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IN THE SUPREME COURT OF THE STATE OF IDAHO

ERICK VIRGIL HALL,)
)
 Petitioner-Appellant,)
)
 v.)
)
 STATE OF IDAHO,)
)
 Defendant-Respondent.)
 _____)

NO. 38528/38704

APPELLANT'S REPLY BRIEF

COPY

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

HONORABLE THOMAS F. NEVILLE
District Judge

SARA B. THOMAS
State Appellate Public Defender
State of Idaho
I.S.B. #5867

IAN H. THOMSON, I.S.B. #8327
JORDAN E. TAYLOR, I.S.B. #8212
Deputy State Appellate Public Defenders
3050 N. Lake Harbor Lane, Suite 100
Boise, ID 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

L. LAMONT ANDERSON
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

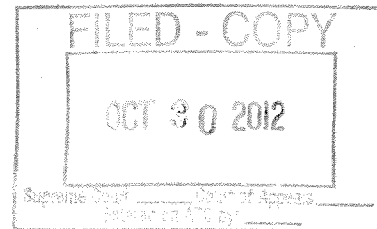


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STATEMENT OF THE CASE

Nature of the Case

This is a permissive appeal arising from two interlocutory orders entered by the district court during Erick Hall's pending capital post-conviction proceedings. This Court granted Mr. Hall permission to appeal three issues: (1) whether the district court is justified in ordering a second conflict inquiry where a conflict evaluation has already been conducted by an independent attorney, who found no conflict, the Petitioner does not raise a conflict, and neither the State nor the court can identify any facts that would give rise to a conflict; (2) whether the district court violates the separation of powers by ordering the State Appellate Public Defender (*hereinafter* SAPD) to pay for services already provided under the statute designating the authority to provide conflict counsel specifically to the SAPD; and (3) whether an attorney-client privilege exists during the representation of a client, when communications pertain to a pending case on which the client is being represented by other attorneys.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Hall's Appellant's Brief. (Brief of Appellant, pp.1-4.) They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto. However, Mr. Hall reserves the right to correct or clarify the State's recitation of the facts throughout this reply brief where relevant.

ISSUES

1. Whether The District Court Was Justified In Ordering A Second Conflict Inquiry Where A Conflict Evaluation Had Already Been Conducted By An Independent Attorney Who Found No Conflict, The Petitioner Did Not Raise A Conflict, And Neither The State Nor The Court Can Identify Any Specific Facts That Would Either Undermine That Determination Or Give Rise To A Conflict?
2. Whether The District Court Violated The Separation Of Powers By Ordering The SAPD To Pay For Services Already Provided Under The Statute Designating The Authority To Provide Conflict Counsel Specifically To The SAPD Where There Is No Evidence The SAPD Or Independent Counsel Failed To Satisfy Their Obligations?
3. Whether The District Court Erred In Ordering The Disclosure Of Confidential And Attorney Client Privileged Information In Furtherance Of An Unjustified Second Conflict Inquiry?

ARGUMENT

I.

The District Court Erred In Ordering A Second Conflict Inquiry Where A Conflict Evaluation Had Already Been Conducted By An Independent Attorney Who Found No Conflict, The Petitioner Did Not Raise a Conflict, And Neither The State Nor The Court Can Identify Any Facts That Would Either Undermine Those Determinations Or Give Rise To A Conflict

A. Introduction

The State attempts to reframe the issue by asserting “the district court did not err by conducting an inquiry into the existence of a possible conflict of interest that included the appointment of independent conflict counsel to investigate the existence of a possible conflict of interest.” (Brief of Respondent (*hereinafter* Respondent’s Brief), p.9.) Mr. Hall never categorically objected to the idea of the district court conducting an inquiry of a potential conflict of interest, and in fact, agrees with the court’s general duty to inquire. In addition, once the district court ruled that an inquiry would be necessary, the SAPD suggested several possibilities in order to satisfy the court’s duty. It also provided the court with an independent conflict counsel—Mr. Benjamin—who had already investigated the possible conflict of interest.

The State contends in its Respondent’s Brief that the question before this Court is not whether an actual conflict exists, but “the nature of the inquiry the district court must undertake to determine whether an actual conflict exists.” (Respondent’s Brief, p.9.) In large part, Mr. Hall agrees. Mr. Hall does not wish to frame the issue as asking this Court to make a final determination that no actual conflict exists, nor that the district court is not justified in requiring an inquiry into a conflict of interest once it is raised by one of the parties. However, the primary point lost in the State’s framing of the issue is its failure to ask whether a *second* inquiry is justified, where the resources available to the district court in the *first* inquiry were discounted, ignored, and never exhausted.

B. The Nature Of The District Court's Conflict Inquiry

The SAPD contracted with Mr. Benjamin in order to conduct an evaluation of any conflict with Mr. Hall in order to avoid delay and to avoid having its own evaluation of whether a conflict existed being questioned or disputed by other parties involved. In addition, the SAPD accepted the district court's holding that an inquiry was necessary and suggested several alternatives that would be acceptable. The SAPD also repeatedly encouraged the district court to avail itself of Mr. Benjamin in conducting its inquiry. The SAPD only objected to the appointment of a second conflict counsel when it became clear Mr. Roark was to engage in the exact same effort already completed by Mr. Benjamin, the SAPD would have to pay for the same work a second time, and it was unclear whether Mr. Roark was being appointed as an investigator for the Court or as counsel to Mr. Hall on the matter.

1. The SAPD Acted Out Of A Desire To Avoid Delay Or Undermine The Existing Attorney-Client Relationship

The State argues in its Respondent's Brief that Mr. Benjamin's affidavit could not alleviate the district court's concerns surrounding any possible conflict of interest because it failed to discuss the nature of the communications between the SAPD and trial counsel. (Respondent's Brief, p.17.) In addition, the State notes that neither the SAPD's Amended Notice, nor Mr. Benjamin's Affidavit explained "the genesis of the SAPD's concern." *Id.* As was repeatedly explained to the district court, after noting the extent and nature of the contacts between the SAPD and trial counsel, the SAPD filed its original *Ex Parte* Notice of Possible Conflict of Interest (hereinafter *Ex Parte* Notice) in order to avoid additional delay and to avoid any potential to undermine the already existing attorney-client relationship with Mr. Hall.

