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## Kellis v. State Respondent's Brief Dckt. 43463

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IN THE SUPREME COURT OF THE STATE OF IDAHO

TIMOTHY ANDREW KELLIS,	)	
	)	No. 43463
Petitioner-Appellant,	)	
	)	Latah Co. Case No.
v.	)	CV-2014-384
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
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**BRIEF OF RESPONDENT**

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**APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF LATAH**

---

**HONORABLE JOHN R. STEGNER**  
District Judge

---

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## STATEMENT OF THE CASE

### Nature of the Case

Timothy A. Kellis appeals from the district court's order summarily dismissing his successive petition for post-conviction relief.

### Statement of Facts and Course of Proceedings

The Idaho Court of Appeals described the facts and course of proceedings underlying Kellis' convictions as follows:

Kellis was initially charged with ten counts of lewd and lascivious conduct with a minor under sixteen, Idaho Code § 18–1508, and two counts of sexual abuse of a child, I.C. § 18–1506, for misconduct with teenage boys, much of which occurred at a Boy Scout camp where Kellis was a staff member. Subsequently, one of the ten lewd conduct counts was amended to attempted lewd conduct with a minor under sixteen, I.C. §§ 18–306 and 18–1508. Kellis pleaded not guilty to all charges and went to trial before a jury. He was found guilty of all counts. The district court imposed concurrent unified sentences of life with fifteen years fixed for each of the nine counts of lewd conduct, fifteen years with five years fixed for the count of attempted lewd conduct, and twenty-five years with fifteen years fixed for each of the two counts of sexual abuse.

State v. Kellis, 148 Idaho 812, 813-814, 229 P.3d 1174, 1175-1176 (Ct. App. 2010). The Idaho Court of Appeals affirmed Kellis' convictions and sentences. (Id.)

Kellis then filed a *pro se* post-conviction petition, and then, through appointed counsel, an amended petition. See Kellis v. State, Docket No. 41034, 2014 Unpublished Opinion No. 672 (Idaho App., August 15, 2014). In the amended petition, Kellis asserted his trial counsel was ineffective in numerous respects, including for: failing to adequately investigate prior allegations of sexual misconduct made by the victims, failing to obtain an expert witness to investigate



the allegations made by the victims and to analyze the credibility of those allegations, failing to utilize an expert witness to determine whether physical evidence could be recovered from the victims' sleeping bags, and failing to prevent or rebut evidence that Kellis provided alcohol to one of the victims. Id., pp.4-8. The district court summarily dismissed Kellis' petition on the ground that he failed to present facts adequate to support any of his claims. Id. On appeal, Kellis asserted that the district court provided inadequate notice of its grounds for dismissal. Id., p.4. The Idaho Court of Appeals affirmed the district court. Id., pp.4-8.

Kellis then filed a successive post-conviction petition. (R., Vol. I, pp.11-44.) The district court construed Kellis' petition as asserting that his trial counsel was ineffective for failing to: (1) review recordings of the investigating officer's interviews with the victims in order to analyze the interviewing techniques utilized by the officer; (2) investigate evidence that the victims previously made other allegations of sexual misconduct; (3) obtain an expert witness to demonstrate bias in the state's witnesses; (4) allege double jeopardy; (5) contact witnesses who would corroborate Kellis' testimony; and (6) argue that the district court lacked subject matter jurisdiction over the case. (R., Vol. I, pp.165-168.)

The district court appointed counsel to represent Kellis on the successive petition. (R., Vol. I, p.115.) However, after the state filed its motion for summary dismissal (R., Vol. I, pp.116-135), Kellis' counsel, citing I.R.P.C. 1.16 (note 3), 3.1, and 3.3, filed a motion to withdraw (R., Vol. I, pp.148-149). Contemporaneously with this motion, Kellis filed a motion requesting that the district court appoint

substitute, or “conflict,” counsel. (R., Vol. I, pp.150-156.) After a hearing, the district court denied both motions. (R., Vol. I, pp.158-163; Tr., p.22, L.9 – p.25, L.14.)

