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IN THE SUPREME COURT OF THE STATE OF IDAHO

MAXWELL HOFFMAN,)
)
 Plaintiff-Appellant,) NO. 39553
)
 v.)
)
 STATE OF IDAHO,)
)
 Respondent.)
 _____)

APPELLANT'S BRIEF

**APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF OWYHEE**

HONORABLE GREGORY M. CULET
District Judge

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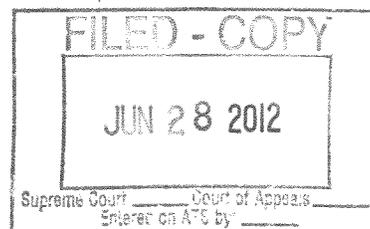


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STATEMENT OF THE CASE

Nature of the Case

Petitioner Max Hoffman originally received a death sentence in this 1988 murder case. Following federal habeas relief, the death sentence was vacated and he received a fixed life sentence pursuant to a resentencing held in 2008. Thereafter, he filed a successive petition for post conviction relief based on the recantation of his co-defendant who, contrary to his original trial testimony, had testified at the resentencing that Mr. Hoffman was not involved at the murder and was not present at it.

The district court summarily denied the successive petition as untimely. Petitioner appeals that ruling, asserting that it was error.

Statement of the Facts

The factual recitation of the trial evidence from the original opinion issued by the Idaho Supreme Court in this case, *State v. Hoffman*, 123 Idaho 638, 851 P.2d 934 (1993), is presented below:

The evidence at Hoffman's trial disclosed that on September 10, 1987, Denise Williams (Williams), a confidential informant working for Nampa narcotic officers, made a controlled drug buy from Richard Holmes (Holmes) which resulted in the arrest of Holmes. During the arrest it became apparent that Williams was working for the police. Holmes was subsequently released from custody on bail.

Upon Holmes' release, Sam Longstreet, Jr. (Longstreet) and James Slawson (Slawson) arranged for a meeting with Holmes. Longstreet and Slawson, who were responsible for introducing Williams to Holmes for the purpose of purchasing drugs, testified that they met with Holmes in an effort to assure him that they had nothing to do with his arrest. They further testified that when they arrived at Holmes' residence, two other men, defendant Hoffman and Ronald Wages (Wages), were present. Both Wages and Hoffman worked for Holmes as part of his drug operation, and both men were heavy drug users themselves. During this meeting, outside the presence of Hoffman and Wages, Holmes asked Longstreet and Slawson if they would kill Williams for her involvement in his arrest and to

prevent her from testifying at Holmes' preliminary hearing on the drug charges. Longstreet and Slawson stated that they were incapable of killing Williams but would help in other ways. In response, Holmes' stated that if it were up to him he would cut Williams' throat and "let her bleed like an animal."

The next day, Longstreet and Slawson returned to Holmes' house. Hoffman and Wages were again present. Holmes had Hoffman conduct a strip search of Longstreet and Slawson to ensure that they were not wired and working for the police. During this meeting, an agreement was reached between Holmes, Longstreet and Slawson wherein Longstreet and Slawson were to kidnap Williams and take her to a spot in Owyhee County known as the Boy Scout Camp. Holmes, Wages, Longstreet and Slawson then drove to the Boy Scout Camp where they planned the details of the kidnapping. It was agreed that Longstreet and Slawson would call Holmes once they had kidnapped Williams and that Wages would be waiting at the camp when they arrived. It was also agreed that Williams was to be tied up to a tree in the area until Holmes arrived.

The following evening, Holmes and Hoffman took Wages to the Boy Scout Camp where they all ingested drugs. Holmes and Hoffman then left, leaving Wages at the Camp. Longstreet and Slawson arrived at the camp sometime later with Williams. Longstreet testified that he and Slawson tricked Williams into going with them by telling her that they would take her to buy alcohol. The three drove around drinking and ingesting drugs, stopping only once to allow Longstreet to call Holmes and leave a message that he had Williams. Longstreet and Slawson then pretended to get lost and eventually made their way to the Boy Scout Camp as was earlier planned. Upon their arrival at the camp, Wages, who was wearing a bandanna and carrying a sawed off shotgun, ordered Longstreet and Slawson to strip Williams of her clothes and to tie her up. The two men complied with Wages' order. Longstreet and Slawson then left the camp, leaving Williams with Wages.

