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# Stephenson v. State Respondent's Brief Dckt. 40188

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

DWAYNE R. STEPHENSON, )  
 )  
 Petitioner-Appellant, )  
 )  
 vs. )  
 )  
 STATE OF IDAHO, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

NO. 40188-2012

Gooding Co. Case No.  
CV-2012-276

**BRIEF OF RESPONDENT**

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

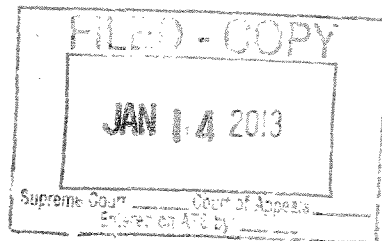
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District Judge**

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## STATEMENT OF THE CASE

### Nature of the Case

Dwayne R. Stephenson appeals from the district court's order summarily dismissing his petition for post-conviction relief.

### Statement of Facts and Course of Proceedings

The district court described the facts and the proceedings in Stephenson's underlying criminal case and appeal as follows:

The petitioner in his pending petition appears to seek post-conviction relief on two of his criminal cases in Jerome County [CR-2002-36 & CR-2005-2371] and one criminal case in Gooding County [CR-2003-619].

In Jerome County Case No. CR-2002-36, a Judgment of Conviction was entered on July 8, 2002 and the petitioner was placed on probation. After a number of probation violations and the opportunity to complete a retained jurisdiction program, court imposed the petitioner's sentence to serve on December 29, 2005. The petitioner did not appeal his original Judgment of Conviction or the imposition of his sentence.

In Gooding County Case No. CR-2003-619, a Judgment of Conviction was entered on December 29, 2005. The petitioner appealed his Judgment of Conviction on February 10, 2006. The Judgment of Conviction was affirmed on appeal and the remittitur was filed with the District Court on May 18, 2007.

In Jerome County Case No. CR-2005-2371, a Judgment of Conviction was entered on December 29, 2005. The petitioner appealed his Judgment of Conviction on February 10, 2006. The judgment of Conviction was affirmed on January 18, 2007 and the remittitur was issued on march [sic] 20, 2007.

(R., pp.105-106 (bracketed case numbers original).)

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

Stephenson filed a *pro se* petition for post-conviction relief in Gooding County on May 14, 2012 seeking relief in all three of the above cases. (R., pp.1-9.) In his petition Stephenson asserted seven separate issues relating to the nature of his underlying guilty pleas and sentences. (Id.)

The district court filed a notice of intent to summarily dismiss Stephenson's petition for post-conviction relief providing Stephenson with the statutory 20 days to assert sufficient reason to justify the untimely filing of his petition. (R., pp.105-110.) The district court advised that absent such a showing, Stephenson's petition would be dismissed as a matter of law:

The petitioner in Gooding County Case No. CR-2003-619 had a judgment of Conviction entered on December 29, 2005. The Court hereby [takes judicial notice] pursuant to I.R.E. 201 of the ROA Report for CR-2003-619. The petitioner appealed his conviction and the conviction was affirmed and the opinion of the court was filed with the District Court on February 8, 2007 and the Remittitur was filed with the District Court on May 18, 2007. The petitioner's petition for post-conviction relief as to this case is almost five years after the judgment of Conviction became final.

To the extent that the petitioner seeks post-conviction [relief] as to Jerome County Cases Nos. CR-2002-36 and CR-2005-2371, the petitioner has filed his petition in the wrong county and even if the petition were filed in Jerome County, it would likewise be untimely. Jerome County Case no. CR-2002-36 became final 42 days after July 8, 2002 as to the Judgment of Conviction and the revocation of the petitioner's probation and imposition of his sentence became final 42 days after December 29, 2005. Jerome County Case No. 2005-2371 became final on March 20, 2007 after the Supreme Court issued the remittitur after affirming the conviction on appeal.

The petition is untimely as a matter of law and should be dismissed. To the extent that the petitioner argues that the Department of Corrections has miscalculated the time he must serve, the petitioner must filed [sic] a petition for writ of habeas

corpus pursuant to I.C. § 19-4201, et. seq. Any petition for a writ of habeas corpus must be filed in Ada County pursuant to I.C. § 19-4205 which is the county in which he is confined.

(R., p.108.) Stephenson filed a response to the district court's notice of intent to dismiss wherein he attempted to argue jurisdiction but failed to provide reason for the untimely filing of his petition for post-conviction relief. (R., pp.111-117.) The district court summarily dismissed Stephenson's petition for post-conviction relief, finding that Stephenson had "failed to establish that his petition was timely filed." (R., p.118.)

Stephenson timely appeals from the order dismissing his petition. (R., pp.124-125, 135-138.)

## ISSUE

Stephenson's issues are listed on an un-numbered page at the beginning of his brief on appeal. Because of the length of the issues presented, they will not be reprinted here.

The state phrases the issue on appeal as:

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



## ARGUMENT

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

#### A. Introduction

The district court summarily dismissed Stephenson's petition for post-conviction relief after concluding Stephenson failed to establish his petition was timely filed. (R., pp.118-123.) On appeal, Stephenson asserts he was entitled to equitable tolling because his original claims included a double jeopardy violation as well as ineffective assistance of counsel during the plea process. (Appellant's brief, p.1.) Because these are not valid bases for tolling, Stephenson's arguments fail.

