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Fields v. State Respondent's Brief Dckt. 40586

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IN THE SUPREME COURT OF THE STATE OF IDAHO

ZANE JACK FIELDS,)
)
) Petitioner-Appellant,)
) No. 40586-2012
 vs.)
) Ada Co. Case
) No. CV 2011-14403
)
) STATE OF IDAHO,)
)
) Respondent-Appellee.)
 _____)

BRIEF OF RESPONDENT-APPELLEE

**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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District Judge**

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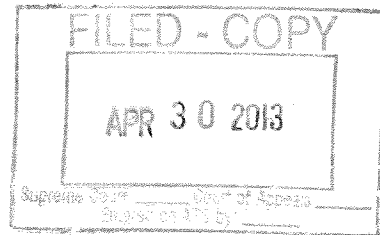


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STATEMENT OF THE CASE

Nature Of The Case

Petitioner-Appellant Zane Jack Fields (“Fields”) appeals from the district court’s Order Dismissing Petition for Post Conviction Relief, wherein the court dismissed his sixth post-conviction petition that challenges his underlying conviction for first-degree murder and imposition of the death penalty.

Statement Of Facts And Course Of Proceedings In Fields’ Underlying Criminal And First Post-Conviction Proceedings

The material facts leading to Fields’ conviction for first-degree murder and his sentence of death for the murder of Mary Catherine Vanderford (“Mary”) are detailed in State v. Fields (Fields I), 127 Idaho 904, 907-08, 908 P.2d 1211 (1995), as follows:

At approximately 11:15 a.m., February 11, 1988, [Mary] was stabbed to death while working at the Wishing Well Gift Shop (the Wishing Well) in Boise. The stabbing occurred during a robbery in which approximately fifty dollars in cash was taken. [Mary] was working alone in the shop at the time. Soon after the perpetrator left, Ralph P. Simmons (Simmons) arrived at the store. When Simmons arrived [Mary] was speaking to the emergency dispatcher. Simmons put pressure on a wound on [Mary’s] neck and began speaking with the dispatcher.

Ada County Police Detective Randy Folwell (Folwell), who was in the area at the time, heard the emergency dispatch and drove to the Wishing Well. [Mary] told Folwell that her attacker was a lone male who had left the store. Emergency medical personnel soon arrived and began treating [Mary]. [Mary] was immediately transported to Saint Alphonsus Hospital.

Dr. Frank J. Fazzio, Jr., the doctor who treated [Mary] when she arrived at the emergency room, testified that [Mary] was in full cardiac arrest upon arrival. [Mary] was never resuscitated. Dr. Fazzio opined that [Mary’s] death was a result of loss of blood. Frank A. Roberts, the pathologist who performed the autopsy on [Mary], similarly concluded that the cause of death was loss of blood as a result of stab wounds, primarily a neck wound.

The State also called a number of witnesses who identified Fields as a person they saw in or near the store immediately before and after the incident. Betty Hornecker (Hornecker) testified that she was in the Wishing Well at approximately 11:00 a.m. on February 11, 1988[,] when a man, who appeared to be acting strangely, came into the store and walked immediately to the back of the building. The man remained in the building after Hornecker left the store. Hornecker immediately contacted the police after reading about the murder the following day. Although the police used Hornecker's description to prepare a composite drawing of the suspect, she was unable to make an identification from a photographic lineup provided by police. Another witness, Murie Jan Munk, had been in the Wishing Well at approximately 11:05 or 11:10 a.m. the day of the murder. She saw a man in the store at the time, although she could not describe his face. All she was able to remember was that he was "fat and sloppy, a little over six feet tall." The man was still in the store when she left.

Nancy Carol Miller (Miller), an employee at Quilter's Crossing, a craft store at the intersection of Liberty and Fairview, testified that a man came into Quilter's Crossing at approximately 12:30 p.m. Miller testified that her attention was drawn to the man because it is rare for a man to come into the store and because the man had "wild looking eyes." Miller also noted that the man appeared to have a brown wooden-handled knife in his right coat pocket. Miller later telephoned the police when she read that they were seeking information about possible suspects in the Wishing Well incident. The police showed Miller a photographic lineup, from which she identified Fields as the man who had been in the store. She also identified Fields in court. Miller stated that after Fields left her store, she saw him go into T-Shirts Plus, a neighboring store.

Vicky Tippetts (Tippetts), an employee at T-Shirts Plus, testified that a "wild looking man," who appeared to have a wooden-handled knife sticking out of his pocket, came into the store. When Tippetts asked the man if she could help him, he said no, but kept staring at her and the cash register. After approximately five minutes, the man left the store. Tippetts identified Fields in the photographic lineup, as well as in court, as the man who had been in her store that day.

The next witness was Robert D. Starbrad (Starbrad), an employee at Videon, a video rental and sales store located near the Wishing Well. Starbrad testified that, at 12:15 p.m., he received a call from another Videon store, informing him of the Wishing Well robbery. At approximately 12:30 p.m., a man Starbrad later identified as Fields came into the store. The man's odd appearance and behavior made Starbrad nervous, and Starbrad contacted the store's manager to ask that someone keep an eye on the man while he was in the store. Starbrad identified

Fields as the man who had been in the store in both the photographic lineup and in court. The retail floor manager at Videon, Timothy S. McWilliams (McWilliams), testified that Starbrad contacted him about a man in the store, and identified Fields as the man who had been in the store when shown a photographic lineup by police.

The State also called Keith Edson (Edson), who first met Fields while serving a prison sentence for grand theft auto in 1982. Edson and Fields were in protective custody together while they were both in prison. Edson was walking on Fairview Avenue the morning of the murder when he saw a man he vaguely recognized go into the Wishing Well. The man came out of the store looking nervous and upset. It was not until Edson heard Fields' name on television ten days later that he was able to remember the name of the person he saw.

Most of the State's remaining witnesses were inmates who testified about statements Fields made about the killing while in jail. The first such witness was Jeffrey L. Acheson (Acheson), Fields' roommate at the Ada County Jail while Fields was awaiting trial on charges stemming from an incident at the ShopKo store in Boise. Acheson testified that whenever a "Crime Stoppers" report about the incident at the Wishing Well came on television, Fields would get upset and nervous and change channels, turn the television off, or turn the [sic] down the volume. Acheson also testified that Fields said "they can't pin that on me," because Fields "took care of the evidence."

Joe Heistand (Heistand), another inmate at the County Jail, testified that Fields said he had been near the Wishing Well a few times before the incident looking for a "possible score," and had noticed that an "old lady ran the store and was alone." Fields further told Heistand that [Mary] began screaming and hollering when she saw him taking money out of the cash register. Fields told [Mary] to cooperate but, when she continued to scream, he stabbed her. Fields also told Heistand that he took between forty eight and fifty dollars from the till, and that [Mary] was still alive when he left the store. Heistand further testified that Fields told him that Fields expected his roommate to testify that Fields was not in Boise at the time of the murder, but Fields' roommate had already contacted the police and given a different story.

Scott Bianchi (Bianchi), another inmate, testified that Fields told him that, although he killed [Mary], he did not mean to do so and felt bad. Bianchi was also approached by an investigator working for Fields before the preliminary hearing. Bianchi stated that Fields asked him to testify falsely at the preliminary hearing, but Bianchi told the investigator that his testimony "wouldn't be helpful."

Fields' case consisted of two brief witnesses. The first was Mark Ayotte, a detective with the Boise City Police Department, who testified that he had contacted approximately nine contractors who had been at BMC West on Fairview the day of the murder, as well as several jail inmates. The second witness was Robert W. Jue, a Department of Health and Welfare district health inspector, who testified that the Taco Bell on Fairview opened to the public on February 23, 1988, and was not operational on February of that year. This testimony was presumably offered to impeach Edson's testimony that he bought a drink at Taco Bell while out walking on the morning of the murder. Fields did not testify.

