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Gerdon v. State Respondent's Brief Dckt. 39300

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

JAMES GERDON,

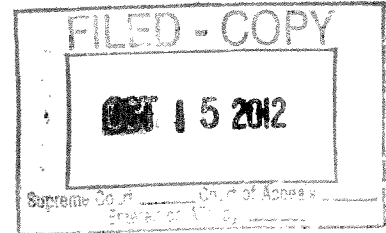
Petitioner-Appellant,

vs.

STATE OF IDAHO,

Respondent.

NO. 39300



BRIEF OF RESPONDENT

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

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STATEMENT OF THE CASE

Nature Of The Case

James Gerdon appeals from the district court's order summarily dismissing his third petition for post-conviction relief.

Statement Of Facts And Course Of Proceedings

The district court set forth the factual and procedural history of Gerdon's underlying criminal case and subsequent post-conviction relief actions as follows:

In an underlying criminal case, *State of Idaho v. James Alan* [sic] *Gerdon*, Dist. Ct., Fifth Jud. Dist., Twin Falls County, Idaho, Case No. CR 03-6576, Gerdon pled guilty on November 10, 2003, to four counts of Sexual Abuse of a Minor, three counts of Lewd Conduct with a Minor, and two counts of Attempted Lewd Conduct with a Minor. On February 13, 2004, Gerdon was sentenced to a total of fifteen years fixed and fifteen years indeterminate with all sentences to run concurrent. Gerdon filed a notice of Appeal on March 16, 2004. However, in an unpublished decision, the Court of Appeals affirmed the conviction and sentence. *State v. Gerdon*, Docket No. 30624, 2005 Unpublished Opinion No. 468 (May 19, 2005).

On October 20, 2004, Gerdon filed his first petition for post-conviction relief which was summarily dismissed by the Honorable John C. Hohnhorst, District Judge, on June 28, 2006. See *James Allen Gerdon v. State of Idaho*, Dist. Ct., Fifth Jud. Dist., Twin Falls County, Idaho, Case No. CV 2004-5173. On September 10, 2007, Gerdon appealed this dismissal; however, the Idaho Supreme Court Conditionally Dismissed Gerdon's appeal for failure to file the Notice of Appeal within forty-two days.

On April 21, 2008, Gerdon filed his second Petition for Post-Conviction Relief claiming ineffective assistance of counsel during his first post-conviction. See *James Allen Gerdon v. State of Idaho*, Dist. Ct., Fifth Jud. Dist., Twin Falls County, Idaho, Case No. CV 2008-1712. On May 6, 2009, the district court summarily dismissed this petition stating the petitioner's allegations were conclusory and unsubstantiated by any fact. In addition, the court held that an allegation of ineffective assistance of counsel during post-conviction relief proceedings is not a cognizable ground for filing a subsequent post-conviction relief application. Although

Gordon appealed the district court's Order, he subsequently filed a *Motion to Voluntarily Dismiss Appeal* on March 31, 2010.

On June 21, 2010, Gordon filed his third petition for post conviction relief with an accompanying affidavit. On April 4, 2011, the State filed its Motion for Summary Dismissal as to all claims in Gordon's petition for post-conviction relief. On April 18, 2011, Gordon filed a verified Amended Successive Petition for Post-Conviction Relief. As a basis for relief Gordon claims his prior post-conviction counsel failed to assert ineffective assistance of trial counsel for failure to file a motion to suppress and failing to object to restitution. This court first dismissed allegations regarding restitution and issued a notice of intent to dismiss his allegation regarding trial counsel's failure to file a motion to suppress.^[1] Gordon then filed a *Motion to Reconsider* and an *Amended Motion for Reconsideration*. The court heard arguments generally on August 8, 2011, however, no formal filing was made in response to the court's intent to dismiss Gordon's allegation regarding trial counsel's failure to file a motion to suppress.

(R., pp.312-314.)

On September 30, 2011, the district court issued an order captioned "Memorandum Opinion on Petitioner's Amended Successive Petition for Post Conviction Relief, Motion for Reconsideration, and Amended Motion for Reconsideration." (R., pp.311-322.) In that order, the court denied Gordon's motion for reconsideration, reaffirmed its prior determination that Gordon's first claim was barred by *res judicata* principles (see fn. 1, supra), held both claims were untimely, and dismissed the case. (Id.) Gordon filed a timely appeal. (R., pp.326-329.)

¹ In its Notice of Intent to Dismiss Amended Successive Petition for Post Conviction Relief, filed May 17, 2011, the district court gave notice of its intent to dismiss Gordon's first claim on the basis that it was barred by principles of *res judicata* from being relitigated. (R., pp.211-212.)

ISSUE

Gerdon states the issue on appeal as:

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?

(Appellant's Brief, p.2.)

The state rephrases the issue as:

Has Gerdon failed to demonstrate error in the district court's summary dismissal of his third post-conviction petition?

