8-4-2012

State v. Shackelford Respondent's Brief Dckt. 39398

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 39398
	)	
vs.	)	
	)	
DALE CARTER SHACKELFORD,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

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STATEMENT OF THE CASE

Nature Of The Case

Defendant, Dale Carter Shackelford ("Shackelford"), appeals from his resentencing for two counts of first-degree murder in which he was given consecutive fixed life sentences.

Statement Of Facts And Course Of Proceedings

The facts leading to Shackelford's convictions for first-degree murder (two counts), conspiracy to commit first-degree murder (two counts), first-degree arson, conspiracy to commit first-degree arson, and preparing false evidence were summarized by the Idaho Supreme Court in State v. Shackelford, 150 Idaho 355, 361-62, 247 P.3d 582 (2010) (footnote omitted), as follows:

> Dale Shackelford was convicted of the murders of his ex-wife, Donna Fontaine, and her boyfriend, Fred Palahniuk, which occurred near the Latah County town of Kendrick, Idaho, in May 1999. The State alleged that Shackelford conspired with Martha Millar, Bernadette Lasater, Mary Abitz, Sonja Abitz, and, John Abitz. Millar and Lasater worked for Shackelford's trucking business, Shackelford Enterprises, in Missouri. The Abitz family lived near the residence where the bodies of Donna and Fred were found. Sonja Abitz was Shackelford's fiancée at the time of the murders, and John and Mary Abitz are Sonja's parents. The alleged conspirators eventually pled guilty to charges related to the murders.
>
> Shackelford and Donna married in Missouri in December 1995 and the relationship ended in the summer of 1997, with the couple divorcing in November of that year. Donna accused Shackelford of raping her in July 1997, and charges were filed in 1998. In the spring of 1999, Donna developed a relationship with Fred and, on May 28, 1999, the two visited Donna's brother, Gary Fontaine, at the home Gary and Donna's daughter owned together outside of Kendrick. The morning of May 29, Donna, Fred, and Gary went to the Locust Blossom Festival in Kendrick, where they met John, Mary, and Sonja Abitz.

After leaving the festival, Gary went to the Abitz's house, but he left around dark, returned home, noticed Donna's pickup in the driveway, and smelled smoke. Gary called the Abitz's house and reported that his two-story garage was on fire. Mary, Sonja, Ted Meske (Mary's brother), and Shackelford arrived at the fire and various individuals tried to extinguish it, but were unsuccessful.

At 7:40 p.m., Latah County Sheriff Patrol Deputy Richard Skiles was called to investigate the fire at 2168 Three Bear Road. When Skiles arrived at the scene, nearly an hour later, he observed several persons – including Gary Fontaine, Mary Abitz, Sonja Abitz, Brian Abitz (Sonja's brother), Ted Meske, and Shackelford – standing near the garage that was completely engulfed in flames. Based upon information obtained from Ted and Shackelford, Deputy Skiles contacted dispatch to have an on-call detective sent "because there was a possibility there could be a suicide victim in the fire." By the time the fire department arrived, the garage had been utterly destroyed. Several hours later, after the fire had been extinguished, two bodies were found in the rubble. The bodies were subsequently identified as the remains of Donna and Fred. At trial, a state fire investigator testified as to his opinion that the fire was arson.

Doctor Robert Cihak conducted autopsies of the remains, which were severely burned. Shotgun pellets were found in Donna's right chest region and a bullet was found in the back of her neck. Dr. Cihak opined that the bullet wound was fatal and was inflicted when Donna was still alive. A bullet was also found in Fred's body behind the upper breastbone, which Dr. Cihak concluded was the cause of death. Dr. Cihak offered his opinion that Donna and Fred were dead at the time of the fire.

On February 11, 2000, an Indictment was filed charging Shackelford with two counts of first-degree murder, first-degree arson, two counts of conspiracy to commit first-degree murder, conspiracy to commit arson, and preparing false evidence. (#27966, R., pp.1-4.)[1] An Amended Indictment was subsequently filed charging Shackelford with a persistent violator sentencing enhancement in violation of I.C. § 19-2514 because he had been previously convicted of five felonies, including sodomy, theft, burglary, unauthorized use of a motor vehicle, and possession of a stolen vehicle. (Id., pp.1517-

[1] The state will refer to the records and transcripts by their respective Idaho Supreme Court numbers and to Shackelford's opening brief as "Brief."

