8-28-2012

Hall v. State Respondent's Brief Dckt. 38704

IN THE SUPREME COURT OF THE STATE OF IDAHO

ERICK VIRGIL HALL,

Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 38528-2011

BRIEF OF RESPONDENT

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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Nature Of The Case

Petitioner-Appellant Erick Virgil Hall ("Hall") appeals, with permission from the Idaho Supreme Court, from two of the district court's interlocutory orders, which include (1) Memorandum Decision and Order Appointing Keith Roark as Independent Conflict Counsel and (2) Memorandum Decision and Order Denying the Motion to Reconsider; and Supplementing the Original Decision and Order.

Statement Of The Facts And Course Of The Proceedings

On May 20, 2003, Hall was charged with the first-degree murder and rape of Cheryl Ann Hanlon ("Cheryl"). (R., pp.10, 54.) Hall was initially represented by Amil Myshin and D.C. Carr. (Id.) However, because Hall was earlier convicted of the first-degree murder, kidnapping, and rape of Lynn Beth Henneman ("Lynn") and following that conviction a post-conviction petition was filed contending Myshin and Carr were ineffective ("Hall I"), Robert Chastain and Deborah Kristal were appointed to represent Hall in the case involving Cheryl ("Hall II"). (R., pp.10 n.1, 11, 54-55.) Hall was convicted of Cheryl's first-degree murder and rape, and the district court sentenced him to death for first-degree murder and consecutive fixed life for rape. (R., pp.10, 54-55.)

With the assistance of the State Appellate Public Defender ("SAPD"), Hall filed a Petition for Post-Conviction Relief challenging his convictions and death sentence in Hall II (R., pp.9-51); an amended petition was filed that included multiple claims of ineffective assistance of counsel involving all four of his trial attorneys (R., pp.117-300). The state filed answers (R., pp.53-83, 923-1057) and motions for orders waiving the attorney-client privilege requesting Hall's four trial attorneys provide the state a "copy of

the same documents [they] provide[] to the State Appellate Public Defender's Office" and that the state be permitted to "discuss this case" with the four attorneys because of ineffective assistance of counsel claims raised in the post-conviction petition (R., pp.84-91). After a hearing (Tr., pp.73-103), the motions were granted (R., pp.1249-51).

On June 29, 2010, the SAPD filed a sealed *Ex Parte* Notice of Possible Conflict of Interest asserting a "possible conflict of interest regarding the State Appellate Public Defender (SAPD) representing Mr. Hall in these post-conviction proceedings." (R., p.2043) ("*Ex Parte* Notice," p.1).[1] The SAPD's notice reiterated that, after Hall was convicted in Hall I, the SAPD was appointed to represent him during Hall I post-conviction proceedings while his case in Hall II proceeded to trial. (Id., pp.1-2.) The SAPD's representation in Hall I involved the retention of experts, resulting in "overlap between some of the experts and testing in Hall I and Hall II," and it was the SAPD's "understanding" the district court "encouraged the SAPD to cooperate with Mr. Hall's trial counsel in Hall II by sharing testing results and expert reports, in an effort to preclude duplication of efforts and unnecessary expenditure of scarce resources." (Id., p.2.) "The SAPD cooperated with trial counsel in Hall II by sharing testing and expert information obtained in Hall I" post-conviction proceedings. (Id.) As a result, attorneys with the SAPD's office "may have had contact with trial counsel [in Hall II] and that contact may present a conflict of interest in the SAPD's continued representation of Mr. Hall" in Hall II post-conviction proceedings. (Id., pp.2-3.) Therefore, the SAPD determined "independent counsel should be hired to independently evaluate the conflict."

[1] Hall's motion, along with various other sealed documents, was later unsealed and submitted as an exhibit to the record.

(Id., p.3.) Dennis Benjamin was "contacted" and "agreed to evaluate the conflict and advise Mr. Hall whether or not the conflict should be waived." (Id.)

Although the state was not notified regarding the SAPD's *Ex Parte* Notice, on July 30, 2010, "in an abundance of caution and in an effort to avoid unnecessary delays," the state filed a Motion for Inquiry into Possible SAPD Conflict requesting the court "inquire of [the SAPD] to ensure that there is no conflict" even though an attorney from the SAPD's office represented no conflict existed. (R., pp.1288-90).

At a hearing on August 6, 2010, the SAPD's *Ex Parte* Notice and the state's motion were discussed with the SAPD agreeing the *Ex Parte* Notice was "not very specific," was even "opaque," and "didn't include any facts." (Tr., pp.241-42.) After requiring that the state be provided a copy of the *Ex Parte* Notice (Tr., pp.247-48), the district court reviewed relevant law and concluded it had "an affirmative duty to conduct an inquiry, and notice "the adequacy of th[e] Court's inquiry is a constitutional issue" (Tr., pp.252-53). The Court further explained the question of whether a conflict actually exists "is a matter for the Court to decide" (Tr., p.255), and while it may have been "prudent" for the SAPD to "engage" Benjamin, it is the court's "obligation to conduct an inquiry . . . and make those determinations" irrespective of "Benjamin's views on that subject when [the court had] not appointed him as conflict Counsel" (Tr., p.256).

The SAPD agreed, explaining, "We've reviewed the same case law and we're not in disagreement with anything Your Honor's stated, as far as the Court's duty, the Court's obligation, the Court's prerogative and power" and, although Benjamin "is the SAPD's institutional conflict Counsel," the SAPD recognized "the Court may want to select independent Counsel of the Court's own choosing." (Tr., p.258.) Nevertheless,

the SAPD requested the state's motion be denied until Benjamin could "finish his investigation, understanding that the Court has to be satisfied and that the Court is very unlikely to be satisfied with current Counsel's representations." (Tr., p.261.) The SAPD filed a response to the state's motion reiterating many of the prior arguments to the court. (R., pp.1296-1309.) While setting a hearing on the state's motion, the district court reiterated it would be "happy to hear from Mr. Benjamin," but advising although it "may well have been appropriate and prudent" for the SAPD "to have engaged another mind on this issue," the court "wanted to be clear" even though the SAPD called him "independent doesn't mean that he's been appointed by the Court, or that [the Court] would be persuaded, and – and certainly not bound by, his views." (Tr., p.268.) The SAPD agreed with the court's comments. (Id.)

The state filed a brief supporting its motion (R., pp.1310-16) and the SAPD filed a response, conceding, "neither the court nor the State should necessarily be satisfied with representations made by the SAPD as to the nature of any potential conflict," but, contrary to the prior position at the August 6, 2010 hearing, the SAPD contended, "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" (R., p.1320), an argument reiterated in Hall's "three suggested paths of inquiry" (R., pp.1323-25). However, the SAPD conceded if the court did not rely upon Benjamin's representations it still had "the discretion to appoint independent counsel," but contended the costs would be incurred by the district court because the SAPD had allegedly met its obligation under I.C. § 19-871 to obtain "independent counsel" and

appointment of another attorney would "amount to expert opinion regarding the nature and extent of the conflict" under I.C. §§ 19-860(b) and 19-4904. (R., p.1325.)

