12-23-2014

# Tucker v. State Appellant's Brief Dckt. 42448

IN THE SUPREME COURT OF THE STATE OF IDAHO

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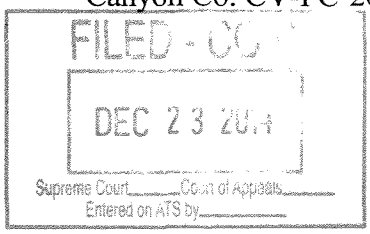
|---|---|---|
| THOMAS TAYLOR TUCKER, | ) | |
| | ) | S.Ct. No. 42448 |
| Petitioner-Appellant, | ) | Canyon Co. CV-PC-2013-5427 |
| vs. | ) | |
| | ) | |
| STATE OF IDAHO, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

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# OPENING BRIEF OF APPELLANT

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Appeal from the District Court of the Third Judicial District of the State of Idaho
In and For the County of Canyon

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HONORABLE MOLLY J. HUSKEY,
District Judge

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## TABLE OF CONTENTS

## I. TABLE OF AUTHORITIES

### FEDERAL CASES



### STATE CASES

**DOCKETED CASES**



**STATE STATUTES**



**OTHER**

## II. STATEMENT OF THE CASE

### A. *Nature of the Case*

This is an appeal from the summary dismissal of Appellant Thomas Tucker's petition for post-conviction relief. The order of summary dismissal should be reversed in part because the court dismissed two of Mr. Tucker's claims on a basis not raised in the state's motion to dismiss and without giving him twenty days notice. Moreover, the court erred because Mr. Tucker established a genuine question of material fact regarding his claim of ineffective assistance of counsel and the deprivation of his right to testify.

### B. *Procedural History and Statement of Facts*

Mr. Tucker was charged with felony D.U.I. and with being a Persistent Violator. He was found guilty after a jury trial. He filed a Notice of Appeal. Appellate counsel raised a challenge to the sentence imposed and to the denial of the Rule 35 motion. The Court of Appeals affirmed in an unpublished opinion. *State v. Tucker*, No. 39405 (2013 Unpublished Opinion No. 323).

On June 3, 2013, Mr. Tucker filed a *pro se* Petition and Affidavit for Post-Conviction Relief. R 4. The petition raised three claims: 1) ineffective assistance of counsel; 2) collusion between testifying police officers; 3) judicial bias. R 5. Counsel was appointed. R 34. The court then filed a Notice of Intent to Dismiss. R 39. The state filed an Answer. R 49.

At a status conference on July 8, 2013, the court granted permission for appointed counsel to file an Amended Petition. R 52; 67. On September 13, 2013, an Amended Petition for Post-Conviction Relief and an Affidavit of Petitioner were filed. R 68; 79. The Amended Petition raised claims of ineffective assistance of trial counsel and a claim of ineffective assistance of appellate counsel. R 80-83. The state filed an Answer to the Amended Petition. R

89.

On November 12, 2013, the court held a status conference. The state informed the court that it intended to file a Motion for Summary Dismissal. The court noted that it would file a Notice of Intent to Dismiss. R 92-93. The state later filed an Amended Answer and Motion for Summary Dismissal. R 94; 97. It addressed the claims of ineffective assistance of counsel, generally arguing that the claims were not supported by sufficient facts establishing deficient performance and that the petition did not allege or establish that Mr. Tucker was prejudiced by any deficient performance. R 99-102. The court never filed a Notice of Intent to Dismiss the Amended Petition.

On April 1, 2014, Mr. Tucker sought permission to file a second amended petition. R 113. The motion was granted. R 135. The Second Amended Petition alleged six claims, two of which are pertinent to this appeal:

> 1. Ineffective assistance of counsel for failing to call Petitioner to testify on his own behalf at trial. R 117-118.
>
> 2. That Petitioner was deprived of his right to testify in his own behalf at trial when trial counsel rested the defense case without calling him. R 119.

The respondent answered the second amended petition. R 132. It did not file a motion to summarily dismiss this petition nor did the court file a notice of intent to dismiss the second amended petition.