At the time the SAPD filed its original *Ex Parte* Notice, the office had just emerged from a time-consuming conflict inquiry on another unrelated case, *Abdullah v. State*. From the very beginning, it was apparent that the SAPD's decision to file a notice of possible conflict and to contract with an outside attorney to conduct a conflict review was considerably influenced by the SAPD's experience in the *Abdullah* case. (See Tr., p.332, Ls.16-25; see also R., pp.1350-51; R., pp.1396-98; R., pp.1462-63.) The discussion and evolution of the conflict inquiry repeatedly referenced what had occurred in *Abdullah*. (See Tr., p.245, L.21 – p.246, L.19; Tr., p.290, L.21 – p.291, L.10; Tr., p.318, L.17 – p.319, L.18; Tr., p.320, Ls.15-21; Tr., p.327, Ls.12-20; Tr., p.359, L.3 – p.362, L.3.) In fact, the SAPD went so far as to submit to the district court a copy of transcripts in the *Abdullah* case for guidance (R., pp.1354-64), and submitted a very lengthy motion dedicated entirely to the history of that case, along with its Motion to Reconsider and the Motion for Permission to Appeal. (See Motion for Court to Take Judicial Notice, R., pp.1485-1933.) The SAPD's Ex Parte Notice was filed out of an abundance of caution and represented an attempt to avoid the costly delay experienced in *Abdullah*.¹ (See Tr., p.245, L.21 – p.246, L.19; R., p.1398; R., pp.1462-63.) There was also considerable concern on the part of the SAPD as to the possible detrimental affect its own evaluation of a conflict could have if that same evaluation was later contradicted or undermined by another analysis or finding by the court. (R., pp.1398-99

¹ In the *Abdullah* case, the post-conviction court inquired as to whether contacts between the SAPD and trial counsel gave rise to any conflict, and counsel at the SAPD subsequently filed its own representation that no conflict existed. (See R., p.1385; R., pp.1462-63.) After the SAPD had made its own findings known to their client and the district court (and the State did not disagree), the district court, nevertheless, entered a finding that a conflict did exist and that the SAPD had a conflict in its representation of Mr. Abdullah. (See R., p.1385; R., pp.1462-63.) The district court then appointed Mr. Roark as counsel to advise Abdullah on whether the unidentified conflict should be waived. (See R., p.1385.) The conflict waiver was not finally resolved until May 7, 2010 (R., pp.1445-53); and Mr. Hall's Ex Parte Notice was filed on June 29, 2010. (Appears as an exhibit to the Clerk's Record (see R., p.2043).)

(“such a finding of a conflict, in direct opposition to the finding made by counsel could have a significant impact on the attorney-client relationship and any existing relationship of trust”); R., p.1400 (“the SAPD did not want to advise Mr. Hall as to whether a conflict existed, only to have that representation contradicted by another attorney or the Court, as happened in the *Abdullah* case.”); *see also* Tr., p.324, L.16 – p.325, L.4.) In contrast to the State’s characterization, the SAPD filed its notice in an attempt to be candid and forthcoming with the court about its undertaking a conflict review with outside conflict counsel. (*See* discussion at R., pp.1396-1401.)

2. SAPD Participation In The Conflict Inquiry And Its Repeated Suggestions To Use Mr. Benjamin As Part Of The District Court’s Inquiry

Mr. Hall informed the district court at the first hearing after counsel had filed the *Ex Parte* Notice, that the SAPD had contracted with Mr. Benjamin to advise Mr. Hall on whether any conflict existed and had made all of its files available for his review and inspection. (R., pp.1299-1300; Tr., p.258, L.19 – p.259, L.4.) However, Mr. Hall also recognized the district court had an independent duty to inquire where “a trial court knows or reasonably should know that a particular conflict may exist.” (R., p.1302, *citing State v. Lovelace*, 140 Idaho 53, 60 (2003).) Attorneys at the SAPD believed that affording Mr. Hall an opportunity to consult with an outside attorney would allow him to take any necessary action in raising a conflict issue without any interference from the SAPD. (R., p.1319.) As a result, the SAPD urged the district court not to rule on whether a conflict inquiry should be ordered until the court could hear from

Mr. Benjamin.² (R., p.1308; Tr., p.259, L.14 – p.260, L.2; Tr., p.283, L.12 – p.284, L.22.) Without hearing from Mr. Benjamin, the district court instead granted the State’s motion for a conflict inquiry by the court. (See Tr., p.295, Ls.1-3.) The SAPD then repeatedly requested, without objecting to the Court’s order for a conflict inquiry, that the district court hear from Mr. Benjamin regarding his evaluation of the conflict and the details surrounding any identified potential conflict.³ (See Tr., p.284, Ls.15-22; Tr., p.304, Ls.16-21; Tr., p.324, Ls.2-6; R., p.1308.) The State also repeatedly asked the district court to inquire of Mr. Benjamin. (Tr., p.307, L.22 – p.308, L.16; Tr., p.366, L.24 – p.367, L.21.) The district court admitted that Mr. Benjamin had “gone a long way” in beginning a “searching and thorough” investigation, (Tr., p.376, Ls.5-16) and at various times even suggested that it might be appropriate to hear from Mr. Benjamin at an appropriate time. (See Tr., p.311, Ls.4-7; Tr., p.314, Ls.8-9; Tr., p.328, Ls.7-10.)

Unfortunately, beyond the affidavit Mr. Benjamin submitted on August 31, 2010, the district court never heard from him regarding the conflict review or the facts surrounding his

² The SAPD never argued that the district court was required to hear from Mr. Benjamin, or accept his findings as part of any conflict inquiry. In fact, days before the district court granted a conflict inquiry, Mr. Hall filed a notice suggesting three possible paths if a conflict inquiry were deemed necessary, including (1) relying on the representations of Mr. Benjamin, (2) appointing additional counsel at county expense, or (3) ordering a review of the materials by a different district court judge. (See discussion at R., pp.1322-27.)