On August 26, 2010, a hearing was held on the state's motion. (Tr., pp.277-378.) The SAPD noted Benjamin was at the hearing and that the purpose of his retention by the SAPD "was not to advise the State Appellate Public Defender as to whether there was a conflict," but "to evaluate it and to take that straight to Mr. Hall, and for Mr. Hall, then, to be able to come in front of the court and say, I've got a conflict." (Tr., p.283.) Although the SAPD conceded the district court "has an obligation to be satisfied, truly satisfied, that there's no conflict" (Tr., p.289), the SAPD gave a "qualified objection" to the state's motion (Tr., p.286), explaining the court should first hear from Benjamin, and if he said "I've reviewed all the materials, I've seen this, I've spoken with Mr. Hall, and there's simply no conflict," there would be no need for further inquiry; otherwise the SAPD "wouldn't have grounds to really object to an investigation by the Court" (Tr., pp.289-90). Moreover, the SAPD conceded, "we've been compromised. That's why we would ask the Court to rely on conflict Counsel." (Tr., p.293.)

After hearing arguments, the district court granted the state's motion, but then inquired regarding the "proper scope of the inquiry." (Tr., pp.294-95.) Because the court did not have sufficient information regarding even the existence of a possible conflict, the court declined to hear from Benjamin, but ordered the SAPD to file an amended notice providing "something more specific about the . . . basis for saying there is . . . a potential conflict or not" beyond "contact." (Tr., pp.310-11.) Resisting the court's order, the SAPD contended, "We are not able to provide additional information to this Court because we don't represent Mr. Hall on this issue anymore, Mr. Benjamin does." (Tr.,

p.317.) The court reiterated the information it was seeking was the basis for SAPD's filing the *Ex Parte* Notice and the nature of the "contact" between the SAPD and Hall's attorneys in Hall II. (Tr., pp.328-332.)

The SAPD filed an Amended Notice of Possible Conflict of Interest (R., pp.1336-40), stating "there were numerous contacts between trial counsel and post-conviction counsel," which included, "emails back and forth, primarily between Mr. Ackley and Ms. Kristal; phone calls between Mr. Ackley and Ms. Kristal or Mr. Chastain; meetings on at least two occasions where all attorneys were present; in addition to contacts with staff of the SAPD in order to facilitate or arrange the exchange of information regarding testing and experts" (R., p.1338); the amended notice did not discuss the genesis of the SAPD's *Ex Parte* Notice or the nature of any contact with the trial attorneys in Hall II. Moreover, the amended notice stated, "any further disclosure as to the specific content of those communications should be directed at Mr. Benjamin." (Id). Benjamin filed a Limited Notice of Appearance for purposes of "the conflict of interest issue only" (R., p.1341), and an affidavit under seal ("Benjamin Affidavit") (R., pp.1343-44, 2043). The state responded to the amended notice (R., p.2043), and the SAPD filed a "letter" raising various options the court could utilize to resolve the "conflict inquiry" (R., pp.1349-53).

After another hearing (Tr., pp.348-78), on December 27, 2010, the district court entered its Memorandum Decision and Order (R., pp.1368-78). Based in part upon the vague and conclusory nature of the SAPD and Benjamin's pleadings, particularly regarding the "factual basis for the filing of the *Ex Parte* Notice," the court concluded it was "presently lacking the factual background necessary to reach any conclusion" regarding the existence of a conflict stemming from the SAPD representing Hall during

Hall I post-conviction proceedings, having simultaneous "contact" with Hall's trial attorneys during Hall II guilt and sentencing phases, and then contending his trial attorneys were ineffective during the guilt and sentencing phases in Hall II. (R., pp.1373-75.) Because it was "lacking enough facts" the court appointed R. Keith Roark as independent conflict counsel to "conduct an inquiry into whether a conflict exists," which could include "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 to represent the Petitioner in this Hall II post-conviction and appeal case." (R., pp.1375-76.) The court rejected the SAPD's request that Roark's appointment "be at county expense since our office has already paid for the exact same service being provided" because, the court explained, "the SAPD has not provided the 'exact same service.'" (R., pp.1376-77.)

On January 10, 2011, the SAPD filed a motion to reconsider (R., pp.1379-1414), permission to appeal (R., pp.1461-1480), and to take judicial notice of various documents from an unrelated capital post-conviction case, Abdullah v. State, #SPOT 0500308 (R., pp.1485-90). The district court denied all three motions. (R., pp.1965-88, 2010-14.) The SAPD also filed a motion to appeal the district court's order denying reconsideration (R., pp.1989-2000), which was likewise denied by the district court (R., pp.2006-09).

The SAPD filed a motion to appeal the district court's Memorandum Decision and Order with the Idaho Supreme Court, which was granted. (R., pp.2023-24.) The SAPD's motion to appeal the district court's order denying reconsideration and to consolidate was also granted by the supreme court. (R., pp.2-3.) Timely notices of appeal were filed by the SAPD. (R., pp.2015-22, 2025-33.)

ISSUES

Hall has phrased the issues on appeal as follows:

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 Obligation?

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?

(Brief, p.5) (capitalization and punctuation in original).

The state wishes to rephrase the issues on appeal as follows:

1. Because the SAPD refused to provide further information that would permit the district court to conduct a thorough and searching inquiry into whether the SAPD had a conflict of interest based upon contact with trial counsel, has Hall failed to establish the court erred by appointing independent conflict counsel to assist the court in its thorough and searching inquiry regarding the existence of a possible conflict?

2. Because Hall's separation of powers argument was not raised before the district court, has it been waived?

   Alternatively,

   Because I.C. § 19-871 deals with the payment of counsel and not the appointment of counsel, has Hall failed to establish the district court erred by appointing Roark to assist the court in conducting a thorough and searching inquiry into the existence of a conflict of interest?

3. Has Hall failed to establish the district court's order appointing Roark and requiring that he assist the court in its thorough and searching inquiry improperly violates rules of confidentiality?

ARGUMENT

I.

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

A. Introduction

Hall contends because neither he, the SAPD, nor Benjamin have determined an actual conflict of interest exists, "the district court has no basis to order a second conflict inquiry by Mr. Roark." (Brief, p.6.) However, 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. Because the district court was not satisfied with the information provided by the SAPD and Benjamin, the court did not err by appointing independent conflict counsel to investigate the nature of the "possible conflict of interest" first raised by the SAPD in the *Ex Parte* Notice that stems from the SAPD's interaction with Hall's trial attorneys in Hall II while the SAPD was representing Hall during post-conviction proceedings in Hall I, particularly since Hall has now raised several ineffective assistance of trial counsel claims in Hall II post-conviction proceedings that may be based upon interaction with the SAPD.

B. Standard Of Review

"The adequacy of the inquiry into a conflict of interest is a constitutional issue over which this Court exercises free review." State v. Lopez, 139 Idaho 256, 259, 77 P.3d 124 (Ct. App. 2003); *see also* State v. Severson, 147 Idaho 694, 704, 215 P.3d 414 (2009).

