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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

PAUL EZRA RHOADES,)
)
 Petitioner-Appellant,)
)
 vs.)
)
 STATE OF IDAHO,)
)
 Respondent.)

NO. 35021

FILED - COPY
OCT - 8 2018
Supreme Court _____ Court of Appeals _____
Entered on ATS by: _____

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE SEVENTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BONNEVILLE**

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District Judge**

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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 The Underlying Criminal Proceedings.....	1
Statement Of The Facts and Course Of The Underlying Post-Conviction Proceedings	3
ISSUES	5
ARGUMENT	6
I. Because Rhoades Failed To Establish The State Prevented Him From Filing A Timely Post-Conviction Petition, The District Court Properly Dismissed His Petition	6
A. Introduction.....	6
B. Standard Of Review	7
C. Rhoades’ Post-Conviction Petition Was Properly Dismissed Because It Was Untimely And He Failed To Meet His Burden Of Establishing Equitable Tolling.....	7
1. Introduction.....	7
2. Rhoades’ First Three Claims Were Not Filed Within One Year From The Determination Of His Appeal.....	8
3. Rhoades Has Failed To Establish The District Court Applied An Incorrect Equitable Tolling Standard	8
4. Rhoades Has Failed To Establish The District Court’s Findings Of Fact Are Clearly Erroneous	12
II. Because Rhoades’ Appeal Is Frivolous, The Court Should Award the State Costs and Attorney Fees on Appeal	15
CONCLUSION	17
CERTIFICATE OF MAILING.....	18

TABLE OF AUTHORITIES

CASES

<u>Banks v. Dretke</u> , 540 U.S. 668 (2004).....	14
<u>Carter v. State</u> , 108 Idaho 788, 702 P.2d 826 (1985).....	15
<u>Chavez v. Barrus</u> , 2008 WL 3905436, *12 (Idaho 2008).....	15
<u>Chico-Rodriguez v. State</u> , 141 Idaho 579, 114 P.3d 137 (Ct. App. 2005)	9, 10, 14
<u>Cochran v. State</u> , 133 Idaho 205, 984 P.2d 128 (Ct. App. 1999)	8
<u>Esquivel v. State</u> , 128 Idaho 390, 913 P.2d 1160 (1996).....	15
<u>Evensiosky v. State</u> , 136 Idaho 189, 30 P.3d 967 (2001).....	8
<u>Feld v. Idaho Crop Improvement Assoc.</u> , 126 Idaho 1014, 895 P.2d 1207 (1995).....	12
<u>Freeman v. State</u> , 122 Idaho 627, 836 P.2d 1088 (Ct. App. 1992).....	7
<u>Gabourie v. State</u> , 125 Idaho 254, 869 P.2d 571 (Ct. App. 1994).....	7
<u>Gilpin-Grubb v. State</u> , 138 Idaho 76, 82 P.3d 787 (2002).....	7
<u>Gonzales v. State</u> , 139 Idaho 384, 79 P.3d 743 (Ct. App. 2003).....	8
<u>LaBelle v. State</u> , 130 Idaho 115, 937 P.2d 427 (Ct. App. 1997)	12
<u>North Carolina v. Alford</u> , 400 U.S. 25 (1970).....	2
<u>Sayas v. State</u> , 139 Idaho 957, 88 P.3d 776 (Ct. App. 2003).....	8, 9
<u>Schneider v. Curry</u> , 106 Idaho 264, 678 P.2d 56 (Ct. App. 1984).....	12
<u>Schwartz v. State</u> , 145 Idaho 186, 177 P.3d 400 (Ct. App. 2008).....	7
<u>Sheahan v. State</u> , 146 Idaho 101, 190 P.3d 920 (Ct. App. 2008)	15
<u>Sivak v. State</u> , 134 Idaho 641, 8 P.3d 636 (2000)	14
<u>State v. Acevedo</u> , 131 Idaho 513, 960 P.2d 196 (Ct. App. 1998).....	12
<u>State v. Creech</u> , 132 Idaho 1, 966 P.2d 1 (1998)	16

