STATE OF IDAHO
COUNTY OF KOOTENAI } SS
FILED:
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CLERK, DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

GERALD ANGELO BARCELLA, Petitioner, v. STATE OF IDAHO, Respondent.	**CASE NO. CV – 01 – 5504** FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION RE: EVIDENTIARY HEARING

Petitioner has filed a successive petition for post-conviction relief, alleging that he was denied his Sixth Amendment right to testify on his own behalf and that his prior post-conviction counsel failed to raise the claim in the Petitioner's prior petition.

Dennis Benjamin, Nevin, Benjamin, McKay & Bartlett, Boise, Idaho, for Petitioner.

Barry McHugh, Kootenai County Prosecuting Attorney's Office, for Respondent.

I. FACTUAL AND PROCEDURAL BACKGROUND

The facts of this case are set forth in the Idaho Court of Appeals opinion in State v. Barcella, 135 Idaho 191, 16 P.3d 288 (Ct. App. 2000) and Barcella v. State, 148 Idaho 469, 224 P.3d 536 (Ct. App. 2009), and this Court's previous opinions. Important to the matter before this Court, the Petitioner submitted his original pro se petition for

post-conviction relief on August 24, 2001 ("Pro Se Petition"), and listed numerous claims in the table of contents. (Pro Se Petition, pp.1-5.) In the body of his Pro Se Petition, the Petitioner designated a section with the title "Ineffective Assistance of Trial Counsel" (Pro Se Petition, pp.214-489), and included a subsection titled "Denied the Right to Take the Stand / I.A.C. Trial Counsel / Due Process" (Pro Se Petition, p.409). In this subsection, Petitioner asserted that he did not enjoy full communication with his trial counsel because "Barcella's attorney refused to ever discuss the option of Barcella taking the stand in his own defense and Barcella contends he was severely prejudiced." (Pro Se Petition, p.409 (punctuation altered).) The Petitioner included an "Affidavit of Gerald Barcella" setting forth his testimony. (Pro Se Petition, pp.410-425.)

On August 31, 2005, attorney Michael Palmer was appointed to represent the Petitioner in the post-conviction proceedings. On March 9, 2006, Mr. Palmer filed on Petitioner's behalf an "Amended Petition for Post-Conviction Relief Pursuant to I.C.R. 57" ("First Petition"). In the First Petition, Mr. Palmer asserted four claims on behalf of the Petitioner, including "c. [t]hat the conviction is subject to collateral attack on the grounds of ineffective assistance of counsel." (First Petition, p. 2.) The Petitioner further alleged:

> 10. All of the above and each allegation in and of itself (sic), constitute ineffective assistance of counsel and/or prosecutorial misconduct. The deficiencies alleged demonstrate that trial counsels (sic) representation did not meet the objective standards of competence. Further the deficiencies alleged resulted in prejudice such that, but for both parties trial counsels errors (sic), there is a reasonable likelihood that the Petitioner would have been found not guilty at trial."

(Id. at 3.)

The State filed an answer on March 24, 2006, and "State's Amended Motion for Summary Disposition" on April 5, 2006. After a hearing, this Court issued its January 25, 2007, "Order on Summary Dismissal," granting the State's motion in part, but this Court did not dismiss the Petitioner's claim of ineffective assistance of counsel.

This Court held an evidentiary hearing on Petitioner's claim of ineffective assistance of counsel on May 29, 2007. On June 25, 2008, this Court entered its "Decision on Petition for Post-Conviction Relief" ("June 25, 2008 Decision"), and identified the issue presented as "whether trial counsel's refusal to allow Petitioner to testify constituted a deficient performance." (June 25, 2008 Decision, p.8.) This Court held that "[i]f Petitioner was not allowed to testify, trial counsel's performance fell below an objective standard of reasonableness and was deficient. Petitioner has met the first prong of the Strickland test." (June 25, 2008 Decision, p.9.) However, this Court concluded that the Petitioner was not prejudiced because "the outcome of the trial would not have been different if Petitioner had been allowed to exercise his constitutional right to testify." (June 25, 2008 Decision, p.10.)

The Petitioner appealed the June 25, 2008 Decision, and while the Petitioner's appeal of the June 25, 2008, Decision was pending, Petitioner's appellate counsel filed with this Court, under the same case number, a "Verified Second Petition for Post-Conviction Relief" ("Second Petition") on March 4, 2009.

In the Second Petition, the Petitioner asserts that "the Petitioner was denied his right to testify in his behalf guaranteed by the Sixth Amendment," and he cites to DeRushe v. State, 146 Idaho 599, 200 P.3d 1148 (2009). (Second Petition, p.3.) The State filed an answer on March 27, 2009, and on April 28, 2009, the Petitioner and the

State stipulated to stay "the proceedings in this case until the appeal from this Court's denial of his first post-conviction petition (Barcella v. State, Supreme Court No. 35502) is fully resolved." This Court entered a stay on May 6, 2009.

