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## Brown v. State Respondent's Brief Dckt. 41826

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

LLOYD JAMES BROWN,  
Petitioner-Appellant,

vs.

STATE OF IDAHO,  
Respondent.

)  
) No. 41826  
)  
) Shoshone Co. Case No.  
) CV-2013-507  
)  
)  
)  
)  
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)

**BRIEF OF RESPONDENT**

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF SHOSHONE

HONORABLE FRED M. GIBLER  
District Judge

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**FILED - COPY**  
JUL 28 2014  
Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
Entered on ATS by \_\_\_\_\_

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## STATEMENT OF THE CASE

### Nature Of The Case

Lloyd James Brown appeals from the district court's order summarily dismissing his untimely petition for post-conviction relief.

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

In July 2011, pursuant to his guilty plea, Brown was convicted of trafficking in heroin and was sentenced to 12 years with five years fixed. (R., pp.2-3, 27.) Brown did not file an appeal.<sup>1</sup> (R., p.3.) More than two years after the judgment became final in his case, Brown filed his petition for post-conviction relief on September 12, 2013. (R., p.2.) In the petition, Brown alleged that his guilty plea was neither knowing nor voluntary, and that his counsel was ineffective for failing to file a motion to suppress evidence and for failing to appeal. (R., pp.3-8.)

The district court issued its notice of intent to dismiss Brown's petition for post-conviction relief on the ground that it was untimely. (R., pp.25-28.) After Brown responded (R., pp.30-40), the district court issued an amended notice of intent to dismiss the untimely petition (R., pp.41-44). Two months later, the district court dismissed Brown's untimely petition for post-conviction relief. (R., pp.54-56.) Brown filed a timely notice of appeal. (R., pp.58-60.)

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<sup>1</sup> Brown did, however, file a Rule 35 motion, which was denied. (R., p.27.)

## ISSUES

Brown states the issues on appeal as:

1. Was the Petitioner/Appellant denied his right to Appeal the Sentence imposed? (By Counsel's Failure to file such Appeal).
2. Was counsel ineffective for advising the Petitioner/Appellant to plead guilty without challenging the evidence against the Petitioner/Appellant?

(Appellant's brief, p.1.)

The state rephrases the issue as:

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

## ARGUMENT

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

#### A. Introduction

Brown filed his petition for post-conviction relief on September 12, 2013, more than two years after the judgment in his underlying criminal case became final. (Compare R., p.2 with R., p.27.) Adhering to the procedures set forth in Idaho Code § 19-4906, the district court ultimately dismissed the petition on the ground that it was untimely. (R., pp.25-28; 41-44; 54-56.) On appeal, Brown asks this Court to extend equitable tolling to his claim of ineffective assistance of counsel. (Appellant's brief, pp.1-8.) Brown has failed to show that his claim merits equitable tolling. The district court's order dismissing Brown's untimely post-conviction petition should be affirmed.

#### 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. Brown's Petition For Post-Conviction Relief Is Untimely And He Has Failed To Show A Sufficient Basis For Equitably Tolling The Statute Of Limitation

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:

When a court 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 and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply within 20 days to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or, [sic] direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if there exists a material issue of fact.

I.C. § 19-4906(b); see also Workman, 144 Idaho at 523, 164 P.3d at 803.

The district court followed the procedures set forth in Idaho Code § 19-4906 in dismissing Brown’s untimely post-conviction petition. First, the district court gave notice of its intent to dismiss Brown’s post-conviction petition on the ground that it was untimely. (R., pp.25-28.) Then, following additional filings from Brown, the trial court reiterated this basis and further explained why Brown’s petition was frivolous in an amended notice. (R., pp.41-44.) Finally, more than 20 days later, the court dismissed the petition. (Compare R., p.41 with p.54.)

Brown’s petition for post-conviction relief was untimely. In his underlying criminal case, Brown was convicted, pursuant to a guilty plea, of trafficking in heroin in July 2011. (R., p.27.) Brown did not appeal. (R., p.3.) More than two years later, Brown filed his petition for post-conviction relief in September 2013. (R., p.2.) Brown’s petition for post-conviction relief was clearly untimely under Idaho Code § 19-4902, and the district court correctly dismissed the petition.



As he did below (see R., pp.30-40), Brown appears to argue on appeal that he should have been granted equitable tolling, because he alleged in his petition that his counsel was ineffective for failing to appeal the indeterminate portion of his sentence. (See Appellant's brief.) "[T]he bar for equitable tolling for post-conviction actions is high." Chico-Rodriguez v. State, 141 Idaho 579, 582, 114 P.3d 137, 140 (Ct. App. 2005). "Equitable tolling for post-conviction actions 'is borne of the petitioner's due process right to have a meaningful opportunity to present his or her claims.'" Schultz v. State, 151 Idaho 383, 385-86, 256 P.3d 791, 793-94 (Ct. App. 2011) (quoting Leer v. State, 148 Idaho 112, 115, 218 P.3d 1173, 1176 (Ct. App. 2009)). Idaho appellate courts have allowed for equitable tolling in circumstances where the petitioner is incarcerated out-of-state without access to representation or Idaho legal materials; where his mental illness or medications render him incompetent and prevent him from timely challenging 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). Courts, however, "have not permitted equitable tolling where the post-conviction petitioner's own lack of diligence caused or contributed to the untimeliness of the petition." Amboh v. State, 149 Idaho 650, 653, 239 P.3d 448, 451 (Ct. App. 2010) (citations omitted).

Brown argues that his ineffective assistance of counsel claim should not be time-barred because in other cases where defendants in federal court sought federal relief for procedurally defaulted claims under *habeus corpus*, those claims could still be heard. (Appellant's brief, p.2.) Contrary to Brown's argument, under the Uniform Post-Conviction Procedure Act, equitable tolling is not available for mere claims of ineffective

assistance of counsel. The Idaho Supreme Court's opinion in Rhoades v. State, 148 Idaho 247, 220 P.3d 1066 (2009), controls on this point. Addressing Rhoades' argument that equitable tolling should apply to his claim of ineffective assistance of counsel, the Court held:

We have repeatedly held that ineffective assistance of counsel claims can or should be known after trial. In addressing one of Rhoades' previous appeals, we squarely addressed this issue. "Ineffective assistance of counsel is one of those claims that should be reasonably known immediately upon the completion of the trial and can be raised in a post-conviction petition." The facts of the case, being particularly within the knowledge of the defendant should be sufficient to alert a defendant to the presence of ineffective assistance of counsel.... Accordingly, we conclude that the district court properly dismissed this claim as untimely.

Id. at 253, 220 P.3d at 1072 (citation omitted). Brown's knowledge was sufficient to alert him sooner than two years after his conviction became final that his attorney had failed to file an appeal of his sentence. Brown's lack of diligence in timely asserting a claim of which he either was or should have been aware does not provide a basis for equitable tolling.

This Court should decline to extend equitable tolling to this case. Brown's post-conviction petition was untimely and the district court was correct to summarily dismiss the petition on this ground. The district court's order summarily dismissing Brown's petition should be affirmed.

CONCLUSION

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

DATED this 28th day of July, 2014.



\_\_\_\_\_  
RUSSELL J. SPENCER  
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of July, 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by placing two copies in the United States mail, postage prepaid, addressed to:

LLOYD JAMES BROWN  
IDOC #100925  
ISCI, Unit 15. Cell 57  
PO Box 14  
Boise, ID 83707



\_\_\_\_\_  
RUSSELL J. SPENCER  
Deputy Attorney General

RJS/pm