The district court then entered a notice of intent to dismiss Kellis’ successive petition on the ground that Kellis failed to demonstrate “sufficient reason,” pursuant to I.C. § 19-4908, why his claims were not adequately raised in his initial post-conviction petition. (R., Vol. I, pp.164-170.) Kellis’ appointed counsel then filed a renewed motion to withdraw, citing the same grounds she raised in her initial motion. (R., Vol. I, pp.199-200.) Kellis filed a motion for re-consideration of the district court’s order denying his motion for substitute, or “conflict,” counsel. (R., Vol. I, pp.171-177.) Without conducting an additional hearing, the court granted Kellis’ appointed counsel’s motion to withdraw, but denied Kellis’ motion for re-consideration of its order denying Kellis’ request for substitute counsel. (R., Vol. I, pp.193-196, 206-207.)

Kellis then filed a *pro se* amended successive post-conviction petition, which contained two ineffective assistance of appellate counsel claims. (R., Vol. II, pp.229-266.) Kellis asserted his appellate counsel was ineffective for failing to raise double jeopardy and subject matter jurisdiction claims on direct appeal. (Id.) The district court entered a notice of intent to dismiss these additional two claims on the ground that they were both barred by I.C. § 19-4908 and the doctrine of *res judicata*. (R., Vol. III, pp.502-511.) The district court then summarily dismissed all eight of Kellis’ successive post-conviction petition claims

on the ground that they were all barred by I.C. § 19-4908 and the doctrine of *res judicata*. (R., Vol. III, pp.502-532, 543-547.)

Kellis timely appealed. (R., Vol. III, pp.537-540.) The district court appointed counsel to represent Kellis on the appeal. (R., Vol. III, pp.549-550.) However, the Idaho Supreme Court later granted appointed counsel's motion to withdraw. (11/30/15 Order.) Kellis proceeds *pro se*.

## ISSUES

Kellis states the issues on appeal as:

- A. Did the District Court err by denying Appellant's Motion for Appointment of Conflict Counsel[?]
- B. Did the District Court err when it failed to hold a hearing, as provided by I.R.C.P. Rule 11(b)(2), after appointed post[-]conviction counsel Deborah L. McCormick filed a renewed motion requesting leave to withdraw, and when it was clear that the attorney-client relationship had broke down[?]
- C. Did the District Court err by dismissing Appellant's Amended Second Petition by denying Appellant's Motions to Depose by Written Examination and for Authorization to Employ an Investigator, thus, denying this Appellant the opportunity to obtain the necessary evidence in support of his claims[?]
- D. Did the District Court err by dismissing Appellant's Amended Second Petition after appellant provided sufficient reason to file the claims as per I.C. § 19-4908[?]

(Appellant's brief, p.4.)

The state rephrases the issues on appeal as:

- 1. Has Kellis failed to show that the district court abused its discretion by denying his motion to appoint conflict counsel?
- 2. Has Kellis failed to show that the district court erred by declining to conduct an additional hearing on Kellis' appointed counsel's renewed motion to withdraw?
- 3. Has Kellis failed to show that the district court abused its discretion by denying his motion to conduct discovery?
- 4. Has Kellis failed to show that the district court erred by summarily dismissing his successive post-conviction petition?

## ARGUMENT

### I.

#### Kellis Has Failed To Show That The District Court Abused Its Discretion By Denying His Motion To Appoint Conflict Counsel

##### A. Introduction

Kellis contends that the district court abused its discretion by denying his motion to appoint conflict counsel. (Appellant’s brief, pp.5-11.) Kellis’ argument fails because a post-conviction petitioner has no constitutional or statutory right to substitute counsel, and because in any event, Kellis did not allege an actual conflict with his appointed counsel that either necessitated the appointment of substitute counsel, or required the district court to inquire about any potential conflict.

