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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

GERALD ANGELO BARCELLA,)
)
Petitioner-Appellant,)
)
vs.)
)
STATE OF IDAHO,)
)
Respondent.)

NO. 35502

FILED - COPY
JUN 24 2009
Supreme Court Court of Appeals
Entered on ATS by: _____

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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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Gerald A. Barcella appeals from the district court's order summarily dismissing some of the claims contained in his for post-conviction petition relief and from the district court's order dismissing the remaining claims after an evidentiary hearing.

Statement Of Facts And Course Of Underlying Criminal 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, 16 P.3d 288 (Ct. App. 2000) (review denied):

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 at 205, 16 P.3d at 302.

Course Of Post-Conviction Proceedings

Barcella filed a timely pro se petition for post-conviction relief. (R., pp.1-326.)¹ In his petition, Barcella listed twenty-nine "Grounds for ... application for post-conviction relief":

- 1) Ineffective Assistance of Counsel
- 2) Prosecutorial Misconduct
- 3) Access to Courts Violated
- 4) Due Process Rights Violated
- 5) Judge Haman's pretrial decisions violated petitioner's rights
- 6) Judge Bengston's decisions and conduct at trial violated petitioner's rights.
- 7) Trial judge should have granted a new trial
- 8) Cumulative effect of trial counsel's errors
- 9) Cumulative effect of judge's wrongful decisions and conduct
- 10) Cumulative effect of prosecutorial misconduct.
- 11) Cumulative effect of trial counsel's errors, pretrial and trial judges wrongful decisions and conduct and prosecutorial misconduct
- 12) Ineffective assistance of appellate counsel
- 13) The jury used information not in evidence to convict petitioner
- 14) Petitioner's 5th Amendment rights against self-incrimination were violated
- 15) Judge's decisions at trial were unjust and manifestly inconsistent

¹ (Pages four through thirty-nine are the table of contents and documents relating to his struggle to get documents related to his case delivered to him at the prison.)

- 16) 8th Amendment rights violated by an unfair process
- 17) The jury was improperly selected
- 18) Jury Instructions on Murder I and Murder II were improper
- 19) The jury pool was improperly selected
- 20) The jury relied on false and perjured testimony to convict petitioner
- 21) The appellate court should have overturned petitioner's conviction and ordered a new trial or petitioner's immediate release
- 22) Petitioner's right to confront and examine witnesses was denied repeatedly
- 23) The jury pool had the potential of being contaminated by a perspective [sic] juror's comments.
- 24) Barcella's 6th Amendment rights to confront witnesses were denied
- 25) Barcella's 14th Amendment rights to due process were violated
- 26) Barcella's access to courts rights were violated
- 27) Combination of all errors included in this petition along with 2 reversible errors acknowledged in appeal response and other reasons sighted [sic] in appeal denied Barcella a fair trial
- 28) New evidence not disclosed at trial.
- 29) Mr. Barcella's trial was unfair.

(R., pp.40-45.) Barcella's petition included a request for counsel, which was granted by the district court. (R., pp.2, 584-588.) Barcella also filed an "Affidavit of Gerald A. Barcella." (R., pp.330-332.) Apparently filed simultaneously with the affidavit, or possibly attached to the affidavit (although the affidavit itself does not refer to any attachments) are more than two hundred pages of documents, including jail kites and hand-written notes apparently written by Barcella, copies of transcripts, reports and letters prepared by other individuals (R., pp.333-579).

The state filed an answer to Barcella's petition (R., pp.591-592), and moved for summary disposition (R., pp.594-595). The basis for the state's motion was Barcella had "provided no affidavit, record or other evidence supporting his general allegation of ineffective assistance of counsel" and

provided reference to State v. Nielsen, 121 Idaho 779, 828 P.2d 342 (Ct. App. 1992) for the proposition that a petition may be dismissed for lack of “affidavits, documents or other evidence [thereby] not having presented a genuine issue of material fact.” (R., p.594.) The state further asserted that Barcella had failed to provide “affidavits, documents or other evidence to supports hit allegation that there exists evidence of material facts not previously presented and heard that requires vacation of the conviction and sentence.” (R., pp.594-595.)