A Complaint was filed charging Fields with Mary's first-degree murder based upon the felony-murder doctrine. (##19185/19809, R., pp.17-18.)¹ At Fields' preliminary hearing, Harold Raymond Gilcrist ("Gilcrist") testified that, while in protective custody at the Idaho Correctional Institution-Orofino during April through May 1989, he had several conversations with Fields wherein Fields made admissions and statements about Mary's murder (Prelim. Hear. Trans., pp.119-76); Gilcrist did not testify at Fields' trial (##19185/19809, R., pp.67-103; *see also* Trial Transcripts *generally*). Probable cause was found by the magistrate (##19185/19809, R., pp.15-16) and an Information charging Fields with Mary's first-degree murder was filed (*id.*, pp.17-18).

¹ These records are not part of the record on appeal and, as discussed below, that alone is sufficient reason to affirm the district court. Moreover, while Fields filed a Motion to Take Judicial Notice asking the district court to take judicial notice of the files and transcripts from his underlying criminal and post-conviction cases (#40586-2012, R., pp.188-229), which the court acknowledged (*id.*, p.267), it does not appear the court actually ruled on the motion. However, in the event this Court should grant an untimely motion permitting consideration of the records, the state will refer to the records and transcripts by their respective supreme court docket numbers. The supreme court docket numbers for Fields' underlying trial, sentencing and first post-conviction case are ##19185 and 19809. The supreme court docket number for Fields' second post-conviction case is #24119. The supreme court docket numbers for his third post-conviction case is ##35679/36704. The supreme court docket number for his fourth post-conviction case is #36508. The supreme court docket number for his fifth post-conviction case is #38571-2011. The supreme court docket number for his sixth post-conviction case, and the subject of the instant appeal, is #40586-2012. "Brief" refers to Fields' opening brief in the instant case.

The details of Fields' trial are described above, which included testimony from inmate witnesses regarding various admissions Fields made while in custody about Mary's murder, including: Jeffrey L. Acheson ("Acheson") (##19815/19809, Tr., pp.1418-39, 1441-56), Joe Heistand ("Heistand") (id., pp.1460-1528), and Scott Bianchi ("Bianchi") (id., pp.1559-1616). Detective Dave Smith also testified regarding his investigation of Mary's murder and his contact with the inmate witnesses. (Id., pp.1368-98.) On May 16, 1990, a jury found Fields guilty as charged. (#19815/19809, R., p.104.)

Fields filed a Motion for New Trial on July 17, 1990, contending an inmate, Salvador Martinez ("Martinez"), advised he overheard Gilcrist (who did not testify at Fields' trial), Heistand and Bianchi state "they had lied, or intended to lie, at Fields' trial in exchange for promised benefits from the authorities." (##19185/19809, R., pp.108-12.) After an evidentiary hearing that commenced on August 6, 1990 (id., pp.1712-1879, 1886-1905), at which Martinez (##19185/19809, Tr., pp.1716-64), Detective Smith (id., pp.1790-1813), Bianchi (id., pp.1817-31, 1871-73), Heistand (id, pp.1831-45), Gilcrist (id., pp.1845-62), and Acheson (id., pp.1862-71) testified, denying they lied when they previously testified, the district court denied Fields' motion (##19185-19809, R., pp.144-49), concluding Martinez's testimony "was not believable to this court and would not be believable to a jury" and "the testimony of the inmate witnesses that they had not spoken to Mr. Martinez is credible" (id., p.145).

After Fields' sentencing hearing (##19185/19809, Tr., pp.1907-36), the district court found the state had proven three statutory aggravating factors and, after weighing the collective mitigation against the statutory aggravating factors individually, sentenced

Fields to death (#19185-19809, R., pp.164-77). Judgment was filed March 7, 1991. (Id., pp.178-79.)

On April 18, 1991, Fields filed his first post-conviction petition. (##19185/19809, R., pp.197-203.) With the assistance of new counsel, an amended petition was filed raising one additional claim. (Id., pp.218-19.) After an evidentiary hearing that commenced January 6, 1992 (##19185/19809, pp.1953-2122), which included testimony from Bianchi (id., pp.2022-30), Gilcrist (id., pp.2056-58), and Acheson (id., pp.2060-67), the district court denied Fields' claims on January 30, 1992, but withdrew the "utter disregard" statutory aggravating factor because of the Ninth Circuit's erroneous conclusion that it was unconstitutionally vague, *see Creech v. Arave*, 947 F.2d 873, 881 (9th Cir. 1991) (id., pp.226-235).²

On July 13, 1992, Fields filed another Motion for New Trial (##19185/19809, Supp. R., pp.7-8) and Second Amended Application for Post-Conviction Relief (id., pp.9-10), contending Bianchi lied when he testified at Fields' trial. On August 3, 1992, another evidentiary hearing commenced (#19185/19809, Supp. Tr., pp.4-96) at which Bianchi testified, conceding he told Fields' attorney, Amil Myshin ("Myshin"), he lied at Fields' trial, but explaining he lied to Myshin and his trial testimony was true (id., pp.6-45). Bianchi also admitted he had talked with Gilcrist about the conversation with Myshin (id., pp.16-17), but was unsure whether he had read Gilcrist's preliminary hearing testimony prior to Fields' trial (id., p.20). Fields filed an affidavit denying he showed Bianchi the preliminary hearing transcript or made statements to Bianchi regarding Mary's murder (#19185/19809, Supp. R., pp.34-35); Myshin filed an affidavit

² The Supreme Court subsequently reversed the Ninth Circuit's decision in *Arave v. Creech*, 507 U.S. 463, 471 (1993).

detailing his conversation with Bianchi (id., pp.36-37). The district court denied Fields' Motion for New Trial and post-conviction relief, concluding, "it appears to the court that [Bianchi's] testimony at trial and in the post-conviction review proceedings is true in those respects that are material." (Id., p.60.) The court further explained any discrepancies between Bianchi's recollection of his conversation with Myshin and Myshin's recollection "are not material to the facts testified to at trial. They represent differences in recollection on points that do not influence the outcome. Mr. Bianchi's testimony at trial was tested under intense cross-examination, and in the jury's eyes and in the court's eyes withstood that test. His explanation for telling persons he lied at trial is believable and believed by this court" (id.).

On February 16, 1995, this Court affirmed Fields' conviction, sentence and denial of post-conviction relief. *See Fields I, supra.*

Statement Of Facts And Course Of Proceedings Involving Commencement Of Fields' Federal Habeas Proceedings

Pursuant to Fields' motion, new counsel, Leo N. Griffard, was appointed to represent Fields in federal court on October 30, 1995. (#40586, R., p.238.) Pursuant to Fields' motion, two new attorneys, Joan M. Fisher ("Fisher") and Scott D. Fouser ("Fouser"), were substituted for Griffard to represent Fields in federal court on January 3, 1996. (Id.) Fields filed a discovery motion that included taking the inmate witnesses' depositions, including Gilcrist, and obtaining various documents and other information regarding those witnesses via interrogatories and requests for production. (Id., pp.242-46.) The federal district court granted a majority of Fields' motion on April 11, 1996,

including Gilcrist and the other inmate witnesses' depositions (id., pp.247-53), and ordered that discovery be completed by July 29, 1996 (id., p.239).

Pursuant to Fields' request, Fisher moved to withdraw as his attorney and on July 22, 1996, Michael J. Wood ("Wood") was appointed. (Id., p.239.) Based upon Fields' request, the discovery deadline was continued to November 1, 1996. (Id., pp.240, 254-56.) The federal court also stayed Fields' federal habeas case pending completion of state successive post-conviction proceedings. (Id.) Fields never noticed the authorized depositions and none were ever taken during his federal habeas case. (Id., p.240.)

Statement Of Facts And Course Of Proceedings In Fields' Second Post-Conviction Case

With Fouser and Wood's assistance, after filing Fields' federal writ of habeas corpus, Fields filed his second post-conviction petition on September 11, 1996 (#24119, R., pp.4-51), raising multiple "fundamental errors resulting in a manifest injustice" (id., pp.15-25) (capitalization altered), "unconstitutional death penalty procedures and findings" (id., pp.25-33) (capitalization altered), "new evidence" (id., pp.33-34) (capitalization altered), and "ineffective assistance of counsel" (id., pp.34-49) (capitalization altered). The district court concluded Fields failed to satisfy the requirements of I.C. § 19-2719 (id., pp.87-96), and entered a final order denying relief on July 23, 1997 (id., pp.130-35). This Court affirmed the district court's decision denying post-conviction relief on September 7, 2000. Fields v. State (Fields II), 135 Idaho 286, 17 P.3d 230 (2000).