#### 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 Stephenson's Petition For Post-Conviction Relief Was Appropriate Because It Was Untimely Filed And Stephenson 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 Stephenson's petition as 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." Absent a showing by the petitioner that the one-year statute of limitation should be tolled, the failure to file a timely petition for post-conviction relief is a basis for dismissal of the petition. Evensiosky v. State, 136 Idaho 189, 30 P.3d 967 (2001); Sayas v. State, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003). The only three circumstances in which Idaho recognizes equitable tolling are: (1) "where the petitioner was incarcerated in an out-of-state facility on an in-state conviction without legal representation or access to Idaho legal materials," Sayas, 139 Idaho at 960, 88 P.3d at 779; (2) "where mental disease and/or psychotropic medication renders a petitioner incompetent and prevents petitioner from earlier pursuing challenges to his conviction," Id.; and (3) where there are "claims which simply [were] 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)). Stephenson's petition did not allege any of the foregoing bases (or any basis at all) as a reason to toll the limitation period for filing his petition. (See generally R., pp.1-7.)

Applying the above principles in this case, the district court summarily dismissed Stephenson's petition. Contrary to Stephenson's assertions on appeal, a review of the record and the applicable law supports the district court's order of summary dismissal. Stephenson's petition was filed May 14, 2012, significantly more than one year after the issuance of the 2007 Remittitur in Stephenson's direct appeal of the Gooding County case.

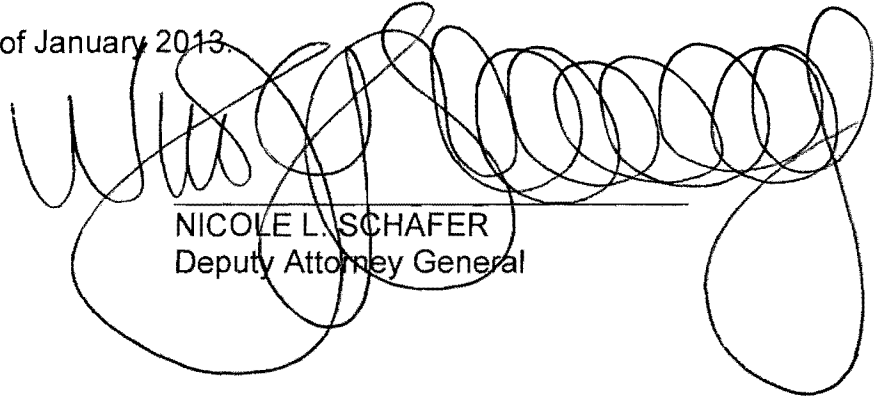
Stephenson does not argue that his claims were not known to him or could not reasonably have been known to him in the requisite time-frame for filing his initial post-conviction petition. Instead, Stephenson claims the entry of his plea and eventual sentencing were in violation of his rights against double jeopardy and the district court gave an "incorrect statement of the laws of the United States, and the State of Idaho" in rejecting Stephenson's argument that his double jeopardy claim attached the court's subject matter jurisdiction. (Appellant's brief, pp.1-2.) The district court correctly concluded the double jeopardy claim should have been raised in Stephenson's direct appeal. (R., p.121 (citing State v. Jensen, 138 Idaho 941, 944, 71 P.3d 1088, 1091 (Ct.App. 2003) ("If Jensen's sentences violate double jeopardy protections, this violation occurred upon entry of his judgment of conviction and sentences, and the appeal could have been taken at that time."))).) Because Stephenson failed to justify the

untimely filing of his petition, he has failed to show that the district court erred in dismissing his petition for post-conviction relief.

CONCLUSION

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

DATED this 14<sup>th</sup> day of January 2013.

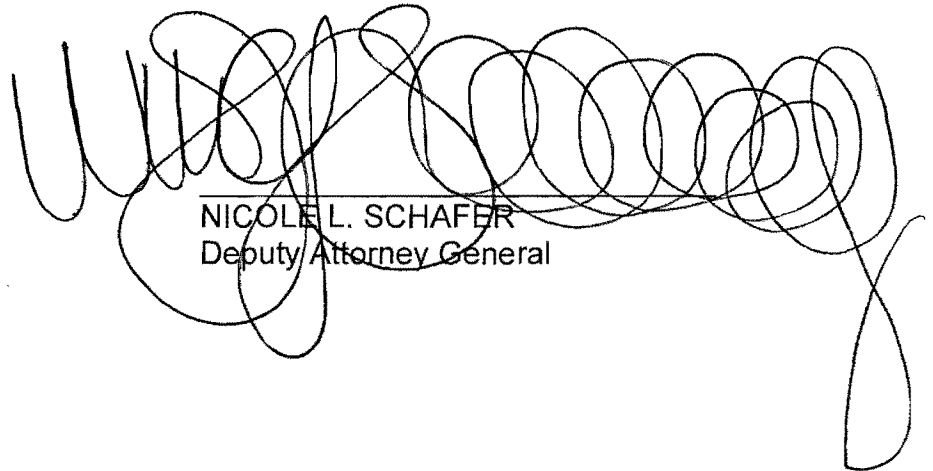


NICOLE L. SCHAFER  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 14<sup>th</sup> day of January 2013, I caused two true and correct copies of the foregoing REPLY BRIEF to be placed in the United States mail, postage prepaid, addressed to:

DWAYNE ROBERT STEPHENSON  
Inmate # 67012  
I.S.C.I., Unit 14  
P.O. Box 14  
Boise, ID 83707



NICOLE L. SCHAFER  
Deputy Attorney General

NLS/pm