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## Gerdon v. State Respondent's Brief Dckt. 40420

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES ALAN GERDON,	)	
	)	No. 40420
Petitioner-Appellant,	)	
	)	Twin Falls Co. Case No.
vs.	)	CV-2012-3345
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
_____	)	

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**BRIEF OF RESPONDENT**

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

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**HONORABLE G. RICHARD BEVAN**  
District Judge

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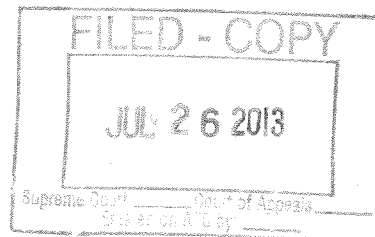
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## STATEMENT OF THE CASE

### Nature Of The Case

James Allen Gerdon appeals from the district court's summary dismissal of his untimely successive petition for post-conviction relief.

### Statement Of The Facts And Course Of The Proceedings

As set forth by the district court:

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 However, in an unpublished decision, the Court of Appeals affirmed the conviction and sentence. *State v. Gerdon*, Docket No. 30624, 2005 Unpublished Opinion No. 468 (May 19, 2005).

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

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

ground for filing a subsequent post-conviction relief application. Although Gerdon appealed the district court's Order, he subsequently filed a *Motion to Voluntarily Dismiss Appeal* on March 31, 2010.

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

(R., pp.17-19 (brackets original).)

On August 9, 2012, Gerdon filed another successive petition for post-conviction relief, alleging that his constitutional rights were violated and that he received ineffective assistance of post-conviction counsel. (R., pp.9-15.) On August 13, the district court gave notice of its intent to dismiss Gerdon's successive petition on the grounds that it was filed outside of the statute of limitations and that its claims were, or should have been, previously litigated. (R., pp.16-25.) More than 20 days later, on September 5, the district court summarily dismissed Gerdon's untimely successive petition for post-conviction relief. (R., pp.27-30.) Gerdon filed a motion for reconsideration (R., pp.32-33), which the district court also denied (R., pp.38-39). Gerdon filed a timely notice of appeal. (R., pp.45-47.)

## ISSUE

Gerdon states the issue on appeal as:

Did the district court err when it summarily dismissed Mr. Gerdon's Successive Petition for Post-Conviction Relief as untimely and as a successive petition, and denied Mr. Gerdon's Motion to Reconsider?

(Appellant's brief, p.2.)

The state rephrases the issue as:

Has Gerdon failed to show error in the district court's dismissal of his untimely successive petition for post-conviction relief?

## ARGUMENT

### Gerdon Has Failed To Show Error In The District Court's Dismissal Of His Untimely Successive Petition For Post-Conviction Relief

#### A. Introduction

Gerdon was originally convicted in 2004. (R., p.17.) Later that same year, Gerdon filed his first petition for post-conviction relief, which was summarily dismissed. (R., p.17.) In 2008, Gerdon filed his first successive petition for post-conviction relief, which was dismissed on the basis that it was conclusory and unsubstantiated by any fact. (R., p.18.) In 2010, Gerdon filed another successive petition for post-conviction relief. (R., pp.18-19.) That petition was dismissed on the basis that its claims were previously litigated or time-barred. (R., p.19.) On August 9, 2012, Gerdon filed his most recent successive petition for post-conviction relief. (R., pp.9-15.) The district court dismissed the petition on the grounds that it was untimely and its claims were, or should have been, previously litigated. (R., pp.16-30.)

On appeal, Gerdon asserts that the district court erred by summarily dismissing his third successive petition for post-conviction relief, arguing that he presented an issue of material fact and the time limits should be tolled. (Appellant's brief, pp.2-7.) Application of the correct legal standards to the facts alleged by Gerdon shows no error in the district court's dismissal of his untimely successive post-conviction petition.

#### B. Standard Of Review

"On review of a dismissal of a post-conviction relief application without an evidentiary hearing, this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file



....” Workman v. State, 144 Idaho 518, 523, 164 P.3d 798, 803 (2007) (citing Gilpin-Grubb v. State, 138 Idaho 76, 80, 57 P.3d 787, 791 (2002)).

C. Gerdon’s Petition For Post-Conviction Relief Is Untimely And He Has Failed To Show A Sufficient Basis For Equitably Tolling The Statute Of Limitations

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* To be timely, a post-conviction proceeding must 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.” I.C. § 19-4902(a). Under Idaho Code § 19-4906, a district court may summarily dismiss a petition for post-conviction relief when it “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,” by indicating its intention to dismiss and giving the parties an opportunity to respond within 20 days. I.C. § 19-4906(b); see also Workman, 144 Idaho at 523, 164 P.3d at 803.

Adhering to the requirements set forth in Idaho Code § 19-4906(b), the district court summarily dismissed Gerdon’s successive post-conviction petition on the ground that it was untimely. (R., pp.21-24.) In his underlying criminal case, Gerdon was convicted of several counts of lewd conduct, attempted lewd conduct, and sexual abuse of a minor. (R., p.17.) His convictions were affirmed on appeal in an unpublished decision issued on May 19, 2005. (Id.) More than seven years later, on August 9, 2012, Gerdon filed his current successive petition for post-conviction relief. (R., p.9.) Gerdon’s successive petition for post-conviction relief is therefore clearly untimely under Idaho Code § 19-4902.

