11-27-2013

Gerdon v. State Respondent's Brief Dckt. 40454

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAMES ALAN GERDON,	)	
	)	Nos. 40454, 40455
Petitioner-Appellant,	)	
	)	Twin Falls Co. Case No.
vs.	)	CV-2008-1712, CV-2004-5173
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

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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STATEMENT OF THE CASE

Nature Of The Case

In these consolidated cases, James Gerdon appeals from the district court's orders denying his I.R.C.P. 60(b) motions for relief.[1]

Statement Of The Case And Course Of Proceedings

1. Underlying Criminal Case - Twin Falls County Case No. CR-2003-6576

Gerdon pled guilty to four counts of sexual abuse of a minor, three counts of lewd conduct, and two counts of attempted lewd conduct. State v. Gerdon, Docket No. 20624, 2005 Unpublished Opinion No. 468, p.1 (Idaho App. May 19, 2005) ("Gerdon I"). "In exchange for his guilty pleas, eight additional counts were dismissed." Id. The district court imposed concurrent sentences for an aggregate term of 30 years with 15 years fixed. Id. at pp.1-2. Gerdon appealed his sentences and the Idaho Court of Appeals affirmed on May 19, 2005. Id. at pp.1-2.

2. Initial Post-Conviction Case – Twin Falls County Case No. CV-2004-5173 (Docket Nos. 34659, 40455)

On October 19, 2004, Gerdon filed what appears to be his first petition for post-conviction relief. (#40455 R., p.2.) That petition was dismissed on June 29, 2006, by the Honorable John Hohnhorst. (#40455 R., p.3.) Gerdon apparently wrote Judge Hohnhorst a letter inquiring about the status of his case that the Judge received on July 17, 2006, and to which Judge Hohnhorst responded on July 20, 2006. (#40455 R.,

[1] The Court granted Gerdon's motion to consolidate the appeals in Twin Falls County Case No. 2008-1712 (Docket No. 40454) and Twin Falls County Case No. CV-2004-5173 (Docket No. 40455). (Order Granting Motion to Consolidate Appeals and to Suspend Briefing, dated August 22, 2013.)

pp.3, 8, 20.) In his response, Judge Hohnhorst advised Gerdon that the court had entered an order dismissing Gerdon's petition on June 28, 2006. (#40455 R., pp.8-9.) According to the state, "Judge Hohnhorst stated he was sending a copy of the decision directly to Mr. Gerdon at the address supplied to the court in the July 17, 2006, letter" and, on July 27, 2006, the court also filed a "Supplemental Summary Dismissal." (#40455 R., pp.8-9; see also p.3 (Register of Actions indicating a Supplemental Memorandum Opinion and Order Re: Dismissal of Petition for Post-Conviction Relief was filed on July 25, 2006).) On August 22, 2006, Judge Hohnhorst also responded to "an undated letter from Mr. Gerdon" in which Gerdon asked the court to submit "an affidavit in connection with [Gerdon's] post-conviction proceeding." (#40455 R., pp.3, 21-22.)

Gerdon sent additional letters on February 5, 2007, and July 27, 2007. (#40455 R., p.3.) The July 27, 2007 letter[2] states an "appeal was supposed to be filed on Case CV-04-5173" and that Gerdon instructed counsel to file an appeal. (#40455 R., p.23.) Gerdon requested "appeal forms" in the event one had not been filed. (#40455 R., p.23.)

Gerdon eventually filed a notice of appeal on September 10, 2007. (#34659[3] file folder; #40455 R., p.3.) On October 11, 2007, the Idaho Supreme Court entered an order conditionally dismissing Gerdon's appeal because the notice of appeal was not timely from the June 28, 2006 judgment dismissing Gerdon's petition. (#34659, Order

[2] The February 5, 2007 letter does not appear to be part of the record.

[3] Contemporaneous with this brief, the state filed a motion to take judicial notice of the pleadings included in Docket No. 34659 – the initial appeal from Twin Falls County Case No. CV-2004-5173.