<u>State v. LePage</u> , 138 Idaho 803, 69 P.3d 1064 (Ct. App. 2003).....	9
<u>State v. O’Neill</u> , 118 Idaho 244, 796 P.2d 121 (1990)	7
<u>State v. Rhoades</u> , 119 Idaho 594, 809 P.2d 455 (1991).....	3
<u>State v. Tucker</u> , 131 Idaho 174, 953 P.2d 614 (1998).....	12
<u>Waye v. Murray</u> , 884 F.2d 765 (4th Cir. 1989).....	14

STATUTES

I.C. § 12-121	15
I.C. § 19-4901, et. seq.....	7
I.C. § 19-4902	4, 7, 8, 10

RULES

I.A.R. 40.....	15
I.A.R. 41.....	15

STATEMENT OF THE CASE

Nature Of The Case

Petitioner-Appellant Paul Ezra Rhoades (“Rhoades”) appeals from the district court’s Memorandum Decision and Order on Motion for Summary Dismissal dismissing his Petition for Post-Conviction Relief because it is untimely and he failed to establish equitable tolling.

Statement Of Facts And Course Of The Underlying Criminal Proceedings

In 1987, an Information was filed charging Rhoades with Nolan J. Haddon’s first-degree murder and the robbery at Buck’s Store where Nolan was working when he was murdered by Rhoades. (R., p.99A, *Brief in Support of Respondent’s Motion for Summary Dismissal* (“Brief in Support”), Appendix A.) In the same Information, but unrelated case, Rhoades was also charged with numerous offenses committed against Susan Michelbacher, including first-degree murder, first-degree kidnapping, robbery, rape and infamous crime against nature. (R., p.99A, *Brief in Support*, Appendix A.)

On July 2, 1987, the state filed a Supplemental Response to Defendant’s Discovery Request, disclosing a report by Don Wycoff “relative to materials heretofore examined by him,” which was to be provided to Rhoades by July 13, 1987. (R., p.99A, *Brief in Support*, Appendix C, p.1.) The supplemental response also referenced a report and additional witnesses that would be “forthcoming upon [the state’s] receipt of the test results from a FBI Serilogist [sic],” which had been submitted on June 2, 1987, and involved the “submission of a semen sample . . . done after consulting defendant’s attorney Stephen Hart.” (R., p.99A, *Brief in Support*, Appendix C, p.1.) Rhoades has

never contended he did not receive the subsequent FBI report and actually appears to concede it was received prior to the Michelbacher trial. (R., pp.30-31, 72.)

After Rhoades pled not guilty, he filed a Motion to Sever Charges requesting, “all matters alleged to have occurred relative to Susan Michelbacher be separated and severed from those alleged to have been relative to Nolan Haddon” (R., p.99A, Brief in Support, Appendix B), which the trial court granted (R., p.99A, Brief in Support, Appendix D, pp.23-27).¹

During the Michelbacher trial, Wycoff testified regarding the conclusions of the state laboratory reports regarding PGM blood testing, which included testimony that Rhoades could not be excluded as a semen donor. (R., p.99A, Transcript Excerpts from Bonneville County Case No. 87-04-547 (“Transcript Excerpts”), Appendix 2, p.1689.) The transcript excerpt, which was offered by Rhoades in the instant case, makes no reference to the FBI analysis or report. (R., p.99A, Transcript Excerpts, Appendix 2.)

After Rhoades was convicted in the Michelbacher case and another case from Bingham County involving the first-degree murder of Stacy Baldwin (R., p.99A, Brief in Support, Appendix I, p.1), the parties entered into a written plea agreement, allowing Rhoades to enter an “Alford”² plea to second-degree murder and robbery in connection with Nolan’s murder and the robbery at Buck’s Convenience Store. (R., p.99A, Brief in Support, Appendix E.) Rhoades maintained his innocence, but conceded the strength of the state’s evidence and that “a conviction may be had on the charges as presently filed including the charge of First Degree murder.” (R., p.99A, Brief in Support, Appendix E,

¹ The same attorneys represented Rhoades in both the Michelbacher and Haddon cases.

