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## Gerdon v. State Appellant's Brief Dckt. 39300

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES GERDON,

Petitioner-Appellant,

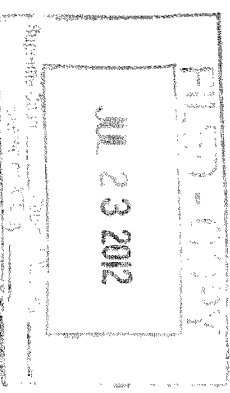
No. 39300

v.

STATE OF IDAHO,

Respondent.

APPELLANT'S BRIEF



BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF TWIN FALLS

HONORABLE G. RICHARD BEVAN  
District Judge

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## I. STATEMENT OF THE CASE

### A. Nature of the Case

James Gerdon appeals from the district court's memorandum opinion dated September 30, 2011 dismissing his amended successive petition for post conviction relief (R., pp. 311-322), and the district court's judgment of dismissal, filed October 7, 2011 (R., p. 324). Mr. Gerdon asserts that the district court erred by dismissing his petition for post-conviction relief and by failing to reconsider its dismissal.

### B. Statement of the Facts & Course of Proceedings

Mr. Gerdon had pleaded guilty to sexual abuse of a minor, lewd conduct with a minor and attempted lewd conduct with a minor on November 10, 2003. He was sentenced thereon to a total of fifteen years fixed and fifteen years indeterminate, all sentences to run concurrently. (R. 312). Mr. Gerdon filed an appeal, but the case was affirmed on May 19, 2005. (R. 312).

On October 20, 2004, Mr. Gerdon filed his first petition for post-conviction relief. It was summarily dismissed on June 28, 2006. (R. 312). There was apparently confusion as to when Mr. Gerdon received notice of the dismissal, with Mr. Gerdon writing to the district judge to inquire regarding the status of his case. The district judge sent him a copy of the memorandum opinion, and Mr. Gerdon wrote back requesting an affidavit for purposes of appeal. (R. 318). Mr. Gerdon then filed an untimely appeal that was dismissed due to the untimeliness. (R. 318).

Mr. Gerdon filed his second petition for post-conviction relief claiming ineffective assistance of counsel during his first post-conviction on April 21, 2008. This petition

was dismissed on May 6, 2009. (R. 313, 318). Mr. Gerdon appealed, but voluntarily dismissed his appeal. (R. 313).

On June 21, 2010, Mr. Gerdon filed the instant petition for post-conviction relief with, along with a supporting affidavit, alleging ineffective assistance of prior post-conviction counsel for failure to assert ineffective assistance of trial counsel for failure to file a motion to suppress and failing to object to restitution. (R. 313-314).

Throughout Mr. Gerdon's contentions, he maintained that he did not have effective communication with his attorneys and that therefore he had ineffective assistance of counsel at the trial stage, appellate stage, and during his post-convictions. (See, eg., Tr. pg. 51, Line 1 - pg. 68, Line 7). Because he was unable to effectively communicate with his attorneys, and as a result, his arguments were never presented properly, Mr. Gerdon argued that his successive post-conviction petition should be allowed. *Id.*

Ultimately, the District Court denied the motion to reconsider and dismissed the petition for post-conviction relief in its memorandum decision. (R. 311-322),, and entered an order dismissing the petition for post-conviction relief. (R. 324).

Mr. Gerdon timely filed his appeal. (R 326-328).

## II. ISSUES PRESENTED ON APPEAL

- A. **Did the district court err when it dismissed Mr. Gerdon's Amended Successive Petition for Post-Conviction Relief as untimely and as a successive petition, because the doctrine of equitable tolling should have applied to allow the Amended Successive Petition?**

### III. ARGUMENT

#### A.

The District Court Erred when it dismissed Mr. Gordon's Amended Successive Petition for Post-Conviction Relief as untimely and as a successive petition, because the doctrine of equitable tolling should have applied to allow the Amended Successive Petition.

A petition for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is a civil action in nature. *Workman v. State*, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007). Under Idaho Code § 19-4903, the petitioner must prove the claims upon which the petition is based by a preponderance of the evidence. *Workman*, 144 Idaho at 522, 164 P.3d at 802.

A claim for post-conviction relief must be raised in an original application. I.C. § 19-4908. That application must be filed within one year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever proceeding is later. I.C. § 19-4902. Successive petitions are impermissible "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." I.C. § 19-4908.

