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## Byington v. State Respondent's Brief Dckt. 38995

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

MICHAEL BYINGTON,	)	
	)	
Petitioner-Appellant,	)	NO. 38995
	)	
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE RONALD J. WILPER  
District Judge

LAWRENCE G. WASDEN  
Attorney General  
State of Idaho

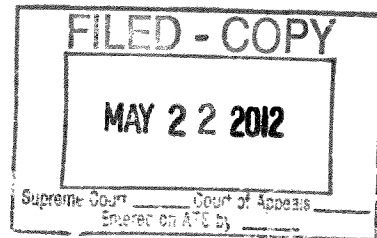
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## STATEMENT OF THE CASE

### Nature Of The Case

Michael Shane Byington appeals from the dismissal of his petition for post-conviction relief following an evidentiary hearing.

### Statement Of Facts And Course Of The Underlying Proceedings

The Idaho Court of Appeals described the facts and the proceedings in Byington's underlying criminal case and appeal as follows:

On New Year's Eve 2007, there was a party held at a residence shared by Byington, his girlfriend, Crystal Lundberg, and Lundberg's daughter, C.L. At the party Lundberg got into a physical fight with Byington's niece. Lundberg and C.L. left the residence and stayed elsewhere that night. Lundberg apparently was upset with Byington for not intervening in the fight and the next day she and C.L. went back to pack up their possessions. Corey Richardson, C.L.'s cousin, learned of the altercation and that Lundberg and C.L. were at the Byington residence and went to the home to retrieve C.L. from a place and situation he considered not safe. Byington let Richardson into the residence and words were exchanged between the men in the immediate presence of Lundgren [sic] and C.L. At some point, Byington grabbed a shotgun, either pointed it at or displayed it to Richardson, and told him to get out of the house. Richardson and C.L. left and Richardson called the police. Both Richardson and C.L. filled out written police statements. Richardson's statement said that during the confrontation Byington became angry and pointed the shotgun at him. C.L.'s statement said that Byington "pointed a gun at my cousin Cory Richardson only because he asked what happened last night and Mike said a fight said [sic] get out of my house while pointing the gun at my cousin Cory."

Byington was charged with aggravated assault by use of a deadly weapon. Idaho Code §§ 18-901, -905(a). At trial he contended that he acted in justifiable self-defense out of fear of physical assault by Richardson. Lundgren [sic] testified in Byington's defense but C.L., although she attended the trial and was listed as a defense witness, did not. The jury returned a verdict of guilty.

Byington hired a new attorney and filed a motion for a new trial based upon newly discovered evidence. His evidence consisted of C.L.'s affidavit in which she stated that during the confrontation Richardson was angry, yelling and throwing his hands about while stepping back and forth towards Byington, that Byington did not point the gun at Richardson but only held it to his chest, that she felt pressured and intimidated by Richardson and her father's family to back up Richardson's statement to the contrary, and that she did not tell Byington's trial attorneys about these things. At the hearing on Byington's motion for a new trial, however, C.L. testified differently from her affidavit on one point, stating that she told Byington's trial attorneys that, contrary to her police statement, Byington did not point the gun at Richardson. Her testimony is ambiguous as to whether she gave this information to the attorneys before or after Byington's trial. The district court denied the motion for a new trial on multiple grounds. Byington appeal[ed].

State v. Byington, Docket No. 35697, 2009 Unpublished Opinion No. 616, pp.1-2 (Idaho App., September 18, 2009).

Byington argued on appeal that the district court erred in denying his motion for a new trial based on newly discovered evidence in the form of an affidavit of C.L. Id. at p.2. The Idaho Court of Appeals affirmed Byington's judgment of conviction finding he "did not establish that he could not have discovered the matters presented in C.L.'s affidavit and testimony by the exercise of diligence prior to his trial." Id. at pp.2-3.