##### B. Standard Of Review

In a post-conviction proceeding, “[t]he decision to grant or deny a request for court-appointed counsel lies within the discretion of the district court.” Charboneau v. State, 140 Idaho 789, 792, 102 P.3d 1108, 1111 (2004) (citation omitted). “[T]he decision of whether to appoint substitute counsel lies within the discretion of the trial court and will only be reviewed for an abuse of discretion.” State v. Lippert, 152 Idaho 884, 887, 276 P.3d 756, 759 (Ct. App. 2012). On review, the appellate court must determine whether the district court “acted within the boundaries of its discretion, consistent with any legal standards applicable to its specific choices, and whether the court reached its decision by an exercise of reason.” State v. Lafferty, 125 Idaho 378, 381, 870 P.2d 1337, 1340 (Ct. App. 1994).

C. The District Court Acted Well Within Its Discretion In Denying Kellis' Motion To Appoint Conflict Counsel

The right to conflict-free representation derives from the Sixth Amendment as applied to the states by the Due Process Clause of the Fourteenth Amendment. Powell v. Alabama, 287 U.S. 45 (1931). The Sixth Amendment guarantees a criminal defendant the right to counsel during all “critical stages” of the adversarial proceedings against him. Estrada v. State, 143 Idaho 558, 562, 149 P.3d 833, 837 (2006) (citations omitted). Although this right encompasses the first direct appeal, it does not extend to post-conviction proceedings. Lawrence v. Florida, 549 U.S. 327, 336-37 (2007); Pennsylvania v. Finley, 481 U.S. 551, 555 (1987). See also Murphy v. State, 156 Idaho 389, 394, 327 P.3d 365, 370 (2014) (quoting Coleman v. Thompson, 501 U.S. 722, 752 (1991)) (“[T]here is no constitutional right to an attorney in state post-conviction proceedings.”); Hall v. State, 155 Idaho 610, 616, 315 P.3d 798, 804 (2013) (“[T]he right to counsel in post-conviction proceedings is not a constitutional right.” (internal quotations and citations omitted)).

As the Idaho Supreme Court has explained, a post-conviction petition is a civil proceeding and so provides the clearest example of a proceeding to which the Sixth Amendment right to counsel, and the correlative right to conflict-free counsel, do not apply. See Hall, 155 Idaho at 616, 315 P.3d at 804. Because Kellis lacks a Sixth Amendment right to counsel to pursue his post-conviction petition, the district court also had no free-standing duty to inquire into any alleged conflict of interest. Rios-Lopez v. State, 144 Idaho 340, 343-344, 160 P.3d 1275, 1278-1279 (Ct. App. 2007) (procedures required to rule on a request

for substitute counsel made by a criminal defendant with a Sixth Amendment right to counsel do not apply in post-conviction proceedings).

Prior to its repeal in 2013, I.C. § 19-856 provided that a district court could, for “good cause,” assign a substitute attorney to represent a criminal defendant or post-conviction petitioner. I.C. § 19-856 (repealed by S.L. 2013, ch. 220, § 6, eff. July 1, 2013). While the Idaho appellate courts did not define the parameters of what constituted “good cause” for substitution of counsel in a post-conviction proceeding, the Idaho Court of Appeals recognized that “determining whether good cause exists to substitute counsel for a criminal defendant differs from determining whether good cause exists to substitute counsel for an applicant for post-conviction relief” because a post-conviction petitioner, unlike a criminal defendant, has no right to counsel. Rios-Lopez, 144 Idaho at 344, 160 P.3d at 1279.

The state asserts that because there is no constitutional right to post-conviction counsel, and because I.C. § 19-856 has been repealed, a post-conviction petitioner does not have a constitutional or statutory right to substitute counsel, even upon a showing of “good cause.” However, even assuming, *arguendo*, either that the repeal of I.C. § 19-856 did not change the legal landscape for post-conviction petitioners seeking substitute counsel,<sup>1</sup> or that a post-conviction petitioner has the right to conflict-free counsel once counsel has

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<sup>1</sup> The Idaho Court of Appeals has suggested that the legal landscape for criminal defendants and post-conviction petitioners seeking to substitute counsel did not change following the repeal of I.C. § 19-856 because the Idaho appellate courts’ “treatment of the statute was premised largely upon Sixth Amendment principles.” See State v. Anderson, 2015 WL 6951758 (Idaho App. Nov. 9, 2015) (unpublished).

actually been appointed, Kellis has still failed to show he is entitled to relief. Kellis failed to allege either an actual conflict, or even a “vague, unspecified possibility of conflict” that would require a district court to conduct an inquiry in a criminal case. Hall, 155 Idaho at 619, 315 P.3d at 807 (citing Mickens v. Taylor, 535 U.S. 162, 168–169 (2002)).