Upon completion of Fields' second post-conviction case, the stay in federal court was lifted, and the court permitted Wood to withdraw and appointed the Federal Defenders of Eastern Washington and Idaho ("Federal Defenders"). (#40586, R., p.240.)

Despite having missed the discovery deadline, on June 14, 2002, Fields filed another discovery motion, which the federal district court denied. (Id.) Fouser was subsequently discharged and Dennis Benjamin (“Benjamin”) was appointed to represent Fields in federal court; the Federal Defenders and Benjamin continue to represent Fields in federal court. (Id.)

Statement Of Facts And Course Of Proceedings In Fields’ Third Post-Conviction Case

On August 2, 2002, relying upon Ring v. Arizona, 536 U.S. 584 (2002), Fields filed a “Petition for Post-Conviction Relief or Writ of Habeas Corpus” and “Motions to Correct Illegal Sentences, to Vacate Sentences of Death and for New Sentencing Trial.” (#35679, R., pp.5-14.) The state responded, asking that the petition be dismissed because Ring does not apply retroactively (id., pp.37-46), which the district court granted (id., pp.293-304). This Court affirmed the district court on June 30, 2010. Fields v. State (Fields III), 149 Idaho 399, 234 P.3d 723 (2010).

Statement Of Facts And Course Of Proceedings In Fields’ Fourth Post-Conviction Case

On June 27, 2002, Fields filed a Petition for Post-Conviction Scientific Testing, requesting testing of “three distinct pieces of evidence” including DNA testing of his coat that was admitted at trial as exhibit 22, comparison of nineteen latent fingerprints taken from the murder scene with a national fingerprint data base (“AFIS”), and DNA testing of fingernail scrapings from Mary’s body. (#36508, R., pp.7-14.) Pursuant to Fields’ motion, which is not part of the record, coupled with the “concurrence of the State,” the district court entered an order on December 3, 2002, for release of the coat “by the Ada County Clerk’s Office to a representative of law enforcement for transport to the Idaho

State Police Forensic Lab for DNA testing. The coat is to be returned to the Ada County Court Clerk's Office at the completion of the DNA testing" and "is to be transported and contained in such a manner as to protect the integrity of the evidence and the chain of custody." (Id., pp.64-65.) The coat was retrieved on December 9, 2002 by Gary Starkey (#38571-2011, R., pp.48-49) and tested by the State Lab on January 2, 2003, but it was determined there was an inadequate sample to do additional testing (id., p.55). This information was conveyed to Fields' attorney by Deputy Prosecutor Roger Bourne ("Bourne") on February 3, 2003. (Id., p.54.)

Nevertheless, Fields waited until October 10, 2003, to file a Motion for Independent Scientific Testing requesting independent testing of the coat. (#36508, R., pp.77-78.) The state's objection was filed on October 31, 2003. (Id., pp.84-84.) While he filed several motions for production of documents (#36508, R., pp.117-20) and access to evidence (id., pp.123-31), which the district court generally granted (id., pp.151-54), Fields never noticed a hearing on the motion seeking independent testing of the coat.

After additional testing and comparisons were completed on other evidence, on November 5, 2007, the state filed a Motion to Dismiss, asserting the testing and comparisons failed to produce results favorable to Fields. (#36508, R., pp.176-78.) Fields initially responded to the state's motion by filing various affidavits attached to his attorney's affidavit, which included one from Acheson that was allegedly signed on July 16, 2004, and discussed some of his involvement with the "investigators," housing prior to trial, "special treatment" for his testimony, and that Gilcrist, Heistand, and Bianchi "told [Acheson] of how they made up most of what they were saying, in order to get out of Orofino." (#36508, R., p.275, Affidavit of Counsel with Materials in Opposition to

Respondent's Motion for Summary Disposition, Exhibit D, Affidavit of Jeff Acheson.) Fields did not file his actual Response to the State's Motion to Dismiss until April 11, 2008, which included an allegation of "actual innocence." (Id., pp.195-220.) Concluding Fields failed to establish a genuine issue of material fact warranting further proceedings, the district court dismissed his successive petition on April 3, 2009. (Id., pp.257-61.)

On May 25, 2011, this Court affirmed and expressly addressed Acheson's affidavit, recognizing Fields' post-conviction petition was premised upon DNA testing under I.C. 19-4901(a)(6) and not newly discovered evidence based upon Acheson's affidavit, which the Court concluded "do[es] not create a genuine issue of material fact with respect to Fields's claim under Idaho Code § 19-4901(6)." Fields v. State (Fields IV), 151 Idaho 18, 25, 253 P.3d 692 (2011). The Court further explained Acheson's affidavit could not support a claim for post-conviction relief based upon the allegation of newly discovered evidence because it was merely impeachment evidence, which cannot support a successive application for post-conviction relief under I.C. § 19-2719(5)(b). Fields IV, 151 Idaho at 26. More importantly, "there [was] nothing in the record indicating when any new facts in the affidavits supporting [Fields'] claim were known or reasonably should have been known" and "[i]t was Fields' burden to allege facts showing that he fits within the narrow exception to Idaho Code § 19-2719." Id.

Statement Of Facts And Course Of Proceedings In Fields' Fifth Post-Conviction Case

On August 27, 2010, pursuant to Ada County Exhibits Clerk Margaret Lundquist's ("Lundquist") request, Bourne sent a letter and various attachments to Lundquist regarding Fields' coat (#38571-2011, R., pp.76-80), which had been the subject of his fourth post-conviction petition and was determined by the State Lab to have

an inadequate sample for additional testing (id., p.55). Bourne's letter explained the coat was destroyed after it was tested by the State Lab, and detailed the coat's chain of custody beginning with it being retrieved for testing by the State Lab in 2002, completion of the State Lab's attempt to test the coat, retrieval of the coat from the State Lab by Shawna Hilliard, an e-mail found by Bridget Kinney to Detective Smith asking what should be done with the coat, Detective Smith's response that it should be destroyed, a February 16, 2004 Property Invoice revealing the coat was scheduled for destruction, and information from Vicki Drown, who was in charge of the Ada County Sheriff's Property Room, that "the coat was no doubt destroyed according to the instruction on the property invoice." (Id., pp.76-78). Bourne explained the decision to destroy the coat was made without his consultation or someone from the prosecutor's office, and he assumed "neither Shawna Hilliard, Bridget Kinney or [sic] Dave Smith remembered the requirements of the Order probably due to the passage of time." (Id.) The record does not reveal if the letter was sent to Fields' attorneys.

On October 10, 2010, Fields filed his fifth Petition for Post-Conviction Relief raising another claim of "actual innocence" and a due process claim both based upon the coat's destruction having been ordered by Detective Smith. (Id., pp.10-19.) The state responded, asking that the petition be summarily dismissed (id., pp.88-100), and later filed an affidavit from Smith with attachments (id., pp.162-72) explaining why he approved the coat's destruction, which, in relevant part, stated:

5. When asked by Ms. Kinney in the email what to do with the coat, your affiant recalls thinking that since fourteen (14) years had elapsed since the trial and since no further testing could be done on the coat, the coat was of no further value and could be disposed of. Your affiant was aware that the Idaho State Forensic Laboratory had determined that there was no blood sample left on the coat for

DNA testing. Your affiant was not aware that the Court had ordered that the coat be returned to the clerk's office. Your affiant had no intention of destroying anything that had evidentiary value and would not have ordered its destruction if it had appeared to your affiant that the coat had any evidentiary value. As stated above, your affiant assumed with the passage of time that the evidentiary portion of the case was long since over;

6. Your affiant was in no way attempting to interfere with the defendant's right to a fair trial. Your affiant assumed that the coat had no further value since the trial was over.