#### Statement Of The Facts And Course Of Post-Conviction Proceedings

Byington filed a timely petition for post-conviction relief alleging 10 separate instances of ineffective assistance of counsel. (R., pp.4-11.) Byington claimed counsel was ineffective because his trial counsel quit seven days before the jury trial; substitute trial counsel failed to conduct any independent

investigation and instead relied on previous counsel's preparation; counsel "ignored [Byington] pointing out that a jury panel member was a police officer who was under the misunderstanding that [he] had previously had an affair with his wife;" said "police officer ended up on the jury panel and during the trial made a face at Byington;" counsel at trial "failed to call an eyewitness;" counsel at trial "failed to object to the subject weapon being referred to as a 'sawed-off shotgun' when the subject shotgun was as shipped from the factory;" a police officer lied in response to a question on direct concerning the nature of Byington's weapon and counsel did not object to the response by the officer nor object to a lack of foundation "that the subject shotgun was loaded or had a shell in the chamber at the time of the confrontation that lead [sic] to the charges in this matter;" and the officer who allegedly lied "was subsequently arrested, charged and convicted of molesting children." (R., p.5.) The state filed an answer requesting the court dismiss Byington's petition for post-conviction relief for failure to allege sufficient facts that would warrant a conclusion that trial counsel was deficient or that any deficiency prejudiced Byington. (R., pp.27-31.) The court scheduled an evidentiary hearing on Byington's petition for post-conviction relief. (R., pp.34-35.)

At the hearing Byington himself, his girlfriend, and one of the members of his trial team testified. (See generally Tr.<sup>1</sup>, pp.9-77.) During the evidentiary hearing, counsel for Byington asked the court to consider a portion of an audio

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<sup>1</sup> There are two transcripts on appeal: a jury trial transcript and the transcript from the evidentiary hearing. Because only the latter is cited to in this brief, it will be referred to simply as "Tr."



recording of Byington's arrest to demonstrate Byington had not given law enforcement permission to enter his home to retrieve the gun used in the aggravated assault, asserting had trial counsel reviewed it, they would have realized the officer's actions violated Byington's Fourth Amendment rights. (Tr., p.56, L.18 – p.59, L.1.) The state clearly objected to Byington's attempt to try an issue not raised by his petition: "[T]he premise that counsel should have done a motion to suppress is not one of the allegations in the petition for post-conviction relief. It's something that we could have addressed had it been in there." (Tr., p.59, Ls.16-20.) The court agreed that Byington's petition contained no allegation of ineffective assistance of counsel for failure to file a motion to suppress. (Tr., p.60, Ls.10-17.) Nevertheless, it admitted the audio and agreed to listen to it over the state's objection to its being outside the scope of Byington's petition. (Tr., p.85, L.8 – p.87, L.1.) The court reserved ruling on the new issue Byington attempted to raise during the evidentiary hearing:

THE COURT:       [...]

                  And it's for that reason, [counsel for the state], that I'm sort of giving you a heads up that I may request some additional argument or so forth from the parties. Because I think we all agree, this was sort of news to all of us.

MR. ROCKSTAHL [Byington's counsel]: It was.

THE COURT: It really didn't look like a negligent failure to file a motion to suppress at the beginning, coming in today.

                  So let me just go ahead and gather that information up. And then I'll – you'll either get a decision from me or an order for some new material. Okay?

(Tr., p.87, Ls.7-19.)

After the hearing, the court ordered the parties to submit additional briefing on the question of whether the unpled allegation of ineffective assistance of counsel for failure to file a motion to suppress could be considered by the court. (R., pp.41-43.) Byington complied with the court's request for additional briefing (R., pp.45-55) and, without permission of the court, also filed a "Supplemental Petition for Post Conviction Relief" to "include the recently discovered issue regarding the violation of his Miranda rights, illegal warrantless search and use of evidence and admissions illegally acquired" (R., p.56). The state filed a memorandum in support of its objection to the new claim not raised in the petition. (R., pp.59-64.)

The court dismissed Byington's petition for post-conviction relief, finding:

The Petitioner attempted to and in fact was allowed by the Court to introduce evidence of an alleged illegal custodial interrogation and subsequent search. These matters were not raised in the original Petition for Post Conviction Relief. Therefore, the Court now rules that those claims were waived and will not be considered.

On the merits of the matters raised in the Petition for Post Conviction Relief, the Court finds that the Petitioner has failed to carry his burden of persuading the Court by a preponderance of the evidence that the allegations are true. Therefore, the Petition for Post Conviction Relief is dismissed.

(R., p.65.)

Byington timely appeals. (R., pp.69-71.)

## ISSUE

Byington states the issue on appeal as:

Did the district court err when it found Mr. Byington's suppression related claim of ineffective assistance of counsel to be waived because it was not in his original petition?

(Appellant's brief, p.3.)