22.) The Honorable John R. Stegner presided throughout the entirety of Shackelford's criminal case. (Id., pp.25-27, 3120-27.) At the conclusion of his trial, a jury found Shackelford guilty of all the charged offenses. (Id., pp.2223-31.) Because Shackelford was found guilty of crimes carrying a potential life sentence, the state moved to dismiss the persistent violator enhancement (id., pp.244-46), which was granted (id., pp.2290-91). After completion of post-trial motions and an extensive sentencing hearing, Judge Stegner found the state proved two statutory aggravating factors involving Donna's murder (id., pp.3094-3100) and one statutory aggravating factor involving Fred's murder (id., pp.3111-15), reviewed the mitigation evidence (id., pp.3084-91, 3100-07), weighed the collective mitigation against each individual statutory aggravator (id., pp.3100, 3115), and sentenced Shackelford to death for both murders (id., p.3122). As to the remaining crimes, Shackelford was given a fixed twenty-five years for first-degree arson, fixed life for one count of conspiracy to commit murder, a fixed twenty-five years for the second count of conspiracy to commit murder, and a fixed five years for preparing false evidence, all sentences to run concurrently with each other. (Id., pp.3123-25.)

With the assistance of the State Appellate Public Defender ("SAPD"), Shackelford filed his initial post-conviction petition (#31928, R., pp.10-35), a third amended petition (id., pp.2534-2642), and an addendum to his third amended petition (id., pp.2980-90). Judge Stegner presided over Shackelford's post-conviction proceedings, including settlement of the record on appeal. (Id., pp.108-09, 3740-42; #27966/321928, Supp. R., pp.134-36). However, Shackelford moved to disqualify Judge Stegner because Shackelford named him as a party in a Writ of Mandate that involved the return of money seized at the time of Shackelford's arrest. (#31928, R., pp.126-44.)

After a hearing, Judge Stegner denied Shackelford's motion. (#31928, Tr., pp.22-29.) The issue was neither raised on appeal nor addressed by the Idaho Supreme Court. *See* Shackelford, *supra.* Judge Stegner ultimately granted Shackelford sentencing relief, concluding, based upon Ring v. Arizona, 536 U.S. 584 (2002), that the jury was mandated to conduct the weighing process in death penalty cases and, therefore, ordering that Shackelford's death sentences be "set aside." (#31928, R., pp.3580-84.) Based upon the decision to provide Shackelford sentencing relief, Judge Stegner concluded three other sentencing claims were moot. (Id., pp.3628-29.) All of Shackelford's remaining guilt and sentencing claims were denied. (Id., pp.3569-3631.)

Both the state and Shackelford appealed. (#31928, R., pp.3702-09.) The Idaho Supreme Court affirmed Shackelford's convictions, prison sentences, and the determination that Shackelford had to be resentenced for first-degree murder, albeit on different grounds, by concluding the jury did not find the statutory aggravating factors and the error was not harmless "because we cannot find beyond a reasonable doubt that a reasonable jury could find that the State proved that Donna and Fred were killed at the same time"; the court did not address whether Ring requires the jury to conduct the relevant weighing. Shackelford, 150 Idaho at 386-88.

On remand, the state provided notice it would not seek the death penalty for Donna and Fred's murders. (#39398, R., pp.14-20.) Judge Stegner presided over the entirety of Shackelford's resentencing. (Id., pp.12, 144-48.) Shackelford moved to disqualify Judge Stegner for cause under I.C.R. 25(b)(4), asserting that Judge Stegner's presiding over the criminal proceedings of Shackelford's co-defendants, presiding over Shackelford's post-conviction case, and statements Judge Stegner made "that the

Defendant manipulated, deceived, coerced and utilized other improper, illegal and immoral schemes to influence others including Co-Defendants to perform acts they would not otherwise perform," resulted in him being biased. (Id., pp.72-77.) In his supporting brief (id., pp.64-71), Shackelford also raised a due process argument, contending Judge Stegner had "reviewed voluminous materials that are testimonial hearsay which have not been subjected to cross-examination." (Id., pp.66-67.) During the hearing regarding Shackelford's motion, his attorney clarified, "With respect to the *Crawford* case, I'd just like to state that we're not arguing about the admissibility of – of hearsay at sentencing, we are about the effect of that – that that hearsay may have with regard to the prejudice or biases – of the Court." (#39398, Tr., p.23.) Judge Stegner denied the motion expressly noting if he were biased or prejudiced he "wouldn't have vacated [Shackelford's] sentence of death in the two counts that he's back to be resentenced upon." (Id., p.26.)

An updated presentence report ("updated PSI") was ordered (#39398, R., pp.34-35), and Shackelford filed an objection to various portions of the presentence report prepared for his first sentencing and the updated PSI (id., pp.89-94); however, it does not appear Judge Stegner ruled on the objections. After the resentencing hearing (#39398, Tr., pp.31-75), Shackelford was sentenced to fixed life for each count of first-degree murder, to be served consecutively (#32398, R., pp.144-48). Judgment was filed on October 6, 2011 (id.), and a timely Notice of Appeal was filed on October 20, 2011 (id., pp.149-52).

ISSUES

Shackelford has phrased the issues on appeal as follows:

> I. Whether the district court abused its discretion in refusing to disqualify itself from sentencing Mr. Shackelford[.]
>
> II. Whether the district court erred in considering testimony not subject to confrontation and cross-examination in sentencing Mr. Shackelford[.]
>
> III. Whether the district court abused its discretion in considering victim impact evidence from a person who was not a victim of Mr. Shackelford's crimes[.]

