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## Garcia v. State Respondent's Brief Dckt. 42530

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**COPY**

BERNARDO PENALOZA GARCIA,	)	
	)	No. 42530
Petitioner-Appellant,	)	
	)	Canyon Co. Case No.
vs.	)	CV-2013-11193
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	

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BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF CANYON

HONORABLE MOLLY J. HUSKEY  
District Judge

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RESPONDENT

PRO SE  
PETITIONER-APPELLANT

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## STATEMENT OF THE CASE

### Nature of the Case

Bernardo Penaloza Garcia appeals, *pro se*, from the district court's order denying his motion for reconsideration of the order summarily dismissing his post-conviction petition.

### Statement of Facts and Course of Proceedings

Garcia pled guilty to conspiring to traffic in methamphetamine, and his conviction and sentence were affirmed on appeal. (R., p.63.) The Remittitur issued on November 16, 2012. (R., pp.62-63.)

On November 20, 2013, Garcia filed a *pro se* petition for post-conviction relief, alleging his conviction was obtained in violation of due process and double jeopardy protections, his sentence violated the Eighth Amendment, and his counsel was ineffective for allegedly coercing his guilty plea, failing to object to numerous exhibits and failing to present mitigating evidence at sentencing. (R., pp.3-10.) Garcia also filed a motion for the appointment of post-conviction counsel, which the district court granted. (R., pp.14-22.) The state answered Garcia's petition and filed a motion for summary dismissal. (R., pp.24-52.) After a hearing, the district court granted the state's motion and summarily dismissed Garcia's petition on the bases that it was untimely and, alternatively, that the claims therein were waived and/or did not present a genuine issue of material fact. (R., pp.58-59, 63-72.) The final judgment was entered on July 24, 2014. (R., pp.73-74.)

On August 11, 2014, Garcia filed a *pro se* motion for reconsideration of the summary dismissal order, and an affidavit and memorandum in support thereof, arguing the court erred in dismissing the petition as untimely. (R., pp.75-95.) To support his argument, Garcia attached to his affidavit prison mail logs that showed he placed his post-conviction petition in the prison mail system on November 12, 2013, and that the petition was mailed on November 13, 2013. (R., pp.81-88.) Based on the mail logs, the district court concluded Garcia's petition was timely filed pursuant to the "Mailbox Rule."<sup>1</sup> (R., p.96.) The court nevertheless denied Garcia's motion for reconsideration, reasoning:

This Court granted the Motion for Summary Dismissal on alternative grounds. "When a decision is 'based upon alternative grounds, the fact that one of the grounds may be in error is of no consequence and may be disregarded if the judgment can be sustained upon one of the other grounds.'" *Andersen v. Prof'l Escrow Servs., Inc.*, 141 Idaho 743, 746, 118 P.3d 75, 78 (2005). Thus, even if the Court erroneously dismissed the petition on the grounds that it was untimely filed, the Petitioner has not challenged the Court's dismissal on the other, alternate grounds.

(R., p.96.)

Garcia thereafter filed a notice of appeal, timely only from the district court's order denying his motion for reconsideration. (R., pp.99-103; see also R., p.117 (Order Conditionally Dismissing Appeal because not timely from entry of

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<sup>1</sup> Under the "mailbox rule," pleadings filed by *pro se* inmates are deemed filed at the time of delivery to prison authorities, rather than when received by the court clerk. Munson v. State, 128 Idaho 639, 642, 917 P.2d 796, 799 (1996). Ordinarily, a *pro se* inmate claiming application of the "mailbox rule" must present evidence – generally in the form of prison mail logs – demonstrating the timelines of the filing(s) pursuant to that rule. See, e.g., State v. Lee, 117 Idaho 203, 204-05, 786 P.2d 594, 595-96 (Ct. App. 1990); Hayes v. State, 143 Idaho 88, 91, 137 P.3d 475, 478 (Ct. App. 2006).

summary dismissal order), pp.118-22 (Amended Notice of Appeal identifying orders appealed from as “Final Judgment entered on the 24<sup>th</sup> day of July, 2014, and the Order Denying Motion for Reconsideration entered on the 13<sup>th</sup> day of August, 2014” (underlining omitted)); p.123 (Order Withdrawing Conditional Dismissal Order and ordering appeal to “proceed only as to the denial of Appellant’s Motion for Reconsideration filed in District Court on August 13, 2014”).)

## ISSUES

Garcia states the issues on appeal as:

1. Did the district court err in dismissing Mr. Garcia's Verified Petition for Post-Conviction Relief as untimely?
2. Did the district court err by dismissing the post-conviction proceedings where the claims therein presented genuine issues of material fact?

(Appellant's brief, p.6.)

The state rephrases the issues as:

1. Is this Court without jurisdiction to consider the propriety of the district court's order summarily dismissing Garcia's post-conviction petition because Garcia's appeal is not timely from that order?
2. Has Garcia failed to carry his burden of showing the district erred by denying his motion for reconsideration?



## ARGUMENT

### I.

#### This Court Is Without Jurisdiction To Consider The Propriety Of The District Court's Order Summarily Dismissing Garcia's Post-Conviction Petition Because Garcia's Appeal Is Not Timely From That Order

##### A. Introduction

Garcia argues the district court erred in summarily dismissing his petition for post-conviction relief. (Appellant's Brief, pp.7-10.) This Court is without jurisdiction to consider the merits of Garcia's appellate arguments because Garcia's appeal is not timely from the summary dismissal order.