The state rephrases the issue on appeal as:

Has Byington failed to establish the district court erred in failing to allow an amendment to his petition for post-conviction relief to add an additional claim of ineffective assistance of counsel on the day of the evidentiary hearing?

## ARGUMENT

### Byington Has Failed To Establish The District Court Erred In Failing To Allow An Amendment To His Petition For Post-Conviction Relief For An Issue First Raised During The Evidentiary Hearing

#### A. Introduction

The sole issue raised on this appeal involves the propriety of the district court's order dismissing Byington's unpled claim of ineffective assistance of counsel for failure to file a motion to suppress at trial. Byington argues the district court erred as a matter of law by ruling "that by not raising the suppression motion claim in his original post-conviction petition [Byington] waived the claim." (Appellant brief, p.4.) Byington's argument fails.

#### B. Standard Of Review

A trial court's decision whether to grant or deny a motion to amend the pleadings to conform to the evidence is reviewed for an abuse of discretion. Sweitzer v. Dean, 118 Idaho 568, 574-75, 798 P.2d 27, 33-34 (1990); Obray v. Mitchell, 98 Idaho 533, 567 P.2d 1284 (1997); Cameron Sales, Inc. v. Klemish, 93 Idaho 451, 463 P.2d 287 (1970).

#### C. Byington Has Failed To Establish The District Court Erred When It Failed To Allow An Amendment To His Petition For Post-Conviction Relief

Byington acknowledges the allegation of ineffective assistance of counsel for failure to file a motion to suppress "was not raised in the initial petition for post-conviction relief." (Appellant's brief, p.1.) However, he appears to claim that because "he had presented evidence concerning a new claim, with the permission of the district court" and subsequently filed a supplemental petition for

post-conviction relief adding the new claim, the district court erred in failing to allow the amendment to his petition and in dismissing his petition for post-conviction relief in its entirety. (Appellant's brief, p.6.) Correct application of the law shows Byington is incorrect.

An application for post-conviction relief initiates a proceeding that is civil in nature. Bearshield v. State, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); Hassett v. State, 127 Idaho 313, 315, 900 P.2d 221, 223 (Ct. App. 1995). All grounds for relief, and the facts in support thereof, must be specifically set forth in the original, supplemental, or amended application. I.C. § 19-4908. Although the trial court “may make appropriate orders for amendment of the application,” I.C. § 19-4906, such amendments are governed by the Idaho Rules of Civil Procedure. Monahan v. State, 145 Idaho 872, 875, 187 P.3d 1247, 1250 (Ct. App. 2008); see also Dunlap v. State, 141 Idaho 50, 57, 106 P.3d 376, 383 (2004); Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); I.C.R. 57(b). Specifically, where the petitioner moves to amend the application to conform to the evidence presented at trial, I.R.C.P. 15(b) provides:

When issues not raised by the pleading are tried by express or implied consent of the parties, they shall be treated as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The

court may grant a continuance to enable the objecting party to meet such evidence.

In support of his position, Byington points to the fact he presented evidence supporting his new claim “with the permission of the district court.” (Appellant’s brief, p.6.) “Implied consent to the trial of an unpleaded issue is not established merely because evidence relevant to that issue was introduced without objection.” Monahan, 145 Idaho at 876, 187 P.3d at 1250 (citing M.K. Transport, Inc. v. Grover, 101 Idaho 345, 349, 612 P.2d 1192, 1196 (1980)). “The trial court has the discretion to determine whether the parties have consented to trial of the unpled issue.” Monahan, 145 Idaho at 875, 187 P.3d at 1250. Here, although the district court did agree to listen to the proffered 17 minutes of a police officer’s audio outside of court, such concession by the court was made over the objection of the state: “And just so that we’re clear for the record, I’m stipulating to the admission of the audio, but I’m not waiving my objection of being outside the scope of the petition.” (Tr., p.86, L.22 – p.87, L.1.)

Although Byington asserts “[t]he State also provided argument disputing the merits of the new claim” (Appellant’s brief, p.2, n.3), such “arguments” by the state were made in conjunction with and subsequent to objecting to the issue being tried when not raised in Byington’s petition for post-conviction relief: “the premise that counsel should have done a motion to suppress is not one of the allegations in the petition for post-conviction relief. It’s something that we could have addressed had it been in there” (Tr., p.59, Ls.16-20). The district court recognized failure to file a motion to suppress had not been raised as one of the 10 claims of ineffective assistance of counsel asserted in Byington’s petition and

was only recognized by the court as a potential issue once Byington tried to admit the audio in support of his argument over the state's objection:

Well, Counsel, [counsel for Byington], frankly, in reading the petition for post-conviction relief, I have the same concern expressed by counsel for the respondent here.

