1-5-2009

Barcella v. State Appellant's Brief Dckt. 35502

IN THE SUPREME COURT OF THE STATE OF IDAHO

GERALD A. BARCELLA,

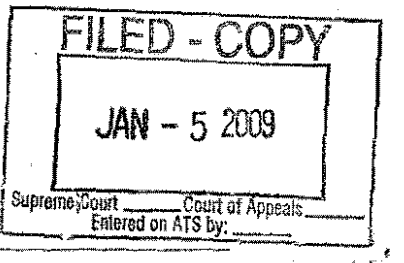
Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent-Respondent.

S. Ct. No. 35502



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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A. Nature of the Case

This is an appeal from the denial of Gerry Barcella's petition for post-conviction relief. Clerk's Record (CR) 846.

B. Procedural History

In 1997, Gerry Barcella was found guilty of the 1995 first degree murder of William Smith. He had been accused of killing Smith, the manager of the apartment building where they both lived, by hitting him with a pulaski.[1] Although the state had sought the death penalty, Gerry was sentenced to a term of life with 30 years fixed. CR 59-77.

A direct appeal was taken and the Court of Appeals found several errors. These included: the improper admission of informant testimony wherein one informant testified that Gerry was not worried that he would be convicted because he had gotten away with a couple of prior shootings; the improper admission of the preliminary hearing testimony of a informant snitch without a proper determination that he was an unavailable witness; and 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 by the state of certain evidence, as the Court found that even if there was error any such error was not 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

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[1] A pulaski is a single bit ax with an adze-shaped hoe extending from the back. Merriam-Webster Online Dictionary, www.merriam-webster.com/dictionary/pulaski.

was not excessive. CR 59-77. *State v. Barcella,* 135 Idaho 191, 16 P.3d 288 (Ct. App. 2000), *rev. denied,* 2001.

Gerry then filed a *pro se* petition for post-conviction relief. CR 1. His petition raised 29 claims for relief. These included:

1. Ineffective assistance of counsel;
2. Prosecutorial misconduct;
3. Violation of the right to access to the courts;
4. Violation of the right to due process;
5. Violation of constitutional rights by pre-trial decisions;
6. Violation of constitutional rights by the decisions and conduct of the trial judge;
7. Error in not granting a new trial motion;
8. The cumulative effect of errors of trial counsel;
9. The cumulative effect of the judges' wrongful decisions and conduct;
10. The cumulative effect of prosecutorial misconduct;
11. The cumulative effect of trial counsel's errors and the pretrial and trial judges' wrongful decisions;
12. Ineffective assistance of appellate counsel;
13. Use by the jury of information not in evidence to convict;
14. Violation of the 5th Amendment right against self-incrimination;
15. Trial court decisions which were unjust and manifestly inconsistent;
16. Violation of the 8th Amendment by an unfair process;
17. Improper selection of the jury;

18. Improper jury instructions on first and second degree murder;

19. Improper selection of a jury pool;

20. Reliance by the jury on false and perjured testimony;

21. Error by the appellate court in not overturning the conviction and ordering a new trial or immediate release;

22. Repeated denial of the right to confront and examine witnesses;

23. Potential contamination of the jury pool by a prospective juror's comments;

24. Denial of the 6th Amendment right to confront witnesses;

25. Violation of the 14th Amendment right to due process;

26. Violation of the right to access to the courts;

27. Denial of a fair trial by a combination of all errors;

28. New evidence not disclosed at trial;

29. Unfair trial.

CR 40-46.

These claims were presented in detail in Gerry's 326 page *pro se* petition. CR Vol. I. And, they were supported by his 249 page *pro se* affidavit. CR Vol. II. Gerry also filed a motion for the appointment of counsel. CR 584.

Gerry's motion for counsel was granted and the Kootenai County Public Defender was appointed. CR 588. Immediately thereafter, John Hull was appointed as conflict counsel. CR 589.

The state then filed its two page answer which included a blanket denial of all of Gerry's allegations, a denial that there were any material facts not previously heard, and a denial that

Gerry received ineffective assistance of counsel. Based upon this blanket denial which did not in any way specifically address even one of Gerry's 29 claims, the state asked the court to dismiss the petition. CR 591.

The state also filed a motion for summary disposition on the grounds that Gerry had filed no affidavit, record, or other evidence supporting his allegations. This motion made no reference to Gerry's 249 page affidavit. CR 594.

About a year later, when nothing new had been filed in the case, the state moved to dismiss for failure to pursue the proceedings. CR 595. And, apparently as a result, Hull was replaced with Rolf Kehne. CR 596. Kehne filed an objection to the state's motion to dismiss asking the court to allow him time to become familiar with the case and investigate potential claims. CR 598.