Conditionally Dismissing Appeal, dated October 11, 2007.) Gerdon, with the assistance of counsel, filed a response, to which he attached a mail log showing he "mailed his Notice of Appeal on August 31, 2007," and in which he requested his appeal "not be dismissed as untimely as it is clear that [he] wished to have a Notice of Appeal filed on his behalf." (#34659, Response to Conditional Dismissal, dated November 1, 2007.) On November 16, 2007, the Supreme Court entered an order dismissing Gerdon's appeal, presumably because Gerdon's notice of appeal was still untimely even if the 42-day appeal period was calculated using the date of mailing. (#34659, Order Dismissing Appeal, dated November 16, 2007.) The Remittitur in Docket No. 34659 issued on December 7, 2007.

On March 3, 2008, Gerdon filed a *pro se* "Motion for Reconsideration" asking the court to re-enter its ruling because, Gerdon alleged, he "was never officially notified of the ruling" and, therefore, "could not properly file an appeal to a higher court." (#40455 R., p.5.) The state filed a response on November 28, 2008, and the court held a hearing on April 20, 2009, and denied relief. (#40455 R., pp.7-25; #36608 Tr.[4])

On October 9, 2012, Gerdon filed another motion for reconsideration, relying on I.R.C.P. Rule 60(a) and (b). (#40455 R., pp.29-30.) In that motion, Gerdon cited the Supreme Court's opinion in Martinez v. Ryan, 132 S.Ct. 1309 (2012), and asserted "the court failed to rule on a motion filed in CR 2003-6576" and that his counsel was ineffective "in CR 2003-6576." (#40455 R., pp.29-30.) Gerdon also filed an affidavit claiming (1) he has "several psychiatric problems"; (2) he "was out of state when [he]

[4] The Court has taken judicial notice of the Reporter's Transcript and Clerk's Record filed in Gerdon v. State, Docket No. 36608. (#40454 R., p.28.; #40455 R., p.57.)

filed a lot of the legal work in CV-2004-5173"; and (3) he "did not have adequate access to a law library or legal assistance when [he] filed legal work in CV 2004-5173." (#40455 R., pp.31-32.) Gerdon further alleged there was a "clerical error" "omitting the motion filed on 3-11-2004 in CR 2003-6576" that "directly affected the order to dissmiss [sic] and harmed [his] case in CV 2004-5173." (#40455 R., p.33.) Finally, in his affidavit, Gerdon complained that he "repeatedly asked the court to rule on [his] legal communications being interfered with by the State of Idaho and on [his] post conviction counsel being ineffective" but the court "never ruled on either of these issues in CV 2004-5173" and claimed that "[i]n CV 2010-2884 the State of Idaho stipulated that legal mail sent between James Gerdon and his court appointed attorney was never delivered." (#40455 R., pp.33-34.)

The court denied Gerdon's motion, stating:

> This motion fails to set forth any grounds upon which a court could give relief. First, the motion cites to I.R.C.P. 60(a) and 60(b), but does not provide how those rules relate to his case in any way. Second, Gerdon provides two arguments—that the trial court did not rule on one of his motions and that his defense counsel was ineffective. Gerdon provides no support as to why those two arguments could warrant the relief sought in any way. Lastly, Gerdon cites to *Martinez v. Ryan* – a Supreme Court case – but does not indicate how that case affects his argument or supports his requested relief.
>
> Gerdon's motion provides no recognizable claim. Therefore, the motion is DENIED.

(#40455 R., pp.35-36 (capitalization original).)

Gerdon filed a timely notice of appeal from the order denying his October 9, 2012 motion to reconsider. (#40455 R., p.41.)

