4-24-2012

Barcella v. State Appellant's Brief Dckt. 39520

IN THE SUPREME COURT OF THE STATE OF IDAHO

GERALD A. BARCELLA,

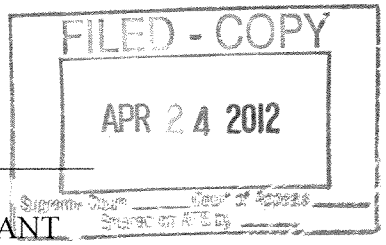
Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent-Respondent.

S. Ct. No. 39520-2012



OPENING BRIEF OF APPELLANT

Appeal from the District Court of the First
Judicial District of the State of Idaho
In and For the County of Kootenai

HONORABLE JOHN PATRICK LUSTER
District Judge

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TABLE OF CONTENTS

I. TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

OTHER

II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the denial of post-conviction relief following an evidentiary hearing.

Relief should be granted because the District Court made an unreasonable and unsupported finding of fact that Mr. Barcella waived his state and federal constitutional rights to testify and further erred in unreasonably refusing to apply the controlling United States Supreme Court precedent, *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967).

B. Procedural History

In 1998, Mr. Barcella was tried for and convicted of first degree murder. He was sentenced to life with thirty years fixed. Later, the conviction was affirmed on appeal. *State v. Barcella,* 135 Idaho 191, 16 P.3d 288 (Ct. App. 2000), *rev. denied,* 2001.

Thereafter, Mr. Barcella filed a timely *pro se* petition for post-conviction relief. R 35502, Vol. 1, p. 1.[1] Counsel was appointed, an amended petition was filed, and the case proceeded to an evidentiary hearing after which relief was denied. R 35502, Vol. 3, pp. 757-761, 820-833. An appeal was taken and the Court of Appeals affirmed the denial of relief. *Barcella v. State,* 148 Idaho 469, 224 P.3d 536 (Ct. App. 2009), *rev. denied* 2010.

While Mr. Barcella's appeal from the denial of post-conviction relief was pending, he filed a verified second petition for post-conviction relief without a case number. Augmented Record, Verified Second Petition for Post-Conviction Relief. The District Court filed this second

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[1] The record in this case has been augmented with the Court File, Reporter's Transcript, and Clerk's Record filed in prior appeal No. 35502. R 310.

petition under the original case number. ROA entry March 4, 2009.

Proceedings on the second petition were stayed pending the appeal from the original petition. Augmented Record, Order to Stay Proceedings Pending Resolution of Appeal.

Following the decision in the appeal from the first petition, proceedings on the second petition continued and an amended verified second petition was filed. R 130-137. Two claims were raised:

1) That Mr. Barcella was denied the right to testify in his own behalf in violation of the Sixth Amendment.

2) That the Sixth Amendment claim should be allowed in a successive petition because original post-conviction counsel was ineffective in failing to include the claim in the original petition. R 130-137.

After taking judicial notice of the prior criminal proceeding and appeal and prior post-conviction proceedings and appeal and following an evidentiary hearing, the District Court held that Mr. Barcella's Sixth Amendment claim could be raised in the successive petition, but that he did not show by a preponderance of the evidence that trial counsel had prohibited him from testifying and that even if he had been prohibited from testifying, any error was harmless under the standard for fundamental error set out in *State v. Perry,* 150 Idaho 209, 228, 245 P.3d 961, 980 (2010), *reh'g denied.* R 262-284. A final judgment was entered. R 293-295.

This appeal timely follows. R 286-292, 296-309.

C. Evidence from Trial

Mr. Barcella, as will be explained below, disputes some of the evidence presented at trial. However, the Court of Appeals has summarized the facts presented as follows:

The state's evidence at trial set forth the following fact scenario: On the evening of April 2, 1995, Barcella told Kenneth Thrift - his drinking buddy for the evening, Virginia Smeltzer - the bartender at the Watering Hole bar in Coeur d'Alene, and Brad Bakie that he intended to kill Smith, the elderly manager of the Harmony House apartments where Barcella resided.

Returning to Barcella's room at the Harmony House apartments after the Watering Hole closed, Barcella and Thrift noisily entered the building and went into Barcella's one-room apartment, across the hall from Smith's room. There, they continued to drink accompanied by the noise of the radio and television. Smith, through the door, told Barcella to turn the volume down. Barcella begrudgingly complied. Some time later, while Thrift returned to his room next door to get some cigarettes and more beer, Barcella entered Smith's room and bludgeoned him in the head with a pulaski. When Thrift came bac, about five minutes later, Barcella was at Smith's door, across the hall, wiping off the doorknob with his bandana.

