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IN THE SUPREME COURT OF THE STATE OF IDAHO

ERICK VIRGIL HALL,	)	
Petitioner-Appellant,	)	NO. 38528/38704
v.	)	
STATE OF IDAHO,	)	APPELLANT'S BRIEF
Defendant-Respondent.	)	

COPY

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

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MAY 29 2012
Supreme Court_____Court of Appeals_____
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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) 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

During the course of Mr. Hall's post-conviction proceedings[1] the SAPD hired Dennis Benjamin—an independent attorney—to evaluate a possible conflict it might have in its

[1] It is undisputed that a jury found Erick Hall guilty of Murder in the First Degree and Rape, in Ada County Case No. H0300624 (hereinafter "Hall II"). (R.38528/38704, pp.10, 54.) It is also undisputed that after a special sentencing hearing pursuant to I.C. § 19-2515, the judgment and sentence of death were pronounced on January 3, 2008, by the Honorable Thomas F. Neville, District Judge of the Fourth Judicial District, in Ada County, Boise, Idaho. (R.38528/38704, pp.10, 55.) On February 14, 2008, Mr. Hall filed a timely petition for post-conviction relief pursuant to I.C. §19 1719, which initiated these capital post-conviction proceedings. (R.38528/38704, p.9.) Mr. Hall also stands convicted and sentenced to death for the murder of Lynn Henneman, Ada County Case No. H0300518, (hereinafter "Hall I.") (R.38528/38704, pp.10 n.1, 11, 54.) It is undisputed by the parties that the SAPD represented Mr. Hall in the "Hall I post-conviction proceedings during the time that Rob Chastain and Deborah Kristal represented the Petitioner in the present case, including during Mr. Chastain and Ms. Kristal's

representation of Mr. Hall. (Ex Parte Notice of Possible Conflict of Interest (Filed Under Seal), filed June 29, 2010[2] (hereinafter Ex Parte Notice).) Mr. Benjamin was contracted by the SAPD to conduct a review and advise Mr. Hall on the matter. (Affidavit of Dennis Benjamin (Filed Under Seal), filed August 30, 2010[3] (hereinafter Benjamin Affidavit), ¶ 5.) Mr. Benjamin obtained a complete waiver of the attorney-client privilege from Mr. Hall with respect to the SAPD, and had unfettered access to the SAPD's files and communications. (Benjamin Affidavit, ¶¶ 5, 8.) He conducted interviews with all of the parties involved and reviewed the relevant legal pleadings. (Benjamin Affidavit, ¶ 7.) Mr. Benjamin met with Mr. Hall and informed him of the findings from his exhaustive investigation. (Benjamin Affidavit, ¶ 5.) Mr. Benjamin determined there was no conflict and informed the court of his evaluation and finding by affidavit. (Benjamin Affidavit, ¶ 10.)

The SAPD currently represents Mr. Hall on both Hall I and Hall II, on direct appeal and in post-conviction proceedings. (R.38528/38704, p.11.) After the SAPD was appointed on Hall I in January of 2005, Hall II had not yet gone to trial and Mr. Hall was represented by separate counsel. During that period of overlapping representation, there were numerous communications between Mr. Hall's attorneys at the SAPD and his trial attorneys. Those communications included meetings and discussions, as well as information-sharing regarding experts in furtherance of their concurrent representation. (*See* R.38528/38704, p.1338.) These contacts were the reason the SAPD hired Mr. Benjamin to perform a conflict evaluation. *Id.* Mr. Hall's SAPD attorneys during the relevant time were Mark Ackley and Paula Swensen. (R.38528/38704, p.1337.) Both of these attorneys had left their employment at the SAPD before

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preparation for this case, the trial itself and the capital sentencing proceedings." (R.38528/38704, p.1289; *also see* p.11.)

[2] Appears as an exhibit to the Clerk's Record. (*See* R.38528/38704, p.2043.)

[3] Appears as an exhibit to the Clerk's Record. (*See* R.38528/38704, p.2043.)

the *Ex Parte* Notice was filed. (2/3/2009 Tr.38528/38704, p.34, Ls.14-18 (Ms. Swensen left the SAPD in July of 2008); R.38528/38704, p.1241 (Mr. Ackley left the SAPD in April of 2010).) Mr. Hall's trial attorneys in Hall II were Rob Chastain and Deb Kristal. (R.38528/38704, p.10.) After Mr. Hall was convicted and sentenced on Hall II, the SAPD was also appointed to represent him on that case. (R.34890 Vol. VII, pp.1301-02.)

When the SAPD hired Mr. Benjamin to conduct a conflict evaluation, it notified the court by way of its *Ex Parte* Notice that a conflict review was underway, and Mr. Benjamin had been hired to handle it. (*Ex Parte* Notice, p.3.) A month later, without any knowledge of the *Ex Parte* Notice, the State filed a separate motion requesting a judicial inquiry into any possible conflict that may exist. (R.38528/38704, pp.1288-90.) The Court granted that motion for inquiry before ever hearing from Mr. Benjamin as to his findings and assessment. (8/26/2010 Tr.38528/38704, p.295, Ls.1-3.) The district court noted that hearing from Mr. Benjamin would not be helpful until the court had decided whether a conflict existed. (*Id.*, p.297, Ls.9-11.) Mr. Benjamin subsequently filed his affidavit detailing his investigation and conclusion that there was no conflict. (Benjamin Affidavit.)

<u>Memorandum Decision and Order Appointing Keith Roark as Independent Conflict Counsel</u>

After reviewing Mr. Benjamin's affidavit, the district court issued its Memorandum Decision and Order Appointing Keith Roark as Independent Conflict Counsel (hereinafter *Order*). (R.38528/38704, pp.1368-78.) In its *Order*, the district court admitted it was "presently lacking the factual background necessary" to reach its own conclusion as to whether a conflict actually existed. *Id.* at 1374. Instead, the *Order* appointed a second attorney to evaluate whether a conflict existed and to advise the court on the matter. The district court's order held that no privilege existed between the SAPD and Mr. Hall during the relevant period regarding Hall II.

Id. at 1375. At the same time, the district court acknowledged there was a privilege between the SAPD and Mr. Hall with regard to information or communications concerning Hall I. *Id.*

The court ordered any attorney-client privilege between Mr. Roark and Mr. Hall waived to the extent necessary for Mr. Roark to report to the Court "(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." *Id.* at 1376. Finally, although the SAPD had already paid for Mr. Benjamin's representation of Mr. Hall, the Court ordered the SAPD to also pay for Mr. Roark's work. *Id.* at 1377.

Memorandum Decision and Order Denying the Motion to Reconsider; and Supplementing the Original Decision and Order

After Mr. Hall filed a *Motion to Reconsider Memorandum Decision and Order* (R.38528/38704, pp.1379-414), the district court issued its *Memorandum Decision and Order Denying the Motion to Reconsider; and Supplementing the Original Decision and Order* (hereinafter, *Supplemental Order*) on February 23, 2011. (R.38528/38704, pp.1965-74.) In the *Supplemental Order*, the district court clarified certain aspects of its original order. The *Supplemental Order* authorized Mr. Roark to view the files of the SAPD even in the absence of a waiver from Mr. Hall. (R.38528/38704, p.1969). In addition, the district court ordered that all employees and attorneys at the SAPD be ordered to cooperate with Mr. Roark during the course of his investigation, regardless of any attorney-client privilege or rule of confidentiality that may exist, because Idaho Rule of Professional Conduct (hereinafter IRPC) 1.6(b)(6) allows counsel to breach protections in order to comply with a court order. (R.38528/38704, pp.1969-70.)