The court held a hearing on March 10, 2014, where the respondent told the court that it was relying upon its motion to summarily dismiss the first amended petition. T pg. 8, ln. 10-19. The respondent reiterated its reliance on that motion at a July 14, 2014, hearing. T pg. 17, ln. 10-21. After hearing argument from the respondent and Mr. Tucker's counsel, the court granted the

respondent's motion for summary disposition. T pg. 32, ln. 1-4. With regards to the claims raised on appeal, the court stated its reasons for dismissal as follows.

The court dismissed the ineffective assistance of counsel claim for failing to call Petitioner to testify because Mr. Tucker had not shown that counsel's failure to call him as a witness was deficient performance and he had not alleged or shown prejudice. R 158.

Next, the court dismissed the claim that Mr. Tucker was deprived of his right to testify for two reasons. First, because "the Petitioner has not demonstrated that he was denied the right to testify in his own behalf. The Record reflects that on May 17, 2011, prior to the jury selection process, the court advised the Petitioner that he has a right to testify in his own behalf, and that the decision whether to testify was his alone." R 161-162. Second, the court found the issue was waived under I.C. § 19-4901(b): "Additionally, despite the lack of objection at the district court, because the right to testify is a fundamental right, the issue could have been raised for the first time on appeal. The appellate record could have been sufficiently developed to address the claim that the district court did not advise the Petitioner of his right to testify and thus, the issue could have been raised on appeal." R 161-62.

A Final Judgment was entered. R 164. A timely Notice of Appeal was filed. R 166.

## III. ISSUES PRESENTED ON APPEAL

1. Did the court err by partially dismissing the ineffective assistance of counsel due to the deprivation of Petitioner's right to testify claim on a basis not found in either the state's motion for summary disposition or the court's notice of intent to dismiss?

2. If not, did Mr. Tucker's verified statement that he told his attorney that he wanted to testify at trial but that trial counsel rested the case without calling him to testify create a genuine

issue of material fact that trial counsel's performance was deficient?

3. Then, did the court also err in dismissing that claim by finding that Mr. Tucker had not adequately pleaded and shown that he was prejudiced by that deficient performance?

4. Did the Court err by dismissing the right to testify claim on bases not found in either the state's motion for summary disposition or the court's notice of intent to dismiss?

5. If not, did Mr. Tucker's verified statement that he told his attorney that he wanted to testify at trial but that trial counsel rested the case without calling him to testify create a genuine issue of material fact that he was deprived of his right to testify, notwithstanding the fact that the court advised him earlier in the trial that he had the right to testify?

6. If so, did the court also err in finding that the issue was waived because it could have been raised on appeal?

## IV. ARGUMENT

Every criminal defendant has a fundamental right to testify in his or her own behalf. *Rock v. Arkansas,* 483 U.S. 44, 51 (1987). Although the right is not expressly set forth in the state and federal constitutions, it is necessarily implied from the due process clauses of the Fifth and Fourteenth Amendments and from the compulsory process clause of the Sixth Amendment. *Id.* 483 U.S. at 51-52. *See also,* Idaho Constitution, Art. I, § 13; *State v. Darbin,* 109 Idaho 516, 708 P.2d 921 (Ct. App. 1985). The defendant is personally vested with the ultimate authority to decide whether or not to testify. While counsel may advise the defendant regarding the decision, the decision lies with the defendant and counsel must abide by the defendant's decision. *State v. Hoffman,* 116 Idaho 689, 778 P.2d 811 (Ct. App. 1989).

In post-conviction, a petitioner may raise the issue of whether counsel inappropriately

denied him or her the right to testify either as a claim of ineffective assistance of counsel or as a claim of the deprivation of the constitutional right or as both. *State v. Darbin,* 109 Idaho 516, 522, 708 P.2d 921, 927 (Ct. App. 1985); *Rossignol v. State,* 152 Idaho 700, 707, 274 P.3d 1, 7 (Ct. App. 2012). If the claim is raised as a claim of ineffective assistance of counsel, the burden rests upon the defendant to both identify the acts or conduct alleged to have been deficient and to show how such deficiency was prejudicial to the defense. *Darbin, supra*; *Rossignol, supra.* If the claim is raised as a direct violation of the fundamental constitutional right to testify, then once the defendant shows that he or she was deprived of the right, the burden shifts to the State to prove beyond a reasonable doubt that the deprivation did not contribute to the conviction. *Chapman v. California*, 386 U.S. 18, 24 (1967). "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.*

In this case, Mr. Tucker's Second Amended Petition raises the issue as both ineffective assistance of counsel and as a deprivation of the constitutional right. In support of this claim, Mr. Tucker alleged, *inter alia*, that he told trial counsel that he wanted to testify but that counsel rested the defense case without calling him. Further, there was no recorded waiver of Mr. Tucker's right to testify at the trial.