3. Successive Post-Conviction Case – Twin Falls County Case No. CV-2008-1712 (Docket Nos. 36608, 40454)

On April 21, 2008, Gerdon filed a successive *pro se* petition for post-conviction relief in Twin Falls County Case No. CV-2008-1712 (Docket No. 36608) alleging he "had ineffective assistance of counsel at every stage of this proceeding," referring to his post-conviction case. (#36608 R., p.7.) Gerdon further alleged he did not "receive[ ] any information from any attorney in this case for almost two years" and that he found "out the case was dismissed through rumors, as neither [his] court-appointed attorney, nor the district court itself provided [him] with any notification whatsoever." (#36608 R., p.9.)

The state filed an answer and a separate motion for summary dismissal along with a supporting brief. (#36608 R., pp.26-43.) The state requested summary dismissal on the ground that "ineffective assistance of counsel during post-conviction relief proceedings is not a cognizable ground for filing a subsequent post-conviction relief application." (#36608 R., pp.38-39 (citing Wolfe v. State, 113 Idaho 337, 743 P.2d 990 (Ct. App. 1987)).

Gerdon, with the assistance of counsel, filed a response to the state's motion reciting the authority that permits a successive petition where grounds for relief were not asserted, or were inadequately raised, in the original petition. (#36608 R., p.50.) Gerdon also argued he was entitled to pursue a successive petition because neither the court nor counsel notified him of the summary dismissal of his petition so that he could file a timely appeal. (#36608 R., pp.51-52.) Gerdon specifically requested the court "issue an Order allowing [him] to file his appeal of the Summary Dismissal of his previous Post Conviction Petition." (#36608 R., p.52 (capitalization original).)

The court conducted a hearing[5] on the state's motion at which it noted, in part:

> . . . Mr. Gerdon has not provided this court with any proof that he did not receive notice other than that bald statement [that he did not] and in fact, the Supreme Court's notice of his appeal dismissal was sent to him, and there's no reference to that.
>
> Therefore, I find that Mr. Gerdon had notice of his dismissal as well as an option to file his response with the Idaho Supreme Court explaining why his notice of appeal was filed after the 42-day time requirement. He simply cannot ask this court for reruling simply because he failed to take advantage of the response option given to him by the Idaho Supreme Court. I, therefore, conclude, pursuant to Idaho Code 19-4906(c), that this case is ripe for dismissal.

(#36608 Tr., p.9, Ls.7-23.)

The court subsequently entered a written order dismissing Gerdon's petition, stating: "Petitioner's allegations are conclusory and unsubstantiated by any fact, and 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." (#36608 R., p.54.) Gerdon filed a timely notice of appeal. (#36608 R., pp.56-59.) However, Gerdon later filed a Motion to Voluntarily Dismiss Appeal, which the Idaho Supreme Court granted on April 5, 2010. (#36608 (file folder).)

On October 9, 2012, Gerdon filed a *pro se* "Motion for Relief" in which he asked the court to reconsider the summary dismissal of his post-conviction case pursuant to I.R.C.P. 60(b) in light of the Supreme Court's opinion in Martinez v. Ryan, 132 S.Ct. 1309 (2012), which Gerdon asserted held a petitioner has a "right to effective post conviction counsel." (#40454 R., pp.5-6.) The court denied Gerdon's motion for two

[5] It appears this is the same hearing at which the court considered Gerdon's March 3, 2008 motion to reconsider in Case No. CV-2004-5173; in fact, the state's written response to Gerdon's March 3, 2008 motion to reconsider in Case No. CV-2004-5173 was combined with its brief in support of summary dismissal in Case No. CV-2008-1712. (#40455 R., pp.7-19.)

reasons: (1) Gerdon failed to explain how Martinez is "relevant under Rule 60(b)," and (2) Gerdon "misreads" Martinez, which does not stand for the proposition that a petitioner has a right to effective post-conviction counsel. (#40454 R., pp.7-8.) Gerdon filed a timely notice of appeal from the denial of his October 9, 2012 motion to reconsider. (#40454 R., p.13.)