(Brief, p.6.)

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

1. Has Shackelford failed to establish the district court abused its discretion by denying his motion to disqualify based upon an allegation of bias stemming merely from the district court having presided over his prior trial, sentencing, and post-conviction proceedings and the criminal proceedings of his co-defendants?

2. Because the district court did not rule on Shackelford's objections to the updated PSI and, alternatively, because the Confrontation Clause does not apply at sentencing, has Shackelford failed to establish error stemming from the inclusion of letters in the updated PSI or that the district court abused its discretion if the letters were considered?

3. Because the district court did not rule on Shackelford's objections to the updated PSI and, alternatively because the district court is permitted to consider a broad range of evidence when imposing sentence, has Shackelford failed to establish error stemming from the inclusion of a letter from Susan Birrell or that the district court abused its discretion if the letter was considered?

ARGUMENT

I.

Shackelford Has Failed To Establish The District Court Abused Its Discretion By Denying His Motion To Disqualify Based Upon Judicial Bias

A. Introduction

Shackelford contends the district court abused its discretion by denying his motion to disqualify under I.C.R. 25(b)(4) because of the "prior exposure to prejudicial, unreliable and inadmissible information about Mr. Shackelford and his case, by both presiding over Mr. Shackelford's 2001 capital sentencing, as well as the sentencings of Mr. Shackelford's co-defendants." (Brief, pp.7-8.) Specifically, Shackelford contends the following made it impossible for Judge Stegner to fairly and impartially sentence Shackelford: (1) presiding over the criminal proceedings of co-defendants Bernadette Lasater, Martha Millar, Mary Abitz, and Sonja Abitz; (2) acknowledging Sonya's statements following her arrest were "some of the most incriminating testimony against Mr. Shackelford even though the statement was not elicited at Mr. Shackelford's trial"; (3) presiding over Shackelford's first sentencing and the sentencings of his co-defendants, which allegedly resulted in Judge Stegner forming the opinion that Shackelford "manipulated, deceived, and coerced others to commit acts they would not otherwise do"; (4) exposure to "numerous statements constituting testimonial hearsay that were not subject to cross-examination"; (5) being "privy to the confidential and privileged trial notes of defense counsel that were disclosed to the judge during post-conviction proceedings for an in-camera determination of whether the notes should be provided to the State"; and (6) exposure to "impermissible and inflammatory victim

impact statements in the original PSI, including recommendations from Fred Palahniuk's brother and son that Mr. Shackelford be sentenced to death." (Brief, pp.9-10.)

The district court denied Shackelford's motion to disqualify, explaining it should only be granted "if [the court] has actual prejudice against the defendant of such a nature to render it improbable that the Court could carry out the sentencing in a fair and impartial manner." (#39398, Tr., p.26.) The court further concluded, "I don't think that *Crawford* applies to sentencing," and if the "cumulative effect of the [sic] all of the information that I have received has prejudiced me against Mr. Shackelford . . . I wouldn't have vacated his sentence of death." (Id.) While the court acknowledged ordering disclosure of various documents that were presented for in-camera review during post-conviction proceedings, the court explained, "I don't take it upon myself to read everything that has been disclosed to the State in this case" and "I've probably forgotten more about this case than I knew at one time." (Id., p.27.)

Shackelford has failed to establish the district court abused its discretion by denying his motion to disqualify Judge Stegner for cause or that Shackelford was denied due process.

B. Standard Of Review

The decision on a motion to disqualify under I.C.R. 25 is reviewed for an abuse of discretion, which requires the appellate court to decide "(1) whether the trial court correctly perceived the issue as discretionary; (2) whether the trial court acted within the boundaries of its discretion and consistent with the applicable legal standards; and (3) whether the trial court reached its determination through an exercise of reason." State v.

Pratt, 128 Idaho 207, 211, 918 P.2d 94 (1996) (citing State v. Hedger, 115 Idaho 598, 600, 768 P.2d 1331 (1989)).

C. Shackelford Has Failed To Establish Judge Stegner Was Biased

Under I.C.R. 25(b)(4), "Any party to an action may disqualify a judge or magistrate from presiding in any action [where] [t]hat judge or magistrate is biased or prejudiced for or against any party or that party's case in the action." Additionally, while "[i]t is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process,'" Caperton v. A.T. Massey Coal Co., 556 U.S. 858, 876 (2009) (quoting In re Murchison, 349 U.S. 133, 136 (1955)), "'most matters relating to judicial disqualification [do] not rise to the constitutional level,'" id. (quoting FTC v. Cement Institute, 333 U.S. 683, 702 (1948)). In Caperton, 556 U.S. at 880-81, the Court explained, "a conflict arising from [the judge's] participation in an earlier proceeding" can result in recusal, but "this rule rests on the relationship between the judge and the defendant." "The inquiry is an objective one. The Court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" Id. at 881. "In defining these standards the Court has asked whether, under a realistic appraisal of psychological tendencies and human weakness, the interest poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." Id. at 883-84.