The Idaho Court of Appeals considered multiple arguments from the Petitioner in Barcella v. State, 148 Idaho 469, 224 P.3d 536, (Ct. App. 2009). Notably, appellate counsel for the Petitioner argued that instead of applying the Strickland standard to Barcella's ineffective assistance of counsel claim in the First Petition, this Court should have also applied DeRushe and considered the Petitioner's claim as a violation of his Sixth Amendment right to testify. The Idaho Court of Appeals noted that in the initial briefing on appeal, Petitioner claimed that his counsel was ineffective by "prohibiting Barcella from testifying." Barcella, 148 Idaho at 231, 224 P.3d at 543. However, Petitioner later "filed a supplemental brief, in which he now argues that pursuant to DeRushe, his claim should be analyzed as a direct constitutional violation of his right to testify as opposed to a claim of ineffective assistance of counsel."[1] Id.

The Idaho Court of Appeals distinguished the Petitioner's claims from DeRushe's claims, stating that, unlike the Petitioner, DeRushe had actually alleged a constitutional violation of his right to testify in his post-conviction petition, but the district court in that case incorrectly analyzed the claim as an ineffective assistance of counsel claim. Id. The Idaho Court of Appeals then held that DeRushe "certainly does not stand for the broad proposition that any time a claim of ineffective assistance of counsel is pled the district court must also address any potential underlying constitutional violation

[1] The DeRushe decision was released on January 22, 2009, while the Petitioner's appeal of Barcella v. State, 148 Idaho 469, 224 P.3d 536 (Ct. App. 2009) was pending. Notably, the Petitioner and DeRushe enjoyed the same appellate counsel, and both cases originated from this Court.

independently." Id. In addressing the Petitioner's argument, the Idaho Court of Appeals went on to state:

> No argument was ever presented to the district court regarding a direct constitutional violation of Barcella's right to testify. The district court was not required to frame the issues for the parties, nor was it required to develop the arguments to be presented. Barcella's argument that the district court was required, under DeRushe, to analyze the claim as a direct constitutional violation is incorrect. DeRushe's holding was an instruction to the district court in that case, and it does not mandate that a claim of ineffective assistance of trial counsel for failure to allow the defendant to testify be analyzed as a direct constitutional violation.

Id. The Idaho Court of Appeals affirmed this Court's June 25, 2008, Decision dismissing the First Petition. Id. at 232, 224 P.3d at 544. Remittitur issued January 25, 2010.

On March 23, 2010, this Court held a status conference on the Second Petition and appointed Petitioner's appellate counsel as Petitioner's post-conviction counsel for purposes of the Second Petition. On April 22, 2010, the Petitioner filed a "Motion to Lift Stay and Grant Summary Disposition" ("Petitioner's First Summary Disposition Motion"). The Petitioner also moved this Court to take judicial notice of the records in the underlying case of State v. Barcella, 135 Idaho 191, 16 P.3d 288 (Ct. App. 2000) and Barcella v. State, 148 Idaho 469, 224 P.3d 536 (Ct. App. 2009). The State responded on July 20, 2010, and the Petitioner replied on October 20, 2010. This Court heard arguments from the parties on October 26, 2010, lifted the stay, and took judicial notice of the records and files.

After considering the pleadings, arguments of the parties, the procedural posture of the case, and the Petitioner's First Summary Disposition Motion, this Court issued two orders on November 15, 2010, addressing the Petitioner's allegation that his Sixth Amendment right to testify was violated as set forth in his Second Petition. In the

November 15, 2010, "Memorandum Opinion and Order Re: Petitioner's Motion for Summary Disposition" ("November 15, 2010 Memorandum Opinion") this Court denied the Petitioner's First Summary Disposition Motion, concluding: 1) the Idaho Court of Appeals specifically concluded in Barcella that the Petitioner did not raise a Sixth Amendment claim in either Pro Se or First Petition, 2) the Petitioner did not provide this Court with any evidence in support of his Second Petition that he raised a Sixth Amendment claim in either the Pro Se or First Petition, and 3) neither DeRushe nor Barcella required this Court to address the Petitioner's unraised constitutional claims independently from the Petitioner's ineffective assistance of counsel claims.

This Court also issued a "Notice of Summary Dismissal by the Court, I.C. § 19-4906" on November 15, 2010 ("November 15, 2010, Notice of Dismissal"), notifying the Petitioner that this Court intended to dismiss the Petitioner's Second Petition because, as per I.C. § 19-4908, the claim was waived for failure to assert the claim in either the Pro Se Petition or the First Petition. This Court explained that:

> Even though the Petitioner filed his Second Petition under the same Kootenai County case number as the First Petition, the Second Petition is a successive petition, not a supplement or amendment to the First Petition. Where a second petition for post-conviction relief is filed, it must provide sufficient reasons as to why the grounds asserted for relief were not raised in the first post-conviction relief application. King v. State, 114, Idaho 442, 446, 757 P.2d 705, 709 (Ct. App. 1998).
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> The Petitioner's Second Petition and the subsequent pleadings do not provide any reason why the grounds asserted for relief in the Second Petition were not raised in the Pro Se Petition or First Petition. Further, as stated by the Court of Appeals in Barcella, the DeRushe case does not create a new cause of action and "certainly does not stand for the broad proposition that any time a claim of ineffective assistance of counsel is pled the district court must also address any potential underlying constitutional violation independently." Id. Thus, there is no reason that the Petitioner could not have pled and pursued his claim of a Sixth

> Amendment violation of his right to testify in the Pro Se Petition or First Petition.