Barcella’s counsel filed an amended petition for post conviction relief. (R., pp.757-761.) Barcella’s counsel listed, as grounds for relief:

- a. That the judgment and sentence is in violation of the Constitution of the United States and the State of Idaho.
- b. Prosecutorial misconduct which resulted in a violation of due process.
- c. That the conviction is subject to collateral attack on the grounds of ineffective assistance of trial counsel.
- d. That the affirmation of the conviction by the Supreme Court is subject to collateral attack on the grounds of ineffective assistance of appellate counsel.

(R., pp.758-759.) Counsel further specifically referenced and incorporated Barcella’s “290 page *pro se* Petition” (R., p.759, paragraph 9) but did not reference or incorporate Barcella’s affidavit or the 246 pages of documents apparently attached to that affidavit. Counsel did assure the court that “[f]urther supporting material in the way of affidavits, transcripts, etc. will be filed in supplement to this Petition as they are gathered.” (R., p.759.)

The state filed an answer to the amended petition (R., pp.762-763) and an amended motion for summary disposition (R., pp.764-765). The state pointed

out that Barcella's claim that his judgment and sentence are unconstitutional was an issue that "barred and forfeited on post-conviction" because it could and should have been raised on direct appeal. (R., p.764.) Likewise, Barcella's claim of prosecutorial misconduct appeared to also be an issue that could and should have been raise on direct appeal, citing Rodgers v. State, 129 Idaho 720, 932 P.2d 348 (1997) and Parsons v. State, 113 Idaho 421, 745 P.2d 300 (Ct. App. 1987). (R., p.764.) The state attached a copy of the Court of Appeals' opinion in Barcella's direct appeal. (R., p.765.) Finally, the state based its motion on the fact that Barcella had "provided no affidavit, record or other evidence supporting his conclusory allegations that trial counsel and appellate counsel were ineffective", citing Nellsch v. State, 121 Idaho 779, 828 P.2d 342 (Ct. App. 1992) "for the proposition that claims alleged by a petitioner which are not supported by affidavits, documents or other evidence may be dismissed at summary judgment for not having presented a material issue of fact." (R., p.765.)

At the hearing on the state's motion for summary disposition, the state again iterated what it believed to be the issues raised by Barcella's petition and amended petition: "unconstitutional judgment and sentence" (1/9/07 Tr., p.6, Ls.18-21), "prosecutorial misconduct" (1/9/07 Tr., p.7, Ls.1-4), and "ineffective assistance of counsel" (1/9/07 Tr., p.7, Ls.19-23). The state reiterated the bases for its motion to dismiss – that the first two issues should have been raised on direct appeal and that Barcella had not asserted facts that would support his

claims of ineffective assistance of counsel: “there’s just an absence in the record of facts by way of affidavit.” (1/9/07 Tr., p.6, L.22 – p.8, L.25.)

In response, Barcella’s counsel did not disagree with the state’s characterization of Barcella’s petition having presented three claims. Instead, counsel appeared to concede the state’s point with regard to the first two issues by attempting to instead preserve the first two claims as claims of ineffective assistance of counsel. (1/9/07 Tr., p.9, L.14 – p.11, L.8) Counsel then asked the court to “allow this record to remain open” so that he could submit affidavits in support of Barcella’s claims – as claims of ineffective assistance of counsel – within 30 days. (1/9/07 Tr., p.11, Ls.9-19, p.14, L.23 – 15, L.9.)

