10-21-2011

Williams v. State Appellant's Brief Dckt. 38349

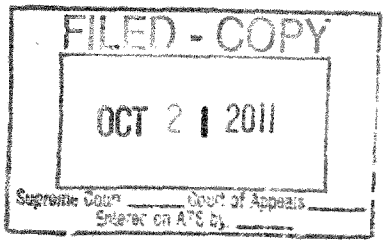
IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL CHARLES WILLIAMS, Plaintiff/Appellant, vs. STATE OF IDAHO, Respondent.	)	S.Ct. No. 38349-2010

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Seventh
Judicial District of the State of Idaho
In and For the County of Bingham

HONORABLE JON J. SHINDURLING
District Judge



Deborah Whipple
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

Attorneys for Appellant

Idaho Attorney General
Criminal Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

DOCKETED CASES

STATE STATUTES

II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the denial of post-conviction relief. The order denying relief should be reversed because summary dismissal of the claim of ineffective assistance of counsel in failing to present and argue self-defense was erroneous. The claim presented a genuine issue of material fact and should have either gone to an evidentiary hearing or been summarily decided in Michael Williams' favor. Further, the Order Denying Relief should be reversed because the District Court did not address all the claims raised in the petition.

B. Procedural History and Statement of Facts

On February 25, 2005, Rogelio Ramirez, Jose Garza, Chris Adams, Jose Martinez (aka Beto, aka Juan) and Ramon Sanchez, a group of men in their mid-twenties, were all at the Bali-Hai Bar in Blackfoot, Idaho. (There may have been additional people in this group as Mr. Martinez identified Roy Ramirez, Ramon Sanchez, Chris Adams, and "a bunch of different friends.") They arrived about eight in the evening and spent the night drinking. In fact, so much alcohol was consumed that some were worried about being arrested for DUI. Trial Tr. p. 97, ln. 7 - p. 100, ln. 11; p. 126, ln. 7; p. 134, ln. 21 - p. 135, ln. 19; p. 142, ln. 24 - p. 144, ln. 24; p. 144, ln. 21-24.[1]

Petitioner Michael Williams was also at the Bali-Hai that night with his brother Doug Williams. They had arrived about 8:45 p.m. and spent the evening there but did not have any direct contact with Mr. Adams or his friends. Trial Tr. p. 221, ln. 23 - p. 222, ln. 19.

---

[1] This Court has taken judicial notice of the Clerk's Record and Reporter's Transcript from the underlying criminal case, *State v. Williams,* Supreme Court Docket No. 33019-2009, per its order dated July 8, 2011. In addition, the PSI is an exhibit on appeal. R Vol. II, page 440.

However, there was evidence not presented at trial that during the evening, Casiko Saunders heard Mr. Adams state that Michael Williams would be taken care of. Additionally, at trial the jury did not learn the fact that Mr. Adams and his companions had histories of violent attacks. R. Vol. I, page 17, 57-58. There was also evidence, not presented at trial, of Mr. Adams' toxicology report showing that he had an ethanol level of 249 mg/dL. R. Vol. I, p. 57-58.

When the bar began to close for the night, Mr. Ramirez and Mr. Martinez were the first of their group to leave. They got into Mr. Ramirez's truck and started to drive out of the parking lot. But, before they left the lot, Mr. Sanchez called Mr. Ramirez and asked him to come back for him and Mr. Adams because they did not want to drive (presumably because they were too intoxicated). Trial Tr. p. 99, ln. 1 - p. 100, ln. 11.

In the meantime, Michael and Doug Williams were walking in the parking lot. Trial Tr. p. 101, ln. 6-7.

Mr. Ramirez backed his truck up 30 - 40 yards to the door of the bar. In doing so, he hit or almost hit Doug Williams, who, according to Mr. Ramirez, "took it wrong." Doug walked around to the front of Mr. Ramirez's truck and looked in the window and he and Mr. Ramirez gave each other the finger. Mr. Ramirez stopped his truck and got out; Doug and Michael kept on walking to Michael's truck. Mr. Ramirez continued to stare at Doug Williams. According to Mr. Ramirez's testimony, he was "eyeballing" Doug. Trial Tr. p. 100, ln. 23 - p. 103, ln. 12; p. 116, ln. 18-23.

Michael Williams, who had nothing to do with the finger throwing and the eyeballing, sat in his truck waiting for Doug who was taking his coat off because it smelled of cigarettes. Trial

Tr. p. 118, ln. 7-14; p. 223, ln. 25 - p. 224, ln. 5.

Mr. Sanchez and Mr. Adams then came out of the bar, with Mr. Sanchez in the lead. Mr. Sanchez urinated against the side of a truck. While he was urinating, Mr. Ramirez, Mr. Adams and another member of their party, referred to only as Jose, told him about the finger throwing. Mr. Sanchez told everyone to hold on and he would go see what was going on as soon as he finished relieving himself. Part of their discussion included a reference to going over to Michael Williams to "kick his ass." Trial Tr. p. 128, ln. 17 - p. 129, ln. 5; p. 123, ln. 14-17.

Rather than waiting for Mr. Sanchez to take the lead, Mr. Adams became very agitated and angry, and threw his beer bottle down, breaking it. Trial Tr. p. 104, ln. 19-25. As he broke the bottle, he said "Fuck this" and walked directly to Michael Williams, who, up to now, had nothing to do with any of this. Trial Tr. p. 117, ln. 21 - p. 118, ln. 14. Mr. Adams walked quickly, with Mr. Sanchez immediately joining him, following at about a 15 foot distance. Trial Tr. p. 130, ln. 13-24.

According to Mr. Sanchez, Mr. Adams walked to the area within the open door of the truck. Trial Tr. p. 132, ln. 9-10. He got so close to Michael Williams, that Michael could not shut the door. As Mr. Sanchez testified, Mr. Adams got "pretty dang close" to Michael. Trial Tr. p. 140, ln. 6-19.