Kehne had the case from October 2002 until 2004, but did not file any pleadings. However during this time, he successfully avoided attempts to dismiss the case for inactivity. ROA 10/23/02 – 9/27/04.

Then in November 2004, Gerry filed a *pro se* affidavit seeking to vacate the order appointing Kehne and to have new conflict counsel appointed as co-counsel to himself. In his affidavit, he documented Kehne's failure to work on the case and his failure to communicate with Gerry. CR 608.[2]

Thereafter, the court issued an order terminating representation by Kehne, and Michael

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[2] Four years later, on June 27, 2008, Rolf Kehne was suspended from the practice of law for one year with all but 90 days withheld based in part upon his conduct in this case. After the 90 day actual suspension, Kehne will be required to serve a two year probationary period. See www2.state.id.us/isb.be/public_discipline.htm.

Palmer was appointed to represent Gerry. CR 745, 748.

Soon thereafter Palmer filed an amended petition wherein he alleged that the judgment and sentence were in violation of the state and federal constitutions, that prosecutorial misconduct had resulted in a violation of due process, and that the conviction was subject to collateral attack on the grounds of ineffective assistance of counsel. He also included in full Gerry's prior *pro se* petition. CR 753, 757.

In response, the state filed an answer to the amended petition which incorporated its initial answer, denied all the allegations other than those in paragraphs 1-9 and 11 of the amended petition, and asked that the amended petition be denied. CR 762.

The state followed its answer to the amended petition with an amended motion for summary disposition. In the amended motion, the state, without reference to the 29 issues raised by Gerry in his *pro se* petition which was included in the amended petition, determined that the amended petition raised only three claims for relief. The state listed those as: 1) the judgment and sentence were in violation of the state and federal constitutions; 2) prosecutorial misconduct; and 3) ineffective assistance of trial and appellate counsel. With regard to the first two claims, the state asserted that such claims could not be raised in post-conviction because they either were or could have been raised in the direct appeal. With regard to the claim of ineffective assistance of counsel, the state again claimed, without reference to Gerry's lengthy *pro se* affidavit, that the claim should be dismissed because it was not supported by an affidavit, record, or other evidence. CR 764.

A few days after the state's amended motion was filed, on April 11, 2006, the court heard a motion to withdraw from Palmer. Palmer asked for permission to withdraw both because he

was not capital certified, and because there would be an inequity in making him continue as counsel because he did not realize that the case was a capital case when he was appointed and because the amount of work involved far exceeded that for which he was being paid under his contract with the public defender. However, the court denied Palmer's motion. Tr. 4/11/06 p. 31-39.

Four months after the state filed its amended motion for summary disposition, Gerry wrote a letter to the court asking that Palmer be removed from his case because he had made no preparation to respond to the state's amended motion and because he had a conflict in representing Gerry given his association with Kootenai County. CR 766.

This request was not granted and the matter proceeded to a hearing on summary judgment on January 9, 2007. Tr. 1/9/07.

The first order of business at the hearing was a letter Gerry had sent to Palmer the day before the hearing asking that Palmer withdraw from the case. Palmer moved for withdrawal pursuant to the letter, but the Court declined to grant that motion, saying that Palmer could make a more formal motion if he deemed it appropriate after the present hearing. Tr. 1/9/07 p. 3-5.

The state then made its argument for summary dismissal stating again that the only three issues in the petition were an unconstitutional judgment and sentence, prosecutorial misconduct, and ineffective assistance of counsel. Again, the state made no reference to the 29 claims Gerry had raised in his *pro se* petition. Tr. 1/9/07 p. 6.

The state asserted that the question of the constitutionality of the judgment and sentence had been raised in direct appeal and so could not be raised again. The state next asserted that even though prosecutorial misconduct was not raised in direct appeal, it should have been and so

could not now be heard in post-conviction. And, lastly, it argued that the claim of ineffective assistance of counsel should be dismissed because Gerry had not alleged facts that would support the claim. Tr. 1/9/07 p. 6-7.

In response, Palmer argued that prosecutorial misconduct could be subsumed in the ineffective assistance of counsel argument, because if there was misconduct it was ineffective assistance to not raise it in direct appeal. He also asked that the issue of ineffective assistance remain open because he was still investigating the factual basis for the claim. Tr. 1/9/07 p. 14-15.