ARGUMENT

Gerdon Has Failed To Demonstrate Error In The District Court's Summary Dismissal Of His Third Post-Conviction Petition

A. Introduction

On appeal, Gerdon challenges the district court's summary dismissal of his third post-conviction petition, in which he claimed his trial counsel was ineffective for failing to: (1) file a suppression motion alleging that, when law enforcement authorities executed a search warrant they "would not show [him] a copy nor tell [him] what they were searching for[,]" and (2) object to an order that he pay \$800.00 in restitution, which, he alleges, was not part of his plea agreement. (R., p.189.) Gerdon also argues that, although his third post-conviction petition is untimely, such untimeliness should be excused by equitable tolling principles because his claims were inadequately presented during his first post-conviction proceeding due to: (a) a lack of effective communication with his attorneys "at the trial stage, appellate stage, and during his post-convictions[,]" (b) "trouble with his legal mail," and (c) being incarcerated out-of-state without access to legal representation and Idaho legal materials. (Appellant's Brief, pp.5-6.) Gerdon's arguments lack merit.

As the district court correctly concluded, because Gerdon's first claim was presented and denied in his first post-conviction proceeding, it is precluded from being reasserted under the *res judicata* doctrine. Moreover, the untimeliness of Gerdon's two claims is not excused by the equitable tolling doctrine or by a "sufficient reason" under I.C. § 19-4908² inasmuch as he was aware of the factual basis of both claims no later

² Successive post-conviction petitions are generally barred under I.C. § 19-4908, which states:

than August 15, 2006, and failed to file them until he filed his third post-conviction petition on June 21, 2010 -- which was not a reasonable time thereafter.

B. Standard Of Review

In reviewing the summary dismissal of a post-conviction application, the appellate court reviews the record to determine if a genuine issue of material fact exists which, if resolved in petitioner's favor, would require relief to be granted. Nellsch v. State, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992). The court freely reviews the district court's application of the law. Id. However, the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001).

C. Gerdon Has Failed To Demonstrate Any Error In The District Court's Determination That His First Claim Is Barred By The Doctrine Of Res Judicata

Gerdon's first claim in his third post-conviction petition is that his trial counsel was ineffective for failing to file a suppression motion on the basis that service of the search warrant was improper. (R., p.189.) He more specifically claims:

Waiver of or failure to assert claims. -- All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated 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.

I asked for a search warrant and when the authorities undertook the search and would not show me a copy nor tell me what they were searching for. I did ask these questions of the authorities.

(Id.) However, the district court correctly determined that, because Gerdon unsuccessfully presented that same claim in his first post-conviction petition, it was barred under the doctrine of *res judicata* from being raised again. The district court's Notice of Intent to Dismiss Amended Successive Petition for Post Conviction Relief initially explained its *res judicata* ground for dismissing Gerdon's suppression claim in the following way:

Gerdon asserts that his prior post-conviction counsel failed or improperly raised the issue of ineffective assistance by trial counsel in not filing a motion to suppress regarding improper service of a search warrant. However, the issue regarding the failure to file a motion to suppress was raised and ruled upon in Gerdon's first petition for post-conviction relief. *See James Allen Gerdon v. State of Idaho*, Dist. Ct., Fifth Jud. Dist., Twin Falls County, Idaho, Case No. CV 2004-5173 NOTICE OF INTENT TO DISMISS 060 0211 (the relevant portion of that opinion is attached for reference and incorporated herein as if fully set forth). As such, that ruling is *res judicata* as to the claim now asserted by Gerdon.

(R., pp.211-212.)

After the evidentiary hearing on Gerdon's motion for reconsideration, the district court issued a memorandum opinion and reiterated:

Gerdon's *Amended Successive Petition* asserts that his prior post-conviction counsel failed or improperly raised the issue of ineffective assistance of trial counsel for not filing a motion to suppress regarding improper service of a search warrant. However, this issue has previously been raised and ruled upon in Gerdon's first petition for post-conviction relief. *See James Allen Gerdon v. State of Idaho*, Dist. Ct., Fifth Jud. Dist., Twin Falls County, Idaho, Case No. CV 2004-5173 (the relevant portion of that opinion is attached to this court's Notice of Intent to Dismiss, filed May 17, 2011).

(R., p.318.)

A review of the relevant portion of the opinion of Gerdon's first post-conviction case, Twin Falls District Court Case No. CV 2004-5173, shows his claim that his trial attorney was ineffective for failing to file a suppression motion to challenge the validity of the service of the search warrant was both raised and rejected in that earlier proceeding, to wit:

Gerdon claims he was present during the search, and asked the officers executing the search for a copy of the warrant. According to Gerdon, the officers refused to give him a copy. Second Aff., p.3, ¶ 3(4). The Search Warrant issued by Judge Higer in the underlying criminal case stated:

A COPY OF THE WARRANT AND A RECEIPT FOR THE PROPERTY TAKEN SHALL BE GIVEN TO THE PERSON FROM WHOM OR FROM WHOSE PREMISES PROPERTY IS TAKEN. IF NO PERSON IS FOUND IN POSSESSION, A COPY AND RECEIPT SHALL BE CONSPICUOUSLY POSTED AT THE PLACE WHERE THE PROPERTY IS FOUND.

Sup. Pet., Exh. A.