### A. *The Court Erred by Partially Dismissing the Ineffective Assistance of Counsel by Depriving Petitioner of His Right to Testify Claim on a Basis Not Found in Either the State's Motion for Summary Disposition or the Court's Notice of Intent to Dismiss Without Giving Twenty-Days Notice*

Here, the district court had three reasons for dismissing the Ineffective Assistance of Counsel claim. First, that "Petitioner has failed to support his claim with any evidence that the

failure to call him as a witness was [a strategic decision] based on ignorance of the relevant law, inadequate preparation or other shortcomings of objective evaluation." R 158. Second, the Court found that "[t]he Petitioner has not alleged that he suffered any prejudice – ie [sic], that the outcome of the trial would have been different." R 158. Third, "[i]n light of the other evidence presented at trial, it does not appear to this Court that the outcome of the trial would have been different had the Petitioner testified." R 159. All three reasons are in error.

To begin, the court erred by dismissing this claim for the first reason because the state did not raise that argument in its Motion for Summary Dismissal nor did the court raise those arguments *sua sponte* in its Notice of Intent to Dismiss. Therefore, Mr. Tucker did not receive proper notice under I.C. § 19-4901(b), which requires the court to give twenty days notice of its intent to dismiss on any basis not raised in the state's motion to dismiss. Here, the ineffective assistance of counsel due to the denial of Petitioner's right to testify claim was not pleaded until the Amended Petition, R 81, while the court's Notice of Intent to Dismiss was filed just two weeks after the filing of the original *pro se* petition. Unsurprisingly, the court's notice did not address the ineffective assistance due to the deprivation of Petitioner's right to testify claim as it had not yet been pleaded. See R 39-45.

For its part, the state in its Motion for Summary Dismissal argued that: 1) all the claims were not supported by admissible evidence; 2) that the ineffective assistance of counsel claims "do not have any supporting information sufficient to show that there was deficient performance by the attorney" and 3) that "there is zero admissible evidence in the Amended Petition to indicate that "but for" the deficient or ineffective conduct, the results would have been different." R 99. Thus, neither document gave Mr. Tucker notice of the first basis upon which the court

dismissed the claim.

This portion of the dismissal should be reversed because of the lack of notice. The applicable law is set out in *Buss v. State,* 147 Idaho 514, 211 P.3d 123 (Ct. App. 2009):

> Pursuant to I.C. § 19-4906(b), the district court may *sua sponte* dismiss an applicant's post-conviction claims if the court provides the applicant with notice of its intent to do so, the ground or grounds upon which the claim is to be dismissed, and twenty days for the applicant to respond. Pursuant to I.C. § 19-4906(c), if the state files and serves a properly supported motion to dismiss, further notice from the court is ordinarily unnecessary. *Saykhamchone v. State,* 127 Idaho 319, 322, 900 P.2d 795, 798 (1995). The reason that subsection (b), but not section (c), requires a twenty-day notice by the court of intent to dismiss is that, under subsection (c), the motion itself serves as notice that summary dismissal is being sought. *Id.* Idaho Rules of Civil Procedure 7(b)(1) requires that the grounds of a motion be stated with 'particularity.' *See DeRushé v. State,* 146 Idaho 599, 200 P.3d 1148 (2009) (reiterating the requirement of reasonable particularity in post-conviction cases.) If the state's motion fails to give such notice of the grounds for dismissal, the court may grant summary dismissal only if the court first gives the applicant the requisite twenty-day notice of intent to dismiss and the ground therefore pursuant to I.C. § 19-4906(b). *See Saykhamchone*, 127 Idaho at 322, 900 P.2d at 798. Similarly, where the state has filed a motion for summary disposition, but the court dismisses the application on grounds different from those asserted in the state's motion, it does so on its own initiative and the court must provide the twenty-day notice.

