

7-17-2012

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

GERALD ANGELO BARCELLA)	
)	
Petitioner-Appellant,)	NO. 39520
)	
vs.)	
)	
STATE OF IDAHO,)	
)	
Respondent.)	

BRIEF OF RESPONDENT

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

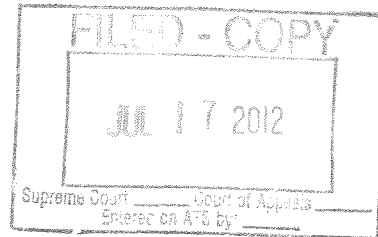
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STATEMENT OF THE CASE

Nature of the Case

Gerald A. Barcella appeals from the district court's order dismissing his successive petition for post-conviction relief after an evidentiary hearing.

Statement of Facts and Course of Proceedings

The factual background and course of the criminal proceedings are set forth by the Idaho Court of Appeals in State v. Barcella, 135 Idaho 191, 194-196, 16 P.3d 288, 291-293 (Ct. App. 2000) (footnote omitted):

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 back, 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 it 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.

At the preliminary hearing, Robert Agrifolio, a convicted defendant in an unrelated burglary case, testified that in September of 1995 he occupied a jail cell adjacent to Barcella's cell in the Latah County Jail. After identifying Barcella, Agrifolio testified that, while in the jail's recreation yard, Barcella told him he hit Smith in the head with an ax because he believed Smith had killed his puppy. Agrifolio was cross-examined extensively about his prior convictions, his conversations with Barcella, and his reason for testifying. Agrifolio testified that he was under subpoena and denied being a jailhouse snitch or getting any benefit from testifying against Barcella.

Barcella was bound over to district court for trial on the charge of murder in the first degree. At trial, the state called twenty-two witnesses including investigating officers, medical experts, the Watering Hole bartender, the apartment owner, several apartment residents, Bobo, Thrift and two jailhouse informants - Agrifolio and George Lane.

Before calling Thrift, the state attempted to preclude impeachment through Thrift's prior criminal convictions. In part, Barcella sought to impeach Thrift by introducing evidence of his criminal history, arguing that Thrift is per se untruthful because honest people do not get arrested ninety-four times, forty-two of which were for felonies. The trial court ruled that Thrift's only felony convictions in the last ten years were two DUIs, not crimes relevant

to truth and veracity under I.R.E. 609. Thrift testified that Barcella owned a pulaski when he moved into the Harmony House apartments, that Barcella had several times threatened to kill Smith, and that he had seen Barcella wiping off Smith's doorknob with a bandana when Thrift came out of his room with more beer. Thrift also stated that Barcella admitted to killing Smith once he and Thrift returned to Barcella's room to drink more beer and, again, after he and Thrift arrived at Denny's Restaurant for breakfast early the next morning.

Bobo also testified that Barcella owned a pulaski when he moved into the Harmony House apartments. She further testified to Barcella's admissions to killing Smith and acknowledged that she had written a note about rent payment that was slipped under Smith's door to prevent police attention from focusing on Barcella. After challenging Bobo's credibility by questioning her about a plea deal on a recent DUI charge and the state's grant of immunity regarding her writing the rent payment note, Barcella also sought to inquire about her status as a jail inmate and why she was allowed to testify in civilian clothing and makeup. The court sustained the state's objection to this line of inquiry.

The state then attempted to call Agrifolio as its next witness; however, the bailiff reported that Agrifolio had told the jailers that he refused to testify. Agrifolio was brought into court from the jail and questioned. After he indicated that he did not want to testify, the court appointed counsel for Agrifolio so that he could obtain legal advice before finally deciding whether or not to testify. A day later, Agrifolio's counsel informed the court that Agrifolio would not testify. The district court determined that Agrifolio was unavailable. Four days later, the court, over Barcella's objection, permitted Agrifolio's preliminary hearing testimony to be read into the record.