(November 15, 2010, Notice of Summary Dismissal, p.4). The Petitioner was given twenty days to respond.

The Petitioner timely responded and alleged that his prior post-conviction counsel, Mr. Palmer, was ineffective for failing to include in the First Petition the Petitioner's Sixth Amendment claim. After reviewing the additional pleadings from the Petitioner, this Court responded with its "Order Re: Summary Dismissal by the Court, I.C. § 19-4906" on December 17, 2010. This Court held that:

> The pleadings and record in this case show the Petitioner has failed to respond to this Court's Notice of Summary Dismissal with any argument or evidence that that he in fact asserted a Sixth Amendment right to testify violation in his Pro Se Petition or First Petition. As a result, this Court is "satisfied, on the basis of the application, the answer or motion, and the record, that the [Petitioner] is not entitled to post-conviction relief and no purpose would be served by any further proceedings" on the Petitioner's Second Petition in its current form. (I.C. § 19-4906.)

(December 17, 2010, Order Re: Summary Dismissal by the Court, p. 6.) However, the Petitioner also requested leave to amend his Second Petition as per I.C. § 19-4906 to allege that his post-conviction counsel, Mr. Palmer, was "ineffective for failing to assert that the Petitioner's Sixth Amendment right to testify was violated." (Id. at 7.) This Court held that:

> . . . . after issuing a notice of summary dismissal, "this court may grant leave to file an amended application or, direct that the proceedings otherwise continue." (I.C. § 19-4906.) Currently, the Petitioner's claims of ineffective assistance of post-conviction counsel are not properly before this Court as a sufficient reason for allowing a successive petition because the Petitioner has not included the claims in his Second Petition. However, given the seriousness of the allegations raised in the Petitioner's Response and the accompanying affidavits, this Court finds that it is proper to allow the Petitioner to file an amended Second Petition. The Petitioner, then, may amend the Second Petition to include a the claim

> that the Petitioner's successive petition should be allowed as per I.C. § 19-4908 because Petitioner's post-conviction counsel was ineffective for failing to include in the First Petition a claim that the Petitioner's Sixth Amendment right to testify was violated. Additionally, in support of this claim "[a]ffidavits, records, or other evidence supporting the allegations shall be attached to the application or the application shall recite why they are not attached." (I.C. § 19-4902 and 19-4903.)

(Id. at pp.9-10.)

On December 29, 2010, the Petitioner filed a "Verified Amended Second Petition for Post-conviction Relief," and included allegations that his prior post-conviction counsel Mr. Palmer provided ineffective assistance by failing to include a Sixth Amendment right to testify claim in the First Petition. The Petitioner also supplied additional affidavits.

The Petitioner then filed a second "Motion for Summary Disposition" ("Petitioner's Second Motion for Summary Disposition") on February 17, 2011, and requested that this Court conclude that 1) Mr. Palmer provided ineffective assistance because he failed to include the Sixth Amendment claim in the First Petition and 2) the Petitioner's trial counsel prevented the Petitioner from testifying in violation of his Sixth Amendment right to testify. The Petitioner supported the pleading with affidavits and provided a memorandum. The State did not timely respond.

At a hearing on April 27, 2011, this Court orally denied the Petitioner's Second Motion for Summary Disposition, leaving two issues for consideration at an evidentiary hearing: 1) whether the Petitioner has shown sufficient reason as to why his Sixth Amendment right to testify claim was not asserted or was inadequately asserted in either the Pro Se or First Petition, and 2) whether the Petitioner' trial counsel violated the Petitioner's Sixth Amendment right to testify on his own behalf.

The parties appeared for an evidentiary hearing on August 19, 2011, and the State timely filed a "Trial Memorandum" on July 21, 2011. After the evidentiary hearing, the Petitioner filed a "Closing Argument" on October 20, 2011, and the State filed a "Closing Argument" on November 10, 2011. After consideration of evidence presented and the record in this matter, as well as the transcripts and records in Kootenai County Case No. CR-96-03185, State v. Barcella, 135 Idaho 191, 16 P.3d 288 (Ct. App. 2000), and Barcella v. State, 148 Idaho 469, 224 P.3d 536 (Ct. App. 2009), this Court makes the following findings of fact and conclusions of law.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. The Petitioner Has Shown Sufficient Reason as to Why His Sixth Amendment Right to Testify Claim was Not Asserted or Was Inadequately Asserted in the Either the Pro Se or First Petition.