The Idaho Supreme Court has repeatedly addressed the issue of judicial bias, particularly in capital cases. In Sivak v. State, 112 Idaho 197, 203-06, 731 P.2d 192 (1986), the supreme court addressed the question of whether the resentencing judge

should be disqualified because of *ex parte* information allegedly received prior to the defendant's first sentencing. While the supreme court directed the judge to disclose any information that could be recalled, the court further explained, "by directing him to disclose that factual information at the resentencing hearing, we are not suggesting Judge Newhouse should be automatically disqualified from presiding over the resentencing or any other subsequent proceedings in this case in the district court." Id. at 206. The court "completely reject[ed] Sivak's invitation to adopt a rule that would inevitably result in the disqualification of a sentencing judge from the post-conviction proceedings for the same defendant," id., and explained, "judges are capable of disregarding that which should be disregarded is a well accepted precept in our judicial system," id. at 205 (quotations and citations omitted); *see also* Pizzuto v. State, 134 Idaho 793, 799, 10 P.3d 742 (2000).

The issue of judicial bias was again raised during one of Sivak's subsequent post-conviction proceedings. Sivak v. State, 127 Idaho 387, 389 901 P.2d 494 (1995). The supreme court rejected Sivak's newest argument, explaining:

> We have held that when addressing a motion to disqualify brought under Criminal Rule 25, which was denied, the judge must recognize the case has been judged, that lasting opinions have been formed, and that the judge must determine if the proper legal analysis which the law requires can be performed. If the judge can make the proper legal analysis, then the motion to disqualify should be denied.

Id. (internal citations omitted); *see also* State v. Wood, 132 Idaho 88, 107, 967 P.2d 702 (1998).

Sivak raised his judicial bias claim before the Ninth Circuit, contending, "Judge Newhouse made up his mind following the initial sentencing proceeding in 1981, he viewed subsequent resentencing hearings with contempt and felt an overwhelming need

to vindicate his initial ruling. Second, Judge Newhouse became embroiled in a running, bitter controversy with [Sivak] and his counsel, such that a detached observer must conclude that a fair and impartial hearing was unlikely." Sivak v. Hardison, 658 F.3d 898, 923-24 (9th Cir. 2011) (internal quotations and citation omitted). While recognizing the standard for judicial bias is "not entirely clear," the Ninth Circuit explained, "Sivak has failed to overcome the twin presumptions against finding actual bias: the state courts determined that Judge Newhouse was impartial, and, in any event, we presume that Judge Newhouse was impartial because he was a judicial officer." Id. at 924. The court noted that, despite having the opportunity to depose Judge Newhouse, "Sivak has failed to identify evidence of actual bias sufficient to overcome the presumptions against his claim." Id. at 925. The court 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.

Id. (internal quotations and citations omitted).

In State v. (Bryan) Lankford, 113 Idaho 688, 700, 747 P.2d 710 (1987), *rev'd on other grounds by* Lankford v. Idaho, 486 U.S. 1051 (1988), the defendant contended the district court erred during post-conviction proceedings by denying his motion to disqualify for prejudice because, in part, the court presided at the trial, ruled on various motions, made findings in assessing the death penalty that Lankford was not credible which would allegedly impact his ability to testify during post-conviction proceedings,

found the underlying offenses to be heinous, atrocious, and exhibit an utter disregard for human life, and had "attached an emotional commitment to the 'correctness' of his initial determination." The supreme court rejected his argument, concluding his "allegations of bias do not show any actual prejudice on the part of the judge directed toward Lankford of such a nature and character that it would have made it impossible for Lankford to get a fair post conviction hearing." Id. at 701.

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 Scoggins. 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 question of whether the death penalty was imposed arbitrarily and under the influence of passion and prejudice was addressed in State v. (Mark) Lankford, 116 Idaho 860, 875, 781 P.2d 197 (1989). The supreme court explained the analysis begins with the basic concept that "[t]he right to due process requires an impartial trial judge." Id. The court reiterated, "A judge may not be disqualified for prejudice unless it is shown that the prejudice is a prejudice that is directed against the party litigant, and is of such a nature and character as would render it improbable that the party could have a fair and impartial trial in the particular case pending." Id. (internal quotations and citation omitted).