³ Mr. Hall did not suggest that the Court was obligated to hear from Mr. Benjamin or rely on his representations. Instead Mr. Hall requested that the district court consider several factors in determining the nature of the conflict inquiry, including “(1) the avoidance of additional and unnecessary delays, (2) the conservation of limited County and State resources, (3) the protection of the attorney-client privilege, and (4) a concerted effort to avoid creating any future or unnecessary conflicts with the [district court.]” (R., p.1352.) Even then, Mr. Hall acknowledged that relying on Mr. Benjamin was only the best of many options. (R., p.1349.) He suggested that the district court consider Mr. Benjamin’s evaluation and place his findings on the record to the court’s satisfaction. (R., pp.1349-50.) Nevertheless, Mr. Hall continued to concede the Court’s power to appoint another attorney, at county expense, amongst other options. (R., pp.1350-52.)

investigation. In fact, the district court characterized Mr. Benjamin as less than forthcoming. “The [district court] has given both the SAPD and Mr. Benjamin several opportunities to come forward voluntarily with the details of the communications between the SAPD and Hall II trial counsel. In each instance, counsel has chosen not to voluntarily disclose the details of those communications.” (R., p.1375.) That characterization is not true. Mr. Benjamin was never given an opportunity in court or on the record to answer any questions that the district court may have had to satisfy its obligation to inquire into the possibility of a conflict. In fact, as was already mentioned, the district court refused to hear from Mr. Benjamin when offered by the SAPD or the State.

In its Respondent’s Brief, the State acknowledges that the district court is required to do more, noting that “when presented with a possible conflict of interest claim, ‘at a minimum the trial court should have requested that [counsel] give him some idea of what the conflict entailed to allow him to determine whether to order [counsel] to withdraw.’” (Respondent’s Brief, pp.20-21, *citing United States v. DeRobertis*, 771 F.2d 1057, 1063 (7th Cir. 1985).) In the words of the State, “the mere reading of a file and colloquy with defense counsel may not be sufficient inquiry.” (Respondent’s Brief, p.20.) Here, the mere reading of Mr. Benjamin’s affidavit was an insufficient inquiry under *Holloway v. Arkansas*, 435 U.S. 475 (1978), or *Hamilton v. Ford*, 969 F.2d 1006 (11th Cir. 1992).

a. The Independent Nature Of Mr. Benjamin’s Representation

The State notes in its Respondent’s Brief that Mr. Hall’s attorneys at the SAPD had acknowledged that “the Court is very unlikely to be satisfied with current Counsel’s representations” and that “neither the court nor the State should necessarily be satisfied with representations made by the SAPD as to the nature of any potential conflict.” (Respondent’s

Brief, p.4.) It should be clear from the context of the transcript that Mr. Hall's counsel was referring to the representations of attorneys at the SAPD office, and not those representations made by Mr. Benjamin. (*See Tr.*, p.259, L.14 – p.261, L.5.) In fact, the SAPD was requesting that the district court hear from Mr. Benjamin in the place of attorneys from the SAPD. *Id.* The State mentions that attorneys at the SAPD had initially agreed with the district court's assertion that the Court would not be bound by the views of Mr. Benjamin, and then took a contrary position in its subsequent filing, stating that "representations made by Mr. Benjamin, as independent conflict counsel, should not suffer the same skepticism and would certainly allow the Court to rely on his representations." (Respondent's Brief, p.4.) However, such a position did not contradict what the SAPD attorneys had previously said in court, and in fact was a direct response to the State's assertion that "this Court cannot rely upon Mr. Benjamin's independent review." (*See R.*, p.1320.) The SAPD's consistent position was that although the district court was not bound by Mr. Benjamin's representations, it should consider them, give them appropriate weight, and could rely on them in conducting its own inquiry. (*See R.*, pp.1302-03, 1320, 1323-25, 1336, 1349-50.)

Mr. Benjamin was contracted by the SAPD as "counsel to Mr. Hall" and not as counsel to advise the SAPD. (*Tr.*, p.307, Ls.2-4; Affidavit of Dennis Benjamin (Filed Under Seal), filed August 31, 2010⁴ (hereinafter Benjamin Affidavit), ¶5.) The SAPD gave Mr. Benjamin full access to attorney and client files regarding Mr. Hall's cases, and all communications with "Hall II" trial counsel. (*Tr.*, p.307, Ls.4-5; Benjamin Affidavit, ¶¶5,7.) Other than providing access to Mr. Benjamin, there were no further communications with Mr. Benjamin regarding his findings or advice to Mr. Hall prior to his submitting his affidavit. (*See Tr.*, p.283, Ls.16-18; Benjamin

⁴ Appears as an exhibit to the Clerk's Record. (*See R.*, p.2043.)

Affidavit, ¶5.) Mr. Benjamin undertook an exhaustive investigation of the period of overlapping representation and met with Mr. Hall. (Benjamin Affidavit, ¶¶5,7.) There is no evidence Mr. Benjamin’s representation of Mr. Hall on the conflict issue was compromised in any way.

b. SAPD Cooperation And Willingness To Share Additional Information With The District Court

The State also suggests that the SAPD resisted the district court’s order to file an amended notice, specifying and explaining the nature of the contacts between the SAPD attorneys and trial counsel. (Respondent’s Brief, p.5.) The SAPD objected primarily because it believed that it no longer represented Mr. Hall on the limited issue of whether or not there was a conflict of interest and that the district court should direct such an inquiry at Mr. Benjamin. (See Tr., p.317, L.20 – p.319, L.2; p.324, L.2 – p.325, L.10; p.327, L.21 – p.328, L.6.) The SAPD also expressed some reservation that to reveal additional information might require a disclosure of privileged information. (See Tr., p.329, L.14 – p.330, L.18.) The SAPD even expressed frustration that the district court was requiring the SAPD to file an amended notice instead of requesting the same information from Mr. Benjamin. (Tr., p.330, Ls.7-15.) The district court requested that the amended filing include “something more specific” (Tr., p.311, L.6), and asked for “some benchmarks, about what it is that—that caused your office to file this notice.” (Tr., p.328, Ls.8-10.) The district court indicated that it was “not looking for specific advice given, just whether advice was given.” (Tr., p.313, Ls.11-12.)

Without further objection, the SAPD did file an Amended Notice of Possible Conflict of Interest. (R., pp.1336-40.) In that notice, the SAPD disclosed the extent of communication between SAPD attorneys and trial counsel over the course of several months; noted that there had been at least two meetings between the attorneys, and indicated additional contacts with SAPD staff in order to facilitate the sharing of testing and expert information. (R., p.1338.) The

SAPD also indicated that the “content and nature of those communications have already been made available to the State by providing complete access to trial counsels’ files” and that any disclosure as to the specific content of the communications should be addressed to Mr. Benjamin. *Id.* The next day, Mr. Benjamin filed a Limited Notice of Appearance “as to the conflict interest issue only” along with an affidavit filed under seal. (*See R.*, pp.1341-44.) In that affidavit, Mr. Benjamin explained the extent and nature of his review, and his specific findings regarding whether any advice had been given by the SAPD attorneys to Mr. Hall’s trial attorneys. (Benjamin Affidavit, ¶¶10-12.) It should be noted that the district court never found Mr. Benjamin to be conflicted in his representation of Mr. Hall, and has never removed Mr. Benjamin or relieved him of his Limited Notice of Appearance.