Instead, in his motion requesting that the district court appoint conflict counsel, Kellis appeared to confuse the concept of actual conflict of interest with personal “conflicts” that may arise between a client and his own counsel. To demonstrate an actual conflict, a defendant or post-conviction petitioner must show: (1) that his counsel actively represented conflicting interests; and (2) that the conflict had an adverse effect. Cuyler v. Sullivan, 446 U.S. 335, 350 (1980); Chippewa v. State, 156 Idaho 915, 921, 332 P.3d 827, 833 (2014). In his motion, Kellis did not allege that his appointed counsel actively represented conflicting interests, or that any conflict had any adverse effect on his counsel’s representation. (See R., Vol. I, pp.150-156.) Instead, Kellis alleged only that his successive post-conviction counsel was ineffective for failing to adequately communicate with him and for failing to amend his successive petition in the manner he requested.<sup>2</sup> (Id.)

Kellis did not have a constitutional or statutory right to substitute counsel. In any event, Kellis failed to allege an actual conflict of interest or even a “vague,

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<sup>2</sup> The state disputes any implied assertion that by initially appointing counsel, the district court necessarily and affirmatively concluded that Kellis’ successive post-conviction claims were potentially meritorious, and that Kellis was thus entitled to substitute counsel once the district court granted appointed counsel’s motion to withdraw from the case. In any event, it does not appear that Kellis made such an argument to the district court.



unspecified possibility of conflict,” that may have required further inquiry from the district court. Kellis has therefore failed to show the district court abused its discretion by denying his motion to appoint conflict counsel.

## II.

### Kellis Has Failed To Show That The District Court Erred In Declining To Conduct An Additional Hearing On His Appointed Counsel’s Renewed Motion To Withdraw

#### A. Introduction

Kellis contends that the district court erred by declining to conduct a hearing on his appointed counsel’s renewed motion to withdraw. (Appellant’s brief, pp.11-13.) A review of the record and the plain language of I.R.C.P. 11(b)(2) reveals that the district court was not required to conduct an additional hearing before ruling on Kellis’ appointed counsel’s *renewed* motion to withdraw. In any event, even if the district court erred, any such error was harmless.

#### B. Standard Of Review

The interpretation of court rules presents a question of law over which appellate courts exercise free review. See Eby v. State, 148 Idaho 731, 734, 228 P.3d 998, 1001 (2010) (interpretation of rules of civil procedure given free review) (citation omitted).

#### C. Idaho Rule Of Civil Procedure 11(b)(2) Did Not Require The District Court To Conduct An Additional Hearing Before Ruling On Kellis’ Appointed Counsel’s Renewed Motion To Withdraw

Idaho Rule of Civil Procedure 11(b)(2) provides, in relevant part:

[N]o attorney may withdraw as an attorney of record for any party to an action without first obtaining leave and order of the court upon a

motion filed with the court, and a hearing on the motion after notice to all parties to the action, including the client of the withdrawing attorney. Leave to withdraw as a counsel of record may be granted by the court for good cause and upon such conditions or sanctions as will prevent any delay in determination and disposition of the pending action and the rights of the parties.

Therefore, pursuant to I.R.C.P. 11(b)(2), no attorney may withdraw from representation of a client in a post-conviction proceeding until a hearing on the attorney's motion to withdraw is conducted by the district court.