In its ruling, the Court stated that only four claims were before it: 1) unconstitutional judgment and sentence; 2) prosecutorial misconduct; 3) ineffective assistance of trial counsel; and 4) ineffective assistance of appellate counsel. In so doing, the Court did refer to Gerry's original petition stating:

> . . . It's very difficult to sort through Mr. Barcella's petition in this case. It was my hope that we'd have it amended in some fashion where it would be a little more legible and easy to grasp, but that hasn't occurred.
>
> What has occurred, though, is we do have an amended petition in front of the Court which refers and incorporates the original handwritten petition. And the amended petition is a sworn petition by Mr. Barcella. So we have, basically a sworn complaint in front of the Court.

Tr. 1/9/07 p. 16-17.

The Court then held that claims of an unconstitutional judgment and sentence and prosecutorial misconduct were subject to summary dismissal. However, claims of ineffective assistance of counsel were not be dismissed. Tr. 1/9/07 p. 20, CR 771.

And, so on May 29, 2007, an evidentiary hearing began on Gerry's petition. And, at that

hearing, the very first words from the state included, ". . . if there ever was a succinct statement of the issues, I haven't been able to find it, so I am a little unclear as to what the arguments are going to be . . ." Tr. 5/29/07 p. 3. And, just moments later, the state said, "I obviously have some idea, but Mr. Barcella's pleadings in the matter were quite extensive, and it's a bit hard to respond to the issues when I don't know exactly what the issues are going to be." Tr. 5/29/07 p. 5.

Palmer presented testimony from five witnesses. Two are most relevant for this appeal: John Adams, who represented Gerry at trial, and Gerry.

Adams testified that while he understood that trial counsel cannot ignore a defendant's constitutional right to testify and that the decision of whether to testify lies ultimately with the client, he might have, in this case, denied Gerry the right to testify. Tr. 5/29/07 p. 167-169. Adams further testified that he would not have allowed Gerry to voluntarily waive the right to counsel and not put it on the record, especially given this was a death penalty case, because "that's how people die, so I wouldn't do that." Tr. 5/29/07 p. 175. Adams testified that if there is no waiver on the record of Gerry's right to testify, the only explanation is that he did not in fact waive that right. Tr. 5/29/07 p. 174.

Adams adamantly maintained that Gerry did not get a fair trial. According to Adams, Gerry's trial was the most flawed, the worst, trial he had ever seen in his 27 years of criminal defense work. Tr. 5/29/07 p. 149, 157.

Gerry gave lengthy testimony. Especially relevant to this appeal, Gerry testified that he and Adams did not communicate well. In fact, as confirmed by Adams, Gerry sent Adams 638 kites from the jail about the case. However, Gerry testified that Adams never responded to even

one. Tr. 5/29/07 p. 116, p. 172. Further, Gerry testified that Adams had told him that he would not allow Gerry to testify at trial, even though Gerry repeatedly told Adams that he wanted to testify. Tr. 5/29/07 p. 122-124. And, indeed, in trial transcript, which extends over 1800 pages, there is no record of Gerry ever waiving the right to testify. See Trial Transcript. See also, CR 827, where in the Opinion on Petition for Post-Conviction Relief, the Court writes, ". . . the lengthy trial transcript does not appear to contain a specific waiver of Petitioner's right to testify." Gerry also testified that he could not recall any colloquy about his right to testify occurring either on or off the record. Tr. 5/29/07 p. 124.

Gerry also testified as to some of the substance of the case against him. He testified that he had wanted to do a manslaughter type defense because he did not premeditate the killing of Smith. Tr. 5/29/07 p. 136. He also testified that he wanted to testify because much of the testimony the state offered at trial was lies and he wanted to rebut them. Tr. 5/29/07 p. 123.

With regard to the alleged offense, Gerry 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, Smith had let Gerry move into the apartment and had let him have a dog. Rather than having bad feelings toward Smith, Gerry was grateful to him. Tr. 5/29/07 p. 125, 129, 201.

Gerry also testified as to the terrible time he was having immediately before Smith died.

Gerry had been in jail in Wallace, and upon his release, he had lost the house he had been buying. Tr. 5/29/07 p. 201. His dog had also died and he had been forced to move to Coeur d'Alene, even though he did not really want to. He moved into the apartment, which was named

Harmony House, but was really more like Animal House. People there were drunk and on drugs and running up and down the hallways. One guy was even standing in the hallway swinging a 2 x 4 with nails and spikes in it and had to be arrested. Further, that week, Gerry was assaulted by a homosexual 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. 5/29/07 p. 203.

These events were all set over Gerry's pre-existing PSTD, alcoholism, and bipolar disorder. Tr. 5/29/07 p. 205.

In the three years before Smith's death, Gerry had been sober. However, when he moved to Idaho, he had started "controlled" drinking, wherein he would work out and then go have a pitcher or two of beer. Tr. 5/29/07 p. 208.