Back in Barcella's room, Barcella told Thrift that he had killed Smith. The two continued drinking beer until about 4:30 a.m. and then left to get breakfast at Denny's Restaurant. From there, Barcella called his girlfriend Rikki Bobo. He told her to get over to Denny's and that he had killed Smith. Once she arrived, Barcella again told Bobo and Thrift that he killed Smith by striking him in the head three times with a pick ax.

After visiting with Barcella and Thrift at Denny's for nearly an hour, Bobo returned to Barcella's room at Harmony House. There, she noticed that Barcella's pulaski was not in his room. When Barcella arrived, Bobo, with Barcella's approval, wrote out a note addressed to Smith requesting a receipt for Barcella's rent payment. Barcella told her that the note was a good idea because he would make the police believe that Barcella thought Smith was still alive. Bobo slipped the note under Smith's door.

Later that afternoon, Peter Cooper, the owner of the Harmony House apartments, discovered Smith's body. Smith had several large head wounds and smaller wounds in his chest. A pulaski was found under a piece of carpet stuffed under Smith's bed. During the homicide investigation, officers discovered that Barcella, a convicted felon, possessed firearms in his room. While in jail on a charge of being a felon in possession of a firearm, Barcella was charged with first degree murder for the killing of Smith, I.C. §§ 18-4001--18-4003.

Barcella v. State, 148 Idaho at 471-72, 224 P.3d at 538-39.

On appeal, several errors were found. These included: 1) the improper admission of

informant testimony wherein an informant testified that Mr. Barcella was not worried that he would be convicted because he had gotten away with a couple of prior shootings; 2) the improper admission of the preliminary hearing testimony of an informant snitch without a proper determination that he was an unavailable witness; and 3) the improper exclusion of testimony that would have impeached the improperly admitted preliminary hearing testimony. However, all these errors were found harmless. Additionally, the Court of Appeals declined to decide whether there was error in the late disclosure of certain evidence, as it held that any error would not have been prejudicial. The Court further found no error in the limitation on cross-examination of two of the State's primary witnesses, found no basis for reversal of the conviction on the claim of cumulative error, and found that the sentence was not excessive. *State v. Barcella, supra.*

D. Evidence Presented in Support of the First Petition

Mr. Barcella filed a *pro se* petition for post-conviction relief raising 29 claims. R 35502, Vol. I, pp. 40-46. Ultimately, relief was denied. *Barcella v. State, supra.* However, as discussed below, evidence offered at the evidentiary hearing on the first petition held May 29-30, 2007, was considered by the District Court in its decision on the second petition.

E. Evidence Presented in Support of the Second Petition

To support his claim that he was denied his state and federal constitutional rights to testify, Mr. Barcella presented evidence that there was never any colloquy about or recorded waiver of the right to testify at the trial. Record *State v. Barcella, supra.* Further, trial counsel John Adams testified that he would not have allowed Mr. Barcella to voluntarily waive the right to testify and not put it on the record, especially given that the State was seeking the death

penalty. He testified, "That's how people die, so I wouldn't do that." Tr. 5/29/07, p. 175, ln. 409.

Mr. Barcella testified that he and Mr. Adams did not communicate well, that Mr. Adams told him that he would not allow him to testify at trial, and that he could not recall any colloquy about his right to testify occurring on or off the record. Tr. 5/29/07 p. 116, ln. 18-19; p. 122, ln. 5 - p. 124, ln. 20.

Although Tim Gresback, Mr. Adams' co-counsel, and Mr. Durant, the defense investigator both testified for the State in the post-conviction proceedings, neither could testify that they remembered any conversation with Mr. Barcella about the fact that he had the right to testify and that he was ultimately responsible for deciding whether to exercise or waive that right. Tr. 8/19/11, p. 48, ln. 13 - p. 68, ln 19.

Mr. Gresback testified he had no specific recollections of any conversations about the decision for Mr. Barcella to testify or not. Tr. 8/19/11, p. 57, ln. 13-16; p. 62, ln. 4-8.

Mr. Durant testified he could not recall any of the conversations that may have occurred regarding Mr. Barcella testifying at trial. Tr. 8/19/11, p. 78, ln. 22-24. He further testified that he could not remember any time when there had been a serious disagreement between Mr. Adams and his client about the client testifying. Tr. 8/19/11 p. 94, ln. 21 - p. 95, ln. 4. (At the time he offered this testimony, he had participated in 2500 cases in the public defender's office and his testimony conflicted with Mr. Adams' testimony that he had "dominated" his clients' desires regarding testifying "many, many" times and at times had "drag out fights" with them. Tr. p. 5/30/07, p. 168, ln. 15-17; Tr. 8/19/11, p. 80, ln. 24-25.)