Like the instant case, in State v. Pratt, 128 Idaho 208, 209-11, 912 P.2d 94 (1996), the defendant had to be resentenced after initially being sentenced to death, and raised the same issue being raised by Shackelford. The court rejected Pratt's claim of judicial bias, explaining he failed to "offer any specific proof of prejudice" and "[i]t does not appear from the record that the trial judge abused his discretion in determining at resentencing

that he could sit fairly and impartially and perform the proper legal analysis which the law requires to be performed." Id. at 210-11 (internal quotations and citations omitted).[2]

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

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[2] As recognized in State v. Elliott, 126 Idaho 323, 329 n.1, 882 P.2d 978 (Ct. App. 1994), the Idaho Supreme Court has used "impossible" and "improbable" when discussing the question of whether the litigant gets a fair trial. While the court of appeals resolved the conflict in favor of the "improbable" standard, the Idaho Supreme Court has continued to use the "impossible" standard. Pizzuto, 134 Idaho at 799. Moreover, as recognized in Roe v. Doe, 142 Idaho 174, 177-78, 125 P.3d 530 (2005) (quoting Desfosses v. Desfosses, 120 Idaho 27, 29, 813 P.2d 366 (Ct. App. 1991) (quoting United States v. Grinnell, 384 U.S. 563, 583 (1966)), the United States Supreme Court has utilized the "impossible" standard, explaining that to warrant the disqualification of a judge for alleged bias, the bias must either be based on information "other than what the judge learned from his participation in the case" or be "of such a nature and character that it would make it impossible for the litigant to get a fair trial." However, in Idaho Dept. of Health and Welfare v. Doe, 150 Idaho 752, 764, 250 P.3d 803 (Ct. App. 2011) (quoting Bach v. Bagley, 148 Idaho 784, 791-92, 229 P.3d 1146 (2010)), the court of appeals opined the Idaho Supreme Court "implicitly overruled the prior Idaho cases" and held "that whatever the source of the bias or prejudice, it must be 'so extreme as to display clear inability to render fair judgment,' that 'unless there is a demonstration of 'pervasive bias' derived either from the extrajudicial source or facts and events occurring at trial, there is no basis for judicial recusal.'" Irrespective of whether the standard is "improbable," "impossible," or "clear inability to render fair judgment," Shackelford has failed to meet his burden of establishing that mere exposure to evidence from his prior trial, sentencing, post-conviction proceedings, or proceedings involving his co-defendants constitutes sufficient evidence of judicial bias or prejudice that warrants recusal under I.C.R. 25(b)(4) or due process.

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).

Shackelford's argument can be synopsized into his attorney's statement at the hearing regarding his motion to disqualify for cause, when counsel explained, "We're simply contending that due to the saturation effect through the Court's exposure to all of the information, documents, and statements that the Court has seen and heard in this and related cases, that it would appear that bias or prejudice could be the result of that saturation effect." (#39398, Tr. p.24.) However, as detailed above, mere exposure to additional information from a defendant, co-defendant, or some extra-judicial source, simply does not rise to the level of bias for purposes of I.C.R. 25(b)(4) or due process.

Moreover, Shackelford's reliance upon State v. (Bryan) Lankford, 127 Idaho 608, 903 P.2d 1305 (1995), is sorely misplaced. Lankford did not involve a claim of judicial bias, but an allegation that the state violated a plea agreement, and that Santobello v. New York, 404 U.S. 257 (1971), mandated resentencing before a different judge. Lankford, 127 Idaho at 615-16. Although the supreme court distinguished Santobello because breach of the plea agreement was discovered prior to the first resentencing, Lankford, at 616, the court nevertheless concluded, "so there can be no suggestion that the sentence ultimately imposed on remand, whatever it may be, is in any way a product of the residual effects of the state's submission of aggravating evidence and arguments, resentencing shall be by a judge who has not heard the evidence or arguments" id. at 618.

In Pratt, 128 Idaho at 210 (internal quotations and citations omitted), the supreme court readily distinguished Lankford, explaining:

> Notably, however, the Court there explicitly stated that it did not base disqualification on *ex parte* communications that occurred between the judge and a prosecution witness. As in this case, there was no evidence in the record indicating that the sentencing judge received the type of information that would serve to bias the judge. Pratt's claim of bias, like Lankford's, thus lacks support in fact and runs contrary to common experience.

Shackelford's case is clearly not governed by Lankford, but is governed by the cases detailed above, which are conspicuously ignored by Shackelford. There is simply no basis for a finding of bias or prejudice based merely upon Judge Stegner having "prior knowledge of the sought punishment, the evidence [he] found to support the sought punishment and [his] actual imposition of death." (Brief, p.13.)

II.

Shackelford's Claim Regarding The Confrontation Clause Fails Because There Is No Adverse Ruling And The Confrontation Clause Does Not Apply At Sentencing

A. Introduction

Shackelford initially contends the district court erred by considering the statements of Madison County assistant prosecutor R. Scott Killeen, Bernadette Lasater, and Martha Millar, which were attached to the updated PSI, because the statements were allegedly "testimonial" and violated Shackelford's Sixth Amendment right to confront witnesses. (Brief, p.14.) Shackelford subsequently expands his claim to include a statement of Sonja Abitz. (Brief, pp.35, 38.)

Because the district court never ruled on Shackelford's Objections and Response to Presentence Investigation, there is no adverse opinion from which he can appeal.