² North Carolina v. Alford, 400 U.S. 25 (1970).

p.2.) The agreement also reserved Rhoades' right to appeal, pursuant to I.C.R. 11, "any and all motions filed prior to the date of this Agreement." (R., p.99A, Brief in Support, Appendix E, pp.7-9.) Finally, the agreement detailed the state's evidence that would be presented at trial, none of which involved serology testing by an Idaho State crime lab or the FBI. (R., p.99A, Brief in Support, Appendix E, pp.2-5.)

Pursuant to the plea agreement, an amended information was filed (R., p.99A, Brief in Support, Appendix F) and Rhoades was subsequently sentenced to indeterminate life for second-degree murder and indeterminate life for robbery, to be served concurrently (R., p.99A, Brief in Support, Appendix G). The Idaho Supreme Court affirmed Rhoades' convictions and sentences. State v. Rhoades, 119 Idaho 594, 809 P.2d 455 (1991). The Remittitur issued March 8, 1991. (R., p.99A, Brief in Support, Appendix H.)

Statement Of Facts And Course Of the Underlying Post-Conviction Proceedings

In 1997, Rhoades filed a federal writ of habeas corpus, which the federal district court dismissed on March 30, 2006. (R., p.99A, Brief in Support, Appendix I, p.1.) On July 29, 2005, while his federal habeas case was pending and more than fourteen years after the Idaho Supreme Court affirmed his convictions and sentences, Rhoades filed the instant Petition for Post-Conviction Relief, raising the following claims: (1) the prosecutor committed misconduct by failing to advise counsel that the FBI's PGM test allegedly exonerated Rhoades of the rape in the Michelbacher case and failing to correct Wycoff's allegedly false trial testimony regarding PGM testing in that case (R., pp.6-12); (2) actual innocence of the crimes for which he pled guilty (R., p.12); (3) ineffective assistance of trial counsel by failing to provide Rhoades' forensic expert in the

Michelbacher case with “sufficient and available information regarding the PGM testing conducted by the FBI on the swabs collected from the victim and the samples conducted from Petitioner and others to allow that expert to discern that the FBI PGM report exonerated Petitioner” (R., pp.12-13); and (4) a request for DNA testing “of any and all evidence which may contain Deoxyribonucleic acid (‘DNA’) collected by the State in the investigation of the murder of Nolan Haddon” (R., pp.14-16). The basis of Rhoades’ claims are premised upon an affidavit from Greg Hampikian, Ph.D., who contends the FBI report, on its face, excludes Rhoades as the semen contributor in the Michelbacher case. (R., pp.33-36.)

The state responded by filing an answer (R., pp.37-44) and Motion for Summary Dismissal Based Upon Statute of Limitations, asserting Rhoades’ petition required dismissal because it was filed beyond the one-year statute of limitation in the Uniform Post-Conviction Procedure Act (“UPCPA”) under I.C. § 19-4902(a). Rhoades subsequently informed the district court he was withdrawing his fourth claim regarding DNA testing, but desired to proceed on his three remaining claims. (R., p.56.) Rhoades responded to the state’s motion by conceding his post-conviction petition is untimely, but asserting he was entitled to equitable tolling because the prosecutor allegedly elicited false testimony from Wycoff during the Michelbacher trial and subsequently failed to disclose he had elicited false testimony. (R., pp.68-77.) After hearing oral argument (Tr., pp.7-21), on November 27, 2007, the district court granted the state’s motion to dismiss, concluding Rhoades’ petition was untimely and that he failed to meet his burden of establishing equitable tolling (R., pp.85-92). Rhoades’ timely Notice of Appeal was filed January 8, 2008. (R., pp.93-98.)

ISSUES

Rhoades has stated the issues on appeal as follows:

- (1) Whether the district court abused its discretion in summarily dismissing the Petition for Post-Conviction Relief for untimely filing even though Appellant had no notice of the prosecutorial misconduct claims ("First Ground") or the scientific basis for his actual innocence claims ("Second Ground"), his ineffective assistance of counsel claim ("Third Ground"), or his claim to test the biological evidence for DNA ("Fourth Ground") until he consulted an expert out of an abundance of caution, and even though neither trial defendants nor postconviction petitioners have any obligation to search for evidence of prosecutorial misdeeds, absent notice of their existence;
- (2) Whether the district court abused its discretion by applying the wrong legal standard to determine whether Appellant was entitled to equitable tolling and, alternatively, whether in any event Appellant met the standard which the district court erroneously employed.