And that is that in reading the petition for post-conviction relief, there is not a specific contention that trial counsel, whether [initial counsel] or his new attorneys ... , failed to provide effective assistance of counsel by neglecting to file a motion to suppress the shotgun that was apparently found during a warrantless search.

(Tr., p.60, Ls.6-17.) Because it is clear from the record the issue was not tried by the express or implied consent of the parties, in order to amend his petition to include the new issue, Byington required the permission of the court. I.R.C.P. 15.

At the conclusion of the evidentiary hearing, the court took the matter under advisement and later ordered the parties to provide supplemental briefing "on the issue that had not been previously raised." (R., pp.40-43.) It was only then that Byington filed a "Supplemental Petition for Post Conviction Relief" asserting the newly raised claim. (R., pp.56-58.) The state argued Byington had waived the claim as it was clear he had or should have had knowledge of it at the time the petition was filed. (R., pp.60-61.) The court denied Byington's petition for post-conviction relief finding, as relating to the motion to suppress claim:

The Petitioner attempted to and in fact was allowed by the Court to introduce evidence of an alleged illegal custodial interrogation and subsequent search. These matters were not raised in the original Petition for Post Conviction Relief. Therefore, the Court now rules that those claims were waived and will not be considered.

(R., p.65.)

In Monahan v. State, testimony was elicited by post-conviction counsel at an evidentiary hearing regarding Monahan's expression to trial counsel of his desire to withdraw his guilty plea. 145 Idaho at 874, 187 P.3d at 1249. The state objected on the basis that the issue had not been not raised as one of the 17 claims of ineffective assistance of counsel alleged in Monahan's petition for post-conviction relief. Id. The district court at evidentiary hearing "expressly ruled that the testimony was not admissible as to any allegation of ineffective assistance with regard to an effort to withdraw the guilty plea." 145 Idaho at 876, 187 P.3d at 1251. The Court of Appeals, in finding the "state did not impliedly consent to trying the unpled theory and that the district court specifically ruled that the issue could not be raised," held "[s]imply because the testimony was admitted relating to whether Monahan was competent to plead guilty does not demonstrate the parties consented to try any other issue." Id.

Here, the state maintained its objection to Byington's claim at evidentiary hearing counsel was ineffective for failing to file a motion to suppress because it had not been raised in his petition for post-conviction relief. Byington attempted to admit a 17-minute audio in support of this new contention, over the objection of the state as to its relevance to pled claims. The state ultimately stipulated to the authenticity of the audio in the face of foundational concerns, but maintained its objection that the audio itself was irrelevant as outside the scope of the petition. (Tr., p.83, L.16 – p.87, L.1.) The district court recognized the issue was not included in Byington's petition for post-conviction relief and was going to



“gather ... information up” before making a ruling on the unpled issue. (Tr., p.87, Ls. 2-19.)

The court ultimately ruled the matters not raised in Byington’s petition were waived and would not be considered. (R., p.65.) Because the state did not expressly or implicitly consent to trying Byington’s unpled claim of ineffective assistance of counsel for failure to file a motion to suppress and the district court never permitted the amendment of Byington’s pleading to include this new claim, the district court correctly dismissed Byington’s petition for post-conviction relief.

While amendments to pleadings should be liberally granted when justice so requires, a trial court has broad discretion to deny a request where there is “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.” Foman v. Davis, 371 U.S. 178, 182 (1962). Thus, for example, a trial court properly refuses permission to amend a civil complaint when the record contains no allegations that, if proven, would entitle the party to the relief claimed. Bissett v. State, 111 Idaho 865, 869, 727 P.2d 1293, 1297 (Ct. App. 1986) (citation omitted). I.R.C.P. 15 allows for the amendment “once as a matter of course” any time before a response is filed and “the action has not been placed upon the trial calendar.” Because Byington’s case was in the middle of an evidentiary hearing on his petition for post-conviction relief before the new issue was raised, Byington needed “leave of court or [ ] written consent of the [state]” to amend his petition. I.R.C.P. 15 (a). He had neither. The state made