As Mr. Adams approached the truck, Michael Williams said something. Mr. Martinez testified that it sounded like, "You fucked with the wrong guy," "You picked the wrong guy," or "You got the wrong guy." Trial Tr. p. 154, ln. 17-24.

Michael Williams testified that he was sitting in his truck when he heard the bottle break and then Mr. Adams stood up from a kneeling position, put a hand to his hip, raised his other

hand, and yelled, "I'm going to fucking kill you." He walked straight toward Mr. Williams followed by one other person. Two other people in the group were chanting something. Trial Tr. p. 223, ln. 2 - p. 224, ln. 18.

Michael looked around for Doug, and he was not in the truck, nor could he be seen outside the truck. So, Michael, being threatened by Mr. Adams, with another person coming up right behind him, and others in the group by the other truck, reached for his gun. (Michael carried a gun in his truck pursuant to a concealed weapons permit.) Trial Tr. p. 224, ln. 4-21; p. 234, ln. 12 - p. 235, ln. 2; p. 192, ln. 19-20.

As Mr. Adams got in the truck's doorway, Michael said, "You've got the wrong guy. Please stop." Trial Tr. p. 225, ln. 4-6.

At that point, Mr. Ramirez yelled that Michael had a gun or a knife. Trial Tr. p. 107, ln. 3-5. Mr. Ramirez, however, did not believe that Mr. Adams responded. Trial Tr. p. 107, ln. 18-19.

Michael testified that Mr. Ramirez yelled, "He's got a gun. Get your gun." And, in response, Mr. Adams smiled at Michael and said, "Oh yeah. I got something for you," and lunged into the truck. Trial Tr. p. 225, ln. 4-16.

Michael fired the gun. He believed that his first and second shots missed because Mr. Adams did not stop coming toward him. With the final shot, Mr. Adams turned and started to walk back to Mr. Sanchez. Trial Tr. p. 132, ln. 15-25; p. 225, ln. 23 - p. 226, ln. 6.

Michael called 911 and held his gun while he waited for the police to arrive. As soon as he saw the police lights, he opened the action, left it open, pulled out the round, dropped the clip, and left the gun on the top of the center console in the truck. Trial Tr. p. 226, ln. 16 - p. 227, ln.

1.

At that time, threats were being shouted and there was a lot of commotion, and Michael was still on the phone with the 911 operator waiting for directions as to what to do. In the chaos, he did not hear the police tell him to get out of the truck, and so he was pulled from the truck. Tr. p. 227, ln. 6 - p. 228, ln. 6.

While Michael was being held on the ground by the police, he said to Officer Clark, "They have a gun. They have gun." Trial Tr. p. 180, ln. 16-18.

Brad Bench and his supervisor Paul Newbold interrogated Michael. Officer Bench testified that Michael was calm and collected and told him that Mr. Adams was coming forward toward him, that he repeatedly told Mr. Adams that he had the wrong guy and asked him stop, that Michael originally had the gun under his arm, but then held the gun so Mr. Adams could see it, that Mr. Adams did not stop, and that Michael trained the gun on him and fired. Officer Bench claimed that Michael said that he aimed, as he had been trained in the military, for center mass. Trial Tr. p. 188, ln. 3-18; p. 190, ln. 3 - p. 192, ln. 16.

Officer Bench maintained that Michael told him he had seen no other weapons and that he was not afraid for his life. Officer Bench said that Michael agreed there were other options he could have taken like leaving his brother behind or using Mace, if he'd had Mace with him. Trial Tr. p. 193, ln. 10 - p. 194, ln. 24. However, in his post-conviction petition, Michael alleged there was evidence discovered before trial, but never presented to the jury, that his truck had been tampered with so as to render it inoperable so as to prevent him from driving away from Mr. Adams. R. Vol. I, p. 25-26.

On cross-examination, Officer Bench admitted that Michael had not stated that he aimed

at Mr. Adams. Rather, Michael said, according to the transcript of the recording made of the interrogation, "I wasn't like trained on him." Trial Tr. p. 197, ln. 19-21.

Officer Bench also admitted that he had spent a great deal of the interrogation discussing with Mr. Williams whether he should get an attorney and that Officer Bench did not tell him to consult counsel. Rather, at the end of their discussion, Mr. Williams decided to not have counsel. Trial Tr. p. 199, ln. 10-25.

Officer Bench also admitted that Mr. Williams had told him that he did feel threatened when he heard someone yell to Mr. Adams to get a gun. Trial Tr. p. 201, ln. 20 - p. 202, ln. 2.

In his testimony, Mr. Williams stated that he had told Officer Bench that he was in fear for his life. He testified that he had acted in self-defense. Trial Tr. p. 230, ln. 7-10; p. 234, ln. 9-11.

The state originally charged Mr. Williams with first degree murder and sought the death penalty. That case was ultimately dismissed. CR-2005-0001272.

In its second attempt, the state again charged Mr. Williams with first degree murder, but did not seek the death penalty.

At trial, while self-defense instructions were given, Trial Tr. p. 248, ln. 10-16; p. 252, ln. 14- p. 254, ln. 22, defense counsel did not pursue that defense.

Counsel's opening statement did not mention self-defense. Rather, counsel discussed the facts and concluded:

> One of the things that you have to determine because the charge is first-degree murder, you have to determine if the State proves beyond a reasonable doubt the killing was willful, deliberate, premeditated, and intentional.
>
> I think, ladies and gentlemen of the jury, by the time you hear the evidence, you

will find that the State has not met its burden with regard to first degree murder.

Trial Tr. p. 93, ln. 6-14.

In his closing, the prosecutor spent some time arguing that self-defense did not apply.

Trial Tr. p. 269, ln. 4 - p. 273, ln. 16.

