

STATE OF IDAHO  
COUNTY OF KOOTENAI  
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CLERK, DISTRICT COURT  
DEPUTY

<b>IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE</b>	
<b>STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI</b>	
Geraldo Angelo Barcella,	)
	)
Petitioner,	)
	)
v.	)
	)
State of Idaho,	)
	)
Respondent.	)

**CASE NO. CV – 01 – 5504**

MEMORANDUM OPINION AND  
ORDER RE: PETITIONER'S MOTION  
FOR SUMMARY DISPOSITION  
(SECOND PETITION FOR POST-  
CONVICTION RELIEF)

Petitioner has filed a second petition for post-conviction relief, alleging that he was denied his Sixth Amendment right to testify on his own behalf.

Dennis Benjamin, Nevin, Benjamin, McKay & Bartlett, Boise, Idaho, for Petitioner.

Marty Raap, Kootenai County Prosecuting Attorney's Office, for Respondent.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

The facts of this case are substantially set forth in the Idaho Court of Appeals opinion in Barcella v. State, 148 Idaho 469, 224 P.3d 536 (Ct. App. 2009). Important to the matter before this Court, the Petitioner submitted his original pro se petition for post-conviction relief on August 24, 2001 ("Pro Se Petition"), identifying numerous claims in the table of contents. (Pro Se Petition, pp.1-5.) In his Pro Se Petition, the Petitioner

designated a section with the title "Ineffective Assistance of Trial Counsel" (Pro Se Petition, pp.214-489), and included a subsection titled "Denied The Right to Take the Stand / I.A.C. Trial Counsel / Due Process" (Pro Se Petition, p.409). In this subsection, Petitioner asserted that he did not enjoy full communication with his trial counsel because "Barcella's attorney refused to ever discuss the option of Barcella taking the stand in his own defense and Barcella contends he was severely prejudiced." (Pro Se Petition, p.409 (punctuation altered).) Petitioner included an "Affidavit of Gerald Barcella" setting forth his testimony. (Pro Se Petition, pp.410-425.)

On August 31, 2005, Michael Palmer was appointed as Petitioner's post-conviction counsel. On March 9, 2006, Attorney Palmer filed on Petitioner's behalf an "Amended Petition for Post-Conviction Relief Pursuant to I.C.R. 57" ("First Petition"). In the First Petition the Petitioner asserted four claims, including "c. [t]hat the conviction is subject to collateral attack on the grounds of ineffective assistance of counsel." (First Petition, p. 2.) The Petitioner further alleged:

10. All of the above and each allegation in and of itself (sic), constitute ineffective assistance of counsel and/or prosecutorial misconduct. The deficiencies alleged demonstrate that trial counsels (sic) representation did not meet the objective standards of competence. Further the deficiencies alleged resulted in prejudice such that, but for both parties trial counsels errors (sic), there is a reasonable likelihood that the Petitioner would have been found not guilty at trial."

(Id. at 3.)

The State filed "Respondent's Answer to Amended Petition for Post-Conviction Relief" on March 24, 2006, and "State's Amended Motion for Summary Disposition" ("Motion for Summary Disposition") on April 5, 2006. After a hearing, this Court issued its January 25, 2007, "Order on Summary Dismissal," granting in part the State's Motion

for Summary Disposition, but this Court did not dismiss the Petitioner's claim of ineffective assistance of counsel.

This Court held an evidentiary hearing on Petitioner's claim of ineffective assistance of counsel on May 29, 2007. After the hearing, this Court requested additional briefing from the parties. On June 25, 2008, this Court entered its "Decision on Petition for Post Conviction Relief" ("Decision"), and identified the issue presented as "whether trial counsel's refusal to allow Petitioner to testify constituted a deficient performance." (Decision, p.8.) This Court then concluded that "[i]f Petitioner was not allowed to testify, trial counsel's performance fell below an objective standard of reasonableness and was deficient. Petitioner has met the first prong of the Strickland test." (Decision, p.9.) However, this Court concluded that the Petitioner was not prejudiced because "the outcome of the trial would not have been different if Petitioner had been allowed to exercise his constitutional right to testify." (Decision, p.10.)

The Petitioner appealed the Decision on July 3, 2008, and the State Appellate Public Defender was appointed to represent the Petitioner. Shortly thereafter, another attorney replaced the State Appellate Public Defender as counsel for Petitioner on appeal. While the Petitioner's appeal of the Decision was pending, Petitioner's appellate counsel also filed with this Court, under the same case number (Kootenai County Case No. CV-01-5504), a "Verified Second Petition for Post-Conviction Relief" ("Second Petition") on March 4, 2010.