C. Hall Has A Statutory Right To Conflict-Free Counsel

While the Sixth Amendment has been interpreted to include the right to be represented by conflict-free counsel, State v. Severson, 147 Idaho 694, 703, 215 P.3d 414 (2009) (citing Wood v. Georgia, 450 U.S. 261, 271 (1981)), "[t]here is no Sixth Amendment right to appointed counsel in a collateral attack upon a conviction." Fields v. State, 135 Idaho 286, 291, 17 P.3d 230 (2000) (citing Murray v. Giarratano, 492 U.S. 1 (1989)).[2] While Hall does not have a Sixth Amendment right to post-conviction counsel, he does have a statutory right to counsel. Under I.C.R. 44.2(1), "Immediately following the imposition of the death penalty, the district judge who sentenced the defendant **shall** appoint at least one attorney to represent the defendant for the purpose of seeking any post-conviction remedy referred to in I.C. § 19-2719(4) that the defendant may choose to seek." (Emphasis added). As explained in Hernandez v. State, 127 Idaho 685, 687, 905 P.2d 86 (1995), when an Idaho statute provides an indigent defendant with a right to counsel, the courts look to cases that have "discussed the manner of proving ineffective assistance of counsel, even though the basis for the right in those cases was constitutional, not statutory." *See also* Smith v. State, 146 Idaho 822, 833-34, 203 P.3d 1221 (2009) (the statutory right to counsel enacted by the legislature for violent sexual predators establishes a right to effective assistance of counsel and "the appropriate

[2] Martinez v. Ryan, --- U.S. ---, 132 S.Ct. 1309 (2012), has not changed this basic Sixth Amendment principle because Martinez merely provided an "equitable ruling" that permits a federal habeas petitioner to raise ineffective assistance of post-conviction counsel as "cause" to overcome procedurally defaulted claims. Martinez expressly noted it was "not the case" to resolve the question of whether there is a constitutional right to effective assistance of counsel during post-conviction proceedings to raise ineffective assistance of trial counsel claims. 132 S.Ct. at 1315.

analysis is by reference to the well-established standards governing such claims under the Sixth Amendment").

While the Sixth Amendment right to conflict-free counsel has not been expressly extended to post-conviction proceedings, in Fields v. State, 135 Idaho 286, 233-34, 17 P.3d 230 (2000), the Idaho Supreme Court noted conflict of interest principles from Cuyler v. Sullivan, 446 U.S. 335 (1980), and concluded, "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." Moreover, as explained above, when reviewing a statutory right to counsel, Idaho courts look to Sixth Amendment principles, which presumably include the right to conflict-free counsel. *See* Hernandez, 127 Idaho at 88; Smith, 146 Idaho at 833-34.

D. The District Court Has A Duty To Inquire Into The "Possible Conflict Of Interest" Raised In Hall's *Ex Parte* Notice

"Whenever a trial court knows or reasonably should know that a particular conflict **may** exist, the trial court has a **duty** of inquiry." State v. Lovelace, 140 Idaho 53, 60, 90 P.3d 278 (2003) (emphasis added) (citing Wood v. Georgia, 450 U.S. 261, 272-73 (1981); Cuyler v. Sullivan, 466 U.S. 335, 347 (1980)). Even when the record demonstrates the mere "*possibility* of a conflict of interest" the court has a duty to inquire further. Wood, 450 U.S. at 272 (emphasis in original). The Supreme Court has explained the duty to inquire "is not to be confused with when the trial court is aware of a vague, unspecified possibility of conflict, such as that which 'inheres in almost every instance of multiple representation.'" Mickens v. Taylor, 535 U.S. 162, 168-69 (2002) (quoting Cuyler, 446 U.S. at 348).

As explained in Severson, 147 Idaho at 423 (citing Holloway v. Arkansas, 435 U.S. 475, 488 (1978)), "A trial court's failure to conduct an inquiry, under certain circumstances will serve as a basis for reversing a defendant's conviction." If the defendant does not object and the court fails to make proper inquiry, "the defendant's conviction will only be reversed if he or she can prove that an actual conflict of interest adversely affected his lawyer's performance." Id. (citing Cuyler, 446 U.S. at 348). However, "once a defendant raises a timely objection to a conflict, the trial court is constitutionally obligated to determine whether an actual conflict of interest exists. A court's failure to make a proper inquiry after a defendant's timely objection will result in the automatic reversal of the defendant's conviction." Id.

While this duty to inquire has not been expressly extended to post-conviction proceedings, because Idaho courts look to Sixth Amendment principles when reviewing a statutory right to counsel, those principles presumably include the duty to inquire. *See* Hernandez, 127 Idaho at 88; Smith, 146 Idaho at 833-34. Moreover, several jurisdictions have opined the duty to inquire applies in post-conviction cases irrespective of whether there is a right to counsel under the Sixth Amendment. In Frazier v. State, 303 S.W.3d 674, 683 (Tenn. 2010), the court expressly expanded the duty to inquire to post-conviction proceedings. In People v. Hardin, 818 N.E.2d 1246, 1251 (Ill. App. Ct. 2nd 2004), the court adopted a duty to inquire when "a defendant presents facts suggesting a conflict that goes beyond the problem of one public defender having to attack another." Finally, in State v. Pelphrey, 778 N.E.2d 129, 132 (Ohio Ct. App. 2002), the court held, "the trial court had a duty in this case to inquire into the alleged conflict of interest when Pelphrey filed his Crim. R. 32.1 motion to withdraw his guilty pleas or in the alternative

for post-conviction relief, because at that time the court knew or should have known that a possible conflict of interest existed."

While Hall initially appears to concede the district court had a duty to inquire, he appears to backtrack by contending the court did not have a duty to inquire "[b]ecause the possibility of a conflict was raised by Mr. Hall's counsel alone, and not by Mr. Hall." (Brief, p.9.) This argument is without merit. As explained in Severson, 147 Idaho at 703, "In order to ensure that a defendant receives conflict-free counsel, a 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." (Emphasis added.) Moreover, the Supreme Court has explained the duty to inquire exists when the trial court is merely aware of the "possibility of a conflict of interest." Wood, 450 U.S. at 272. The question is not whether the defendant or counsel know of a conflict and advised the court, but whether the court "knows or reasonably should know that a particular conflict may exist." Lovelace, 140 Idaho at 60. Indeed, it is entirely possible the court may know or reasonably should know of a possible conflict that could be unknown to the defendant or his attorney. It is even possible counsel would advise a defendant not to raise a possible conflict because counsel made the independent determination that an actual conflict does not exist. Nevertheless, while there may not be an automatic reversal if a defendant does not make an objection, there is still a duty to inquire, and if it is determined that an actual conflict exists, new counsel must be appointed. Severson, 147 at 703.

