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Gerdon v. State Appellant's Reply Brief Dckt. 40420

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	1
Nature of the Case	1
Statement of the Facts and Course of Proceedings.....	1
ISSUES PRESENTED ON APPEAL.....	1
ARGUMENT.....	1
A. The District Court Erred 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.....	1
1. Mr. Gerdon’s Petition should have been allowed under I.C. 19-4901 and not been summarily dismissed due to the existence of a genuine issue of fact.....	3
CONCLUSION.....	6
CERTIFICATE OF MAILING.....	7

I. TABLE OF AUTHORITIES

STATE CASES

<i>Baker v. State</i> , 142 Idaho 411, 128 P.3d 948 (2007)	3,4, 6
<i>Berg v. State</i> , 131 Idaho 517, 960 P.2d 738 (1998)	2, 5
<i>Charboneau v. State</i> , 144 Idaho 900, 174 P.3d 875 (2007)	2, 4, 5
<i>Cowger v. State</i> , 132 Idaho 681, 978 P.2d 241 (Ct. App. 1999)	2, 5
<i>Gonzales v. State</i> , 120 Idaho 759, 819 P.2d 1159 (Ct. App. 1991)	2, 5
<i>Workman v. State</i> , 144 Idaho 518, 164 P.3d 798 (2007).....	1, 2
<i>Rhoades v. State</i> , 148 Idaho 247, 220 P.3d 1066 (2009)	2, 5
<i>Ricca v. State</i> , 124 Idaho 894, 865 P.2d 985 (Ct. App. 1993)	2, 5

STATUTES

I.C. § 19-4901.....	3
I.C. § 19-4902.....	2
I.C. § 19-4903.....	2
I.C. § 19-4908.....	2, 3

I. STATEMENT OF THE CASE

A. Nature of the Case

James Gerdon appeals from the district court's Summary Dismissal dated September 5, 2012, of his successive petition for post conviction, and the Order Denying Motion to Reconsider dated September 19, 2012. (R., pp. 27-29, 38-40). Mr. Gerdon asserts that the district court erred by dismissing his petition for post-conviction relief and by failing to reconsider its dismissal.

B. Statement of the Facts & Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Gerdon's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

II. ISSUES PRESENTED ON APPEAL

- A. 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?**

III. ARGUMENT

A.

- A. The District Court Erred 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.

As noted in Mr. Gerdon's opening brief, a petition for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is a civil action in nature.

Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007). Under Idaho Code §

19-4903, the petitioner must prove the claims upon which the petition is based by a preponderance of the evidence. *Workman*, 144 Idaho at 522, 164 P.3d at 802.

To re-state, a claim for post-conviction relief must be raised in an original application. I.C. § 19-4908. That application must be filed within one year from the expiration of the time for appeal or from the determination of an appeal or from the determination of a proceeding following an appeal, whichever proceeding is later. I.C. § 19-4902. Successive petitions are impermissible "unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the original, supplemental, or amended application." I.C. § 19-4908.

Section 19-4908's "sufficient reason" language in the statute necessarily provides "a reasonable time within which such claims [may be] asserted in a successive post-conviction petition, once those claims are known." *Charboneau v. State*, 144 Idaho 900, 905, 174 P.3d 870, 875 (2007). The determination of what is a reasonable time is considered by the courts on a case-by-case basis. *Id.*

Summary dismissal of an application is permissible only 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. If such a factual issue is presented, an evidentiary hearing must be conducted. *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); *Cowger v. State*, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999); *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991).

On review of a dismissal of a post-conviction relief application without an

evidentiary hearing, the court must determine whether a genuine issue of fact exists based on the pleading, deposition, and admissions together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

1. Mr. Gerdon's re-affirms that his Petition should have been allowed under I.C. 19-4901 and not been summarily dismissed due to the existence of a genuine issue of fact.

Mr. Gerdon's contends that the district court erred by failing to allow his petition under I.C. § 14-4901, and *Charboneau v. State*, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007). As stated in his previous brief, Mr. Gerdon argues that he has made a substantial factual showing that his claim for relief raises a substantial doubt about the reliability the court process concerning the motion he filed that the court did not process. Further Mr. Gerdon contends that because the court did not rule on the motion, he could not have, in the exercise of due diligence, been raised earlier, allowing a successive petition under I.C. § 19-4901.