4. Second Successive Post-Conviction Case – Twin Falls County Case No. CV-2010-2884 (Docket No. 39300)

"In June 2010, Gerdon filed his third petition for post-conviction relief." Gerdon v. State, Docket No. 39300, 2013 Unpublished Opinion No. 384, p.2 (Idaho App. March 1, 2013) ("Gerdon II"). "As a basis for relief, Gerdon claimed that counsel for his first post-conviction petition failed to adequately assert ineffective assistance for trial counsel's failure to file a motion to suppress and failure to object to restitution." Id. "The district court dismissed the allegation regarding restitution and issued a notice of intent to dismiss Gerdon's allegation regarding trial counsel's failure to file a motion to suppress." Id. Although represented by counsel, Gerdon filed a *pro se* motion for reconsideration and his attorney filed an amended motion and requested an evidentiary hearing. Id. "The district court granted an evidentiary hearing on the motion for reconsideration," which was "held on August 8 and 9, 2011." Id. After the hearing, the "district court issued a written decision dismissing Gerdon's amended successive petition as untimely and denied Gerdon's motion for reconsideration and amended motion for reconsideration." Id.

On appeal, Gerdon "argue[d] the doctrine of equitable tolling should have been applied to allow his amended successive petition. Specifically, Gerdon contend[ed] he

did not have adequate communication with his attorneys in either of his previous post-conviction petitions. Therefore, the arguments he desired to offer were never adequately set forth." Gerdon II at p.2.

The Court of Appeals rejected Gerdon's claim, stating:

> Gerdon's first post-conviction petition was dismissed on June 28, 2006. While Gerdon contends he did not receive timely notice of this, Gerdon received a letter from the district court on August 15, 2006, notifying Gerdon of that decision. Gerdon acknowledges receipt of this letter. Therefore, in August 2006, Gerdon was aware of all the essential information necessary to file the successive petition now at issue. Namely, Gerdon was aware of his case number, the pertinent facts relevant to his case, and his potential claims--that his attorney did not handle the first post-conviction petition in the manner he so desired. Further, on April 28, 2008, Gerdon acting pro se, filed his second petition for post-conviction relief. This demonstrates Gerdon's familiarity with the process of filing petitions for post-conviction relief in Idaho. Gerdon was out of the state at the time he filed his second petition. Moreover, Gerdon was appointed counsel after filing his second petition and was able to send multiple letters to the district court. Accordingly, Gerdon has failed to show that he was denied access to Idaho courts which would warrant allowing his third petition for post-conviction relief under the doctrine of equitable tolling.

Gerdon II at p.4.

5. Third Successive Post-Conviction Case – Twin Falls County Case No. CV-2012-3345 (Docket No. 40420)

Gerdon filed another successive post-conviction petition on August 9, 2012 (Twin Falls County Case No. CV-2012-3345). The appeal filed in relation to the August 9, 2012 petition is currently pending – Gerdon v. State, Docket No. 40420.

ISSUES

Gerdon states the issues on appeal as:

> A. Did The District Court Err When It Denied Mr. Gerdon's Motion For Relief Under IRCP 60(b) Regarding The Petitioners [sic] Right To Effective Assistance Of Post-Conviction Counsel (Docket No. 40454)?
>
> B. Did The District Court Err When It Denied Mr. Gerdon's Motion For Relief Under IRCP 60(a) and 60(b) Also Regarding The Petitioners [sic] Right To Effective Assistance Of Post-Conviction Counsel (Docket No. 40455)?

(Appellant's Brief, p.2 (capitalization original).)

The state rephrases the issues on appeal as:

Should this Court decline to consider Gerdon's claims of error because he failed to preserve them or support them with argument and authority? Alternatively, has Gerdon failed to show error in the denial of either of his I.R.C.P. 60 motions?

ARGUMENT

Gerdon's Claims Of Error In Relation To His I.R.C.P. 60 Motions Are Not Preserved; Even If Considered, He Has Failed To Show Error In the Denial Of Either Of His Motions For Reconsideration

A. Introduction

Gerdon argues he is entitled to relief under I.R.C.P. 60 based primarily on what he calls "irregularities which resulted in him not receiving his legal mail." (Appellant's Brief, pp.2-3.) Because this claim was not the basis for Gerdon's Rule 60(b) motions that are the subject of this appeal, this Court should decline to consider Gerdon's arguments. Even if considered, Gerdon's claims are without merit.