Hoffman arrived at the camp a short time later. Hoffman and Wages loaded Williams into a car and met Holmes at the old ION highway cutoff. Holmes kicked Williams in the head and told her she was "a dead bitch." Holmes left and subsequently returned in a brown Nissan four-wheel drive and told Hoffman and Wages, "You know what to do." Holmes then left again.

Hoffman and Wages then took Williams in the Nissan. After driving around for several hours, they stopped the vehicle in Delamar, Idaho. Wages and Hoffman instructed Williams to write two letters to the press, which were intended to exonerate Holmes of the drug charges. After the letters were written, Williams was taken to a cave outside of Silver City, Idaho.

Hoffman took Williams into the cave and slashed her throat with a knife. As Hoffman was returning to the vehicle, Wages spotted Williams crawling up an embankment near the cave. Wages then pursued Williams and stabbed her under the arm with Hoffman's knife. Thinking Williams was dead, both men buried her with rocks. It would later be determined that the cause of death was a crushing blow by a rock to William's head.

Upon William's disappearance, a police investigation ensued. Eventually, Longstreet and Slawson agreed to provide the police with information regarding William's disappearance in exchange for a recommendation of a year in jail for kidnapping. Based on this information, Holmes and Wages were indicted on charges of conspiracy to commit murder. In an effort to secure a plea agreement, Holmes led the police to Williams' body. The conspiracy charges against Holmes were vacated, but Holmes was subsequently charged with aiding and abetting first degree murder on August 22, 1988.

After Williams' body was found, Wages confessed to the killing and became a cooperative witness for the state and agreed to give a full account of how it occurred. Wages and Hoffman were then charged with first degree murder in Owyhee County. Hoffman went to preliminary hearing on September 14, 1988, where Wages was the principal witness for the State. Hoffman called Holmes as a witness, but Holmes refused to testify, claiming the fifth amendment right against self incrimination.^{FN1}

FN1. Within a few days after refusing to testify at the preliminary hearing, and while incarcerated at the Idaho State Correctional Institution, Holmes was killed by another prisoner.

Hoffman's case proceeded to trial where a jury found him guilty of first degree murder.

Id. p. 639-641.

At the resentencing in 2008, contrary to his trial testimony, Wages testified that Mr. Hoffman actually was not there when the victim was killed and that it was really Holmes who was there and who initially cut her throat and beat her up. (Resentencing tr. 10/30/2008, p. 375-379, 387.¹) He said that Mr. Hoffman was actually at home

¹¹ While the post conviction district court does not appear to have formally taken judicial notice of the resentencing transcript, the court and parties repeatedly referred to that hearing and so Appellant has contemporaneously filed a motion to take judicial notice of the resentencing transcript appearing in Supreme Court docket 35941.

babysitting the women. (Resentencing tr., 10/30/2008, p. 379.) Wages testified that he had earlier lied because Mr. Hoffman and Wages were to take the fall for the murder upon the direction of (unnamed) higher up drug associates in California. (Resentencing tr. 10/30/2008, p. 383, 388, 413-415.) Wages testified that his family had been threatened and he was trying to protect them. (Resentencing tr. 10/30/2008, p. 389-390, 413-415.) He was now telling the truth because he had to live with himself and it had been eating at him for 20 years. (Resentencing tr. 10/30/2008, p. 383, 413-414.)

The court found that the testimony of Wages at the resentencing was not even remotely credible. (Resentencing tr. 10/30/2008, p. 553, 555.)

Course of Proceedings

This case has now spanned 24 years and the procedural history is long and convoluted. The basics are that Mr. Hoffman was convicted of first degree murder in 1988 and the district court sentenced him to death. The Idaho Supreme Court upheld the conviction and death sentence in the original appeal reported as *State v. Hoffman*, 123 Idaho 638, 851 P.2d 934 (1993). After various machinations in the federal courts, the federal district court found that Mr. Hoffman had received ineffective assistance of counsel in sentencing and ordered that he be resentenced, and upon the appeal from the remainder of the federal district court case, the Ninth Circuit Court of Appeals additionally found that he had received ineffective assistance of counsel in the plea bargaining stage. *Hoffman v. Arave*, 455 F.3d 926 (9th Cir. 2006) (vacated in part).