The state's twentieth witness, Lane, also a jailhouse witness, testified that Barcella had admitted to killing his apartment manager by hitting him in the back of the head because the manager was nagging him about making too much noise. Lane testified that Barcella said a witness, his drinking buddy, had seen him come out of the manager's apartment on the night of the murder. Lane testified that Barcella was not worried about being prosecuted because in the past he had shot a couple of people and was never convicted. Barcella immediately objected and moved for a mistrial on the grounds that the state has elicited testimony about prior bad acts in violation of I.R.E. 404. The district court denied the motion

for a mistrial and instructed the jury to disregard Lane's last statement.

Barcella also sought a mistrial on the ground that the state made a late disclosure of the first twenty-seven pages of the transcript of Bobo's statement to the police. The court denied the motion, suggesting Barcella could avoid any prejudice caused by late disclosure by recalling Bobo as a witness. Barcella declined to do so.

The trial court denied Barcella's motion for a judgment of acquittal made at the close of the state's case. During Barcella's case-in-chief, Barcella did not testify. After presenting several character witnesses in defense, Barcella sought to introduce testimony from Kootenai County Public Defender's Office Investigator Mark Durant. Durant was to testify that Agrifolio had recently made several unsolicited telephone calls to him, stating that he – Agrifolio - had been pressured into testifying at the preliminary hearing and, that when asked if his preliminary hearing testimony had been truthful, Agrifolio had said he would “take the Fifth Amendment on that.” The state objected and the court, without explanation, disallowed Durant's testimony.

The jury returned a verdict of guilty to first degree murder and found that Barcella had used a deadly weapon in the commission of the murder. Barcella filed a motion for new trial re-raising the issues he had raised at trial - Lane's blurt about Barcella having shot two people in the past and gotten away with it, the late disclosure of the first twenty-seven pages of Bobo's statement to the police, the admission of Agrifolio's preliminary hearing testimony, the trial court's preclusion of Durant's impeachment of Agrifolio's preliminary hearing testimony, and the court's refusal to allow Barcella to inquire into Thrift's record of prior arrests to impeach him for lack of truthfulness. The district court denied Barcella's motion for a new trial, explaining that Barcella had failed to demonstrate prejudice from the state's late disclosure of a portion of Bobo's statement to the police and that Lane's “couple of shootings” blurt had been dealt with by instructing the jury to disregard that statement. The court also ruled that Agrifolio's purported refusal to testify made him unavailable, allowing his preliminary hearing testimony to be read into the record, that I.R.E. 609 did not permit Barcella to impeach Thrift with his prior arrests, and that Barcella had made no offer of proof regarding impeachment of Agrifolio's preliminary hearing testimony.

The state filed a notice of intent to seek the death penalty, and a hearing was held on aggravating and mitigating circumstances. The district court found that the state had failed to prove the existence of any statutory aggravating circumstance beyond a reasonable doubt and thus the death penalty could not be imposed. At sentencing, the district court imposed a term of life imprisonment, with thirty years fixed. The court denied Barcella's I.C.R. 35 motion for reduction of the sentence.

The Court of Appeals affirmed Barcella's conviction and sentence.

Barcella, 135 Idaho 191, 16 P.3d 208.

Course of Post-Conviction Proceedings

Barcella filed a timely *pro se* petition for post-conviction relief and supporting affidavits asserting 29 claims.¹ (#35502 R., Vol. I, pp.1-329; Vol. II, pp.330-579.) The district court granted Barcella's request for counsel. (#35502 R., Vol. I, p.2; Vol. III, pp.584-588.) Barcella's appointed counsel eventually narrowed and clarified Barcella's petition to include four claims: (1) the judgment and sentence were unconstitutional; (2) prosecutorial misconduct; (3) his trial counsel was ineffective for preventing him from testifying and for failing to adequately communicate with him; and (4) his appellate counsel was ineffective. (#35502 R., Vol. III, pp.757-761; see also pp.778-786.) The state filed an answer and motion for summary disposition (#35502 R., Vol. III, pp.762-765).