Defense counsel did not rebut that argument, but instead argued for a verdict of manslaughter. She argued:

> One of the State's own witnesses, Mr. Sanchez, puts Mr. Adams clear in the vehicle with Mr. Williams before the shots are fired. He's practically on top of him. If that's not heat of passion and a sudden quarrel, I've never heard of it.
>
> . . .
>
> First-degree murder is a willful, unlawful, deliberate, premeditated killing of a human being. That's not what we have here. We have a situation where a drunk individual's mouth got ahead of him. He picked a fight, and he got the consequences of his actions. Unfortunately, that meant his, his death.

Trial Tr. p. 281, ln. 13-17; p. 283, ln. 13-18.

While counsel did make passing reference to Mr. Williams defending himself, she did not attempt to argue that self-defense applied. She did not set out the law of self-defense; she did not argue that Mr. Williams was resisting an attempt to murder or commit a felony or great bodily injury; she did not argue that the circumstances were sufficient to excite the fears of a reasonable person and that Mr. Williams acted under the influence of such fears alone. Trial Tr. p. 280, ln. 3 - p. 283, ln. 23.

Following these arguments, the jury returned a guilty verdict, as defense counsel had urged, on voluntary manslaughter with a deadly weapon enhancement. Trial Tr. p. 292, ln. 13-22.

Mr. Williams was sentenced to a determinate term of 15 years for voluntary

manslaughter, and a consecutive sentence of 15 years with 10 fixed for the weapons enhancement for a total fixed term of 25 years followed by an indeterminate term of 5 years. Trial Tr. p. 330, ln. 7-15.

A direct appeal was taken raising only the issue of whether the sentence was excessive and relief was denied in an unpublished decision. *State v. Williams,* Docket No. 33019.

Mr. Williams then filed a *pro se* petition for post-conviction relief raising seven issues: 1) prosecutorial misconduct; 2) judicial bias/judicial misconduct; 3) ineffective assistance of counsel; 4) ineffective assistance of counsel on appeal; 5) conflict of interest with trial counsel; 6) jury/juror bias/prejudice; and 7) cumulative errors by counsel and the court. R 8-84.

Counsel then entered the case on Mr. Williams' behalf with private counsel eventually replacing appointed counsel. R 155. However, no amended petition was ever filed. ROA.

The state moved for summary judgment. R 198-203. A hearing was held and the District Court took notice of the record in the underlying case. R 268. Following the submission of briefs, affidavits, and a hearing, the District Court granted summary dismissal of several of the claims. Specifically, the Court dismissed the claims of prosecutorial misconduct, claims relating to pre-trial publicity, claims of judicial misconduct, claims of juror misconduct, and as the Court termed it "insufficient assistance of counsel" except insofar as counsel failed to file a motion to suppress custodial statements. R 354-376.

Following an evidentiary hearing on the remaining claim, the District Court entered an order denying post-conviction relief. R 420-427.

This appeal timely followed. R 428-430.

III. ISSUES PRESENTED ON APPEAL

1. Was summary dismissal inappropriate because counsel's act of abandoning self-defense and thereby conceding guilt of voluntary manslaughter against the repeat and clear direction of Mr. Williams was constitutionally deficient performance subject to a presumption of prejudice?

2. In the alternative, was summary dismissal of the claim that counsel was ineffective in abandoning self-defense erroneous because there was a genuine issue of material fact as to whether counsel's deficient performance was prejudicial under *Strickland*?

3. In the second alternative, was summary dismissal inappropriate because the District Court failed to analyze whether counsel's actions in abandoning self-defense resulted in a denial of fundamental constitutional rights which could not be waived without Mr. Williams' consent?

4. Should this case be remanded for further proceedings because the District Court did not address all the claims in the petition?

IV. ARGUMENT

A. The Claim of Ineffective Assistance of Counsel in Abandoning Self-Defense Raised a Genuine Issue of Material Fact Not Subject to Summary Dismissal.

1. *Relevant Facts*

In his *pro se* petition, Mr. Williams alleged that he was denied the state and federal constitutional rights to effective assistance of counsel. Idaho Constitution, Article 1, § 13, United States Constitution, Amendments 6 and 14. R Vol. I, page 18.

Mr. Williams set out numerous examples of ineffective assistance. R. Vol. I, p. 18-34. And, all are subsumed in the overarching claim of ineffective assistance in failing to adequately

present the defense of self-defense at trial despite Mr. Williams' repeat and clear requests that counsel present self-defense and defend against not only first degree murder but also voluntary manslaughter. R. Vol. I, p. 33-34; Vol. II, p. 305-307. After post-conviction counsel was obtained, the claim was carried forward:

> But, in the instant case, there are so many things which were bypassed and ignored that it is impossible to conclude otherwise [than] that defense counsel abandoned the defense of self-defense and dedicated herself solely to a verdict of not guilty of the first-degree murder charge, contrary to the known and stated wishes of the Petitioner. This is ***not*** trial strategy.

R. Vol. II, page 237 (bold italics original). See also R. Vol. II, pages 295-304.

The District Court agreed that the defense of self-defense had been abandoned. In its opinion, decision, and order on the state's motion for summary judgment, the District Court stated:

> Williams claims that he requested that Campbell present a theory of self-defense. Campbell did not present this theory; instead she appears to have sought to primarily defeat the charges of first and second degree murder, which she did successfully.
>
> Campbell's decision not to focus on the defense of self-defense falls within the area of tactical decisions. [*Giles v. State,* 125 Idaho 921, 924, 977 P.2d 365, 368 (1994).] Additionally, Williams admitted to the police that he was not afraid of Adams. With that admission available to the State, it was reasonable for Campbell not to pursue the affirmative defense. See, however, point 8 below, Motion to exclude Defendant's statement.[2]

R. Vol. II, page 367.

---

[2] The District Court was incorrect that self-defense is an affirmative defense. *See* ICJI 1517 Self-Defense, Comment noting that Idaho statutory and case law no longer place the burden upon a homicide defendant to prove that the defendant's actions were excusable. *See also,* I.C. § 18-4009, Justifiable homicide by any person.