As explained in a later 9th Circuit opinion, *Hoffman v. Arave*, 518 F.3d 656 (9th Cir. 2008), after the above decision, the state then petitioned for writ of certiorari which the United States Supreme Court granted. Before the case was heard, however, Mr. Hoffman moved the court to vacate the portion of the Ninth Circuit opinion finding his counsel ineffective during plea bargaining so that he could proceed with resentencing as ordered by the federal district court. The United States Supreme Court granted the motion, and upon remand to the United States Court of Appeals, the Ninth Circuit ordered as follows:

We now instruct the district court to dismiss with prejudice Hoffman's claim of ineffective assistance of counsel during plea bargaining. The district court's grant of Hoffman's habeas petition on his claims of ineffective assistance of counsel with respect to sentencing still stands. The State of Idaho should proceed with the resentencing of Hoffman as ordered by the district court.

Id. p. 657.

The matter was then remanded to the state district court for resentencing. On October 30, 2008, the state district court entered a new sentence of fixed life. (R. p. 30.) Mr. Hoffman filed a Rule 35 motion, which the district court denied. (R. p. 30.)

Mr. Hoffman appealed the new sentence and denial of the Rule 35 motion, said appeal being unsuccessful, and also filed a petition for review, which was denied. (R. p. 30.) The remittitur issued on February 2, 2010. (R. p. 30.)

On September 30, 2010, Mr. Hoffman filed a pro se petition for post conviction relief and requested that counsel be appointed. (R. p. 29.) The court appointed counsel who filed a verified amended petition for post conviction relief. The state filed an answer. (R. p. 29.)

The court then issued its notice of intent of summary dismissal (hereinafter notice of intent). The court listed the claims raised in the petition as follows:

- 1) Actual innocence
- 2) Ineffective assistance of counsel
- 3) Sentence of fixed life is cruel and unusual punishment
- 4) Testing during the underlying criminal matter placed defendant's IQ at 65, qualifying him as mentally retarded under I.C. section 19-2515A.
- 5) The sentence is grossly disproportionate to the crime in light of all of the evidence.
- 6) There is evidence of material facts not previously presented and heard by the jury, specifically, statements and testimony of Ronald Wages.

Notice of Intent, p. 2-3. (R. p. 30-31.)

As to these claims, the court held that the claim of ineffective assistance of counsel should have been raised in the previous petition. (R. p. 33.) It ruled that since the death penalty was not imposed upon resentencing, the diminished capacity statute is inapplicable. (R. p. 34.) The court held that the claims regarding the severity of the sentence were raised on direct appeal. (R. p. 34.) Finally, the court held that there was sufficient evidence to survive summary dismissal on the claims of actual innocence and material facts not previously presented and heard by the jury in the form of the affidavit/testimony of Ron Wages. (R. p. 35.)

The state then brought a motion for summary disposition. (R. p. 38-39.) Petitioner filed a memorandum in objection to motion for summary disposition. (R. p. 43-

46.) Petitioner also moved for a court appointed private investigator, and the state objected. (R. p. 48-52, 59-62.)

In the meantime, since there was no response to its notice of intent to dismiss, the court issued its order of partial summary dismissal on all grounds except the claim of actual innocence relating to material facts not previously presented and heard by the jury. (R. p. 56.)

A motion hearing was held during which the court inter alia, made a tentative ruling that as to the actual innocence issue relating to material facts not previously presented to the jury, since it could have been brought in prior petitions for post conviction relief, it was now untimely. The court orally gave notice of intent to dismiss on timeliness grounds and ordered the parties to brief the issue prior to a hearing finalizing the issue. (Tr. 10/20/11, p. 23.) The court also stated it would wait and revisit the motion to appoint an investigator until after it determined whether the petition was timely or not. (Tr. 10/20/11, p. 23.)

Petitioner thereafter filed a supplemental memorandum in objection to summary disposition and affidavit of petitioner in support, and the state filed a reply memorandum in support of its motion for summary disposition, arguing inter alia, that the petition was untimely. (R. p. 64-65, 67-69, 70-77.)

A final hearing was held and the court granted the state's motion for summary disposition on the basis that the petition was untimely. (Tr. 12/9/2011, p. 57; R. p. 79-80.)

Petitioner timely appeals. (R. p. 82-84.)

ISSUE

Whether the district court erred when it summarily denied post conviction relief by holding that the successive petition was not timely filed.