It bears repeating that an "allegation that a claim was not adequately presented in the first post-conviction action . . . provides sufficient reason for permitting issues that were inadequately presented to be presented in a subsequent application for post-conviction relief." *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005).

Mr. Gerdon argues that his underlying claims were not adequately presented, and that the inadequate presentation of his claims was due to the failure of the court to

rule on a motion that Mr. Gerdon had filed.

Because his motion was never heard, he could not pursue his claim, and that therefore, his points were not adequately presented as discussed in *Charboneau* and *Baker*.

Further, Mr. Gerdon presented testimony that he did not have access to Idaho law books as he was held out of state, and that for that additional reason, his arguments were not presented adequately previously. (R., p. 10).

The district court noted that “equitable tolling” as discussed by *Charboneau*, has been applied only in cases of mental disease and/or psychotropic medication, or when a petitioner was incarcerated out of state on an in-state conviction without legal representation or access to Idaho legal materials. (R. 22). Mr. Gerdon contends that he has submitted evidence of both those very things. First, his motion that he duly filed was not ruled upon, providing him no access to the courts to pursue his claim. Second, due to being housed out of state, and/or due to the communication issues he documented, he did not have access to legal representation in any effective sense. Last, he did not have access to Idaho legal materials.

It is Mr. Gerdon’s position that the failure to rule on his motion denied him access to the courts. Therefore, Mr. Gerdon’s problems with his legal mail cost him the ability to file for any further relief concerning those issues. His subsequent post-conviction, therefore, attempts dealt with the lack of ability to receive a ruling from the courts, and therefore a lack of access to the courts.

As stated above, summary dismissal of an application is permissible only 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. If such a factual issue is presented, an evidentiary hearing must be conducted. *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998); *Cowger v. State*, 132 Idaho 681, 684, 978 P.2d 241, 244 (Ct. App. 1999); *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991).

It bears repeating that on review of a dismissal of a post-conviction relief application without an evidentiary hearing, the court must determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Rhoades v. State*, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009); *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

Mr. Gerdon further contends that he raised substantial facts in his pleadings (See R., pp. 9-12) concerning his motion which was held by the courts for seven and one half years, and that the inadequate presentation of his claims was due to the inadequate access to the courts and to his attorneys. Mr. Gerdon also argues that he was not allowed sufficient time to adequately present his post-conviction arguments due to delay in receiving the district court's notice of intent to dismiss. (See. also, R., pp. 35-36). Mr. Gerdon contends that he raised numerous facts presenting issues regarding ineffective performance by his attorney that caused his underlying claim to be inadequately presented.

Therefore, because he raised such claims, and supported them with the facts in

his pleadings, that summary dismissal, and the failure to reconsider or alter said dismissal upon his motion, was error.

Additionally, Mr. Gerdon disputes the contention of the Respondent that the district court was correct in ruling that Mr. Gerdon's claims were previously litigated. (See Respondent's Brief, pg. 8). On the contrary, Mr. Gerdon argues that his motion was never ruled upon, and that therefore it was not previously litigated or properly heard, thus providing a basis for equitable tolling. *Baker v. State*, 142 Idaho 411, 420, 128 P.3d 948, 957 (Ct. App. 2005).

Therefore, Mr. Gerdon re-affirms his position that the district court failed to properly determine whether or not a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file as required by law. Consequently, as the district court failed to properly analyze the factual questions raised by Mr. Gerdon's pleadings and by the record, and failed to allow Mr. Gerdon, a pro se applicant for relief, an opportunity for a hearing to "flesh out" his claims, the court erred by summarily dismissing his petition. Therefore, it is Mr. Gerdon's contention that his post-conviction petition, and at least a hearing thereon, should have been allowed.

IV. CONCLUSION

Based on the above, Mr. Gerdon respectfully requests that this Court vacate the district court's order dismissing his petition for post-conviction relief, and denying his motion to reconsider, and remand the matter for further hearings.

DATED this 1st day of October, 2013.

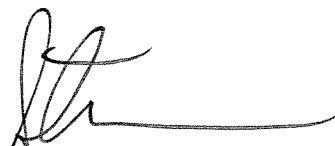


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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 1st day of October, 2013, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing a copy thereof to be placed in the U.S. Mail, addressed to:

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