In September 2014, Kellis' appointed counsel filed a motion requesting leave to withdraw. (R., Vol. I, pp.148-149.) In support of the motion, Kellis' counsel cited I.R.P.C. 1.16 (note 3), 3.1, and 3.3. (Id.) The district court conducted a hearing on this motion before ultimately denying it. (R., Vol. I, pp.158-163; Tr., p.22, L.9 – p.25, L.14.) The court concluded that appointed counsel demonstrated good cause to withdraw, but that there were, at that time, "no conditions that would 'prevent any delay in determination and disposition of the pending action and the rights of the parties.'" (R., Vol. I, pp.160-161 (quoting I.R.C.P 11(b)(2)).) The court explained that because it was entering a notice of intent to dismiss the underlying petition simultaneously with its order denying Kellis' appointed counsel's motion to withdraw, there was "insufficient time" to stay the case, as would be required by I.R.C.P. 11(b)(2) if appointed counsel was permitted to withdraw. (R., Vol. I, p.161.)

In the next two months, Kellis filed, *pro se*, a response to the district court's notice of intent to dismiss his petition (R., Vol. I, pp.178-190), and a motion to reconsider his motion to appoint conflict counsel (R., Vol. I, pp.171-177). Then, in December 2014, Kellis' appointed counsel filed a "renewed"

motion requesting leave to withdraw. (R., Vol. I, pp.199-200.) The renewed motion relied on the same grounds as the initial motion – I.R.C.P. 1.16 (note 3), 3.1, and 3.3.<sup>3</sup> (Id.) The district court granted this motion without conducting an additional hearing. (R., Vol. I, pp.206-207.)

The plain language of I.R.C.P. 11(b)(2) did not require the district court to conduct an additional hearing upon Kellis' appointed counsel's "renewed" motion to withdraw. Counsel's renewed motion was not a new, distinct, or separate motion. Instead, it repeated the grounds set forth in her initial motion. The district court had already concluded, after a hearing at which Kellis participated, that these grounds constituted "good cause" for counsel's withdrawal from the case. In compliance with I.R.C.P. 11(b)(2), appointed counsel thus did not withdraw until she obtained leave and order from the court and provided notice to Kellis, and until the district court conducted a hearing, after which it concluded that good cause existed for counsel to withdraw.

Kellis has therefore failed to demonstrate that the district court violated I.R.C.P. 11(b)(2) by permitting appointed counsel to withdraw without conducting an additional hearing following counsel's renewed motion to withdraw.

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<sup>3</sup> In the renewed motion, appointed counsel also argued that Kellis' letter to the court indicating that he planned to file *pro se* pleadings "can be construed as a discharge [of appointed counsel]." (R., Vol. I, p.199.) In granting the renewed motion, the district court did not address this alternative argument that Kellis had already discharged his appointed counsel. (R., Vol. I, pp.206-207.)

D. Even If The District Court Erred By Permitting Counsel To Withdraw Without Conducting An Additional Hearing Following Appointed Counsel's Renewed Motion To Withdraw, Any Such Error Was Harmless

Idaho Rule of Civil Procedure 61 provides that a district court “must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” See also McClure Engineering, Inc. v. Channel 5 KIDA, 143 Idaho 950, 955, 155 P.3d 1189, 1154 (Ct. App. 2006) (holding that an attorney’s failure to comply with the notice requirements of I.R.C.P 11(b)(2) and I.R.C.P. 7(b)(3)(a) did not invalidate the subsequent withdrawal order because the aggrieved party failed to demonstrate that the deficient notice prejudiced them in some way).

In this case, even if the district court erred by permitting Kellis’ appointed counsel to withdraw without conducting an additional hearing following the renewed motion to withdraw, any such error was harmless pursuant to I.R.C.P. 61 because Kellis has failed to demonstrate prejudice.