Moreover, while the updated PSI contains letters from Killeen, Lasater, and Millar, because there are no letters from Abitz, Shackelford's expansion of the claim to include letters from her is without merit. Irrespective, because the Confrontation Clause does not apply to sentencing, Shackelford has failed to establish any error even if the letters were considered by the district court. Finally, even if the Confrontation Clause applies to sentencing hearings, any alleged error was harmless.

B. There Is No Adverse Ruling From Which Shackelford Can Appeal

While Shackelford undoubtedly filed a motion objecting to the letters from Killeen, Lasater, and Millar, which were attached to the updated PSI, he did not object to any letters from Abitz (#39398, Tr., pp.89-94) because none exits (*see* updated PSI and addendum to the updated PSI). Moreover, as conceded by Shackelford (Brief, p.3 ("Neither the State nor the court addressed Mr. Shackelford's objections to the PSI and UPSI prior to sentencing")), the district court never addressed his objections.

It is a fundamental tenet of appellate practice that the appellate courts "will not 'review a trial court's alleged error on appeal unless the record discloses an adverse ruling which forms the basis for the assignment of error.'" State v. Barnes, 133 Idaho 378, 384, 987 P.2d 290 (1999) (quoting State v. Fisher, 123 Idaho 481, 485, 849 P.2d 942 (1993)); *see also* State v. Huntsman, 146 Idaho 580, 586, 199 P.3d 155 (Ct. App. 2008) ("It is the appellant's burden to obtain a ruling on his motion"). Moreover, the appellate court "does not assume error on appeal; rather, the party assigning error must affirmative show it." Fritts v. Liddle & Moeller Const., Inc., 144 Idaho 171, 173, 158 P.3d 947 (2007) (citations mitted).

Because the district court never ruled on Shackelford's objections to the presentence report, updated PSI, or the addendum and this Court cannot assume the district court relied on the information to which he objected, this Court cannot address the merits of Shackelford's argument.

C. Standard Of Review

The Idaho Supreme Court detailed the standard of review for Confrontation Clause claims in Shackelford, 247 P.3d at 599 (citation omitted), as follows:

> When a violation of a constitutional right is asserted, this Court will give deference to the trial court's factual findings unless those findings are clearly erroneous. However we exercise free review over the trial court's determination as to whether constitutional requirements have been satisfied in light of the facts found. Whether the admission of [the letters] violated Shackelford's right to confront witnesses under the Sixth Amendment is a question of law over which the Court exercises free review.

D. The Confrontation Clause Does Not Apply At Sentencing

The Confrontation Clause of the Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Prior to Shackelford's resentencing, the Supreme Court abandoned its prior Confrontation Clause analysis from Ohio v. Roberts, 448 U.S. 46 (1980), and concluded the Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." Crawford v. Washington, 541 U.S. 36, 53-54 (2004).

Idaho's courts have repeatedly rejected the contention that the Confrontation Clause applies at sentencing, including those involving the death penalty. "The rationale for this rule is, in part, 'the belief that modern penological policies, which favor

sentencing based upon the maximum amount of information about the defendant, would be thwarted by restrictive procedural and evidentiary rules.'" State v. Guerrero, 130 Idaho 311, 312, 940 P.2d 419 (Ct. App. 1997) (quoting Sivak v. State, 112 Idaho 197, 216, 731 P.2d 192 (1986)); *see also* State v. Creech, 132 Idaho 1, 10, 966 P.2d 1 (1998) (reaffirming Sivak, 112 Idaho at 216). Moreover, this principle has not changed with the advent of Ring v. Arizona, 536 U.S. 584, (2002), or Crawford, *supra*. Indeed, not only has Shackelford ignored the binding precedent above, he has failed to cite any jurisdiction that has concluded the Confrontation Clause applies at sentencing because of Ring or Crawford. Rather, it appears Shackelford, based upon the "plain language" of the Sixth Amendment "considered in light of the history surrounding its ratification" (Brief, p.15), contends the Confrontation Clause has always applied at sentencing (id., pp.14-38). However, Shackelford's argument was rebuffed in State v. McGill, 140 P.3d 930, 941 (Ariz. 2006), where the court recognized, "Just as '[t]he constitution's text does not alone resolve' to what extent statements not subjected to cross examination may be admitted during the trial, *Crawford*, 541 U.S. at 42, 124 S.Ct. 1354, the Constitution's text does not alone resolve whether the right to confront adverse witnesses extends to sentencing hearings." Rather, the Arizona Supreme Court recognized the Supreme Court applied a "historical analysis similar to that employed later by the Court in *Crawford*," recognizing out-of-court affidavits were used frequently during sentencing "'both before and since the American colonies became a nation, courts in this country and England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.'" Id. (quoting Williams v. New

York, 337 U.S. 241, 246 (1949)). The court reasoned, "In accord with its historical review and analysis, the *Williams* Court concluded that the right to confront adverse witnesses has never applied to sentencing. In the more than fifty years since it decided *Williams*, the Supreme Court has never suggested otherwise." Id.