Mr. Durant further testified the office had a policy of explaining that the final decision on

the right to testify lies with the client. However, he could not remember a conversation in accord with the policy occurring in Mr. Barcella's case. Nor could he remember a conversation not happening in Mr. Barcella's case. Tr. 8/19/11, p. 95, ln. 1 - p. 96, ln. 5.

Mr. Adams did not testify that he told Mr. Barcella he had a right to testify and that he (Mr. Barcella) controlled the decision as to whether to exercise or waive that right. Instead, Mr. Adams testified that based on his opening statement at trial, he must have anticipated Mr. Barcella testifying. But, then Mr. Barcella did not testify. Tr. 5/30/07, p. 165, ln. 7 - p. 166, ln. 19.

Mr. Adams testified that Mr. Barcella got a bad trial, in fact, the worst trial he had ever seen in his 27 years of criminal defense work. Tr. 5/30/07 p. 149, ln. 21-23; p. 157, ln. 8-9. Regarding Mr. Barcella's right to testify, Mr. Adams testified that he had dominated his client's desires many, many times, and he could not remember anything in this case about any discussions he had with Mr. Barcella about the right to testify - he testified that they had to have talked about it, but he simply could not recall what they had said. Tr. 5/30/07, p. 168, ln. 15 - p. 169, ln. 22. He further clarified the only explanation he could offer for not putting a waiver of the right to testify on the record was that Mr. Barcella did not want to waive the right. Tr. 5/30/07, p. 173, ln. 19 - p. 174, ln. 6.

Mr. Adams offered no testimony at all that his office had a policy regarding discussions with clients on the right to testify and the waiver of that right. Tr. 5/30/07 p. 149-182. The only standard practice he testified to was that he put waivers of the right to testify on the record if they were voluntarily made and there was no waiver on the record in this case. Tr. 5/30/07 p. 173, ln. 10 - p. 174, ln. 6.

Mr. Barcella testified he had wanted to do a manslaughter type defense because he did not premeditate the killing of Mr. Smith. Tr. 5/29/07 p. 136, on. 19-22. He testified that much of the testimony the State offered was lies which he wanted to rebut. Tr. 5/29/07 p. 123, ln. 9-20.

With regard to the alleged offense, Mr. Barcella testified that all the motives suggested by the State were invalid. He would never kill someone for putting a note on his door. Nor was there any issue over a dog. And, he certainly would not have killed someone because they told him to stop making noise. In fact, Mr. Smith had let Mr. Barcella move into the apartment and have a dog. Rather than having bad feelings toward Mr. Smith, Mr. Barcella was grateful to him. Tr. 5/29/07 p. 125, ln. 13-15, p.129, ln. 24-25, Tr. 5/30/07, p. 201, ln. 7-9.

Mr. Barcella also testified as to the terrible time he was having immediately before Mr. Smith died. Mr. Barcella had been in jail in Wallace, and upon his release, he had lost the house he had been buying. Also, his dog had died and he had been forced to move to Coeur d'Alene. He moved into the apartment, which was named Harmony House, but was really more like Animal House. The residents were drunk and on drugs. It was so bad, that a man in the hallway swinging a 2 x 4 with nails and spikes in it had to be arrested. Furthermore, the same week as Mr. Smith's death, Mr. Barcella was assaulted and got into an altercation with some Gypsy Jokers, one of whom told him that he was going to kill or severely maim him. Tr. 5/30/07 p. 201, ln. 14 - p. 204, ln. 4.

These events were all set over Mr. Barcella's pre-existing PTSD, alcoholism, and bipolar disorder. Tr. 5/30/07 p. 205, ln. 13-16.

In the three years before Mr. Smith's death, Mr. Barcella had been sober. However, when he moved to Idaho, he had started "controlled" drinking. Tr. 5/30/07 p. 208, ln. 20-22.

Mr. Barcella was drunk for approximately four days prior to Mr. Smith's death. He was also taking a "mega-dose" of Xanax which caused blackouts and memory loss.[2] Tr. 5/29/07 p. 211, ln. 7 - p.212, ln. 23.

Because of the drinking and Xanax, it was hard for Mr. Barcella to remember events clearly. But he did remember that on either the day Mr. Smith died or the day before, he went to the Cotton Club with Bill Solberg and got drunk. Tr. 5/30/07 p. 208, ln. 3 - p.209, ln. 19. Later that day, his girlfriend, Ricki Bobo, took him shopping and when they came back to his apartment, there was a note from Mr. Smith on his door. But, the note did not upset Mr. Barcella and he just took it from the door. The idea that this note was a motive for him to harm Mr. Smith was totally false. Tr. 5/30/07 p. 210, ln. 2-21.