This Court and the Idaho Court of Appeals both previously held that the Petitioner did not assert in either the Pro Se Petition or the First Petition that the Petitioner's trial counsel prohibited the Petitioner from testifying on his own behalf in violation of his Sixth Amendment right to testify. Barcella, 148 Idaho at 231, 224 P.3d at 543; November 15, 2010 Memorandum Opinion, CV-01-5504, pp.6-9; November 15, 2010 Notice of Dismissal, CV-01-5504, pp.3-4; December 17, 2010, Order of Dismissal, CV-01-5504, pp.3-6.

Because the Petitioner's claim was not raised in the prior petitions, the issue presented is whether the Petitioner has waived the claim that his Sixth Amendment right to testify was violated. Idaho Code § 19-4908 provides:

> All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground . . . not so raised, or knowingly, voluntarily and intelligently waived . . . in any other proceeding the applicant has taken to secure relief may not be

> the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application.

While successive petitions may be permissible in certain circumstances, an applicant must raise all issues and claims in the initial application or risk waiver and forfeiture under Idaho Code § 19-4908. Parsons v. State, 113 Idaho 421, 426, 745 P.2d 300, 305 (Ct. App. 1987). Where a second petition for post-conviction relief is filed, it must provide sufficient reasons as to why the grounds asserted for relief were not raised in the first post-conviction relief application. King, 114, Idaho at 446, 757 P.2d at 709.

Claims that are not raised in the original petition are waived for the purposes of post-conviction relief as if they had been knowingly, voluntarily and intelligently waived. State v. LePage, 138 Idaho 803, 811, 69 P.3d 1064, 1072 (Ct. App. 2003) *review denied*; Hooper v. State, 127 Idaho 945, 947, 908 P.2d 1252, 1254 (Ct. App. 1996)). In Palmer v. Dermitt, the Idaho Supreme Court interpreted I.C. § 19-4908, holding that successive petitions are prohibited "in those cases where the petitioner . . . offers no 'sufficient reason' for the omission of those grounds in his 'original, supplemental or amended petition.'" 102 Idaho 591, 593, 635 P.2d 955, 957 (1981), Id. at 593, 635 P.2d at 957 (emphasis in original). The district court must find the "failure to include newly asserted grounds for relief in the prior post[-]conviction relief proceeding was without sufficient reason before the application may be summarily dismissed on the ground of waiver." Id. (emphasis in original.)

1. A Claim of Ineffective Assistance of Post-Conviction Counsel Cannot Be Maintained Because There is No Constitutional or Statutory Right to Post-Conviction Counsel

In his Second Amended Petition, the Petitioner alleges:

32. Prior post-conviction counsel's failure to raise and/or preserve the Sixth Amendment claim in the original petition was deficient performance in that it fell below an objective standard of reasonableness.

33. This deficient performance was the only reason that the Sixth Amendment claim was not presented in the original post-conviction proceeding.

34. Mr. Barcella was prejudiced by prior post-conviction counsel's failure to adequately raise the Sixth Amendment claim because, had he done so, the Court would have reached the merits of the claim and would have granted Mr. Barcella a new trial.

35. Mr. Barcella's post-conviction counsel was ineffective in failing to preserve and/or include in the First Petition a claim that his Sixth Amendment right to testify was violated at trial.

36. Ineffective assistance of prior post-conviction counsel is a sufficient reason to allow a successive petition under I.C. § 19-4908.

(Second Amended Petition, p.4; *see* Second Amended Petition, p.6.) Thus, the Petitioner alleges that his prior post-conviction counsel provided ineffective assistance as per Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984),[2] by failing to include the Sixth Amendment claim in the First Petition, and that this is "sufficient reason as to why" the Sixth Amendment claim was not previously raised.

There is no Sixth Amendment right to appointed counsel in a collateral attack upon a conviction. Follinus v. State, 127 Idaho 897, 902–03, 908 P.2d 590, 595–96

[2] To prevail on a claim of ineffective assistance of counsel, the applicant must show that his attorney's performance was deficient, and that he was prejudiced by the deficiency. Russell v. State, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990), *citing* Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To establish a deficiency, the applicant has the burden of showing that his attorney's representation fell below an objective standard of reasonableness. Russell, 118 Idaho at 67, 794 P.2d at 656 (internal citations omitted). To establish prejudice, the applicant must show a reasonable probability that, but for his attorney's deficient performance, the outcome of his trial would have been different. Id.(internal citations omitted).