On the day of Smith's death, Gerry was drinking and taking Xanax.[3] So, it was hard for him to remember events clearly. However, either the day Smith died or the day before, he went to the Cotton Club with Bill Solberg and they got drunk. Tr. 5/29/07 p. 208-209. Later that day, his girlfriend, Ricki Bobo, took him shopping for some shoes and when they came back to his apartment, there was a note from Smith on his door. But, the note did not upset Gerry and he just took it from the door. The idea that this note was a motive for him to harm Smith was totally false. Tr. 5/29/07 p. 210.

At any rate, Gerry was drunk for approximately four days prior to Smith's death. He was also taking a "mega-dose" of Xanax, and this caused blackouts and memory loss. Tr. 5/29/07 p. 211-212.

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[3] 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.

Shortly before Smith's death, Gerry had received his SSI check and slipped his rent under Smith's door. While he had been in the habit of working out, he did not go to the gym the day Smith died because he was very depressed and alone. Instead, he continued drinking. Tr. 5/29/07 p. 213-214.

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 there drinking. Gerry was leery of Thrift, but because he was drinking, he lost sight of his morals and started drinking with him. After leaving Lakers, he and Thrift went to T.W. Fishers and probably two other places, the Cantina and Tito Macaroni's, and Gerry had a drink at each place. Tr. 5/29/07 p. 214.

At some point, Gerry went home. He cannot remember now if he continued drinking at home, but at 5:30 p.m., he went to the Watering Hole. Thrift, David Overcash, and Solberg were there and Gerry probably had about three or four more beers. While there, the bartender asked Gerry to straighten out Overcash because he was calling her foul names. He agreed to help and took Overcash outside, where he kicked him. They then went back inside and the bartender, in thanks, bought Gerry more beer for the next couple of hours. Tr. 5/29/07 p. 215.

A couple of hours later Thrift and Bakey came in. Both were drunk. Bobo also showed up saying she had been at the Cantina drinking. Meanwhile, Gerry was doing shots. He was so drunk that at about 10:30 p.m., he froze up and could not walk. This made Bobo very angry and she and Solberg carried Gerry out to Solberg's truck. Tr. 5/29/07 p. 216.

Gerry can recall getting into the truck and going with Solberg to two other bars. At some point, Bobo went home and Bakey and Thrift also left. Tr. 5/29/07 p. 217.

About 1:30 a.m. Gerry called Bobo. It was a "drunk's phone call" based upon Gerry's

loneliness and depression. By then, he was very drunk and he and Solberg left the bar to return to the apartment building. Tr. 5/27/07 p. 217-218.

Gerry can remember crawling into his room and Smith telling them that they could not come in at two or three in the morning drunk. However, Smith too was a drinker and he didn't yell at Gerry or anything. In fact, they had often interacted together at the bars. Tr. 5/29/07 p. 218.

Gerry stayed in his room and drank another beer or two. At this point he had not slept for four days. Tr. 5/27/07 p. 219.

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. Gerry is not sure why, but he might have been afraid that Smith would yell at him for the noise and he wanted to avoid trouble. At any rate, Gerry'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 already been jumped and so wanted to protect himself. Tr. 5/30/07 p. 9.

This is the last thing Gerry can remember. Tr. 5/27/07 p. 220.

Some time later, Gerry woke up in Smith's room. Smith was dead and the pulaski was on the floor between them. Tr. 5/27/07 p. 220. Gerry was in a blackout period and does not know how Smith died. Tr. 5/30/07 p. 12.

Gerry got extremely scared and did not know what to do. So, he left Smith's room, went into his own room, and had some more beer. Everything kept running through his mind and it was terrible. Tr. 5/27/07 p. 221.

Sometime between 5:00 a.m. and 6:00 a.m., Gerry and Thrift had another beer. Then Thrift suggested that he (Thrift) hotwire Solberg's truck and that they go out for breakfast. They did this and went to Denny's. Tr. 5/27/07 p. 221-222.

At Denny's, Gerry told Thrift and Bobo that he had killed Smith. In response, Bobo came up with an idea to put a note under Smith's door asking for a rent receipt in order to deflect suspicion from Gerry. Tr. 5/27/07 p. 222.

After breakfast, Bobo brought her son to Gerry's apartment and Gerry continued drinking throughout the day. Finally, Peter Cooper went into Smith's room and found Smith's body. Cooper wanted someone to call the police, and after freaking out, Gerry remembered that Smith was the only one in the building with a phone. So, Gerry told Cooper this, and Cooper called the police. Tr. 5/27/07 p. 223.