(Id., p.163.)

On February 18, 2011, the district court denied post-conviction relief. (Id., pp.185-95.) Addressing the first claim, the court explained it was barred under I.C. § 19-2719(5)(b) because it "rais[ed] matters that are cumulative or impeaching" and, even if it was not merely cumulative or impeaching, "destruction of the coat does not cast doubt on the reliability of the conviction." (Id., pp.189-91.) Addressing the second claim, the court reasoned Fields "has not shown that the evidentiary value of the coat was material or that he has been prejudiced by the destruction of the evidence." (Id., p.194.)

After detailing the history associated with the coat, this Court concluded Fields' fifth post-conviction petition was untimely under I.C. § 19-2719, explaining:

Given the opportunities for testing or examining of all the exhibits, and absent any compelling argument to the contrary, Fields cannot make a showing that the destruction of the coat could not reasonably have been known until October 2010. Fields should have known that the coat was destroyed no later than May 2010, when all of the exhibits were photographed by defense counsel.

Fields v. State (Fields V), 2013 WL 1198084, *4-5 (Idaho 2013).

Statement Of Facts And Course Of Proceedings In Fields' Sixth And Instant Post-Conviction Case

On July 28, 2011, Fields filed his sixth Petition for Post-Conviction Relief (#40586-2012, R., pp.4-17), which was based primarily upon Gilcrist's July 8, 2011 recantation (id., pp.70-71), and raised the following claims: (1) actual innocence (id., pp.7-13); (2) police and prosecutorial misconduct based upon (a) Detective Smith allegedly "sharing information about the crime with inmate witnesses," (b) "the State's use of testimony at trial by inmates Acheson, Bianchi and Heistand," (c) withholding of exculpatory evidence based upon "Detective Smith's improper conduct," (d) knowing use of false testimony by Acheson, Bianchi, and Heistand, and (e) "purposeful destruction" of Fields' coat (id., pp.13-15); and (3) violation of due process because Gilcrist was allegedly "working together and in concert with Detective Smith" by conveying "materially false and damaging information to inmates Bianchi, Heistand and Acheson before trial to assist them with their trial testimony" (id., pp.15-16).

Attached to Fields' sixth petition were various exhibits, including the Affidavit of Greg Worthen ("Worthen"), an investigator with the Federal Defenders, detailing his involvement with Fields' case starting approximately June 2010, including attempts to locate Gilcrist. (Id., pp.61-64.) Gilcrist's declaration was also attached, contending, "Zane Fields never told me he killed anybody. Fields never implicated himself to me as the murderer or a participant in the murder of Mary Vanderford at the Wishing Well," the information Gilcrist "said [he] got from Fields was actually information provided directly to [Gilcrist] by Detective Smith" and looking at Detective Smith's file that was allegedly left on a table during their meeting when Detective Smith left the room, and that Gilcrist shared the information allegedly obtained from Detective Smith with Heistand and

Bianchi. (Id., pp.70-71.) While Gilcrist's July 8, 2011 declaration was signed "under penalty of perjury," it was not notarized. (Id., p.71.) The remaining exhibits attached to the sixth petition were from his fourth and fifth prior post-conviction cases. (Id., pp.66-68, 73-117.)

The state filed a response and requested the successive petition be dismissed because (1) Gilcrist's declaration was "not an affidavit as contemplated by I.C. § 19-4903 and is not otherwise admissible evidence," (2) the claims are governed by the doctrine of *res judicata*, (3) the petition was untimely under I.C. § 19-2719, and (4) Fields failed to plead in his petition why Gilcrist's "current story was not known nor could not have reasonably have been known at the time of the filing of the original petition for post conviction relief" or "why Gilcrist could not have been found and interviewed after his release from prison in 1992." (Id., pp.128-34.) Affidavits from Detective Smith, Heistand, and Bianchi were also filed denying Gilcrist's allegations (id., pp.135-36, 148-56), along with an affidavit from paralegal Kevin Burnett explaining he had reviewed records at the Idaho Department of Correction ("IDOC") and determined Gilcrist had been in the custody of IDOC from May 27, 1983, until his release on July 23, 1992 (id., pp.143-44).

Fields filed a response, discussing efforts to contact Gilcrist, asserting his sixth petition was filed within 42 days of learning of Gilcrist's recantation (id., pp.164-174), and attaching the Affidavit of Harold Gilcrist that was identical to his prior declaration,

but dated September 30, 2011 (*id.*, pp.176-77), and the Affidavit of Bruce Livingston (“Livingston”), one of Fields’ current attorneys, discussing his role in Fields’ case.³

After the state filed a reply that detailed the time frame of Fields’ case (*id.*, pp.230-36) and a supporting affidavit with various attachments relating to proceedings in his federal habeas case (*id.*, pp.37-56), Fields filed another affidavit from Gilcrist that contended, “[f]or years [he] was unwilling to tell anybody what really happened regarding [his] testimony against Zane Fields” and that it was “only after” a “2009 major medical crisis” when he was allegedly in a coma for a period of time that he “took stock of [his] life and realized the incredible amount of guilt [he] felt at having falsely testified against Zane Fields” (*id.*, p.264). Gilcrist concluded, “When Greg Worthen of the Federal Defender Services of Idaho approached me in 2011, while I was in the Kootenai County Jail, it gave me the opportunity to tell the truth and come clean about my false story and testimony that Zane had confessed to me. . . . Prior to this medical crisis, which occurred in 2009, I would not have told the truth about what happened.” (*Id.*)

Recognizing most of the information associated with Fields’ successive petition had already been litigated, the district court’s analysis focused “solely on [Fields’] new allegations based upon the Declaration of Harold Gilcrist.” (*Id.*, pp.270-71.) After reviewing Gilcrist’s January 9, 1992 post-conviction evidentiary hearing testimony, which was the last time he testified, and noting Gilcrist “had not yet changed his story” at that time, the district court concluded the claims in Fields’ sixth petition could not have been filed as part of his first post-conviction case. (*Id.*, p.273.) Nevertheless, the court dismissed Fields’ successive petition because he failed to allege facts showing when his

³ Two other affidavits were also filed by Fields, but neither is particularly relevant to the issues currently before this Court. (#40586, R., pp.179-84.)

claims were known or reasonably could have been known since the successive petition “is silent as to when the facts regarding Mr. Gilcrist’s decision to change his story reasonably could have been known.” (Id.) The court expressly addressed Worthen’s affidavit and concluded it failed to explain why “Gilcrist’s changed story could not reasonably have been discovered through the exercise of due diligence between 1992 and 2007.” (Id., pp.273-74.) As to the affidavits submitted months after the filing of Fields’ successive petition, particularly Livingston’s affidavit and Gilcrist’s second affidavit, the court reasoned Fields “cited no authority which stands for the proposition that a petition which fails to meet the heightened pleading requirements to allege facts showing when [Fields’] claims were known or reasonably could have been known, may be ‘cured’ by submitting further affidavits approximately five months after the successive petition was filed.” (Id., p.274) (emphasis omitted). The court also concluded, even if the successive petition met the heightened pleading requirements of I.C. § 19-2719, it was “not supported by material facts stated under oath or affirmation as Mr. Gilcrist’s Declaration was unsworn and unverified.” (Id., pp.274-75.) Finally, the court concluded that, because Gilcrist’s “changing story is merely impeaching” and his “testimony played no part in the jury’s verdicts” since he did not testify at Fields’ trial, the successive petition had to be dismissed pursuant to I.C. § 19-2719(5)(b). An Order Dismissing Petition for Post Conviction Relief was filed November 29, 2012 (id., p.279), and Fields’ timely Notice of Appeal was filed December 18, 2012 (id., pp.280-82).

ISSUES

Fields states the issues on appeal as follow:

The district court improperly applied Idaho Code § 19-2719(5) and incorrectly dismissed this Petition. The district court:

1. Improperly applied § 19-2719(5) to find the Petition did not meet the exception for successive petitions, when it found the Petition did not plead facts asserting the new information in Gilcrist's declaration could not reasonably have been known until the June 2011 discovery.