The district court summarily dismissed Barcella's first two claims and granted him an evidentiary hearing with regard to his ineffective assistance of

¹ The Idaho Supreme Court ordered that the appellate record in this case be augmented with the clerk's records and transcripts filed in Barcella's initial post-conviction appeal, Barcella v. Idaho, Docket No. 35502. (1/5/12 "Order Augmenting Record.")

trial and appellate counsel claims. (#35502 R., Vol. III, p.771; #35502 1/9/07 Tr., p.15, L.10 – p.20, L.3.) Following additional briefing from the parties (#35502 R., Vol. III, pp.778-819), and the two-day evidentiary hearing (#35502 5/29/07 Tr.; 5/30/07 Tr.), the district court dismissed the remaining claims in Barcella's petition (#35502 R., Vol. III, pp.820-833). Concerning Barcella's ineffective assistance of trial counsel claim, the district court concluded that even if Barcella's counsel prevented him from testifying, Barcella failed to show prejudice. (#35502 R., Vol. III, pp.823-829.)

Barcella appealed. (#35502 R., Vol. III, pp.840-843.) On appeal, Barcella argued that the district court erred in dismissing his claims. (#35502 Appellant's brief.) Barcella also argued that his claim that his trial counsel was ineffective for preventing him from testifying should be analyzed both as an ineffective assistance of counsel claim and as a deprivation of a constitutional right claim. (#35502 Supplemental Appellant's brief.) The Idaho Court of Appeals affirmed the district court's dismissal of Barcella's petition for post-conviction relief. Barcella v. State, 148 Idaho 469, 224 P.3d 536 (Ct. App. 2009). The Court of Appeals first affirmed the district court's summary dismissal of Barcella's sentencing and prosecutorial misconduct claims. Id. at 474-476, 224 P.3d at 541-543. The Court then held that Barcella did not raise a constitutional right deprivation claim in his post-conviction petition, and so it would not consider such a claim on appeal. Id. at 475-477, 224 P.3d at 542-544. Finally, the Court affirmed the district court's dismissal of Barcella's ineffective assistance of counsel claims. Id. at 477, 224 P.3d at 544-545. Specifically, the Court

concluded that Barcella “failed to demonstrate prejudice from any prevention by trial counsel of Barcella testifying at trial.” Id.

While his appeal from the dismissal of his initial post-conviction petition was pending, Barcella filed a successive petition for post-conviction relief, asserting that he was deprived of his constitutional right to testify. (3/4/09 “Verified Second Petition for Post-Conviction Relief”;² R., pp.89-90.) The district court initially issued a notice of summary dismissal on the ground that Barcella had waived the claim by failing to pursue it previously. (R., pp.98-103; 119-129.) Barcella alleged in response that ineffective assistance of his initial post-conviction counsel excused his failure to previously raise the claim. (R., pp.104-118; 130-151.) The district court granted an evidentiary hearing and entertained additional briefing on both the claim and the issue of whether the claim had been waived. (R., p.269; 8/19/11 Tr.³)

In its written memorandum opinion following the evidentiary hearing, the district court concluded that Barcella’s initial post-conviction counsel’s ineffectiveness constituted sufficient reason as to why the claim was not previously asserted. (R., pp.275-277.) However, the district court also concluded that Barcella failed to show that he was deprived of his constitutional right to testify. (R., pp.277-282.) The court further concluded that even if

² The Idaho Supreme Court granted Barcella’s motion to augment the appellate record with his 3/4/09 Verified Second Petition for Post-Conviction Relief. (4/25/12 Order).

³ On July 12, 2012, Barcella filed a motion to augment the appellate record with the transcript from the 8/19/11 evidentiary hearing. That motion remains pending before the Court.

Barcella had been so deprived of his constitutional right, such error was harmless. (R., pp.282-283.) Barcella timely appealed. (R., pp.286-292.)