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 Those Determinations 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

Mr. Hall has both a constitutional and statutory right to conflict-free counsel on direct appeal and in his initial post-conviction in a capital case. Mr. Benjamin has determined, and represented to the court, there is neither an actual conflict nor reason to believe a conflict exists. In this instance, the SAPD's *Ex Parte* Notice is supplanted by Mr. Benjamin's affidavit. In that affidavit, Mr. Benjamin found no actual conflict arose from the contacts which led the SAPD to file its original *Ex Parte* Notice. In addition, in an abundance of caution, Mr. Benjamin explained no conflict that could possibly exist would be of a nature requiring the conflict to be imputed to other SAPD attorneys. Under these circumstances, the district court has no basis to order a second conflict inquiry by Mr. Roark.

B. Right To Conflict-Free Counsel Where Actual Conflicts Exist

Even though in the present case Mr. Benjamin's independent evaluation revealed that no actual conflict exists, the district court's duty to inquire is rooted in a defendant's right to conflict-free counsel. A criminal defendant has a Sixth Amendment and Due Process right to conflict-free representation at trial and on appeal. *See State v. Severson*, 147 Idaho 694, 703 (2009) (citing *Wood v. Georgia*, 450 U.S. 261, 271 (1981)), *also see Douglas v. California,* 372 U.S. 353 (1963), *Evitts v. Lucey,* 469 U.S. 387 (1985). Idaho appellate courts have also recognized a statutory right to post-conviction counsel for non-frivolous claims, as opposed to a constitutionally grounded right. *Charboneau v. State*, 140 Idaho 789, 793 (2004); *Plant v. State*,

143 Idaho 758, 761 (Ct. App. 2006); *see also* I.C. § 19-852(b); I.C. § 19-4904. However, even in the absence of a constitutional right to post-conviction counsel, Idaho appellate courts have still acknowledged a petitioner's constitutional right to post-conviction representation unmarred by conflict. *See Fields v. State*, 135 Idaho 286, 289-90 (2000) ("Because these facts do not identify a conflict other than the one related to the trial, they also fail to support the claim of ineffectiveness of appellate/post-conviction counsel as a result of a conflict of interest.").

Elsewhere, the Supreme Court has recognized, a statutory constitutional right to effective assistance of counsel. In *Smith v. State*, 146 Idaho 822 (2009), the Supreme Court considered whether a criminal defendant had a protected right to the effective assistance of counsel at Violent Sexual Predator (VSP) hearing board determination and on appeal from that decision. Like post-conviction cases, because the hearing and appeal were "civil in nature, there is no constitutional right to effective assistance of counsel." *Id.* at 833. However, because the right to counsel was provided by statute, the Supreme Court found a statutory right to effective assistance of counsel.[4] *Id.* The Court concluded that because "there is a statutory right to effective assistance of counsel" the "appropriate analysis is by reference to the well-established standards governing such claims under the Sixth Amendment." *Id.* at 834. Here, the same extension of a Sixth Amendment analysis of conflict-free counsel should apply regardless of whether the guarantee of counsel is by statute or by a constitutional right.

[4] "This statutory right to counsel would be a hollow right if it did not guarantee the defendant the right to effective assistance of counsel." *Smith v. State*, 146 Idaho at 833 (quoting *Hernandez v. State*, 127 Idaho 685, 687 (1995)). Consequently, the Court found there was no "legitimate basis" to evaluate an effective assistance of counsel claim any differently based on whether the right to counsel was guaranteed by statute or by the constitution. *Id.* at 833-34. It should also be noted that because the SAPD acts concurrently as both appellate and post-conviction counsel, it would be almost impossible to divide the SAPD's representation at any point in time as constitutionally required (as on direct appeal), or statutorily mandated (during initial post-conviction).

The critical issue in identifying whether a conflict of interest exists lies in determining if the interests of counsel conflict with his or her client's interest, thereby compromising counsel's duty of loyalty. *Strickland v. Washington*, 466 U.S. 688, 692 (1984) (recognizing that counsel who labors under an actual conflict of interest breaches the duty of loyalty to his or her client, which is "perhaps the most basic of counsel's duties."). The United States Supreme Court has drawn a distinction between actual and theoretical conflicts of interest, finding that "'an actual conflict of interest' meant precisely a conflict *that affected counsel's performance*—as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor*, 535 U.S. 162, 171 (2002)(emphasis in original). That Court held "an 'actual conflict,' for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance." *Id.* at 172 n.5. This Court has stated an actual conflict of interest involves counsel actively representing conflicting interests. *See Dunlap v. State*, 141 Idaho 50, 62 (2004) (citing *State v. Wood*, 132 Idaho 88, 98 (1998)). As summarized by the Ninth Circuit Court of Appeals:

> In several cases in which the Supreme Court has defined the right to conflict-free counsel, the defense attorney actively and concurrently represented conflicting interests. In those cases, the Court created, in effect, a distinction between an actual conflict of interest, and a mere hypothetical one . . . . [T]he Sixth Amendment does not protect against a "mere theoretical division of loyalties." Rather, it protects against conflicts of interest that adversely affect counsel's performance. Indeed, in *Mickens*, the Court held that "actual conflict" is defined by the effect a potential conflict had on counsels performance. In *Mickens*, the Court explained, "[A]n actual conflict of interest [means] precisely a conflict that affected counsel's performance—as opposed to a mere theoretical division of loyalties."

Alberni v. McDaniel, 458 F.3d 860, 870 (9th Cir. 2006) (citations omitted); *see also United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. 1991) ("More than a *mere possibility* of a conflict, however, must be shown. The Sixth Amendment is implicated only when the representation of counsel is adversely affected by an *actual* conflict of interest."). Accordingly, while a trial court has a duty to inquire into a potential conflict of interest, "a trial court may not disqualify counsel

on the basis of speculation or conjecture. . . ." *People ex rel. Woodard v. Dist. Ct.*, 704 P.2d 851, 853 (Col. 1985). In the instant case, the district court has effectively disqualified Mr. Benjamin as Mr. Hall's counsel for the limited issue of advising him on any potential conflict and replaced him with Mr. Roark, based on the district court's speculation and conjecture that Mr. Benjamin's evaluation, advice and counsel are not impartial.

The appropriate appellate standard of review in this case is the same as would apply when constitutional issues are presented. "The adequacy of the inquiry into a conflict of interest is a constitutional issue over which this Court exercises free review. *See State v. Statton*, 136 Idaho 135, 136, 30 P.3d 290, 291 (2001)." *State v. Lopez*, 139 Idaho 256, 259 (Ct. App. 2003).

C. The Extent Of District Court's Duty To Inquire Based On Easing Defendant's Concern

Mr. Hall acknowledges the "trial court has an affirmative duty to inquire into a potential conflict *whenever it knows or 'reasonably should know* that a particular conflict may exist.'" *State v. Severson*, 147 Idaho 694, 703 (2009) (quoting *State v. Lovelace*, 140 Idaho 53, 60 (2003) (emphasis added)). Because the possibility of a conflict was raised by Mr. Hall's counsel alone, and not by Mr. Hall, each of the conflict cases argued before the district court below present facts significantly different from those presented here.