3. Mr. Hall Objects To The District Court’s Order Appointing Mr. Roark, Which Requires Him To Render The Same Services Provided By Mr. Benjamin

a. Mr. Benjamin Has Already Performed The Same Work Now Required Of Mr. Roark

The State mentions in its Respondent’s Brief that the district court issued its Memorandum Decision and Order Appointing Keith Roark as Independent Conflict Counsel (*hereinafter* Order) due to the “vague and conclusory nature of the SAPD and Benjamin’s pleadings” and that the court is “lacking the factual background necessary to reach any conclusion” regarding the existence of a conflict. (Respondent’s Brief, p.6.) Consequently, the district court appointed Mr. Roark and tasked him with conducting a conflict inquiry. As part of that order, the district court requested that Mr. Roark first “conduct a thorough and searching review of the SAPD’s pre-trial, trial and pre-sentence involvement in the trial of Hall II (R., p.1375), and then report the following, “(1) whether a conflict exists; (2) if so, the general nature

of the conflict; (3) the facts surrounding or underlying the conflict; and (4) whether independent counsel believes that such conflict may be imputed to the entire SAPD's office.” (R., p.1376.)

This is a perfect description of what Mr. Benjamin undertook and performed for Mr. Hall after contracting with the SAPD. In fact, it appears that the district court constructed its order to mirror the contents of Mr. Benjamin's own affidavit because Mr. Benjamin clearly outlined these same efforts and conclusions in his affidavit. The scope of Mr. Benjamin's representation of Mr. Hall was the same as proposed for Mr. Roark in that he had been contracted by the SAPD to determine whether there was a conflict in representing Mr. Hall. (Benjamin Affidavit, ¶5.) Second, Mr. Benjamin conducted an extensive review of the case by conducting seven interviews with parties involved, reviewing all emails sent or received by trial counsel, reviewing SAPD attorney notes and internal correspondence, and SAPD correspondence with trial counsel, along with the post-conviction petitions on both of Mr. Hall's matters. (Benjamin Affidavit, ¶7.) His affidavit also included responses to the same four requests the district court asked to be included in Mr. Roark's report to the court. First, his affidavit indicated that he did not believe a conflict existed and included an explanation as to why. (Benjamin Affidavit, ¶¶10-13.) Second, with respect to the “nature of the conflict,” he referenced an instance in which advice was given by SAPD attorneys to trial counsel. (Benjamin Affidavit, ¶12.) Third, because Mr. Benjamin made a determination that no conflict existed, it did not include detailed facts surrounding the advice that was given, but included an explanation that the advice was favorable to Mr. Hall and did not relate to any claim in Mr. Hall's post-conviction petitions. (*Id.*) Finally, the affidavit includes Mr. Benjamin's opinion that, even if the facts were to constitute a conflict of interest, it could not be imputed to the entire SAPD office. (Benjamin Affidavit, ¶13.)

It is important to note that the district court's order does not require Mr. Roark to report on the facts of the case should he determine a conflict does *not* exist. Such an omission is telling, in light of the fact the district court indicates that its duty to inquire further is the result of counsels' lack of disclosure of specific facts surrounding the potential conflict. (R., p.1375, Ls.1-3; p.1373, L.24 – p.1374, L.2.) Here, Mr. Benjamin has already determined that no conflict exists, and consequently conclusion is that no conflict exists. (*See*, Benjamin Affidavit, ¶10.) If Mr. Roark were to reach the same conclusion in his report, one assumes that there would be no need to further elaborate on the facts since the district court's order is conditional on his finding a conflict.

b. Mr. Benjamin Was Not Exhausted As A Resource By The District Court

The district court never exhausted or utilized the work already performed by Mr. Benjamin. Mr. Benjamin appeared in court three times to represent Mr. Hall before the district court judge on the conflict issue. (Tr., p.282, L.24; Tr., p.335, Ls.17-19; Tr., p.348, Ls.17-18.) At no time did the district court inquire of Mr. Benjamin as to the content of his conflict review or his findings. However, the court repeatedly stated that Mr. Benjamin was not the district court's choice to conduct any conflict review and would not have been its choice had the SAPD consulted with the court before contracting with him. (Tr., p.257, Ls.8-9 (“he is not the Court's selection in this case”; Tr., p.268, Ls.11-15 (“the fact that you've called him independent doesn't mean that he's been appointed by the Court, or that I would be persuaded”); R., p.1377 (“he is not this Court's choice of independent counsel and would not have been this Court's choice of independent counsel had the SAPD consulted with the Court before choosing him.”).) The district court clearly expressed its displeasure that Mr. Benjamin had been engaged to conduct a conflict review by the SAPD without first consulting the court.

The only significant difference between the evaluation already conducted by Mr. Benjamin and the inquiry to be conducted by Mr. Roark, appears to be the court's authorization of Mr. Roark to conduct depositions, if necessary. (R., p.1376.) However, the SAPD did request in its Motion to Reconsider that the district court inquire of Mr. Benjamin as to whether he would like to depose any witnesses. (R., p.1409.) The district court declined to inquire any further of Mr. Benjamin.

c. The District Court's Use Of Mr. Benjamin Represents No More Of An Abdication Of The Court's Duty To Inquire Than Would The Use Of Mr. Roark To Assist The Court In A Similar Way

Every case that the State cites in its Respondent's Brief deals with the district court's own "independent duty to conduct its own thorough and searching inquiry regarding the possibility of a conflict of interest" in that they involve conflict inquiries undertaken by the trial court. (*See* Respondent's Brief, p.22.) However, the instant case presents a clear case where the district court has opted to abdicate that investigation and evaluation to a third-party attorney, Mr. Roark, who will report those findings back to the district court in order to make the final determination of whether a conflict exists. (*See* R., pp.1375-76.) The State even admits that "the court's duty to conduct a 'thorough and searching' inquiry cannot be abrogated and given to an attorney retained by the very entity that may have precipitated the alleged conflict' it is the court's inquiry, not counsel's or someone chosen by counsel." (Respondent's Brief, p. 18.) And yet, in the same breath, the State argues that it is permissible for the district court to "give" the inquiry to another attorney to perform, in this case, Mr. Roark. If it is, as the State argues, "the court's inquiry," Mr. Roark's assistance should face the same problem as does that of Mr. Benjamin.