2. Improperly applied § 19-2719(5) by refusing to consider any subsequent evidence submitted in opposition to the State's summary dismissal motion, reply and supporting affidavits to establish the exception for successive petitions.

3. Improperly applied § 19-2719(5) by refusing to consider material facts stated under affirmation and filed with the Petition to establish the exception for successive petitions.

4. Improperly applied § 19-2719(5)(b) by finding the newly discovered evidence is merely impeaching.

(Brief, p.5.)

The state wishes to rephrase the issues on appeal as follows:

Has Fields failed to provide an adequate record to review his claims that the district court erred in dismissing his successive post-conviction petition because the underlying records from his trial and prior post-conviction cases are not included in the record on appeal?

Alternatively,

Because Fields has failed to establish the claims in his successive petition were filed within forty-two days after they were known or reasonably should have been known, is this Court without jurisdiction to hear the claims, requiring this Court to dismiss his appeal or affirm the district court?

Alternatively,

Are Fields' claims, which are based upon Gilcrist's recantation, barred by I.C. § 19-2519(5)(b) because Gilcrist alleges matters that are merely cumulative or impeaching?

ARGUMENT

I.

Not Only Has Fields Failed To Establish The District Court Erred By Summarily Dismissing His Successive Post-Conviction Petition, But Because He Failed To Provide This Court With The Underlying Record To Support His Claims And Establish His Claims Are Timely, The District Court Must Be Affirmed

A. Introduction

Because this is his sixth Petition for Post-Conviction Relief, Fields' case stands as a poster child for why I.C. § 19-2719 was enacted by the Idaho Legislature. In his successive petition, filed more than twenty years after he was sentenced to death for Mary's murder, Fields raises another actual innocence claim and several due process allegations, all stemming primarily from Gilcrist's recantation, an inmate witness who did not even testify at Fields' trial. The district court dismissed the petition because Fields failed to meet the heightened pleading requirements mandated under I.C. § 19-2719, which require capital murderers to establish when the claim was known or reasonably could have been known, was not supported by material facts stated under oath or affirmation, and was based merely upon impeaching evidence because it serves only to impeach the testimony of the three other inmate witnesses and Detective Smith.

On appeal, Fields contends the district court erred by dismissing his successive petition because he filed his petition within 42 days after allegedly learning of Gilcrist's recantation, alleged facts in his successive petition and filed affidavits demonstrating his attempts to find Gilcrist, provided subsequent evidence attempting to cure pleading defects, and that Gilcrist's affidavit is "substantive evidence" supporting Fields' claims regarding Detective Smith's alleged misconduct and the state's suppression of that alleged misconduct.

Because the claims in Fields' successive petition are based upon the underlying records from prior cases, including his trial, post-trial motions, initial post-conviction, and successive post-conviction cases and he has failed to provide this Court with the record from those cases, the district court's decision must be affirmed. Nevertheless, even if those records had been properly provided to this Court, the state is requesting that Fields' appeal be dismissed because he failed to file his successive petition within forty-two days after the claims were known or reasonably should have been known and, therefore, are untimely and properly dismissed. Moreover, because the underlying basis for Fields' claims is Gilcrist's recantation, which can only be utilized for impeachment purposes, the district court properly dismissed Fields' claims under I.C. § 19-2719(5)(b).

B. Fields Failed To Provide An Adequate Record On Appeal To Review His Claims

Fields contends the district court erred by denying the claims in his successive post-conviction petition because he provided the court with newly discovered evidence – Gilcrist's recantation - which was timely presented to the court once it was known and allegedly establishes Fields' innocence and a denial of due process under the Fourteenth Amendment, all of which is premised upon the evidence presented at his trial and prior post-conviction cases. (Brief, pp.7-15.) However, Fields has failed to provide an adequate record on appeal to review his claims. Although he filed a Motion to Take Judicial Notice before the district court asking the court to take judicial notice of the "files and transcripts in the underlying criminal case, initial post-conviction" and his subsequent post-conviction cases (#40586-2012, R., pp.188-229), there is no indication in the record the motion was noticed for hearing or ruled upon by the district court.

More importantly, Fields has failed to move to augment the record or ask this Court to take judicial notice of any of his prior cases. The appellant bears the burden of providing a record on appeal to substantiate his claims. State v. Toney, 130 Idaho 858, 860-61, 949 P.2d 1065 (Ct. App. 1997). It is presumed that any missing portions of the record support the actions of the court below. State v. Repici, 122 Idaho 538, 541, 835 P.2d 1349 (Ct. App. 1992). In the absence of an adequate record on appeal, the appellate court will not presume error. State v. Sima, 98 Idaho 643, 644, 570 P.2d 1333, 1334 (1977); State v. Longoria, 133 Idaho 819, 823, 992 P.2d 1219, 1223 (Ct. App. 1999).

Because Fields has not included the records from his underlying conviction, initial post-conviction case, and subsequent post-conviction cases, he has failed to present an adequate appellate record for review of the issues before this Court and, therefore, has failed to establish error.

C. Standard Of Review

“Whether a successive petition for post-conviction relief was properly dismissed pursuant to I.C. § 19-2719 is a question of law. This Court reviews questions of law de novo.” Fields V, 2013 WL 1198084, *3 (quoting Pizzuto v. State, 134 Idaho 793, 795, 10 P.3d 742 (2000)). “When this Court is presented with a motion to dismiss by the State based upon the provisions of Idaho Code § 19-2719, the proper standard of review this Court should utilize is to directly address the motion, determine whether or not the requirements of section 19-2719 have been met, and rule accordingly.” Hairston v. State, 144 Idaho 51, 55, 156 P.3d 552 (2007) (quoting Creech v. State, 137 Idaho 573, 575, 51 P.3d 387 (2002)), *remanded on other grounds by* Hairston v. Idaho, 552 U.S. 1227 (2008).

D. Fields' Successive Post-Conviction Petition Is Governed By I.C. § 19-2719

Idaho Code § 19-2719 sets forth special appellate and post-conviction procedures in all capital cases. Fields IV, 253 P.3d at 967. Capital post-conviction proceedings, like non-capital post-conviction proceedings which are governed by the Uniform Post-Conviction Procedure Act (“UPCPA”), are civil in nature and governed by the Idaho Rules of Civil Procedure. Pizzuto v. State, 127 Idaho 469, 470, 903 P.2d 58 (1995). Idaho Code § 19-2719 does not eliminate the applicability of the UPCPA in capital cases, but acts as a modifier and “supersedes the UPCPA to the extent that their provisions conflict.” McKinney v. State, 133 Idaho 695, 700, 992 P.2d 144 (1999).

Specifically, I.C. § 19-2719 provides a capital defendant one opportunity to raise all challenges to the conviction and sentence in a post-conviction relief petition which must be filed within forty-two days after entry of judgment. State v. Rhoades, 120 Idaho 795, 806, 820 P.2d 665 (1991). The only exception is provided in I.C. § 19-2719(5), which permits a successive petition “in those unusual cases where it can be demonstrated that the issues raised were not known and reasonably could not have been known within the time frame allowed by the statute.” Id., 120 Idaho at 807. A capital defendant who brings a successive petition for post-conviction relief has a “heightened burden and must make a *prima facie* showing that issues raised in that petition fit within the narrow exception provided by the statute.” Pizzuto, 127 Idaho at 471.

Claims meeting the exception because they were not known or could not have reasonably been known within forty-two days of judgment “must be asserted within a reasonable time after they are known or reasonably could have been known.” Paz v. State, 123 Idaho 758, 760, 852 P.2d 1355 (1993); McKinney, 133 Idaho at 701. In

ascertaining what constitutes a “reasonable time,” the Idaho Supreme Court has explained,

[A] reasonable time for filing a successive petition for post-conviction relief is forty-two days after the petitioner knew or reasonably should have known of the claim, unless petitioner shows that there were extraordinary circumstances that prevented him or her from filing the claim within that time period. In that event, it still must be filed within a reasonable time after the claim was known or knowable.

