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IN THE SUPREME COURT OF THE STATE OF IDAHO

STEVE A. CHERRY,	)	
	)	No. 45132
Petitioner-Appellant,	)	
	)	Kootenai County Case No.
v.	)	CV-2004-8445
	)	
STATE OF IDAHO,	)	
	)	
Defendant-Respondent.	)	
_____	)	

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**BRIEF OF RESPONDENT**

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

---

**HONORABLE JOHN T. MITCHELL  
District Judge**

---

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## STATEMENT OF THE CASE

### Nature Of The Case

Steve A. Cherry appeals from the district court's order denying his motion for permission to file a successive post-conviction petition.

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

Cherry filed a motion in a previously final post-conviction case requesting permission to file a successive petition. (R., pp. 37-94.) The district court denied the motion, concluding there was not sufficient reason to file a successive petition and that the petition was untimely. (R., pp. 95-100.) Cherry filed a notice of appeal within 42 days of the district court's order. (R., pp. 102-12.)

## ISSUE

Cherry states several issues on appeal. (Appellant's brief, p. 8.) The state rephrases the issue as:

Has Cherry failed to show error in the district court's denial of Cherry's motion to file a successive post-conviction petition because Cherry failed to show sufficient reason to file a successive petition and because the claims Cherry was attempting to raise were untimely?

## ARGUMENT

### Cherry's Proposed Successive Petition Was Untimely And A Barred Successive Petition

#### A. Introduction

Cherry shot and killed his former girlfriend, shot and wounded a man with her at the time, and threatened to shoot the former girlfriend's roommate. State v. Cherry, 139 Idaho 579, 581, 83 P.3d 123, 125 (Ct. App. 2003). A jury convicted him of first-degree murder, aggravated battery, and aggravated assault, all with firearm enhancements. Id. His convictions were affirmed on direct appeal. Id. at 586, 83 P.3d at 130.

Cherry filed a petition for post-conviction relief in 2004, which was denied. (R., pp. 2, 95.) "From time to time" he files motions in the criminal case or this, the post-conviction case. (Id.) He filed a "similar motion" to the one at issue here "about a decade ago." (R., p. 96.) The district court dismissed the motion "for the same reasons," namely that there were no grounds to file a successive petition and the claims were not timely. (R., pp. 96-100.)

Cherry asserts that the "main focus of this appeal" is the dismissal of his 2005 and 2007 appeals from denial of post-conviction relief, which denied him access to the courts. (Appellant's brief, pp. 2-3, 8.) Cherry has failed to show that the district court erred by denying Cherry the chance to bring an untimely successive petition for post-conviction relief.

#### B. Standard Of Review

The appellate court exercises free review over the district court's application of the Uniform Post Conviction Procedure Act. Evensiosky v. State, 136 Idaho 189, 190, 30 P.3d 967, 968 (2001).

C. The District Court Properly Found The Motion To File An Untimely And Successive Petition Without Merit

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. An analysis of whether “sufficient reason” exists to file a successive petition includes an analysis of whether the petition was filed within a “reasonable time” after the petitioner’s discovery of the factual basis for the claim. Charboneau v. State, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007). “In determining what a reasonable time is for filing a successive petition, [the court] will simply consider it on a case-by-case basis, as has been done in capital cases.” Id. at 905, 174 P.3d at 875.

The district court concluded Cherry’s motion to file a successive petition was “similar” to a motion filed “a decade ago.” (R., p. 96.) Application of the legal standards set forth in the preceding paragraph show the district court correctly concluded that a ten-year delay from a previous motion where the claims were denied for the same reason did not show “sufficient reason” to file a successive petition or that the claims were brought within a reasonable time of discovery of the factual basis for the claims. Finally, the district court concluded that Cherry’s claim of “actual innocence” was not an exception to these general rules. (R., pp. 97-100.) Even if an “actual innocence” exception to the successive petition and timeliness bars were required by due process, Cherry’s unsupported claim of self-defense (R., pp. 18-19) did not show a *prima facie* claim of actual innocence. Rhoades v. State, 148 Idaho 247, 253, 220 P.3d 1066, 1072 (2009) (to make a *prima facie* claim of



actual innocence “the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence” (quotations and citation omitted)).

Cherry’s appellate arguments seem to center around the fact his 2005 and 2007 appeals were dismissed for failure to pay applicable fees. (Appellant’s brief, pp. 2-5, 52.) He also argues the merits of the claims he wishes to assert in the successive petition. (Appellant’s brief, pp. 8-51.) To file a successive petition, however, Cherry must show “sufficient reason” why the claim “was not asserted or was inadequately raised *in the original, supplemental, or amended application.*” I.C. § 19-4908 (emphasis added). See also Griffin v. State, 142 Idaho 438, 441, 128 P.3d 975, 978 (Ct. App. 2006) (petitioner must show “sufficient reason” why claims were “*inadequately presented in the original case*” (emphasis added)). Cherry’s claims that he did not have a proper opportunity to appeal the denial of his claims is not grounds for a successive petition to reassert those claims.

Even if dismissal of his appeals were a proper ground for filing a successive petition the claims are still untimely. Cherry knew of the factual basis (the dismissal of his appeals in 2005 and 2007) for years prior to the present motion, so the 2017 claim that the dismissal of those appeals violated his due process rights was not raised within a reasonable time.

Cherry has failed to show that he presented a “sufficient reason” to file a successive petition. His claim that dismissal of his prior appeals constitutes such a reason fails as a matter of law. Moreover, Cherry knew the factual basis for his claim years before the present motion. He has failed to show the district court erred by denying his motion to file a successive petition.

CONCLUSION

The state respectfully requests this Court to affirm the denial of Chery's motion to file a successive petition.

DATED this 29th day of March, 2018.

/s/ Kenneth K. Jorgensen  
KENNETH K. JORGENSEN  
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 29th day of March, 2018, served two true and correct paper copies of the foregoing BRIEF OF RESPONDENT by placing the copies in the United States mail, postage prepaid, addressed to:

STEVE A. CHERRY  
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OROFINO, ID 83544

/s/ Kenneth K. Jorgensen  
KENNETH K. JORGENSEN  
Deputy Attorney General

KKJ/dd