2. *Standard of Review*

Idaho Code Section 19–4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. 19–4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. A claim for post-conviction relief will be subject to summary dismissal if the applicant has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof. *DeRushé v. State,* 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009). Thus, summary dismissal is permissible when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Goodwin,* 138 Idaho at 272, 61 P.3d at 629. Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State,* 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct.App. 1994); *Baruth v. Gardner,* 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct.App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Rhoades,* 148 Idaho at 250, 220 P.3d at 1069; *Ricca v. State,* 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct.App. 1993). In post-conviction actions, the district court, as the trier of fact, is not constrained to draw inferences in favor of the party opposing the motion for summary disposition; rather the district court is free to arrive at the most probable inferences to be drawn from uncontroverted evidence. *Hayes v. State,* 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct.App. 2008).

Wolf v. State, ___ Idaho ___, ___ P.3d ___, 2011 WL 1900460 (Ct.App. 2011).

3. *Argument*

a. *Summary dismissal was inappropriate because counsel's act of abandoning self-defense and thereby conceding guilt of voluntary manslaughter against the repeat and clear direction of Mr. Williams was constitutionally deficient performance subject to a presumption of prejudice.*

The State and Federal Constitutions guarantee the right to effective assistance of counsel.

Idaho Const. Art. 1, § 13; United States Constitution Amendments 6 and 14. *Strickland v. Washington,* 466 U.S. 668, 685, 104 S.Ct. 2052, 2063 (1984); *State v. Owen,* 129 Idaho 920, 930, 935 P.2d 183, 193 (1997). "[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland,* 466 U.S. at 684, 104 S.Ct. at 2063. "[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." *Id.*

Ineffective assistance of counsel claims are generally governed by the two-part test of *Strickland.* A defendant claiming ineffective assistance must show that counsel's representation fell below an objective standard of reasonableness and that any deficiencies in counsel's performance were prejudicial. *Strickland,* 466 U.S. at 688, 690, 692, 104 S.Ct. at 2066-7. However, where there has been an actual breakdown in the adversarial process at trial, prejudice is presumed. *United States v. Cronic,* 466 U.S. 648, 104 S.Ct. 2039 (1984).

> [T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.' *Anders v. California,* 386 U.S. 738, 743 [87 S.Ct. 1396, 1399] (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted-even if defense counsel may have made demonstrable error-the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Cronic, 466 U.S. at 656-57, 104 S.Ct. at 2045-46 (footnotes omitted).

Counsel has the authority to manage the day-to-day conduct of the defense, *New York v. Hill,* 528 U.S. 110, 114-15, 120 S.Ct. 659 (2000); *Taylor v. Illinois,* 484 U.S. 400, 418, 108 S.Ct. 646, 657-8 (1988), including the authority to make tactical decisions. *Strickland,* 466 U.S. at 688-9, 104 S.Ct. at 2065.

"But certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate." *Florida v. Nixon,* 543 U.S. 175, 187, 125 S.Ct. 551, 560 (2004). These include whether to plead guilty, waive a jury, testify, and appeal. *Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 3312 (1983). *See also,* ABA Standards for Criminal Justice 4-5.2 (3d ed. 1993) and Idaho Rules of Professional Conduct 1.2(a). When those decisions are made by counsel without the consent of the defendant, deficient performance exists and is presumed prejudicial. *See Beasley v. State,* 126 Idaho 356, 359-60, 883 P.2d 714, 717-8 (Ct.App. 1994).

A concession of guilt, with certain very narrow exceptions, cannot be made without the consent of the client. "It is deficient performance for an attorney to concede [her] client's guilt without prior consultation with the client, even where the concession relates to one charge out of several, and even where evidence of guilt is strong." *United States v. Thomas,* 417 F.3d 1053, 1059 (2005) (B. Fletcher, concurring).

In *Florida v. Nixon,* Mr. Nixon was charged with first-degree murder, kidnaping, robbery, and arson. Counsel determined that the best strategy was to not contest the evidence in the guilt phase but to focus on the penalty phase in hopes of avoiding the death penalty. Counsel explained this plan to Mr. Nixon, but he was unresponsive. The Florida Supreme Court reversed and remanded for a new trial on the grounds that a concession of guilt at trial requires the defendant's affirmative and explicit acceptance without which counsel's performance is presumptively ineffective. 543 U.S. at 185, 125 S.Ct. at 559. The United States Supreme Court reversed, issuing a narrow holding that in a capital case, when counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is

unresponsive, counsel's strategic choice to not contest guilt, but to focus on the penalty phase, is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy satisfies *Strickland,* then a claim of ineffective assistance of counsel will not stand. 543 U.S. at 192, 125 S.Ct. at 563.

While the Supreme Court did state there was no blanket rule that counsel obtain her client's explicit approval to not contest guilt, the Court carefully narrowed its holding:

> On the record thus far developed, Corin's concession of Nixon's guilt does not rank as a "fail[ure] to function in any meaningful sense as the Government's adversary." [*Cronic,* 466 U.S. at 666, 104 S.Ct. at 2039.] Although such a concession in a run-of-the mine trial might present a closer question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus.

543 U.S. at 190-1, 125 S.Ct. at 562 (footnote omitted).

While the Supreme Court has not yet offered further guidance on the question, it has been thoroughly examined by other courts.