Moreover, while Hall did not raise an "objection" based upon an alleged conflict, it was the SAPD that initially brought the issue before the district court. There was simply no basis for the court to ignore the SAPD's *Ex Parte* Notice even though it did not

constitute an "objection" based upon an actual conflict, but merely advised the court of the possibility of a conflict. The danger associated with a possible conflict in capital post-conviction proceedings that stems from post-conviction counsel's involvement in the underlying trial is obvious. In English v. Cody, 146 F.3d 1257, 1259 (10th Cir. 1998), the court reexamined an Oklahoma statute requiring defendants to raise all ineffective assistance of counsel claims on direct appeal or the claim would be forfeited. The court recognized defendants "must be allowed to obtain an objective assessment of trial counsel's performance and must be allowed to adequately develop the factual basis for any claim of ineffectiveness," id. at 1261 (citing Kimmelman v. Morrison, 477 U.S. 365, 378 (1986)). *See also* Guinan v. United States, 6 F.3d 468, 471-73 (7th Cir. 1993) (ineffective assistance of counsel claims not raised on direct appeal were not waived if the defendant continued to be represented by trial counsel or if the ineffectiveness claims required investigation outside the trial record); Ciak v. United States, 59 F.3d 296, 303-04 (2nd Cir. 1995) (same). This principle was addressed by the Ninth Circuit in Hoffman v. Arave, 236 F.3d 523, 531-35 (9th Cir. 2000), where the court concluded, because the same attorneys represented the defendant at trial and post-conviction, the defendant was unable to obtain an objective assessment of trial counsel's performance and develop the factual basis of ineffective assistance of counsel claims. Likewise, in Carter v. State, 362 S.E.2d 20, 21 (S.C. 1987) (citing Commonwealth v. Via, 316 A.2d 895 (Pa. 1974)), the court concluded:

> When an applicant is represented on post-conviction relief by his trial counsel, there is no waiver of the issue of ineffective assistance of counsel. Absent a showing that the applicant was specifically advised of the hazards of being represented by trial counsel at the post-conviction hearing and that the applicant consented to such an arrangement, a

> successive post-conviction application, alleging ineffective assistance of trial counsel, should not be barred.

It was for these reasons that I.C.R. 44.2 was implemented, requiring that capital post-conviction counsel be someone other than trial counsel, which "satisfie[s] the requirement that [capital post-conviction petitioners] be afforded the ability to consult with different counsel on appeal in order to obtain an objective assessment of trial counsel's performance." Porter v. State, 139 Idaho 420, 423 n.2, 80 P.3d 1021 (2003).

Finally, as is oft repeated by the capital defense bar:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Lankford v. State, 500 U.S. 110, 125 n.21 (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (footnote omitted)).

Based upon the SAPD's *Ex Parte* Notice and the pleadings subsequently filed by the respective parties, coupled with heightened standards of review in capital cases, the district court had a duty to inquire regarding the possibility of a potential conflict of interest stemming from the SAPD's contact with Hall's trial attorneys in Hall II.

E. The District Court Was Permitted To Establish The Parameters Of Its Inquiry Into The "Possible Conflict Of Interest" Raised In the SAPD's *Ex Parte* Notice

"In order to satisfy the inquiry requirement, a trial court's examination of the potential conflict **must be thorough and searching** and should be conducted on the record. The court must make the kind of inquiry that might ease the defendant's dissatisfaction, distrust or concern." Severson, 215 P.3d at 424 (emphasis added)

(internal quotations and citations omitted). The inquiry must also be "'targeted at the conflict issue.'" State v. Lopez, 139 Idaho 256, 259, 77 P.3d 124 (Ct. App. 2003) (quoting Selsor v. Kaiser, 81 F.3d 1492, 1501 (10th Cir. 1996)). While trial courts are "entitled to rely on representations made by counsel," they "may inquire further into the facts." Id. (citing Kaplan v. United States, 375 F.2d 895, 897 (9th Cir. 1967)).

Because the SAPD's *Ex Parte* Notice was, as conceded by counsel, "not very specific," "opaque," and "didn't include any facts" (Tr., pp.241-42), the trial court was not able to "target" the exact concern being raised by the SAPD. Undoubtedly, the district court's concern was piqued by the concession that the "SAPD cooperated with trial counsel in Hall II by sharing testing and expert information obtained in Hall I" (*Ex Parte* Notice, p.2), particularly in light of the claims in the amended post-conviction petition that challenged trial counsels' effectiveness regarding testing and expert witnesses (R., pp.177-83, 221-26, 241-45). Moreover, the SAPD's assertion that "Ms. Romero became aware that Mr. Ackley and/or Ms. Swenson may have had contact with trial counsel and that contact may present a conflict of interest in the SAPD's continued representation of Mr. Hall" (*Ex Parte* Notice, pp.2-3) would have caused the district court significant consternation, resulting in the conclusion that there was even more "contact" between the SAPD and trial counsel than sharing of "testing and expert information." This is particularly important because the amended petition raised an ineffective assistance of counsel claim that was based upon a "complete breakdown in the attorney-client relationship" (R., pp.121-22), which could have been exacerbated by contact with the SAPD. Indeed, the SAPD was concerned enough that Benjamin was retained to "independently evaluate the conflict" and "advise Mr. Hall whether or not a conflict

should be waived." (Id., p.3.) Moreover, the SAPD conceded the filing of the *Ex Parte* Notice "has to cause the Court some concern." (Tr., p.284.)

The district court's concern obviously was not alleviated by the SAPD's Amended Notice of Possible Conflict of Interest (R., pp.1336-40), but actually increased the necessity of conducting a "thorough and searching inquiry." For example, discussing the "contact" that "may present a conflict of interest," the SAPD merely explained there were "numerous contacts between trial counsel and post-conviction counsel" that occurred "[o]ver the course of several months," which included: (1) e-mails, "primarily" between Ackley and Kristal; (2) phone calls between Ackley and Kristal or Chastain; (3) at least two meetings "where all attorneys were present"; and (4) additional contacts with SAPD staff to facilitate the exchange of information regarding testing and experts. (R., p.1338.) Because the SAPD explained the *Ex Parte* Motion "was filed due to the **extent** of the communications between counsel" (id.) (emphasis added), this was not *de minimus* contact, and the district court had every right to be concerned and want further inquiry.

Likewise, Benjamin's affidavit would not have alleviated the district court's concerns because it also failed to discuss the nature of the communication between the SAPD and trial counsel, merely explaining, "The conflict issue centers around the communication between former SAPD lawyers, i.e., Paula Swenson and Mark Ackley, and Mr. Hall's trial lawyers, i.e., Robert Chastain and Deborah Kristal, before and during the second trial." (Benjamin Affidavit, p.2.) Rather than explain the genesis of the SAPD's concern regarding the "extent of the communications between counsel" that generated the *Ex Parte* Notice, Benjamin merely explained when the "communication could result in a conflict of interest" (R., p.2) and that "there is no conflict of interest"

(Id., p.4). Nevertheless, despite his conclusion regarding the existence of a conflict, Benjamin noted there was one exception where it "appears one of the former SAPD lawyers gave advice to the trial lawyers to take a certain action." (Id., p.5.) While Benjamin concluded there was still no conflict even though the "trial lawyers took that advice and the result was favorable to Mr. Hall" (id.), there is no indication regarding the nature or subject matter of the advice that would permit the trial court to make its own determination regarding the existence of a conflict of interest.