The case of *State v. Severson*, 147 Idaho 694 (2009), presents an extensive discussion of the court's obligation to conduct a "thorough and searching" conflict examination. *Id.* at 704. However, in that case, Mr. Severson had been appointed counsel at trial "despite Severson's objection that he had a conflict of interest" and had argued himself that "the appointment of [counsel] violated his right to be represented by conflict-free counsel." *Id.* at 701. This Court made clear that "*because Severson had objected* to the conflict of interest at trial, the court had an affirmative duty to inquire into the potential conflict." *Id.* at 704 (emphasis added). In light of that crucial fact, this Court indicates the trial court "must make the kind of inquiry that might

ease *the defendant's dissatisfaction, distrust, or concern.*" *Id.* (quoting *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991) (emphasis added)). Here, Mr. Hall has not made an objection, requested different counsel, or shown any dissatisfaction, distrust, or concern about his representation by the SAPD after being fully advised on the issue by an independent attorney.[5]

In *Severson*, this Court also relied on *State v. Lovelace*, 140 Idaho 53 (2003). In *Lovelace*, the prosecution first moved that defense counsel be disqualified because of a conflict with his ongoing campaign to seek the position of county prosecutor. *Id.* at 59. Lovelace later filed a motion to dismiss his trial counsel "due to a possible future conflict of interest" and requested he be allowed to proceed *pro se*. *Id.* Although the court refused to appoint new counsel at that time, a new lawyer was appointed once his original attorney was sworn in as county prosecutor. *Id.* In *Lovelace*, this Court noted "whenever a trial court knows or reasonably should know that *a particular conflict* may exist, the trial court has a duty of inquiry." *Id.* at 60 (emphasis added). This Court found, "Lovelace provided no facts to suggest that counsel allowed anything adversely to affect his representation", concluding "the district court's denial of relief on the conflict of interest claim was proper." *Id.* at 61-62. This Court's findings acknowledged the district court and the State were aware of circumstances that could *appear* to present a conflict, but there had been no suggestion that the attorney's representation was compromised. In light of Mr. Benjamin's affidavit, the same rationale applies in the instant case. Mr. Benjamin acknowledged contacts between SAPD attorneys and trial counsel, but neither the State nor the district court identify facts to suggest the SAPD's representation of Mr. Hall has

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[5] In its holding, the Idaho Supreme Court refused to find that a conflict existed where another public defender who worked in the same office as Mr. Severson's trial counsel, had represented the mother of the victim in a civil suit directly relating to Mr. Severson's criminal case. *Id.* at 701. The facts presented in Mr. Benjamin's affidavit do not reveal any type of personal interest that would be comparable to the facts in *Severson*. (*See* Benjamin Affidavit, ¶¶ 6, 10, 11, 12.)

been affected by those prior contacts. Unlike *Lovelace*, Mr. Hall has never made a request for new counsel, and the district court admitted "this Court is presently lacking the factual background necessary to make such a determination." (R.38528/38704, p.1970.)

Finally, the parties also cited *State v. Lopez*, 139 Idaho 256 (Ct. App. 2003), where the Court of Appeals considered whether the defendant deserved a new trial after the trial court had undertaken to appoint conflict counsel to advise the defendant about the effects of an *actual conflict* known by the court, and the defendant had subsequently waived any conflict. The Court of Appeals found "the inquiry into the potential conflict was adequate" and reversed the trial court's decision to grant the defendant a new trial based on the conflict. *Id.* at 259. In the instant case, where no actual conflict has been found, Mr. Hall was still afforded the advice of an independent attorney and has decided not to raise any conflict issues.

D. A Second Inquiry Is Unnecessary And Duplicative

The district court found the SAPD's filings disclosed that: (1) SAPD attorneys had contact with trial counsel in Hall II that may present a conflict of interest; (2) SAPD attorneys were concerned about a possible conflict of interest; (3) the SAPD hired Mr. Benjamin to independently evaluate the conflict; and, (4) Mr. Benjamin was hired to evaluate the conflict and advise Mr. Hall as to any waiver. (R.38528/38704, p.1966.) In addition, the district court found Mr. Benjamin's inquiry "revealed at least one instance where the SAPD gave advice to trial counsel in Hall II." *Id.* at 1967.

When attorneys at the SAPD identified involvement between its own prior post-conviction attorneys and trial counsel on Hall II, the SAPD decided, out of an abundance of caution, to contract with independent counsel for the purpose of determining if a conflict existed. (8/26/2010 Tr.38528/38704, p.306, Ls.23-25; Benjamin Affidavit, ¶ 5.) At the same time, it

informed the district court it had contracted with Mr. Benjamin to represent Mr. Hall on the matter. (*Ex Parte* Notice, p.3.) Because the SAPD recognized that any evaluation of the nature and quality of the conflict made by its own attorneys could be perceived as compromised, the SAPD contracted with independent counsel to evaluate the communications and independently advise Mr. Hall of the potential conflict and any rights he might have as a result. (8/6/2010 Tr.38528/38704, p.259, Ls.18-21.) Mr. Benjamin was contracted by the SAPD as "counsel to Mr. Hall" and not as counsel for the SAPD. (8/26/2010 Tr.38528/38704, p.307, Ls.2-4; Benjamin Affidavit, ¶ 5.) After Mr. Hall signed a waiver, the SAPD gave Mr. Benjamin full access to attorney and client files in Hall I and Hall II, and all communications with Hall II trial counsel. (8/26/2010 Tr.38528/38704, p.307, Ls.4-5; Benjamin Affidavit, ¶¶ 5, 7.) Other than providing access to Mr. Benjamin, there was no further communication with Mr. Benjamin regarding his findings or advice to Mr. Hall prior to his submitting his affidavit. (*See* 8/26/2010 Tr.38528/38704, p.283, Ls.16-18; Benjamin Affidavit, ¶5.) Mr. Benjamin undertook an exhaustive investigation of the period of overlapping representation, and met with Mr. Hall. (Benjamin Affidavit, ¶¶ 5, 7.) Mr. Benjamin appeared in court three times to represent Mr. Hall before the district court on the conflict issue. (8/26/2010 Tr.38528/38704, p.282, L.24; 9/1/2010 Tr.38528/38704, p.335, Ls.17-19; 10/19/2010 Tr.38528/38704, p.348, Ls.17-18.)

Mr. Benjamin explained in his affidavit that although there was contact between SAPD lawyers and Hall II trial counsel, those contacts did not constitute a conflict under Idaho law. (Benjamin Affidavit, ¶ 10.) Mr. Benjamin recognized in one instance SAPD lawyers did offer advice to Mr. Hall's attorneys, but the advice given presented no conflict for the SAPD. *Id.*, ¶ 12. After his review and evaluation, Mr. Benjamin met with Mr. Hall and consulted with him. *Id.*, ¶ 5. Mr. Hall has never directly, or indirectly through Mr. Benjamin, expressed any concern

regarding a potential conflict with the SAPD. In spite of the extensive inquiry, the district court found in its *Supplemental Order* these very actions undertaken by the SAPD established a basis for a second judicial inquiry by Mr. Roark. (*See* R.38528/38704, p.1970.)

1. The Weight And Import Of Representations Made By Dennis Benjamin

Trial courts "necessarily rely in large measure upon the good faith and good judgment of defense counsel" in determining whether a conflict of interest exists or will likely develop in the course of their representation. *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980) (citing *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978)). Some courts, including the Ninth Circuit Court of Appeals, have held trial counsel's judgment that no conflict of interest exists is a sufficient basis for a court to conclude there is no conflict. *United States v. Crespo de Llano*, 838 F.2d 1006, 1012 (9th Cir. 1987); *see also United States v. Fish*, 34 F.3d 488, 493 (7th Cir. 1994); *United States v. Haren*, 952 F.2d 190, 195 (8th Cir. 1987).

The IRPC also suggest that "determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved." IRPC Rule 3.7, Comment ¶ 6. The same rules also make it clear that an attorney's failure to faithfully comply with those established standards provide grounds for discipline. *See* IRPC Preamble ¶ 19. The United States Supreme Court has noted "when a considered representation regarding a conflict in clients' interests comes from an officer of the court, it should be given the weight commensurate with the grave penalties risked for misrepresentation." *Holloway v. Arkansas*, 435 U.S. 475, 486 (1978).