When the police arrived, they declined to interview Gerry saying he was too drunk to talk with. Gerry looked into the room, but he already understood what had happened. Tr. 5/27/07 p. 224.

Meanwhile, Bobo was freaking out and felt that it was not a good place for her 11 year old son to be. So, he, Bobo, and the boy left. As they left, Gerry spoke with a police officer, showing her his ID and asking if it was OK to leave. Tr. 5/27/08 p. 225.

The three went to a motel and spent the night. The next day Gerry returned to the apartment and was arrested on a federal weapons charge. Tr. 5/27/07 p. 225.

Gerry did not confess to killing Smith to the two informants who testified in the trial, Lane and Agrifolio. Tr. 5/30/07 p. 16.

Gerry had no issues with Smith. He had no problems with him at all. Tr. 5/27/07 p. 229.

In fact, Gerry has been waiting until the end of his case because he wants to put Smith's friend Bob Healy's mind to rest by answering any questions he may have. Tr. 5/27/07 p. 229-230.

Gerry thinks about Smith every day and prays for him and his friends. Tr. 5/27//07 p. 231.

Had Gerry been able to present the evidence he wanted at trial, the jury would have learned that he had been in fights before, but they would have also learned the nature of the other people involved. And, they would have learned that Gerry does not lie. Tr. 5/27/07 p. 232.

Gerry testified that if he had been allowed to testify at trial and admit that he had killed Smith, the informant testimony, which was full of horrible lies, would not have been admitted. Tr. 5/27/07 p. 232. If Gerry had been able to testify at trial, he would have given the same testimony that he gave at the hearing on his petition. Tr. 5/30/07 p. 7.

While Gerry 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. 5/27/07 p. 232-233.

Following the hearing, the District Court entered a written opinion denying post-conviction relief. The Court adopted the assumption that trial counsel did not allow Gerry to testify and that for purposes of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984), this was deficient performance. However, the Court further found that the deficient performance did not prejudice Gerry because the outcome of the trial would not have been different if he had been allowed to testify. The Court further held that there was no deficient performance in trial counsel's failure to communicate with Gerry nor was there ineffective assistance by appellate counsel. CR 820.

This appeal timely followed. CR 840.

III. ISSUES PRESENTED FOR REVIEW

1. Given the vagueness of the state's motion for summary dismissal, did the District Court err in summarily dismissing all issues except ineffective assistance of trial and appellate counsel without giving 20 days notice of the reasons therefore as required by I.C. § 19-4906(b)?

2. Even if the state's notice had been proper and the Court had been correct that Gerry had raised only four issues and not twenty-nine, did the District Court err in summarily dismissing the claims of an unconstitutional judgment and sentence and prosecutorial misconduct as the issues could not have been raised on direct appeal as proof of the claims required presentation of evidence outside the appellate record?

3. Did the District Court err in finding that trial counsel's error in prohibiting Gerry from testifying in his own defense was not prejudicial given that with Gerry's testimony there was a reasonable probability that the jury would have found Gerry guilty of manslaughter, but not first degree murder, as his testimony established that he could not have formed the requisite intent for first degree murder?

IV. ARGUMENT

A. Summary Dismissal Without 20 Days Notice of the Reasons Therefore as Required by I.C. §19-4906(b) was Erroneous Given the Vagueness of the State's Motion for Summary Dismissal.

While petitions for post-conviction relief may be summarily dismissed if certain notice requirements are met, I.C. § 19-2906(b) and (c), summary dismissal was not proper in this case because the notice requirements were not fulfilled.

Summary dismissal of a petition for post-conviction relief is authorized under I.C. § 19-

4906(b) and (c). Those sections provide in pertinent part:

> (b) When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply within 20 days to the proposed dismissal. . .
>
> (c) The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

The reason for the 20 day notice requirement in subsection (b) is so that the petitioner will have an opportunity to respond to the court's concerns. *Sua sponte* dismissals without the 20 day notice are not allowed. *Saykhamchone v. State,* 127 Idaho 319, 900 P.2d 795 (1995). Further, when summary dismissal is sought by the state, the state is required to provide notice in its motion of the specific grounds therefore. *Id.*

In *Saykhamchone,* the state filed an answer to a petition for post-conviction relief and in the answer's prayer for relief asked the court to dismiss without further hearings. The Supreme Court held that this document was not sufficient to give Saykhamchone notice of the grounds upon which dismissal was being sought. The Supreme Court stated that ". . . at a minimum the state's prayer for relief in the Answer was deficient for not stating its grounds *with particularity,* and for not stating that it was the state's *motion* for summary disposition under I.C. § 19-4906(c)." 127 Idaho at 322, 900 P.2d at 798 (italics in original). Therefore, summary dismissal without 20 days notice from the court as to the reasons for dismissal was error.