(1995), *citing* Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). Prior to 1993, Idaho Code § 19-4904 mandated the appointment of post-conviction counsel, and as a result, a petitioner could maintain an ineffective assistance of post-conviction counsel claim. As a result, there are numerous cases that address ineffective assistance of post-conviction counsel claims. The most notable is Palmer where the Idaho Supreme Court stated that "[a]n allegation of ineffective assistance of prior post-conviction counsel, if true, provides sufficient reason for permitting newly asserted allegations to be raised in a subsequent post-conviction application." Hernandez v. State, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct. App. 1999), *citing* Palmer, 102 Idaho at 596, 635 P.2d at 960; *see* Lee v. State, 122 Idaho 196, 199, 832 P.2d 1131, 1134 (1992); Henderson v. State, 123 Idaho 51, 52, 844 P.2d 33, 34 (Ct.App.1992); Rodriguez v. State, 122 Idaho 20, 22, 830 P.2d 531, 533 (Ct.App.1992).

However, in 1993, I.C. § 19-4904 was amended and the requirement of appointing counsel removed. Follinus, 127 Idaho at 902-03, 908 P.2d at 595-96. Thus, "a claim of ineffective assistance of post-conviction counsel may not be brought because the applicant for post-conviction relief does not have a right to effective assistance of counsel." Rios-Lopez v. State, 144 Idaho 340, 343, 160 P.3d 1275, 1278 (Ct. App. 2007), *citing* Follinus, 127 Idaho at 902-03, 908 P.2d at 595-96.

The case of Hernandez, however, appears to confuse the issue. In that case, the petitioner made a showing that his post-conviction counsel erred in a rather dramatic fashion by filing an application with bare and conclusory allegations unsupported by evidence, and failing to respond to the district court's notice of summary dismissal. Hernandez, 133 Idaho at 798, 992 P.2d at 793. In considering whether the

petitioner had met the standards of I.C. § 19-4908, the Hernandez court cited to Palmer for the proposition that "[a]n allegation of ineffective assistance of prior post-conviction counsel, if true, provides sufficient reason for permitting newly asserted allegations to be raised in a subsequent post-conviction application." Hernandez, 133 Idaho at 798, 992 P.2d at 793, *citing* Palmer, 102 Idaho at 596, 635 P.2d at 960. The Hernandez court, however, also entered a footnote stating

> [t]here is no constitutionally protected right to the effective assistance of counsel in post-conviction relief proceedings. Follinus v. State, 127 Idaho 897, 902, 908 P.2d 590, 595 (Ct.App.1995). Thus, such an allegation, in and of itself, is not among the permissible grounds for post-conviction relief. *See* Wolfe v. State, 113 Idaho 337, 339, 743 P.2d 990, 992 (Ct.App.1987).

Hernandez, 133 Idaho at 798, fn.2, 992 P.2d at 793, fn.2.

A close reading of Hernandez shows that the Idaho Supreme Court did not conclude that Hernandez's post-conviction counsel was "ineffective," but instead what was most important to the Hernandez court's consideration is that the merits of Hernandez' potential claims were not addressed at any time. Id. The Idaho Supreme Court concluded that the successive petition should be allowed because failure to allow Hernandez a "meaningful opportunity to have his or her claims presented may be violative of due process." Id. at 798, 992 P.2d at 793, *citing* Abbott v. State, 129 Idaho 381, 385, 924 P.2d 1225, 1229 (Ct. App. 1999). Thus, Hernandez does not stand for the proposition that a Petitioner can assert that his post-conviction counsel provided ineffective assistance.[3]

Regardless of the case law and statutory authority, in his Closing Argument the Petitioner relies on both Palmer and Hernandez to support the claims in paragraphs 32-

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[3] A petitioner is not without recourse, for a post-conviction petitioner, just like any other client, may bring a malpractice claim against his counsel.

36 and on page 6 in his Second Amended Petition that his post-conviction counsel was ineffective as per the Strickland v. Washington test. Conversely, the State argues that the Petitioner has "failed to state a claim upon which relief can be granted," because the claim of ineffective assistance of post-conviction counsel is not available to the Petitioner. (State's Closing Argument, p.2.) Notably, the State did raise this as an affirmative defense in its February 22, 2011, Answer to the Second Amended Petition.

This Court agrees that the Petitioner's claims as set forth in paragraphs 32-36 and on page 6 of the Second Amended Petition, cannot be sustained. First, unlike the petitioner in Hernandez, the Petitioner in this case received a meaningful opportunity to have his claims heard. Barcella, 148 Idaho 469, 224 P.3d 536. Second, because there is no statutory or constitutional right to effective post-conviction counsel, the Petitioner cannot claim that his prior post-conviction counsel was ineffective for failing to assert the Petitioner's Sixth Amendment right to testify claim. As a result, the Petitioner has failed to state a claim upon which this Court can grant relief. This Court, then, declines to enter a finding that the Petitioner's prior post-conviction counsel provided ineffective assistance as per Strickland v. Washington. Instead, this Court concludes as a matter of law that paragraphs 32- 36 and the claim on page 6 of the Second Amended Petition do not provide "sufficient reason" as to why the Petitioner's Sixth Amendment claim was not raised in the First Petition.