147 Idaho at 517, 211 P.3d at 126 (footnotes omitted). *See also, Kelly v. State,* 149 Idaho 517, 523, 236 P.3d 1277, 1283 (2010). ("Thus, where a trial court dismisses a claim based upon grounds other than those offered – by the State's motion for summary dismissal, and accompanying memoranda -- the defendant seeking post-conviction relief must be provided with a 20-day notice period.") *See also Baxter v. State*, 149 Idaho 859, 865, 243 P.3d 675, 681 (Ct. App. 2010) (Noting that if the court dismisses on grounds not presented in the state's motion, the petitioner has no opportunity to respond and attempt to establish a material issue of fact.).

Here, neither the court's notice nor the state's motion gave Mr. Tucker notice of the first

reason upon which the court dismissed the ineffective assistance claim. This was error under I.C. § 19-4906(b)(c) and this Court should vacate that portion of the order of dismissal. Further, as explained below, the court's rulings are erroneous on the merits and reversal is also required for that reason.

**B.** ***Mr. Tucker's Verified Statement That He Told His Attorney That He Wanted to Testify at Trial But That Trial Counsel Rested the Case Without Calling Him to Testify Created a Genuine Issue of Material Fact That Trial Counsel's Performance Was Deficient***

1. Standard of review

An order for summary disposition of a post-conviction relief petition is appropriate only if there exists no genuine issue of material fact which, if resolved in applicant's favor, would entitle him or her to the requested relief. If a genuine question of material fact exists, an evidentiary hearing must be held. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991). When reviewing a summary disposition of a post-conviction petition, this Court will independently review the record to determine whether a genuine question of material fact exists, and whether the moving party is entitled to judgment as a matter of law. The Court will liberally construe the facts and reasonable inferences in favor of the non-moving party. *Cowger v. State*, 132 Idaho 681, 684-85, 978 P.2d. 241, 244-245 (Ct. App. 1999).

The court erred in dismissing the right to testify claim because there were genuine questions of material fact regarding whether trial counsel's performance was deficient when he prevented Mr. Tucker from testifying and whether that deficiency prejudiced Mr. Tucker.

2. Facts pertaining to argument

The Second Amended Petition made the following allegations relevant to the right to

testify claim:

> 18. Petitioner had discussed with his counsel whether Petitioner should testify at his trial and Petitioner expressed a desire to testify in his own behalf.
>
> 19. Nonetheless, Petitioner's counsel concluded the presentation of the defense evidence without calling Petitioner as a witness.
>
> 20. This failure prejudiced Petitioner at trial by eliminating the opportunity Petitioner had of explaining to the jury, himself, the facts he had regarding the case.
>
> 21. Petitioner's testimony would have been considered by the jury in its deliberations and could have resulted in a favorable verdict for Petitioner.
>
> . . . .
>
> 31. Petitioner had an absolute right to testify at his own trial.
>
> 32. Petitioner was surprised by his attorney's representation the day of trial that no expert witness had been retained and would not be testifying, causing him to be confused and disoriented in his decision-making.
>
> 33. Petitioner desired to testify in his own behalf at trial.
>
> 34. Petitioner does not recall his judge advising him that he had a right to testify, or not testify, and that this decision was his to make not the attorney's decision.
>
> 35. Not familiar with the rights he had, not familiar with the processes of a trial, Petitioner was unaware that he could have testified even though his attorney had advised against it.
>
> 36. Petitioner could have provided information for the jury to consider in its deliberations which could have resulted in a favorable verdict.

R 117-119.

The verified Second Amended Petition was supported by the affidavit of Mr. Tucker. He alleged the following facts:

> 21. That Petitioner had told Deaton [defense counsel] that he wanted to testify in his own defense at the trial, but Deaton closed his presentation of evidence

without letting Petitioner testify.

22. That he does not believe that he was advised by the Court that he had a right to testify, regardless of the desire of his attorney, and, had he known this, would have insisted on testifying.

23. That Petitioner desired to offer the following testimony: he was fatigued, having been awake and working for more than 30 hours, he had not wet his pants, rather he urinated into a container, as he sometimes does as he is nearly incontinent, and the container spilled in his lap; the uneven surface upon which he was standing while performing the field sobriety tests was causing him difficulty because he was wearing cowboy riding boots with a 2 1/4-inch undershot heel; the mechanical problems with the truck were such that the truck kept veering off to the side requiring constant correction and made it difficult for Petitioner to drive straight on the road; the officer's overhead lights on his car and the rain and wet conditions were bothering his eyes; and, he did not take the breath test because he was confused by the advisory given him prior to the test.