Officer Smith, who was in charge of conducting the search, averred in the *Inventory and Return of Search Warrant* that "On the 8th day of July, 2003, I made a diligent search of the above-described premises, vehicle, or person and found and seized the items listed below in Item 7." *Sup. Pet.*, Exh. B (Inventory). The Inventory further recited:

3. Name(s) of person(s) found in possession of property:
NIA.
4. The inventory was made in the presence of:
[] The person(s) named in (3) from whose possession the property was taken.
[X] Others: Det. Scott Smith; Det. Curt Gambrel; Det. Chris Fullmer; Det. Chuck Garner; Det. Luke Allen; Officer Clint Doerr; CSO Tracy Perreira; CSO Patti Rohweder
5. Name of person served with a copy or description of place where copy is posted; **A copy was left on the couch in the living room at the residence.**

Sup. Pet., Exh. B (emphasis by district court).

There is an obvious discrepancy between Gerdon's claim that he was present during the search, and those identified by the Inventory as being present. Other than his unverified assertion, Gerdon has given the Court no evidence to support his claim that he was present during the search, or that the officers conducting the search did not serve a copy of the warrant upon him. The Idaho Supreme Court has specifically held that a search warrant need not be presented before a search is conducted.

In *State v. Gomez*, 101 Idaho 802, 809, 623 P.2d 110 (1980), cert. denied, 454 U.S. 963, 102 S.Ct. 503, 70 L.Ed.2d 378 (1981) the court found the following statement from the United States Supreme Court to be applicable to search warrants issued pursuant to I.C.R. 41: "[Federal] Rule 41 (d) does require federal officers to serve upon the person searched a copy of the warrant and a receipt describing the material obtained, but it does not invariably require that this be done before the search takes place." *Gomez*, 101 Idaho at 809 (*quoting Katz v. United States*, 389 U.S. 347, 355 n.16, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). The court also noted that other courts have concluded that the fact that investigative officers initiated a search without the issued but undelivered warrant in their physical possession did not invalidate the search. *Gomez*, 101 Idaho at 809 (*citing United States v. Woodring*, 444 F.2d 749 (9th Cir.1971); *United States v. Cooper*, 421 F.Supp. 804 (W.D. Tenn. 1976); *State v. Johnson*, 16 Ohio Misc. 278, 240 N.E.2d 574 (Ct. C.P. 1968)). Gerdon does not assert that he never received a copy of the warrant.

Even if Gerdon was present at the time of the search, and even if the officers failed to serve him with a copy of the warrant, his claim that this should invalidate the search is unavailing.

Gerdon has failed to show that his attorney's inaction was deficient in any way, or that he has been prejudiced thereby. Gerdon's claims concerning his attorney's failure to file a motion to suppress are dismissed.

(R., pp.220-222.)

Gerdon's first claim of his third post-conviction petition is identical to the claim decided by the district court in Gerdon's first post-conviction proceeding – the alleged failure of trial counsel to file a suppression motion based on improper service of the search warrant. Therefore, that claim is barred by the doctrine of *res judicata*, which prevents re-litigation of issues that have been previously decided in a final judgment or decision in an action between the same litigants. *State v. Rhoades*, 134 Idaho 862,

863, 11 P.3d 481, 482 (2000); Gubler v. Brydon, 125 Idaho 107, 110, 867 P.2d 981, 984 (1994). The district court's order summarily dismissing Gerdon's first claim of his third post-conviction petition was proper, and Gerdon has failed to meet his burden on appeal of demonstrating otherwise.

D. Gerdon Has Failed To Show The District Court Erred In Summarily Dismissing His Third Post-Conviction Petition Based On Untimeliness

1. Introduction

On February 17, 2004, the Judgment of Conviction in Gerdon's underlying criminal case was entered, and following an unsuccessful appeal, the Remittitur was filed on July 5, 2005. (R., p.85.) Pursuant to Idaho Code § 19-4902, Gerdon had one year from the expiration of that date to present his current post-conviction claims -- July 5, 2006.

Gerdon timely filed his first post-conviction petition on October 20, 2004, before his direct appeal was final, but it was summarily dismissed on June 28, 2006, and because he did not appeal that dismissal order within 42 days, but instead waited until September 10, 2007 to do so, the Idaho Supreme Court conditionally dismissed the appeal as untimely on October 11, 2007.³ (R., pp.85, 312-314.)

On April 21, 2008, Gerdon filed a second post-conviction petition (R., p.85), which was summarily dismissed on May 6, 2009 (R., pp.86, 313). Although Gerdon

³ According to a brief filed by the state, the Idaho Supreme Court gave Gerdon 21 days to respond to its notice, but Gerdon appears to have filed a Motion for Reconsideration/Motion for Re-ruling in the district court instead. (See R., p.282.) The record on appeal does not include the Remittitur for Gerdon's first post-conviction proceeding.

appealed that dismissal order, he later filed a motion to voluntarily dismiss the appeal, which motion was granted along with the filing of a Remittitur on April 5, 2010 (*id.*).