Anderson v. State, ___ Idaho at ___, ___ P.3d at ___, 2007 WL 322794 (Idaho App. 2007) at 7, *rev. granted* March 21, 2008, provides a succinct statement of the requirements for a

motion for summary dismissal.

> It is well established that a petitioner is entitled to notice and an opportunity to respond before his petition for post-conviction relief is dismissed. I.C. § 19-4906(b); *Saykhamchone v. State,* 127 Idaho 319, 321, 900 P.2d 795, 797 (1995); *State v. Christensen,* 102 Idaho 487, 488-89, 632 P.2d 676, 677-78 (1981); *Martinez v. State,* 126 Idaho 813, 892 P.2d 488 (Ct. App. 1996). If the dismissal is based upon the state's motion for summary dismissal, this requirement is met only if the motion states with particularity the ground on which summary dismissal is sought. *Saykhamchone,* 127 Idaho at 322, 900 P.2d at 798; *Christensen,* 102 Idaho at 488-89, 632 P.2d at 677-78. Broad and generic contentions of deficiencies in a petition for post-conviction relief do not suffice. *Franck-Teel,* 143 Idaho at 668-69, 152 P.3d at 29-30. Proper notice must refer to specific allegations in the petition on a claim-by-claim basis, and specifically refer to deficiencies in the evidence or additional legal analysis necessary to avoid summary dismissal of the claim. *Id.* at 668, 152 P.3d at 29. *See also, Crabtree v. State,* 144 Idaho 489, 494, 163 P.3d at 1201, 1206 (Ct. App. 2006).

Anderson v. State, supra. See also, Murphy v. State, 143 Idaho 139, 149, 139 P.3d 741, 751 (Ct. App. 2006),("If the [state's] motion [for summary dismissal] is not specific, any dismissal granted by the district court will be treated as a *sua sponte* dismissal subject to the notice requirement of I.C. § 19-4906(b). *Martinez v. State,* 126 Idaho 813, 818, 892 P.2d 488, 493 (Ct. App. 1995).").

In this case, the state did move for summary judgment twice, once right after Gerry filed his *pro se* petition and again after Palmer filed the amended petition. However, neither motion met the notice requirements of *Saykhamchone, Anderson, Franck-Teel, Crabtree,* and *Murphy.*

In its first motion for summary judgment, the state filed a two page answer which included a blanket denial of all of Gerry's allegations, a denial that there were any material facts not previously heard, and a denial that Gerry received ineffective assistance of counsel. At the same time, the state also filed a motion for summary disposition on the grounds that Gerry had filed no affidavit, record, or other evidence supporting his allegations. This document made no

reference to Gerry's 249 page affidavit. CR 594.

Based on these documents which did not in any way specifically address even one of Gerry's 29 claims or any of the statements in Gerry's lengthy affidavit, the state asked the court to dismiss the petition. In no way did either of these documents "refer to specific allegations in the petition on a claim-by-claim basis, and specifically refer to deficiencies in the evidence or additional legal analysis necessary to avoid summary dismissal of the claim." *Anderson v. State, supra.*

Later, the state filed an answer to the amended petition which incorporated its initial answer, denied all the allegations other than those in paragraphs 1-9 and 11 of the amended petition, and asked that the amended petition be denied.

The state followed its answer to the amended petition with an amended motion for summary disposition. In the amended motion, the state, without reference to the 29 issues raised by Gerry in his *pro se* petition, which was included in the amended petition, determined that the amended petition raised only three claims for relief. The state listed those as: 1) the judgment and sentence were in violation of the state and federal constitutions; 2) prosecutorial misconduct; and 3) ineffective assistance of trial and appellate counsel. With regard to the first two claims, the state asserted that such claims cannot be raised in post-conviction because they either were or could have been raised in the direct appeal. With regard to the claim of ineffective assistance of counsel, the state again claimed, without reference to Gerry's lengthy *pro se* affidavit, that the claim should be dismissed because it was not supported by an affidavit, record, or other evidence.