Pizzuto v. State, 146 Idaho 720, 727, 202 P.3d 642 (2008).

The heightened pleading requirement mandated by I.C. § 19-2719(5)(a) has been expressly applied by the Idaho Supreme Court to require successive petitioners to allege facts in the successive petition demonstrating when the claim was known or reasonably could have been known. Stuart v. State, 149 Idaho 35, 41-42, 232 P.3d 813 (2010).

A successive post-conviction petition is “facially insufficient” if it merely alleges “matters that are cumulative or impeaching or would not, even if the allegations were true, cast doubt on the reliability of the conviction or sentence.” I.C. § 19-2719(5)(b). If evidence is merely cumulative with evidence already within the possession of the defense at the time the first petition for post-conviction relief is filed, a procedural bar exists mandating dismissal of the successive petition. Sivak v. State, 134 Idaho 641, 647-49, 8 P.3d 636 (2000).

Even if the petitioner can meet these mandates, I.C. § 19-2719(5)(a) details the additional requirements that must be met before the successive petition may be heard:

An allegation that a successive post-conviction petition may be heard because of the applicability of the exception herein for issues that were not known or could not reasonably have been known shall not be considered unless the applicant shows the existence of such issues by (i) a precise statement of the issue or issues asserted together with (ii) material facts stated under oath or affirmation by credible persons with first hand knowledge that would support the issue or issues asserted. A pleading that

fails to make a showing of excepted issues supported by material facts, or which is not credible, must be summarily dismissed.

I.C. § 19-2719(5)(a).

If a capital petitioner fails to comply with the requirements of I.C. § 19-2719, the issues are “deemed to have [been] waived” and “[t]he courts of Idaho shall have no power to consider any such claims for relief as have been so waived or grant any such relief.” I.C. § 19-2719(5); McKinney, 133 Idaho at 700. Likewise, failure to meet the requirements of I.C. § 19-2719(5)(a) mandates dismissal of the successive post-conviction petition. Fields v. State, 135 Idaho 286, 289-90, 17 P.3d 230 (2000).

In State v. Beam, 115 Idaho 208, 213, 766 P.2d 678 (1988), the Idaho Supreme Court discussed the purpose and policy behind the passage of I.C. § 19-2719:

The underlying legislative purpose behind the statute stated the need to expeditiously conclude criminal proceedings and recognized the use of dilatory tactics by those sentenced to death to “thwart their sentences.” The statute’s purpose is to “avoid such abuses of legal process by requiring that all collateral claims for relief . . . be consolidated in one proceeding. . . .” We hold that the legislature’s determination that it was necessary to reduce the interminable delay in capital cases is a rational basis for the imposition of the 42-day time limit set for I.C. § 19-2719. The legislature has identified the problem and attempted to remedy it with a statutory scheme that is rationally related to the legitimate legislative purpose of expediting constitutionally imposed sentences.

E. Fields Has Failed To Establish The Claims In His Successive Petition Were Timely Filed

1. Heightened Pleading Requirements Under I.C. § 19-2719(5)

As detailed above, Gilcrist did not testify at Fields’ trial, but testified at Fields’ preliminary hearing (Prelim. Hear. Trans., pp.119-76), during the evidentiary hearing involving Fields’ Motion for New Trial on August 31, 1990 (##19185/19809, Tr., pp.1845-62), and during the first post-conviction evidentiary hearing on January 6, 1992

(id., pp.2056-58). As of those dates, Gilcrist had not recanted any of his testimony. Therefore, it was reasonable for the district court to conclude Fields' instant claims could not have been known when he filed his first post-conviction petition on April 18, 1991. (##19185/19809, R., pp.197-203.)

Nevertheless, Fields' instant successive petition fails to explain when the claims were known or reasonably could have been known, particularly since there is no indication in the successive petition, declarations, affidavits, or other documents filed with the successive petition, establishing Fields' and counsels' efforts to even contact Gilcrist between January 6, 1992, and the summer of 2010. As recognized by the district court, "The July 28, 2011 successive petition contains no information regarding when Mr. Gilcrist decided to change his story regarding Fields' confession, a fact which is central to the determination of when the claim reasonably should have been known." (#40586-2012, R., p.273, n.1.) As in Stuart, 149 Idaho at 42 (emphasis added), "[Fields'] **petition** is silent as to when the facts supporting his claims were known or reasonably could have been known. It was [Fields'] burden to present a **petition** alleging facts that would show that he fits within the exception to I.C. § 19-2719. [Fields'] **petition** simply did not attempt to meet this burden. In light of [Fields'] **petition's** silence as to its timeliness, this appeal must be dismissed. . . ."

Idaho Code § 19-4903, which governs the general content of post-conviction petitions, expressly states, "Affidavits, records, or other evidence supporting its allegations shall be attached to the application or the application shall recite why they are not attached." *See also State v. Payne*, 146 Idaho 548, 561, 199 P.3d 123 (2008) ("The application must present or be accompanied by admissible evidence supporting its

allegation, or the application will be subject to dismissal.”); Row v. State, 135 Idaho 573, 580, 21 P.3d 895 (2001) (“the petition listed various issues that Row desired to raise regarding the effectiveness of her appellate counsel, but it did not include, nor was it accompanied by sworn statements setting forth the material facts supporting those issues”). However, none of the documents Fields filed with his successive petition comply with the requirements of I.C. § 19-2719(5)(a), which demands heightened pleading requirements detailing when a claim was known or reasonably could have been known. Under I.C. § 19-2719(5)(a), the timeliness of a successive petition is a material fact that must be supported in the successive petition or with sworn statements accompanying the petition containing facts establishing when the claim was known or reasonably could have been known, a task Fields failed to accomplish when he filed his successive petition.

While Fields filed Gilcrist’s declaration with his successive petition (#40856, R., pp.70-71), because it was not “stated under oath or affirmation” as required by I.C. § 19-2715(5)(1)(ii), it was not considered by the district court (#40856, R., pp.274-75). A similar issue was raised in Kelly v. State, 149 Idaho 517, 523, 236 P.3d 1277 (2010), where a petitioner attempted to raise a claim in a “Brief and Affidavit in Support of Post Conviction Relief” that was not signed or notarized. The Idaho Supreme Court recognized the pleading did not constitute an affidavit under law and affirmed the district court’s denial of the claim. Id. (citing Black’s Law Dictionary 23 (3rd pocket ed. 2006) (defining affidavit as a “voluntary declaration of facts written down and sworn to by the declarant himself before an officer authorized to administer oaths, such as a notary public.”)). In Tri State Land Co., Inc. v. Roberts, 131 Idaho 835, 838-39, 965 P.2d 195

(Ct. App. 1998) (citing cases), the Idaho Court of Appeals reviewed a declaration filed in support of a motion for summary judgment and affirmed the district court's ruling that it was inadmissible because "it is unsworn, makes no statement that the facts contained therein are based on personal knowledge, and further contains hearsay information."

The state certainly recognizes, as noted by Fields (Brief, p.14), that I.C. § 19-2719(5)(a)(ii) requires "material facts stated under oath or affirmation." However, even the definition for "affirmation" utilized by Fields is in conjunction with whether "an affidavit is true." (Brief, p.14) (quoting Black's Law Dictionary 55 (5th ed. 1979)). Gilcrist's declaration is clearly not an affidavit, and he also failed to "affirm" that the contents of the declaration are true. Irrespective, and more importantly, and as discussed below, even if Gilcrist's declaration is considered, it fails to establish the timeliness of Fields' successive petition because it fails to establish when Gilcrist changed his mind and decided to recant his prior testimony.