ISSUE

Barcella states the issues on appeal as:

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 v. California, 386 U.S. 18 (1967)] harmless error analysis?

(Appellant's Brief, pp.11-12.)

The state rephrases the issue as:

Has Barcella failed to show the district court erred in dismissing his successive petition for post-conviction relief after an evidentiary hearing?

ARGUMENT

Barcella Has Failed To Show The District Court Erred In Dismissing His Successive Petition For Post-Conviction Relief After An Evidentiary Hearing

A. Introduction

Barcella contends that the district court erred in dismissing his successive petition for post-conviction relief. (See generally, Appellant's brief.) Specifically, Barcella contends that the district court erred in concluding that Barcella waived his right to testify, and then by utilizing an incorrect harmless error standard. (Id.) A review of the record reveals that Barcella failed to meet his burden to show that he was deprived of his constitutional right to testify and that, while the district court utilized an incorrect harmless error standard, any error was harmless under the correct standard as well.

B. Standard Of Review

When the district court conducts an evidentiary hearing and enters findings of fact and conclusions of law, an appellate court will disturb the findings of fact only if they are clearly erroneous, but will freely review the conclusions of law drawn by the district court from those facts. Mitchell v. State, 132 Idaho 274, 276-77, 971 P.2d 727, 729-730 (1998).

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. Peterson v. State, 139 Idaho 95, 97, 73 P.3d 108, 110 (Ct. App. 2003). A trial court's decision that a post-conviction petitioner has

not met his burden of proof is entitled to great weight. Sanders v. State, 117 Idaho 939, 940, 792 P.2d 964, 965 (Ct. App. 1990).

C. Barcella Has Failed To Meet His Burden To Show That His Right To Testify Was Violated

A petitioner seeking post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations upon which his claim is based. Estes v. State, 111 Idaho 430, 436, 725 P.2d 135, 141 (1986); Clark v. State, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); I.C.R. 57(c). When a post-conviction petitioner alleges a direct violation of his or her constitutional right to testify, then the petitioner has the burden to show he or she was deprived of the right to testify. Rossignol v. State, 152 Idaho 700, ___, 274 P.3d 1, 4-10 (Ct. App. 2012).

A criminal defendant has a fundamental right to testify on his own behalf. State v. Hoffman, 116 Idaho 689, 690, 778 P.2d 811, 812 (Ct. App. 1989); Cootz v. State, 129 Idaho 360, 924 P.2d 622 (Ct. App. 1996). Counsel may advise the defendant regarding the wisdom and propriety of testifying; however, the defendant is personally vested with the ultimate authority to decide whether or not to testify. Hoffman, 116 Idaho at 690, 778 P.2d at 812. A defendant must be aware of his right to testify at trial before he can adequately waive that right. Hoffman, 116 Idaho at 691-92, 778 P.2d at 813-14; Cootz 129 Idaho 360, 924 P.2d 622.

However, neither Hoffman nor Cootz stand for the proposition that where a post-conviction petitioner asserts that he was deprived his constitutional right to testify, the district court is required to affirmatively find that the petitioner waived

his right to testify, and that the petitioner was aware of that right, before it may dismiss the petition after an evidentiary hearing. Rossignol 152 Idaho at ____, 274 P.3d at 4-11 (affirming district court's dismissal of a post-conviction petition after an evidentiary hearing where Rossignol failed to prove he was unaware of his ultimate right to decide whether to testify). Further, a district court is not required to obtain an on-the-record waiver of the right to testify when a defendant does not testify at trial. Aragon v. State, 114 Idaho 758, 763, 760 P.2d 1174, 1179 (1988). In order to obtain relief, it is the post-conviction petitioner's burden to show that he was prevented from testifying and/or that he was unaware of his right to testify.