Hall's primary complaint stems from the district court's decision to appoint Roark to conduct an investigation regarding the possibility of a conflict of interest raised in Hall's *Ex Parte* Notice. (Brief, pp.11-16.) While the state certainly appreciates the SAPD's desire to conserve resources by forcing the district court to merely rely upon the investigation and representations of Benjamin, 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 counsels' or someone chosen by counsel. As explained in Harjo v. Reynolds, 894 F.Supp. 1496, 1501 (N.D. Okla. 1995):

> The *Holloway* court denied the suggestion it was transferring to defense counsel the authority of the trial judge to rule on the existence or risk of a conflict and to appoint separate counsel. It said "our holding does not preclude a trial court from exploring the adequacy of the basis for defense counsel's representations regarding a conflict of interests without improperly requiring disclosure of the confidential communications of the client." *Id.* at 487, 98 S.Ct. at 1180. The Court also noted the trial court could discipline counsel who presented such motions for dilatory purposes.

See also Cuyler, 446 U.S. at 347 ("Unless **the trial court** knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry") (emphasis added).

The state recognizes "[a]n attorney . . . is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial," Holloway, 435 U.S. at 485 (internal quotations and citation omitted), that defense attorneys "are officers of the court, and when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath," id. at 486, and that "trial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel," Cuyler, 446 U.S. at 347. *See also* United States v. Crespo de Llano, 838 F.2d 1006, 1012 (9th Cir. 1988) (internal quotations and citation omitted) ("In ascertaining whether the risk of conflict warrants appointment of separate counsel, the court is entitled to rely on the good faith and good judgment of defense counsel who represents to the court that no conflict exists"). However, while courts may rely upon the representations of counsel, "[a] court may inquire further into the facts." Severson, 147 Idaho at 704. Indeed, the Ninth Circuit has explained, "it is good practice for a trial judge to make inquiry when the possibility of a conflict of interest seems apparent." Willis v. United States, 614 F.2d 1200, 1206 (9th Cir. 1979).

As explained in Garcia v. Bunnell, 33 F.3d 1193, 1199 (9th Cir. 1994), "the trial judge here should have conducted his own neutral inquiry as soon as he heard [counsel's] disclosure, in order to reach his own informed judgment." 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." United States v. DeRobertis, 771 F.2d 1057, 1063 (7th Cir. 1985). As explained in Hamilton v. Ford, 969 F.2d 1006, 1012-13 (11th Cir. 1992), the mere reading of a file and colloquy with defense counsel may not be sufficient inquiry. Moreover, the need to conduct a thorough and searching inquiry "does not preclude a trial court from exploring the adequacy of the basis of defense counsel's representations regarding a conflict of interest without improperly requiring disclosure of the confidential communications of the client." Holloway, 435 U.S. at 487.

The difficulties of this inquiry and the determination that an attorney must be disqualified due to a conflict of interest are discussed in United States v. Evanson, 584 F.2d 904, 911 (10th Cir. 2009). The Tenth Circuit recognized "the need for appellate courts to be highly deferential to the trial judge's judgment" because

> [d]isqualification motions . . . are not assessed "with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between the parties are seen through a glass, darkly." To assess "[t]he likelihood and dimensions of nascent conflicts of interest," the courts must predict how events will unfold at trial, a daunting task that can require an exercise of "instinct and judgment based on experience."

Id. (quoting Wheat v. United States, 486 U.S. 153, 162-63 (1988)). Therefore, the "facts and circumstances of each case . . . must be left to the informed judgment of the trial court" because

> [c]ourts confronting potential conflicts of interest face the prospect of being whip-sawed by assertions of error no matter which way they rule. If a court disqualifies counsel, the defendant can raise . . . a claim that he was denied his Sixth Amendment right to chosen counsel. But if the court declines to disqualify counsel, the defendant may claim that his counsel's conflict of interest resulted in constitutionally ineffective performance at trial.

Id. (internal quotes and citations omitted).

Hall's final complaint stems from his contention that "any possible conflict created by actions taken by Ms. Swenson or Mr. Ackley could not be imputed to Mr. Hall's current post-conviction counsel at the SAPD." (Brief, pp.14-15.) However, Hall is arguing the proverbial "cart before the horse"; the issue is not whether a conflict exists or the nature of the alleged conflict, but the nature of the **inquiry** that must be conducted to determine the existence of a conflict. As explained by the Idaho Supreme Court:

> Once a court conducts an inquiry, it must determine whether a conflict actually exists. If the court concludes defense counsel does have a conflict, it must obtain a knowing and voluntary waiver from the defendant or give the defendant an opportunity to acquire new counsel. If on the other hand, the court concludes that a conflict of interest does not exist, the representation may continue without a waiver.

Severson, 147 Idaho at 704 (internal citations omitted).

Moreover, if the underlying basis for the SAPD's *Ex Parte* Notice was nothing more than contact between Hall's trial attorneys in Hall II and former employees of the SAPD while representing Hall in Hall I post-conviction proceedings and it is Hall's position that such contact did not amount to a potential conflict of interest, why did the SAPD file the *Ex Parte* Notice and retain Benjamin to determine whether an actual conflict exists? Clearly, neither the SAPD nor Benjamin has adequately explained the underlying basis of the contact that resulted in the filing of the SAPD's *Ex Parte* Notice. Rather, as explained by the court, "Instead of being forthcoming and candid with the Court about the facts in this case, the SAPD has chosen to alert the Court to the vague possibility of some unnamed conflict, hire outside counsel on the conflict issue only, and defer all questions to Mr. Benjamin even though he represents the Petitioner and not the SAPD." (R., pp.1373-74.) As the court recognized, "its 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." (R., p.1374.)

Because the district court has an independent duty to conduct its own thorough and searching inquiry regarding the possibility of a conflict of interest first raised in the SAPD's *Ex Parte* Notice, Hall has failed to establish the court erred by appointing Roark to assist the court in conducting that inquiry.

II.

Because It Was Not Raised Before The District Court, Hall Has Waived His Separation Of Powers Claim

A. Introduction

Hall contends the district court's order requiring the SAPD to pay for Roark's services violates the separation of powers doctrine of art. II, § 1, of the Idaho Constitution. (Brief, pp.16-25.)

While Hall challenged the district court's authority to require the SAPD to pay for Roark's services, the argument was never couched in the context of a separation of powers violation. Indeed, with the exception of art. VII, § 13 (R., pp.1408-09), Idaho's Constitution was never cited to the district court, let alone art. II, § 1 of the Idaho Constitution. Because Hall never raised this argument in the court below, providing the district court with an opportunity to rule upon this issue, it has been waived on appeal. Even if the issue was properly raised, because 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, Hall's claim fails.