Again, these documents wholly failed to "refer to specific allegations in the petition on a

claim-by-claim basis, and specifically refer to deficiencies in the evidence or additional legal analysis necessary to avoid summary dismissal of the claim." *Anderson v. State, supra.*

In fact, rather than giving notice to Gerry and his counsel of the deficiencies in the petition, both the Court and the state made comments on the record to the effect that they had not even identified what Gerry's claims actually were. The prosecutor stated, ". . . if there ever was a succinct statement of the issues, I haven't been able to find it, so I am a little unclear as to what the arguments are going to be . . ." Tr. 5/29/07 p. 3. And, just moments later, "I obviously have some idea, but Mr. Barcella's pleadings in the matter were quite extensive, and it's a bit hard to respond to the issues when I don't know exactly what the issues are going to be." Tr. 5/29/07 p. 5. And the Court stated, " . . . It's very difficult to sort through Mr. Barcella's petition in this case. It was my hope that we'd have it amended in some fashion where it would be a little more legible and easy to grasp, but that hasn't occurred." Tr. 1/9/07 p. 16-17.

Just as in *Saykhamchone,* the vague documents filed by the state were not enough to put the petitioner on notice of the reasons why dismissal was being sought and therefore not sufficient to allow dismissal without 20 days notice from the court under subsection (b).

Because proper notice was not given, the order summarily dismissing all of Gerry's claims except ineffective assistance of counsel claims should be reversed and the matter remanded for further proceedings on those issues.

B. <u>The Claims of an Unconstitutional Judgment and Sentence and Prosecutorial Misconduct Should Not Have Been Summarily Dismissed.</u>

Even if it is determined that the state's notice was sufficient and summary judgment was appropriate on some of Gerry's issues, the issues of an unconstitutional judgment and sentence

and prosecutorial misconduct should not have been summarily dismissed.

The District Court dismissed the claim that the judgment and sentence were unconstitutional on the basis that the issue had been raised in direct appeal and therefore could not now be raised in post-conviction. Tr. 1/9/07 p. 6.

The District Court did not make entirely clear its reasons for summarily dismissing any claims of prosecutorial misconduct. The state had argued that prosecutorial misconduct is a claim that cannot be raised in post-conviction because it can be raised in direct appeal. Tr. 1/9/07 p. 7. And, presumably, this was the argument accepted by the Court. The Court's comments on the question were:

> And, again, to the extent that any failure to properly deal with the prosecutorial misconduct is an allegation of ineffective assistance of counsel, I think that that certainly survives as part of the ineffective assistance of counsel claim. And so I think, basically, an ineffective assistance of counsel claim as raised by Mr. Barcella is the issue that would be in front of the Court for the evidentiary hearing. Any independent claim for prosecutorial misconduct or any independent claim for unconstitutional imposition of judgment and sentence, I think, certainly should be removed and summary disposition should be granted.

Tr. 1/9/07 p. 19-20.

I.C. § 19-4901(b) does establish that most issues which could have been raised on direct appeal cannot be raised in post-conviction.

> b) This remedy is not a substitute for nor does it affect any remedy incident to the proceedings in the trial court, or of an appeal from the sentence or conviction. Any issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings, unless it appears to the court, on the basis of a substantial factual showing by affidavit, deposition or otherwise, that the asserted basis for relief raises a substantial doubt about the reliability of the finding of guilt and could not, in the exercise of due diligence, have been presented earlier. Except as otherwise provided in this act, it comprehends and takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or

sentence. It shall be used exclusively in place of them.

However, claims of an unconstitutional judgment and sentence and of prosecutorial misconduct which are based upon allegations outside of the record on appeal are not claims which could have been raised in direct appeal and are properly heard in post-conviction. *State v. Windsor,* 110 Idaho 410, 420, 716 P.2d 1182, 1192 (1985). *See also, Raudebaugh v. State,* 135 Idaho 602, 21 P.3d 924 (2001) and *Sivak v. State,* 134 Idaho 641, 8 P.3d 636 (2000), recognizing that claims of prosecutorial misconduct can be properly raised in post-conviction.

Some of the allegations of an unconstitutional judgment and sentence in Gerry's *pro se* petition were based upon facts outside the appellate record, including claims that the jury relied upon information not in evidence to convict, that the jury was improperly selected, and that the jury had been contaminated by a prospective juror's comments. Any of these claims, if established, would amount to an unconstitutional judgment against Gerry. However, they were not and could not have been effectively raised in direct appeal, and so should not have been summarily dismissed. *Id.*

Likewise, any allegations of prosecutorial misconduct offered by Gerry based upon conduct which was outside the appellate record, including any claims of *Brady*[4] violations, intimidation of witnesses, or tampering with evidence, which were not fully litigated in the course of the trial, were proper claims for post-conviction relief and should not have been summarily dismissed. For example, in his *pro se* petition, Gerry alleged that the prosecutors had "perpetrated a fraud upon the Court through suborning false and perjured testimony, withholding evidence, withholding exculpatory evidence, planting snitches, withholding convictions and

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[4] *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194 (1963).

criminal files of state's witnesses, bolstering false and perjured testimony, . . ." CR 118. Issues of the planting of snitches, the withholding of exculpatory evidence and many others alleged by Gerry would require presentation of evidence not already in the record.