The district court likewise viewed Barcella’s petition, without objection from Barcella, as having presented the three issues as articulated by the state, expanded to four by Barcella’s own petition breaking down the ineffective assistance of counsel claim into trial counsel and appellate counsel claims. (1/9/07 Tr., p.15, L.10 – p.20, L.6.) The court summarily dismissed Barcella’s first and second claims, and granted him an evidentiary hearing with regard to claims three and four – ineffective assistance of trial and appellate counsel. (R., p.771; 1/9/07 Tr., p.15, L.10 – p.20, L.6.)

After an evidentiary hearing on the claims of ineffective assistance of counsel (5/29/07 transcript and 5/30/07 transcript), and following briefing by the parties (R., pp.778-819), the district court dismissed the remainder of Barcella’s petition. (R., pp.820-833.) Barcella timely appealed. (R., pp.840-843.)

ISSUES

Barcella states the issues on appeal as:

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 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?

(Appellant's brief, p.15.)

The state wishes to rephrase the issues on appeal as:

1. *Has Barcella failed to preserve his claim that the state's notice was insufficient because he failed to object below?*
2. *Has Barcella failed to establish error in the district court's dismissal of his claims of unconstitutional judgment and sentence and prosecutorial misconduct?*
3. *Has Barcella failed to establish the district court erred when it analyzed his claim that trial counsel did not allow him to testify as an ineffective assistance of counsel claim?*

ARGUMENT

I.

Barcella's Claim That The State's Motions For Summary Dismissal And Memoranda In Support Did Not Give Him Sufficient Notice May Not Be Raised For The First Time On Appeal

A. Introduction

Barcella claims that the state's motions for summary disposition were "vague" (Appellant's brief, p.15), did not "refer to specific allegations in the petition on a claim-by-claim basis [or] specifically refer to deficiencies in the evidence or additional legal analysis necessary to avoid summary dismissal of the claim" (Appellant's brief, p.18). Barcella's Appellant's brief casts his claim as a claim of insufficient notice by the state. (Appellant's brief, pp.15-19.) As such, they may not be raised for the first time on appeal, because Barcella did not object to the sufficiency of the notice below.

B. The Notice Requirements of I.C. § 19-4906

An applicant for post-conviction relief is required to make a prima facie case by presenting admissible evidence on each element of his or her claims. Berg v. State, 131 Idaho 517, 518-19, 960 P.2d 738, 739-40 (1998). Idaho Code § 19-4906(c) permits either party in a post-conviction relief proceeding to file a motion for summary disposition of the application. The trial court can grant the motion 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." Id.

Because a post-conviction relief proceeding is governed by the Idaho Rules of Civil Procedure, see Stuart v. State, 127 Idaho 806, 813, 907 P.2d 783, 790 (1995); I.C. § 19-4907(a), a motion for summary disposition must “state with particularity the grounds therefor.” Saykhamchone v. State, 127 Idaho 319, 322, 900 P.2d 795, 798 (1995); I.R.C.P. 7(b)(1). The particularity requirement of Rule 7(b)(1), however, “only requires reasonable particularity.” DeRushé v. State, 146 Idaho 599, ---, 200 P.3d 1148, 1150 (2009) (*citing* Patton v. Patton, 88 Idaho 288, 292, 399 P.2d 262, 264-65 (1965)). “If the notice is sufficient that the other party cannot assert surprise or prejudice, the requirement is met.” Id. Furthermore, “[i]f the ground for summary disposition is that there is no admissible evidence on an essential element of a claim, reasonable particularity only requires pointing that out.” Id. Stated differently, if the basis for dismissal is lack of evidence produced by the petitioner, the motion need only state as much.

When a district court summarily dismisses a post-conviction application relying in part on the same arguments presented by the state in its motion for summary dismissal, the notice requirement has been met. Workman v. State, 144 Idaho 518, 525, 164 P.3d 798, 805 (2007).