2. The Evidence Shows That There Is Sufficient Reason as to Why the Petitioner's Sixth Amendment Claim was Not Raised in the First Petition

The Petitioner also makes the following pertinent allegations in his Second Amended Petition:

27. Prior post-conviction counsel knew at the time he represented Mr. Barcella on the original petition that Mr. Adams had denied Mr. Barcella the constitutional right to testify in his own behalf.

28. Prior post-conviction counsel also knew that any claims not raised and/or preserved in the original petition would be waived.

29. Prior post-conviction counsel new that the deprivation of the right to testify requires relief on post-conviction unless the state can prove that the error in denying the right to testify was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 13, 24, 87 S.Ct. 824, 828 (1967).

30. Prior post-conviction counsel knew that the state could not meet the burden of demonstrating that the denial of the right to testify was not harmless beyond a reasonable doubt.

31. Prior post-conviction counsel did not decline to raise and/or preserve the Sixth Amendment claim for strategic purposes.

(Second Amended Petition, pp.3-4.) The Petitioner supported these claims with the "Affidavit of Michael Palmer" (October 14, 2010) and the "Second Affidavit of Michael Palmer" (December 2, 2010), in which Mr. Palmer states that he did not intend to waive the Petitioner's Sixth Amendment claim.

The Petitioner called his prior post-conviction counsel, Mr. Palmer, to testify at the August 19, 2011, evidentiary hearing about why the Petitioner's Sixth Amendment claim was not included in the First Petition. At the hearing, Mr. Palmer testified that in the First Petition he should have framed the Petitioner's right to testify claim as both an ineffective assistance of counsel claim as per Strickland v. Washington, and as a Sixth Amendment violation as per Chapman v. California. (Evidentiary Hearing Transcript., p.20, Ls. 1-5.) He also testified that he never received his client's permission to waive the Sixth Amendment right to testify claim. (Ev. Hrg. Tr., p.16, L.3 – p.17, L.7.)

Certainly, this Court finds Mr. Palmer's testimony somewhat suspect given the emphasis on DeRushe and the timing of the Second Petition. However, a thorough

review of the evidence supports a finding that 1) the Petitioner desired all claims possible be raised in his First Petition, 2) the Petitioner did not intend to waive any claims, 3) Mr. Palmer knew that the Sixth Amendment claim should have been raised separately from the ineffective assistance of counsel claim, and 4) Mr. Palmer simply failed to articulate the claim in the First Petition or support the claim at the prior evidentiary proceeding. Given these facts, this Court concludes, and notably the State tends to agreed (Closing Argument, p.3), that the Petitioner has shown sufficient reason as to why the claim was not asserted or was inadequately raised in the First Petition such that this Court will address the Petitioner's Sixth Amendment right to testify claim as set forth in the Second Amended Petition.

B. The Petitioner has Not Shown by a Preponderance of the Evidence that His Trial Counsel Prohibited the Petitioner from Testifying in Violation of the Petitioner's Sixth Amendment Right.

1. Legal Standard Applicable to Post-Conviction Proceedings

The standard for post-conviction proceedings was recently repeated in the case of Mendiola v. State,

> An application for post-conviction relief initiates a proceeding that is civil in nature. State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); Clark v. State, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); Murray v. State, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct.App.1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; Russell v. State, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct.App.1990).The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. Larkin v. State, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct.App.1988).

2010 WL 4483675, p.1 -2 (Ct. App.2010).

2. Legal Standards Applicable to the Sixth Amendment Right to Testify on One's Behalf

The right to testify on one's own behalf at a criminal trial derives from several sources: the Fourteenth, Sixth, and Fifth Amendments to the U.S. Constitution. The Fourteenth Amendment guarantees an opportunity to be heard and to offer testimony:

> "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense-a right to his day in court-are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." (Emphasis added.) In re Oliver, 333 U.S. 257, 273, 68 S.Ct. 499, 507, 92 L.Ed. 682 (1948). See also Ferguson v. Georgia, 365 U.S., at 602, 81 S.Ct., at 773. (Clark, J., concurring) (Fourteenth Amendment secures "right of a criminal defendant to choose between silence and testifying in his own behalf").

Rock v. Arkansas, 483 U.S. 44, 51-53, 107 S. Ct. 2704, 2708-10 (1987).

The right to testify is also found in the "compulsory clause" of the Sixth Amendment, which grants a defendant the right to call "witnesses in his favor," a right that applies to the States by the Fourteenth Amendment. Rock, 483 U.S. at 51-53, 107 S. Ct. 2704, 2708-10, *citing* Washington v. Texas, 388 U.S. 14, 17-19, 87 S.Ct. 1920, 1922-1923 (1967). As discussed in Faretta v. California, the Sixth Amendment:

> "grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.' "

422 U.S. 806, 819, 95 S.Ct. 2525, 2533 (1975)(emphasis added). As the United States Supreme Court stated in Rock:

> Even more fundamental to a personal defense than the right of self-representation, which was found to be "necessarily implied by the structure of the Amendment," is an accused's right to present his own version of events in his own words. A defendant's opportunity to conduct

> his own defense by calling witnesses is incomplete if he may not present himself as a witness.