Because not all the claims of an unconstitutional judgment and sentence and prosecutorial misconduct could have been raised in the direct appeal, the order summarily dismissing those claims should now be reversed and the matter remanded for further proceedings. *Id.*

C. The Ineffective Assistance of Counsel in Prohibiting Gerry From Testifying Was Prejudicial.

In its opinion the District Court adopted the assumption that trial counsel was ineffective in denying Gerry his right to testify in his own defense. However, the Court also found that this ineffective assistance was not prejudicial. This conclusion is incorrect, because had Gerry testified, it is reasonably probable that the jury would have found him guilty of manslaughter instead of first degree murder. And, even if the jury had still returned a verdict of first degree murder, it is reasonably probable that on appeal the Court of Appeals would not have found the three trial errors harmless.

To prevail on a claim of ineffective assistance of counsel, the petitioner must show that counsel's performance was deficient and that the deficiency was prejudicial. To show prejudice, the petitioner must show that there was a reasonable probability that, without counsel's unprofessional errors, the outcome of the trial would have been different. *Strickland v. Washington, supra.*

In this case, the District Court correctly found that in denying Gerry his constitutional right to testify, trial counsel was ineffective. "It is assumed that trial counsel did not allow

Petitioner to testify since there is no specific evidence regarding the reason that trial counsel did not call Petitioner to the stand or of a waiver." CR 827. *See* American Bar Association Standards for Criminal Justice 4-5.2 (decision of whether to testify is ultimately for the accused and not counsel to make).

But, the Court then went on to find that this error was harmless, stating that the jury had considered lesser included offenses and rejected them and that even if the jury had heard Gerry's testimony it would not have reached a different verdict. CR 828-829. In this, the District Court erred.

The evidence presented at trial was summarized in *State v. Barcella, supra.* According to that summary, on the day Smith died, Gerry was drinking heavily and made threats to kill Smith. Sometime in the middle of the night, Gerry went into Smith's room, killed him with the pulaski, and left. He later told Thrift and Bobo that he had killed Smith. Further evidence was offered that two informants independently heard Gerry 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.

In his testimony at his post-conviction hearing, Gerry testified that he had been drinking a tremendous amount over the course of several days preceding Smith's death. In addition, he testified to his post-traumatic stress disorder, his alcoholism, his depression, and his bi-polar illness. Further, he told the Court 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 and that 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. Gerry told the Court that he had no issues with Smith and

that his threats had been directed at others, not 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 Smith.

In the main, Gerry's testimony did not conflict with the evidence offered by the state at his trial. At the trial, there was testimony as to Gerry's state of intoxication. There was ample evidence that Smith died from being hit with an instrument like, if not identical to, the pulaski Gerry owned.

What Gerry 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 Smith was killed.

In short, what Gerry 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 Gerry testified at trial as he testified at the post-conviction hearing, he would not have 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 that of 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 Gerry's extreme state of intoxication attributable both to Xanex 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), "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

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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.

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 intent.

Gerry's testimony would have been such that had the jury heard it, there was a reasonable probability that he would have been convicted not of first degree murder, but rather of voluntary manslaughter. Moreover, even if the jury had still convicted Gerry of first degree murder, it is reasonably probable that the Court of Appeals would not have found the numerous trial errors were harmless. In either event, prejudice did result from the ineffective assistance of counsel. *Strickland v. Washington, supra.* Because the ineffective assistance of counsel was prejudicial, the District Court order denying post-conviction relief on this issue must now be reversed.

V. CONCLUSION

Because proper notice was not given, the order summarily dismissing all issues other than ineffective assistance of counsel should now be reversed and the matter remanded for further proceedings on those issues. In the alternative, because the issue of prosecutorial misconduct could not have been raised in direct appeal, the order summarily dismissing that issue should now be reversed and the matter remanded for further proceedings on that issue. And, in any event, the order finding ineffective assistance of trial counsel but denying relief because no prejudice was established, must now be reversed because as set out above, if Gerry had testified, it is reasonably probable that the jury would have returned a verdict of manslaughter as opposed to first degree murder.

Respectfully submitted this 5TH day of January, 2009.

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CERTIFICATE OF SERVICE

I hereby certify that on this 5TH day of January, 2009, I deposited in the United States mail, two true and correct copies of the foregoing, postage prepaid addressed to:

Office of the Attorney General
P.O. Box 83720
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Dennis Benjamin