R 123-24.

3. The deprivation of a client's right to testify is not a strategic decision entitled to deference under *Strickland;* to the contrary, it is deficient performance *per se*

A defendant in a criminal case is guaranteed the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution. The Sixth Amendment has been incorporated through the Due Process Clause of the Fourteenth Amendment to apply to the states. *See, Powell v. Alabama*, 287 U.S. 45, 73 (1932). The Equal Protection and Due Process Clauses of the Fourteenth Amendment guarantee the right to counsel on appeal. *Douglas v. California,* 372 U.S. 353 (1963). This right to counsel includes the right to effective assistance of that counsel. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Idaho law also guarantees a criminal defendant's right to counsel. Idaho Const. Art. 1, § 13; I.C. § 19-852.

In general, a claim of ineffective assistance of counsel, whether based upon the state or federal constitution, is analyzed under the familiar *Strickland v. Washington*, 466 U.S. 668

(1984), standard. In order to prevail under *Strickland*, a petitioner must prove: 1) that counsel's performance was deficient in that it fell below standards of reasonable professional performance; and 2) that this deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. at 689. The prejudice prong of the test is shown if there is a reasonable probability that a different result would have been obtained in the case if the attorney had acted properly. *Id.*

The court here stated that the decision to not call Mr. Tucker to testify was a strategic decision of the type which should not be second-guessed by the court. Presumably, the court was referring to the series of cases which hold "[t]he decision of what witnesses to call 'is an area where we will not second guess counsel without evidence of inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation.'" *State v. Payne*, 146 Idaho 548, 563, 199 P.3d 123, 138 (2008), *quoting State v. Larkin*, 102 Idaho 231, 234, 628 P.2d 1065, 1068 (1981); *and citing Bagshaw v. State*, 142 Idaho 34, 38, 121 P.3d 965, 969 (Ct. App. 2005). Those cases, however, are not applicable here because it is not counsel's decision whether or not the defendant will testify. The right to testify is personal to the defendant and cannot be taken away by counsel even if counsel's reasons for wanting to do so are good. The decision whether to testify lies with the defendant and counsel must abide by the defendant's decision. *State v. Hoffman, supra.* Thus, counsel's failure to call Mr. Tucker to testify is deficient performance *per se*.

The Court of Appeals has held that the decision of whether the defendant should testify is the "one exception" to the general rule that counsel's decision on what witnesses to call is a matter of trial strategy. *State v. Darbin*, 109 Idaho 516, 521, 708 P.2d 921, 926 (Ct. App. 1985). In reaching that conclusion, the Court of Appeals cited to a Seventh Circuit case which "held that

the decision whether a defendant should testify was personal to the defendant and could not be made by his counsel as a matter of trial strategy." *Id.*, *citing Alicia v. Gagnon*, 675 F.2d 913, 920 (7th Cir. 1982). As the Washington Supreme Court has noted:

> As to the first step in the *Strickland* analysis, we hold that a defendant who is able to prove that his attorney actually prevented him from testifying has satisfied *Strickland*'s first requirement. As noted above, it is well established that the defendant's right to testify is fundamental and may not be abrogated by defense counsel. The decision whether or not to take the stand rests with the defendant. Therefore, an attorney who takes steps to abridge this right, against the will of the client, is providing deficient counsel. Preventing a client from testifying against the client's wishes falls below the objective standard of reasonable conduct for attorneys.

*State v. Robinson*, 982 P.2d 590, 598 (Wash. 1999). Likewise, the Eleventh Circuit has written:

> Where the defendant claims a violation of his right to testify by defense counsel, the essence of the claim is that the action or inaction of the attorney deprived the defendant of the ability to choose whether or not to testify in his own behalf. In other words, by not protecting the defendant's right to testify, defense counsel's performance fell below the constitutional minimum, thereby violating the first prong of the *Strickland* test. For example, if defense counsel refused to accept the defendant's decision to testify and would not call him to the stand, counsel would have acted unethically to prevent the defendant from exercising his fundamental constitutional right to testify. . . . . Under such circumstances, defense counsel has not acted " 'within the range of competence demanded of attorneys in criminal cases[.]'"

