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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

<b>JOSHUA THOMAS BENETT,</b>	)	
	)	
<b>Petitioner-Appellant,</b>	)	<b>NO. 44993</b>
	)	
<b>v.</b>	)	<b>BONNEVILLE COUNTY</b>
	)	<b>NO. CV 2015-5524</b>
<b>STATE OF IDAHO,</b>	)	
	)	<b>REPLY BRIEF</b>
<b>Respondent.</b>	)	
<hr style="border: 0.5px solid black;"/>		

**REPLY BRIEF OF APPELLANT**

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

---

**HONORABLE JOEL E. TINGEY**  
District Judge

---

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## STATEMENT OF THE CASE

### Nature of the Case

In this appeal, Joshua Thomas Bennett asserts the district court erred when it dismissed his petition for post-conviction relief, because the court improperly dismissed his Confrontation Clause claim without providing any notice of the grounds for dismissal.

The State argues in its Respondent's Brief that the district court dismissed the entirety of the petition, including the Confrontation Clause claim, on the same grounds articulated by the State in its motion for summary dismissal, namely that the petition was not supported by sufficient evidence. (*See Resp. Br.*, p.5.) The State also argues that even if the district court did not provide any notice, this Court should still affirm because Mr. Bennett provided no arguments on the merits that the district court incorrectly dismissed the Confrontation Clause claim, and because the record shows the decision was correct on the merits. (*See Resp. Br.*, p.5.)

This Reply Brief is necessary to address the State's unavailing arguments. Despite the State's contention, the district court granted summary dismissal of the Confrontation Clause claim for reasons other than those provided by the State, without the twenty days' notice provided for in I.C. § 19-4906(b). As in *Buss v. State*, 147 Idaho 514 (Ct. App. 2009), there was no substantial overlap between the district court's basis for dismissal and the State's motion for summary dismissal. Additionally, like the petitioner in *Caldwell v. State*, 159 Idaho 233 (Ct. App. 2015), Mr. Bennett was not provided any notice as to the alternative basis that the State now proposes for affirming the district court's grant of summary dismissal. Affirming the grant of summary dismissal on that alternative basis would be tantamount to the district court granting summary dismissal on a basis not identified in the State's motion for summary dismissal without the requisite twenty days' notice.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Bennett's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

## ISSUE

Did the district court err when it dismissed Mr. Bennett's petition for post-conviction relief, because the court improperly dismissed his Confrontation Clause claim without providing any notice of the grounds for dismissal?

## ARGUMENT

### The District Court Erred When It Dismissed Mr. Bennett’s Petition For Post-Conviction Relief, Because The Court Improperly Dismissed His Confrontation Clause Claim Without Providing Any Notice Of The Grounds For Dismissal

#### A. Introduction

Mr. Bennett asserts the district court erred when it dismissed his petition for post-conviction relief, because the court improperly dismissed his Confrontation Clause claim without providing any notice of the grounds for dismissal.

#### B. The District Court Improperly Dismissed Mr. Bennett’s Confrontation Clause Claim Without Providing Any Notice Of The Grounds For Dismissal

Mr. Bennett asserts the district court improperly dismissed his Confrontation Clause claim without providing any notice of the grounds for dismissal. Because the State did not articulate any grounds for dismissing the Confrontation Clause claim in its motion for summary dismissal, the district court had to provide notice of its grounds for dismissing that claim. *See Saykhamchone v. State*, 127 Idaho 319, 322 (1995); I.C. § 19-4906(b) & (c). However, the district court did not provide Mr. Bennett with any prior notice of the grounds for dismissal of the Confrontation Clause claim.

##### 1. The District Court Granted Summary Dismissal Of The Confrontation Clause Claim For Reasons Other Than Those Provided By The State, Without The Requisite Twenty Days’ Notice

The State argues that “[w]hile the State admittedly focused on the *Strickland* standard<sup>1</sup> [for claims of ineffective assistance of counsel] in its briefing, and did not specifically articulate the ‘Confrontation [Clause] claim,’ the state also plainly addressed the petition in its entirety

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<sup>1</sup> *See Strickland v. Washington*, 466 U.S. 668 (1984).



when it contended, without limitation, that ‘Petitioner’s statements are unsupported, inadmissible, and conclusory,’ requiring a dismissal.”<sup>2</sup> (Resp. Br., p.9 (citations omitted).) The State contends, “[t]he district court likewise found ‘I’m just not seeing the evidence, the petition that would actually support this case going forward and to withstand a motion for summary dismissal.’” (Resp. Br., p.9.) Thus, the State argues that the district court did not need to provide additional notice; “[b]ecause the state argued the petition in its entirety was unsupported by any evidence, and the district court concluded the same, the dismissal was at the very least partially based on the state’s grounds.” (Resp. Br., p.9.)