B. Hall's Separation Of Powers Claim Was Waived Because It Was Not Raised Before The District Court

It is well settled that constitutional issues will not be considered when raised for the first time on appeal. State v. Ransom, 137 Idaho 560, 565, 50 P.3d 1055 (Ct. App. 2002) (citing State v. Fodge, 121 Idaho 192, 195, 824 P.2d 123, 126 (1992); State v. Rozajewski, 130 Idaho 644, 645, 945 P.2d 1390, 1391 (Ct. App. 1997)). Furthermore, failure to raise an issue in the district court, thereby denying the trial court the opportunity to rule on the alleged error, constitutes waiver of that issue on appeal. State v. Martin, 119 Idaho 577, 579, 808 P.2d 1322 (1991); State v. Mauro, 121 Idaho 178, 181, 824 P.2d 109 (1991); State v. Smith, 130 Idaho 450, 454, 942 P.2d 574 (Ct. App. 1997). The Idaho Supreme Court has expressly applied this fundamental appellate doctrine to claims based upon the separation of powers doctrine. Fodge, 121 Idaho at 195. Likewise it has been applied to other constitutional challenges. Ransom, 137 Idaho at 565; State v. Hardman, 120 Idaho 667, 672, 818 P.2d 782 (Ct. App. 1991).

Absent a timely objection, the appellate courts of this state will only review an alleged error under the fundamental error doctrine. State v. Perry, 150 Idaho 209, ---, 245 P.3d 961, 979 (2010). Review under the fundamental error doctrine requires Hall demonstrate the error he alleges: "(1) violates one or more of [his] unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." Id. at 980.

Hall's separation of powers claim fails because, not only has he failed to argue fundamental error, the first prong of Perry cannot be met since his claim is not alleged to have violated federal constitutional rights, but is a challenge under Idaho's constitution.

C. Standard Of Review

The standard of appellate review applicable to constitutional issues is one of deference to factual findings, unless they are clearly erroneous, but free review of whether constitutional requirements have been satisfied in light of the facts found. State v. Bromgard, 139 Idaho 375, 380, 79 P.3d 734, 739 (Ct. App. 2003); State v. Smith, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001). The interpretation of a statute is a question of law this Court reviews de novo." State v. Schultz, 151 Idaho 863, 865, 264 P.3d 970 (2011).

D. Hall Has Failed To Establish The District Court's Order Requiring The SAPD To Pay For Roark's Services Violates The Separation Of Powers Clause

Hall's argument is premised upon art. II, § 1 of the Idaho Constitution and the contention that I.C. § 19-871 prohibits the district court from appointing conflict counsel and making the SAPD pay for the services of conflict counsel. (Brief, pp.16-24.) Hall has simply misunderstood I.C. § 19-871.

Article II, § 1 of the Idaho Constitution reads as follows:

> The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted.

In 1998, the legislature enacted the State Appellate Public Defender Act to reduce the financial burden to the counties associated with the costs of legal representation of indigent defendants, particularly convictions for first-degree murder, by "provid[ing] competent counsel but avoid paying high hourly rates to independent counsel to represent indigent defendants in appellate proceedings." 1998 Idaho Sess. Laws, ch.389, pp.1190-

95; I.C. § 19-868. Duties of the SAPD include representation of certain felony appeals and post-conviction relief proceedings in district court in capital cases. I.C. § 19-870(1). Idaho Code § 19-870(3) permits the SAPD to "employ deputy state appellate public defenders and other employees necessary to carry out the responsibilities of the office" and "contract with private attorneys to provide representation on a case-by-case basis when such contracts would conserve budgetary resources." Additionally, I.C. § 19-871 addresses those situations where the SAPD is "unable to carry out the duties required in this act." In its entirety, it reads as follows:

> Should the state appellate public defenders 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.

Id. (emphasis added).

While I.C. 19-870(3) permits the SAPD to "contract with private attorneys . . . when such contracts would conserve budgetary resources," 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. In non-capital post-conviction cases, I.C. § 19-4904 permits the district court to appoint counsel "[i]f the applicant is unable to pay court costs and expenses of representation, including . . . a court appointed attorney. While I.C. § 19-4904 requires the costs be borne by the respective county, based upon I.C. § 19-871, the SAPD must "arrange for counsel for indigent defendants to be compensated out of the budget of the state appellate public defender." However, because the State Appellate Public Defender Act merely permits the SAPD to "contract with private attorneys . . . when such contracts

would conserve budgetary resources," but only allows the SAPD to "arrange for counsel for indigent defendants to be compensated" when the SAPD is "unable to carry out the duties required in this act because of a conflict of interest or any other reason," the district court must be permitted, pursuant to I.C. § 19-4904, to appoint conflict counsel in capital post-conviction cases whom the SAPD must arrange to be "compensated out of the budget of the state appellate public defender" under I.C. § 19-871.

This interpretation of the State Appellate Public Defender Act is based upon a plain reading of the Act and the plain meaning of the words in the Act, which constitutes the basis for determining the legislature's intent when it was enacted. As explained in State v. Schulz, 151 Idaho 863, 867, 264 P.3d 970 (2011) (quoting Farber v. Idaho State Ins. Fund, 147 Idaho 307, 310, 208 P.3d 289 (2009)):

> "The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction."

Moreover, it is consistent with I.C.R. 44.2(1), which reads as follows:

> Immediately following the imposition of the death penalty, the district judge who sentences the defendant shall appoint at least one attorney to represent the defendant for the purpose of seeking any post-conviction remedy referred to in I.C. § 19-2719(4) that the defendant may choose to seek. This appointment shall be made in compliance with the standards set forth in Idaho Criminal Rule 44.3, and the attorney appointed shall be someone other than counsel who represented the defendant prior to the imposition of the death penalty. This new counsel shall not be considered to be co-counsel with any other attorney who represents the

> defendant, but may also be appointed to pursue the direct appeal for the defendant.

While I.C. § 19-870 requires the appointment of the SAPD in capital post-conviction proceedings in those counties participating in the capital crimes defense act and where the petitioner was sentenced on or after September 1, 1998, there is no limitation on the district court's ability to appoint conflict counsel in capital post-conviction proceedings. Moreover, because I.C.R. 44.2(1) still requires that capital post-conviction counsel meet the standards of I.C.R. 44.3, the district court has final authority over the **appointment** of post-conviction counsel even if it does not involve conflict counsel, while the SAPD has authority and is mandated under I.C. § 19-871 to "arrange for counsel for indigent defendants to be **compensated** out of the budget of the state appellate defender." (Emphasis added.) In other words, if the district court concluded the SAPD did not meet the requirements of I.C.R. 44.3, the court has authority to appoint counsel that is qualified and order that attorney be compensated out of the SAPD's budget. The same would be true anytime the district court concluded the SAPD was "unable to carry out the duties required in [the] act because of a conflict of interest or **any other reason**," I.C. § 19-871 (emphasis added), including a "thorough and searching" inquiry into whether a conflict of interest exists based upon prior contact between the SAPD and trial counsel that was actually raised by the SAPD in its *Ex Parte* Notice. Moreover, as explained in the preceding section, because it is the district court's duty to conduct the inquiry and determine the procedure to be utilized to conduct the inquiry, it is simply irrelevant that the SAPD had already contracted with Benjamin, particularly when the district court concluded his inquiry was insufficient.