*United States v. Teague*, 953 F.2d 1525, 1534 (11th Cir. 1992), *quoting Strickland*, 466 U.S. at 687, in turn *quoting McMann v. Richardson*, 397 U.S. 759, 770–71 (1970).

In light of the above, Mr. Tucker had sufficiently shown deficient performance under *Strickland* to avoid summary dismissal. The unrebutted evidence before the court was that trial counsel knew that Mr. Tucker wanted to testify, but that he rested the defense case without calling Mr. Tucker to testify. That evidence was sufficient to establish a genuine question of material fact.

### C. *Further, the Court Erred by Finding That Mr. Tucker Had Not Adequately Pleaded That He Was Prejudiced by That Deficient Performance and by Applying a Too High of Standard for Showing Prejudice*

1. Mr. Tucker pleaded that he was prejudiced

In addition to failing to find a *prima facie* case of deficient performance, the court also found that "[t]he Petitioner has not alleged that he suffered any prejudice – ie [sic], that the outcome of the trial would have been different." R 158. However, it is unclear what the court means by this because the pleadings are clear that Mr. Tucker did allege he was prejudiced. He alleged in ¶ 21 of the Second Amended Petition that "Petitioner's testimony would have been considered by the jury in its deliberations and could have resulted in a favorable verdict for Petitioner." R 118. And he alleged in ¶ 36 that "Petitioner could have provided information for the jury to consider in its deliberations which could have resulted in a favorable verdict." R 119. Further, he alleged in his affidavit what facts he would have testified to had he been called at trial R 124. Thus, the court's finding that prejudice was not pleaded is disproved by the record and the case should not have been dismissed on that basis. While it is true that Mr. Tucker alleged that his testimony "could" and not "would" have resulted in a different verdict, he is only required to prove "could" under *Strickland.*

Moreover, in addition to the factual error, the court also applied an incorrect standard of *Strickland* prejudice when evaluating this claim.

2. The court misapplied the *Strickland* prejudice standard

The court found that *Strickland* required that the Petitioner must show that he suffered "prejudice," which it defined as a showing "that the outcome of the trial would have been different." R 158. However, the court's understanding of *Strickland* prejudice is incorrect. The

Supreme Court has written that "*Strickland* asks whether it is 'reasonably likely' the result would have been different. This does not require a showing that counsel's actions more likely than not altered the outcome[.]" *Harrington v. Richter*, 562 U.S. 86, 131 S.Ct. 770, 792 (2011) (internal citations omitted). *Strickland* does not require a showing that the result of the proceeding would have been different. While *Harrington* states that the difference between a showing of reasonable probability and a preponderance of the evidence is "slight," the difference is real and legally significant. Consequently, the court's dismissal of the ineffective assistance of counsel claim should be reversed due to the court's application of an incorrect standard.

### D. *The Court Erred by Dismissing the Right to Testify Claim on a Basis Not Found in Either the State's Motion for Summary Disposition or the Court's Notice of Intent to Dismiss Without Giving Twenty-Days Notice*

Here, the district court's reason for dismissing the right to testify claim was that the record showed Mr. Tucker was advised of his right to testify by the criminal trial court and that the issue was waived because it should have been raised on appeal. Both reasons are in error, as will be explained below. But again, this Court need not reach those issues because the court erred by dismissing this claim when the state did not raise those arguments in its Motion for Summary Dismissal nor did the court raise those arguments *sua sponte* in its Notice of Intent to Dismiss. Therefore, the dismissal of this cause of action also occurred without proper notice.

The right to testify claim was not pleaded until the Second Amended Petition. The state did not address this claim at all in its Motion for Summary Dismissal, which was filed after the filing of the first Amended Petition but before the filing of the second. See R 97-102 (combined motion and memorandum). The court's Notice of Intent to Dismiss was filed seven months before the state's motion, just two weeks after the filing of the original *pro se* petition. It also did

not address the right to testify claim. See R 39-45. Thus, neither document gave Mr. Tucker notice of the bases upon which the court eventually summarily dismissed the claim.

The dismissal should be reversed because of the lack of notice required by I.C. § 19-4906(b) and *Buss v. State,* as previously set forth.