In the Second Petition, the Petitioner asserts that "the Petitioner was denied his right to testify in his behalf guaranteed by the Sixth Amendment," and he cites to DeRushe v. State, 146 Idaho 599, 200 P.3d 1148 (2009). (Second Petition, p.3.) The

State filed its "Respondent's Answer to Verified Second Petition for Post-Conviction Relief" on March 27, 2009. Later, on April 28, 2009, the Petitioner and the State stipulated to stay "the proceedings in this case until the appeal from this Court's denial of his first post conviction petition (Barcella v. State, Supreme Court No. 35502) is fully resolved." This Court entered a stay on May 6, 2009.

The Idaho Court of Appeals issued its opinion on the Petitioner's appeal of this Court's Decision in Barcella v. State, 148 Idaho 469, 224 P.3d 536, (Ct. App. 2009), and affirmed this Court's Decision. Remittitur issued on January 25, 2010. On March 23, 2010, this Court held a status conference and appointed Petitioner's appellate counsel as Petitioner's post-conviction counsel for purposes of the Second Petition. On April 22, 2010, the Petitioner filed a "Motion to Lift Stay and Grant Summary Disposition" ("Petitioner's Motion") and "Memorandum in Support of Motion to Lift Stay and Grant Summary Disposition" ("Petitioner's Memorandum"). The Petitioner also moved this Court to take judicial notice of the records in the underlying case of State v. Barcella, 135 Idaho 191, 16 P.3d 288 (Ct. App. 2000) and Barcella v. State, 148 Idaho 469, 224 P.3d 536 (Ct. App. 2009). The State responded with its "Brief in Opposition to Second Petition for Post-Conviction Relief," ("State's Response") on July 20, 2010.

The Petitioner filed his "Reply to Brief in Opposition to Second Petition for Post-Conviction Relief" ("Petitioner's Reply") on October 20, 2010, and supported the Petitioner's Reply Brief with the "Affidavit of Michael Palmer," the Petitioner's prior post-conviction counsel. This Court heard arguments from the parties on October 26, 2010, and granted the Petitioner's motion to lift the stay and motion to take judicial notice, but took the Petitioner's Motion under advisement.

## II. LEGAL STANDARDS

An application for post-conviction relief initiates a civil, rather than, criminal proceeding, governed by the Idaho Rules of Civil Procedure. State v. Yakovak, 145 Idaho 437, 443, 180 P.3d 476, 482 (2008). The applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907. The application must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations or the application will be subject to dismissal.

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application is the procedural equivalent of summary judgment under I.R.C.P. 56. "A claim for post conviction relief will be subject to summary dismissal . . . if the applicant has not presented evidence making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." DeRushe v. State, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009) (citation omitted). Thus, summary dismissal is permissible when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. State v. Payne, 146 Idaho 548, 561, 199 P.3d, 123, 136.

### III. DISCUSSION

#### A. Petitioner's Motion for Summary Disposition

Citing to DeRushe v. State, 146 Idaho 599, 200 P.3d 1148 (2009), Petitioner asserts in his Second Petition that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law because this Court "erred in analyzing [Petitioner's] claim as alleging ineffective assistance of counsel rather than as alleging denial of his constitutional right to testify in his own behalf." (Second Petition, p.3.) Essentially, the Petitioner asserts that 1) there is no issue of fact that his trial counsel denied him his Sixth Amendment right to testify, 2) that he raised this claim in his First Petition, and 3) that the standard this Court should have applied in the June 25, 2008, Decision is not the Strickland v. Washington, 466 U.S. 668, 687-88 (1984), test of ineffective assistance of counsel, but the DeRushe test of whether not permitting Petitioner to testify was harmless error. (Second Petition, pp.2-3; Petitioner's Memorandum, throughout; Petitioner's Reply, throughout.) In support, the Petitioner submits the Affidavit of Michael Palmer, the Petitioner's prior post-conviction counsel.

The State responds primarily with procedural challenges to Petitioner's Second Petition, but in regards to the merits of the Petitioner's claim, the State asserts that Petitioner is not entitled to judgment as a matter of law because the underlying record shows that Petitioner never asserted his right to testify. (State's Response, pp.8-11.)

The Petitioner essentially makes the same argument to this Court that was rejected by the Idaho Court of Appeals in Barcella v. State, 148 Idaho 469, 224 P.3d 536 (2009), and therefore the Petitioner cannot be entitled to judgment as a matter of law. In Barcella, the Idaho Court of Appeals noted that in the initial briefing on appeal,

Petitioner claimed that his counsel was ineffective by “prohibiting Barcella from testifying.” Barcella, 148 Idaho at 231, 224 P.3d at 543. However, Petitioner later “filed a supplemental brief, in which he now argues that pursuant to DeRushe, his claim should be analyzed as a direct constitutional violation of his right to testify as opposed to a claim of ineffective assistance of counsel.” Id.