Kellis had ample opportunity to be heard in response to both appointed counsel’s initial motion to withdraw, and the renewed motion to withdraw. Kellis was present, via telephone, at the hearing on appointed counsel’s initial motion to withdraw, and had the opportunity to present argument at that hearing. (Tr., p.22, L.9 – p.25, L.14.) After appointed counsel filed her renewed motion to withdraw, Kellis received notice and filed a response to that motion. (R., Vol. I, pp.201-203.) On appeal, Kellis has not attempted to argue how an additional hearing on the renewed motion would have resulted in a different outcome. (See Appellant’s brief, pp.11-13.) Additionally, as discussed above, there is nothing in

the record to indicate that Kellis was constitutionally or statutorily entitled to substitute, or “conflict” counsel.

Idaho Rule of Civil Procedure 11(b)(2) did not require the district court to conduct an additional hearing before granting Kellis’ appointed counsel’s renewed motion to withdraw. In any event, even if the district court erred, any such error was harmless pursuant to I.R.C.P. 61 because Kellis has failed to demonstrate prejudice.

### III.

#### Kellis Has Failed To Show That The District Court Abused Its Discretion By Denying His Motion To Conduct Discovery

##### A. Introduction

Kellis contends that the district court abused its discretion by denying his motion to conduct discovery in the successive post-conviction proceeding. (Appellant’s brief, pp.13-15.) A review of the record reveals that the district court acted well within its discretion to deny Kellis’ discovery motions.

##### B. Standard Of Review

Discovery during post-conviction relief proceedings is a matter left to the sound discretion of the district court. I.C.R. 57(b); Raudebaugh v. State, 135 Idaho 602, 605, 21 P.3d 924, 927 (2001) (citing Fairchild v. State, 128 Idaho 311, 319, 912 P.2d 679, 687 (Ct. App. 1996)). On review, the appellate court must determine whether the district court “acted within the boundaries of its discretion, consistent with any legal standards applicable to its specific choices, and

whether the court reached its decision by an exercise of reason.” Lafferty, 125 Idaho at 381, 870 P.2d at 1340.

C. The District Court Acted Well Within Its Discretion In Declining Kellis’ Motion To Conduct Discovery

Discovery generally available in civil proceedings is not available in post-conviction proceedings “unless and only to the extent ordered by the trial court.” I.C.R. 57(b); see also Jacobsen v. State, 99 Idaho 45, 50, 577 P.2d 24, 29 (1978); Aeschliman v. State, 132 Idaho 397, 402, 973 P.2d 749, 754 (Ct. App. 1999). “In order to be granted discovery, a post-conviction applicant must identify the specific subject matter where discovery is requested and why discovery as to those matters is necessary to his or her application.” State v. LePage, 138 Idaho 803, 810, 69 P.3d 1064, 1071 (Ct. App. 2003), (citing Aeschliman, 132 Idaho at 402-403, 973 P.2d at 754-755).

“Unless discovery is necessary to protect an applicant’s substantial rights, the district court is not required to order discovery.” Raudebaugh, 135 Idaho at 605, 21 P.3d at 927. Moreover, discovery is not a mechanism for finding out if evidence supports claims, and this “fishing expedition” discovery is discouraged. Murphy v. State, 143 Idaho 139, 148, 139 P.3d 741, 750 (Ct. App. 2006) (“Fishing expedition’ discovery should not be allowed. The UPCPA provides a forum for known grievances, not an opportunity to research for grievances.”).

In this case, after the district court filed its initial notice of intent to dismiss Kellis’ successive post-conviction claims on the ground that the claims were barred by I.C. § 19-4908, Kellis filed three motions requesting that the court

permit him to conduct discovery. (R., Vol. I, pp.212-223, 227-228.) Specifically, Kellis requested: (1) that the court appoint a private investigator “to locate and interview numerous witnesses or potential witnesses”; (2) that he be permitted to depose his trial counsel; and (3) that the respondent provide certain transcripts. (R., Vol. I, pp.212-218.)

The district court denied these motions. (R., Vol. II, pp.383-389.) The court correctly recognized that each of Kellis’ discovery requests were aimed towards developing the merits of his successive post-conviction claims. (R., Vol. II, pp.386-387.) Thus, these discovery requests, and the information Kellis sought to obtain, would not have helped Kellis overcome I.C. § 19-4908, the procedural bar that was the basis of the district court’s notice of intent to dismiss and subsequent summary dismissal order. Because the district court did not reach the merits of Kellis’ claims, Kellis cannot show that his merits-based discovery requests were necessary to protect his substantial rights.