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)). Idaho appellate courts, therefore, have allowed for equitable tolling in circumstances where the petitioner is incarcerated in an out-of-state facility without access to representation or Idaho legal materials, where his mental illness or medications render him incompetent and prevent him from pursuing a timely challenge to his conviction, or where the petitioner’s claim is based on newly discovered evidence. Judd v. State, 148 Idaho 22, 25-26, 218 P.3d 1, 4-5 (Ct. App. 2009). Absent a showing by the petitioner that the limitations period should be tolled, however, any petition filed outside the one-year limitation period of Idaho Code § 19-4902 is time-barred and subject to summary dismissal. Evensiosky v. State, 136 Idaho 189, 190-91, 30 P.3d 967, 968-69 (2001); Schultz v. State, 151 Idaho 383, 385, 256 P.3d 791, 793 (Ct. App. 2011).

Gerdon’s third successive petition was based, in part, on Gerdon’s claim that the district court unreasonably delayed ruling on a *pro se* motion in his underlying criminal case. (R., p.10.) According to Gerdon, he filed the motion in March 2004, but had to wait until September 30, 2011, for the district court to rule on it. (R., p.14.) Gerdon, below and on appeal, has never specified what this motion actually was. Gerdon nevertheless argues that equitable tolling should apply to his post-conviction claims either because he lacked access to representation or legal materials to precipitate action on the unspecified motion, or because the delay in ruling on the unspecified

motion deprived him of his constitutional right of access to the legal system. (Id.; Appellant's brief, pp.4-6.) Gerdon's arguments fail.

To the extent Gerdon argues that he lacked access to the courts or legal materials, this allegation is disproved by the record: Throughout his criminal proceedings, Gerdon has enjoyed ample access to Idaho courts and legal materials, as evidenced by his several filings including an appeal of his underlying criminal case and three prior petitions for post-conviction relief. (See R., pp.17-18.) Gerdon also made no allegation that he lacked access to legal materials after the court issued its order on his unspecified motion. Therefore, he has failed to show that equitable tolling should apply to his petition for post-conviction relief.

Moreover, even if an alleged delay in ruling on Gerdon's unspecified *pro se* motion could constitute a basis for permitting equitable tolling of Gerdon's claims, he still failed to file his petition within a reasonable time under the circumstance of this case. A successive petition for post-conviction relief must be filed within a reasonable time of when the claims are discovered by the petitioner. Charboneau, 144 Idaho at 903-06, 174 P.3d at 873-76. Timeliness is measured from the date of notice, "not from the date a petitioner assembles a complete cache of evidence." Id. at 905, 174 P.3d at 875. Gerdon claims that the court ruled on his motion on September 30, 2011, yet he did not file his petition for post-conviction relief until almost a year later on August 9, 2012. It is not reasonable for a petitioner to delay for almost a year his claim that the district court delayed its ruling on a motion. Therefore, the district court properly dismissed Gerdon's petition for post-conviction relief because it was untimely.

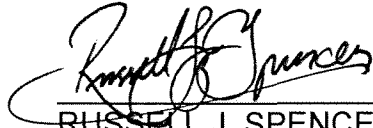
As an alternative basis, the district court also dismissed Gerdon's successive petition on the ground that his claims were, or should have been, previously litigated. (R., pp.21-24.) Under Idaho Code § 19-4908, "[a]ny grounds for relief not raised [in the initial petition] are permanently waived if the grounds were known or should have been known at the time of the first petition." Stuart v. State, 118 Idaho 932, 933-34, 801 P.2d 1283, 1284-85 (1990). A court may grant a supplemental or additional petition where 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." Rhoades, 148 Idaho at 250, 220 P.3d at 1069. In this case, however, the district court specifically found that "the information provided with the present application failed to raise sufficient grounds." (R., p.24.) Gerdon does not appear to challenge this finding on appeal. Therefore, Gerdon's successive petition for post-conviction relief was not permitted under Idaho Code § 19-4908 and the district court's order summarily dismissing the successive petition must be affirmed on that unchallenged basis. See State v. Goodwin, 131 Idaho 364, 366, 956 P.2d 1311, 1313 (Ct. App. 1998) (where a basis for a trial court's ruling is not challenged on appeal, an appellate court will affirm on the unchallenged basis).

Gerdon's successive petition for post-conviction relief was untimely filed and he has provided no basis for tolling the statute of limitations. The claims he raised in his petition either were, or should have been, previously litigated in his several prior petitions for post-conviction relief. The district court properly dismissed Gerdon's petition and its order dismissing the petition should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's summary dismissal of Gerdon's untimely successive petition for post-conviction relief.

DATED this 26th day of July, 2013.



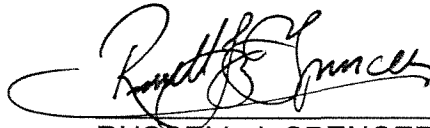
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RUSSELL J. SPENCER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 26th day of July, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by placing a copy in the United States mail, postage prepaid, addressed to:

STEPHEN D. THOMPSON  
Attorney at Law  
PO Box 1707  
Ketchum, Idaho 83340



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RUSSELL J. SPENCER  
Deputy Attorney General

RJS/pm