In *United States v. Swanson,* 943 F.2d 1070 (1991) (decided before *Nixon*), in closing argument, defense counsel told the jury that no reasonable doubt existed regarding the only factual issues in dispute. The Ninth Circuit found that this was denial of effective representation justifying a presumption of prejudice per *Cronic.* In making this finding, the Court noted that counsel's concession that there was no reasonable doubt implicated not only the Sixth Amendment right to counsel, but also the Fourteenth Amendment's due process protection against conviction except upon proof beyond a reasonable doubt. Further, the Court noted that in arguing that there could be no doubt about the facts of the case, defense counsel affirmatively aided the prosecutor thereby creating a conflict of interest. The Court stated that "[a]n effective

attorney 'must play the role of an active advocate, rather than a mere friend of the court.'"

Swanson, 943 F.2d at 1075, (quoting *Osborn v. Shillinger,* 861 F.2d 612, 624 (10th Cir. 1988), in turn quoting *Evitts v. Lucey,* 469 U.S. 387, 394, 105 S.Ct. 830, 835 (1985).

> A defense attorney who abandons this duty of loyalty to his client and effectively joins the state in an effort to obtain a conviction or death sentence suffers from an obvious conflict of interest. Such an attorney, like unwanted counsel, "'represents' the defendant only though a tenuous and unacceptable legal fiction." *Faretta v. California,* 422 U.S. 806, 821, 95 S.Ct. 2525, 2534 (1975). In fact, an attorney who is burdened by a conflict between his client's interests and his own sympathies to the prosecution's position is considerably worse than an attorney with loyalty to other defendants, because the interests of the state and the defendant are necessarily in opposition.

Swanson, 943 F.2d at 1075, quoting *Osborn,* 861 F.2d at 629.

Likewise, in *Cooke v. State,* 977 A.2d 803, 829 (Del. 2009) *cert. denied,* 130 S.Ct. 1506, 176 L. Ed. 2d 151 (U.S. 2010), *Cronic's* presumption of prejudice was applied when defense counsel ignored the client's repeated requests to pursue a not guilty verdict and instead sought and presented evidence and argument in support of a guilty but mentally ill verdict. The Court wrote:

> Cooke's overarching strategy was to obtain a verdict of not guilty by presenting evidence that he was factually innocent. Defense counsel had an independent and inconsistent strategy: to obtain a verdict of guilty but mentally ill by conceding Cooke's guilt and introducing evidence of his mental illness during the guilt/innocence phase of the trial. Counsel's override negated Cooke's decisions regarding his constitutional rights, and created a structural defect in the proceedings as a whole.

977 A.2d at 849.

The Delaware Supreme Court found that there had been a two-fold breakdown in the adversarial system of justice: 1) Cooke's attorneys did not assist him with his trial objective of obtaining a not guilty verdict; and 2) in pursuing their own inconsistent objective of proving that

Cook was guilty but mentally ill, defense counsel not only failed to subject the state's case to meaningful adversarial testing, but also undermined the due process requirement that the state prove guilt beyond a reasonable doubt. Thus, the Court held that *Cronic's* presumption of prejudice applied and that even though Cooke's counsel had acted in good faith their actions had so undermined the proper function of the adversarial process that the trial could not be relied upon as having produced a just result and a new trial was granted. 977 A.2d 850.

In this case, Mr. Williams presented evidence that he had repeatedly requested counsel to pursue a complete acquittal because he had acted in self-defense. See Affidavit of Michael Williams, R. Vol. II, page 305-307. I.C. § 18-4009. The District Court found that counsel ignored that request and did not present a self-defense theory. R. Vol. II, page 367. In not presenting self-defense, counsel conceded guilt to voluntary manslaughter. This was deficient performance subject to a presumption of prejudice. *Florida v. Nixon, supra*; *Cronic, supra*; *Thomas, supra*; *Swanson, supra*; *Cooke, supra.* At the very least, the issue of whether counsel was ineffective in conceding guilt to a lesser included charge is a genuine issue of material fact preventing summary judgment for the state. *Goodwin, supra.* In fact, however, summary judgment should have been granted for Mr. Williams on this issue. *Id.*

b. *In the alternative, summary dismissal was inappropriate because abandonment of self-defense raises a genuine issue of material fact as to whether counsel's performance was deficient and prejudicial under Strickland.*

In the alternative, even if this Court should determine that the *Cronic* presumption of prejudice does not apply, summary dismissal was not appropriate because there was a genuine issue of material fact as to whether the failure to contest the manslaughter charge was deficient

performance which prejudiced Mr. Williams. *Strickland, supra; Goodwin, supra.*

As discussed above, the law is clear that counsel was deficient in conceding guilt to the charge of voluntary manslaughter. *Thomas, supra.* Therefore, summary judgment would only have been appropriate if there was no genuine issue of material fact that the concession was prejudicial. *Strickland, supra.*

To demonstrate prejudice under *Strickland,* the petitioner must demonstrate that there is a reasonable probability that counsel's errors affected the outcome of the proceedings. This, Mr. Williams did.

Mr. Williams presented admissible evidence including his own affidavit that he had repeatedly requested Ms. Campbell to present and argue self-defense. R. Vol. II, page 305-307. He presented the affidavit of his brother, Doug. Doug Williams' affidavit stated that Doug had repeatedly contacted defense counsel offering to testify and that his testimony would have included his perceptions that night that both he and Michael were in danger of bodily harm or even death by Messrs. Adams, Sanchez, Ramirez, and Martinez. R. Vol. II, page 326-327. Mr. Williams also included in the post-conviction materials, the toxicology report on Mr. Adams, which found an ethanol level of 249 mg/dL, a level of intoxication that could have induced or magnified aggressive and dangerous behavior by Mr. Adams. R Vol. I, page 57. And, Mr. Williams alleged that he could produce admissible evidence that Ms. Saunders had heard Mr. Adams state that Mr. Williams would be taken care of, that Mr. Williams' truck had been tampered with to prevent him from leaving the parking lot, and that Mr. Adams and his friends had histories of violent attacks on others. R. Vol. I, pages 17, 57-58.