Gerdon filed his third post-conviction petition on June 21, 2010, which was summarily dismissed on September 30, 2011. (*R.*, pp.86, 311-322.) In this appeal of that dismissal, Gerdon asserts that, although his third post-conviction petition is untimely, such untimeliness should be excused by equitable tolling principles because his claims were inadequately presented (re: suppression based on improper service) or not raised (re: restitution) during his first post-conviction proceeding due to a lack of effective communication with his attorneys, trouble with his legal mail, and because he was incarcerated out-of-state he was denied access to legal representation and Idaho legal materials. (Appellant's Brief, pp.5-6.) Gerdon's arguments fail.

2. Both The Due Process Clause And Equitable Tolling Require Inmates To Show They Were Actually Hindered Or Prevented From Filing A Petition

Clarifying its opinion in Bounds v. Smith, 430 U.S. 817, 828 (1977), that legal resources may be necessary to provide inmates with access to the courts, the United States Supreme Court stated in Lewis v. Casey, 518 U.S. 343, 351(1996):

Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense. That would be the precise analog of the healthy inmate claiming constitutional violation because of the inadequacy of the prison infirmary. Insofar as the right vindicated by *Bounds* is concerned, "meaningful access to the courts is the touchstone," *id.*, at 823, 97 S.Ct., at 1495 (internal quotation marks omitted), and the inmate therefore must go one step further and demonstrate that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim.

Thus, Lewis explains, an inmate is required to show "actual injury" by going "one step further and demonstrat[ing] that the alleged shortcomings in the library or legal assistance program hindered his efforts to pursue a legal claim." Id. Therefore, the due process test for meaningful access to courts is not simply premised on whether an inmate has access to law books or legal assistance. Rather, the inmate must establish in his petition a causal connection: that the alleged inadequacies of available legal resources actually hindered or prevented him from pursuing a legal claim.

Under Idaho law, the rule for "tolling" the statute of limitation for a UPCA petition is effectively the same as the Due Process standard -- the shortcoming must actually hinder or prevent the filing of the petition. Idaho Code § 19-4902 provides, "An application may be filed at any time within one (1) 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 is later." The failure to file a timely petition for post-conviction relief is a basis for dismissal of the petition. Evensiosky v. State, 136 Idaho 189, 190-191, 30 P.2d 967, 968-969 (2001).

Generally, "equitable tolling" is available only where the petitioner shows that "extraordinary circumstances prevented him from filing his petition on time." Valverde v. Stinson, 224 F.3d 129, 133 (2nd Cir. 2000) (discussing equitable tolling theories in the context of federal habeas petitions); see Chico-Rodriguez v. State, 141 Idaho 579, 582, 114 P.3d 137, 140 (Ct. App. 2005) (discussing "extraordinary circumstances" and acknowledging "the bar for equitable tolling for post-conviction actions is high"). Idaho appellate courts have recognized that the one-year limitation period of I.C. § 19-4902 may be tolled if an applicant is prevented, either by mental disease or by being denied

access to courts, from earlier pursuing challenges to his or her conviction. Sayas v. State, 139 Idaho 957, 960, 88 P.3d 776, 779 (Ct. App. 2003); Anderson v. State, 133 Idaho 788, 791, 992 P.2d 783, 786 (Ct. App. 1999). However, a petitioner seeking equitable tolling must demonstrate a causal connection between the “extraordinary circumstance” and failure to timely file a petition. The Idaho Court of Appeals explained in Chico-Rodriguez v. State, 141 Idaho 579, 582, 114 P.3d 137, 140 (Ct. App. 2005):

We hold that in order for the statute of limitation under the UPCPA to be tolled on account of a mental illness, an unrepresented petitioner must show that he suffered from a serious mental illness which rendered him incompetent to understand his legal right to bring an action within a year or otherwise rendered him incapable of taking necessary steps to pursue that right. Equitable tolling will apply only during the period in which the petitioner's mental illness *actually prevented him from filing a post-conviction action*; any period following conviction during which the petitioner fails to meet the equitable tolling criteria will count toward the limitation period.

(Emphasis added.)

Thus, as is true in regard to the Due Process Clause, Idaho's post-conviction relief statute of limitation also requires inmates to show they have actually been prevented or hindered from filing a petition by whatever shortcoming or interference has been alleged.

3. The District Court Correctly Determined That Gerdon Failed To Demonstrate A Sufficient Reason For The Untimely Filing Of His Claims

Where, as here, 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. I.C. § 19-4908; Charboneau v. State, 144 Idaho 900, 904, 174 P.3d 870,

874 (2007). Moreover, newly discovered claims must be filed within a reasonable time after their discovery under Charboneau, 144 Idaho at 904, 174 P.3d at 874.

As previously discussed, because Gerdon fully presented his first claim -- trial counsel's failure to file a suppression motion based on improper service of the search warrant -- in his first post-conviction proceeding, he is precluded from reasserting that claim by the doctrine of *res judicata*. Gerdon's second claim -- that his plea agreement was breached by the court ordering \$800 in restitution -- is clearly untimely from his July 5, 2006 post-conviction filing deadline because he was made aware during his sentencing hearing that the state was going to present such an order for the court to sign.⁴ (R., p.46 (prosecutor advised court during sentencing hearing that the state would be presenting an order to the court for \$800 for payment for an evaluation of Gerdon that was ordered by the court); see also R., p.32 (restitution order).)