(Appellant's brief, pp.11-12.)

The state wishes to rephrase the issues on appeal as follows:

1. Because Rhoades has failed to establish the district court applied an incorrect equitable tolling standard or that the district court's factual findings regarding prosecutorial misconduct are clearly erroneous, has Rhoades failed to establish the district court erred by dismissing his untimely post-conviction petition?
2. Because Rhoades' appeal is being brought frivolously and without foundation, should the state be awarded attorney fees and costs on appeal?

ARGUMENT

I.

Because Rhoades Failed To Establish The State Prevented Him From Filing A Timely Post-Conviction Petition, The District Court Properly Dismissed His Petition

A. Introduction

Rhoades concedes his post-conviction petition was not filed within the one-year UPCPA statute of limitation, but contends he is entitled to equitable tolling. Specifically, he contends the district court “abused its discretion” by applying an incorrect legal equitable tolling standard by applying the “high federal legal standard which Idaho has never adopted” - “extraordinary circumstance.” (Appellant’s brief, p.17.) Rhoades also contends even if the district court applied the correct legal standard, he met that standard because the state allegedly concealed exculpatory evidence by not disclosing Wycoff’s testimony was allegedly false. (Appellant’s brief, pp.17-19.) Finally, Rhoades contends the district court “abused its discretion” by concluding he presented no evidence that the prosecutor knew of an alternative interpretation of the FBI’s report and deliberately withheld such evidence from Rhoades, and *deliberately withheld evidence that Wycoff’s testimony at the Michelbacher trial was perjured.* (Appellant’s brief, pp.12-17.)

The state concurs that Rhoades’ petition was not timely filed within the UPCPA’s one-year statute of limitation. Further, the district court applied the correct legal standard for equitable tolling as previously adopted by the Idaho Court of Appeals and, more importantly, Rhoades failed to meet any standard for equitable tolling because he failed to present any evidence establishing the prosecutor withheld exculpatory evidence or suborned perjury in the Michelbacher trial. Finally, Rhoades has failed to establish the

court's factual findings, regarding his contention of prosecutorial misconduct, are clearly erroneous or that the court misapplied the law to those facts.

B. Standard Of Review

The applicability of a statute of limitation to an action under a given set of facts is a question of law subject to free review on appeal. State v. O'Neill, 118 Idaho 244, 245, 796 P.2d 121 (1990); Schwartz v. State, 145 Idaho 186, ---, 177 P.3d 400, 403 (Ct. App. 2008); Freeman v. State, 122 Idaho 627, 628, 836 P.2d 1088 (Ct. App. 1992). An appellate court will defer to the factual findings made by the district court unless they are clearly erroneous, requiring Rhoades to establish the court's factual findings are "not supported by substantial and competent evidence in the record." Gilpin-Grubb v. State, 138 Idaho 76, 82 P.3d 787 (2002); Gabourie v. State, 125 Idaho 254, 256, 869 P.2d 571 (Ct. App. 1994). However, this Court exercises free review over the application of the relevant law to those facts. Gabourie, 125 Idaho at 256.

C. Rhoades' Post-Conviction Petition Was Properly Dismissed Because It Was Untimely And He Failed To Meet His Burden Of Establishing Equitable Tolling

1. Introduction

Because Rhoades' instant case involves a non-capital sentence, it is governed by the UPCPA, codified at I.C. § 19-4901, *et. seq.* Rhoades' first three claims all stem from his guilty plea and conviction for second-degree murder and robbery and, therefore, must have been filed within the time constraints of I.C. § 19-4902(a).³

³ Rhoades' fourth claim involved DNA testing on evidence secured as a result of the investigation regarding Nolan's murder and the robbery at Buck's Store. Therefore, this claim was governed by the time constraints of I.C. § 19-4902(b). Because Rhoades withdrew his fourth claim (R., p.56), it is unnecessary to further address it. However,