However, even if Shackelford contended Ring or Crawford changed the analysis, such an argument would be misguided. As explained in United States v. Littlesun, 444 F.3d 1196, 1200 (9th Cir. 2006) (quotes and citation omitted), the Ninth Circuit, relying upon Williams, 337 U.S. 241, concluded, "the law on hearsay at sentencing is still what it was before *Crawford*; hearsay is admissible at sentencing, so long as it is accompanied by some minimal indicia of reliability." *See also* Rodgers v. State, 948 So.2d 655, 674-75 (Fla. 2006) (Cantero, J., concurring) (collecting federal appellate cases denying Confrontation Clause rights at sentencing); Summers v. State, 148 F.3d 778, 783 n.16 (Nev. 2006) (same); McGill, 140 P.3d at 942 n.7 (Ariz. 2006) (citing federal and state appellate cases denying Confrontation Clause rights at sentencing).

Shackelford has failed to establish the Confrontation Clause applies at a resentencing, particularly a non-capital resentencing. Therefore, he has failed to establish the district court erred even if the court had overruled Shackelford's objection to the letters from Killeen, Lasater, and Millar.

E. Any Alleged Error Was Harmless

Assuming this Court addresses the merits of Shackelford's claim, any alleged error was harmless. "Typically, under the harmless error test, once the defendant shows that a constitutional violation occurred, the State has the burden of demonstrating beyond a reasonable doubt that the violation did not contribute to the jury's verdict." State v.

Adamcik, 152 Idaho 445, ---, 272 P.3d 417, 444 (2012). "Whether an error is harmless in a particular case depends upon a host of factors, including the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." State v. Hooper, 145 Idaho 139, 146, 176 P.3d 911 (2007). "Idaho courts applied the harmless error test to Confrontation Clause violations prior to *Crawford*" and "[t]here is no reason to assume the harmless error test would not apply post-*Crawford*." Id.

In Shackelford's resentencing, there is no possibility the statements contributed to his fixed life sentences for first-degree murder. Discussing the imposition of sentence, the district court referenced the prior imposition of the death penalty, stating, "But having found that the ultimate sanction was, or could have been appropriate for the crimes that you committed, I don't think it should come as any surprise that I'm imposing fixed life sentences for the murders of Donna Fontaine and Fred Palahniuk." (#39398, Tr., p.74.) In other words, the district court was not relying upon new information contained in the updated PSI or the addendum, but the evidence supporting its prior findings regarding imposition of the death penalty. Because the letters were not part of that evidence, there is no possibility they contributed to the court's imposition of consecutive fixed life sentences for first-degree murder. The court further explained, "You are very bright. You are very charming. But you used your intelligence and your charm in, **as I characterized before**, unspeakable ways, and I therefore think that the fixed life sentence is the appropriate sentence for you." (Id.) (emphasis added).

Moreover, the district court had already imposed a fixed life sentence for Count IV, conspiracy to commit murder, without the letters Shackelford now challenges that were not available until the resentencing. (R., #27966, pp.3123-24.) Therefore, the information contained within the letters was unnecessary and not considered by the district court when imposing consecutive fixed life sentences for the underlying first-degree murders of Donna and Fred.

Because the state has established beyond a reasonable doubt that any alleged violation of the Confrontation Clause did not contribute to the district court's imposition of consecutive fixed life sentences for the first-degree murders of Donna and Fred, any alleged error was harmless.

III.

Shackelford's Claim Regarding The Letter Of Suzanne Birrell Fails Because There Is No Adverse Ruling

A. Introduction

Shackelford contends the district court abused its discretion by "admitting and considering" the letter of Suzanne Birrell, which was attached to the updated PSI, because she was "neither Mr. Shackelford's victim nor an immediate family member of his victims." (Brief, p.39.)

Because the district court never ruled on Shackelford's Objections and Response to Presentence Investigation, there is no adverse opinion from which he can appeal. Moreover, because of the broad nature of the district court's discretion in admitting evidence at sentencing, coupled with the desire to obtain the maximum amount of information about defendants prior to imposing a sentence, Shackelford has failed to

establish the district court abused its discretion even if Birrell's letter was considered. Finally, even if the letter was erroneously considered, any alleged error was harmless.

B. There Is No Adverse Ruling From Which Shackelford Can Appeal

Like his claim regarding the Confrontation Clause, Shackelford's claim regarding Birrell's letter is based upon the Defendant's Objection and Response to Presentence Investigation where he objected to the letter. (#39389, R., p.90.) However, just like the Confrontation Clause claim in section II(B) above, Shackelford never obtained a ruling from the district court. Because Shackelford failed to meet his burden of obtaining a ruling on his objection, Huntsman, 146 Idaho at 586, and this Court does not assume error, Fritts, 144 Idaho at 173, this Court cannot address the merits of his claim.