The day of Mr. Smith's death, Mr. Barcella had received his SSI check and slipped his rent under Mr. Smith's door. While he had been in the habit of working out, he did not go to the gym that day because he was very depressed and alone. Instead, he continued drinking. Tr. 5/30/07 p. 213, ln. 16 - p. 214, ln. 11.

He went to the Lakers Café about 10:00 a.m. and stayed for a couple of hours. Ken Thrift, whom he knew from the apartments, was also there drinking. Mr. Barcella was leery of Mr. Thrift, but because he was drinking, he lost sight of his morals and they started drinking together. After leaving Lakers, he and Mr. Thrift went to three other places and Mr. Barcella had a drink at each one. Tr. 5/30/07 p. 214, ln. 12-25.

At some point, Mr. Barcella went home. He cannot remember now if he continued

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[2] Xanax is used to treat anxiety and panic disorders. It acts on the brain and nerves by enhancing the effects of GABA. Side effects include mental/mood changes, dizziness, drowsiness, trouble walking, and slurred speech. www.webmd.com.

drinking at home, but at 5:30 p.m., he went to The Watering Hole. David Overcash and Mr. Solberg were there and Mr. Barcella probably had three or four more beers. While there, the bartender asked Mr. Barcella to straighten out Mr. Overcash because he was calling her foul names. He agreed to help and took Mr. Overcash outside. The bartender, in thanks, bought Mr. Barcella more beer for the next couple of hours. Tr. 5/30/07 p. 215, ln. 1-21.

Mr. Thrift and Mr. Bakie arrived at The Watering Hole a couple of hours later. Both were drunk. Ms. Bobo also showed up saying she had been at the Cantina drinking. Meanwhile, Mr. Barcella was doing shots. By 10:30 p.m. he was so drunk that he could not walk. Ms. Bobo and Mr. Solberg had to carry him out to Mr. Solberg's truck. Tr. 5/30/07 p. 216, ln. 1-217, ln. 6.

Mr. Barcella can recall getting into the truck and going with Mr. Solberg to two other bars. At some point, Ms. Bobo, Mr. Bakey, and Mr. Thrift left. Tr. 5/30/07 p. 217, ln. 7-11.

About 1:30 a.m. Mr. Barcella called Ms. Bobo. It was a "drunk's phone call" based in loneliness and depression. By then, Mr. Barcella was very drunk and he and Mr. Solberg left the bar to return to the apartment building. Tr. 5/30/07 p. 217, ln. 17 - p. 218, ln. 3.

Mr. Barcella can remember crawling into his room and Mr. Smith telling them that they could not come in at two or three in the morning drunk. However, Mr. Smith too was a drinker and he didn't yell at Mr. Barcella or anything. In fact, they had often interacted together at the bars. Tr. 5/30/07 p. 218, ln. 6-25.

Mr. Barcella stayed in his room and drank another beer or two. At this point, he had not slept for four days. Tr. 5/30/07 p. 219, ln. 5-6.

After a bit, he heard some people in their early twenties down on the sidewalk making noise, and he yelled at them to shut up. Mr. Barcella is not sure why, but he might have been

afraid that Mr. Smith would yell at him for the noise and he wanted to avoid trouble. At any rate, Mr. Barcella's room was full of tools and he grabbed the pulakski and went down to talk to the kids. Tr. 5/27/07 p. 219-220. He took the pulaski only to protect himself. He had no intent of hurting anyone. He was highly intoxicated and had recently been jumped and wanted to protect himself. Tr. 5/30/07 p.219, ln. 10 - p. 220, ln. 11.

This is the last thing Mr. Barcella can remember. Tr. 5/30/07 p. 220, ln. 9-11.

Some time later, Mr. Barcella woke up in Mr. Smith's room. Mr. Smith was dead and the pulaski was on the floor between them. Mr. Barcella was in a blackout period and does not know how Mr. Smith died. Tr. 5/30/07 p. 220, ln. 12-16.

Mr. Barcella got extremely scared and did not know what to do. So, he left Mr. Smith's room, went into his own room, and had some more beer. Everything kept running through his mind and it was terrible. Tr. 5/30/07 p. 221, ln. 13-17.