If the petitioner’s claim on appeal from summary dismissal is lack of particularity – that the “State did not state the grounds of its motion with sufficient particularity” – it is a claim that the petitioner must raise below. DeRushé at ---, 200 P.3d at 1151. A post-conviction petitioner “cannot raise the alleged lack of specificity for the first time on appeal.” Id. (*citing* Ferrier v. State, 135 Idaho 797,

799, 25 P.3d 110, 112 (2001); McCoy v. State, 129 Idaho 70, 921 P.2d 1194 (1996)).

Barcella did not raise below his new claim on appeal that the state's notice was "vague" or did not "refer to specific allegations in the petition on a claim-by-claim basis [or] specifically refer to deficiencies in the evidence or additional legal analysis necessary to avoid summary dismissal of the claim." Despite his attempts in his supplemental briefing, in light of the holding in DeRushé, to recast his claim as one of *no* notice, his claim on appeal is that the state's notice was insufficient. See State v. Raudebaugh, 124 Idaho 758, 763, 864 P.2d 596 (1993) ("This Court has held that it will not consider an issue if it was not raised as an issue on appeal."). As such, it should not be considered as having been raised for the first time on appeal.

II.

The Claims Of Unconstitutional Judgment And Sentence And Prosecutorial Misconduct Were Properly Summarily Dismissed

A. Introduction

Barcella contends that his claims that his judgment and sentence were unconstitutional and that the prosecution engaged in misconduct should not have been summarily dismissed, because, he claims, these claims could not have been raised on direct appeal because they were "based upon allegations outside of the record on appeal." (Appellant's brief, p.21.) Barcella's claim on appeal is based not on these claims' viability as claims related to the ineffective assistance of counsel but as stand-alone claims requiring extrinsic evidence in

support. (Appellant's brief, pp.19-22.) Below, Barcella waived any objection to the dismissal of these claims except as they related to his claims of ineffective assistance of counsel. Further, Barcella has failed to establish any error by the district court in the dismissal of these claims because they are issues that should have been raised on direct appeal.

B. Standard Of Review

In reviewing the dismissal of a post-conviction application, the appellate court reviews the record to determine if a genuine issue of material fact exists which, if resolved in petitioner's favor, would require relief to be granted. Nellsch v. State, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992). The court freely reviews the district court's application of the law. Id. at 434, 835 P.2d at 669.

C. Barcella Has Waived Any Objection To The Dismissal Of These Claims Except As They Are Related To His Claims Of Ineffective Assistance Of Counsel

At the hearing on the state's motion for summary disposition, the state opened with the state reiterated the bases for its motion to dismiss – that the first two issues should have been raised on direct appeal. (1/9/07 Tr., p.6, L.22 – p.7, L.18.)

Barcella's counsel concede the state's point with regard to the first two issues by attempting to instead preserve the first two claims as claims of ineffective assistance of counsel. (1/9/07 Tr., p.9, L.14 – p.11, L.8) Counsel then asked the court to "allow this record to remain open" so that he could

submit affidavits in support of all of Barcella's claims – as claims of ineffective assistance of counsel – within 30 days. (1/9/07 Tr., p.11, Ls.9-19, p.14, L.23 – 15, L.9.)

A waiver is a voluntary, intentional relinquishment of a known right or advantage. Dennett v. Kuenzli, 130 Idaho 21, 26, 936 P.2d 219, 224 (Ct. App. 1997). Waiver will not be inferred; the intent to waive must clearly appear on the record. Margaret H. Wayne Trust v. Lipsky, 123 Idaho 253, 256, 846 P.2d 904, 907 (1993). Ordinarily, a client is bound by his attorney's actions. State v. LePage, 102 Idaho 387, 391, 630 P.2d 674, 678 (1981). Because post-conviction proceedings are civil in nature, State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983), and a court is entitled to accept counsel's express waiver of a claim in a civil case, see, e.g., Jung v. Mundy, Holt & Mance, P.C., 372 F.3d 429, 432 (D.C. Cir. 2004), an express waiver of post-conviction claims by counsel is valid. Barcella's counsel waived objection to the dismissal of his first two claims, except as they might relate to his overall claims of ineffective assistance of counsel.