The preference for the defendant's or petitioner's own counsel to make the determination as to the existence and effect of a conflict, independent of judicial inquiry, is important due to the very nature of the attorney-client privilege, and the fact the SAPD *actively represented* Mr. Hall as appellate counsel in Hall I at the time he was on trial in the instant case (Hall II). (*See infra.*

III(B).) Mr. Benjamin assessed the possible conflict of interest issue and concluded no conflict existed. This opinion was reached after interviewing Mr. Hall's former SAPD, trial counsel, Mr. Hall, reviewing SAPD files (including notes, and correspondence), Mr. Hall's post-conviction petitions in Hall I and Hall II, in light of relevant case law, the IRPC, and a recent article by Bar Counsel. (Benjamin Affidavit, ¶ 7.)

A second conflict inquiry conducted by Mr. Roark would be entirely duplicative of the review and work already completed by Mr. Benjamin. There is no evidence Mr. Roark will do anything differently than what Mr. Benjamin has already done. Additionally, to the extent the district court was dissatisfied with the information provided by Mr. Benjamin, it did not exhaust that resource, and in fact, refused to inquire at all of Mr. Benjamin beyond the content of his affidavit. (*See* 8/26/2010 Tr.38528/38704, pp.276-333; 9/1/2010 Tr.38528/38704, pp.334-46; 10/19/2010 Tr.38528/38704, pp.347-78.[6]) To the extent Mr. Benjamin did not conduct depositions, the district court could also grant him that power. (*See* 10/19/2010 Tr.38528/38704, p.371, L.19 – p.372, L.4.)

2. Imputing Conflicts Of Former Public Defenders To Public Defenders At Same Office

Regardless of the district court's willingness to accept Mr. Benjamin's representations about the existence of any conflict between Mr. Hall and the SAPD, a second inquiry is also unnecessary precisely because any possible conflict created by actions taken by Ms. Swensen or

[6] Mr. Benjamin only addressed the court briefly on 10/19/2010 at p.371, L.13 – p.374, L.4, and offered an explanation as to why he did not feel depositions were necessary, and explained why the State's concern regarding a former attorney from the SAPD becoming a witness in post-conviction did not present a problem under these facts. (The official transcript also notes Mr. Benjamin speaking at p.369 of the transcript, through p.371. However, during that speech the speaker refers to Mr. Benjamin in the third person, refers to "Mr. Ackley or Ms. Swensen or other people from our office', and is followed by Mr. Benjamin. All of that would lead one to believe that the speaker on pp.369-71 is misattributed to Mr. Benjamin, and appears to be Mr. Thomson from the SAPD.)

Mr. Ackley should not be imputed to Mr. Hall's current post-conviction counsel at the SAPD. Neither Ms. Swensen nor Mr. Ackley, post-conviction counsel for Mr. Hall at the time of the Hall II trial, were working for the SAPD at the time either the *Ex Parte* Notice or the State's original Motion for Inquiry Into Possible SAPD Conflict (Hall II) were filed. (2/3/2009 Tr.38528/38704, p.34, Ls.14-18; R.38528/38704, p.1241.)

The Court of Appeals has held that even where one attorney currently employed by the same public defender office labors under a conflict, that conflict will not necessarily be imputed to all other attorneys in the same office. *State v. Cook*, 144 Idaho 784, 794 (Ct. App. 2007). The primary holding in *Cook* was ultimately adopted by the Idaho Supreme Court in *State v. Severson*, 147 Idaho 694 (2009). In *Cook*, the Court of Appeals reviewed a case where one public defender at the Kootenai Public Defender was representing a defendant at trial and another attorney in the same office "had recently represented or was currently representing numerous of the state's witnesses in Cook's case." *Cook*, 144 Idaho at 787. Although the facts in the instant case do not involve concurrent representation of multiple defendants or witnesses in a case involving Mr. Hall, the fact that such a facially apparent conflict did not lead the Court of Appeals to impute the conflict to other attorneys at the Kootenai Public Defender's Office, leads one to believe such a conflict would not be imputed to current attorneys for representation made by former attorneys at the same office.

The Court of Appeals ultimately held that "a *per se* rule imputing conflicts of interest to affiliated public defenders is inappropriate where there is no indication the conflict would hamper an attorney's ability to effectively represent a client." *Id.* at 794. Neither the district court nor the State can explain how the contact between Mr. Ackley and Ms. Swensen would hamper Mr. Hall's current attorneys' ability to effectively represent him.

In his affidavit to the court, Mr. Benjamin specifically recognizes the impact of *Severson* on his evaluation of any possible conflict of interest and finding there is no conflict, unjustified or otherwise. (Benjamin Affidavit, ¶¶ 7, 8, 13.) In the present case, neither the State nor the court can show that any actions taken by Mr. Ackley or Ms. Swensen represent an actual conflict, or might substantially affect or compromise the SAPD's current representation of Mr. Hall.

E. Conclusion

Mr. Benjamin performed a careful and exhaustive evaluation of any possible conflicts of interest the SAPD may have had with Mr. Hall. The district court's order appointing Keith Roark, in large part, mimicked the work that had already been performed by Mr. Benjamin. Since any work done by Mr. Roark would be duplicative, this Court should vacate the district court's order appointing Mr. Roark to engage in a second conflict review. If the district court were still not satisfied with the adequacy of the conflict evaluation done by Mr. Benjamin, it would be free to inquire further of Mr. Benjamin and Mr. Hall and seek additional information or assurances from them.

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

Pursuant to I.C. § 19-871, the SAPD has the statutory obligation to represent capital clients in post-conviction, and to pay the costs incurred as part of that representation in the event the SAPD is unable to carry out its duties due to a conflict or other reasons. The SAPD satisfied

that statutory obligation by contracting with Mr. Benjamin to evaluate the possibility of a conflict of interest, to advise Mr. Hall on the matter, and to afford him an opportunity to further raise the issue with the district court. The SAPD identified a circumstance where it believed the client would best be served by independent advice from independent counsel. Relying on the same process and procedure it employs daily in satisfying its statutory obligation, it contracted with an attorney to perform that work and paid for those services out of its own budget. The district court's subsequent order appointing a second attorney to conduct yet another conflict evaluation at the SAPD's expense, and to repeat the work already performed by Mr. Benjamin, violates the principle of the separation of powers and exceeds the court's authority.

Whether a branch of government exercises powers that properly belong to another branch is a constitutional question. IDAHO CONST., art. II, § 1; *Gibson v. Bennett*, 141 Idaho 270, 276 (Ct. App. 2005). "Because constitutional questions are purely questions of law, they are reviewed *de novo*." *Bradbury v. Idaho Judicial Council*, 136 Idaho 63, 67 (2001).

B. <u>The District Court's Order Violates The Separation Of Powers And Exceeds Its Authority</u>

The Idaho Legislature has authorized the SAPD, by statute, to identify and evaluate conflicts, and to provide conflict attorneys in the appropriate cases. In this case, the SAPD has fulfilled that obligation by hiring Mr. Benjamin to represent Mr. Hall and advise him of his rights and options. At issue is whether a district court judge has the authority to order the SAPD to pay for services the SAPD has already contracted to be performed and paid for–pursuant to its statutory obligation.

1. <u>Principle Of Separation Of Powers</u>

When the Legislature created the office of the State Appellate Public Defender, it categorized the office as a department of self-governing agencies within the executive branch, with the SAPD being appointed by the Governor, on the advice and consent of the Senate. I.C.

§§ 19-869(1)-(2), 67-2601(1). The legislature also identified the powers and duties of the SAPD and his or her office to include the representation of indigent capital defendants in post-conviction relief proceedings, in the district court and on direct appeal. *See* I.C. § 19-870(1)(a), (d). In addition to these duties, the Legislature vested the SAPD with the power to "contract with private attorneys to provide representation on a case-by-case basis when such contracts would conserve budgetary resources." I.C. § 19-870(3). Furthermore, the SAPD was directed to "arrange for counsel for indigent defendants to be compensated out of the budget of the state appellate public defender" in circumstances where the SAPD is "unable to carry out the duties required in this act because of a conflict of interest or any other reason[.]" I.C. § 19-871. Pursuant to these provisions, it is the exclusive power of the SAPD to decide who it will contract with to provide legal representation to indigent clients when the SAPD is unable to do so.