2. Rhoades' First Three Claims Were Not Filed Within One Year From The Determination Of His Appeal

Idaho Code § 19-4902(a) establishes the statute of limitation for filing a post-conviction petition, as follows, "An application may be filed at 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 a proceeding following an appeal, whichever is later." "The 'appeal' referenced in that section means the appeal in the underlying criminal case." Gonzales v. State, 139 Idaho 384, 385, 79 P.3d 743 (Ct. App. 2003). "[T]he limitation period begins to run, after an unsuccessful appeal, when the Idaho Supreme Court or the Idaho Court of Appeals issues a remittitur." Cochran v. State, 133 Idaho 205, 207, 984 P.2d 128 (Ct. App. 1999). The failure to file a timely petition is a basis for dismissal of the petition. Evensiosky v. State, 136 Idaho 189, 30 P.3d 967 (2001).

The Remittitur in Rhoades' case was issued March 8, 1991. (R., p.99A, Brief in Support, Appendix H.) However, Rhoades did not file his instant petition until July 29, 2005, more than fourteen years after issuance of the Remittitur. (R., p.3.) Because Rhoades' petition was not timely filed, the district court properly dismissed it unless he demonstrated equitable tolling sufficient to toll the one-year statute of limitation.

3. Rhoades Has Failed To Establish The District Court Applied An Incorrect Equitable Tolling Standard

The district court properly recognized Idaho has adopted the doctrine of equitable tolling in post-conviction cases. Sayas v. State, 139 Idaho 957, 960, 88 P.3d 776 (Ct. App. 2003). Addressing the law regarding equitable tolling, the district court explained:

even if Rhoades had not withdrawn his fourth claim, it was untimely and would be governed by the same standards of equitable tolling as detailed in this 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). In federal habeas actions, [for] a petitioner to be entitled to equitable tolling, he must show “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.” *Lawrence v. Florida*, 127 S.Ct. 1079, 1085 (2007) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)[)] (petitioner bears the burden of showing entitlement to equitable tolling). Petitioner has failed to meet the burden of showing the existence of some extraordinary circumstance which stood in the way of his timely filing the instant petition.

(R., pp.89-90.)

Rhoades contends the district court’s use of the federal standard requiring “some extraordinary circumstance” constitutes an “abuse of discretion.” (Appellant’s brief, pp.12, 17.) First, determination of the proper legal standard to be applied is a question of law over which this Court exercises free review, not an “abuse of discretion.” *State v. LePage*, 138 Idaho 803, 807, 69 P.3d 1064 (Ct. App. 2003).

Second, Rhoades’ contention that the district court applied an erroneous legal standard is simply incorrect. While Idaho has recognized the doctrine of equitable tolling in post-conviction cases, it has generally been limited to include: “(1) where the petitioner was incarcerated in an out-of-state facility or an in-state conviction without legal representation or access to Idaho legal materials; (2) and where mental disease and/or psychotropic medication renders a petitioner incompetent and prevents petitioner from earlier pursuing challenges to his convictions.” *Sayas v. State*, 139 Idaho 957, 960, 88 P.3d 776 (Ct. App. 2003). The court of appeals has also determined “there may be circumstances in which a language barrier would legitimately give rise to an access to court claim for purposes of extending the filing deadline.” *Id.* Finally, in *Chico-Rodriguez v. State*, 141 Idaho 579, 582, 114 P.3d 137 (Ct. App. 2005), the court of

appeals expressly discussed and implicitly adopted the federal courts' requirement of "an 'extraordinary circumstances' or 'rare and exceptional circumstances' standard for determining when the statute of limitation for a post-conviction or habeas corpus action is equitably tolled," and that "[t]hese cases illustrate that the bar for equitable tolling for post-conviction actions is high." Further, a petitioner seeking equitable tolling must demonstrate a causal connection between the "extraordinary circumstance" and failure to timely file a petition. *Id.* Based upon Chico-Rodriguez, Rhoades has failed to establish the district court applied an incorrect standard.

Finally, when the district court's opinion is read in context, it is readily apparent it was not based upon a finding that Rhoades failed to establish an "extraordinary circumstance," but a finding that he failed to establish any factual basis warranting equitable tolling. The court concluded if Rhoades could establish the prosecutor knew Rhoades was exonerated based upon the FBI report, withheld that information from Rhoades, and suborned perjury when Wycoff testified in the Michelbacher trial, "[t]here [would] be no doubt but that deliberate deception in a criminal prosecution would likely entitle a petitioner to equitable tolling for I.C. § 19-4902 purposes." (R., p.90.) However, addressing Rhoades' factual contention regarding the withholding of exculpatory evidence and subordination of perjury, the court concluded:

However, the Court cannot accept Petitioner's illogical and grandiose inference drawn from one expert's opinion.