ARGUMENT

THE DISTRICT COURT ERRED WHEN IT SUMMARILY DENIED POST CONVICTION RELIEF BY HOLDING THAT THE SUCCESSIVE PETITION WAS NOT TIMELY FILED

A. Standard of Review at Trial and on Appeal

An application for post-conviction relief under Idaho Code § 19-4901 is civil in nature and is an entirely new proceeding distinct from the criminal action which led to the conviction. *Nguyen v. State*, 126 Idaho 494 (Ct.App. 1994). In order to prevail in a post-conviction proceeding, the applicant must prove, by a preponderance of the evidence, the allegations upon which the request for post-conviction relief is based. *Id.*

Summary disposition is the procedural equivalent of summary judgment under I.R.C.P. 56, with the facts construed and all reasonable inferences made in the light most favorable to the non-moving party. *Gonzales v. State*, 120 Idaho 759 (Ct.App. 1991). Allegations contained in the verified petition are deemed true for the purpose of determining whether an evidentiary hearing should be held. *Martinez v. State*, 125 Idaho 844 (Ct.App. 1994). If the allegations do not frame a genuine issue of material fact, the court may grant a motion to summarily dismiss, but if the application raises material issues of fact, the district court must conduct an evidentiary hearing. *Id.*

In determining whether a motion for summary disposition was properly granted, the appellate court reviews the facts in the light most favorable to petitioner and determines whether, if true, they would entitle petitioner to relief. *Saykhamchone v. State*, 127 Idaho 319 (1995).

B. The Arguments Regarding Timeliness and the Court's Rulings

As explained above, the district court at first held that there was sufficient evidence to survive summary disposition on the actual innocence issue regarding evidence not heard by or considered by the jury. This related to Ron Wages' testimony at the resentencing described above whereby he recanted his original trial testimony and instead testified that Mr. Hoffman did not participate in the murder and was not present when it occurred.

While that testimony was given in 2008, as early as 2000 there was evidence that Wages would recant. Attached to the Petitioner's motion to appoint investigator was an affidavit of Richard Hays dated September 19, 2000.² (R. p. 53-55.)

Mr. Hays was an investigator for the Federal Capital Habeas Unit which had formerly represented Mr. Hoffman. (R. p. 53.) The affidavit explained that Mr. Hays had interviewed Ron Wages on March 28, 2008, and he did a brief affidavit at that time, and also, Ron Wages gave a longer, more detailed affidavit to Joan Fisher (Capital Habeas Unit attorney) on May 15, 2000. (R. p. 53.) The contents of these affidavits of Wages were not described in Mr. Hays' affidavit, however.

Mr. Hays' affidavit continued by explaining that from March 28, 2000, through the present, Mr. Hays had been trying to find people who could corroborate Mr. Wages' affidavit and was able to find several people who were able to, but were unwilling to do affidavits out of fear for their safety. (R. p. 54.) The affidavit then detailed Mr. Hays' contacts with various witnesses. (R. p. 54.)

² The affidavit does not indicate why it was being made or what it was in support of, but the affidavit is captioned *Hoffman v. State* in the Third Judicial District of the State of Idaho. However, there is no filing stamp nor case number.

The affidavit discussed Charles Doan, a fellow inmate of Ron Wages, who stated that Wages told him that Wages and Holmes killed Denise Williams and got Max Hoffman to take the fall for Holms because Max was their “dog” and they could get him to believe or do anything they told him to. Mr. Doan stated he was told this during a religious ceremony which he believed precludes him from telling the authorities and also, he is a long term inmate who will not snitch out anyone regardless of the circumstances. (R. p. 54.)

A witness named Tom Needham (who was a friend of the group) told Mr. Hays that he was led to believe by Holmes and Wages that they had killed Denise Williams but he is due out of prison soon and so does not want to risk any problems with other inmates. (R. p. 54.)

The affidavit then described several more contacts, and concluded by stating that Mr. Hays continues to investigate the Wages’ recantation. (R. p. 54-55.)

During the first motion hearing in the instant case the district court focused on the fact that Wages’ recantation was evidence that could have been raised in prior post conviction proceedings and so it was untimely now. (Tr. 10/20/2011, p. 23.) The court declared its tentative ruling to be a notice of intent to dismiss on the timeliness issue. (*Id.*)

At the above referenced hearing, Petitioner argued that the newly discovered evidence was not shored up until Wages testified under oath that way at the resentencing in 2008. (Tr. 10/20/2011, p. 18.) He also argued that it is possible that former counsel really didn’t believe that Ron Wages would actually come into the courtroom and testify consistently with what was in his affidavit. (Tr. 10/20/2011, p. 19.)