The trial records also included the opening statements and closing arguments of both the

state and defense counsel.

Of particular import to his claim of ineffective assistance of counsel, defense counsel's opening statement, as set out above, conceded manslaughter and urged the jury only to find that Mr. Williams was not guilty of either first or second degree murder. Trial Tr. p. 93, ln. 6-14; p. 281, ln. 13-17; p. 283, ln. 13-18.

In addition, the closing arguments reveal defense counsel's decision to not object to several instances of prosecutorial misconduct, presumably as part of her decision not to raise self-defense.

Prior to trial, the prosecutor had repeatedly and unsuccessfully sought admission of testimony from Mr. Williams' ex-wife that she believed that he had a concealed weapons permit and carried a weapon because he was hoping that someday someone would present a danger to either himself or someone else, including their children, so that he could shoot someone. See, Trial Tr. p. 1, ln. 20 - p. 23, ln. 11. Despite the inadmissibility of this evidence, in closing, the prosecutor argued that Mr. Williams had a concealed weapons permit and a gun because he had long hoped that he would get the opportunity to shoot someone.

> . . . Because Mr. Williams was waiting for a confrontation. He had his gun there. He, he was waiting for a confrontation where he could shoot somebody if he got the opportunity.

Trial Tr. p. 264, ln. 4-7.

> He carries a loaded firearm around in his vehicle. Why? There wasn't any – he didn't testify to any specific threat from anyone. It's because he's hoping that just somebody is going to mess with him, and Chris Adams was just that unfortunate person who did it. He got the result of Mr. Williams's practice, just like he practiced, center of mass.

Trial Tr. p. 266, ln. 10-16.[3]

> There were no weapons found there. So why pull it out? Because this was the plan that if anybody messed with him, they were going to get it.

Trial Tr. p. 268, ln. 13-14.

> . . . It's because he had another agenda, ladies and gentlemen. He had a loaded gun, and he's licensed to use it. So he did. And Chris Adams is the one that paid the price for that.

Trial Tr. p. 272, ln. 1-5.

And, in rebuttal, the prosecutor argued,

> He pulled that gun, and he was a hunter. He stayed concealed like a hunter does. He kept that gun concealed, and he sucked that big game in. He let him walk all the way up to him until he was, he was a guaranteed kill; and then he shot Chris Adams three times, made sure he was going to die because he messed with the wrong person.

Trial Tr. p. 286, ln. 14-20.

Even though the evidence to support this argument was found inadmissible at trial, defense counsel did not object. This failure is consistent with counsel's decision to forgo self-defense. The prosecutor's argument, unobjected to and unrebutted, virtually guaranteed a conviction for voluntary manslaughter because it absolutely undercut any theory that Mr. Williams acted in self-defense, as I.C. § 18-4010 requires that the defendant acted solely under the influence of a reasonable fear of the commission of certain offenses.

The District Court noted in its decision granting summary judgment, that Mr. Williams had admitted to the police that he was not afraid of Mr. Adams, thus, in the Court's view

---

[3] As set out above, Officer Bench admitted on cross-examination that Mr. Williams did not tell him that he aimed at center mass. So, not only did trial counsel fail to object to prosecutorial misconduct in arguing evidence not admitted at trial, she also failed to object to arguing evidence completely impeached at trial.

rendering reasonable the decision to forego self-defense. R. Vol. II, page 367. However, if counsel had not determined to abandon self-defense and thereby concede guilt to voluntary manslaughter, this "admission" could have been successfully nullified for at least two reasons. First, because, as will be discussed below, the statement was never made and Officer Bench's testimony claiming it was made was easily disproved. And, second because the statement is not legally relevant, because the fear of the aggressor is not required. I.C. § 18-4010 requires a reasonable "fear" that the person killed is going to commit murder or another felony. It does not require that the defendant be personally afraid of the person killed. Otherwise, the law of self-defense would be nonsensical insofar as only those people who personally feared harm or death could claim the defense, while those who did not feel personal fear either because they were trained to defend themselves and confident in their own abilities or because through religious or other training they did not fear death could not claim the defense.

In the interview, wherein this admission of lack of fear supposedly occurred, Mr. Williams told Officers Bench and Newbold that he believed Mr. Adams had a gun in his pocket.

> Mr. Williams: . . . I so I just um, pulled my weapon and I said man, look, I said you got the wrong guy. I said please stop and um, one of his buddies behind said he's got a gun, get yours. . . . he starts rattling in his pocket. And I was like whoa, so I re-aimed my gun again and I said please stop and I know the other guy just ran for their cars and stuff. . . . I mean obviously, I heard the word gun over in the car. He put his hand in his pocket, I have no idea if it's get your gun out of your pocket or if they're getting another one. . . .
>
> . . .
>
> Officer Bench: At one point, at one point you said that you never perceived a threat?
>
> Mr. Williams: Ya [I did], the hand in the pocket.
>
> Officer Bench: Okay, at what point did you perceive it?

. . .

Mr. Williams: And I told the officers when they got there, when I was on the ground out there, please there's, there's a weapon over there, . . .

Officer Bench: Like I just asked you never, really at no point you felt that your life was in danger?

Mr. Williams: Well, [that's] why I did what I did,

. . .

Mr. Williams: Ya I heard you. His hand was in his pocket, not like in a casual way. His hand was in his pocket [transcript blank] No, I just [transcript blank] I heard those guy say get your gun, I thought he was pulling a gun. I wasn't [transcript blank] but

. . .

Officer Newbold: So you felt you were threatened after they made that comment [others telling Mr. Adams to get a gun]?

Mr. Williams: Sure, ya.

. . .