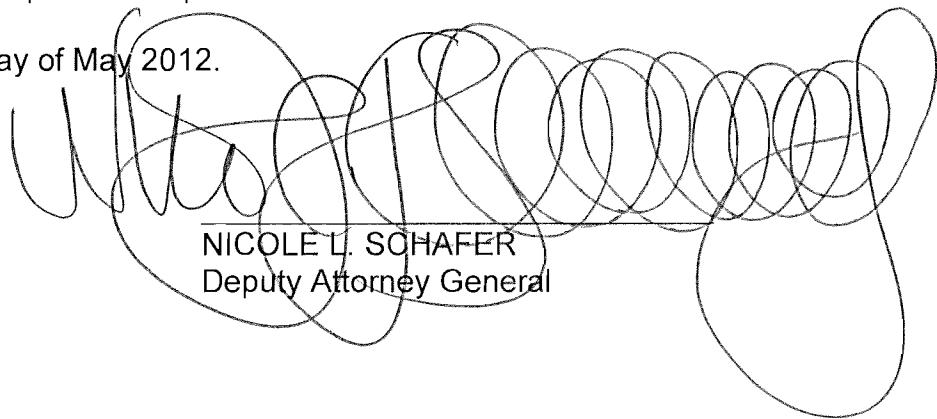
its objection to the petition repeatedly known. The district court reserved ruling on the newly raised issue pending review of all of the evidence presented at the evidentiary hearing while noting the success of the unpled issue was not guaranteed even if allowed to be included in the original petition for post-conviction relief: “[w]ether or not that motion would have been granted and the shotgun suppressed may or may not carry the day.” (Tr., p.60, Ls.18-20.) The district court was not required to provide leave to amend a post-conviction petition already consisting of 10 separate claims when introduced in the middle of evidentiary hearing where there was no reason given for the failure to include the allegation in the original petition and no showing that Byington would be entitled to the relief sought with the amendment. Byington has failed to show error in the district court’s denial of his attempt to amend his petition and the subsequent dismissal of his petition for post-conviction relief.

Byington argues the district court improperly denied his claim for ineffective assistance of counsel for failure to file a motion to suppress on the incorrect theory that this was an impermissible successive petition for post-conviction relief. As discussed above, the district court’s decision was consistent with the requirements of I.R.C.P. 15 and I.C. § 19-4908 and, as such, should be affirmed by this Court. See, e.g., McKinney v. State, 133 Idaho 695, 700, 992 P.2d 144, 149 (1999); State v. Avelar, 129 Idaho 700, 704, 931 P.2d 1218, 1222 (1997) (where the lower court reaches the correct result by a different theory, the appellate court will affirm the order on the correct theory).

CONCLUSION

The state respectfully requests that this Court affirm the district court's order dismissing Byington's petition for post-conviction relief.

DATED this 22<sup>nd</sup> day of May 2012.



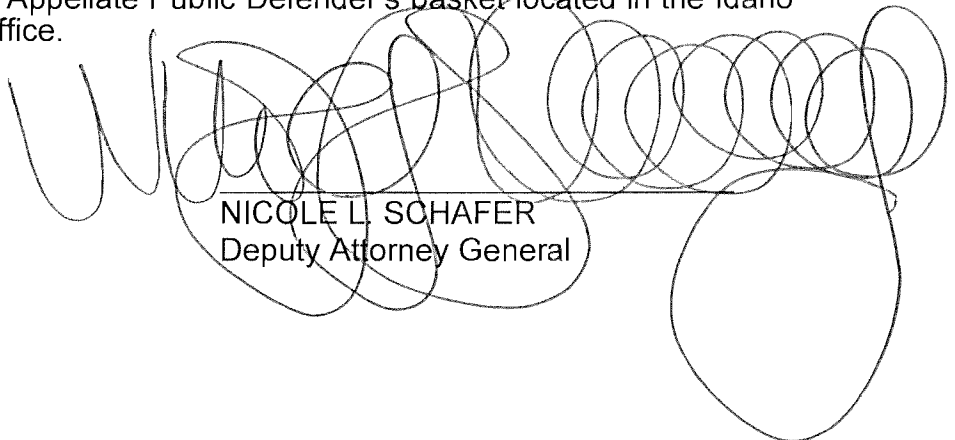
NICOLE L. SCHAFER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 22<sup>nd</sup> day of May, 2012, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

SPENCER J. HAHN  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

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



NICOLE L. SCHAFER  
Deputy Attorney General

NLS/mg