C. Standard Of Review

The admission of evidence at sentencing is reviewed for an abuse of discretion, requiring the appellate court to decide "(1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) whether the lower court reached its decision by an exercise of reason." State v. Gain, 140 Idaho 170, 174, 90 P.3d 920 (Ct. App. 2004).

D. Shackelford Has Failed To Establish The District Court Abused Its Discretion

Shackelford's reliance upon I.C. § 19-5306 and State v. Payne, 146 Idaho 548, 575, 199 P.3d 123 (2008), is misplaced because Birrell's letter was not admitted as a victim impact statement. While Shackelford correctly notes the district court inquired whether any victims or family members "would like to make statements at this time"

(#39398, Tr., pp.36-37), the prosecutor explained, "there are none present, Your Honor. The State would refer the Court back to the sentencing, where there was that type of information offered to the Court. And also in the updated presentence, there is a new letter from Dawn [sic] Fontaine's daughter that I actually believe was submitted after the presentence itself was filed" (id., p.37). The prosecutor subsequently affirmed the "new letter" was from Shanna Hathman, and that the state had "nothing other than that specifically on behalf of the victims." (Id.) There was never any mention that Birrell's letter was a "victim impact statement." Rather, the prosecutor utilized Birrell's letter to emphasize Shackelford's dangerousness and fear that if he is ever released from prison he will kill others that were involved in securing his convictions. (Id., p.69.)

The Idaho Court of Appeals has discussed the broad range of information that may be considered at sentencing, explaining:

> After a criminal defendant's guilt has been established, the trial court has greater latitude regarding the information that it may consider for sentencing than could have been considered while the state was attempting to establish that guilt at trial. The trial court, therefore, has broad discretion in the admission of evidence at a sentencing proceeding and properly may consider a wide range of relevant evidence in determining an appropriate sentence for the particular defendant before it. Moreover, it is essential that the trial court receive all information available about the defendant before imposing sentence so that such sentence will reflect the character and propensity of the defendant as well as the circumstances of the offense.

State v. Hoover, 138 Idaho 414, 422, 64 P.3d 340 (Ct. App. 2003) (citations omitted).

In State v. Jeppson, 138 Idaho 71, 75, 57 P.3d 782 (Ct. App. 2002), *abrogated on other grounds*, Verska v. Saint Alphonsus Reg. Med. Ctr., 151 Idaho 889, 895 265 P.3d 502 (2011), the magistrate considered not only the letter of the victim, but the letters of her three children. Recognizing the trial court has broad discretion in determining what

evidence may be admitted at sentencing and that the judge is "presumably able to ascertain the relevancy and reliability of the broad range of information and material presented to it during the sentencing process and to disregard the irrelevant and unreliable," the court of appeals concluded the three letters were "admissible at a sentencing hearing as long as the defendant is given an opportunity to challenge the reliability of the hearsay and to explain or rebut it." Id. at 75-76. Likewise, in State v. Matteson, 123 Idaho 622, 851 P.2d 336 (Ct. App. 1993), the court of appeals concluded the district court did not error in permitting the victim's family to testify at the sentencing hearing, which included testimony concerning their opinion of the defendant, sentencing, and the years taken away from the actual victim's life.

The underlying basis for this broad range of admissible evidence at sentencing is premised "on the belief that modern penological policies, which favor sentencing based on the maximum amount of information about the defendant, would be thwarted by restrictive procedural and evidentiary rules." Sivak, 112 Idaho at 215 (citing Williams, 337 U.S. at 246-50). Indeed, based upon Williams, the Idaho Court of Appeals has explained, "A sentencing judge may properly conduct an inquiry broad in scope, largely unlimited, either as to the kind of information he may consider or the source from which it may come." State v. Chapman, 120 Idaho 466, 470, 816 P.2d 1023 (Ct. App. 1991).

Obviously, information that Shackelford threatened to murder others is relevant information the district court should consider in determining future dangerousness. Moreover, Shackelford had "an opportunity to examine all information presented to the court at sentencing, to present favorable evidence, and to explain or rebut adverse evidence." State v. Martin, 142 Idaho 58, 60, 122 P.3d 317 (Ct. App. 2005); *see also*

State v. Pizzuto, 119 Idaho 742, 760, 810 P.2d 680 (1991) ("To ensure reliability, the defendant must be afforded the opportunity to present favorable evidence, to examine all materials contained in the presentence report, and to explain and rebut adverse evidence").

Even if Birrell's letter was considered, Shackelford has failed to establish the district court abused its discretion, requiring that his sentences for first-degree murder be affirmed.

E. Any Alleged Error Was Harmless

Assuming this Court addresses the merits of Shackelford's claim, for all of the reasons detailed in section II(E) above, any alleged error was harmless.

CONCLUSION

The state respectfully requests that Shackelford's consecutive fixed life sentences for the first-degree murders of Donna and Fred be affirmed.

DATED this 14th day of August, 2012.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 14th day of August, 2012, served a true and correct copy of the foregoing document by causing a file stamped copy addressed to:

SHANNON N. ROMERO
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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