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# Cobell v. State Respondent's Brief Dckt. 39321

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

EUGENE RAY COBELL )

Petitioner-Appellant, )

vs. )

STATE OF IDAHO, )

Respondent. )

NO. 39321

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BRIEF OF RESPONDENT

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APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF ADA

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HONORABLE MICHAEL E. WETHERELL  
District Judge

---

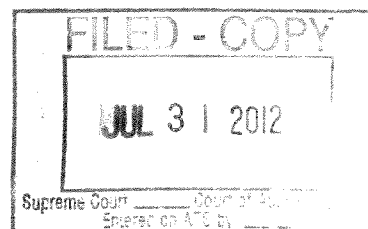
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## STATEMENT OF THE CASE

### Nature of the Case

Eugene Ray Cobell appeals from the district court's order summarily dismissing his successive petition for post-conviction relief.

### Statement of Facts and Course of Proceedings

The Idaho Court of Appeals described the facts and the proceedings in Cobell's underlying criminal case and appeal as follows:

Cobell, a seventy-two-year-old man, was visiting the home of his niece and his grandniece, a twenty-year-old woman. One evening, after the other members of the family went to bed, Cobell and his grandniece remained on the couch. The grandniece fell asleep with her head on Cobell's shoulder and was awakened by Cobell fondling and kissing her. When she sat up alarmed, Cobell forced her to the ground, removed her clothing, performed oral sex on her, penetrated her with his penis, and digitally penetrated her anus while pulling her head back by her pony tail. The victim reported the incident to her mother. When her mother confronted Cobell, he initially responded that he did not do anything and later admitted that he and the victim were just being friendly but that he could not have raped her because he was impotent. The police were called and an officer asked Cobell some preliminary questions. After some vague responses, Cobell eventually told the officer that he had his arm around the victim, she fell asleep and he kissed her on the neck. He denied any sexual contact with the victim.

Cobell was charged with rape, I.C. § 18-6101, and penetration by a foreign object, I.C. § 18-6608. At trial, the victim testified that Cobell sexually assaulted her. However, Cobell testified that the entire encounter was consensual and began with a kiss which then escalated to more passionate behavior. The jury found Cobell guilty of both charges. The district court sentenced Cobell to concurrent unified terms of life, with minimum periods of confinement of ten years.

State v. Cobell, Docket No. 35410, 2009 Unpublished Opinion No. 77, pp.1-2

(Idaho App., December 2, 2009).

On appeal, in addition to arguing an excessive sentence, Cobell asserted his “Fifth Amendment right to remain silent was violated when the prosecutor cross-examined him concerning his failure to relate to the victim’s family and police officers on the night of the assault the version of events to which he testified at trial,” as well claiming prosecutor misconduct by “using his post-*Miranda* silence during cross-examination and further commenting on [his] silence and misstating the evidence during closing evidence.” Id. at 2-8. The Court of Appeals found the district court erred by allowing the state to question Cobell regarding his post-*Miranda* silence at the police station, but such error was harmless. Id. at 10. The court further found any errors in the state’s closing argument failed to rise to the level of fundamental error. Id. Finally, the Court of Appeals found Cobell “failed to demonstrate that the district court abused its discretion in sentencing him to concurrent unified life sentences, with minimum periods of confinement of ten years, for the crimes of rape and penetration by a foreign object” and affirmed Cobell’s judgment of conviction and sentences. Id.

#### Statement Of The Facts And Course Of Post-Conviction Proceedings

Cobell filed an initial petition for post-conviction relief that was dismissed by the district court and not appealed by Cobell. (R., pp.4, 22-23, 27.) Cobell filed a *pro se* second petition for post-conviction relief, initiating the present case. (R., pp.3-20.) In the petition he asserted a claim of actual innocence based on his claimed inability to commit the crimes in question because of a medical condition. (Id.) He also asserted ineffective assistance of counsel for not “effectively fill[ing] the first [petition for post-conviction relief].” (R., p.15.)

The state filed an objection and motion to dismiss Cobell's second petition for post-conviction relief. (R., pp.22-26.) The state contended Cobell was not entitled to file a successive petition for post-conviction relief because Cobell had failed to assert "any reason why the grounds for relief were not raised in the first application." (R., p.25.)