Over eight months after his successive petition was filed on July 28, 2011 (#40586-2012, R., pp.4-17), Fields attempted to cure the pleading defect by filing Gilcrist's March 14, 2012 affidavit on April 4, 2012, asserting that, prior to a "medical crisis, which occurred in 2009, [Gilcrist] would not have told the truth about what happened" (Id., pp.261-64). However, the Idaho authority upon which Fields relies to support his filing of Gilcrist's tardy affidavit does not support the proposition that a pleading deficit can be cured with an affidavit filed over eight months after the complaint or petition is filed. Simply stated, none of the cases involve the issue before this Court: whether insufficient heightened pleading requirements required under I.C. § 19-2719(5)(a) can be cured with an affidavit filed over eight months after the successive

petition was filed. For example, in McKinney v. State, 133 Idaho 695, 698, 992 P.2d 144 (1999), there is no question affidavits were filed after the initial successive petition was filed and that limited discovery was granted by the district court. However, the issues before the court was not whether heightened pleading requirements had been met, but whether the ineffective assistance of counsel claims in the successive petition should have been raised in the first petition and whether the district court abused its discretion by denying the petitioner's motion for default judgment. Id. at 704.

Likewise, as conceded by Fields (Brief, p.11), the issue in Pizzuto v. State, 146 Idaho 720, 202 P.3d 642 (2008), involved the elements of the claim – mental retardation – and not the timeliness of the petition.⁴ Moreover, the state acknowledges that in Rhoades v. State, 135 Idaho 299, 300, 17 P.3d 243 (2000), this Court reaffirmed the general standard of review for dismissal of post-conviction petitions without an evidentiary hearing, which requires “this Court [to] determine whether a genuine issue of material fact exists based on the pleadings, depositions and admissions together with any affidavits on file.” However, this standard does not involve the heightened pleading requirements mandated by I.C. § 19-2719(5)(a), but is the general standard of review for determining whether the merits of a post-conviction claim should be summarily dismissed, which is applicable to all post-conviction cases, not just capital cases governed by I.C. § 19-2719. Id. (citing Small v. State, 132 Idaho 327, 331, 971 P.2d 1151 (Ct. App. 1998) (non-capital case)).

⁴ Timeliness was an issue, but not in the context of the September 14, 2004 affidavit of Dr. Craig Beaver that was filed after Pizzuto filed his successive petition on June 29, 2003. Because this Court clarified the standard for determining what constitutes a “reasonable time” for filing a successive petition and Pizzuto did not have notice of the clarification, it was not applied to his case. Pizzuto, 146 Idaho at 727.

Similarly, Pizzuto v. State, 149 Idaho 155, 159, 233 P.3d 86 (2010), involved the “separate affidavit” of James Rice that was signed May 10, 2006, several months after a successive petition was filed on November 26, 2005, id. at 161. However, this Court did not address the issue based upon heightened pleading requirements, but considered the content of Rice’s subsequent affidavit and the fact it also failed to detail the timing of various events. Id. at 161-62. In other words, the Court had an alternative basis for rejecting the claim and was not required to address heightened pleading requirements.

Fields’ reliance upon Fields II, 135 Idaho at 290-91, is also misplaced and actually bolsters the state’s argument. Fields’ first successive petition was filed October 11, 1996. Id. at 287. J.C. Bryant’s affidavit, which raised claims not included in the original successive petition, was filed in May 1997. Id. The Court did not consider the contents of Bryant’s affidavit because “evidence developed subsequent to the application cannot be relied upon to form a basis for granting post-conviction [relief] on Fields’ original application.” Id. Likewise, Gilcrist’s second affidavit in Fields’ instant case is evidence that was developed subsequent to the application that cannot be relied upon to grant post-conviction relief unless an amended successive petition is filed.

Fields’ reliance upon Pacheco v. Artuz, 193 F.Supp.2d 756, 761 (S.D.N.Y 2002), is also misplaced (Brief, p.9) because it is irrelevant to the issue before this Court. The question at this juncture is not when Fields should have learned of Gilcrist’s recantation, but why Fields failed to meet heightened pleading requirements under I.C. § 19-2719 by explaining in his successive petition when the claims were known or reasonably could have been known instead of waiting over eight months to file Gilcrist’s second affidavit.

As the procedural history of his challenges to his underlying conviction and sentence reveal, Fields has not been timely or diligent in the filing of many of his pleadings. Based upon the mandates of I.C. § 19-2719, Fields' history of tardy compliance with court orders, and the delay associated with his case, he should not be rewarded for failing to comply with the pleading mandates of I.C. § 19-2719.

2. Fields' Pleadings Fail To Establish His Successive Petition Is Timely

Even if all of the documents Fields submitted to the district court are considered by this Court, he has failed to meet his burden of establishing his successive petition is timely. As detailed above, there is nothing in Fields' successive petition explaining when his claim was known or reasonably should have been known. (#40586, R., pp.4-17.) While there is some limited references to the procedural history of Fields' case in his petition (id., pp.5-6), discussion regarding when the respective inmate witnesses testified (id., pp.7-8), Worthen's eventual contact with Gilcrist in the summer of 2011, and the contents of Gilcrist's declaration (id., pp.8-9), there is simply nothing explaining when Fields' claims were known or reasonably should have been known. Gilcrist's declaration suffers from the same deficit. (Id., pp.70-71.)

While the Affidavit of Greg Worthen discusses the Federal Defender's involvement in Fields' case since being appointed in May 2001, there is nothing in the affidavit indicating any aspect of Fields' case prior to when the Federal Defenders were appointed in May 2001. (Id., pp.61-64.) Moreover, the focus of Worthen's affidavit centers on his involvement in Fields' case since the summer of 2010, when he was "assigned to learn about, identify the investigative needs of, and to investigate, the Zane Fields case." (Id., p.61.) Worthen's discussion of the Federal Defender's involvement in

Fields' case between May, 2001, when the Federal Defenders were initially appointed to represent Fields, and Worthen being assigned to investigate Fields' case in the summer of 2010, is extraordinarily deficient. Worthen discussed Kelly Nolan ("Nolan") sending an e-mail to another former investigator, Ben Leonard ("Leonard"), in December, 2007. (Id., p.62.) While Leonard responded to Nolan's e-mail, stating he attempted to find and interview Gilcrist by contacting Gilcrist's family members and learning he was "homeless and using illegal drugs," there is no indication when or how the contact was made with Gilcrist's family members by Leonard. (Id.) Worthen discussed Nolan's attempts to find Gilcrist beginning in January 2008, by contacting Sam Shimenti, Gilcrist's Washington State probation officer. (Id., pp.62-63.) Worthen explained that from the time of his assignment in the summer of 2010, he "regularly searched for a location for Gilcrist . . . through normal processes" and "talking to his prior associates." (Id., p.63.) However, Worthen did not "expand[] [his] search to include the VINELink website, a public-access website for locating individuals who have been arrested and are being held in county jails," until May 2011. (Id.) As a result, Worthen located Gilcrist in the Kootenai County Jail, interviewed him on June 17, 2011, and received Gilcrist's declaration on July 8, 2011. (Id.)

Livingston's affidavit confirms the Federal Defenders were appointed to Fields' case in May, 2001, filed an amended habeas petition and post-conviction petition in 2002, had Leonard "working on the case with [him] by 2002," "endeavored to review the file for information about evidence, eyewitnesses, and inmate snitch witnesses," and, at an unknown time, reviewed notes and memoranda from J.C. Bryant ("Bryant"), an

investigator retained by Fouser, that “set forth efforts in 1996 to find and review files at the prison regarding the inmate snitch witnesses including Gilcrist.” (Id., p.186.)

However, there are no affidavits from Nolan, Leonard, or Bryant detailing their work on the case, and none of the documents referenced in Worthen’s and Livingston’s affidavits are attached to their respective affidavits or are otherwise part of the record. More importantly, there is no information regarding attempts to locate Gilcrist after he testified during the first post-conviction evidentiary hearing on January 6, 1992 (##19185/19809, Tr., pp.1845-62), and May 2001, when the Federal Defenders were appointed to represent Fields in federal court. While Livingston’s affidavit states Leonard was “working on the case with [him]” by 2002, they “endeavored to review the file for information about evidence, eyewitnesses, and inmate snitch witnesses, including Scott Bianchi, Joe Heistand, Jeff Acheson and Harold Gilcrist,” and the file included “various notes and memoranda” from Bryant that “set forth efforts in 1996 to find and review files at the prison regarding the inmate snitch witnesses including Gilcrist” (#40586, R., p.186), Livingston’s affidavit fails to explain what took place between the time of the Federal Defender’s appointment in May 2001, and 2002, when Leonard begin working on the case with him. More importantly, Livingston’s affidavit fails to explain when he and Worthen “endeavored to review the file for information about . . . inmate snitch witnesses,” what “efforts” were undertaken by Bryant, whether those efforts expanded beyond the unknown “prison” in 1996, and whether those efforts continued after 1996.