In his supplemental memorandum, Petitioner argued that it appears that a strategic decision was made to specifically limit the relief requested to tie in that relief with the new event that had triggered an opening to file the petition. (R. p. 65.) For example, in the petition for post conviction relief filed on October 3, 2001, the only issue raised was that Petitioner had recently been classified as mentally retarded and therefore, could not be executed. (R. p. 65.) In the petition for post conviction relief filed on August 2, 2002, the only issue raised was based on the recent case of *Ring v. Arizona*, 536 U.S. 584 (2002), and argued that Petitioner cannot be executed. (R. p. 65.) The memorandum speculated that prior counsel may have believed that if a new sentencing hearing was held it would reset the post conviction clock for all claims and/or that prior counsel may have only been concerned with removing the death sentence. (R. p. 65.)

Also filed at this time was the affidavit of Mr. Hoffman who stated that he has difficulty reading and understanding what goes on in his court cases. (R. p. 67.) He has been classified as mentally retarded and therefore has consistently relied heavily on the advice of his attorneys. (R. p. 68.) To the best of his recollection, each prior attorney was focused on the ineffective assistance of counsel claim related to trial counsel and were also focused on removing him from death row. (R. p. 68.) To the best of his recollection, he dropped his appeals and other legal avenues to challenge his conviction on several occasions and refused to allow his claims to move forward because he could not get any of the attorneys to focus on the claim of actual innocence and he was frustrated by it. (R. p. 68.)

The affidavit continued by stating to the best of his recollection, the reason the Hays' affidavit was not included in the two other post conviction filings is because he believed the issue would be addressed in the Federal Ninth Circuit. (R. p. 68.) Finally, Mr. Hoffman stated in his affidavit that he also believed that the information would be used to help mediate and negotiate his criminal case after it was determined that he could not be executed and the case was pending resentencing. (R. p. 68.)

At the final motion hearing, Petitioner's counsel mentioned that when speaking with his client, as the affidavit stated, Mr. Hoffman remembered that he was trying to get his attorneys to assert the claim of actual innocence and they were not willing to do so, which resulted in him several times withdrawing pending appeals and asking at one point that he be executed, and he attempted to fire his attorneys on several different occasions. (Tr. 12/9/2011, p. 36.)

At that same hearing, the court mentioned that it had made a specific record at the resentencing that it had found Wages' testimony that Mr. Hoffman was not present or involved in the murder to lack credibility. (Tr. 12/9/2011, p. 32.)

The court also recited from *Whiteley v. State*, 131 Idaho 323, 326, (1998), where the Idaho Supreme Court held the request for a new trial in a post conviction proceeding based on newly discovered evidence is the same as a motion for new trial after a jury verdict. Before a new trial can be granted, and irrespective of the form of the request, new evidence must satisfy the four part test set forth in *State v. Drapeau*, 97 Idaho 685 (1976). (Tr. 12/9/2011, p. 50.)

First, the evidence has to be newly discovered and unknown the defendant at the time of trial (the court mentioned that is true in our case.) Two, the evidence has to

be material, not merely cumulative or impeaching. Three, the evidence must probably produce an acquittal. (Tr. 12/9/2011, p. 50-51.)

As to the last part, the court explained:

And four, the failure to learn of the evidence was due in no part to a lack of diligence on the part of the defendant. Which we get into here as a key component of this argument.

There isn't much Idaho case law discussing strategic decisions on prior post conviction claims as a basis for a new claim. But it is dealt with in other cases from a trial perspective and ineffective assistance of counsel.

So as example only, in the case of State versus Yakovac, Y-a-k-o-v-a-c, [145] Idaho 437 at 444, the Idaho Supreme Court held: When evaluating an ineffective assistance of counsel claim, this court does not second guess strategic and tactical decisions, and such decisions cannot serve as a basis for post conviction relief unless the decision is shown to have resulted from inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective review.

I'm making a correct statement of law, but I cited that out of sequence here. I meant to cite, before I get to that one, 19-4908. Well, I'd still note that last one. And 49—19-4908 Idaho Code provides that all grounds of relief available to the applicant must, under the act, be raised in the original, supplemental, or--supplemental or amended application. Any ground finally adjudicated for not—or not so raised or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which, for sufficient reason, was not asserted or was inadequately raised in the original, supplemental, or amended application.