In this case, the district court concluded that Barcella's counsel did advise him of his right to testify, and that Barcella waived that right. (R., pp.280-282.) On appeal, Barcella contends that these findings were erroneous. (Appellant's brief, pp.22-28.) To the contrary, these findings were supported by substantial evidence. However, even if these findings were made in error, such findings were not necessary to find that Barcella failed to meet his burden to prove that his right to testify was violated. Before dismissing Barcella's petition, the district court was not required to find that there was "substantial evidence" of Barcella's constitutional rights waiver, but only that Barcella failed to meet his burden to show his constitutional rights were violated. The record reveals that Barcella indeed failed to make such a showing.

There was no indication during the trial that Barcella was denied his right to testify. (See generally #25216 Trial Tr.;⁴ R., p.280.) Barcella did not assert his right to testify in any kind of public way during the trial proceedings. (See generally #25216 Trial Tr.; R., p.280.) Subsequently, Barcella was afforded two post-conviction evidentiary hearings to address this issue - first pursuant to his claim in his initial petition that his trial counsel was ineffective for preventing him from testifying, and second pursuant to his claim in his successive petition that he was deprived of his constitutional right to testify. (#35502 5/29/07 Tr.; #35502 5/30/07 Tr.; 8/19/11 Tr.)

At the first evidentiary hearing, Barcella's trial counsel, John Adams, testified that while he took very seriously Barcella's rights, including his right to testify, he could not remember whether he informed Barcella of this right or prevented him from exercising it. (#35502 5/30/07 Tr., pp.168, L.18 – p.169, L.22; p.175, L.1 – p.176, L.1.) Adams is a very experienced defense attorney, who had approximately 15 years of experience at the time of the trial. (#35502 5/30/07 Tr., p.149, Ls.2-22.) Adams was aware of Barcella's right to testify, understood the distinction between preventing a client from testifying and advising him not to testify, and stated that he could not recall ever preventing any client from testifying. (#25502 5/30/07 Tr., p.166, L.20 – p.169, L.2.) Certainly, Barcella can make no inference that inexperience or ignorance of the law caused

⁴ The trial transcript and the transcripts from the initial post-conviction evidentiary hearing were admitted as evidence during the successive post-conviction evidentiary hearing. (R., p.311; Plaintiff's Exhibits 1, 2A, 2B, 2C; 8/19/11 Tr., p.6, L.12 – p.7, L.17.)

his defense counsel to deprive him of his constitutional rights by refusing to allow him to testify.

At the second evidentiary hearing, Tim Gresback, Adams' co-counsel at Barcella's murder trial, testified that he could not recall Barcella ever discussing with him his desire to testify, despite being involved in the case, and despite Barcella's "excellent" ability to verbalize his positions and/or beliefs. (8/19/11 Tr., p.48, L.13 - p.62, L.8.) Gresback also could not remember being aware of any overt disagreement between Barcella and Adams over the issue of Barcella's desire to testify. (8/19/11 Tr., p.58, L.14 – p.60, L.4; p.67, Ls.16-22.)

Mark Durant, a criminal investigator with the Kootenai County Public Defender's Office, who was involved in the Barcella case (8/19/11 Tr., p.71, L.23 – p.78, L.21), testified that the Kootenai County Public Defender's Office had a "rule" that "[i]t's up to the defendant to testify" (8/19/11 Tr., p.94, L.21 – p.95, L.19). Durant continued that he could remember no occasion in 16 years where this rule was deviated from, including the present case. (8/19/11 Tr., p.95, Ls.13-19.) Finally, Durant explained that, generally, the Kootenai County Public Defender's Office explains that rule to clients "numerous times during the pretrial meetings," and during the trial itself. (8/19/11 Tr., p.95, L.18 - p.96, L.1.)

Barcella testified that he desired to testify at trial and that he expressed that desire to his counsel, but that his counsel did not allow him to testify. (5/29/07 Tr., p.122, L.21 – p.123, L.5; 8/19/11 Tr., p.113, Ls.4-13.) Barcella also appeared to acknowledge, however, that Adams talked to him about his right to testify:

Q: Do you have any memory at all of the Judge talking to you about your right, your ability to waive your Fifth Amendment right to testify?