The State argues that the district court's duty "to conduct a thorough and searching inquiry would [not] be satisfied in this case by simply accepting the opinions of counsel

regarding whether a conflict exists without any disclosure of the factual basis for that opinion' because the court 'is presently lacking the factual background necessary to reach any conclusion.'" (Respondent's Brief, pp.22-23.) However, given the structure of the district court's order and what information it has requested be included in Mr. Roark's report, that is precisely what the district court appears to be willing to do as long as the report comes from an attorney of its own choosing.

C. Conclusion

Given the fact that the appointment of Mr. Roark appears to duplicate precisely the same evaluation already conducted by Mr. Benjamin, the district court's conflict inquiry should have exhausted the offering of current conflict counsel before appointing a second conflict counsel. Such an appointment would constitute a second full inquiry by the district court. Where an independent attorney has already conducted a conflict evaluation, has made the determination that no conflict exists, and the defendant has chosen not to seek new counsel as a result, the district court erred in appointing Mr. Roark.

II.

The District Court Exceeded Its Authority And Violated The Separation Of Powers By Ordering the SAPD To Pay For Services Already Provided Under the Statute Designating The Authority To Provide Conflict Counsel Specifically To The SAPD, Where There Is No Evidence The SAPD Or Independent Counsel Failed To Satisfy Their Obligations

A. Introduction

The State makes two arguments why Mr. Hall should be denied relief under this claim. First, that Mr. Hall has waived his separation of powers argument on appeal. However, because this is a permissive interlocutory appeal, Mr. Hall has not waived his separation of powers argument, and the issue for consideration is whether this Court should consider the claim now or later during his consolidated direct and post-conviction appeal after perfecting his claim in

district court. Mr. Hall also asserts the district court has already heard the sum and substance of Mr. Hall's claim that the court exceeds its jurisdiction by forcing a department of the executive branch to pay for duplicate services already provided. The State's second argument is that I.C. § 19-871 "merely requires the SAPD to pay for the services of conflict counsel and does not prohibit the district court from making an appropriate appointment." Mr. Hall contends that the SAPD has already paid for the services of conflict counsel in Mr. Benjamin, and that any forced payment of additional conflict counsel represents overreaching by the district court.

B. Mr. Hall's Waiver Of A Separation Of Powers Argument

The State cites several cases to represent the notion that constitutional issues will not be considered when raised for the first time on appeal. However, none of the cases cited by the State involved a permissive appeal, but instead represent cases on appeal from a final judgment. *See State v. Ransom*, 137 Idaho 560, 563 (Ct. App. 2002) (on direct appeal from a judgment of conviction and sentence for voluntary manslaughter); *State v. Fodge*, 121 Idaho 192, 193 (1991) (on direct appeal from a judgment of conviction and sentence for lewd conduct with a minor); *State v. Rozajewski*, 130 Idaho 644, 645 (Ct. App. 1997) (on direct appeal from conviction and sentence for possession of a controlled substance); *State v. Martin*, 119 Idaho 577, 578 (1991) (on State's appeal from a withheld judgment granted by the district court at sentencing); *State v. Mauro*, 121 Idaho 178 (1991) (on appeal from a Court of Appeals decision to reverse the district court's denial of the defendant's motion to withdraw his guilty plea); *State v. Smith*, 130 Idaho 450, 451 (Ct. App. 1997) (on direct appeal from a conviction and sentence for arson); and *State v. Hardman*, 120 Idaho 667, 668 (Ct. App. 1991) (on appeal of a district court's affirmation of a magistrate court's judgment of conviction for obstruction and failure to produce insurance).

If this Court were to declare the separation of powers claim as waived and refuse to address Mr. Hall's claim on the merits, the very purpose and nature of the permissive appeal would be undermined. This Court grants permission for an interlocutory appeal where there is a "controlling question of law" as to which there are "substantial grounds for difference of opinion" and where allowing an immediate appeal "may materially advance the orderly resolution of the litigation." I.A.R. 12(a). This Court has interpreted Rule 12 in light of its intent "to provide an immediate appeal from an interlocutory order if substantial legal issues of great public interest or legal questions of first impression are involved." *Budell v. Todd*, 105 Idaho 2, 3-4 (1983).

Mr. Hall challenged the district court's jurisdiction in light of a separation of powers framework when he filed his first Motion for Permission to Appeal (*hereinafter* Motion) with this Court on February 11, 2011. He stated his proposed Issues for Appeal, and included it as an enumerated issue: "(3) whether the district court violates the separation of powers by forcing the SAPD to pay for services already provided under the statute designating the authority to provide conflict counsel specifically to the SAPD." (Motion, p.11.) He included a lengthy discussion at that time of the proposed issue and why it presented a controlling question of law appropriate for an interlocutory appeal. (*See* Motion, section III(C), pp.18-20.) Although the State did not have the benefit of the entire record when it constructed its Response to Petitioner's Motion for Permission to Appeal, it had seen the various appendices attached to Mr. Hall's Motion, which included several notices, affidavits, a motion, and the Court's original Order, issued on December 27, 2010 (Motion, Appendices A-F.) At that time, the State made no objection to the issues as framed by Mr. Hall given the nature of the district court's order. Both of Mr. Hall's Notices of Appeal, filed on April 13, 2011 and June 14, 2011, clearly included a violation of the

separation of powers as an issue he intended to raise on appeal. (*See* Notice of Appeal, filed April 13, 2011, ¶3(d); Notice of Appeal, filed June 14, 2011, ¶3(d).)