An application—now I'm citing Charboneau versus State, Charboneau, and that's 144 Idaho 900 at 904 to 905. An allegation that a claim was not adequately presented in the first post-conviction action due to the ineffective assistance of prior post-conviction counsel, if true, provides sufficient reasoning for permitting issues that were inadequately presented to be presented in a subsequent application for post conviction relief.

Further, though, while -- the court later stated in the decision on the same page: While Idaho Code section 19-4908 does not mention whether successive petitions must be filed within the one year time limitation, the

statute clearly contemplates that there may be circumstances under which a successive petition may be filed, if the trial court finds a claim for sufficient reason was not asserted or was inadequately raised in the original petition.

Then I've talked about the fact that the court, in the Yakovac case, does not second guess strategic or tactical decisions, and those alone can't serve as a basis for relief in this capacity or failure to raise those.

Getting back to the Charboneau case, the court held in that case: There should be a reasonable time within which such claims are asserted in a successful—a successive post-conviction petition, once those claims are known. The trial court's analysis of sufficient reason permitting a filing of a successful [sic] petition must necessarily include an analysis of whether the claims being made were asserted within a reasonable period of time. In determining what a reasonable time is for filing a successive petition—this is the court—we simply consider it on a case-by-case basis, as has been done in capital cases.

Tr. 12/9/2011, p. 51, ln. 5—p. 54, ln. 7 (emphasis added).

The court noted that in this case, in addition to the 11 years of delay (the court later corrected this to 8 years since the evidence was brought up at the resentencing in 2008), the time has elapsed against the state. The court stated it remembered that somewhere it heard (but might have been off the record) that witnesses have died, including law enforcement personnel, probably on both sides of the case. (Tr. 12/9/2011, p. 54.) While many are alive, one of the reasons for the timeliness requirement is fairness in raising issues at a time that each side can address them. So, the 11 year delay in raising the issue puts additional risk on the state to respond. (Tr. 12/9/2011, p. 54-55.)

The court concluded:

Petitioner does not—I know he stated this in his affidavit, but I did not consider that to be adequate justification for the failure to previously raise these issues that would justify permitting them to be heard now.

Tr. 12/9/2011, p. 55, lns. 20-24.

The court also mentioned that there was extremely competent counsel on both sides and that when death was still on the table, it is unfathomable that counsel didn't pursue Wages' recantation if it was credible. (Tr. 12/9/2011, p. 56.)

The court found that the claim was obviously not pursued for strategic reasons, and there are no facts to support second guessing that decision. Since the court had not found a reasonable basis to delay the issue, using the reasonable time standard, not the one year standard, it held that 11 (or 8) years is just too long. (Tr. 12/9/2011, p. 56.) The court then dismissed the petition. (Tr. 12/9/2011, p. 57.)

C. The Court Erred in Summarily Denying the Petition

First, of all, the standard of review of "the district court's construction and application of the limitation statute is a matter of free review." *Schwartz v. State*, 145 Idaho 186, 189 (Ct. App. 2008).

In that same case, the Court of Appeals explained the law relating to the time for bringing successive petitions:

The statute of limitation for post-conviction actions provides that an application for post-conviction relief may be filed at any time within one year from the expiration of the time for appeal or from the determination of appeal or from the determination of a proceeding following an appeal, whichever is later. I.C. § 19-4902(a). The appeal referenced in that section means the appeal in the underlying criminal case. The failure to file a timely application is a basis for dismissal of the application. However, if an initial post-conviction action was timely filed and has been concluded, an inmate may file a subsequent application outside of the one-year limitation period if "the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application." See also I.C. § 19-4908. *Charboneau v. State*, Docket No. 32120, 144 Idaho 900, 174 P.3d 870, (Nov. 21, 2007).

Ineffective assistance of prior post-conviction counsel may provide sufficient reason for permitting newly asserted allegations or allegations inadequately raised in the initial application to be raised in a subsequent post-conviction application. See *Palmer v. Dermitt*, 102 Idaho 591, 596, 635 P.2d 955, 960 (1981); *Hernandez v. State*, 133 Idaho 794, 798, 992 P.2d 789, 793 (Ct. App. 1999). Additionally, when a second or successive application is presented because the initial application was summarily dismissed due to the alleged ineffectiveness of the initial post-conviction counsel, use of the relation-back doctrine may be appropriate. See *Hernandez*, 133 Idaho at 799, 992 P.2d at 794. This is so because failing to provide a post-conviction applicant with a meaningful opportunity to have his or her claims presented may be violative of due process. *Id.* See also *Abbott v. State*, 129 Idaho 381, 385, 924 P.2d 1225, 1229 (Ct. App. 1996); *Mellinger v. State*, 113 Idaho 31, 35, 740 P.2d 73, 77 (Ct. App. 1987) (Burnett, J., concurring).