Section 19-4908 sets forth no fixed time within which successive petitions may be filed, however, the "sufficient reason" language in the statute necessarily provides "a reasonable time within which such claims [may be] asserted in a successive post-conviction petition, once those claims are known." *Charboneau v. State*, 144 Idaho 900, 905, 174 P.3d 870, 875 (2007). The determination of what is a reasonable time is

considered by the courts on a case-by-case basis. *Id.*

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 reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction relief." *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005). Thus, a petitioner asserting ineffective assistance of prior post-conviction counsel as the "sufficient reason" for failing to adequately assert a claim in the original post-conviction action must satisfy a two-level burden of proof. First, the petitioner must demonstrate that ineffective assistance of post-conviction counsel caused the inadequate presentation of a claim in the first petition. See *id.* Second, the petitioner must prove the underlying claim that was inadequately presented and upon which relief is sought. See *Workman*, 144 Idaho at 522, 164 P.3d at 802.

1. Mr. Gordon's Petition should have been allowed under I.C. 19-4901.

Mr. Gordon's contends that the district court erred by failing to allow his petition under I.C. § 14-4901, and *Charboneau v. State*, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007). Mr. Gordon argues that he has made a substantial factual showing that his claim for relief raises a substantial doubt about the reliability of the finding of guilt and could not have, in the exercise of due diligence, been raised earlier, allowing a successive petition under I.C. § 19-4901. He contends that the ineffectiveness of his attorney at his first post-conviction prevented him from properly presenting his arguments. *Id.*



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 reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction relief." *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005).

Mr. Gerdon contends that he raised substantial facts in his pleadings concerning the performance of his attorneys, that his underlying claims were not adequately presented, and that the inadequate presentation of his claims was due to the inadequate performance on his attorneys. Mr. Gerdon contends that he raised numerous facts presenting issues regarding ineffective performance by his attorneys that caused his underlying claim to be inadequately presented.

As stated above, throughout Mr. Gerdon's case, he maintained that he did not have effective communication with his attorneys and that therefore he had ineffective assistance of counsel at the trial stage, appellate stage, and during his post-convictions. (Tr. pg. 51, Line 1 - pg. 68, Line 7. Tr. pg. 99, Line 13, - pg. 109, Line 24). Because he was unable to effectively communicate with his attorneys, and as a result, his arguments were never presented properly, Mr. Gerdon argued that his successive post-conviction petition should be allowed. Mr. Gerdon also specifically tendered exhibits into evidence at his evidentiary hearing that demonstrated he had trouble with his legal mail, (Tr. pg. 110, Line 22 - pg. 126, Line 21, Exhibits 1 - 24), and that as a result, he could not communicate effectively with his attorneys, and that therefore, his points were not adequately presented as discussed in *Charboneau and Baker*.

Further, Mr. Gordon presented testimony that he did not have access to Idaho law books as he was held out of state, and that for that additional reason, his arguments were not presented adequately previously. (Tr. pg. 127, Lines 4 - 18).

The district court noted that “equitable tolling” as discussed by *Charboneau*, has been applied only in cases of mental disease and/or psychotropic medication, or when a petitioner was incarcerated out of state on an in-state conviction without legal representation or access to Idaho legal materials. (R. 316). Mr. Gordon contends that he has submitted evidence of both those very things. First, due to being housed out of state, and/or due to the communication issues he documented, he did not have access to legal representation in any effective sense. Second, he did not have access to Idaho legal materials.

It is Mr. Gordon’s position that the problems with communication with the courts and his attorneys caused him to be untimely in filing his appeal from his first post-conviction. The record before the district court showed that there was no evidence Mr. Gordon received notice of the June 28, 2006 decision until after 42 days had passed. Therefore, Mr. Gordon’s problems with his legal mail cost him the ability to file a timely appeal. His subsequent post-conviction attempts dealt with the lack of ability to communicate with his attorneys, and the ineffective assistance of his first post-conviction attorney.

The district court reasoned that because Mr. Gordon was able to file pleadings beginning in April, 2008, he must have had access to the courts the entire time. (R. 10-11). However, Mr. Gordon’s contention was that he never had adequate nor effective

access to either the courts, nor counsel. That his second post-conviction was approximately eighteen months demonstrates the additional difficulties Mr. Gordon had in accomplishing legal tasks.

Therefore, it is Mr. Gordon's contention that his third post-conviction petition should have been allowed, based on the claim of ineffective assistance of his prior post-conviction counsel, and due to that ineffective representation, the conduct of his trial and appellate counsel.

#### **IV. CONCLUSION**

Based on the above, Mr. Gordon respectfully requests that this Court vacate the district court's order dismissing his petition for post-conviction relief.

DATED this 9 day of July, 2012.



STEPHEN D. THOMPSON  
Attorney for Defendant/Appellant

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 9 day of July, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

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Criminal Division  
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