[Barcella]: I don't know, it's possible.

Q: You don't know, though?

[Barcella]: I don't know. **I know John told me.** I didn't know anything about the law back then, I only started learning after my appeal.

(5/29/07 Tr., p.124, Ls.9-16 (emphasis added).) Barcella also testified that Adams told him that if he “wanted to give up [his] right to testify,” he had to put that on the record. (8/19/11 Tr., p.114, Ls.8-10.) These comments create a strong inference that Adams and Barcella discussed Barcella’s right to testify, and that Barcella was thus aware of that right.

Barcella failed to meet his burden to show that he was unaware of his right to testify, that he was prevented from testifying, or that his constitutional right to testify was violated. Barcella never attempted to assert his right to testify during the trial proceedings, and Barcella's counsel could not remember if they failed to inform Barcella of his rights, or if they prevented him from testifying. The district court was not required to grant post-conviction relief based solely on Barcella's assertions. The district court therefore did not err in dismissing Barcella's petition.

D. Even If Barcella Had Met His Burden To Show That His Right To Testify Was Violated, Any Such Error Was Harmless

Where a defendant succeeds in meeting his burden to show he or she was deprived of the right to testify, the state must convince the reviewing court

beyond a reasonable doubt that the deprivation did not contribute to the defendant's conviction – that it was harmless error. Rossignol, 152 Idaho at ____, 275 P.3d at 4-5 (citing Chapman v. California, 386 U.S. 18 (1967)).

In this case, the district court concluded that even if Barcella had met his burden to show that he deprived his constitutional right to testify, such error was harmless. (R., pp.282-283.) However, in making this determination, rather than utilizing the Chapman harmless error test, the district court applied, *sua sponte*, the fundamental error and harmless error test announced by the Idaho Supreme Court in State v. Perry, 150 Idaho 209, 219-228, 245 P.3d 961, 971-980 (2010). (R., pp.282-283.) The Perry analysis, which applies to appellate review of unpreserved errors, requires, as its third prong, an appellant to show that an error affected the outcome of his trial. Perry, 150 Idaho at 219-228, 245 P.3d at 971-980. This test has no application to a district court's analysis of harmless error in a constitutional challenge in a post-conviction petition proceeding. Therefore, the district court erred in utilizing this standard. However, a review of the record reveals that if Barcella was deprived of his right to testify, such deprivation was harmless under the Chapman reasonable doubt standard as well, and this Court may affirm the district court's decision on this basis. State v. Foster, 127 Idaho 723, 728, 905 P.2d 1032, 1037 (Ct. App. 1995) (“If the reason expressed by a trial court for its decision is erroneous, the trial court's action will nonetheless be upheld on appeal if an alternative legal basis supports it.”) (citations omitted).

The Idaho Court of Appeals has already analyzed the harmlessness of any error that prevented Barcella from testifying. In Barcella's initial post-conviction petition proceeding, the district court concluded that even if Barcella's counsel was ineffective in preventing him from testifying, any such error was harmless pursuant to the Strickland prejudice standard (i.e., the district court concluded that Barcella did not show a reasonable probability that, but for any error preventing him from testing, the outcome of the trial would have been different.) (#35502 R., pp.828-829.) The Idaho Court of Appeals affirmed the district court, concluding that Barcella "failed to demonstrate prejudice from any prevention by trial counsel of Barcella testifying at trial." Barcella, 148 Idaho at 477, 224 P.3d at 545. Any deprivation of Barcella's constitutional right to testify was similarly harmless beyond a reasonable doubt under the Chapman standard.

At his evidentiary hearings, Barcella stated that he wanted to testify at trial to deny assertions made by other witnesses, including that he had previously shot and killed two other people. (#35502 5/29/07 Tr., p.123, Ls.4-25; 8/19/11 Tr., p.108, L.19 – p.109, L.22.) Barcella also wanted to testify about the state's theory about his motive for the killing, his consumption of alcohol and medication around the time of the killing, the events surrounding the killing, and whether or not he intended kill Smith. (#35502 5/29/07 Tr., p.119, L.5 – p.144, L.16; 8/19/11 Tr., p.104, Ls.11-17, p.107, Ls.2-8.)