B. Standard Of Review

"The decision to deny or grant relief pursuant to a Rule 60(b) motion is reviewed on appeal under the abuse of discretion standard." Kirkland v. State, 143 Idaho 544, 547, 149 P.3d 819, 822 (2006) (citing Win of Michigan, Inc. v. Yreka United, Inc., 137 Idaho 747, 753, 53 P.3d 330, 336 (2002)).

C. Gerdon's I.R.C.P. 60 Arguments Are Not Preserved; Even If Preserved, They Are Without Merit

In Case No. CV-2004-5173 (Docket No. 40455), Gerdon requested relief pursuant to I.R.C.P. 60(a) and (b), referring the district court to the Supreme Court's recent opinion in Martinez, supra, and arguing: (1) "The court failed to rule on a motion filed in CR 2003-6576," and (2) "Ineffective assistance of counsel," based on counsel's performance in Gerdon's underlying criminal case. (#40455 R., pp.29-30.) In Case No. CV-2008-1712 (Docket No. 40454), Gerdon requested relief only pursuant to I.R.C.P.

60(b), asserting: "In Martinez v. Ryan the federal supreme court ruled that petitioners do have a right to effective post conviction counsel." (#40454 R., pp.5-6 (verbatim).)

On appeal, however, Gerdon claims he is entitled to Rule 60 relief in both cases "due in part to irregularities which resulted in him not receiving his legal mail." (Appellant's Brief, pp.2-3; see also pp.5-6.) "[T]his Court has consistently held that [it] will not consider issues that were not presented to the district court, bur rather are raised for the first time on appeal." Crowley v. Critchfield, 145 Idaho 509, 512, 181 P.3d 435, 438 (2007); see also Lawrence v. Jones, 124 Idaho 748, 752, 864 P.2d 194, 198 (Ct. App. 1993) (declining to consider claim that party was entitled to attorneys fees "based on grounds that were not raised below"). Because Gerdon's claim on appeal as to why he believes he is entitled to Rule 60 relief is different than what he argued below, this Court should decline to consider his arguments.

This Court should also decline to consider Gerdon's arguments because he has failed to cite any authority for the proposition that alleged "irregularities" in receiving legal mail qualify as grounds for relief under either I.R.C.P. 60(a) or (b). State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996) ("When issues on appeal are not supported by propositions of law, authority, or argument, they will not be considered."). Indeed, Gerdon fails to cite any legal authority that actually governs Rule 60 motions. (See generally Appellant's Brief, pp.2-8.) Instead, Gerdon recites standards governing post-conviction petitions and successive petitions, including the standards for summary dismissal. (Id.) While Gerdon does cite some of the language from Rule 60(b), in that he claims he is entitled to relief "due to mistake, neglect, fraud, and/or because the judgment was void" and the words "clerical" and "error" from Rule 60(a), this hardly

qualifies as argument and authority in support of his claim that alleged irregularities in receiving his legal mail qualify under any of the categories for relief upon which he relies. As noted by the Court of Appeals, "merely attaching . . . labels to one's actions," such as "inadvertence and neglect," "do[es] not automatically make the actions excusable." Washington Federal Savings and Loan Association v. Transamerica Premier Insurance Company, 124 Idaho 913, 915, 918, 865 P.2d 1004, 1006 (Ct. App. 1993). Moreover, even if labeling something was enough, contrary to law, neither of Gerdon's motions for reconsideration used any of the "labels" from Rule 60(a) or (b) he now cites.[6] Palmer v. Spain, 138 Idaho 798, 802, 69 P.3d 1059, 1063 (2003) ("In order to obtain relief from judgment, the moving party must specify the grounds upon which it is entitled to relief from judgment."). For these additional reasons, this Court should decline to consider Gerdon's claims on appeal.