The district court filed a notice of intent to summarily dismiss Cobell's successive petition for post-conviction relief providing Cobell with the statutory 20 days to assert sufficient reason for failure to assert his grounds for relief in his initial petition for post-conviction relief. (R., pp.27-28.) The district court determined Cobell's only argument to support his position that his claims were not adequately raised in his initial petition for post-conviction relief was that his counsel was ineffective, failing to make any showing why his claims were not previously raised. (R., pp.27-28.) Cobell filed a response to the state's motion to dismiss wherein he merely restated his arguments from his successive petition for post-conviction relief. (R., pp.29-31.) The district court summarily dismissed Cobell's successive petition for post-conviction relief, finding Cobell had failed to show "sufficient reason that the claims in his petition were not earlier raised." (R., p.32.)

Cobell timely appeals from the order dismissing his petition. (R., pp.34-37.)



## ISSUE

Cobell states the issue on appeal as:

Did the district court err by summarily dismissing Mr. Cobell's successive petition for post-conviction relief?

(Appellant's brief, p.4.)

The state rephrases the issue on appeal as:

Has Cobell failed to establish the district court erred in summarily dismissing his petition for post-conviction relief?

## ARGUMENT

### Cobell Has Failed To Show Error In The Summary Dismissal Of His Successive Petition For Post-Conviction Relief

#### A. Introduction

The district court summarily dismissed Cobell's successive petition for post-conviction relief after concluding Cobell failed to make any showing why his claims were not previously raised. (R., pp.27-28.) On appeal, Cobell asserts his claim for ineffective assistance of post-conviction counsel was properly presented in his successive petition for post-conviction relief and the district court erred in summarily dismissing it. (Appellant's brief, pp.7-8.)

Cobell's argument fails.

#### B. Standard Of Review

The appellate court exercises free review over the district court's application of the Uniform Post Conviction Procedure Act. Evensiosky v. State, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001). On appeal from summary dismissal of a post-conviction petition, the appellate court reviews the record to determine if a genuine issue of material fact exists, which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. Matthews v. State, 122 Idaho 801, 807, 839 P.2d 1215, 1221 (1992); Aeschliman v. State, 132 Idaho 397, 403, 973 P.2d 749, 755 (Ct. App. 1999). Appellate courts freely review whether a genuine issue of material fact exists. Edwards v. Conchemco, Inc., 111 Idaho 851, 852, 727 P.2d 1279, 1280 (Ct. App. 1986).

C. Dismissal Of Cobell's Successive Petition For Post-Conviction Relief Was Appropriate Because It Was Untimely Filed And Cobell Failed To Allege Facts That, If True, Would Overcome The Successive Petition Bar And Entitle Him To Post-Conviction Relief

A petition for post-conviction relief initiates a new and independent civil proceeding and the petitioner bears the burden of establishing, by a preponderance of the evidence, that he is entitled to relief. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983). However, a petition for post-conviction relief differs from a complaint in an ordinary civil action. A petition must contain more than "a short and plain statement of the claim" that would suffice for a complaint. Workman, 144 Idaho at 522, 164 P.3d at 522 (referencing I.R.C.P. 8). The petitioner must submit verified facts within his personal knowledge and produce admissible evidence to support his allegations. Id. (citing I.C. § 19-4903). Furthermore, the factual showing in a post-conviction relief application must be in the form of evidence that would be admissible at an evidentiary hearing. Drapeau v. State, 103 Idaho 612, 617, 651 P.2d 546, 551 (1982); Cowger v. State, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999).

Idaho Code § 19-4906 authorizes summary disposition of an application for post-conviction relief when the applicant's evidence has raised no genuine issue of material fact, which if resolved in the applicant's favor, would entitle the applicant to the requested relief. Downing v. State, 132 Idaho 861, 863, 979 P.2d 1219, 1221 (Ct. App. 1999); Martinez v. State, 126 Idaho 813, 816, 892 P.2d 488, 491 (Ct. App. 1995). Pursuant to I.C. § 19-4906(c), a district court may dismiss a post-conviction application on the motion of any party when it

appears that the applicant is not entitled to relief. Specifically, 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.

Applying these principles in this case, the district court summarily dismissed Cobell's petition. Contrary to Cobell's assertions on appeal, a review of the record and the applicable law supports the district court's order of summary dismissal.

1. Cobell's Successive Petition Was Untimely

Idaho Code § 19-4902(a) requires that a post-conviction proceeding be commenced by filing a petition "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 proceedings following an appeal, whichever is later." In the case of successive petitions, the Idaho Supreme Court has "recognized that rigid application of I.C. § 19-4902 would preclude courts from considering 'claims which simply are not known to the defendant within the time limit, yet raise important due process issues.'" Rhoades v. State, 148 Idaho 247, 250 220 P.3d 1066, 1069 (2009) (quoting Charboneau v. State, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007)). In those circumstances, the court will apply a "reasonable time" standard. Rhoades, 148 Idaho at 251, 220 P.3d at 1070. "In determining what a reasonable time is for filing a successive petition, [the court] will simply consider it on a case-by-case basis, as has been done in capital cases."