Despite the State’s contention, the district court granted summary dismissal of the Confrontation Clause claim for reasons other than those provided by the State, without the requisite twenty days’ notice. A district court need not give twenty days’ notice of its intent to dismiss, where the district court “relied in part on the same arguments presented in the State’s motion to dismiss.” *Workman v. State*, 144 Idaho 518, 524 (2007). In *Workman*, the Idaho Supreme Court held, “[t]here is significant overlap between the reasoning in the district court’s decision and the State’s motion to dismiss.” *Id.* at 524. The Court held, “[t]he district court’s reasoning for dismissal of Workman’s petition is not so different in kind as to transform its decision into a *sua sponte* dismissal and, therefore, the district court was not required to give 20 days notice of its intent to dismiss.” *Id.*

But in this case, the district court did not rely in part on the State’s arguments. Rather, this case is akin to *Buss v. State*, 147 Idaho 514 (Ct. App. 2009), where there was no substantial

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<sup>2</sup> Contrary to the State’s suggestion (*see* Resp. Br., pp.8-9), Mr. Bennett does not argue on appeal that the State failed to provide adequate notice in its motion for summary dismissal. Rather, the issue on appeal is that the district court improperly dismissed his Confrontation Clause claim without providing any notice of the grounds for dismissal.

overlap between the district court's basis for dismissal and the State's motion for summary dismissal. The State's motion for summary dismissal in *Buss* opened "with an introductory paragraph stating the purpose of the motion, and generally stating that '[p]etitioner has no evidentiary basis to support his claims.'" *Buss*, 147 Idaho at 518. The State "mistakenly addressed Buss's petition as though it made a claim that his guilty plea was not entered knowingly and voluntarily because he was not apprised of the consequences of pleading guilty. In fact, Buss did not make such a claim." *Id.* Instead, "Buss claimed that his guilty plea was coerced or unknowing because his attorney told him that Idaho did not recognize self-defense or justifiable homicide as affirmative defenses to the charge. The state did not respond in any way to that claim or the effect his attorney's alleged advice had on his decision to plead guilty." *Id.*

After a hearing on the motion, the district court in *Buss* denied the petitioner's claim of ineffective assistance of counsel for failure to satisfy both prongs of the *Strickland* test. *Id.* The district court determined that because the petitioner had not provided any facts supporting self-defense or justifiable homicide, he did not prove that he was prejudiced by trial counsel's alleged advice. *Id.*

On appeal, the Idaho Court of Appeals concluded, "the district court's summary dismissal of Buss's petition was based on grounds not asserted by the state." *Id.* The *Buss* Court noted, "[w]hile the state's motion contained an introductory sentence declaring that there was no evidence to support Buss's claims, the state's argument focused exclusively on a claim that Buss never raised." *Id.* While the State had provided grounds with reasonable particularity for dismissing the hypothetical claim, "the state's motion did not address the ineffective assistance of counsel claim that Buss actually alleged." *Id.* The district court, in contrast, focused on the elements of the claim for ineffective assistance of counsel, and dismissed the claim for failure to

provide evidence to support the prejudice element. *Id.* The *Buss* Court wrote, “[t]he state’s motion and the grounds for dismissal stated by the district court call for two very different factual responses from Buss. There is no substantial overlap between the district court’s basis for dismissal and the state’s motion for dismissal.” *Id.*

Thus, the *Buss* Court held, “the district court dismissed Buss’s petition on its own initiative. When the district court grants summary dismissal for reasons other than those provided by the state, the court is required to provide twenty days’ notice pursuant to I.C. § 19-4906(b).” *Id.* (citation omitted). The Court held the district court erred by failing to provide the petitioner with a notice of intent to dismiss and the opportunity to respond. *Id.*

As in *Buss*, there was no substantial overlap here between the district court’s basis for dismissal of the Confrontation Clause claim and the State’s motion for summary dismissal. In *Buss*, the State’s “introductory sentence declaring that there was no evidence that there was no evidence to support Buss’s claims” did not create a substantial overlap, considering “the state’s argument focused exclusively on a claim that Buss never raised.” *See id.* Similarly, here, the State’s argument in the motion for summary dismissal that “Petitioner’s statements are unsupported, inadmissible, and conclusory” did not create a substantial overlap. (*See R.*, p.43.)

Reading the whole motion for summary dismissal reveals the State “synthesized” Mr. Bennett’s assertions into two ineffective assistance of counsel claims. (*See R.*, p.40.) Just as the State in *Buss* focused exclusively on a claim the petitioner never raised, while never addressing the actual claim, *see Buss*, 147 Idaho at 518, here the State in its motion for summary dismissal focused exclusively on those ineffective assistance of counsel claims, while never addressing the Confrontation Clause claim (*see R.*, pp.40-43). Thus, the State’s argument on appeal ignores the context of its arguments made before the district court. (*See Resp. Br.*, p.7.)

The State's argument on appeal also ignores the context of the district court's grounds for summary dismissal. (*See* Resp. Br., p.9.) When the district court determined, "I'm just not seeing the evidence . . . that would actually support this case going forward and to withstand a motion for summary dismissal" (Tr., p.16, Ls.18-21), it did so after discussing Mr. Bennett's ineffective assistance of counsel claims. As the State cited previously in its Respondent's Brief (*see* Resp. Br., pp.7-8), right before the district court determined it did not see evidence to survive summary dismissal, it stated, "[t]here's a lot of allegations and suppositions and assumptions and innuendo but no real evidence that there was a violation of the standard applicable to an attorney representing Mr. Bennett and whether any such violation had an effect on the ultimate outcome of the case, which are the *Strickland* standards" (*see* Tr., p.16, Ls.11-17). When the district court dismissed Mr. Bennett's post-conviction petition, it did not discuss the Confrontation Clause claim as a separate claim, much less give its contemplated grounds for dismissal of that claim. (*See* R., pp.95-98; Tr., p.15, L.12 – p.16, L.23.)

Put otherwise, as in *Buss*, "the district court's summary dismissal of [Mr. Bennett's] petition was based on grounds not asserted by the state." *See Buss*, 147 Idaho at 518. With the State not stating with particularity any grounds for dismissing the Confrontation Clause claim, and the district court not giving its contemplated grounds for dismissing that claim, there was no substantial overlap here between the district court's basis for dismissal of the Confrontation Clause claim and the State's motion for summary dismissal. *See id.* Thus, the district court did not rely in part on the State's arguments when it dismissed the Confrontation Clause claim. The district court granted summary dismissal of the Confrontation Clause claim for reasons other than those provided by the State, without the requisite twenty days' notice.

2. Mr. Bennett Was Not Provided Any Notice As To The Alternative Basis That The State Now Proposes For Affirming The District Court's Grant Of Summary Dismissal

The State argues that, even if the district court did not provide any notice, because Mr. Bennett “provides no argument on the merits that the district court incorrectly dismissed his Confrontation Clause claim, and because the record shows the decision was correct on the merits, this Court should nevertheless affirm.” (*See* Resp. Br., p.10.)

However, Mr. Bennett was not provided any notice as to this alternative basis that the State now proposes for affirming the district court's grant of summary dismissal. Affirming the grant of summary dismissal on that alternative basis would be tantamount to the district court granting summary dismissal on a basis not identified in the State's motion for summary dismissal without the twenty days' notice provided for in I.C. § 19-4906(b).

The State contends that this case is similar to *Ridgley v. State*, 148 Idaho 671 (2010). (*See* Resp. Br., pp.11-12.) However, the State's summary of *Ridgley* fails to tell the full story. (*See* Resp. Br., p.11.) In *Ridgley*, the district court dismissed five of the petitioner's ineffective assistance of counsel claims because “the issues previously presented by Ridgley in support of his motion to withdraw his plea of guilty could not be relitigated in this post-conviction action,” a ground for dismissal that “was not stated in the district court's notice of intent to dismiss.” *Ridgley*, 148 Idaho at 676. But the State here did not mention (*see* Resp. Br., p.11), that the district court's prior “notice stated its intent to dismiss on the grounds that Ridgley had presented no evidence supporting his claims of deficient performance nor evidence establishing an objective basis from which to conclude that, but for counsel's alleged deficiencies, Ridgley would not have pled guilty.” *See Ridgley*, 148 Idaho at 676.

On appeal, the Idaho Supreme Court was “unable to conclude that the district court gave Ridgley appropriate notice of its intention to dismiss the first five claims on the basis of res judicata.” *Id.* However, the *Ridgley* Court wrote, “[t]his conclusion does not automatically require reversal . . . . Because this Court employs the same standards on appellate review that the trial court applies in considering summary dismissal of a petition for post-conviction relief, if Ridgley failed to provide admissible evidence supporting these claims, they were properly dismissed.” *Id.* The *Ridgley* Court ultimately affirmed the summary dismissal of the claims for lack of evidence of prejudice, because “Ridgley simply made no effort to link his claims of deficient performance with his plea of guilty.” *See id.* at 676-77.

Unlike the district court in *Ridgley*, the district court here did not provide Mr. Bennett with any prior notice of the grounds for dismissal of the Confrontation Clause claim. In light of the complete picture of *Ridgley*, this case is actually much more similar to *Caldwell v. State*, 159 Idaho 233 (Ct. App. 2015).

On appeal, the petitioner in *Caldwell* asserted the district court erred in summarily dismissing a claim of ineffective assistance of counsel for failing to interview and call a psychiatrist as an expert witness. *See id.* at 238. The district court based its dismissal on its determination the psychiatrist’s testimony would have been inadmissible, a legal conclusion that was erroneous under current law. *See id.* The State, ostensibly based on *Ridgley*, argued the error could be overlooked and the district court could be affirmed, based on the petitioner’s failure to submit an affidavit or other admissible evidence to support his claim. *See id.*

The Idaho Court of Appeals held *Ridgley* did not support the State’s position, because the *Ridgley* Court’s “conclusion was premised on the district court’s initial notice to the petitioner that his claim was not sufficiently supported—notice that *Caldwell* did not receive here. Absent

such notice, we may not affirm on a theory other than that upon which the district court based the summary dismissal.” *Id.* (citing *Ridgley*, 148 Idaho at 676; *Baxter v. State*, 149 Idaho 859, 865 (Ct. App. 2010)).

The *Caldwell* Court later explained, “[t]he only claimed basis for summarily dismissing Caldwell’s ineffective assistance of counsel claim in the state’s motion for summary dismissal was that the psychiatrist’s proffered testimony would have been inadmissible at trial. This was also the only basis provided by the district court in granting the state’s motion.” *Id.* at 239. The Court held, “[a]s a result, Caldwell was not provided with any notice as to the alternative basis that the state now proposes for affirming the district court’s grant of summary dismissal.” *Id.* “Moreover, were we to affirm the grant of summary dismissal on this alternative basis, it would be tantamount to the district court granting summary dismissal on a basis not identified in the State’s motion for summary dismissal without the twenty days’ notice provided for in I.C. § 19-4906(b).” *Id.* Thus, the *Caldwell* Court held, “we will not affirm the summary dismissal of this claim on the alternative basis proposed by the state.”<sup>3</sup> *Id.*

Like the petitioner in *Caldwell*, Mr. Bennett was not provided with any notice as to the alternative basis that the State now proposes for affirming the district court’s grant of summary dismissal on the Confrontation Clause claim. The State never argued in its motion for summary dismissal that the Confrontation Clause claim in particular should be dismissed because it was unsupported and failed on the merits. (*Compare R.*, pp.40-43, *with Resp. Br.*, p.13.) Thus, granting summary dismissal on the State’s alternative basis in this appeal would be tantamount to the district court granting summary dismissal on a basis not identified in the State’s motion for

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<sup>3</sup> The *Caldwell* Court ultimately affirmed the summary dismissal, on the basis the petitioner failed to raise a genuine issue of material fact regarding deficient performance. *Caldwell*, 149 Idaho at 240.

summary dismissal without the requisite twenty days' notice. *See Caldwell*, 159 Idaho at 239. Just as the Idaho Court of Appeals declined to adopt the State's argument in *Caldwell*, this Court should decline to adopt the State's argument here. Mr. Bennett was not provided any notice as to this alternative basis that the State now proposes for affirming the district court's grant of summary dismissal.

Because the district court did not provide Mr. Bennett with any notice of the grounds for dismissal of the Confrontation Clause claim, it improperly dismissed that claim. *See, e.g. Ridgley*, 148 Idaho at 676. The district court therefore erred when it dismissed Mr. Bennett's petition for post-conviction relief. *See Saykhamchone*, 127 Idaho at 322. The Confrontation Clause claim should be remanded to the district court for further proceedings. *See Murphy v. State*, 143 Idaho 139, 151 (Ct. App. 2006).

#### CONCLUSION

For the above reasons, as well as the reasons contained in the Appellant's Brief, Mr. Bennett respectfully requests that the Court reverse the district court's Order of Dismissal and Judgment with respect to the Confrontation Clause claim, and remand the claim for further proceedings.

DATED this 4<sup>th</sup> day of April, 2018.

\_\_\_\_\_/s/\_\_\_\_\_  
BEN P. MCGREEVY  
Deputy State Appellate Public Defender



CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4<sup>th</sup> day of April, 2018, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JOSHUA THOMAS BENNETT  
2711 W JEFFERSON STREET  
BOISE ID 83702

JOEL E TINGEY  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

ROCKY L WIXOM  
BONNEVILLE COUNTY PUBLIC DEFENDER  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
E-MAILED BRIEF

\_\_\_\_\_/s/\_\_\_\_\_  
EVAN A. SMITH  
Administrative Assistant

BPM/eas