⁴ With regard to Gerdon's restitution claim, the record shows that a Restitution Order for payment of \$800.00 was entered on February 18, 2004, five days after Gerdon was sentenced and one day after the Judgment of Conviction and Sentence was filed. (R., pp.30-32.) The district court's first Notice of Intent to Dismiss, filed prior to Gerdon amending his third post-conviction petition, stated:

Gerdon also asserts that his due process rights were violated when Judge Hohnhorst signed an Order of Restitution outside the presence of him and his counsel. The state informed the court at sentencing, in Gerdon's presence, that it would submit an order of restitution for the psychosexual evaluation which Gerdon undertook. Gerdon was thus aware of this order at sentencing and had the opportunity to object through counsel. These opportunities provided Gerdon with due process as a matter of law and this claim is not supportable now.

Finally, the Order of Restitution was public record. Gerdon has failed to provide a sufficient reason why he did not know or could not have known, after due diligence, that restitution had been entered against him. As such, his claim should be summarily dismissed.

(R., p.96.)

Nevertheless, the district court gave Gerdon the benefit of any doubt by placing the outside date that he had knowledge of the factual bases for his claims as August 15, 2006, the day Gerdon sent the court a letter acknowledging he had lost his first post-conviction case and was going to appeal.⁵ Therefore, whether measured from August 15, 2006 to when Gerdon filed his second post-conviction petition on April 21, 2008 (over one year and eight months) as the district court did⁶, or to when Gerdon actually filed his claims in his third post-conviction petition (over three years and ten months), Gerdon's claims are clearly untimely because they were not filed within a reasonable time from when he became aware of them. Moreover, Gerdon cannot fault any attorney for his failure to file a timely petition in the twenty month period after August 15, 2006,

⁵ The district court explained the significance of the August 15, 2006 letter as follows:

Gerdon's first post-conviction relief action was dismissed on June 28, 2006. A month later, Gerdon expressed concern about the status of his case and Judge Hohnhorst mailed a copy of the June 28, 2006 Memorandum Opinion to Gerdon. Gerdon sent a letter, postmarked August 15, 2006, requesting an affidavit from Judge Hohnhorst for purposes of an appeal. Gerdon then filed an appeal on September 10, 2007. The appeal was dismissed for failure to file within forty-two days. Gerdon then filed his second post-conviction relief action on April 21, 2008.

(R., p.318.)

⁶ It should be noted that, although Gerdon did not file his two current claims in his second post-conviction petition, the court gave him the benefit of measuring the relevant filing deadline to the filing date of that petition instead of the petition that actually contained his claims – the third petition which was filed on June 21, 2010.

because he did not have one until the time he filed his second petition on April 31, 2008.⁷

The district court summarily dismissed Gerdon's third post-conviction petition, reasoning that, despite his equitable estoppel claim, he should have filed his two claims in a timely petition, i.e., within a reasonable time after August 15, 2006, because (1) he had filed two post-conviction petitions on his own in the past (one stemming from a different underlying criminal matter) and clearly knew how to do so, (2) he was not denied access to the courts, and (3) he knew about the factual basis for both of his claims no later than August 15, 2006. (R., p.96; 318-321; see n.4, supra.) Gerdon did not file his current claims in his second post-conviction petition, which was filed on April 21, 2008. Even if he had, as the district court found, that eighteen-month delay⁸ was not a reasonable time period for filing newly discovered claims under Charboneau, 144 Idaho at 904, 174 P.3d at 874. (R., pp.317-321.) Further, Gerdon filed his two claims on June 21, 2010, which is all the more untimely from August 15, 2006, the date Gerdon is deemed to have known about them.

The district court explained:

Simply put, Gerdon was not deprived of court access, being very familiar with the process of filing post-conviction relief claims, and was well aware of the arguments he wanted to assert in a subsequent post-conviction relief action when his first post-conviction relief action was dismissed. Therefore, Gerdon's eighteen month delay [after August 15, 2006] in filing a subsequent post-conviction relief action is unreasonable.

⁷ According to Gerdon's testimony at the "evidentiary" hearing, he was assigned an attorney after he filed his second post-conviction petition in April of 2008. (Tr., p.174, L.12-22.)

⁸ More accurately, it is just over twenty months between August 15, 2006 and April 21, 2008.

Based on the untimeliness of Gerdon's second post-conviction relief action, his third post-conviction relief action is also untimely, and must be dismissed, regardless of the alleged ineffective assistance of counsel for his first post-conviction relief claim.

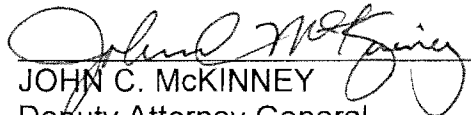
(R., pp.320-321.)