Rock, 483 U.S. at 51-53, 107 S. Ct. 2704, 2708-10. The right to testify is also found in the Fifth Amendment's guarantee against compelled testimony. As stated in Harris v. New York, "every criminal defendant is privileged to testify in his own defense or refuse to do so." 401 U.S. 222, 230, 91, S.Ct. 643, 648 (1971).

The right to testify applies to the states through the Fourteenth Amendment and the Idaho Supreme Court has recognized this right. State v. Fields, 127 Idaho 904, 912, 908 P.2d 1211, 1219 (1995); DeRushe, 146 Idaho at 604, 200 P.3d at 1153. "The defendant personally is vested with the ultimate authority to decide whether or not to testify, and if he or she declines to testify, the defendant has waived that right. American Bar Association, *Standards Relating to the Administration of Criminal Justice,* Compilation, § 5.2 (1974). An "on the record" waiver is not required. Argon v. State, 114 Idaho 758, 763, 760 P.2d 1174, 1179 (1988); Cootz v. State, 129 Idaho 360, 924 P.2d 622 (1996).

Counsel may advise the defendant regarding the wisdom and propriety of testifying; but counsel must abide by the defendant's eventual decision. State v. Hoffman, 116 Idaho 689, 690, 778 P.2d 811, 812 (Ct. App. 1989), *citing* United States v. Curtis, 742 F.2d 1070, 1076 (7th Cir.1984), *cert. denied,* 475 U.S. 1064, 106 S.Ct. 1374, 89 L.Ed.2d 600 (1986); Palmer v. People, 680 P.2d 525, 527 (Colo.1984); *see* DeRushe, 146 Idaho at 604, 200 P.3d at 1153 ("although a defendant can and should consult with counsel about the risks and benefits of testifying, the ultimate decision of whether to do so must be left to the defendant"). However, the defendant does not have a constitutional right to commit perjury, or present testimony that is immaterial to

the charges. Hoffman, 116 Idaho at 691, 778 P.2d at 813, *citing* Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986); Fields, 127 Idaho at 912, 908 P.2d at 1219.

In this case it is undisputed that the Petitioner did not waive his right to testify on the record. When there is no waiver of the right to testify on the record, the evaluating court must make two determinations: 1) whether substantial evidence exists that the defendant waived his right to testify, and 2) if the defendant did not waive his right, whether the error was harmless. Hoffman 116 Idaho at 691-92, 778 P.2d at 813-14; Cootz, 129 Idaho 360, 924 P.2d 622; DeRushe, 146 Idaho at 604, 200 P.3d at 1153.

3. Substantial Evidence Shows the Petitioner Waived His Sixth Amendment Right to Testify

In his Second Amended Petition, the Petitioner alleges:

> 13. The Court adopted the assumption that trial counsel did not allow petitioner to testify and that for purposes of Strickland v. Washington, 466 U.S. 668 (1984), this was deficient performance.
>
> 14. In fact, Mr. Adams refused to permit petitioner to testify at the criminal trial even though petitioner specifically asked to testify.

(Second Amended Petition, p.2.) The Petitioner further alleges that "[i]n DeRushe and in Mr. Barcella's first post-conviction petition too, the district court erred in analyzing [petitioner's] (sic) claim as alleging ineffective assistance of counsel rather than as alleging denial of his constitutional right to testify in his own behalf." (Second Amended Petition, p.5.)

The Petitioner's Second Amended Petition is based on two false premises. First, because the standard of Strickland v. Washington does not apply to the Petitioner's Sixth Amendment right to testify claim, any assumption this Court previously made in

regards to Mr. Adam's deficient performance does not apply. Second, the Petitioner assumes that the Petitioner's right to testify was not waived, or that this Court or the Idaho Court of Appeals has entered some finding that the Petitioner's right to testify was not waived. However, there is no such finding by any court, and notably the underlying criminal case is devoid of any evidence that the Petitioner either waived, or asserted, his right to testify. As a result, this Court must evaluate the evidence presented at the August 19, 2011, evidentiary hearing to determine whether there is substantial evidence showing that the Petitioner waived his right to testify.

This Court has reviewed the testimony of Mr. Adams' and co-counsel Mr. Gresback[4] at the August 19, 2011 evidentiary hearing in this matter and concludes that substantial evidence exists that the Petitioner waived his right to testify. It is clear that at the time of the Petitioner's trial Mr. Adams and his office did not have a policy of placing a defendant's waiver of the right to testify on his own behalf on the record,[5] but that Mr. Adams and co-counsel Mr. Gresback did inform the Petitioner of his right to testify, and that they advised the Petitioner against testifying on his own behalf because the Petitioner wanted to present an "impairment" defense which was inconsistent with the "innocent" defense actually presented.