Petitioner has failed to present an iota of evidence that the prosecution knew of an alternative interpretation of the FBI's PGM report at the time of trial and deliberately withheld that information from Petitioner. Petitioner has failed to present even a scintilla of evidence of [sic] that the serological expert's testimony was perjured, let alone at the elicitation of the prosecution. Simply put, Petitioner has not presented any evidence to the Court of wrongdoing on the part of the prosecution. In

fact, Petitioner has not even alleged that he, himself, was not in possession of the PGM report during trial. To quote the Court's opinion rendered in CV-02-3822, "Petitioner does not assert that the FBI report was withheld from him and his defense counsel before his trial in 1987. Rather, Petitioner only contends that in 2005 he obtained an expert to review the FBI report." (Brief in Supp. Resp. Mot. For Summ. Dis., at 11.)

The assertion that the expert for a criminal prosecution in 1988 incorrectly interpreted the results of a DNA test does not support the inference that the prosecution must have engaged in malicious or deliberate deception. In 1988, DNA testing was still a nascent and developing procedure, which is why the Idaho legislature allowed reexamination of tests which led to conviction up and until July 1, 2002. However, despite this extended deadline, Petitioner failed to petition for reexamination of the PGM report despite the ample time since his conviction and the many advances which have been made in the field of DNA testing. In the absence of anything but bare allegations of prosecutorial misconduct, the Court does not find Petitioner entitled to equitable tolling of the applicable statutes. The purpose of equitable tolling is to afford relief to a party genuinely aggrieved by malicious prosecution and extraordinary limitations in that party's ability to pursue constitutionally-protected rights; the purpose is not to give a genuinely guilty party extraordinary time to cherry-pick experts and formulate potentially-successful defensive theories.

(R., pp.90-91.)

The district court's discussion and rejection of Rhoades' contention - that he was entitled to equitable tolling based upon the alleged withholding of exculpatory evidence and subordination of perjury by the prosecutor - clearly establishes the court's decision was not based upon an erroneous legal standard, but his complete failure to present sufficient facts to support his equitable tolling theory.

4. Rhoades Has Failed To Establish The District Court's Findings Of Fact Are Clearly Erroneous

Assuming arguendo the withholding of exculpatory evidence and subordination of perjury would establish a basis for equitable tolling,⁴ Rhoades has failed to establish the district court's findings of fact regarding his claim, which resulted in the decision that he failed to establish a factual basis supporting such prosecutorial misconduct, are clearly erroneous or that the court erred in its application of the law to those facts.

The entirety of Rhoades' argument is premised upon the July 13, 1987 FBI serology report (R., p.30), Dr. Hampikian's two affidavits, the first signed on June 20, 2005 (R., pp.33-36), and the second on December 21, 2006 (R., pp.83-84), and transcript excerpts from the Michelbacher trial which include four pages of Wycoff's testimony and three pages of the prosecutor's closing argument (R., p.99A, Transcript Excerpts From Bonneville County Case No. 87-04-547).⁵ However, not only do these documents,

⁴ It must be noted that Rhoades has failed to cite a single case from any court establishing the withholding of exculpatory evidence and the subornation of perjury constitutes a basis for equitable tolling. The state is unaware of any court providing equitable tolling based upon the subornation of perjury.