The questions asked directly involve the separation of powers laid forth in the Idaho Constitution. *See* IDAHO CONST., art. II, § 1 ("no person . . . charged with the exercise of powers properly belonging to one of these department shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted."). "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial[.]" *Estep v. Commissioners of Boundary County*, 122 Idaho 345, 346 (1992). "[Article 2, § 1] delineates the doctrine of separation of powers as it relates to the coordinate branches of government—where a power is given to department, another department cannot act." *Id.* (citing *State ex rel. Hansen v. Parsons*, 57 Idaho 775 (1937)).

The district court orders in question represent unauthorized judicial oversight of the executive branch. "In the absence of a legislative invasion of constitutionally protected rights, the judicial branch of government must respect and defer to the legislature's exclusive policy

decisions." *In re SRBA Case No. 39576*, 128 Idaho 246, 255 (1995) (quoting *Idaho State AFL-CIO v. Leroy*, 110 Idaho 691, 698 (1986)). This Court "has consistently recognized that the separation of powers provided by Article II of our constitution prohibits judicial review of the discretionary acts of other branches of government." *In re SRBA Case No. 39576*, 128 Idaho at 261.

2. The SAPD Has Satisfied Its Statutory Obligation And Should Not Be Responsible To Pay For Additional Representation

The district court ordered the SAPD to pay for counsel of the court's choosing to represent Mr. Hall in a conflict inquiry. Despite being informed by the SAPD that an inquiry had already been done, and the SAPD had no budgetary resources to pay for second counsel appointed by the court, the district court disregarded the information and ordered the SAPD to pay for second counsel to represent Mr. Hall in a conflict inquiry. (R.38528/38704, pp.1457, 1972.) In so doing, the district court has effectively defeated the Legislature's intent in creating the SAPD and the capital crimes defense fund, and has exceeded its jurisdiction.

In March of 1998, the Idaho Supreme Court adopted Idaho Criminal Rule 44.3, which sets forth the qualifications for appointed counsel in capital cases. That same year, the Idaho Legislature created the capital crimes defense fund and the SAPD. *See* Hon. George R. Reinhardt III, *Recent Developments in the Law Applicable to Capital Cases and Criminal Appeals by Indigents,* 42 Advocate 7 (June 1999); I.C. § 19-869(1). The Legislature codified its intent in creating both the capital crimes defense fund and the SAPD. With respect to the capital crimes defense fund:

> The establishment of a capital crimes defense fund by the counties of the state for the purpose of funding the costs of criminal defense in cases where the penalty of death is a legal possibility is hereby authorized. . . . Membership in the fund shall be voluntary, as determined by resolution of the board of county commissioners of the respective counties of the state.
>
> . . . .

> The services of the state appellate public defender as provided in section 19-870, Idaho Code, shall be available only to those counties participating in the fund.

I.C. § 19-863A(1), (5). Similarly, with respect to the SAPD:

> The legislature recognizes that the cost of legal representation of indigent defendants upon the appeal of their criminal convictions, particularly convictions for first-degree murder, is an extraordinary burden on the counties of this state. In order to reduce this burden, provide competent counsel but avoid paying high hourly rates to independent counsel to represent indigent defendants in appellate proceedings, the legislature hereby creates the office of the state appellate public defender.

I.C. § 19-868. These same acts also had the effect of consolidating appellate and post-conviction indigent defense representation in a single office of the SAPD.

When the legislature created the SAPD office, it categorized the office as a department of self-governing agencies within the executive branch, with the State Appellate Public Defender being appointed by the Governor, on the advice and consent of the Senate. I.C. § 19-869(1), (2). The Legislature also identified the powers and duties of the SAPD and his or her office, including, but not limited to, the representation of indigent capital defendants in post-conviction relief proceedings in the district court, and on direct appeal. *See* I.C. § 19-870(a), (d). The Legislature vested the SAPD with the power to "contract with private attorneys to provide representation on a case-by-case basis when such contracts would conserve budgetary resources," I.C. § 19-870(3), and to "arrange for counsel for indigent defendants to be compensated out of the budget of the state appellate public defender" in circumstances where the SAPD is "unable to carry out the duties required in this act because of a conflict of interest or any other reason." I.C. § 19-871.

Pursuant to these provisions, it is within the power of the SAPD to decide who it will contract with to provide legal representation to indigent clients when the SAPD is unable to do

so. The SAPD's power and ability to contract with outside counsel is dependent on having sufficient funds to so contract. (*See* R.38528/38704, pp.1456-57 (Affidavit of Josh Tewalt, ¶ 16 ("That all state contracts must contain a clause that indicates that any contract is subject to sufficient appropriation from the Legislature[.]"); ¶ 20 ("That any contract currently initiated by the SAPD would not have the guarantee of sufficient Legislative General Fund Appropriations.").) The SAPD's budget is wholly dependent upon an annual appropriation of funding from the Idaho State Legislature. *See* IDAHO CONST., art. VII, § 13 ("No money shall be drawn from the treasurer, but in pursuance of appropriations made by law."). "An appropriation in this state is authority of the Legislature given at the proper time and in legal form to the proper officers to apply a specified sum from a designated fund out of the treasury for a specified object or demand against the state." *Blaine County Inv. Co. v. Gallet,* 35 Idaho 102 (1922).

The district court was advised the SAPD had no funds in its budget to pay for additional counsel, an assertion supported by the affidavit of Joshua Tewalt from the Idaho Division of Financial Management (DFM). (R.38528/38704, p.1457, ¶ 21 (the SAPD has "no money in the FY2011 budget to cover an additional contract for conflict services in *Erick Hall v. State of Idaho*").) Consequently, the DFM recommended against the SAPD entering any additional contracts in fiscal year 2012.[7] (R.38528/38704, p.1457, ¶¶ 23, 26, 27.) To order the SAPD to engage in a second contract to provide services to Mr. Hall (which had already been rendered), in light of the State's fiscal situation, was an overreach by the district court.

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[7] The SAPD had already been denied a capital case supplemental appropriation, and had submitted a separate supplemental appropriation for already existing shortfalls. (R.38528/38704, p.1456, ¶¶ 12, 15.) In addition, the 2012 budget recommended $0.00 for capital outlay, and any additional conflict contracts would not be guaranteed. (R.38528/38704, p.1457, ¶¶ 20, 26.)

The district court erroneously relied upon Idaho Code § 19-871 for its authority to order the SAPD to compensate "independent counsel" from the SAPD budget. (R.38528/38704, p.1377.) Specifically, because no conflict has been identified in Mr. Hall's case, and because Mr. Roark is an attorney appointed by the district court *to conduct its own inquiry* and report to the district court regarding whether a conflict exists, Idaho Code § 19-871 does not require the SAPD to pay for Mr. Roark's service to the district court. When the SAPD incurs a cost, it does so pursuant to contractual agreements between the SAPD and the conflict attorney. No such arrangement or contract exists between the SAPD and Mr. Roark. As a result of the absence of an appropriation by the Legislature to fund the district court's order, the court's order is in excess of its jurisdiction and is an attempt to defeat the legislative intent in creating both the SAPD office and the capital crimes defense fund. *See cf. In re: State v. District Court of the Fourth Judicial District,* 143 Idaho 695, 152 P.3d 566 (2007) (the State was required to pay costs/fees of special master appointed by the district court in her discretion, where Idaho Code § 12-118 provides that when the State is a party and costs are awarded against it, a warrant must be drawn against the general funds to pay such costs, but the district court cannot identify the source of funding for such costs and cannot issue a writ of execution for the payment to ensure such payment.).