Sometime between 5:00 a.m. and 6:00 a.m., Mr. Barcella and Mr. Thrift had another beer. Then Mr. Thrift suggested that he (Thrift) hotwire Mr. Solberg's truck and that they go out for breakfast. They did this and went to Denny's. Tr. 5/30/07 p. 221, ln. 18 - p. 222, ln. 2.

At Denny's, Mr. Barcella told Mr. Thrift and Ms. Bobo that he had killed Mr. Smith. In response, Ms. Bobo came up with an idea to put a note under Mr. Smith's door asking for a rent receipt in order to deflect suspicion from Mr. Barcella. Tr. 5/30/07 p. 222, ln. 3-8.

After breakfast, Ms. Bobo brought her son to Mr. Barcella's apartment and Mr. Barcella continued drinking throughout the day. Finally, Peter Cooper went into Mr. Smith's room and found Mr. Smith's body. Mr. Cooper wanted someone to call the police and, after freaking out, Mr. Barcella remembered that Mr. Smith was the only one in the building with a phone. So, Mr.

Barcella told Mr. Cooper this, and Mr. Cooper called the police. Tr. 5/30/07 p. 222, ln. 9-p. 223, ln. 25

When the police arrived, they declined to interview Mr. Barcella saying he was too drunk to talk with. Mr. Barcella looked into the room, but he already understood what had happened. Tr. 5/30/07 p. 224, ln. 1-18.

Meanwhile, Ms. Bobo was freaking out and felt that it was not a good place for her son to be. So, he, Ms. Bobo, and the boy left. As they were leaving, Mr. Barcella spoke with a police officer, showed her his ID and asked if it was okay to leave. Tr. 5/30/08 p. 225, ln. 5-17.

The three went to a motel and spent the night. The next day Mr. Barcella returned to the apartment and was arrested on a federal weapons charge. Tr. 5/30/07 p. 225, ln. 18-25.

Mr. Barcella did not confess to killing Mr. Smith to the two informants who testified in the trial. Tr. 5/30/07 p. 232, ln. 4-10.

Mr. Barcella thinks about Mr. Smith every day and prays for him and his friends. Tr. 5/30//07 p. 231, ln. 5-9.

While Mr. Barcella took pride in his strength, there is no pride in killing an old man and he would never do such a thing in his right mind. And, while he had been in many fights before, he has changed and no longer fights. All the fight has gone from him. Tr. 5/30/07 p. 232, ln. 15-p. 233, ln. 12.

III. ISSUES ON APPEAL

1) Did the District Court make an unreasonable determination of fact in finding that Mr. Barcella did not demonstrate by a preponderance of the evidence that trial counsel denied him his Fifth, Sixth and Fourteenth Amendment and Idaho Constitution, Art. I, § 13 rights to testify at

trial?

2) Was the District Court's denial of post-conviction relief an unreasonable application of controlling United States Supreme Court precedent insofar as the Court refused to apply the required *Chapman*[3] harmless error analysis?

IV. ARGUMENT

A. The District Court's Finding that Mr. Barcella Waived the Right to Testify is Unreasonable and Clearly Erroneous

1. *Standard of Review*

The standard of review applicable to this case is set out in *Rossignol v. State*:

> In order to prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. I.C. § 19-4907; *Stuart v. State,* 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *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). We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State,* 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

___ Idaho ___, ___ P.3d ___, 2012 WL 601604 *2 (Ct. App. 2012).

2. *Argument*

The District Court finding that Mr. Barcella waived his right to testify is clearly erroneous because there is no evidence that Mr. Barcella was aware that he had the right and the ultimate right to decide whether to exercise the right regardless of counsel's advice. *Id.,* * 9. Moreover, there is no evidence that Mr. Barcella waived the right. *State v. Hoffman,* 116 Idaho 689, 690,

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[3] *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967).

778 P.2d 811, 812 (Ct. App. 1989).

Every criminal defendant has a fundamental right to testify in his or her own behalf. *Rock v. Arkansas,* 483 U.S. 44, 107 S.Ct. 2704 (1987). Although the right is not expressly set forth in the state and federal constitutions, it is necessarily implied from the due process clauses of the Fifth and Fourteenth Amendments and from the compulsory process clause of the Sixth Amendment. *Id.* 483 U.S. at 51, 107 S.Ct. at 2708-09. *See also,* Idaho Constitution, Art. I, § 13; *State v. Darbin,* 109 Idaho 516, 708 P.2d 921 (Ct. App. 1985).