Here, neither the court's notice nor the state's motion gave Mr. Tucker notice of the reasons upon which the court dismissed the right to testify claim. While this might be understandable since the claim had not yet been raised when those pleadings were filed, it is still error under I.C. § 19-4906(b)(c). This Court should vacate that portion of the order of dismissal and remand for further proceedings. But, as explained below, even if the absence of notice were to be disregarded, the court's rulings are erroneous on the merits and reversal is still required.

**E.** ***Mr. Tucker's Verified Statement That He Told His Attorney That He Wanted to Testify at Trial But That Trial Counsel Rested the Case Without Calling Him to Testify Created a Genuine Issue of Material Fact That He Was Deprived of His Right to Testify, Notwithstanding the Fact That the Court Advised Him Earlier in the Trial That He Had the Right to Testify***

1. Facts pertaining to argument

See Section B(2) above.

2. Why relief should be granted

The court erred in dismissing the right to testify claim because there was a genuine question of material fact regarding whether trial counsel prevented Mr. Tucker from testifying by resting his case without calling Mr. Tucker to testify. "In determining whether a motion for summary disposition is properly granted, a court must review the facts in a light most favorable to the petitioner, and determine whether they would entitle petitioner to relief if true." *Saykhamchone v. State*, 127 Idaho 319, 321, 900 P.2d 795, 797 (1995); *Baldwin v. State*, 145

Idaho 148, 153, 177 P.3d 362, 367 (2007). Summary disposition for failure to raise a genuine issue of material fact may be granted only if the petitioner's evidence, based on the pleadings, depositions and admissions together with any affidavits on file, raises no genuine issue of material fact. *Kelly v. State*, 149 Idaho at 521, 236 P.3d at 1281.

The court here found there was no question of material fact writing that:

> [T]he Petitioner has not demonstrated that he was denied the right to testify in his own behalf. The Record reflects that on May 17, 2011, prior to the jury selection process, the court advised the Petitioner that he has a right to testify in his own behalf, and that the decision whether to testify was his alone.

R 161-162. However, the record, which consists of a minute note from the criminal case, does not support that finding. The note states:

> The Court advised the defendant of his constitutional right against self-incrimination and his right to remain silent. Further, the right to testify was his choice and that if he did testify he could be cross-examined by the State within the scope of anything he testified to on direct examination. The defendant indicated he understood his rights as explained by the Court.

R 145.

Nowhere in that minute note does it indicate that Mr. Tucker was advised that "the decision whether to testify was his alone" as found by the court. It says he was advised that "the right to testify was his choice," which is more naturally understood to mean that the state could not require him to testify against his will. That must have been the way Mr. Tucker understood the court's advisement because he stated in his affidavit that "he does not believe that he was advised by the Court that he had a right to testify regardless of the desire of his attorney, and, had he known this, would have insisted on testifying." R 124.[1]

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[1] Unfortunately, the portion of the trial where this colloquy occurred was not reported or transcribed from the audio recording for the direct appeal. See Exhibit A to State's Answer

The trial court's advisement of the right to testify does not disprove the unrebutted allegation that Mr. Tucker was deprived of that right when counsel rested the defense case without calling Mr. Tucker to testify. It is worth noting that defense counsel did not file an affidavit disputing any of Mr. Tucker's allegations. Taking the record and Mr. Tucker's allegations in the light most favorable to him, there is a genuine question of material fact regarding whether he told counsel he wanted to testify but that defense counsel deprived him of that right by resting the defense case without calling him to testify. Consequently, the order dismissing this claim should be reversed. *Kelly v. State*, *supra*; *Saykhamchone v. State*, *supra*; *Baldwin v. State*, *supra*.

**F.** ***This Issue Was Not Waived by the Failure to Raise it on Direct Appeal Because it Could Not Have Been so Raised***

1. Facts pertaining to argument

> The court also dismissed the right to testify issue finding that the issue was waived under I.C. § 19-4901(b). It wrote:
>
> Additionally, despite the lack of objection at the district court, because the right to testify is a fundamental right, the issue could have been raised for the first time on appeal. The appellate record could have been sufficiently developed to address the claim that the district court did not advise the Petitioner of his right to testify and thus, the issue could have been raised on appeal.

R 161-62.

2. Why relief should be granted

In fact, the right to testify claim could not have been raised for the first time on appeal.