In this case, the district court has selected an attorney other than the public defender, and in defining the scope of representation, determined "the direct expenses necessary to representation." *See* I.C. § 19-860(b). Thus, pursuant to I.C. § 19-860(b) even assuming the district court could order the appointment of Mr. Roark, Ada County is responsible for the payment of Mr. Roark's services. Absent a showing the SAPD cannot carry out its statutory mandate, the SAPD has no obligation to pay for alternate counsel. Here, the SAPD has already

provided Mr. Hall with the service which the SAPD believed, in an abundance of caution, they could better provide him through an independent attorney—an impartial and honest assessment of the existence of a conflict.

3. Acting Within Its Duty And Obligation, The SAPD Appropriately Selected And Provided Conflict Counsel

The ethical and professional duties set forth in the IRPC require a two-step analysis when addressing conflicts: first, determine whether a concurrent conflict exists,[8] and then, if so, decide whether notwithstanding the conflict, the lawyer may continue to represent the client. *See* IRPC 1.7(a), (b). The commentary to the Rule requires attorneys to spend considerable energy and effort in identifying possible conflicts suggesting that "to determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures." IRPC 1.7, Comment ¶ 3. The SAPD adopted a "reasonable procedure" in notifying the court, *ex parte,* of its intent to contract with Mr. Benjamin to represent Mr. Hall in order to evaluate whether a conflict exists, and to advise Mr. Hall on any waiver of that conflict. The result of that evaluation is represented by the finding in Mr. Benjamin's affidavit to the court.

The Legislature requires the SAPD to select and compensate conflict counsel in such cases. Idaho Code § 19-871 provides as follows: "Should the state appellate public defender be unable to carry out the duties required in this act because of a conflict of interest or any other reason, the *state appellate public defender shall arrange* for counsel for indigent defendants to be compensated out of the budget of the state appellate public defender." (emphasis added). Here, the SAPD identified a situation in which it believed there could potentially be a conflict of interest. The process used by the SAPD in selecting Mr. Dennis Benjamin was the exact process

[8] The SAPD recognized from the beginning that any potential conflict of interest would include more than actual conflicts where there is "direct adverseness," and would include the "material limitation" conflict of interest as explained in IRPC 1.7, Comment ¶ 8. (*See* R.38528/38704, p.1299, n.1.)

used by the SAPD in selecting counsel for appellate cases originally assigned to the SAPD for direct appeal or post-conviction representation where a conflict is identified, or the SAPD is otherwise unable to carry out its duties. (8/6/2010 Tr.38528/38704, p.258, L.24 - p.259, L.4.) Consequently, the SAPD satisfied its statutory obligation arranging for counsel, and assuming full financial responsibility for such an assignment.

Nevertheless, on multiple occasions the district court expressed dissatisfaction with the SAPD's selection of Mr. Benjamin and questioned his independence. (8/6/2010 Tr.38528/38704, p.257, Ls.8-11 ("he is not the Court's selection in this case and so, therefore, your view that he's independent is nice, but it's not necessarily persuasive to me"); R.38528/38704, p.1377 ("Mr. Benjamin was chosen by the same office that is potentially conflicted in this matter. . . . 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."); R.38528/38704, p.1971 ("Mr. Benjamin is the SAPD's choice of conflict counsel, taking the place of the SAPD as to the conflict issue alone. This Court, at this stage of the inquiry, has thus far elected not to rely on the representations of Mr. Benjamin.").)

Beyond recognizing that Mr. Benjamin has an ongoing contractual relationship with the SAPD, the district court never provided any explanation as to why Mr. Benjamin's evaluation should not be considered sufficiently independent and reliable. By appointing Mr. Roark, the trial court interfered with an ordinary function that is carried out daily by the SAPD pursuant to its statutory obligation, and simply replaced its judgment for that of the SAPD. To allow a district court to substitute its own counsel, after work has already performed, would invite the interference of any judge where conflict counsel is contracted either at trial or on appeal to act in the stead of the corresponding public defender office.

C. Conclusion

Idaho law requires the SAPD to provide Mr. Hall with capital post-conviction representation. In its attempt to ethically satisfy its statutory obligation, the SAPD adopted reasonable procedures to ensure Mr. Hall had conflict-free representation. Mr. Benjamin has already provided Mr. Hall with an impartial and independent evaluation of any possible conflict with the SAPD, and neither the district court nor the State has been able to show why Mr. Benjamin's work as conflict counsel should not be relied upon or how the SAPD's continued representation of Mr. Hall is compromised. Consequently, Mr. Hall respectfully requests this Court vacate the district court's order appointing Keith Roark. In the alternative, Mr. Hall asks this Court vacate the order requiring the SAPD pay for a second conflict evaluation. To require the SAPD to pay for Mr. Roark's services, where another attorney has already represented that no conflict exists, and where Mr. Hall has already been given advice of counsel on the issue, represents a forced payment for a duplication of services already provided that is unprecedented, unnecessary and extraordinarily wasteful.

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

An attorney-client privilege existed once the SAPD was appointed as appellate and post-conviction counsel to Mr. Hall in January of 2005, regardless of whether a separate criminal trial was still pending. Consequently, the district court should recognize the privileges and rules protecting confidential information apply to the SAPD files, irrespective of whether those files contain information about Mr. Hall's then-pending trial. A subsequent wholesale waiver of the privilege with respect to the trial attorneys on Hall II cannot constitute a waiver of the privilege

and rule of confidentiality, as it concerns Mr. Hall's current appellate and post-conviction attorneys. The district court's orders declaring the attorney-client privilege waived and requiring involuntary disclosure are excessive and unnecessary.

Although Idaho courts do not appear to have announced a clear standard of review in cases involving the attorney-client privilege, the Ninth Circuit Court of Appeals has: "whether statements are protected by an individual attorney-client privilege is a mixed question of law and fact which this court reviews independently and without deference to the district court." *United States v. Richey*, 632 F.3d 559, 563 (9th Cir. 2011) (quoting *United States v. Graf*, 610 F.3d 1148, 1158 (9th Cir. 2010) (internal quotes omitted)). That same court reviewed "de novo the district court's ruling on the scope of the attorney-client privilege." *Id.*

B. The District Court's Order Exceeded Its Authority, Impermissibly Compromises Attorney-Client Confidentiality, Interferes With The Attorney-Client Relationship, and Serves No Legitimate Purpose

1. Existence Of An Attorney-Client Relationship

It is undisputed the SAPD has had a continuous, uninterrupted attorney-client relationship with Mr. Hall since its appointment as post-conviction counsel in Hall I on January 25, 2005. All contacts with Mr. Hall by attorneys or staff from the SAPD and all work generated by them, are covered by the attorney-client privilege, work product rule, and rules of attorney-client confidentiality. That attorney-client relationship exists for the current staff at the SAPD and also extends to those attorneys no longer working for the SAPD. *See* IRPC 1.6, Comment ¶ 19 ("The duty of confidentiality continues after the client-lawyer relationship has terminated."); IRPC 1.9, Comment ¶ 1 ("After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality and conflicts of interest"). Once the SAPD was appointed in January of 2005, all subsequent communications and file contents, *regardless of their nature*,

fall under the mandates of the IRPC which generally prevent disclosure.[9] As a result, the SAPD initially opposed the State's motion for disclosure of client file information or contacts with their client or his other attorneys during their representation. (R.38528/38704, p.1297.) The existence of the attorney-client relationship dictates the existence of the protections attached to the rules of privilege and work-product, along with the rule of confidentiality.