In *Hernandez*, this Court concluded that one year was a reasonable time for an inmate to proceed with a successive post-conviction relief action if the initial action was dismissed due to ineffective assistance from the attorney representing the inmate in that proceeding. However, in *Charboneau*, the Supreme Court recently held that "analysis of 'sufficient reason' permitting the filing of a successive petition must necessarily include an analysis of whether the claims being made were asserted within a reasonable period of time. In determining what a reasonable time is for filing a successive petition, we will simply consider it on a case-by-case basis, as has been done in capital cases." *Charboneau* filed his successive application, at a minimum, thirteen months after he became aware of allegations of undisclosed evidence which were the basis of his newly-asserted claim. The Court held that thirteen months was simply too long to be reasonable.

Id., p. 189-190 (footnotes and some internal citations omitted).

As the district court discussed, the analysis of sufficient reason permitting a filing of a successive petition must necessarily include an analysis of whether the claims therein are made were asserted within a reasonable period of time. Or as conversely stated in our case where two petitions for post conviction relief had been filed since what appears to be the initial discovery of Wages' recantation, the question of whether it was timely raised must necessary include an analysis of whether there was sufficient reason for raising it in the instant petition rather than in an earlier one.

While the district court generally discusses ineffective assistance of counsel claims as being able to constitute sufficient reason for a successive petition, it does not specifically address post conviction counsel's omission of a claim contrary to Petitioner's wishes as constituting sufficient reason. In *Palmer v. Dermitt*, 102 Idaho 591 (1981), the Supreme Court held:

Palmer asserts that the reason he failed to raise the issues concerning the alleged perjured testimony and manufactured evidence as well as the alleged ineffectiveness of his counsel at trial and on direct appeal in the prior postconviction proceeding is because of the ineffective assistance of his prior postconviction counsel. Specifically, these allegations were originally presented in Palmer's pro se petition and amendment thereto for postconviction relief, but were allegedly then omitted by Palmer's court-appointed attorney without the knowledge or consent of Palmer. The allegations of ineffective assistance of prior postconviction counsel, if true, would warrant a finding that the omission in the prior postconviction proceeding of the allegations now being raised anew by Palmer was not a result of an active, knowing choice made by Palmer through this prior court-appointed attorney, and would therefore provide sufficient reason for permitting the newly asserted allegations to be raised in the instant petition. Other jurisdictions have similarly held that claim of ineffective assistance of appellate counsel or prior postconviction counsel provides sufficient reason to permit newly asserted allegations to be raised in a subsequent postconviction proceeding. Since the record discloses no contravention by the State through affidavit or otherwise of these newly asserted allegations, since our conclusion that Palmer is not barred from raising these allegations, the district court erred in summarily dismissing Palmer's petition for issuance of a writ of habeas corpus [postconviction relief] without first providing him an evidentiary hearing going to the merits of these allegations.

Id., p. 595-596 (emphasis added, internal citations omitted).

In our case, Mr. Hoffman's affidavit provided sworn evidence of the Petitioner's desire to raise the actual innocence issue and his failed attempts to get his appointed attorneys to raise it. Mr. Hoffman eventually just had to raise the issue himself in the instant pro se petition in order to put it before the court. The reason for the delay is

clear, his counsel refused to include it in a petition for post conviction relief despite Mr. Hoffman's desire that it be.

After Mr. Hoffman was sentenced to fixed life his case was no longer a capital case and thus he was no longer represented by death penalty attorneys whose primary focus, as is clear from the history of this case as well as Mr. Hoffman's affidavit, was getting him off death row. At the first logical point after the resentencing, to wit, within eight months of the remittitur issued in the appeal of the fixed life sentence, Mr. Hoffman brought the Wages recantation claim pro se.

The state presented no affidavits or competent evidence controverting Mr. Hoffman's claims about his attorneys' refusal to raise the Wages recantation. In other words there is no evidence showing that Mr. Hoffman could have effectively forced his attorneys to earlier bring the claim instead of simply focusing on reasons why he could or should not be executed. Nor is there anything controverting that Mr. Hoffman filed his pro se petition as soon as he could have given his mental retardation and limited abilities including his difficulties in reading and in understanding his case.