Charboneau, 144 Idaho at 905, 174 P.3d at 875. However, absent a showing by the petitioner that the limitation period should be tolled, the failure to file a timely petition for post-conviction relief is a basis for dismissal of the petition. Rhoades, 148 Idaho at 247, 220 P.3d at 1066.

Cobell's successive petition was filed July 28, 2011, more than one year after the issuance of the Remittitur in Cobell's direct appeal. Cobell does not argue that his claims were not known to him or could not reasonably have been known to him in the requisite time-frame for filing his initial post-conviction petition. Further, there is nothing in this record to indicate what issues were actually raised in Cobell's first petition for post-conviction relief; it was apparently summarily dismissed and such dismissal was not appealed. (R., pp.22-23.) Instead, Cobell makes only a blanket, unsupported claim that he was "effected [sic] by other fiduciary misconduct" of his counsel below. (R., p.18.) Because Cobell failed to justify the untimely filing his successive petition, he has failed to show that the district court erred in dismissing his successive petition.

## 2. Cobell's Petition For Post-Conviction Relief Was An Improper Successive Petition

Cobell asserts on appeal that the district court incorrectly concluded "that an allegation of effective [sic] assistance of post-conviction counsel was not a sufficient reason to raise claims in a successive petition," and he is therefore entitled to have his case remanded for further proceedings. (Appellant's brief, p.10.) Although the district court did not expressly acknowledge that ineffective assistance of post-conviction counsel is a potential ground for asserting

previously dismissed claims in a successive petition (R., pp.27-28), Cobell's mere claim that post-conviction counsel was ineffective was insufficient to withstand summary dismissal. In analyzing the situation before it, the district court correctly recognized that it had to find a sufficient reason asserted by Cobell for why the claims asserted in a successive petition were not raised in an initial petition. (Id.) The district court then concluded that Cobell had failed to make any showing why his claims were not previously raised except to say that his post-conviction counsel was ineffective:

All ground for relief must be raised in a petitioner's "original, supplemental, or amended application." I.C. § 19-4908. Any grounds not so raised "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." Thus, the Court must be able to find sufficient reason that a ground was not raised in an initial post-conviction petition for a successive petition to be filed.

Furthermore, "[w]hen a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief . . . it may indicate its intention to dismiss the application. I.C. § 19-4906(b). However, on giving such notice, the court must give the applicant twenty (20) days in which to respond to the proposed dismissal. *Id.*

Here, the petitioner's sole argument that his claims were not adequately raised in his initial post conviction petition is that his post-conviction counsel was ineffective. However, because there is no right to post-conviction counsel, a petition based on ineffectiveness of post-conviction counsel is without merit. (citation omitted.) Because the petitioner has not made any showing why the [sic] his claims were not previously raised, the Court cannot consider this petition.

(R., pp.27-28.)

The state filed a brief in support of its objection to the filing of Cobell's successive petition for post-conviction relief and moved for its dismissal on the

correct legal basis that Cobell had failed to allege “any reason why grounds for relief were not raised in the first application.” (R., p.25.) The court gave Cobell the statutory time to show “sufficient reason that the claims in his petition were not earlier raised.” (R., p.32.) Cobell responded to the state’s brief and motion to dismiss but failed to include any reasons for his failure to allege his claims in his first petition for post-conviction relief. (R., pp.29-32.) Noting that Cobell had once again failed to “show[ ] sufficient reason that the claims in his petition were not earlier raised,” the district court dismissed his successive petition for post-conviction relief. (R., p.32.)