If the Court were to agree that Mr. Hall’s claim that Idaho’s constitutional provision laying forth the separation of powers is violated simply because there was an omission of citation in the district court, given the current procedural posture of the case there is nothing that would prevent Mr. Hall from simply making the same argument under the label of a “separation of powers” label when his post-conviction resumes. In that event, the benefit and purpose of a permissive appeal will have been wasted, simply leaving the issue to be addressed later during the appeal of his post-conviction case.⁵

It also bears mentioning that even in the absence of a citation to article II, section 1 of the Idaho Constitution, the district court was well aware of the sum and substance of the arguments being advanced by Mr. Hall in light of the court’s jurisdiction and the executive authority and mandate given to the SAPD concerning the arrangement and payment of conflict counsel for SAPD clients. If it was not perfectly clear on December 27, 2010, when the district court issued its Order, those arguments had been fully fleshed out in Mr. Hall’s Motion to Reconsider Memorandum Decision and Order, filed on January 10, 2011 (R., pp.1379-1460), and his Motion for Permission to Appeal, filed the same day (R., pp.1461-84). In his Motion, Mr. Hall

⁵ If this Court were to determine that it could not reach the separation of powers claim because post-conviction counsel had never cited article II, section 1 of the Idaho Constitution, Mr. Hall would respectfully suggest that the Court exercise its power under I.A.R. 13.3(a) in order to obtain a ruling from the district court on its orders in light of a clear objection under article II, section 1. (“At any time before the issuance of an opinion, the Supreme Court may on its own motion, or on motion of any party showing good cause, order a case to be remanded to the district court . . . to take further action as designated in the order of remand.”) A temporary remand would allow this Court the opportunity to address the claim on its merits at this stage and to avoid the same issue being raised later on appeal from the final judgment of the post-conviction action.

incorporated the “arguments and caselaw contained in his *Motion for Permission to Appeal*.” (R., p.1379.) In his Motion for Permission to Appeal, Mr. Hall discussed at some length the nature of the district court’s order in light of the SAPD’s statutory authority and obligation, and the fact that the court’s order exceeded its jurisdiction in light of the cited state statutes. (*See R.*, pp.1472-79.) After considering Mr. Hall’s Motion and Motion for Permission to Appeal, the district court issued its subsequent orders denying both on February 23, 2011, and March 4, 2011 (R., pp.1965-74, 1975-88.)

Although Mr. Hall frames the argument in his Brief as a violation of Idaho Constitution article II, section 1, the essence of his argument is grounded in other portions of the Idaho Constitution and several statutes delineating the SAPD function, the extent of the district court’s jurisdiction and its ability to appoint counsel, and the county’s responsibility for such payments. (*See Appellant’s Brief*, section II, pp.16-25.) With the exception of article II, section 1, each of the sections and statutes argued in Mr. Hall’s appellate brief had been presented to the district court for consideration: IDAHO CONST. art. VII, § 13 (*see R.*, pp.1408-09) (regarding appropriations made by the legislature); IDAHO CONST. art. IV, § 18 (*see R.*, p.1476) (regarding constitutional prohibition of claims made against the State without the approval of the Board of Examiners); the argument that the district court exceeded its jurisdiction in defeating the legislative intent in creating the SAPD and the capital crimes defense fund (*see R.*, p.1477); I.C. § 19-860 (*see R.*, pp.1325-26, 1407-08, 1478-79) (regarding the county’s responsibility to pay for direct expenses necessary to indigent representation); I.C. § 19-863(A) (*see R.*, p.1474) (regarding the establishment of the capital crimes defense fund); I.C. § 19-868 (*see R.*, p.1474) (regarding the creation of the state appellate public defender); I.C. § 19-869 (*see R.*, pp.1474-75) (establishing the SAPD as a branch of the executive); I.C. § 19-870 (*see R.*, p.1474) (regarding

the scope of representation and duties of the SAPD, and its ability to contract and provide representation to clients); I.C. § 19-871 (*see* R., p.1323-26, 1389-90, 1399, 1407, 1477-78) (regarding the SAPD’s obligation to arrange for the payment of conflict counsel); I.C. § 19-4904 (*see* R., p.1325) (regarding the county’s responsibility to bear the cost of expenses in post-conviction cases.) Given the record and the various arguments that were made before the district court, Mr. Hall’s failure to note article II, section 1, was merely a citation oversight and does not mean that the district court never had the opportunity to address the claim Mr. Hall has made in the instant appeal.

C. The District Court’s Order Requires The SAPD To Pay For Services Already Rendered, Which Is In Excess Of Its Jurisdiction And Beyond The Statutory Obligations Imposed On The SAPD

The State acknowledges in its Respondent’s Brief that under I.C. § 19-870(3), the SAPD has the authority to “contract with private attorneys to provide representation on a case-by-case basis when such contracts would conserve budgetary resources.” (Respondent’s Brief, p.25.) However, it argues in the same breath that I.C. § 19-871 “does not require nor even permit the SAPD to ‘arrange’ for the appointment of conflict counsel when there is ‘a conflict of counsel or any other reason,’ but only for the compensation of conflict counsel.” *Id.* Read in combination, the State is arguing that the effect of sections 19-870(3) and 19-871 is that the SAPD can contract with a private attorney only where doing so “would conserve budgetary resources” and *not for any other reason*, including where there might be a conflict. If the Court were to adopt such a position, the SAPD would be required to submit *every* conflict case to the Supreme Court or a lower district court for appointment of conflict counsel, unless it could prove that its own contracting authority would “conserve budgetary resources.” Such a reading of the two statutes in question, in isolation of one another, would effectively prevent the SAPD from contracting

with private attorneys without court approval. Such a reading would render the authority granted to the SAPD by the legislature under section 19-870(3) almost meaningless. It should not be forgotten, in any event, that Mr. Hall's primary objection to the appointment of Mr. Roark is rooted in a desire to conserve the budgetary resources referenced in section 19-870(3).

The interpretation of the relevant statutes must also consider the unique nature of a state public defender office. In this respect it should be noted that the United States Supreme Court has determined that states have a "constitutional obligation to respect the professional independence of the public defenders whom it engages." *Polk County v. Dodson*, 454 U.S. 312, 321-22 (1981). The Supreme Court observed that "a defense lawyer best serves the public, not by acting on the State's behalf or in concert with it, but rather by advancing 'the undivided interests of the client.' This is essentially a private function . . . for which state office and authority are not needed." *Id.* at 318-19. In commenting on the institutional role of a public defender, the Supreme Court concluded that a

public defender is not amenable to administrative direction in the same sense as other employees of the State. Administrative and legislative decisions undoubtedly influence the way a public defender does his work. State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior.

Id. at 321.