Mr. Williams: . . . Both hands are in his pocket though? He was doing this, and when I said you know please stop they said get your gun, he said I got something for you and he kept making that forward motion to me, and that's why I [transcript blank]

Post-Conviction Case, State's Exhibit A, Evidentiary Hearing, Admitted 6/21/10, Certification of Exhibits, March 24, 2011.

Had counsel not abandoned the defense of self-defense, she could have effectively impeached Officer Bench's false claim that Mr. Williams had stated to him that he was not in fear for his life when he fired at Mr. Adams. Trial Tr. p. 193, ln. 8-18. Counsel could also have impeached Officer Bench's false claim that Mr. Williams told him that he had hidden the gun

under his arm when he first removed it from the truck console. See Tr. Trial, p. 190, ln. 3 - p. 192, ln. 16 and State's Ex. A. Counsel did get Officer Bench to concede that he had misrepresented Mr. Williams as having stated that he had trained his gun center mass on Mr. Adams, Tr. Trial, p. 197, ln. 16-21, and that it was Officer Bench's "verbiage" that Mr. Williams told him that Mr. Adams was "calling him on." Tr. Trial, p. 199, ln. 119 - p. 120, ln. 201. However, she did not impeach Officer Bench's testimony that Mr. Williams had admitted he did not feel threatened by Mr. Adams. This, despite the fact that the transcript of the interview demonstrates that Mr. Williams repeatedly told Officers Bench and Newbold that he believed Mr. Adams had a gun and he believed that gun represented a threat. This was exactly the "fear" required by I.C. § 18-4010, and had counsel not abandoned self-defense, she could have effectively argued that the state could not carry its burden of proving that Mr. Williams was not acting in self-defense.

Likewise, had counsel not abandoned self-defense, she could have made an objection to the prosecutorial misconduct in presenting the apparently false testimony of Officer Bench. This testimony included the testimony that Mr. Williams stated to him he was not in fear for his life, that he had aimed center mass, that he hid the gun under his arm, and that he believed Mr. Adams was calling him on. "A conviction obtained by the knowing use of perjured testimony is fundamentally unfair" as a violation of due process. *United States v. Agurs,* 427 U.S. 97, 103, 96 S.Ct. 2392, 2397 (1976), as quoted in *State v. Ellington,* 151 Idaho 53, 76, 253 P.3d 727, 750 (2011). It is, in the words of the Supreme Court, "abhorrent" that a man could be convicted and sentenced based upon false testimony of an officer of the state of Idaho. *Id.*

In this case, as in *Ellington,* an officer of the state of Idaho gave false testimony. Had

trial counsel not already determined to abandon self-defense, she would have objected to the prosecutor's solicitation and presentation of Officer Bench's apparently false testimony and such an objection would likely have been sustained. Indeed, counsel could have even made a mistrial motion based upon the prosecutorial misconduct. ICR 29.1. *See State v. Martinez,* 136 Idaho 521, 37 P.3d 18 (Ct. App. 2001) (Error in denying motion for mistrial where three instances of prosecutorial misconduct had a continuing impact on the trial and were not harmless).

Additionally, had counsel not abandoned self-defense, she could have presented evidence of Mr. Adams' and his companions' histories of and reputations for violence. *See* IRE 404(a)(2) (Evidence of a pertinent trait of character of the victim of the crime offered by an accused is admissible) and ICJI 1520 Self-Defense – Victim's Reputation (Evidence concerning the reputation of the victim for being quarrelsome, violent and dangerous may be considered for the purpose of determining whether the victim was the aggressor). This also would have gone to support an argument that the state could not carry its burden of proving beyond a reasonable doubt that Mr. Williams was not acting in self-defense.

Likewise, had counsel not abandoned self-defense, she could have presented Mr. Adams' toxicology report as additional evidence to explain why he was aggressive and did not respond to repeated requests to stop advancing on Mr. Williams.

Had defense counsel presented the evidence of self-defense including Doug Williams' testimony, had she moved for a mistrial based upon the solicitation of Officer Bench's false testimony, had she impeached Officer Bench and presented evidence to the jury that Mr. Williams had repeatedly told the police that night he believed Mr. Adams had a gun, had she offered evidence of the history of and reputation for violence of Mr. Adams and his companions,

and had she objected to and moved to strike the improper statements made by the state in closing, there is a reasonable probability that the jury would not have convicted Mr. Williams. Indeed, the record on post-conviction included the trial record, which includes a jury inquiry: "May we ask the size of Christopher Adams. Height, weight and the clothing that he was wearing at the time?" R. Trial page 134. This inquiry demonstrates the jury was concerned about whether the state could carry its burden of proof that Mr. Williams had not acted in self-defense.

Further, even if each specific failing of counsel was not prejudicial by itself, the cumulative failings raised a genuine issue of material fact as to whether Mr. Williams was denied effective assistance of counsel. *State v. Larsen,* 123 Idaho 456, 459, 849 P.2d 129, 132 (Ct.App. 1993), "Under this doctrine [of cumulative error], the 'accumulation of irregularities, each of which in itself might be harmless, may in the aggregate show the absence of a fair trial.'" quoting *State v. Campbell,* 104 Idaho 705, 719, 662 P.2d 1149, 1163 (Ct.App. 1983).

The petition did raise a genuine issue of material fact under *Strickland* that Mr. Williams was denied his state and federal constitutional rights to effective assistance of counsel. Therefore, summary dismissal of this claim was improper. *Goodwin, supra.*

> c. *In the second alternative, summary dismissal was inappropriate because the district court failed to analyze whether counsel's actions resulted in a denial of fundamental constitutional rights which could not be waived without Mr. Williams' consent.*

The abandonment of self-defense was not only ineffective assistance of counsel, it also denied Mr. Williams his state and federal constitutional rights to jury trial and right to hold the government to its burden of proof as well as his right to present evidence in his own defense. United States Const. Amends. 5, 6 and 14; Idaho Const. Art. I, §§ 7 and 13. *Cooke v. State,* 977

A.2d at 850. Because the question of the denial of fundamental constitutional rights raised a genuine issue of material fact which was not considered by the District Court, summary dismissal was inappropriate. *DeRushé v. State,* 146 Idaho 599, 600, 603-4, 200 P.3d 1148, 1149, 1152-3 (2009).