2. Court's Conflation Of Attorney-Client Privilege And Rule Of Confidentiality

The district court's *Order* repeatedly refers to the "privilege" that exists in this case. (*See* R.38528/38704, p.1375 ("the Court does not wish to expose itself to privileged information concerning Hall I"); R.38528/38704, p.1376 ("keeping in mind the attorney-client privilege issues involved in any intertwining of the Hall I and Hall cases" and "attorney-client privilege issues implicated by the SAPD's representation of Mr. Hall on the Hall I post-conviction and appeal.").) However, the *Order* ignores the distinctions between the attorney-client privilege, rule of confidentiality, and the work-product doctrine.[10]

The attorney-client privilege is an evidentiary rule, and a privilege that may be invoked by a client, or his attorney, to bar an attorney from testifying or disclosing confidential

[9] The attorney-client privilege may be the oldest recognized privilege in the Common Law, and has been recognized at least since the reign of Queen Elizabeth. *See, e.g., Hartford v. Lee*, 21 Eng. Rep. 34 (Ch. 177). And, as Wigmore notes, the privilege was virtually "unquestioned" even then. 8 J. Wigmore, *Evidence* § 2990, at 547 (3d ed. 1940). The attorney-client privilege encourages "'full and frank communication between attorneys and their clients and thereby promotes broader public interests in the observance of law and the administration of justice.'" *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). "The privilege encourages clients to make full disclosure to their lawyers," and "a 'fully informed lawyer can more effectively serve his client.'" *Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998) (citation omitted). It is not hyperbole to suggest that the attorney-client privilege is a necessary foundation for the adversarial system of justice. *In re Lott*, 424 F.3d 446, 450 (6th Cir. 2005).

[10] Mr. Hall's attorneys at the SAPD have invoked the protections under the attorney-client privilege, work product rule, and rules of attorney-client confidentiality since its first filings opposing the State's *Motion for Inquiry Into Possible SAPD Conflict Hall II.* (*See* R.38528/38704, p.1304.)

communications. The attorney-client privilege allows a client "to refuse to disclose and to prevent any other person from disclosing confidential communications" which were made (1) between the client and his lawyers, (2) between the client's lawyers and that lawyer's agents, (3) among several clients and their lawyers, as long as it concerns a matter of common interest, (4) between other representatives of the client, or (5) *among lawyers and their representatives representing the same client*. *See* I.R.E. 502(b). Communications subject to the privilege are limited to those which are confidential and "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." I.R.E. 502(a)(5).

In contrast, the IRPC guide lawyers' professional responsibilities. The IRPC and comments were specifically adopted by the Idaho Supreme Court in 2004, and "are based largely on the American Bar Association (ABA) Model Rules of Professional Conduct, with some Idaho variations." *See* IRPC Title Heading. Rule 1.6 of the IRPC governs confidentiality of information, which is broader than the attorney-client privilege and includes "information relating to the representation of a client." IRPC 1.6(a).

The IRPC makes a clear distinction between the attorney-client privilege and the rule of confidentiality. Although they are "related bodies of law" the "attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client." IRPC 1.6, Comment ¶ 3. The "rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law." *Id.* The commentary to the rule of

confidentiality provides "a lawyer may not disclose such information except as authorized or required" by the IRPC or other law. *Id.*

Because the IRPC, as adopted by the Idaho Supreme Court in 2004, are "based largely on the American Bar Association Model Rules of Professional Conduct", consideration of relevant Model Rules is appropriate. With respect to Rule 1.6, the Annotated Model Rules explain the origin of the rule of confidentiality and the difference between it and the attorney-client privilege:

> The evidentiary attorney-client privilege is closely related to the ethical duty of confidentiality. They are so closely related that the terms "privileged" and "confidential" are often used interchangeably. But the two are entirely separate concepts, applicable under different sets of circumstances. The ethical duty, on the one hand, is extremely broad: it protects from disclosure all "information relating to the representation of a client," and applies at all times. The attorney-client privilege, on the other hand, is more limited: it protects from disclosure the substance of a lawyer-client communication made for the purpose of obtaining or imparting legal advice or assistance, and applies only in the context of a legal proceeding. [Citations omitted.]
>
> Accordingly, a court's determination that particular information is not privileged is not the same as a determination that a lawyer has no ethical obligation to protect the information from disclosure in other contexts. *See, e.g., Ex Parte Taylor Coal Co. Inc.*, 401 So.2d 1 (Ala. 1981) (fact that information not covered by attorney-client privilege does not mean lawyer permitted to reveal client's secrets, even after disclosure in court; under Model Code); *see also Spratley v. State Farm Mut. Ins. Co.*, 78 P.3d 603 n.2 (Utah 2003) (ethical duty of confidentiality not coextensive with attorney-client privilege: "privilege might be waived allowing compelled disclosure by an attorney while the duty of confidentiality is still in full force").

ABA Model Rules of Professional Conduct, Rule 1.6, Annotation, pp.93-94 (2007). While the district court's orders address the waiver of the attorney-client privilege under the Rules of Evidence, that waiver only obliquely addresses counsels' professional or ethical duties or obligations.[11]

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[11] The *Supplemental Order* does explicitly refer to IRPC 1.6(b)(6), when referring to the clarification that the SAPD has been ordered to release its files. Such an order only underscores

3. Scope Of Privilege, Confidentiality And The Protections They Afford

According to the IRPC, "a lawyer shall not reveal information relating to *representation of a client* unless the client gives informed consent." IRPC 1.6(a)(emphasis added). Elsewhere, the rules state that "a lawyer should keep in confidence information relating to *representation of a client* except so far as disclosure is required or permitted." IRPC Preamble ¶ 4 (emphasis added). The IRPC clearly refer not to the representation of a certain case, but to the representation of a client. In contrast, the district court's order draws the conclusion that the attorney-client privilege only attaches when the material or communications involve a specific case—in this case Hall I.[12] The *Order* appears to recognize an attorney-*case* privilege as opposed to an attorney-*client* privilege.

In its *Order,* the district court found that "communications between the SAPD and trial counsel about [Hall II] are not privileged because the SAPD had not yet been appointed to *this case* when the communications occurred." (R.38528/38704, p.1375 (emphasis added).) However, the court did not find there was no attorney-client relationship between the SAPD and Mr. Hall—only that there was no privilege as it related to information on Hall II. *Id.* at 1375-76. This idea seems to have originated in the State's Motion for Inquiry Into Possible SAPD Conflict (Hall II). There, the State requested the SAPD disclose "any correspondence, notes, documents and conversation members of the SAPD staff had with Erick Hall and/or trial counsel for Erick Hall **prior** to the SAPD post-conviction appointment on January 4, 2008," arguing those

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the confusion as to whether the court is referring to the privilege or the rule of confidentiality. (*See* R.38528/38704, pp.1969-70.)

[12] *See* R.38528/38704, p.1375 ("[t]he SAPD did represent the Petitioner on the Hall I post-conviction case during the time frame in which these communications occurred and the court is unaware of the extent to which the contact between the SAPD and trial counsel for Hall II intermingled discussion about Hall I and Hall II, and the court does not wish to expose itself to privileged information concerning Hall I."). The order expresses no similar concern for privileged information concerning Hall II.

disclosures "would not be protected by the Attorney-Client privilege because the SAPD did not represent the Petitioner on Hall II during those time frames." (R.38528/38704, p.1289 (emphasis in original).) However, the SAPD did represent Mr. Hall for approximately three years prior to January of 2008.

After acknowledging that the privilege attaches to some of the SAPD files, the court nevertheless appointed Mr. Roark and ordered him "to conduct a thorough and searching review of the SAPD's pre-trial, trial and pre-sentence involvement in the trial of Hall II up to its appointment" in Hall II. (R.38528/38704, pp.1375-76.) The court further authorized depositions of Mr. Hall's current counsel, the SAPD, and Dennis Benjamin, who had represented Mr. Hall for the limited purpose of evaluating and advising on any possible conflict. (R.38528/38704, p.1376.)