##### B. Standard Of Review

“A question of jurisdiction is fundamental; it cannot be ignored when brought to [the appellate courts'] attention and should be addressed prior to considering the merits of an appeal.” State v. Kavajecz, 139 Idaho 482, 483, 80 P.3d 1083, 1084 (2003) (quoting H & V Engineering, Inc. v. Idaho State Bd. of Professional Engineers and Land Surveyors, 113 Idaho 646, 648, 747 P.2d 55, 57 (1987)). Whether a court has jurisdiction is a question of law, given free review. Kavajecz, 139 Idaho at 483, 80 P.3d at 1084.

##### C. This Court Is Without Jurisdiction To Entertain Garcia's Challenges To The District Court's Order Summarily Dismissing His Post-Conviction Petition

Idaho Appellate Rule 14(a) provides that a notice of appeal must be filed within 42 days of the filing of the final judgment or order from which the appeal is taken. In civil cases, the time for appeal may be tolled by “the filing of a timely motion [except, *inter alia*, motions under I.R.C.P. 60] which, if granted could

affect any findings of fact, conclusions of law or any judgment in the action.” I.A.R. 14(a). The time limits of I.A.R. 14(a) are jurisdictional. I.A.R. 21. Where an appellant has failed to timely appeal an order of the district court, this Court does “not have jurisdiction to entertain a direct challenge to that order.” State v. Roberts, 126 Idaho 920, 922, 894 P.2d 153, 155 (Ct. App. 1995).

The district court entered its order summarily dismissing Garcia’s post-conviction petition on July 24, 2014. (R., p.63.) Garcia filed his notice of appeal 54 days later, on September 16, 2014. (R., p.99.) Because Garcia did not file his notice of appeal within 42 days of the order summarily dismissing his post-conviction, his appeal is not timely from that order.

Garcia did file a motion for reconsideration on August 11, 2014 (R., p.75) – 18 days after the court entered its order summarily dismissing the post-conviction petition; but that motion did not toll the 42-day period in which Garcia was required to file a notice of appeal from the order of summary dismissal because the motion to reconsider – whether construed as an I.R.C.P. 11(a)(2)(B) motion for reconsideration or as an I.R.C.P. 59(e) motion to alter or amend the judgment – was itself not timely. See I.R.C.P. 11(a)(2)(B) (motion for reconsideration must be made within 14 days) and 59(e) (motion to alter or amend “shall be served not later than fourteen (14) days after entry of the judgment”).

There is no question that Garcia’s appeal is timely from the district court’s order denying his motion for reconsideration. (Compare R., p.96 (Order Denying Motion for Reconsideration, filed August 13, 2014) with p.99 (Notice of

Appeal, filed September 16, 2014); see also R., p.123 (Order Withdrawing Conditional Dismissal Order and allowing appeal to “proceed only as to the denial of Appellant’s Motion for Reconsideration”).) However, because Garcia did not file his notice of appeal within 42 days of the order of summary dismissal, and because his untimely motion for reconsideration did not toll the time for filing the notice of appeal, Garcia’s appeal is not timely from the order of summary dismissal. This Court therefore does “not have jurisdiction to entertain [Garcia’s] direct challenge to that order.” Roberts, 126 Idaho at 922, 894 P.2d at 155 (Ct. App. 1995).

## II.

### Garcia Has Failed To Argue, Much Less Demonstrate, That The District Court Erred In Denying His Motion For Reconsideration

Because Garcia’s appeal is timely only from the district court’s order denying his motion for reconsideration, that is the only order this Court has jurisdiction to review. See Section I.C., *supra*. Garcia, however, does not challenge the court’s order denying his motion for reconsideration, instead limiting his appellate arguments to the propriety of the court’s summary dismissal order. (See Appellant’s brief, pp.7-10.) Because Garcia has not even argued, much less demonstrated, that the district court erred in denying his motion for reconsideration, the order of the district court must be affirmed. State v. Hoisington, 104 Idaho 153, 159, 657 P.2d 17, 23 (1983) (appellate court will not review actions of the district court for which no error has been assigned and will not otherwise search the record for unspecified errors).

Alternatively, the order of the district court should be affirmed on its merits.<sup>2</sup> The district court summarily dismissed Garcia's post-conviction petition on the alternative bases that it was untimely and that the claims therein were waived and/or not supported by admissible evidence. (R., pp.63-72.) In his motion for reconsideration, Garcia only challenged the court's determination that the claims were untimely; he did not challenge the court's determination that his claims were waived and/or that he failed to support them with evidence sufficient to raise a genuine issue of material fact. (See R., pp.75-95.) Because Garcia failed to challenge the alternative grounds for dismissal, the district court correctly concluded Garcia failed to show any basis for reconsideration of the order summarily dismissing his post-conviction petition. See Andersen v. Prof'l Escrow Servs., Inc., 141 Idaho 743, 746, 118 P.3d 75, 78 (2005) ("When a decision is based upon alternative grounds, the fact that one of the grounds may be in error is of no consequence and may be disregarded if the judgment can be sustained upon one of the other grounds." (internal quotations and citation omitted)); La Bella Vita, LLC v. Shuler, 158 Idaho 799, \_\_\_, 353 P.3d 420, 427 (2015) (same).

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<sup>2</sup> Although not addressed by the district court, the order denying Garcia's motion for reconsideration may also be affirmed on the alternative basis that the motion was not timely. See Section I.C., *supra*.

CONCLUSION

The state respectfully requests this Court to affirm the district court's order denying Garcia's motion for reconsideration of its order summarily dismissing Garcia's petition for post-conviction relief.


DATED this 10<sup>th</sup> day of November, 2015.

  
LORI A. FLEMING  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10<sup>th</sup> day of November, 2015, 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:

BERNARDO PENALOZA GARCIA  
IDOC #98921  
ICC G 106B  
P. O. BOX 70010  
BOISE, ID 83707

  
LORI A. FLEMING  
Deputy Attorney General

LAF/dd