In sum, even accepting Gerdon's allegation that his first post-conviction counsel was negligent in presenting his claims, Gerdon has not presented a sufficient reason under I.C. § 19-4908 to justify his failure to present his claims within a reasonable time from August 15, 2006. The district court's summary dismissal order, attached as Appendix A, and incorporated into this brief as if fully set forth herein, is fully relied upon in support of the state's argument that Gerdon's third post-conviction petition is untimely, and summary dismissal is warranted on that basis.

CONCLUSION

The state respectfully requests this Court affirm the district court's order summarily dismissing Gerdon's third post-conviction petition.

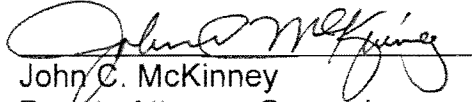
DATED this 15th day of October, 2012.


JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of October, 2012, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

STEPHEN D. THOMPSON
Post Office Box 1707
Ketchum, Idaho 83340


John C. McKinney
Deputy Attorney General

JCM/pm

APPENDIX A

DISTRICT COURT
TWIN FALLS CO, IDAHO
FILED

2011 SEP 30 PM 1:54

BY _____ CLERK

DEPUTY

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

JAMES ALLEN GERDON,

Petitioner,

vs.

STATE OF IDAHO,

Respondent.

)
) Case No. CV 2010-2884
)
)
) **MEMORANDUM OPINION ON**
) **PETITIONER'S AMENDED**
) **SUCCESSIVE PETITION FOR**
) **POST CONVICTION RELIEF,**
) **MOTION FOR**
) **RECONSIDERATION, AND**
) **AMENDED MOTION FOR**
) **RECONSIDERATION**

THIS MATTER is before the court after evidence and oral arguments were presented on August 8, 2011. The State of Idaho ("State") was represented at the hearing by Julie Sturgill, Deputy Prosecuting Attorney for Twin Falls County. James Allen Gerdon ("Gerdon") presented pro se, with Tim Williams acting as standby counsel.

The court, on the basis of the application and record before it, is satisfied that Gerdon is not entitled to post-conviction relief and no purpose would be served by any further proceedings. His Amended Successive Petition is therefore DISMISSED with prejudice.

FACTUAL AND PROCEDURAL HISTORY

In an underlying criminal case, *State of Idaho v. James Alan [sic] Gerdon*, Dist. Ct., Fifth Jud. Dist., Twin Falls County, Idaho, Case No. CR 03-6576, Gerdon pled guilty on November 10, 2003, to four counts of Sexual Abuse of a Minor, three counts of Lewd Conduct with a Minor, and two counts of Attempted Lewd Conduct with a Minor. On February 13, 2004, Gerdon was sentenced to a total of fifteen years fixed and fifteen years indeterminate with all sentences to run concurrent. Gerdon filed a notice of Appeal on March 16, 2004. However, in an unpublished decision, the Court of Appeals affirmed the conviction and sentence. *State v. Gerdon*, Docket No. 30624, 2005 Unpublished Opinion No. 468 (May 19, 2005).

On October 20, 2004, Gerdon filed his first petition for post-conviction relief which was summarily dismissed by the Honorable John C. Hohnhorst, District Judge, on June 28, 2006. See *James Allen Gerdon v. State of Idaho*, Dist. Ct., Fifth Jud. Dist., Twin Falls County, Idaho, Case No. CV 2004-5173. On September 10, 2007, Gerdon appealed this dismissal; however, the Idaho

Supreme Court Conditionally Dismissed Gerdon's appeal for failure to file the Notice of Appeal within forty-two days.

On April 21, 2008, Gerdon filed his second Petition for Post-Conviction Relief claiming ineffective assistance of counsel during his first post-conviction. See *James Allen Gerdon v. State of Idaho*, Dist. Ct., Fifth Jud. Dist., Twin Falls County, Idaho, Case No. CV 2008-1712. On May 6, 2009, the district court summarily dismissed this petition stating the petitioner's allegations were conclusory and unsubstantiated by any fact. In addition, the court held that an allegation of ineffective assistance of counsel during post-conviction relief proceedings is not a cognizable ground for filing a subsequent post-conviction relief application. Although Gerdon appealed the district court's Order, he subsequently filed a *Motion to Voluntarily Dismiss Appeal* on March 31, 2010.

On June 21, 2010, Gerdon filed his third petition for post conviction relief with an accompanying affidavit. On April 4, 2011, the State filed its Motion for Summary Dismissal as to all claims in Gerdon's petition for post-conviction relief. On April 18, 2011, Gerdon filed a verified Amended Successive Petition for Post-Conviction Relief. As a basis for relief Gerdon claims his prior post-conviction counsel failed to assert ineffective assistance of trial counsel for failure to file a motion to suppress and failing to object to restitution. This court first dismissed allegations regarding restitution and issued a notice of intent to

dismiss his allegation regarding trial counsel's failure to file a motion to suppress. Gerdon then filed a *Motion to Reconsider* and an *Amended Motion for Reconsideration*. The court heard arguments generally on August 8, 2011, however, no formal filing was made in response to the court's intent to dismiss Gerdon's allegation regarding trial counsel's failure to file a motion to suppress. For the reasons stated below, the court dismisses Gerdon's Amended Successive Petition and denies Gerdon's Motion for Reconsideration and Amended Motion for Reconsideration.