Kellis has failed to demonstrate that his requested discovery would have assisted him in overcoming the procedural bar of I.C. § 19-4908. He has therefore failed to show that the requests were necessary to protect his substantial rights, or that the district court abused its discretion in denying the requests.

#### IV.

#### Kellis Has Failed To Show That The District Court Erred By Summarily Dismissing His Successive Post-Conviction Petition

##### A. Introduction

Kellis contends that the district court erred by summarily dismissing his post-conviction petition. (Appellant's brief, pp.15-25.) Specifically, Kellis appears to contend that the district court erred in concluding that his successive post-conviction claims were barred by I.C. § 19-4908. (Id.) A review of the record reveals that the district court properly concluded that Kellis failed to show sufficient reason to justify a successive petition.

##### B. Kellis' Successive Post-Conviction Petition Is Precluded By I.C. § 19-4908

Post-conviction proceedings are governed by the Uniform Post-Conviction Procedure Act. I.C. § 19-4901, *et seq.* A petition for post-conviction relief initiates a new and independent civil proceeding in which the petitioner bears the burden of establishing that he is entitled to relief. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007); State v. Bearshield, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983).

A successive petition for post-conviction relief is generally not permissible. I.C. § 19-4908 (claims not raised in initial post-conviction proceedings generally waived). Only in cases where the petitioner can show "sufficient reason" why claims were "inadequately presented in the original case" may he have the opportunity to re-litigate them. Griffin v. State, 142 Idaho 438, 441, 128 P.3d 975, 978 (Ct. App. 2006) (citation omitted); see also I.C. § 19-4908.



Kellis argued that his successive petition was justified because: (1) his initial post-conviction counsel was ineffective in numerous respects, including for failing to raise certain claims that Kellis requested to be raised; and (2) he did not personally receive certain recordings of investigators' interviews with the victims until Jul 18, 2013, after the first post-conviction proceeding concluded. (R., Vol. III, pp.395-487, 533-536; Appellant's brief, pp.15-25.)

The district court properly rejected these arguments and summarily dismissed Kellis' petition. (R., Vol. III, pp.512-533, 543-548.) The court correctly recognized that Kellis' argument that his filing of a successive petition was justified by alleged ineffective assistance of his initial post-conviction counsel was precluded by Murphy v. State, 156 Idaho 389, 392-395, 327 P.3d 365, 368-371 (2014). (R., Vol. III, pp.517-522, 543-544.) In Murphy, the Idaho Supreme Court overruled prior precedent and held that ineffective assistance of post-conviction counsel cannot constitute "sufficient reason" for filing a successive petition pursuant to I.C. § 19-4908. Murphy, 156 Idaho at 392-395, 327 P.3d at 368-371. The Court recognized that because, as the United States Supreme Court has held, there is no constitutional right to an attorney in state post-conviction proceedings, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings, even as a means of attempting to overcome state procedural hurdles. Id.

The district court also correctly rejected Kellis' argument that his late receipt of certain recordings and other evidence justified the filing of his successive petition. (R., Vol. I, pp.165-166; Vol III, pp.514, 528-529.) While the

discovery of “new evidence” can theoretically constitute “sufficient reason” to file a successive petition pursuant to I.C. § 19-4908, see Lopez v. State, 157 Idaho 795, 798, 339 P.3d 1199, 1202 (Ct. App. 2014), Kellis’ assertion that he was not able to personally review recordings of investigators’ interviews is not a “new evidence” claim. Instead, this assertion is essentially a re-framing of claims that Kellis raised in his initial post-conviction petition – that his trial counsel was ineffective for failing to review these recordings, and for failing to investigate evidence that the victims previously made other allegations of sexual misconduct. Kellis has not alleged that his trial counsel (or initial post-conviction counsel) was somehow precluded from obtaining or reviewing this evidence. A *pro se* successive post-conviction petitioner cannot circumvent the I.C. § 19-4908 procedural bar simply by asserting that he personally, in a *pro se* capacity, accessed certain evidence for the first time during the successive post-conviction proceeding.