D. These Claims Must Have Been Raised As Part Of Barcella's Direct Appeal

A post-conviction petition is not a substitute for a direct appeal, and, as such "any issue which could have been raised on direct appeal, but was not, is forfeited and may not be considered in post-conviction proceedings . . ." I.C. § 19-4901(b). Because these claims could have been brought on direct appeal, but were not, they were waived and cannot be considered in post-conviction

proceedings. See Hoffman v. State, 125 Idaho 188, 190-91, 868 P.2d 516, 518-19 (Ct. App. 1994) (refusing to consider issues that should have been raised on direct appeal). Barcella still has not identified what claims fall under the umbrella of “unconstitutional judgment and sentence” or “prosecutorial misconduct” that could not have been raised on direct appeal. The district court correctly applied the law in summarily dismissing Barcella’s claims of unconstitutional judgment and sentence and prosecutorial misconduct based upon his failure to raise the claims on direct appeal.

III.

Barcella’s Claim That His Counsel Was Ineffective For Allegedly Prohibiting Him From Testifying At Trial Was Properly Dismissed After An Evidentiary Hearing

A. Introduction

Barcella claims, in his supplemental brief, that the district court improperly considered his claim that his trial counsel prevented him from testifying as a claim of ineffective assistance of counsel. (Supplemental Brief of Appellant, pp.3-5.) Under the doctrine of invited error, however, Barcella is estopped from complaining of the district court’s ruling.

B. The Doctrine Of Invited Error Precludes Barcella From Raising Any Objection To The District Court’s Treatment Of This Claim

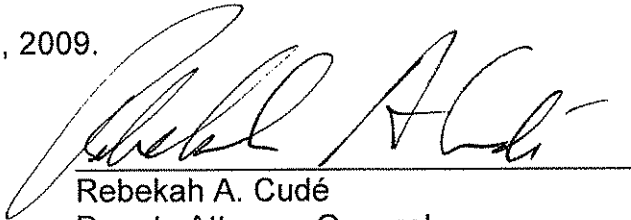
With respect to Barcella’s argument, raised for the first time in his supplemental briefing, that the district court improperly considered his claim that counsel did not allow him to testify as an ineffective assistance of counsel claim, he is precluded from raising such an argument for the first time on appeal. As

evidenced by Barcella's petition, his argument at the hearing on summary dismissal, his argument and presentation of evidence at the evidentiary hearing, and his argument in his Appellant's brief, pp. 22-26, Barcella has consistently framed this claim as a question of ineffective assistance of counsel. Thus, any error in the district court's consideration of this claim was invited and cannot be considered on appeal. A party is estopped, under the doctrine of invited error, from complaining that a ruling or action of the trial court that the party invited, consented to, or acquiesced in was error. State v. Carlson, 134 Idaho 389, 402, 3 P.3d 67, 80 (Ct. App. 2000). The purpose of the invited error doctrine is to prevent a party who "caused or played an important role in prompting a trial court" to take a particular action from "later challenging that decision on appeal." State v. Blake, 133 Idaho 237, 240, 985 P.2d 117, 120 (1999). Moreover, the failure to raise an issue before the trial court waives that issue for the purposes of appeal. State v. Lenon, 143 Idaho 415, 417-18, 146 P.3d 681, 683-84 (Ct. App. 2006). In his petition, amended petition and brief in support of his petition, Barcella framed this issue in precisely the way district court considered it (and in precisely the way that he framed it in his initial brief on appeal). He can not now be heard to complain because the district court considered this issue exactly as he asked.

CONCLUSION

The state respectfully asks this Court to affirm the dismissal of Barcella's petition for post-conviction relief.

DATED this 24th day of June, 2009.




Rebekah A. Cudé
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of June, 2009, 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:

DENNIS BENJAMIN
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