Indeed, it appears from the record that the “efforts” taken by Bryant were exceptionally weak, particularly in light of the fact that Fisher and Fouser were appointed

to represent Fields in federal court on January 3, 1996, the federal court granted Fields' motion for discovery regarding Gilcrist and the other inmate witnesses on April 11, 1996, the state responded to interrogatories on June 19, 1996, and Fields obtained an extension to complete discovery; yet, not only did Fields fail to depose Gilcrist, but none of the depositions were completed and Fields' federal habeas case was stayed. (Id., pp.238-40.) This information was provided to the district court via the Affidavit of L. LaMont Anderson, which specifically referenced various documents from Fields' federal court case (id., pp.238-41), including an affidavit from Fouser explaining why discovery had not been completed (id., p.239). Nevertheless, while certain documents referenced in the affidavit were provided to the court by the state (id., pp.242-56), Fields failed to make the remaining documents available to the court, a tactical decision supporting the state's position that minimal, if any, efforts were exerted by Fields, or his attorneys and investigators, to locate Gilcrist, particularly prior to the appointment of the Federal Defenders in 2001.

Similarly, Worthen's affidavit fails to explain why, after being assigned to Fields' case during the summer of 2010, after recognizing Leonard and Nolan were allegedly having difficulty locating Gilcrist prior to Worthen being assigned to Fields' case and apparently not being able to locate Gilcrist by "using commercially available databases for location searches," Worthen waited until May 2011, to "expand" his search using VINELink, a "public-access website for locating individuals who have been arrested and are being held in county jails." (Id., pp.61-63.) Indeed, neither Worthen nor Gilcrist even explain how long Gilcrist had been in the Kootenai County Jail prior to Worthen's "expanded search." Simply stated, Worthen and Livingston's affidavits are simply too

vague and conclusory to establish when Fields' latest claims were known or reasonably could have been known.

Rather than filing additional affidavits from Nolan, Leonard, or Bryant to detail their respective attempts to locate Gilcrist, Fields attempted to overcome this glaring deficiency by relying upon Gilcrist's second affidavit, which states, "In 2009, [he] had a major medical crisis and was in a coma for a period of time," and then "took stock of [his] life and realized the incredible amount of guilt [he] felt at having falsely testified against [Fields]." (#40586, R., p.264.) Gilcrist asserted that "[p]rior to this medical crisis, which occurred in 2009, [he] would not have told the truth about what happened." (Id.) However, despite Gilcrist's alleged "major medical crisis" in 2009, and his "incredible amount of guilt," he made no effort to contact Fields or his attorneys until 2011, when he was in the Kootenai County Jail and "approached" by Worthen. Moreover, if due diligence had been exercised by Fields to locate Gilcrist after Fields was initially appointed new counsel in federal court in 1995, it is probable a relationship could have been developed or at least contacts made such that Gilcrist would have contacted Fields or his attorneys prior to the "major medical crisis" in 2009. At the very least, Gilcrist would have had information regarding who represented Fields and how to contact his attorneys after the 2009 "major medical crisis." However, because Fields failed to exercise diligence in contacting Gilcrist, particularly prior to the Federal Defenders being appointed, neither Fields nor his attorneys were able to locate Gilcrist until it became a priority and Worthen "expanded [his] search to include the VINELink website" in May 2011, and learned Gilcrist was being held in the Kootenai County Jail. (Id., p.63.)

The glaring deficiencies regarding the timeliness of Field's successive petition could not be overlooked by the district court. While the state recognizes the difficulties associated with recanting witnesses and that "[i]n many cases, no amount of due diligence on the part of a petitioner can compel a witness to come forward and admit to prevaricated testimony," Pacheco, 193 F.Supp.2d at 761, under Idaho law it is Fields' burden to establish when the claims in his successive petition were known or reasonably could have been known. I.C. § 19-2719(5)(a); *see also* Stuart, 149 Idaho at 42.

Because Fields' successive petition and the documents supporting that petition fail to detail all the efforts utilized to contact Gilcrist after his January 6, 1992 post-conviction evidentiary hearing testimony, or explain why from the summer of 2010 to May 2011, Worthen waited to utilize VINELink, even though he was aware of some of the difficulties associated with locating Gilcrist by his predecessors, Fields has failed to establish his petition meets the requirements of I.C. § 19-2719(5)(a).

F. Fields' Claims Are Based Upon Evidence That Is Merely Cumulative Or Impeaching

The district court also dismissed Fields' successive petition because the claims are based upon "Mr. Gilcrist's changing story," which is "merely impeaching" and, therefore, under I.C. § 19-2719(5)(b), require summary dismissal. (#40586-2012, R., p.276.) Idaho Code § 19-2719(5)(b) states, "A successive post-conviction pleading asserting the exception shall be deemed facially insufficient to the extent it alleges matters that are cumulative or impeaching. . . ."

While Fields' concedes Gilcrist's recantation "was impeaching with regard to Detective Smith and the other testifying inmate snitches" (Brief, p.15), he contends the

purpose of the recantation was “twofold” because it includes “substantive evidence of [Detective] Smith’s misconduct,” which allegedly “violates the Due Process Clause of the Fourteenth Amendment” (id.). However, the cases Fields’ cites in his brief all involve the suppression of exculpatory evidence and/or the knowing use of perjured testimony at trial; they do not involve allegations of misconduct based upon Detective Smith’s alleged misconduct that forms the basis of Gilcrist’s recantation. (Brief, p.15) (citing United States v. Bagley, 473 U.S. 667 (1985); Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959); Pyle v. Kansas, 317 U.S. 213 (1942)). Indeed, the claims actually raised in Fields’ successive petition that are based upon Gilcrist’s recantation include: (1) actual innocence; (2) prosecutorial misconduct based upon the state’s alleged withholding of exculpatory evidence; and (3) violation of due process because Gilcrist was allegedly working with Detective Smith to convey information to other inmate witnesses. (#40586-2012, R., pp.7-15.) Irrespective of how Fields’ claims are packaged, they are based upon Gilcrist’s recantation, which can only be utilized to impeach the other inmate witnesses and Detective Smith, particularly since Gilcrist did not testify at trial.

Because Gilcrist’s recantation forms the basis of all the claims in Fields’ successive petition and is nothing more than impeachment evidence, the district court properly dismissed Field’s successive petition.⁵

⁵ The state also asserts Fields has failed to establish, “even if the allegations were true, [they would] cast doubt on the reliability of the conviction or sentence.” I.C. § 19-2719(5)(b). However, because there are competing affidavits regarding the truth of Gilcrist’s recantation and the district court expressly “decline[d] at this point to make a credibility determination” (#40586-2012, R., p.275 n.2), the state submits that should this Court reject the state’s arguments, Fields’ case should be remanded for further

CONCLUSION

The state respectfully requests that, because Fields has failed to meet the requirements of I.C. § 19-2719, his appeal be dismissed or, alternatively, that the district court's Order Dismissing Post-Conviction Relief be affirmed.

DATED this 30th day of April, 2013.



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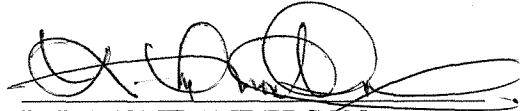
proceedings, permitting the district court to make additional rulings regarding the vitality of Fields' claims, particularly Gilcrist's credibility and recantation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on or about the 30th day of April, 2013, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

Federal Defender Services of Idaho
Teresa Hampton
702 W. Idaho Street, Suite 900
Boise, ID 83702

- U.S. Mail
- Hand Delivery
- Overnight Mail
- Facsimile
- Electronic Court Filing



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