APPLICABLE LAW

An application for post-conviction relief under the UPCPA initiates a proceeding which is civil in nature. *Stuart v. State*, 136 Idaho 490, 495, 36 P.3d 1278, 1282 (2001). Like the plaintiff in any other civil proceeding, an applicant must substantiate, by a preponderance of evidence, the allegations upon which his or her request for post-conviction relief is based. Idaho Code § 19-4907; *Grube v. State*, 134 Idaho 24, 27, 995 P.2d 794, 797 (2000). Unlike a complaint in a civil action, however, an application for post-conviction relief must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). *Martinez v. State*, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant. I.C.

§ 19-4903. The application must include affidavits, records, or other evidence supporting its allegations, or must state why such supporting evidence is not included. *Id.* Further, the post-conviction petitioner must make factual allegations showing each essential element of the claim, and a showing of admissible evidence must be proffered to support those factual allegations. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

Idaho Code Section 19-4906(c) authorizes summary disposition of an application for post-conviction relief. Summary dismissal of an application pursuant to I.C. § 19- 4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. *Judd v. State*, 148 Idaho 22, 218 P.3d 1 (Ct. App. 2009). I.C. § 19-4906(c) provides:

The court may grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

When the alleged facts, even if true, would not entitle the applicant to relief, the trial court may dismiss the application without holding an evidentiary hearing. *Cooper v. State*, 96 Idaho 542, 545, 531 P.2d 1187, 1190 (1975). Allegations contained in the application are insufficient for the granting of relief when (1)

they are clearly disproved by the record of the original proceedings, or (2) they do not justify relief as a matter of law. *Id.*

The statute of limitations for post-conviction actions begins to "run from the expiration of the time for [an] appeal in the criminal action." The time is not restarted by filing an untimely appeal. *Loman v. State*, 138 Idaho 1, 2, 56 P.3d 158, 159 (Ct. App. 2002). 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. I.C. § 19-4908. *Charboneau v. State*, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007) (emphasis added). The failure to file a timely application is a basis for dismissal of the application. *Sayas v. State*, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003).

Equitable tolling would allow a claim to proceed despite being untimely. *Charboneau v. State*, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007). Equitable tolling has only been applied in two situations by Idaho Courts: "where the petitioner was incarcerated in an out-of state facility on an in-state conviction without legal representation or access to Idaho legal materials and where mental disease and/or psychotropic medication renders a petitioner incompetent and prevents petitioner from earlier pursuing challenges to his conviction." *Id.*

Initially, a petitioner could file a successive post-conviction relief action if it is done within one year of the finality of the previous post-conviction relief action that the petitioner alleges was tainted by ineffective assistance of counsel. *Hernandez v. State*, 133 Idaho 794, 800, 992 P.2d 789, 794 (Ct. App. 1999). The reason for this time frame was based, at least in part, on the understanding that inmates do not typically have help from counsel to initiate a successive post-conviction relief action. *Id.* More recently, the Idaho Supreme Court has indicated that the "reasonable time" for filing a successive post-conviction action should be addressed on a case-by-case basis and that thirteen months was "simply too long a period of time to be reasonable." *Charboneau v. State*, 144 Idaho 900, 905, 174 P.3d 870, 875 (2007). Twelve months may be unreasonable in cases where it is clear that the petitioner had sufficient information to file his or her post-conviction relief action immediately after the termination of the previous post-conviction relief action. *Schwartz v. State*, 145 Idaho 186, 192, 177 P.3d 400, 406 (Ct. App. 2008). Dismissal of a successive post-conviction relief action is appropriate if the previous post-conviction relief action was untimely filed. *Id.*

ANALYSIS

Gerdon's *Amended Successive Petition* asserts that his prior post-conviction counsel failed or improperly raised the issue of ineffective assistance of trial counsel for not filing a motion to suppress regarding improper service of a search warrant. However, this issue has previously been raised and ruled upon in Gerdon's first petition for post-conviction relief. See *James Allen Gerdon v. State of Idaho*, Dist. Ct., Fifth Jud. Dist., Twin Falls County, Idaho, Case No. CV 2004-5173 (the relevant portion of that opinion is attached to this court's *Notice of Intent to Dismiss*, filed May 17, 2011). Gerdon argues that his counsel during his first petition for post-conviction relief was ineffective. However, that claim does not entitle Gerdon to relief because it was not raised within reasonable time.

Gerdon's first post-conviction relief action was dismissed on June 28, 2006. A month later, Gerdon expressed concern about the status of his case and Judge Hohnhorst mailed a copy of the June 28, 2006 *Memorandum Opinion* to Gerdon. Gerdon sent a letter, postmarked August 15, 2006, requesting an affidavit from Judge Hohnhorst for purposes of an appeal. Gerdon then filed an appeal on September 10, 2007. The appeal was dismissed for failure to file within forty-two days. Gerdon then filed his second post-conviction relief action on April 21, 2008. This petition was summarily dismissed on May 6, 2009. Gerdon appealed the

dismissal, but filed a *Motion to Voluntarily Dismiss Appeal* on March 31, 2010. On June 21, 2010, Gerdon filed this, his third, post-conviction relief action.