The Idaho Court of Appeals, however, distinguished Petitioner’s claims from DeRushe’s claims, stating that, unlike the Petitioner, DeRushe had actually alleged a constitutional violation of his right to testify in his post-conviction petition, but that the district court in that case incorrectly analyzed the claim as an ineffective assistance of counsel claim. Id. The Idaho Court of Appeals then held that DeRushe “certainly does not stand for the broad proposition that any time a claim of ineffective assistance of counsel is pled the district court must also address any potential underlying constitutional violation independently.” Id. In addressing Barcella’s argument, the Idaho Court of Appeals went on to state:

No argument was ever presented to the district court regarding a direct constitutional violation of Barcella’s right to testify. The district court was not required to frame the issues for the parties, nor was it required to develop the arguments to be presented. Barcella’s argument that the district court was required, under DeRushe, to analyze the claim as a direct constitutional violation is incorrect. DeRushe’s holding was an instruction to the district court in that case, and it does not mandate that a claim of ineffective assistance of trial counsel for failure to allow the defendant to testify be analyzed as a direct constitutional violation.

Id. (emphasis added.) The Idaho Court of Appeals then affirmed this Court’s June 25, 2008, Decision. Id. at 232, 224 P.3d at 544.

Recognizing the unusual procedural avenue the Petitioner has chosen in filing his Second Petition, this Court concludes that the Petitioner is not entitled summary

disposition because, as stated by the Idaho Court of Appeals, DeRushe “certainly does not stand for the broad proposition that any time a claim of ineffective assistance of counsel is pled the district court must also address any potential underlying constitutional violation independently.” Barcella, 148 Idaho at 231, 224 P.3d at 543. Thus, the law that the Petitioner relies on in support of his motion does not require this Court to address the Petitioner’s constitutional claims independently and cannot, therefore, be the basis for granting the Petitioner’s Motion.

Further, it appears that the Petitioner is really asking this Court to reconsider the Decision in the prior post-conviction proceeding. Regardless of the procedural impropriety of the Second Petition, the Petitioner has provided this Court with no evidence that he actually asserted a Sixth Amendment claim in the prior proceeding such that this Court is required to address it. The record shows that the Petitioner asserted his claim initially in the Pro Se Petition as a claim of ineffective assistance of trial counsel. (Pro Se Petition, pp.409-425.) The Petitioner then asserted his claim as an ineffective assistance of trial counsel claim in the First Petition. (First Petition, pp.2-3.) At the evidentiary hearing and in subsequent briefing, the Petitioner only argued that his counsel was ineffective and never argued that his Sixth Amendment right to testify was infringed. Moreover, as shown above, the Idaho Court of Appeals specifically concluded in Barcella that the Petitioner did not raise a Sixth Amendment claim in the Pro Se or First Petition.

The only evidence that the Petitioner has presented in support of his Second Petition is a statement by his prior post-conviction counsel that “at no time did I intend to waive Mr. Barcella’s claim that he had been denied his state and federal constitutional



rights to testify in his own defense at his trial.” (Affidavit of Palmer, ¶ 1.) However, Mr. Palmer does not testify that he asserted a Sixth Amendment claim in the First Petition, that he argued a Sixth Amendment claim at the evidentiary hearing or subsequent briefing, or that his client asked him to include a Sixth Amendment claim. Therefore, the Petitioner has failed to support Petitioner’s Motion with any admissible evidence that supports his claim.

Again recognizing the unusual procedural avenue that the Petitioner has chosen, the Petitioner’s Motion’s is denied because it is not supported by either the DeRushe or Barcella decisions and therefore the Petitioner cannot be entitled to judgment as a matter of law. Additionally, the Petitioner’s Motion is denied because he failed to support the Petitioner’s Motion with any evidence that he had asserted a Sixth Amendment right to testify claim in the prior post-conviction proceeding.


**B. State’s Procedural Objections to Petitioner’s Motion for Summary Disposition**

In its State’s Response, the State raised numerous procedural objections. At oral argument, the State asserted that the State intended the State’s Response as a cross-motion for summary disposition. However, the State never filed a motion as required by I.C. § 19-4906 and, as a result, the Petitioner did not have an opportunity to respond. Given that there is no motion on behalf of the State pending with this Court, this Court cannot treat the State’s Response as a cross-motion for summary disposition. However, the State is not prohibited from filing a motion for summary disposition and reasserting its procedural challenges.

### III. CONCLUSION

Based on the foregoing, it is hereby ordered that the Petitioner's Motion for Summary Disposition be and the same is hereby DENIED.

DATED this 15<sup>th</sup> day of November, 2010



John Patrick Luster  
District Judge

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing MEMORANDUM OPINION AND ORDER RE: PETITIONER'S MOTION FOR SUMMARY DISPOSITION (SECOND PETITION FOR POST-CONVICTION RELIEF), was sent by U.S. Mail, postage prepaid, sent by facsimile transmission, or sent by interoffice mail on the 15 day of November, 2010, to the following:

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11/15/10  
  
DANIEL J. ENGLISH  
Clerk of the District Court

By: \_\_\_\_\_

Deputy Clerk