Because the district court has authority over the appointment of capital post-conviction counsel, Hall has failed to establish the district court's order appointing Roark violates the separation of powers doctrine.

III.

The District Court Did Not Err By Requiring The Possible Disclosure Of Attorney-Client Communications To Either Roark Or The District Court

A. Introduction

Relying upon I.R.E. 502 and I.R.P.C. 1.6, Hall contends the district court erred by requiring the SAPD to allegedly disclose material that is protected by the attorney-client privilege to Roark. (Brief, pp.25-35.) While Hall spends considerable space differentiating between the two rules, the state acknowledges, while similar, they are different concepts, and I.R.P.C. 1.6 is a broader rule relating to the information a client provides during the attorney's representation of the client. *See* I.R.P.C. 1.6, commentary 3. Nevertheless, because the district court has the duty to conduct a "thorough and searching" inquiry to ascertain the existence of an actual conflict, particularly when the possibility of that conflict was raised by Hall, there is no violation of the rules of confidentiality when that information is provided to Roark or the district court.

B. Standard Of Review

"The district court's conclusion 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)).

C. The Court Is Permitted To Inquire Into Confidential Information When Conducting Its Inquiry

Rule 1.6(a) of the I.R.P.C. states, "A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)." Rule 1.6(b) explains, "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . (6) to comply with other law or a court order." Apparently, Hall's argument is based upon the contention that the district court's order is too broad because, according to Hall, "[i]t 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. [sic] Kristal." (Brief, p.32.)

However, as detailed above, the inquiry that must be conducted by the district court cannot be transferred to the SAPD, Benjamin, or even Roark, but is an inquiry that must be conducted by the district court in a fashion that permits the court to conduct a "thorough and searching" inquiry such that the court can determine whether a conflict of interests exists with the SAPD. Moreover, Hall's reliance upon Holloway, the only case he cites to support his position, is misplaced. Addressing the state's concern that reliance upon counsel's representation that there was no conflict was tantamount to transferring the decision to counsel and counsel might abuse that authority for purposes of delay or obstruction of the trial, the Supreme Court explained its holding "did not impair the trial court's ability to deal with counsel who resort to such tactics. Nor does our holding

preclude a trial court from exploring the adequacy of the basis of defense counsel's representations regarding a conflict of interest without improperly requiring disclosure of the confidential communications of the client." Id. The Court continued, "This case does not require an inquiry into the extent of a court's power to compel an attorney to disclose confidential communications that he concludes would be damaging to his client." Id. at 487 n.11. In dicta, the Court further noted, "Such compelled disclosure creates significant risks of unfair prejudice, especially when the disclosure is to a judge who may be called upon later to impose sentences on the attorney's clients." Id.

However, because the extent of Rule 1.6 is a matter of state law, this Court is not bound to follow the dicta in Holloway. Briggs v. Salcines, 392 So.2d 263, 266 n.2 (Fla. 2nd Dist. Ct. App. 1980). Additionally, this is not a case where the SAPD stated there is an actual conflict of interest and the state or the district court were concerned about the validity of the allegation. Rather, the inquiry into whether a possible conflict exists was initiated by the SAPD when the *Ex Parte* Notice was filed seeking a determination of whether an actual conflict exists. Based upon the exceptionally vague nature of the *Ex Parte* Notice and the SAPD's and Benjamin's refusal to provide necessary information, the district court was mandated to explore options that might not normally exist, including Roark's appointment. As explained in Knix v. State, 922 P.2d 913, 919 n.7 (Alaska 1996), conducting *in camera* proceedings or appointing independent conflict counsel that could intrude upon an attorney's relationship with a client is appropriate "upon a substantial showing of necessity." As detailed above, based upon the actions of the SAPD and Benjamin, that showing has been met in Hall's case.

Moreover, Hall has failed to cite any case reversing a trial court's decision that the "thorough and searching" inquiry requires the disclosure of attorney-client communication. Indeed, it appears such inquiries would mandate at least some disclosure of attorney-client communications, provided they are conducted *in camera* or are otherwise not disclosed to the state. In United States v. Burnett, 2009 WL 3747204, *1 (E.D. Tenn. 2009), the defendant complained he had a "complete loss of trust" in his attorney and demanded new counsel be appointed. Because the defendant had the burden of establishing "good cause such as a conflict of interest, a complete breakdown in communication or an irreconcilable conflict" before substitute counsel could be appointed, the district court "conducted a sealed, *ex parte* hearing to inquire into the reasons for the Defendant's dissatisfaction" with his attorney that resulted in the court hearing "confidential statements from [the attorney] and the Defendant in order to determine whether good cause for the appointment of new counsel" existed. Id.; *see also* United States v. Monday, 2009 WL 2745998, *1 (E.D. Tenn. 2009). In Hamilton v. Ford, 969 F.2d 1006, 1012-13 (11th Cir. 1992), the court concluded "the reading of a file for an unrelated purpose is inadequate exploration of the possibility of conflict" and "by asking defense counsel to disclose trial strategy in open court, the trial court improperly placed counsel in a situation where in order to adequately respond he would have had to disclose client confidence, thereby breaching attorney/client confidentiality." However, at no time has the district court asked any of Hall's attorneys to "disclose trial strategy in open court." Rather, the information that is to be gathered by Roark is itself confidential and will be provided only to the district court, not the state.

Finally, Hall's concern that once the attorney-client privilege or rule of confidentiality is waived, it is waived forever and the protection cannot be restored is overstated. (Brief, p.34.) There is no indication that if confidential information is obtained it will ever be provided to the state. Rather, as explained above, the information can be provided to the district court *in camera*. Moreover, the alleged dangers associated with providing the district court confidential information is grossly overstated. Judges are regularly bombarded by information that cannot be considered in future decisions, including pretrial hearings, post-conviction proceedings after having sat during the underlying trial and sentencing, retrials, resentencings. Nevertheless, judges are expected to disregard the prior information and make judicial rulings based upon admissible evidence. In State v. Beam, 115 Idaho 208, 215, 766 P.2d 678 (1988), the court explained the parameters of motions to disqualify judges based upon bias and information gleaned from prior or other proceedings:

> Every trial judge who rules upon a post conviction review proceeding or an I.C.R. 35 motion to reduce sentence will previously have prejudged the matter, often forming extremely strong opinions as to the sentence which should be imposed, and will no doubt be convinced that the procedure followed and the sentence imposed was correct, particularly where the trial court proceedings have been affirmed on appeal by this Court. It would be an unusual case in which a trial judge, when called upon to rule on an I.C.R. 35 motion to reduce sentence, would not approach the case on the basis that the sentence imposed was correct, and require the defendant to shoulder "the burden of showing that the original sentence was unduly severe." *State v. Martinez*, 113 Idaho 535, 536, 746 P.2d 994, 995 (1987). Coming to the case with that frame of mind does not constitute bias or prejudice within the meaning of I.C.R. 25(b)(4) and does not require disqualification of the trial judge. In this case the judge in question had presided at the trial of both Beam and Scroggins. He had heard all of the evidence regarding this brutal murder and raping of an innocent thirteen year old girl. He had presided at the sentencing proceedings in which extensive mitigation and aggravation evidence was presented to the court. Based upon all of that evidence, the trial court then arrived at the judgment that the aggravating circumstances outweighed the