To release the SAPD's entire file to *anyone*, even where that person is another attorney selected by the court would be a clear breach of the attorney-client privilege. The court's *Supplemental Order* does not limit Mr. Roark's authorization to view or access the SAPD files in any way. (R.38528/38704, pp.1969-70.) Those files would include all client communications, notes, communications with others involved in the case, work-product, memoranda, and investigative materials. The district court has also ordered the SAPD to cooperate if questioned by Mr. Roark, "subject to a court order." (R.38528/38704, p.1970.)

4. Mr. Hall's Limited Waiver Of Confidentiality And Alternate Avenues For The District Court To Pursue Additional Information

Mr. Hall has not granted informed consent to the SAPD to share his files with anyone other than Mr. Benjamin for the purpose of conducting an investigation into a possible conflict. (R.38528/38704, p.1460.) The IRPC make it clear that in the absence of the client's informed consent, a lawyer is only permitted to reveal information relating to representation in very

limited circumstances. The applicable exception in the instant case is "to comply with other law or a court order." IRPC 1.6(b)(c). (*See* R.38528/38704, p.1970.)

It is entirely unnecessary to waive Mr. Hall's privilege and confidentiality with the SAPD or Mr. Benjamin, and order the complete disclosure of files, in order to discover the nature of conversations between the SAPD attorneys and trial counsel, where the district court has already waived the attorney-client privilege regarding Mr. Chastain and Mr. Kristal. (*See Order Regarding Respondent's Motions for Discovery and For Waiver of Attorney-Client Privilege*, R.38528/38704, pp.1250-51.) Nothing would prevent the district court from simply inquiring of trial counsel as to the nature of those conversations, and any advice they received from the SAPD attorneys. Instead, the district court's actions in this case suggest that its ultimate desire is for the SAPD's client files be laid bare and for the SAPD to disclose client file information.

The district court, in its *Order*, found that the SAPD's Amended Notice of Possible Conflict of Interest only provided the court with details about the methods by which the contact occurred, and "did not provide any information about the substance of the conversations or disclose whether the SAPD gave advice to trial counsel, despite this Court's specific request." (R.38528/38704, p.1370.) The district court recognizes the Affidavit of Dennis Benjamin, filed the same day as the Amended Notice of Possible Conflict of Interest, did include a disclosure that one of the SAPD attorneys had given advice to trial counsel, but did not "give any information about the substance or subject of that advice." *Id.* If the district court were simply concerned with finding out what was said between the SAPD attorneys and trial counsel, the district court could further inquire of Mr. Benjamin to determine whether he was willing to share the nature of those contacts, or inquire directly of Mr. Chastain and Ms. Kristal, for whom privilege has already been waived. .

5. Uncertain Nature Of Mr. Roark's Contemplated Representation And Inquiry

The district court's order makes little mention of the implications that the presumed attorney-client privilege and rule of confidentiality between Mr. Hall and Mr. Roark may have on Mr. Roark's ability to satisfy the court's request.[13] If, in fact, Mr. Roark is an attorney appointed to represent Mr. Hall, and not an independent investigator of the district court, it is unclear why Mr. Roark would be permitted by the rules of evidence and rules of professional conduct to reveal any more information than the SAPD or Mr. Benjamin have been willing to reveal. The uncertainty of Mr. Roark's relationship to Mr. Hall is compounded by the fact that whereas the district court would require Mr. Roark to "advise the Petitioner" on the waiver issue if the court were to find a conflict, but it is silent as to whether Mr. Roark should consult with Mr. Hall during his evaluation of the conflict. (R.38528/38704, p.1376.)

In *Holloway v. Arkansas*, 435 U.S. 475 (1978), the United States Supreme Court considered the extent to which appointed counsel is required to make disclosures to the Court regarding the basis for a conflict of interest. In *Holloway*, counsel had been appointed to represent three co-defendants at a joint trial. Counsel for the defendant had made motions requesting separate counsel be appointed because of conflicts of strategy and defense that had arisen after counseling with his three clients individually. *Id.* at 477. The Supreme Court held that a failure to appoint separate counsel or to take adequate precautions deprived the defendant of his Sixth Amendment right to assistance of counsel. *Id.* at 484.

[13] The district court notes that "Mr. Roark shall present his findings to this Court, keeping in mind the attorney-client privilege issues involved in any intertwining of the Hall I and Hall II cases." (R.38528/38704, p.1376.) This suggests that Mr. Roark should only be concerned with privilege issues as they relate to information regarding Hall I. But the order also allows Mr. Roark to file a separate report under seal if he were to determine that details regarding the "extent of the conflict and other issues" are not appropriate for the court's consumption. *Id.* This would seem to suggest that the district court recognizes some modicum of confidentiality.

The Supreme Court acknowledged that in representing the basis for a motion requesting separate counsel for a co-defendant "in more detail, defense counsel was confronted with a risk of violating, by more disclosure, his duty of confidentiality to his clients." *Id.* at 485. However, the Court noted that their holding did not "preclude a trial court from exploring the adequacy of the basis of defense counsel's representation regarding a conflict of interest *without improperly requiring disclosure of the confidential communications* of the client." *Id.* at 487 (emphasis added). In the instant case, the district court has alternative avenues of further inquiry without violating the confidential material held by the SAPD and Mr. Benjamin.

Once the attorney-client privilege or rule of confidentiality is waived, it is waived forever and the protection cannot be restored. *See Kelly v. Ford Motor Co.*, 110 F.3d 954, 963 (3d Cir. 1997) ("once putatively protected material is disclosed, the very 'right sought to be protected' has been destroyed", and "there is no way to unscramble the egg scrambled by the disclosure" (citations omitted)). It is a classic case of never being able to unring a bell. If Mr. Roark is granted unfettered access to the SAPD's protected files and communications, and subsequently reports the contents of those files to the district court as suggested by its orders, without any assurances that attorney-client privilege and rules of confidentiality will also apply to Mr. Roark's investigation, irreparable harm may be done to Mr. Hall. Of course, if those protections do apply to Mr. Roark's evaluation, it only begs the question as to what the difference in posture would be between Mr. Benjamin and Mr. Roark. In that instance, the only difference is whether the attorney evaluating the conflict was of the district court's own choosing. If the information in possession of the court is inadequate, the district court should then make further inquiries of Mr. Benjamin as the attorney representing Mr. Hall on the limited issue of the conflict evaluation.

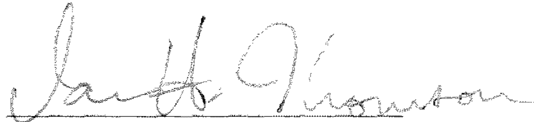
C. Conclusion

Because an attorney-client relationship has existed between Mr. Hall and the SAPD since early 2005, this Court should find that both the attorney-client privilege and rule of confidentiality apply to the entire contents of the SAPD's file, irrespective of whether the district court has already waived the attorney-client privilege with respect to Mr. Chastain and Ms. Kristal. Mr. Hall requests this Court find that in light of Mr. Benjamin's affidavit, the attorney-client privilege and rule of confidentiality serve to protect further disclosure of protected materials to additional attorneys appointed by the court; and that an order requiring the SAPD to release those files and answer questions serves little purpose where the district court has neither exhausted Mr. Chastain and Ms. Kristal—who are no longer bound by the attorney-client privilege—or Mr. Benjamin.

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 return this case for completion of post-conviction proceedings.

DATED this 29th day of May, 2012.



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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 29th day of May, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. mail, addressed to:

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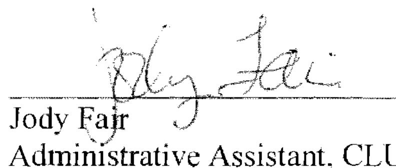

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