Even if the Court considers the merits of Gerdon's claims, he has failed to show the district court abused its discretion in denying either of his Rule 60 motions. Rule 60(a) of the Idaho Rules of Civil Procedure allows for the correction of "[c]lerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission." "Rule 60(a) applies to those errors in which the type of mistake or omission [is] mechanical in nature which is apparent in the record and which does not involve a legal decision or judgment by an attorney." Silsby v. Kepner, 140 Idaho 410, 411, 95 P.3d 28, 29 (2004) (quotations, citation, and alterations omitted). In other words:

---

[6] Gerdon did claim a "clerical error" in the affidavit he filed with his motion in Case No. CV-2004-5173; this reference will be addressed below. (#40455 R., p.32.)

> The basic distinction between "'clerical mistakes" and mistakes that cannot be corrected pursuant to Rule 60(a) is that the former consist of "blunders in execution" where the latter consist of instances where the court *changes its mind*, either because it made a legal or factual mistake in making its original determination, or because on second thought it has decided to exercise its discretion in a manner different from the way it was exercised in the original determination.

Silsby, 140 Idaho at 412, 95 P.3d at 30 (quoting Blanton v. Anzalone, 813 F.2d 1574, 1577 n.2 (9th Cir. 1987)) (italics original).

Rule 60(b)(1) of the Idaho Rules of Civil Procedure provides for relief "from a final judgment, order, or proceeding for the following reasons:"

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Rule 60(b) motions "shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than six (6) months after the judgment, order, or proceeding was entered or taken." In determining whether a party is entitled to relief under Rule 60(b), "the court must examine whether 'the litigant engaged in conduct which, although constituting neglect, was nevertheless excusable because a reasonably prudent person might have done the same thing under the circumstances.'" Washington Federal, 124 Idaho at 915, 865 P.2d at 1006 (quoting Schraufnagel v. Quinowski, 113 Idaho 753, 754, 747 P.2d 775, 776 (Ct. App. 1987)).

"The clerical mistake under Rule 60(a) may be differentiated from the mistake or inadvertence referred to in Rule 60(b)(1), upon the ground that the latter applies

primarily to errors or omissions committed by an attorney or by the court which are not apparent on the record." Silsby, 140 Idaho at 711, 95 P.3d at 29 (citations omitted). "Errors of a more substantial nature are to be corrected by a motion under Rules 59(e) or 60(b). Thus a motion under Rule 60(a) can only be used to make the judgment or record speak the truth and cannot be used to make it say something other than what originally was pronounced." Id.

Gerdon only requested relief pursuant to Rule 60(a) in Case No. CV-2004-5173. (#40455 R., pp.29-33.) The "clerical error" claimed by Gerdon is based on his assertion that the court, in summarily dismissing his petition, erroneously stated Gerdon never filed a motion on March 11, 2004, in CR-2003-6576 when, in fact, such a motion was filed. (#40455 R., pp.32-33.) Gerdon further alleged this error "directly affected the order to dismiss [sic]." (#40455 R., p.33.) Although the record is inadequate to determine whether Gerdon's allegation is accurate, his assertion that the alleged error actually affected the outcome of his case is precisely why the error he claims is not clerical in nature and is, therefore, not the proper subject of a Rule 60(a) motion. Silsby, supra.

With respect to Rule 60(b), Gerdon sought reconsideration pursuant to that rule in both Case No. CV-2004-5173 and Case No. CV-2008-1712, based on the Supreme Court's Martinez opinion. As noted by the district court, Martinez does not, as Gerdon claimed, stand for the proposition that he is entitled to the effective assistance of post-conviction counsel. (#40454 R., p.8.) At issue in Martinez was "whether a federal habeas court may excuse a procedural default of an ineffective-assistance of counsel claim when the claim was not properly presented in state court due to an attorney's

errors in an initial-review collateral proceeding." 132 S.Ct. at 1313. In resolving this issue, the Court held, "Where, under state law, claims of ineffective assistance of trial counsel must be raised in an initial-review collateral proceeding, a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective." Martinez, 132 S.Ct. at 1320. The Court, however, declined to hold that the constitution requires the effective assistance of counsel in post-conviction proceedings. Id. at 1315. Gerdon does not challenge the district court's rejection of his Martinez arguments.