Cobell does not assert on appeal that he had insufficient notice that his successive petition for post-conviction relief would be summarily dismissed for failure to show a sufficient reason his claims were not raised in his initial petition, instead he argues he is entitled to relief because the district court misstated the law. (Appellant’s brief, pp.8-10.) Cobell’s position appears to be all that is required to avoid summary dismissal of a successive petition for post-conviction relief is the mere statement that post-conviction counsel was ineffective. (See Appellant’s brief, pp.8-9.) However, it is clear such an unsupported assertion is not sufficient to withstand summary dismissal. Idaho Code § 19-4908 governs the filing of successive petitions and provides:

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.C. § 19-4908. In interpreting this statute, Idaho's appellate courts have held that "[i]neffective 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." Schwartz v. State, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008) (footnote omitted) (citing 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)). To establish ineffective assistance of counsel, however, a post-conviction petitioner must demonstrate both that (a) his counsel's performance fell below an objective standard of reasonableness and (b) there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

Although Cobell argues "[t]he law is clear that the ineffective assistance of post-conviction counsel is just such a 'sufficient reason' for the petitioner to re-raise claims through successive petitions for post-conviction relief" (Appellant's brief, p.10), a review of the record shows that Cobell failed to make even a prima facie showing of ineffective assistance of post-conviction counsel to establish a "sufficient reason" to justify the filing of his successive petition in this case. There is nothing in the record indicating what was contained within the initial petition for post-conviction relief and Cobell's claim of ineffective assistance of post-conviction counsel consists of his unsupported statement that "he was not



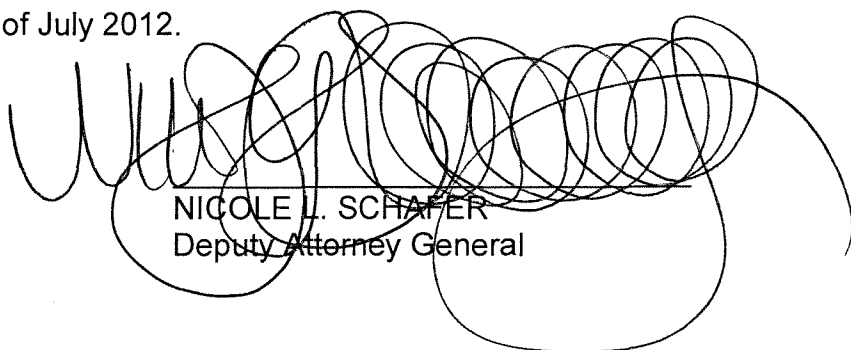
given a fair and just opportunity to present his first (habeus) [sic] U.P.C.P.A., because he lacked notice, and was effected by other fiduciary misconduct.” (R., p.18.) The record thus supports the district court’s determination that Cobell failed to show sufficient reason why the claims in his successive petition for post-conviction relief were not earlier raised.

Because Cobell did have notice that his successive petition for post-conviction relief would be dismissed for failure to show his claims were not addressed in his initial petition and the opportunity to respond, the district court correctly summarily dismissed his petition. Applying free review over the district court’s application of the Uniform Post Conviction Procedure Act, Evensiosky, 136 Idaho at 190, 30 P.3d at 968, shows that the record supports the district court’s finding that Cobell failed to give sufficient reason for the filing of a successive petition for post-conviction relief and therefore the summary dismissal of Cobell’s successive petition was not in error.

#### CONCLUSION

The state respectfully requests that this Court affirm the district court’s order summarily dismissing Cobell’s successive petition for post-conviction relief.

DATED this 31st day of July 2012.



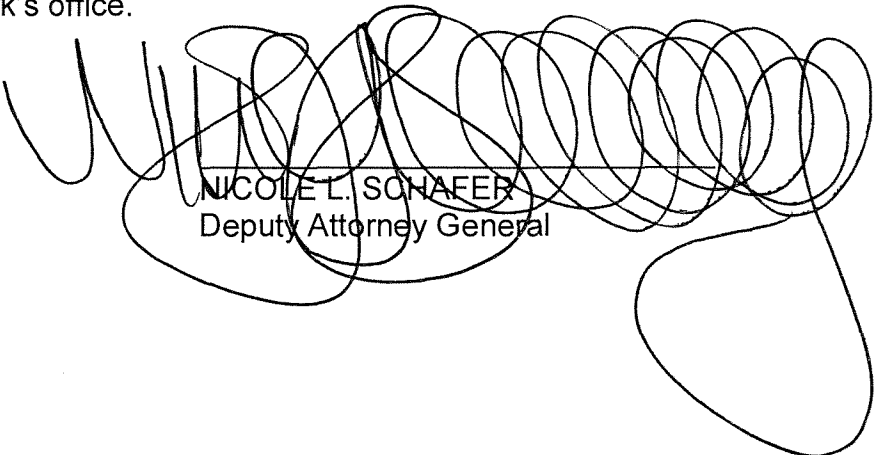
NICOLE L. SCHAFER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 31st day of July 2012, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

JUSTIN M. CURTIS  
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



NICOLE L. SCHAFER  
Deputy Attorney General

NLS/pm