The defendant is personally vested with the ultimate authority to decide whether or not to testify. While counsel may advise the defendant regarding the decision, the decision lies with the defendant and counsel must abide by the defendant's decision. *State v. Hoffman, supra.*

In post-conviction, a petitioner may raise the issue of whether counsel inappropriately denied him or her the right to testify either as a claim of ineffective assistance of counsel or as a claim of the deprivation of the constitutional right. *Darbin,* 109 Idaho at 522, 708 P.2d at 927; *Rossignol,* at * 6. If the claim is raised as a claim of ineffective assistance of counsel, the burden rests upon the defendant to both identify the acts or conduct alleged to have been deficient and to show how such deficiency was prejudicial to the defense. *Darbin, supra*; *Rossignol,* at * 3. If the claim is raised as a direct violation of the fundamental constitutional right to testify, then once the defendant shows that he or she was deprived of the right, the burden shifts to the State to prove beyond a reasonable doubt that the deprivation did not contribute to the conviction. *Chapman, supra*; *Darbin, supra*; *Rossignol, supra.* "[B]efore 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." *Chapman,* 386 U.S. at 24, 87 S.Ct. at 828.

In either case, a defendant may not be found to have waived the right to testify unless the record shows that the defendant was aware he or she had such a right and also the ultimate authority to decide whether to testify, regardless of counsel's advice. *Hoffman,* 116 Idaho at 691-92; 778 P.2d at 813-14; *Rossignol,* * 6. As stated in *Rossignol*:

> We reiterate that, pursuant to *Hoffman*, a defendant may not be found to have waived his or her right to testify at trial unless the defendant was aware that he or she not only had such a right, but also the ultimate right to decide whether to testify regardless of counsel's advice.

Id. * 9.

In *Hoffman,* the Court of Appeals found that the record did not support the District Court's determination that Hoffman had made a valid waiver of his right to testify because the Court made no finding that Hoffman was aware of the ultimate right to decide whether to testify, the attorney made no claim in the post-trial hearing that Hoffman had been advised of such right, and it did not appear that the District Court ever informed Hoffman that he could testify if he so desired. *Hoffman, supra. See Rossignol, supra.*

In a subsequent case, *Cootz v. State,* 129 Idaho 360, 924 P.2d 622 (Ct. App. 1996), the Court of Appeals found that the record did not support the District Court finding that Cootz had waived the right to testify where Cootz stated that he repeatedly told counsel of his desire to testify, but could not say that counsel told him that he could not testify or that the decision to testify was ultimately his and counsel could not recall whether he had advised Cootz that the ultimate decision belonged to him. 129 Idaho at 368-69; 924 P.2d at 630-31.

And, in *Rossignol,* the Court of Appeals found that the record did support a finding that Rossignol had waived his right to testify. The District Court had informed him that he could

testify if he so desired and Rossignol did not prove that he was unaware of his ultimate right to decide whether to testify.

In this case, Mr. Barcella's second amended verified petition raises the issue as a deprivation of the constitutional right. In support of this claim, Mr. Barcella presented evidence that there was no advisement by the Court of his right to testify and that he was told by counsel that he could not testify. Further, no member of the defense team could recall ever advising Mr. Barcella that he had the ultimate right to decide whether to testify. And, lastly, there was no recorded waiver of the right.

The District Court made the following finding with regard to waiver:

> This Court has reviewed the testimony of Mr. Adams and co-counsel Mr. Gresback at the August 19, 2011 evidentiary hearing in this matter and concludes that substantial evidence exists that Petitioner waived his right to testify. It is clear that at the time of 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, 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. Durant 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 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.

R 281-282 (footnotes omitted).

Much of what the District Court found is simply inconsistent with the evidence before it. For example, there was no evidence that Mr. Adams did not have a policy of putting waivers of the right to testify on the record. In fact, Mr. Adams testified that he did have a standard practice of putting waivers on the record and testified that he would not have allowed a defendant to waive the right to testify without putting it on the record, especially in a death penalty case because "that is how people die." And, the evidence was not that counsel advised Mr. Barcella not to testify because his testimony was inconsistent with the defense that he did not commit murder - rather, Mr. Adams, Mr. Gresbeck, and Mr. Durant all testified that they could not remember the content of any of their discussions with Mr. Barcella about testifying.[4] And, no one ever testified that Mr. Barcella had acquiesced to counsel's advice to not testify - rather, Mr. Barcella testified that he was told he could not testify and the defense team could not remember what they told him. Moreover, the trial record is devoid of any mention of the right to testify, let alone a waiver thereof.