In *DeRushé,* Mr. DeRushé filed a petition for post-conviction relief alleging ineffective assistance of counsel in, among other things, denying him the right to testify on his own behalf. The Supreme Court held that the district court had erred in summarily dismissing the claim because it analyzed the claim under the law applicable to ineffective assistance of counsel instead of the denial of the constitutional right to testify.

Barcella v. State, 148 Idaho 469, 475, 224 P.3d 536, 542 (Ct.App. 2009), clarified the scope of the *DeRushé* holding. In *Barcella,* the Court of Appeals noted that the Supreme Court was concerned in *DeRushé* with the District Court's misapprehension of the nature of the allegations in Mr. DeRushé's petition; the Supreme Court specifically stated in *DeRushé* that Mr. DeRushé had alleged errors by counsel. *DeRushé,* 146 Idaho at 600, 200 P.3d at 1149. The Court of Appeals further noted that the Supreme Courts' concern also lay in the District Court's erroneous conclusion that counsel had the right to decide whether Mr. DeRushé could testify and in the fact that the case was dismissed on summary judgment rather than following an evidentiary hearing. 148 Idaho at 543, 224 P.3d at 536.

Reading *DeRushé* and *Barcella* together, the lesson is that when a post-conviction petitioner alleges errors by counsel in denying the petitioner fundamental constitutional rights, such as the right to testify, which counsel cannot waive on behalf of the defendant, the District Court must analyze the question, upon a motion for summary dismissal, not merely by the

Strickland standard, but also by the standard of whether the fundamental constitutional right was improperly denied.

In this case, in abandoning self-defense against the specific and expressed instruction of Mr. Williams, counsel denied him several fundamental rights which are personal to him and could not be waived without his consent, including the right to a jury trial and the right to plead not guilty and put the state to its proof. Further, she waived his right to due process. However, the District Court, like the District Court in *DeRushé* held that the decision to not contest every element of the case and to not present self-defense, thereby waiving the right to a jury trial and the right to not plead guilty and put the state to its proof, lay with counsel, not Mr. Williams.

Just as in *DeRushé*, this was an erroneous decision by the District Court as to the decisions counsel may make and those personal to the client. And, just as in *DeRushé*, the claims regarding the abrogation of personal fundamental rights were analyzed only under ineffective assistance of counsel law and were dismissed in summary judgment.

As in *DeRushé*, this was improper, and the order of summary dismissal should be reversed and the case remanded for an evidentiary hearing on the question of whether Mr. Williams' personal fundamental state and federal constitutional rights were denied by the actions of counsel, analyzed, not through the lens of ineffective assistance of counsel, but as straight-up constitutional deprivation claims.

d. Claims raised but never decided by the district court should be remanded for further proceedings and decision.

Mr. Williams raised several claims in his post-conviction petition that were never addressed by the District Court in either the order on summary judgment or the order following

the limited evidentiary hearing. R Vol. II, p. 354-376, 420-427. These include:

1) whether post-conviction relief should be granted because the state withheld exculpatory evidence including a ballistics report and exculpatory witness statements, *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963), R. Vol. I, p. 3-13;

2) whether counsel was ineffective in failing to conduct pretrial investigation as to blood spatter and gunpowder residue evidence, R. Vol. I, pages 22-24;

3) whether counsel was ineffective in failing to object to the break in the chain of custody of the truck impounded by the police, R. Vol. I, p. 20-21;

4) whether counsel was ineffective in not moving for a mistrial at several different points throughout the proceedings, R. Vol. I, p. 21-22;

5) whether counsel was ineffective in failing to investigate and present evidence that Mr. Williams' truck had been tampered with prior to the shooting so as to render it inoperable, R. Vol. I, p. 25-26;

6) whether counsel was ineffective in failing to object to inaccurate information in the PSI, R. Vol. I, p. 105-106;

Upon remand, the District Court should be ordered to address these claims. *See, Sun Valley Shopping Ctr., Inc. v. Idaho Power Co.,* 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991), adopting a three part test for determining whether a court has abused its discretion, including whether the court correctly perceived that the issue was one of discretion. In failing to rule on Mr. Williams' claims, the District Court failed to perceive that the claims were subject to its discretion and thereby abused its discretion. *Id.*

III. CONCLUSION

The District Court erred in summarily dismissing Mr. Williams' claim that counsel was ineffective in abandoning the theory of self-defense. This abandonment was deficient performance which is presumptively prejudicial. And, even if this Court is not inclined to find a presumption of prejudice, the deficiency was prejudicial under *Strickland.* In either event, Mr. Williams' petition did raise a genuine issue of material fact and should not have been summarily dismissed.

Moreover, summary dismissal was inappropriate because the District Court failed to analyze whether counsel's actions resulted in the denial of fundamental constitutional rights which could not be waived without Mr. Williams' consent.

And, lastly, summary dismissal was inappropriate because the District Court failed to address several of the claims made in the petition for post-conviction relief.

Mr. Williams asks that the order summarily dismissing his petition be vacated and that this Court either grant summary relief in his favor under a presumption of prejudice standard or remand for further proceedings in the District Court.

Respectfully submitted this 21st day of October, 2011.

Deborah Whipple
Attorney for Michael Williams

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 24th day of October, 2011, caused two true and correct copies of the foregoing document to be placed in the United States mail, postage prepaid, addressed to:

Idaho Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Deborah Whipple