⁵ Rhoades also quotes from another sworn statement from Dr. Hampikian, which he contends comes from "the related Bonneville County capital case postconviction proceedings regarding DNA testing and now before this Court in review as Case No. 34236." (Appellant's brief, p.4 n.6.) However, because this additional statement is not part of the record in this case, this Court must disregard it. Feld v. Idaho Crop Improvement Assoc., 126 Idaho 1014, 1016, 895 P.2d 1207 (1995); Schneider v. Curry, 106 Idaho 264, 267, 678 P.2d 56, 59 (Ct. App. 1984). Likewise, Rhoades' reference to the state's ballistic expert's opinion (Appellant's brief, p.1), the portion of the Michelbacher trial transcript referenced on page 5, footnote 7 of Rhoades' brief, and that portion of Wycoff's testimony quoted on pages 5 and 6 of Rhoades' brief are not part of the record in this case and cannot be considered by this Court. Moreover, omitted or missing parts of the record are presumed to support the action of the district court. State v. Tucker, 131 Idaho 174, 177, 953 P.2d 614 (1998); State v. Acevedo, 131 Idaho 513, 515 n.3, 960 P.2d 196 (Ct. App. 1998); LaBelle v. State, 130 Idaho 115, 118-19, 937 P.2d 427 (Ct. App. 1997).

individually or collectively, fail to establish the prosecutor withheld exculpatory evidence or suborned perjury in this case, they also fail to establish the prosecutor withheld exculpatory evidence or suborned perjury in the Michelbacher case.

As detailed above, Rhoades has never contended the state failed to provide him a copy of the FBI report prior to the Michelbacher trial, which forms the basis of Dr. Hampikian's conclusion, only that he recently retained Dr. Hampikian who has rendered an opinion different from that of the state's expert, Donald Wyckoff. The first indication the FBI was testing forensic evidence was on July 2, 1987, in the state's supplemental discovery response, which stated, "A report and additional witnesses will be forthcoming upon our receipt of the test results from a FBI Seriolgologist [sic]. These materials were submitted on June 2, 1987 and we expect them shortly. This submission to the FBI of a semen sample was done after consulting defendant's attorney Stephen Hart." (R., p.99A, Brief in Support, Appendix C, p.1.) Based upon the discussion with Rhoades' attorney regarding the submission of the semen sample to the FBI and the disclosure of the FBI report, Rhoades has simply failed to establish the state withheld exculpatory evidence.

Rhoades nevertheless contends, based upon the report, "it is beyond dispute that the FBI crime laboratory and a state crime laboratory analyst were aware of the report's meaning" and "[t]he prosecuting attorneys should likewise have known the report's meaning." (Appellant's brief, p.15.) However, if the prosecuting attorneys should have known of the report's meaning, Rhoades' attorney should also have known of its meaning. Moreover, not only is there no evidence establishing Wyckoff was ever given a copy of the FBI report, there is no evidence establishing he could not have reviewed the report and simply arrived at a different conclusion or not recognized the meaning of the

report as alleged by Dr. Hampikian. In fact, based upon the allegations contained in Rhoades' post-conviction petition, it appears he was provided a serology expert prior to the Michelbacher trial and that the report was actually provided to that expert. (R., p.13.) Therefore, either Rhoades was aware of the allegedly alternative conclusion from the FBI report or his expert agreed with Wycoff, if he was actually provided a copy of the report, that it failed to alter the conclusion that Rhoades could not be excluded as a semen donor in the Michelbacher case. As noted by the Fourth Circuit:

[I]t will nearly always be possible in cases involving basic human emotions to find one expert witness who disagrees with another, and to procure an affidavit to that effect from the second prospective witness. . . . There is no doubt fifteen years later looking through a "retroscope" that some attorney or psychiatrist may do better, but that is not the question. Counsel identified problems, conducted examinations, and presented evidence. No more is required.

Waye v. Murray, 884 F.2d 765, 767 (4th Cir. 1989).

Rhoades' reliance upon Sivak v. State, 134 Idaho 641, 8 P.3d 636 (2000), and Banks v. Dretke, 540 U.S. 668 (2004), is misplaced (Appellant's brief, pp.12-13, 17-19), because neither involve the question of whether Rhoades can meet the high hurdle of establishing equitable tolling. While the state may have had a duty to provide Rhoades with exculpatory evidence, that alleged failure did not "actually prevent[] him from filing a post-conviction action." Chico-Rodriguez, 141 Idaho at 582. Dr. Hampikian's affidavits are based only upon the FBI report, which was provided to Rhoades and his expert prior to the Michelbacher trial, thereby providing him the opportunity to establish whether the FBI's testing allegedly exonerated him. Rhoades' attorney merely had to

read the report or submit it to their expert; the state did not prevent Rhoades from filing his petition.⁶

Rhoades has simply failed to establish the district court's findings of fact are clearly erroneous or that the court erred in its application of the law to those facts because the report was in his possession and, if it was not provided to his expert in the Michelbacher case, clearly could have been provided.