Instead, Gerdon advances the argument that he is entitled to relief due to "irregularities" in receiving his mail. While Gerdon, in the affidavit he filed in Case No. CV-2004-5173, commented on alleged interference with his legal mail, which he claims prevented him from filing a timely appeal from the summary dismissal of his post-conviction petition, this allegation does not fit within any of the grounds for relief set forth in Rule 60(b) – nor did he cite any specific ground in his motions as he was required to do. Palmer, 138 Idaho at 802, 69 P.3d at 1063.

Although Gerdon, for the first time on appeal, tries to fit his argument into categories (1), (3), and (4) of Rule 60(b) by citing some of the language from those subsections, the grounds for relief under Rule 60(b) are "'mutually exclusive . . ., such that a ground for relief asserted falling fairly under 60(b)(1), cannot be granted under 60(b)(6).'" Eby v. State, 148 Idaho 731, 228 P.3d 998 (2010 (quoting Pullin v. City of Kimberly, 100 Idaho 34, 37 n.2, 592 P.2d 849, 852 n.2 (1979)). Further, Gerdon's appellate claims based on "reasons (1) . . . and (3)" are untimely because his motions

were filed "more than six (6) months after the judgment, order, or proceeding was entered or taken." I.R.C.P. 60(b). That leaves subsection (4), which only allows relief where the "judgment is void." I.R.C.P. 60(b)(4). Motions for relief under I.R.C.P. 60(b)(4) must be "made within a reasonable time." Even assuming the six-year delay in Case No. CV-2004-5173 or the three-year delay in Case No. CV-2008-1712 could be considered a reasonable time for filing a motion to reconsider, the judgments dismissing Gerdon's post-conviction petitions are not void just because Gerdon believes he received ineffective assistance of counsel or was unable to timely appeal due to "irregularities" in receiving his mail. Gerdon has cited no authority supporting a contrary conclusion.

What is clear from the record and even from Gerdon's brief on appeal is that he believes he received ineffective assistance of post-conviction counsel in his original post-conviction case. Those claims were addressed in his successive post-conviction cases. To the extent Gerdon thinks the district court erred in addressing those claims in those cases, he could have appealed. What he is not entitled to is Rule 60(b) relief. See Ross v. State, 141 Idaho 670, 672, 115 P.3d 761, 763 (Ct. App. 2005) (holding that movant failed to "provide any new information . . . that would justify relief pursuant to Rule 60(b)(6), but instead . . . essentially asked the district court to reverse itself and rule in Ross's favor . . .. This was an inappropriate use of Rule 60(b) as a disguised substitute for an appeal.").

Further, with respect to Gerdon's allegations regarding "irregularities" with his mail, to the extent the Court of Appeals already determined, in Docket No. 39300, that such alleged interference did not prevent him from pursuing post-conviction remedies,

Gerdon is not entitled to re-litigate those allegations now. State v. Rhoades, 134 Idaho 862, 863, 11 P.3d 481, 482 (2000) (doctrine of res judicata prevents re-litigation of issues that have been previously decided in a final judgment or decision in an action between the same litigants).

Because Gerdon's claims are not preserved and are unsupported by argument and authority, this Court should not consider them. Alternatively, Gerdon has failed to show any error in the denial of either of his motions for reconsideration.

CONCLUSION

Gerdon has failed to demonstrate that the district court erred in denying his motions to reconsider. The state requests that this Court affirm.

DATED this 27th day of November 2013.

JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 27th day of November 2013, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

STEPHEN D. THOMPSON
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JESSICA M. LORELLO
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JML/pm