The court (and state in its argument) makes much of the competence of the earlier post conviction counsel and infers from this that the Wages recantation was not earlier pursued because it was not credible. But the court fails to consider that what the court characterized as extremely competent counsel in fact did pursue the recantation at the resentencing. The court further fails to consider that one of the attorneys representing Mr. Hoffman in the 2002 post conviction was also one of the two attorneys representing him at the resentencing (although the other attorney conducted

the examination of Wages), to wit, Ellison Matthews.³ (R. p. 65; resentencing transcript.)

In other words, the court's suggestion that earlier post conviction counsel did not find the Wages' recantation credible because the issue was not raised is at odds with the fact that the same attorney was part of its later presentation to the court. There are several logical conclusions which can be drawn from this. First, counsel was part of a presentation of evidence he believed to be false; second, Wages would not really earlier testify in court to the recantation but would by the time of resentencing; or third, counsel intentionally omitted the issue even though it was believed to be valid. Since it cannot be assumed that counsel was intentionally presenting false evidence to the court, either of the last two explanations provide sufficient reason for bringing the claim in the instant petition (and said petition was timely), to wit, the defense didn't really have the evidence before, or, it was intentionally omitted by counsel against Mr. Hoffman's wishes.

The second and third explanations are further supported by the fact that the Hays' affidavit had a state post conviction caption (but was unfiled and contained no case number). In other words, the attorneys were working on the claim but it either did not come together at the time like it later did, or, they could have pursued it but chose not to. So either the claim was timely brought because it could not have been brought sooner, or it could have been but the attorneys omitted it. As to this, given everything in Mr. Hoffman's affidavit, it cannot be said that its omission was an active and knowing choice of Petitioner.

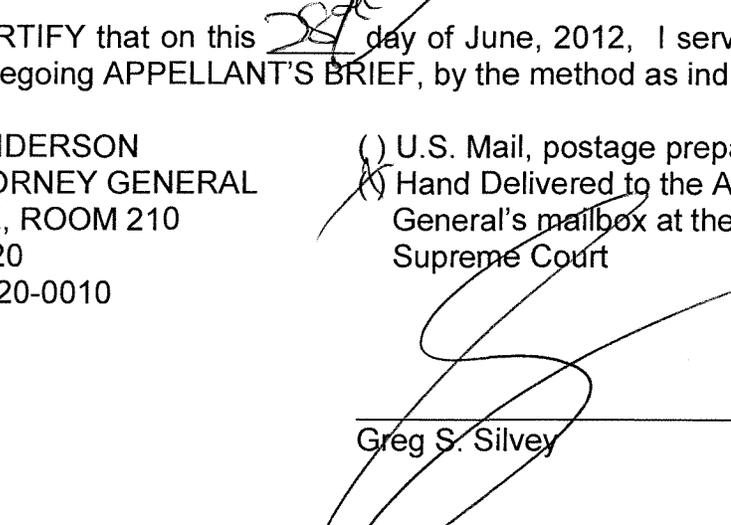
³ As the court pointed out, Ellison Matthews is now deceased.

For all these reasons, the petition was timely filed under these circumstances and the district court erred in summarily dismissing it.

CONCLUSION

Wherefore, for the reasons as stated above, Appellant/Petitioner respectfully requests that the district court's summary denial of the post conviction petition be reversed and that this matter be remanded for an evidentiary hearing.

DATED this 28th day of June, 2012.



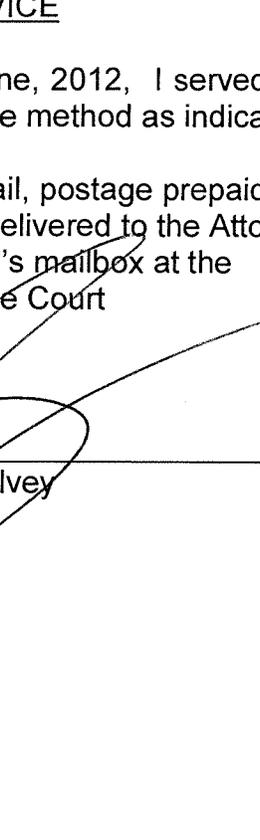
Greg S. Silvey
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day of June, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by the method as indicated below:

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