Kellis has failed to demonstrate that the district court erred in concluding that his successive post-conviction petition was barred by I.C. § 19-4908. This Court should therefore affirm the district court’s summary dismissal of Kellis’ successive petition.

C. In The Alternative, Each Of Kellis’ Successive Post-Conviction Claims Are Barred By The Doctrine Of *Res Judicata*

“In post-conviction proceedings, Idaho appellate courts have applied the related principles of *res judicata* to bar an attempt to raise, in an application for post-conviction relief, the same issue previously decided in a direct appeal.”

Schultz v. State, 153 Idaho 791, 797-98, 291 P.3d 474, 480-81 (Ct. App. 2012) (citing State v. Beam, 115 Idaho 208, 210–11, 766 P.2d 678, 680–81 (1988); State v. Dempsey, 146 Idaho 327, 330, 193 P.3d 874, 877 (Ct. App. 2008); Knutsen v. State, 144 Idaho 433, 439, 163 P.3d 222, 228 (Ct. App. 2007); LePage, 138 Idaho at 811, 69 P.3d at 1072). “The doctrine of res judicata covers both claim preclusion (true res judicata) and issue preclusion (collateral estoppel).” Ticor Title Co. v. Stanion, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007) (citing Hindmarsh v. Mock, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002)). “Separate tests are used to determine whether claim preclusion or issue preclusion applies.” Id. (citing D.A.R., Inc. v. Sheffer, 134 Idaho 141, 144, 997 P.2d 602, 605 (2000)).

For claim preclusion (true res judicata) to bar a subsequent action there are three requirements: (1) same parties; (2) same claim; and (3) final judgment. Id. (citing Hindmarsh, 138 Idaho at 94, 57 P.3d at 805; Farmers Nat’l Bank v. Shirey, 126 Idaho 63, 68, 878 P.2d 762, 767 (1994)).

In this case, the district court concluded, as an alternative basis for summary dismissal, that each of Kellis’ successive post-conviction claims was barred by the doctrine of *res judicata*. (R., Vol. III, pp.509-510, 530-531, 543-545.) On appeal, while Kellis has expressly declined to concede that his claims were barred by the *res judicata* doctrine (Appellant’s brief, p.25), he has provided no argument or authority supporting any implied proposition that the district court

erred by utilizing this ground for dismissal.<sup>4</sup> “A party waives an issue on appeal if either authority or argument are lacking.” State v. Freitas, 157 Idaho 257, 267, 335 P.3d 597, 607 (Ct. App. 2014) (citing State v. Zichko, 129 Idaho 259, 263, 923 P.2d 966, 970 (1996)). The state asserts that the district court correctly applied the *res judicata* doctrine, and relies on the analysis of the district court for this proposition. (See R., Vol. III, pp.509-510, 530-531, 543-545.) This Court may affirm the district court’s summary dismissal of Kellis’ successive petition on this alternative ground.

#### CONCLUSION

The state respectfully requests that this Court affirm the district court’s order summarily dismissing Kellis’ successive petition for post-conviction relief.

DATED this 10th day of May, 2016.

/s/ Mark W. Olson  
MARK W. OLSON  
Deputy Attorney General

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<sup>4</sup> Further, Kellis acknowledges on appeal that “the [d]istrict [c]ourt presents a convincing argument in regards to sufficient reason and *res judicata*. As a [p]ro se litigant I am certain the [c]ourt is correct in their [sic] position and understanding of the law as well as how it applies to this current case.” (Appellant’s brief, p.21.)

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 10th day of May, 2016, caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

TIMOTHY ANDREW KELLIS  
INMATE #90973  
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/s/ Mark W. Olson  
MARK W. OLSON  
Deputy Attorney General

MWO/dd