National standards of justice also reflect the aims set forth by the United States Supreme Court in *Polk County*, to the extent that the American Bar Association's *Ten Principles of a Public Defense Delivery System* explicitly states that

The public defense function, including the selection, funding, and payment of the defense counsel, is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel . . . Removing oversight from the judiciary ensures judicial independence from undue political

pressures and is an important means of furthering the independence of public defense.

ABA Standing Committee On Legal Aid And Indigent Defendants (Feb. 2002), ¶1, p.2.⁶ Similar principles have been mirrored in numerous other publications, standards, and model statutes.⁷ As a result, the Court should be reluctant to endorse judicial meddling in the function of the SAPD where the SAPD has undertaken adequate steps to satisfy its statutory obligations and provide its clients with independent and uncompromised legal advice.

The State argues in its Respondent's Brief that the district court has an obligation under I.C.R. 44.2(1) and I.C.R. 44.3 to ensure that the appointment of post-conviction counsel satisfies the standards and requirements for capital cases. (Respondent's Brief, p.27.) Furthermore, if the district court were to find that the SAPD or any other appointed attorney did not meet requirement under the rules for capital representation, the district court has the "authority to appoint counsel that is qualified and order that attorney be compensated out of the SAPD's budget." *Id.* However, there was never any such finding in this case, and neither the State nor the district court ever challenged or questioned Mr. Benjamin's qualifications to handle capital post-conviction cases. The State goes even further in its argument and advances the proposition that where the SAPD is unable to carry out its duty "for any other reason" under I.C. § 19-871,

⁶ Available online at http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

⁷ See National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Chapter 13, *The Defense* (1973), Standards 13.8, 13.9; National Study Commission on Defense Services, *Guidelines for Legal Defense Systems in the United States* (1976), Guidelines 2.8, 2.18, 5.13; American Bar Association Standards for Criminal Justice, *Providing Defense Services* (3rd ed. 1992), Standards 5-1.3, 5-1.6, 5-4.1; *Standards for the Administration of Assigned Counsel Systems* (NLADA 1989), Standard 2.2; *NLADA Guidelines for Negotiating and Awarding Contracts for Criminal Defense Services*, (1984), Guidelines II-1, 2; and National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970), § 10(d).

the district court has the same authority to appoint counsel and force the SAPD to pay for it. *Id.* Such a position only begs the question whether the court or the SAPD determines what reasons would disqualify the SAPD beyond an actual conflict of interest. It also ignores the fact that such a preliminary determination by the SAPD was the very reason they engaged an outside conflict attorney to evaluate and advise Mr. Hall on any potential conflict of interest. (*See R.*, p.1319; *Tr.*, p.306, Ls.23-25.)

The State further argues in its Respondent's Brief that because the district court has an independent duty to conduct an inquiry and determine the procedure to be utilized, it is simply irrelevant that the SAPD *had already contracted* with Mr. Benjamin, particularly where the court found his inquiry was insufficient. (Respondent's Brief, p.27) Mr. Hall has recognized the power of the Court to appoint another attorney in furtherance of its inquiry. (*R.*, p.1351.) The SAPD has even reluctantly suggested such an appointment as a possible course of action. (*R.*, pp.1322, 1351.) It makes no sense, however, to find that the SAPD's efforts to provide Mr. Hall with conflict counsel should not be considered by the court when determining whether to appoint additional counsel and who should pay for such an appointment. As already noted, the district court has ordered the SAPD to pay for the services of another attorney simply because the district court would not have chosen Mr. Benjamin had he been given the opportunity to select counsel. (*See discussion at I(B)(3)(b), supra.*) It has already been argued that Mr. Roark's investigation would be a duplication of Mr. Benjamin's efforts. (*See discussion at I(B)(3)(a), supra.*) The district court certainly has the prerogative to ask for duplicative work, and doing so would not necessarily constitute an abuse of discretion. However, if the district court wishes to duplicate efforts, without offering a reason as to why Mr. Benjamin would not qualify as

adequate capital counsel, why his representation is compromised,⁸ or why the court is unwilling to fully avail itself of Mr. Benjamin's ongoing representation in conducting its inquiry, then the court appears to be engaging the assistance of Mr. Roark for its own convenience. Mr. Hall argues that such an engagement should be at the district court's expense. (*See R.*, pp.1376-77.)

The SAPD's obligation to "arrange for counsel for indigent defendants to be compensated out of the budget of the state appellate public defender[,]'" is triggered under I.C. § 19-871 by the SAPD's inability to carry out its duties. Absent the inability of the SAPD to carry out its duties because of a conflict or some other reason, the SAPD has *no* obligation to pay for new counsel. Here, the order requiring the SAPD to pay for a conflict inquiry to be conducted by an attorney of the district court's choosing, after having already paid for a similar service, is premised on the district court's erroneous conclusion that the SAPD is either unable to carry out its duties or has failed to satisfy its obligations under the statute. Because there has been a determination by independent conflict counsel that no conflict of interest exists and the district court has failed to identify one, the SAPD's duty to arrange and pay for conflict counsel to represent Mr. Hall during a conflict inquiry has already been satisfied under I.C. § 19-871.

D. Conclusion

Absent the inability of the SAPD to carry out its duties because of a conflict or some other reason, the SAPD has *no* obligation, or ability, to pay for additional counsel. Here, the order requiring the SAPD to pay for a second conflict inquiry to be conducted by an attorney of

⁸ The district court does mention that Mr. Benjamin has an ongoing business relationship with the SAPD as designated conflict counsel. (*See R.*, p.1378, "Mr. Benjamin was chosen by the same office that is potentially conflicted in this matter, and did not have the authority to depose. He is closely aligned with the SAPD in that he regularly acts as conflict counsel for the SAPD and therefore, a portion of his income is dependent to some degree upon his relationship with that office.") However, that mere fact would disqualify all contracted conflict counsel for the very same reason.

the district court's choosing, after having already paid for a similar service, is premised on the district court's erroneous conclusion that the SAPD is either unable to carry out its duties or has failed to satisfy its obligations under the statute. Pursuant to I.C. § 19-871, no determination was made by the SAPD that it was unable to carry out the duties required in the Act subsequent to Mr. Benjamin's review, nor that the SAPD or Mr. Benjamin suffer from any actual conflict of interest. The district court should then be obligated to conduct its conflict inquiry utilizing the cooperation and advice of current conflict counsel, Mr. Benjamin, or engage another attorney at its own expense. Consequently, any attempt by the court to appoint a second conflict counsel at the expense of the SAPD, circumvents the legislative purpose and intent in establishing a state appellate public defender office, and exceeds the district court's jurisdiction insofar as it represents an unjustifiable intrusion by the judiciary into an executive function.