Further, the testimony of the Petitioner and Investigator Mr. Durrant shows that the parties conversed with the Petitioner about the defense's theories and strategies on multiple occasions. However, the issue of whether the Petitioner would testify was not

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[4] This Court notes that Mr. Gresback testified regarding his conversations with Mr. Barcella and Mr. Adams because this Court ordered Mr. Gresback to testify regarding the communications. (Ev. Hrg. Tr., p.33, L.12 – p.34, L.17.) Neither party briefed this issue for this Court's review or further pursued any objections to this Court's order.

[5] While Mr. Adams testifies that he violated the Idaho Rules of Professional conduct by failing to put the Petitioner's waiver on the record, this Court notes that there is no legal requirement to do so, and therefore there is no basis to grant the Petitioner any relief.

frequently discussed beyond the advisement that the Petitioner had a right to testify and that the Petitioner was advised against testifying because his testimony that he was impaired when he killed the victim was inconsistent with the defense that the Petitioner did not commit the murder.

Thus, while the Petitioner may have wanted to testify and present an impairment defense, the Petitioner's trial counsel advised the Petitioner against testifying and the Petitioner either agreed or acquiesced to his trial counsel's advice because the testimony would have been inconsistent with the "innocence" defense. This Court, therefore concludes that substantial evidence exists that the Petitioner waived his right to testify. As a result, the Petitioner is not entitled to the relief requested because he has failed to show a violation of his Sixth Amendment right.

b. Even if No Waiver Occurred, the Error Was Harmless

Regardless, if the Petitioner did not waive his Sixth Amendment right to testify, the record shows that the error was harmless. The Petitioner advocates for the application of the harmless error standard set forth in Chapman v. California, as described in the case of State v. LePage:

> The standard for determining whether error of constitutional dimension is "harmless," as set forth in Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), is "that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Id. at 24, 87 S.Ct. at 828. Although the constitutional right infringed in Chapman was the Fifth Amendment right to remain silent, **the harmless error standard in Chapman is clearly applicable to claimed violations of the other constitutional rights, including the Sixth Amendment's guarantee of the assistance of counsel**. Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed.2d 1 (1972). *See e. g.*, State v. Sharp, 101 Idaho 498, 507, 616 P.2d 1034, 1043 (1980) (Chapman rule applied to prosecutorial misconduct).

102 Idaho 387, 393-94, 630 P.2d 674, 680-81 (1981). However, as recently confirmed by the Idaho Supreme Court in State v. Perry, the Chapman standard only applies to error that is followed by a contemporaneous objection. 150 Idaho 209, 228, 245 P.3d 961, 980 (2010), *reh'g denied* (Dec. 7, 2010).

Instead, when error is not followed by a contemporaneous objection, Idaho's fundamental error doctrine requires a three-pronged inquiry:

> (2) If the alleged error was not followed by a contemporaneous objection, it shall only be reviewed by an appellate court under Idaho's fundamental error doctrine. Such review includes a three-prong inquiry wherein the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's 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. If the defendant persuades the appellate court that the complained of error satisfies this three-prong inquiry, then the appellate court shall vacate and remand.

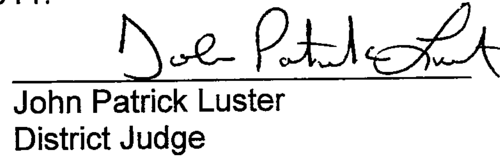
Perry, 150 Idaho at 228, 245 P.3d at 980.

If this Court assumes that there is not substantial evidence that the Petitioner did not waive his right to testify, and as a result the Petitioner's Sixth Amendment Right was violated, this Court must evaluate whether the violation of the Petitioner's Sixth Amendment right to testify was harmless error. There is no contemporaneous objection by the Petitioner, or any assertion that he wanted to testify, in the record, and therefore the Chapman standard does not apply to this case, and the standard of Perry does. Regardless any violation of the Petitioner's right to testify amounts to harmless error because, as discussed above, the Petitioner's testimony that he was impaired when he killed the victim would have directly contradicted the evidence presented that the Petitioner did not kill the victim. The Petitioner's claims, then, as made in his Second Amended Petition, are not supported by logic or evidence, and must be denied.

III. CONCLUSION

Based on the foregoing, it is hereby ordered that the Petitioner's Second Amended Petition is DENIED.

DATED this 8th day of December, 2011.



John Patrick Luster
District Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing FINDINGS FO FACT, CONCLUSIONS OF LAW, AND DECISION RE: EVIDENTIARY HEARING was sent by U.S. Mail, postage prepaid, sent by facsimile transmission, or sent by interoffice mail on the 8th day of December, 2010, to the following:

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CLIFF HAYES
Clerk of the District Court

By: ______________________
Deputy Clerk

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