Mr. Barcella's case is like Hoffman's and Cootz's. As in *Hoffman*, the District Court made no finding that Mr. Barcella was aware of the ultimate right to decide whether to testify, the trial attorneys made no claim in the post-trial hearing that Mr. Barcella had been advised of such right, and it did not appear that the District Court ever informed Mr. Barcella that he could testify if he so desired. *Hoffman, supra.* And, analogous to *Cootz,* Mr. Barcella testified that

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[4] Mr. Durant's testimony about an office policy to discuss the right to testify with the client does not support the District Court's finding of waiver because Mr. Durant could not recall whether that policy was followed in Mr. Barcella's case.

counsel told him that he could not testify and the defense team could not recall whether Mr. Barcella was ever advised that the ultimate decision belonged to him.

The District Court's factual findings are inconsistent with the evidence before it. Further, the District Court did not find, as required by *Rossignol* and *Hoffman,* that Mr. Barcella was ever informed that the ultimate decision of whether to testify was his and not counsel's and the record does not support such a finding. And, lastly, the record contains no evidence of a waiver. Therefore, the District Court's factual finding that Mr. Barcella waived the right to testify is not supported by the record, is unreasonable, and is clearly erroneous.

B. The District Court's Holding that Even If Mr. Barcella was Denied the Right to Testify, Any Error was Harmless was Based Upon an Unreasonable Refusal to Apply Chapman. Moreover, the Error was not Harmless Under Chapman.

1. *Standard of Review*

As noted above, this Court exercises free review of the District Court's application of the law to the facts. *Rossignol,* at * 2. *See also, Hoffman,* 116 Idaho at 691, 778 P.2d at 813, stating, "When determining whether a defendant has waived a constitutional right, we accept the trial court's findings of fact if supported by substantial evidence; however, we freely review the court's application of constitutional requirements to the facts found."

2. *Argument*

Because Mr. Barcella did establish by a preponderance of the evidence that he had been denied his constitutional right to testify, the burden shifted to the State to prove that the denial of the constitutional right was harmless beyond a reasonable doubt. *Chapman, supra*; *Rossignol, supra.* This is a burden the State did not carry.

In addressing the question of whether the error in denying Mr. Barcella the right to testify

was harmless, the District Court applied the fundamental error standard of *State v. Perry, supra.* The Court wrote: "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'd denied* (Dec. 7, 2010)." The Court then set out the three-prong *Perry* test for fundamental error: 1) violates one or more of the defendant's unwaived constitutional rights; 2) plainly exists (without the need for 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. However, thereafter, the Court did not set out its reasoning as to why the three prongs were not met, but rather summarily concluded that the claims in the second amended petition were not supported by logic or evidence. R 283.

This application of *Perry* was wrong. The *Perry* fundamental error standard of review is the standard of review applicable to appeals wherein the issues raised on appeal were not raised before the District Court. *Perry* is not and does not claim to be a standard of review applicable to post-conviction proceedings. The standard applied to a post-conviction claim of the deprivation of the constitutional right to testify is the *Chapman* harmless error standard. *Darbin, supra*; *Cootz, supra*; *Rossignol, supra.* "[B]efore 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." *Chapman,* 386 U.S at 24, 87 S.Ct. at 828. The District Court was simply incorrect in its analysis that *Perry* requires a fundamental error analysis to be applied to claims of constitutional deprivation first raised in post-conviction. *Chapman* is the controlling Supreme Court precedent applicable to claims of the deprivation of federal constitutional rights raised in post-conviction and the District Court's refusal to apply it was unreasonable.

Applying the *Chapman* analysis, the constitutional deprivation was not harmless in this case because the State cannot demonstrate the error harmless beyond a reasonable doubt.

As set out above, the evidence presented at trial was that on the day Mr. Smith died, Mr. Barcella was drinking heavily and made threats to kill Mr. Smith. Sometime in the middle of the night, Mr. Barcella went into Mr. Smith's room, killed him, and left. He later told Mr. Thrift and Ms. Bobo that he had killed Mr. Smith. Further evidence was offered that two informants independently heard Mr. Barcella confess sometime after the events.

At trial, a manslaughter instruction was given, but the jury declined to find manslaughter and returned a verdict of first degree murder. Tr. 12/11/97 p. 1677, ln. 7-17 (Ex. 4 in this appeal).

In his testimony at his first post-conviction hearing, Mr. Barcella testified that he had been drinking a tremendous amount in the days preceding Mr. Smith's death. In addition, he testified to his post-traumatic stress disorder, his alcoholism, his depression, and his bi-polar illness. Further, he testified that he had been taking a "mega-dose" of Xanax. He testified to being so incapacitated by drugs and alcohol that at one point he could not walk. He was having periods of blackouts wherein he was unaware of what he was doing and had no memory of what had transpired after the fact. Mr. Barcella testified that he had no issues with Mr. Smith and that his threats had been directed at others, not Mr. Smith. He also testified that he had grabbed the pulaski to protect himself when he went to confront some college-age kids about noise they were making. He then lost all awareness and later woke up on the floor next to Mr. Smith.