> mitigating circumstances and sentenced both defendants to death. The death penalty is reserved for only the most heinous of first degree murders. The very nature of the sentencing process in capital cases requires a trial judge to form strong opinions and convictions that the defendant merits the most severe penalty. It would be extremely unlikely and no doubt improper for a trial court to impose a death penalty unless it had formed the strong opinion and belief that the defendant had no redeeming features, and that the circumstances of this particular case justified the imposition of this most serious penalty known to the law. Accordingly, when a trial judge is called upon to rule upon a petition for post conviction relief, or a motion for reduction of sentence under I.C.R. 35, particularly in a case where the death penalty has been imposed, he comes to the case after having already formed strong opinions and beliefs regarding the atrocious nature of the crime, the unredeemable character of the defendant, and the need of society to impose this most serious of criminal penalties. A trial judge is not required to erase from his mind all that has gone before, and indeed, it is doubtful that any human being could. Rather, when faced with an I.C.R. 25(b)(4) motion to disqualify for bias and prejudice in a post conviction or I.C.R. 35 proceeding, the trial judge **need only conclude that he can properly perform the legal analysis** which the law requires of him, recognizing that he has already pre-judged the case and has formed strong and lasting opinions regarding the worth of the defendant and the sentence that ought to be imposed to punish the defendant and protect society.

(Emphasis added); *see also* State v. Jones, 146 Idaho 297, 298-99, 193 P.3d 457 (Ct. App. 2008).

The Ninth Circuit has explained:

> But even if a case has been reversed on appeal, it has long been regarded as normal and proper for a judge to sit in the same case upon its remand and to sit in successive trials involving the same defendant. While some may argue that a judge will feel the motivation to vindicate a prior conclusion when confronted with a question for the second or third time, for instance, upon trial after a remand, ... we accept the notion that the conscientious judge will, as far as possible, make himself aware of his biases of this character, and, by that very self-knowledge, nullify their effect.

Sivak v. Hardison, 658 F.3d 898, 924 (9th Cir. 2011) (internal quotations and citations omitted).

The Ninth Circuit has further discussed the issue of judicial bias stemming from an Idaho capital case where the petitioner contended the trial judge's presiding over his co-defendant's case not only constituted actual bias, but the appearance of bias. Paradis v. Arave, 20 F.3d 950, 958 (9th Cir. 1994). The court rejected this argument, explaining, "Paradis' entire argument is based upon the mistaken notion that a trial judge's exposure to evidence, standing alone, demonstrates bias." Id.

As explained in Poland v. Stewart, 117 F.3d 1094, 1103-04 (9th Cir. 1997) (internal quotations and citations omitted), " The fact that the trial judge in the original trial was also the trial judge in the second trial is insufficient to establish bias and prejudice. It has long been regarded as normal and proper for a judge to sit in the same case upon its remand and to sit in successive trials involving the same defendant." *See also* Ceja v. Stewart, 97 F.3d 1247, 1254 (9th Cir. 1996) (trial judge is not required to recuse himself when subsequently sentencing defendant on retrial in a capital case).

There is simply no basis for concluding a judge cannot or will not apply these same principles to information that may otherwise be protected by attorney-client confidentiality.

Further, even when protected information has been provided to the state, it may not be used in future proceedings. As explained in Bittaker v. Woodford, 331 F.3d 715, 718 (9th Cir. 2003), "a litigant waives the attorney client privilege by putting the lawyer's performance at issue during the course of litigation." When ineffective assistance of counsel claims are raised in post-conviction, the courts have concluded there is an implied waiver associated with confidential communications between trial counsel and the petitioner. Id. at 719; Reed v. State, 640 So.2d 1094, 1097 (Fla. 1994); Sanborn v.

Commonwealth, 975 S.W.2d 905, 910 (Ky. 1998). Nevertheless, the state is not permitted to utilize such information if a retrial or resentencing is required. Bittaker, 331 F.3d at 727-28. The state is certainly not asking that any confidential communications be provided to the state, but submits the attorney-client privilege is not, as contended by Hall, "waived forever."

Additionally, the implied waiver doctrine discussed in Bittaker and other cases is associated with the "fairness principle," which is "often expressed in terms of preventing a party from using the privilege as both a shield and a sword." Id. at 719. While the state is not requesting that any confidential information be provided to the state, Hall's *Ex Parte* Notice certainly has the appearance of "using the privilege as both a shield and a sword"; he has raised the issue of a possible conflict of interest between the SAPD and trial counsel – possibly interjecting error into future post-conviction proceedings – but 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. The state and the district court must have the ability to establish for the record and future appellate review whether the contact between the SAPD and Hall II trial counsel resulted in a conflict of interest when Hall has raised ineffective assistance of counsel claims that may involve the SAPD's interjection into the trial and sentencing phases of Hall II, particularly since I.C.R. 44.2 was expressly enacted to prevent the very conflict that was being investigated by the district court and provide Hall "an objective assessment of trial counsel's performance" by independent counsel. *See* English, 146 F.3d at 1259; Hoffman, 236 F.3d at 231-35. Simply stated, if the attorneys from the SAPD's office had abided by the duties provided by the legislature in I.C. § 19-870 and

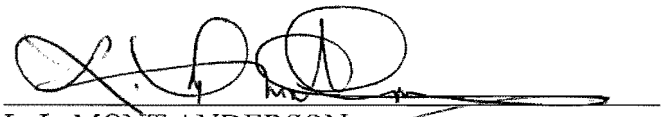
not interjected themselves into Hall II trial and sentencing proceedings by apparently having unspecified contact with the Hall II trial attorneys, these issues would have been avoided. However, Hall wants to utilize the doctrines and rules associated with confidential attorney-client communications as a shield to prevent the district court from conducting the thorough and searching inquiry into the possible conflict raised by the SAPD in the *Ex Parte* Notice that cannot even be "targeted" because the SAPD will not provide the information the district court needs for the inquiry. This "shield and sword" mentality cannot be tolerated by this Court.

On the basis of the rather unique facts associated with this case, Hall has failed to establish the district court erred.

CONCLUSION

The state respectfully requests that the district court's interlocutory orders, (1) Memorandum Decision and Order Appointing Keith Roark as Independent Conflict Counsel and (2) Memorandum Decision and Order Denying the Motion to Reconsider; and Supplementing the Original Decision and Order, be affirmed on appeal.

DATED this 28th day of August, 2012.



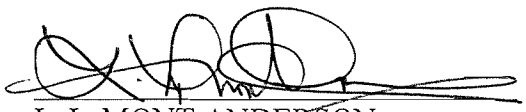
L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 287th day of August, 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

IAN H. THOMSON
JORDAN E. TAYLOR
DEPUTY STATE APPELLATE PUBLIC DEFENDERS

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit