

IN THE SUPREME COURT OF THE STATE OF IDAHO

VALENTINO ALEX HERRERA,)
) No. 47096-2019
 Petitioner-Appellant,)
) Cassia County Case No.
 v.) CV16-19-29
)
 STATE OF IDAHO,)
)
)
 Defendant-Respondent.)
 _____)

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CASSIA**

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STATEMENT OF THE CASE

Nature Of The Case

Valentino Alex Herrera appeals from the district court's summary dismissal of his third petition for post-conviction relief.

Statement Of The Facts And Course Of The Proceedings

The district court summarized the underlying facts and procedural history of Herrera's cases as follows:

In the underlying [criminal] case, Cassia County CR-2006-3507, Petitioner [Herrera] was convicted of battery on a peace officer by a jury. After being convicted of a persistent violator enhancement in a new trial on that issue, Petitioner was sentenced to a term of 30 years, with 10 fixed. Subsequently, Petitioner filed a direct appeal raising various issues, including prosecutorial misconduct consisting of a false statement during trial. The Court of Appeals affirmed the conviction, review was denied on January 11, 2012, and remittitur occurred on January 27, 2012. *State v. Herrera*, 152 Idaho 24, 266 P.3d 499 (Ct. App. 2011) [(hereinafter "Herrera I")].

In 2013, Petitioner timely filed for post-conviction relief on various grounds, including denial of the right to due process and ineffective assistance of trial and appellate counsel. *See* Cassia County Case No. CV-2013-1. However, these claims were summarily dismissed by the district court, and the dismissal was affirmed on appeal. *Herrera v. State*, No. 42351, [2016 WL 1177735] (Idaho Ct. App. March 25, 2016) (unpublished) [(hereinafter "Herrera II")].

Petitioner filed a successive petition for post-conviction relief while the appeal was pending, again alleging ineffective assistance of counsel and due process violations amongst other claims. *See* Cassia County Case No. CV-2016-23. The district court dismissed the action as time barred and barred by res judicata. The Court of Appeals affirmed on August 2, 2017, remitting the case on December 8, 2017. *Herrera v. State*, No. 44083, 2017 WL 3273932 (Idaho Ct. App. Aug. 2, 2017) (unpublished) [(hereinafter "Herrera III")]. The Idaho Supreme Court denied a writ of mandamus [sic] on January 23, 2018.

(R., pp.664-65.)

Herrera subsequently filed a Rule 35 motion to correct an illegal sentence, which the district court denied. State v. Herrera, No. 47359, 2020 WL 4917609, at *1 (Idaho Ct. App. Aug. 21, 2020) (unpublished) (hereinafter “Herrera IV”). The Court of Appeals affirmed the denial of the Rule 35 motion after concluding it “raised significant factual issues that could not be resolved on the face of the judgment.” Id. at *3.

In January of 2019, Herrera filed a third petition for post-conviction relief, supported by several hundred pages of exhibits, commencing the instant case. (R., pp.5-510.) Herrera additionally moved for the appointment of post-conviction counsel. (R., pp.511-17.) The state filed an answer alleging, among other things, that Herrera’s petition was time barred, and that his claims were barred by res judicata. (R., p.523.)

The district court issued a notice of intent to dismiss Herrera’s third petition. (R., pp.526-531.) The court began by construing the third petition as “alleging ineffective assistance of counsel and due process violations by prosecutorial misconduct.” (R., p.527.) The court concluded that Herrera’s petition, like the petition he filed in Herrera III, was barred by the statute of limitations:

Here, the statute of limitations began to run upon the completion of Petitioner’s direct appeal from the underlying case. That appeal was completed January 27, 2012, [in Herrera I,] when the Court of Appeals, after affirming the District Court’s decision, remitted the case after review had been denied. As Petitioner’s present action was not filed until 2019, approximately 7 years later, it is time barred. Petitioner’s second petition has no effect on this time frame, but in any event it has been over a year since the related proceedings for that petition were completed [in Herrera III].

(R., p.528.)

The district court found that Herrera “has not made any argument or presented any facts supporting tolling in either this petition or his previous petition,” and that he “has not done

anything for the present case that would bypass the same bars that applied to his previous petitions.” (Id.) The court accordingly found that “[w]ithout any facts supporting tolling of the statute of limitations, this Court is required to dismiss the action.” (Id.)

The district court additionally found that Herrera’s claims were “barred by waiver or res judicata.” (R., p.529.) Herrera’s “ineffective assistance of counsel claim” had “already been considered” in Herrera II, the appeal from “Petitioner’s first post-conviction relief petition.” (Id.) Beyond that, Herrera had “not presented any new evidence or support for his ineffective assistance of counsel claim that was not available for his previous petitions.” (Id.) The court concluded that “res judicata bars reconsideration of these issues.” (Id.)

The district court went on to find that Herrera’s “argument based on due process” was “similarly barred.” (R., p.530.) That was because Herrera already “raised due process” on direct appeal, in Herrera I, and “during his first petition for post-conviction relief,” in Herrera II. (Id.) Moreover, “[a]ll evidence” Herrera presented “for his current claim is from the original trial.” (Id.)

The court concluded by noting that Herrera “has argued that” the third petition “is not barred as successive because he is actually innocent.” (Id.) However, the court found this purported “‘actual innocence gateway’ ... appears to be based on federal habeas law,” which was inapplicable to an Idaho petition for post-conviction relief, and there “is no parallel rule under Idaho law.” (Id.) Even assuming such a rule existed, the court found it was meritless:

Additionally, Petitioner has not demonstrated a sufficient factual basis to warrant any consideration of innocence even if applicable. Petitioner explicitly states that his claims for relief are not based on innocence, but on the procedural errors of ineffective assistance of counsel and denial of due process by prosecutorial misconduct, use of perjured testimony, and misrepresentations. Petitioner only presents facts related to the procedure at trial and decision of counsel in handling his case, not evidence showing innocence.

(Id. (internal citations omitted).)

The district court accordingly held that Herrera's "claim[s] will be dismissed in 20 days" unless Herrera demonstrated "a material issue of fact as to the above issues." (R., p.531.) Because the court found "no reasonable person with adequate means would retain counsel for a petition that would fail," insofar as "it was filed outside the statute of limitations and only alleged claims barred by waiver and res judicata," the court denied Herrera's motion for counsel. (R., p.533.) After Herrera did not file a timely response to the court's notice of intent to dismiss, the district court entered an order and judgment summarily dismissing Herrera's third petition. (R., pp.544-52.)

Herrera subsequently filed an "Amended Third Petition For Post-Conviction Relief" and exhibits in support. (R., p.553-648.) He also filed a motion for reconsideration and memorandum and affidavit in support (R., pp.649-60), in which he alleged the "Amended Third Petition" had been placed in the prison mail system within his deadline to respond to the court's notice of intent to dismiss (See R., p.658). The district court agreed that, under the mailbox rule, the "Amended Third Petition" was a timely filed response to its notice of intent to dismiss. (R., p.672.) Thus, the court granted Herrera's "Motion to Reconsider under I.R.C.P. 60(b)," "set[] aside the Judgment and Order of Dismissal entered on April 2, 2019," and held that Herrera's

“Amended Third Petition for Post-Conviction Relief will be considered as a response to this Court’s prior notice of intent to dismiss.”¹ (R., p.671.)

The district court concluded that Herrera’s response “fail[ed] to present any arguments or facts that overcome the bars of timeliness or res judicata as articulated in this Court’s notice of intent to dismiss.” (R., p.664.) Herrera still failed to show that the “approximately 7 years”-late third petition was not untimely, and Herrera had “not made any argument or presented any facts supporting tolling” the statute of limitations. (R., p.667.) And Herrera’s claims were still barred by waiver under I.C. § 19-4908, or res judicata (or both). (R., pp.667-69.)

Finally, the court revisited Herrera’s claims of “actual innocence,” in light of Herrera’s response:

Petitioner has argued that his petition is not barred as successive because he is actually innocent and that he raises new facts. Unlike his original petition, which contained little direct discussion of this issue, Petitioner’s Amended Petition focuses on this issue. However, Petitioner’s argument is based only on his conclusion that the victim in the original offense did not qualify as a peace officer as required under the statute of conviction. His evidence stems from a certain certificate. However, this evidence has already been presented, and the issue decided by the Court of Appeals. Post-conviction relief “is not a substitute for nor

¹ The court later used language that suggested it was considering the “Third Amended Petition” not as a response to its notice of intent to dismiss, but as a true amended petition. For example, its final dispositive order was entitled “Order to Dismiss *Amended* Third Petition for Post-Conviction Relief,” which stated “[t]he issue presented is whether Petitioner’s *Amended* Petition raises a material issue of fact.” (R., p.664 (emphasis added).) But Herrera never sought, and the court never granted, the requisite leave to file an amended petition. I.C. § 19-4906(b); Cole v. State, 135 Idaho 107, 110, 15 P.3d 820, 823 (2000) (noting “in a case ... where a default is pending and no response is made within twenty days of the court’s notice of dismissal, an applicant for post-conviction relief must obtain leave of the court before filing an amended application”). Moreover, this contradicts what the court expressly held—that the “Third Amended Petition” would be “considered as a *response* to this Court’s prior notice of intent to dismiss,” not a new petition. (R., p.671 (emphasis added).) The state therefore interprets the court’s reference to Herrera’s “amended” petition as either a typographical error or as a naming convention, not a legal conclusion that Herrera’s third petition had been replaced by an amended third petition.

does it affect any remedy incident to the proceedings in the trial court, or of an appeal from the sentence or conviction.” Idaho Code § 19-4901.

(R., p.668.)

Because the court found “the issues presented” in the third petition had “already been raised, and there are no new facts or arguments presented that were not unascertainable or unavailable during Petitioner’s previous proceedings,” it concluded “there is no sufficient reason to reconsider these claims.” (R., p.669.) The district court re-entered an order and judgment summarily dismissing Herrera’s petition. (R., pp.662-70.) Herrera timely appealed. (R., pp.674-77.)

ISSUES

Herrera states the issues on appeal as:

Did the district court dismiss the third Petition without due regard to [the] Actual Innocence claim.

Did Petitioner's [Attorneys] fail to be effective in this case and violate Petitioner[']s 6th Amendment of the Federal Constitution, by failing to investigate.

Did the [Prosecutors] violate Petitioner[s'] right to due process by their misconduct, 14th Amendment[.]

Did the Idaho Court of Appeals violate Petitioner's Right to due process under the 14th Amendment of the Constitution and the State of Idaho Constitution by failing to apply unambiguous [statutes] as written.

(Appellant's brief, p.4.)

The state rephrases the issues as:

Has Herrera failed to show the district court erred in summarily dismissing his untimely, meritless third petition for post-conviction relief?

ARGUMENT

Herrera Fails To Show The District Court Erred In Dismissing His Untimely, Meritless Third Petition For Post-Conviction Relief

“Applications for post-conviction relief under the UPCPA initiate civil proceedings in which, like a civil plaintiff, the applicant must prove his or her allegations by a preponderance of the evidence.” McKay v. State, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010) (citing Hauschulz v. State, 144 Idaho 834, 838, 172 P.3d 1109, 1113 (2007); I.C.R. 57(c)). Summary dismissal is appropriate where the petitioner’s evidence raises no genuine issue of material fact. Workman v. State, 144 Idaho 518, 522, 164 P.3d 798, 802 (2007). On review of a summary dismissal of a post-conviction petition, “this Court will determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file and will liberally construe the facts and reasonable inferences in favor of the non-moving party.” Id. at 523, 164 P.3d at 803.

On appeal, Herrera shows no genuine issue of material fact that his third petition for post-conviction relief should survive summary dismissal. The district court correctly dismissed Herrera’s third petition for post-conviction relief because, among other things, it was plainly untimely. (R., p.666-67.) “The limitation period of I.C. § 19-4902 begins to run once the Idaho Supreme Court or Court of Appeals issues a remittitur,” and a petition must be “filed within a year of a ‘proceeding following an appeal’ of the underlying action it challenges.” Hauschulz v. State, 144 Idaho 834, 837, 172 P.3d 1109, 1112 (2007); I.C. § 19-4902(a). Herrera’s petition was filed “approximately 7 years” after the remittitur issued in Herrera’s direct appeal. (R., p.667.) Moreover, Herrera had “not made any argument or presented any facts supporting tolling

in either this petition or his previous petition.” (R., p.667.) Thus, the district court correctly concluded that Herrera’s petition was untimely.

On appeal, Herrera fails to show any error. To the extent his opening brief can be deciphered, Herrera fails to address the timeliness issue head on. Instead, Herrera appears to focus on the merits of his underlying claims, repackaging them as “actual innocence” claims (which fail in their own right, as explained below). (See Appellant’s brief.) But Herrera never clearly asserts, much less demonstrates, that his petition was timely, or that the limitation period should be tolled. (See id.)

This is not the first time Herrera has attempted to bypass the statute of limitations by pressing the merits of his underlying claims. The Idaho Court of Appeals rejected his prior attempt, in Herrera III, where it concluded Herrera’s second petition was untimely:

The district court summarily dismissed Herrera’s successive petition because it was not timely filed. The district court acted properly in doing so because Herrera’s successive petition was filed outside the one-year statute of limitation, and Herrera did not set forth a sufficient reason for the late filing. The remittitur in the underlying case was issued on January 11, 2012. Herrera’s initial petition for post-conviction relief was filed on December 24, 2012. Approximately three years later, on January 15, 2016, Herrera filed his successive petition. The district court issued a notice of intent to dismiss the successive petition, indicating that the petition was not timely filed and setting forth the circumstances in which the one-year limitation period may be equitably tolled. However, in Herrera’s lengthy answer to the notice of intent, he did not provide a sufficient reason for the late timing or even argue that the statute of limitation should be equitably tolled. Nor does Herrera provide such argument on appeal. Herrera simply ignores the timing issue and instead focuses on his underlying arguments. Because Herrera does not argue the statute of limitation should be tolled or provide a sufficient reason for the late filing, the district court did not err in summarily dismissing Herrera’s successive petition.

Herrera III, 2017 WL 3273932 *3.

That exact same rationale applies here. If Herrera’s second petition was untimely then the third petition is, by necessity, also untimely. And because Herrera continues to fail to show

that the limitation period would have been tolled, the third petition was barred by the statute of limitation. It was properly summarily dismissed.

Beyond that, the district court correctly dismissed Herrera's third petition because his claims "of ineffective assistance of counsel and due process violations due to prosecutorial misconduct" were "barred by waiver or res judicata." (R., p.529.) To the extent the "ineffective assistance of counsel claim" had "already been considered in" Herrera's first petition (*id.*), it is subject to issue preclusion. "Under Idaho law, issue preclusion bars an issue from being relitigated if, *inter alia*, 'the issue decided in the prior litigation was identical to the issue presented in the present action' and 'the issue sought to be precluded was actually decided in the prior litigation.'" Severson v. State, 159 Idaho 517, 521, 363 P.3d 358, 362 (2015) (quoting Ticor Title Co. v. Stanion, 144 Idaho 119, 124, 157 P.3d 613, 618 (2007)).

While difficult to parse, at least some of Herrera's allegations of ineffective assistance of trial counsel (R., p.555-56) appear to mirror issues already raised and actually decided in Herrera II, 2016 WL 1177735 **5-9. Or, to the extent Herrera's ineffective assistance claims were *not* litigated in the first round of post-conviction litigation, he waived them pursuant to Idaho Code § 19-4908. Johnson v. State, 158 Idaho 852, 856, 353 P.3d 1086, 1090 (Ct. App. 2015). Moreover, the district court rightly found Herrera failed to show any new claims were "not [sic] unascertainable or unavailable" at the time of the first petition, the narrow exception to the rule. (R., pp.667-69.) In any event, the district court correctly found these claims were "barred by waiver or res judicata." (R., p.529.)² For the same reasons, the district court correctly found that

² The district court's final order dismissing the third petition did not restate waiver as a basis for dismissal. (R., p.669.) However, the court's repetition of the "unascertainable or unavailable" language suggests it still considered waiver a basis for summary dismissal. (See id.)

Herrera’s due process claims—which were either raised in Herrera I and/or Herrera II, or subject to waiver—were “similarly barred.” (R., p.668.)

As he did below, Herrera appears to argue on appeal that “actual innocence” should somehow provide a gateway for asserting these untimely, procedurally defaulted and/or waived claims in the third petition. (Appellant’s brief, p.9.) But while Herrera cites authority showing such a gateway exists in *federal* habeas litigation (see Appellant’s brief, p.11 (citing Schlup v. Delo, 513 U.S. 298 (1995))), he fails to identify any state-court analog. See also Rhoades v. State, 148 Idaho 247, 253, 220 P.3d 1066, 1072 (2009) (declining to decide “whether due process requires a free-standing actual innocence exception to the application of I.C. § 19-4902”).

Even assuming a federal “actual innocence” gateway could provide a makeshift end-run around procedural default in state court, Herrera shows no actual innocence. His claims do not remotely meet the high bar of showing actual innocence in Idaho: “that it is more likely than not that no reasonable juror would have convicted” Herrera “in the light of the new evidence.” Abbott v. State, No. 40249, 2013 WL 5316899, at *2 (Idaho Ct. App. Sept. 23, 2013). Indeed, Herrera fails to show that his claims or the supporting evidence are even *new*; as the court alluded to below, Herrera’s “actual innocence” claims simply appear to be his already-rejected merits claims. (See Appellant’s brief, pp.9-24; R., p.530 (“Petitioner only presents facts related to the procedure at trial and decisions of counsel in handling his case, not evidence showing innocence.”).) Likewise, Herrera’s exhibits in support of his third petition appear to be “from the original trial” (R., 530), or, more often, just copies of transcripts, pleadings, and judicial opinions from the many cases preceding this one (see, e.g., R., pp.593-602).

In short, Herrera’s “actual innocence” claims appear to simply repurpose and reassert his merits claims. As the district court put it, “this evidence has already been presented, and the

issue decided by the Court of Appeals.” (R., p.668.) These claims would therefore be barred by res judicata, or fail on the merits (for the reasons already found by Idaho’s appellate courts), but they would not show “actual innocence” by any stretch of the doctrine. By definition, Herrera’s rejected merits claims cannot *themselves* be the “gateway” to their own relitigation.

On that note, Herrera’s petition appears to be just the latest in a series of attempts to relitigate his enduring central thesis—that his victim was not a peace officer. Compare Herrera I, 152 Idaho at 27, 266 P.3d at 502 (arguing “that the State did not introduce sufficient trial evidence to prove that Garrett was a former peace officer”) and Herrera III, 2017 WL 3273932 at *2, n.1 (claiming the court’s jurisdiction “was extinguished when it was revealed that the officer certification was invalid”) and Herrera IV, 2020 WL 4917609 at *1 (“Herrera contends that his sentence is illegal because the victim, a former sheriff’s deputy, was not a former peace officer....”) with Appellant’s brief pp.22 (arguing “Garrett, absent lawful extra time to certify past October 2, 1989, was in fact not legally certified to be a peace officer during the time of his employment with the County”). The third petition breaks no new ground. Try as it might, the state cannot find any timely, non-defaulted, or meritorious arguments within Herrera’s third petition, which is precisely why the district court rejected it. Herrera fails to show error.

CONCLUSION

The state respectfully requests this Court affirm the district court's denial of Herrera's third petition for post-conviction relief.

DATED this 30th day of September, 2020.

/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 30th day of September, 2020, served a true and correct paper copy of the foregoing BRIEF OF RESPONDENT by placing the copy in the United States mail, postage prepaid, addressed to:

VALENTINO ALEX HERRERA
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/s/ Kale D. Gans
KALE D. GANS
Deputy Attorney General

KDG/dd