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(copy of trial transcript); and R 143 (Minute Note from trial indicating that "[t]he Court noted for the record it was proceeding without a Court Reporter at this time to take up preliminary matters before the prospective jury panel was brought in."). The trial transcript also does not show an on the record waiver of Mr. Tucker's right to testify.

*State v. Darbin*, 109 Idaho 516, 523, 708 P.2d 921, 928 (Ct. App. 1985). In *Darbin*, the defendant-appellant raised a claim on direct appeal that counsel deprived him of his right to testify. The Court of Appeals declined to rule on this issue on appeal stating that it should be raised in a post-conviction petition. The Court wrote:

> Although Darbin's contention involves a fundamental constitutional right, we are reluctant to rule upon that contention because the issue has been framed by an insufficient record in this direct appeal from his conviction. While we have determined that this issue is not truly one involving the effectiveness of counsel, we believe that any further development of the issues should be pursued on a petition for post-conviction relief, as is suggested by certain decisions of the Idaho appellate courts in dealing similarly with ineffective assistance of counsel claims.

109 Idaho at 523, 708 P.2d at 928. Under *Darbin* the right to testify claim could not have been raised on direct appeal and the court here erred in holding it was waived under 19-4901(b) for failing to do so.

In addition, it has become more difficult to raise an unobjected-to error on direct appeal since *Darbin* was decided. Under *State v. Perry*, 150 Idaho 209, 226, 245 P.3d 961, 978 (2008), unobjected-to error may only be raised for the first time on appeal in cases where: (1) the defendant has alleged a violation of a constitutionally protected right; (2) the error is clear or obvious, without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision; and (3) the error affected the defendant's substantial rights, meaning in most instances that it must have affected the outcome of the trial proceedings. *Id.* In this case, Mr. Tucker could not have raised the claim on appeal under *Perry* because the error was not clear or obvious. There is no indication in the criminal trial record that Mr. Tucker wanted to testify, that he informed his counsel that he wanted to testify or that defense counsel rested the defense case without obtaining a waiver of

Mr. Tucker's right to testify. As the *Perry* Court noted, "[i]f there is insufficient evidence in the appellate record to show clear error, the matter would be better handled in post-conviction proceedings." 150 Idaho at 226, 245 P.3d at 978. In addition, the claim could not be raised under *Perry* because the record in the direct appeal did not contain a proffer of Mr. Tucker's anticipated trial testimony. Thus, he would not have been able to show his testimony would have affected the outcome of the trial proceedings as required by *Perry*.

Finally, the court below is mistaken in its belief that the simple failure of the trial court to fully advise Mr. Tucker of his right to testify was a claim which could have been raised on appeal. It is long-established that a trial court is not required to advise a defendant of his right to testify or obtain an on the record waiver of that right. The Supreme Court said in *Aragon v. State*, 114 Idaho 758, 760 P.2d 1174 (1988), that:

> We agree with the majority of courts which have addressed this issue and decline to require an on-the-record waiver of defendant's right to testify. Such a requirement would necessarily entail the trial court advising defendant of his right to testify. . . . [A] formal waiver requirement might provoke substantial judicial participation that could frustrate a thoughtfully considered decision by the defendant and counsel who are designing trial strategy.

114 Idaho at 762, 760 P.2d at 1178, *quoting People v. Simmons*, 364 N.W.2d 783, 785 (Mich. App. 1985) (internal quotation marks omitted). *See also State v. Fields*, 127 Idaho 904, 912, 908 P.2d 1211, 1219 (1995). The court's dismissal under I.C. 19-4901(b) cannot be affirmed under this rationale either.

## V. CONCLUSION

For the reasons set forth above, Mr. Tucker respectfully requests that the order of summary disposition as to his claims that his counsel was ineffective for not calling him to testify

and that he was deprived of his right to testify be reversed and the matter remanded for further proceedings.

Respectfully submitted this 23rd day of December, 2014.

Dennis Benjamin
Attorney for Thomas Tucker

CERTIFICATE OF SERVICE

I CERTIFY that on December 23, 2014, I caused two true and correct copies of the foregoing document to be:

X mailed

___ hand delivered

___ faxed

to: Office of the Attorney General
Criminal Law Division
P.O. Box 83720
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Dennis Benjamin

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