II.

Because Rhoades' Appeal Is Frivolous, The Court Should Award the State Costs and Attorney Fees on Appeal

“An action for post-conviction relief is civil in nature and is governed by the Idaho Rules of Civil Procedure. Sheahan v. State, 146 Idaho 101, ---, 190 P.3d 920, 922 (Ct. App. 2008). Pursuant to I.A.R. 40, “costs shall be allowed as a matter of course to the prevailing party unless otherwise provided by law or order of the Court.” Idaho's appellate courts have awarded costs to the prevailing party in post-conviction appeals. *See* Esquivel v. State, 128 Idaho 390, 392, 913 P.2d 1160 (1996) (costs to respondent); Carter v. State, 108 Idaho 788, 796, 702 P.2d 826 (1985) (costs to appellant).

An award of attorney fees should be made to the state pursuant to Idaho Code § 12-121 and I.A.R. 41. “An award of attorneys fees under I.C. § 12-121 is proper only where the Court is left with the abiding belief that the appeal was brought, pursued or defended frivolously, unreasonably or without foundation.” Chavez v. Barrus, 2008 WL

⁶ Rhoades' petition expressly states he had the same attorneys in both the Michelbacher and Nolan cases. (R., pp.12-13.) The petition further avers they had retained an expert witness in the Michelbacher case, but failed to provide that expert with information that allegedly would have permitted the expert to discern the FBI report exonerated Rhoades. (R., p.13.) Therefore, it is clear Rhoades had an expert that could have reviewed the FBI report and determined if it exonerated Rhoades of the Michelbacher rape.

3905436, *12 (Idaho 2008) (internal quotations and citations omitted). Even a cursory review of Rhoades' brief establishes this appeal presents such a circumstance. Not only has Rhoades failed to provide any cogent argument establishing the district court applied an incorrect equitable tolling standard, he failed to recognize the court's decision was based upon his complete failure to present any evidence establishing the factual basis of his equitable tolling argument. Rhoades has cited incorrect standards of review and included references and quotations to documents and pleadings that are not part of the record, despite the state's warning before the district court that the factual basis of parts of his argument were not part of the record, specifically his contention the FBI report was discussed by Wycoff at the Michelbacher trial. (Tr., pp.19-20.)

While the Idaho Supreme Court has previously concluded requests for attorney fees and costs in capital post-conviction cases are inappropriate, State v. Creech, 132 Idaho 1, 23, 966 P.2d 1 (1998), this is an appeal from Rhoades' non-capital post-conviction case. Therefore, because of the frivolous arguments advanced by Rhoades and the time and resources the Office of the Attorney General has devoted to responding to his frivolous appeal, the state requests it be awarded costs and attorney fees on appeal.

CONCLUSION

The state respectfully requests that this Court affirm the district court's summary dismissal of Rhoades' untimely post-conviction petition, and award the state costs and attorney fees on appeal.

DATED this 3rd day of October, 2008.

A handwritten signature in black ink, appearing to read 'L. LaMONT ANDERSON', with a large, stylized flourish extending to the right.

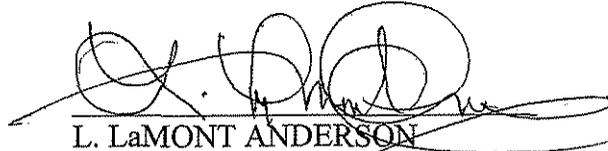
L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on or about the 3rd day of October, 2008, I caused to be serviced a true and correct copy of the foregoing document by the method indicated below, postage prepaid where applicable, and addressed to the following:

Dennis Benjamin
Nevin, Benjamin, McKay & Bartlett
P.O. Box 2772
Boise, ID 83701

U.S. Mail
 Hand Delivery
 Overnight Mail
 Facsimile



L. LaMONT ANDERSON
Deputy Attorney General
Chief, Capital Litigation Unit