III.

The District Court Erred In Ordering The Disclosure Of Confidential And Attorney-Client Privileged Information In Furtherance Of An Unjustified Second Conflict Inquiry

A. Introduction

The State argues that Mr. Hall should be prevented from "using the privilege as both a shield and a sword." (Respondent's Brief, p.35.) By way of elaboration, the State argues that Mr. Hall "is unwilling to provide the district court with the information necessary to conduct the thorough and searching inquiry mandated by the United States Supreme Court and Idaho Supreme Court." (Respondent's Brief, p.35.) Such is not the case. Mr. Hall argues that his attorneys at the SAPD have been forthcoming about the possibility of a conflict of interest, and the information sought by the district court is largely available from other sources without having to pierce an existing privilege.

B. Mr. Hall's Alleged Attempt To Use Attorney-Client Privilege As A Sword And A Shield

Mr. Hall acknowledges his attorneys are permitted to breach attorney-client confidentiality in releasing information pursuant to a court order to do so. “A lawyer may be ordered to reveal information relating to the representation of a client by a court ... to compel the disclosure.” IRPC 1.6, Comment ¶13. However, the Rules of Professional Conduct do not permit immediate capitulation, but instead require that “absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.” *Id.* Mr. Hall's litigation surrounding the district court's orders appointing Mr. Roark, including this permissive appeal, represents such an effort. “In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4.” *Id.* The district court's *Order* and *Supplemental Order* constitute the adverse ruling contemplated in the Commentary to Rule 1.6. Mr. Hall suggests the district court's order requiring disclosure of client files is wholly unnecessary, because there are other ways for the court to accomplish its purposes without violating the privilege and confidentiality of the SAPD.

It is unnecessary to waive privilege and confidentiality with the SAPD or Mr. Benjamin, and order the complete disclosure of files for the court's review, in order to discover the nature of conversations between the SAPD attorneys and trial counsel, precisely because the district court has already waived the attorney-client privilege regarding Mr. Chastain and Mr. Kristal. (*See R.*, pp.1250-51.) In fact, the State reminded the district court, that to the extent there had already been a waiver of attorney-client privilege with Mr. Chastain and Ms. Kristal, the State should be entitled to that information. (*Tr.*, p.245, Ls.9-15.)

Although Hall II trial counsel could probably answer many of the questions without implicating any privilege issues, the district court ordered the State to not contact trial counsel in Hall II regarding the contacts in question. (R., p.1377.) Although the SAPD asserted an attorney-client privilege and confidential relationship exists between the SAPD and Mr. Hall, the SAPD repeatedly suggested that if the district court or State wished to discover the content of communications between the SAPD and Hall II trial counsel, that Mr. Hall's attorney-client privilege had been waived with respect to his trial counsel. (See R., p.1320; R., p.1338; R., pp.1412-13.) Since his trial counsel, Rob Chastain and Deborah Kristal, were available for inquiry, it is a mystery why the district court prohibited the State from contacting Mr. Chastain and Ms. Kristal about any contacts they may have had with the SAPD leading up to the Hall II trial, which could provide the factual information the court believes it is lacking. The district court gave no explanation as to the reasoning for its order barring contact with trial counsel. (See R., p.1377.)

As previously noted, the district court has largely abdicated its role in conducting for itself a searching inquiry into the possibility of a conflict by appointing Mr. Roark to perform the inquiry and submit a report as to its findings. (See discussion at I(B)(3)(c), *supra*.) However, in its Respondent's Brief, the State argues that the district court is entitled to privileged and confidential information and files for an *in camera* review. (Respondent's Brief, p. 32.) Mr. Hall had previously urged the district court to consider a separate judge to consider those materials in order to avoid a possible disqualification of a post-conviction judge where the same judge is tasked with future rulings and findings of fact. (See R., 1326-27.) Because of the nature of the inquiry ordered by the district court, where the court has not yet contemplated a personal review

of those communications and documents, no motion for a separate judge to conduct that review was ever filed.

C. Conclusion

The SAPD immediately disclosed a potential conflict when it became aware of the possibility of a conflict of interest in their representation of Mr. Hall. In addition, Mr. Hall had already signed one waiver of confidentiality and privilege in order for Mr. Benjamin to review all of the SAPD's materials related to its representation of Mr. Hall. Furthermore, because the contacts in question occurred between the SAPD and trial counsel, the fact that trial counsel and their files have been made available to the State would allow the district court or the State to review those contacts and even conduct an inquiry with trial counsel limited to a conflict inquiry, without needing to pierce additional privilege. As a result, any order requiring current counsel to release additional files and answer questions regarding the conflict, is unnecessary.

CONCLUSION

Because Mr. Benjamin has already performed the conflict evaluation sought by the district court, its orders appointing Mr. Roark are duplicative and unnecessary. Even if Mr. Roark were to satisfy the district court's order, the district court would be in no better position to evaluate the presence of an actual conflict than it would be upon further inquiry of Mr. Benjamin. In addition, it is a violation of the separation of powers for the district court to insert itself into the management and budget of an executive agency like the SAPD, where every indication is that the agency has satisfied both its statutory mandate and its ethical obligation to its client. Furthermore, the documents ordered to be released are protected by attorney-client privilege and the rule of confidentiality. For these reasons, Mr. Hall respectfully asks this Court

to vacate the district court's orders appointing Mr. Roark to conduct a second conflict inquiry and remand this case for completion of post-conviction proceedings.

DATED this 30th day of October, 2012.



IAN H. THOMSON
Deputy State Appellate Public Defender



JORDAN E. TAYLOR
Deputy State Appellate Public Defender

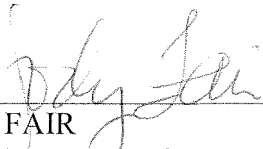
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th day of October, 2012, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF was sent to the following:

ERICK VIRGIL HALL
INMATE # 33835
IMSI - J BLOCK
PO BOX 51
BOISE ID 83707

U.S. Mail
 Statehouse Mail
 Hand-Delivered

L. LAMONT ANDERSON
OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 83720
BOISE ID 83720-0010
Hand delivered to Attorney General's mailbox at Supreme Court.



JODY FAIR
Administrative Assistant