The district court correctly concluded that this proposed testimony would not have affected the outcome of the trial. In affirming Barcella's conviction on

direct appeal, the Idaho Court of Appeals characterized the evidence of Barcella's guilt as "overwhelming." Barcella, 135 Idaho at 204, 16 P.3d at 301.

In that opinion, the Idaho Court of Appeals also held that the trial witness's unsolicited claim that Barcella had admitted shooting two other people, while improper, was itself harmless beyond a reasonable doubt: The Court reasoned:

Although the interjection of the "couple other shootings" statement was plainly improper, we conclude that it was harmless beyond a reasonable doubt. Lane was the state's twentieth witness. Prior to his testimony, the jury had been told by the defense that Barcella had a prior felony conviction. The jury heard testimony from bartender Smeltzer, bar patron Bakie, and Thrift that Barcella had told them he intended to kill Smith. The jury also heard testimony from Thrift, Bobo and Lane that Barcella admitted to killing Smith. Thrift and Bobo both testified that Barcella owned a pulaski. Thrift also testified that he saw Barcella wiping off Smith's doorknob with a bandana when Thrift came out of his room the night Smith was killed. Bobo testified that the pulaski was missing from Barcella's room the next day. A pulaski was recovered from under the bed in Smith's room.

Id. at 199, 16 P.3d at 206 (footnotes omitted). The Court of Appeals concluded that "even if Lane's blurt about prior shootings had not been heard by the jury, the remaining evidence would have easily led the jury to return a guilty verdict."

Id. Since the testimony about the shootings was itself harmless beyond a reasonable doubt, it follows that Barcella's inability to testify and deny the shootings was likewise harmless beyond a reasonable doubt. Likewise, Barcella's inability to dispute other specific witness testimony - none of which was as potentially prejudicial as the shooting testimony - was also harmless beyond a reasonable doubt, in light of the overwhelming evidence against him.

In addition, Barcella's testimony about his intoxicated state the night of the murder would have been cumulative with other evidence presented at trial. At trial, several witnesses testified that they drank with Barcella at several bars prior to the murder. (#25216 Trial Tr. p.560, L.1 – p.572, L.2; p.916, L.22 – p.922, L.1.) One stated that Barcella was talking about “getting even” with Smith as he became more intoxicated, and another described how he and Barcella continued to drink after they left the bars and went to Barcella's apartment immediately prior to Smith's murder. (Id.) The latter witness also testified about Barcella's actions and statements following the murder, when the two continued to drink beer. (#25216 Trial Tr., p.572, L.2 – p.576, L.17.) Additional evidence about Barcella's intoxication from his own perspective would not have affected the outcome of the trial.

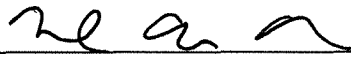
Finally, Barcella's defense at trial was that the state failed to prove that he killed Smith. (R., p.283; #25216 Trial Tr., p.1764, L.23 – p.1789, L.2.) Strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client. ABA Standards for the Administration of Criminal Justice, The Defense Function 5.2. Barcella's proposed testimony about his excessive consumption of alcohol, the events surrounding the killing, and whether or not he had the intent to kill Smith, which essentially amounted to an argument that he should be convicted of manslaughter rather than first-degree murder, would have been directly contrary to the defense's trial strategy and would not have affected the outcome of the trial.

Even if Barcella were able to meet his burden to show that he was deprived his constitutional right to testify, such error was harmless beyond a reasonable doubt. This Court should therefore affirm the district court's order denying Barcella's successive petition for post-conviction relief.

CONCLUSION

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

DATED this 17th day of July 2012.



MARK W. OLSON
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 17th day of July 2012 I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

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