In the main, Mr. Barcella's testimony did not conflict with the evidence offered by the State at his trial. At the trial, there was testimony as to Mr. Barcella's state of intoxication.

There was ample evidence that Mr. Smith died from being hit with an instrument like, if not identical to, the pulaski Mr. Barcella owned.

What Mr. Barcella offered at the post-conviction hearing was evidence in addition to the State's evidence. He offered evidence that he had not gotten away with prior killings. He offered evidence of his drug use and mental illness. Most importantly, he offered uncontroverted and credible evidence of being in a blackout at the time Mr. Smith was killed.

In short, what Mr. Barcella offered was testimony which negated the element of specific intent required for both first and second degree murder.

Murder is defined as the unlawful killing of a human with malice aforethought or the intentional application of torture. I.C. § 18-4001. First degree murder is murder which is perpetrated by any kind of willful, deliberate and premeditated killing. I.C. § 18-4003(a). Manslaughter is the unlawful killing of a human without malice and may be voluntary, involuntary, or vehicular. I.C. § 18-4006. While first degree murder carries penalties including life imprisonment and death, the maximum term of imprisonment for manslaughter is 15 years. I.C. §§ 18-4004, 18-4007.

Had Mr. Barcella testified at trial as he testified at the post-conviction hearing, he would not have totally exonerated himself. However, he would have overcome some of the prejudice resulting from the informant's inappropriate testimony that he had gotten away with two prior shootings. And, more importantly, he would have presented evidence which would have negated the elements of malice and premeditation, taking his offense from first degree murder to manslaughter.

The offense in this case occurred in 1995. *State v. Barcella, supra.* At that time, I.C. §

18-116 stated:

> No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such a condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act.[5]

Under this statute, the jury could have found that given Mr. Barcella's extreme state of intoxication attributable both to Xanax and alcohol, a state which included the inability to walk at one point as well as repeated states of alcoholic blackouts, he was unable to form the specific intent of either malice and/or premeditation. *See, State v. Sprouse,* 63 Idaho 166, 118 P.2d 378 (1941), stating, "While voluntary intoxication is no excuse for the commission of felonious homicide, it is to be taken into consideration in determining the existence or non-existence, on the part of the accused, of malice aforethought, which distinguishes murder from voluntary manslaughter." *See also, State v. Miller,* 65 Idaho 756, 154 P.2d 147 (1944), holding that in a prosecution for murder, voluntary intoxication affects intent. *See also, State v. Gomez,* 94 Idaho 323, 487 P.2d 686 (1971), holding that whether intoxication was of such a degree as to preclude the defendant from formulating the necessary malice was a jury question. *See also, State v. Tucker,* 123 Idaho 374, 848 P.2d 43 (Ct. App. 1993), holding the issue with respect to intoxication was whether the defendant was so intoxicated that he was unable to form the specific intent necessary to commit the offense as charged. *See also, State v. Lopez,* 126 Idaho 831, 892 P.2d 898 (Ct. App. 1995), holding that intoxication may negate the element of specific

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[5] Effective July 1, 1997, I.C. § 18-116 was amended to hold the person charged with a crime responsible for the crime even if she/he was voluntarily intoxicated or under the influence of drugs at the time of the crime.

intent.

Mr. Barcella's testimony would have been such that the State cannot demonstrate that had the jury heard it, it would have still convicted him of first degree murder. Moreover, the State cannot demonstrate beyond a reasonable doubt that even if the jury had still convicted Mr. Barcella of first degree murder, the Court of Appeals would have found the numerous trial errors harmless.

Applying *Chapman,* the District Court order denying post-conviction relief was erroneous and must now be reversed.

V. CONCLUSION

The District Court's finding that Mr. Barcella waived the right to testify is not supported by the record and must be reversed. Likewise, the District Court's application of the *Perry* fundamental error analysis to the question of constitutional error was erroneous. When the proper *Chapman* harmless error standard is applied, the denial of post-conviction relief must be reversed.

Mr. Barcella therefore asks that this Court reverse the judgment denying post-conviction relief and remand with instructions to grant relief, vacate the conviction, and grant a new trial.

Respectfully submitted this 24th day of April, 2012.

Dennis Benjamin

Deborah Whipple
Attorneys for Gerald Barcella

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 24th day of April, 2012, 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