Gerdon's first post-conviction was dismissed on June 28, 2006. While it is unclear if Gerdon received immediate notification of that decision, Gerdon had notice of that decision by August 15, 2006, as evidenced by Judge Hohnhorst's letter. Although Gerdon did file an appeal on his first post-conviction relief action on September 10, 2007, that appeal was untimely and an untimely appeal does not restart the time limitations for subsequent post-conviction relief actions. *Loman*, 138 Idaho at 2, 56 P.3d at 159. As of August 15, 2006, the forty-two days for appeal had passed and therefore, Gerdon needed to file a successive post-conviction action within a reasonable time. Gerdon filed his second post-conviction relief action on April 21, 2008, more than twenty months after the August 15, 2006 date. This second post-conviction relief petition did not discuss discovery of new evidence or any other information that Gerdon would not have had at the outset of his first post-conviction relief action, except for the ineffective assistance of counsel alleged against his post-conviction attorney.

Equitable tolling on the basis of mental disease or mental incompetence is inapplicable because Gerdon does not allege either. Gerdon does contend that he is entitled to tolling because he was incarcerated out-of-state. While Gerdon was apparently incarcerated out of state, he was not deprived access to the courts.

This conclusion is evidenced by Gerdon's knowledge and actions. First, Gerdon sent multiple letters to the court from Texas. Second, Gerdon was familiar with the process of filing post-conviction relief actions as he had previously filed two by himself—one concerning the same underlying criminal conviction as the present claim, and another concerning a prior conviction (Twin Falls County CV 2004-5653). Third, Gerdon's untimely pro se appeal for his first post-conviction relief action, which was filed from Texas more than seven months before his second post-conviction relief action, cites various Idaho appellate rules as well as one Idaho case which indicate he had some access to Idaho law materials. Fourth, Gerdon was aware, in August 2006, of the essential pieces of information necessary to file a successive post-conviction such as his case number, the pertinent facts relevant to his case, and his potential claims.¹ Thus, he had "adequate information to file an application for post-conviction relief." *Schwartz*, 145 Idaho at 192, 177 P.3d at 406.

Lastly, considering Gerdon alleges that he was denied access to the courts by being incarcerated out of state and his second post-conviction action was filed while he was still in Texas, Gerdon does not assert a significant change in circumstances that would enlighten the court as to why Gerdon was denied access to the courts in August 2006, but then regained that access in April 2008,

¹ Gerdon claimed that he was entitled to a subsequent post-conviction action because his attorney did not present Gerdon's arguments the way Gerdon wanted during his first post-conviction. Such information would have been known to Gerdon during that post-conviction action.

while still being incarcerated out-of-state (Texas). Simply put, Gerdon was not deprived of court access, being very familiar with the process of filing post-conviction relief claims, and was well aware of the arguments he wanted to assert in a subsequent post-conviction relief action when his first post-conviction relief action was dismissed. Therefore, Gerdon's eighteen month delay in filing a subsequent post-conviction relief action is unreasonable.

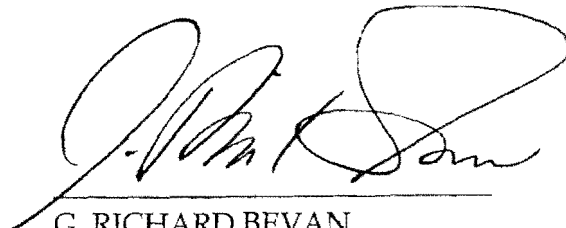
Based on the untimeliness of Gerdon's second post-conviction relief action, his third post-conviction relief action is also untimely, and must be dismissed, regardless of the alleged ineffective assistance of counsel for his first post-conviction relief claim. *See Schwartz*, 145 Idaho at 191, 177 P.3d at 405 (holding that dismissing a successive post-conviction relief action is appropriate if the previous post-conviction relief action was untimely filed); *see also Loman v. State*, 138 Idaho 1, 2, 56 P.3d 158, 159 (Ct. App. 2002) (holding that an untimely filing does not reset the clock for subsequent post-conviction relief actions).

CONCLUSION

For the reasons set forth above, the court DENIES Petitioner's Motion for Reconsideration and Amended Motion for Reconsideration. The court thus DISMISSES Petitioner's Amended Successive Petition for Post-Conviction Relief. Counsel for the State is ORDERED to prepare a judgment in conformity with this opinion within seven (7) days.

IT IS SO ORDERED.

Dated this 70th day of September, 2011.



G. RICHARD BEVAN
District Judge

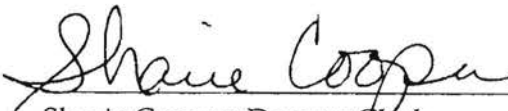
CERTIFICATE OF MAILING/DELIVERY

I, Sharie Cooper, hereby certify that on the 30 day of September, 2011, a true and correct copy of the foregoing Notice of Intent to Dismiss was mailed, postage paid, and/or hand-delivered to the following persons:

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Sharie Cooper, Deputy Clerk