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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOSHUA THOMAS BENNETT,)		
)	NO. 44993
Petitioner-Appellant,)	
)	BONNEVILLE COUNTY
v.)	NO. CV 2015-5524
)	
STATE OF IDAHO,)	APPELLANT'S BRIEF
)	
Respondent.)	
<hr/>		

BRIEF OF APPELLANT

**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

ERIC D. FREDERICKSEN
State Appellate Public Defender
I.S.B. #6555

BEN P. MCGREEVY
Deputy State Appellate Public Defender
I.S.B. #8712
322 E. Front Street, Suite 570
Boise, Idaho 83702
Phone: (208) 334-2712
Fax: (208) 334-2985
E-mail: documents@sapd.state.id.us

**ATTORNEYS FOR
PETITIONER-APPELLANT**

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

**ATTORNEY FOR
RESPONDENT**

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STATEMENT OF THE CASE

Nature of the Case

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.

Statement of the Facts and Course of Proceedings

In Bonneville County No. CR 2012-16081, Mr. Bennett was convicted of delivery of a controlled substance. (*See R.*, pp.6, 37.) The district court imposed a unified sentence of five years, with two-and-one-half years fixed. (*R.*, p.6.) Mr. Bennett appealed, and the Idaho Court of Appeals affirmed his judgment of conviction. *State v. Bennett*, No. 41355, 2015 Unpublished Opinion No. 388 (Idaho Ct. App. Mar. 3, 2015).

Mr. Bennett filed a Petition and Affidavit for Post Conviction Relief. (*R.*, pp.6-9.) As one ground for relief, the petition asserted, “[t]he district court erred & violated Mr. Bennett’s Sixth Amendment rights when it refused to allow him to confront accuser & sustained the State’s objection during cross examination” (*hereinafter*, the Confrontation Clause claim). (*R.*, p.7.) In the Affidavit of Facts in Support of Post-Conviction Petition (*R.*, pp.22-28), Mr. Bennett asserted the district court had precluded him from cross-examining the State’s confidential informant witness about their drug history (*R.*, p.26).

The petition also asserted “[i]neffective assistance of counsel” as a ground for relief. (*R.*, p.7.) Mr. Bennett asserted his first trial counsel was ineffective because he had a conflict of interest in representing another defendant, which caused counsel to fail to convey a plea offer from the State. (*See R.*, p.20.) Mr. Bennett also asserted his second trial counsel was ineffective

for failing to object to particular testimony, failing to object when a witness lied, and failing to call a witness who would have proven Mr. Bennett's innocence. (*See R.*, pp.30-31.)

The State filed an Answer. (*R.*, pp.37-39.) The State denied Mr. Bennett's post-conviction claims. (*See R.*, pp.37-38.) As an affirmative defense, the State argued, "any issues which could have been raised on appeal, but were not, are forfeited and may not be considered in Post-Conviction proceedings." (*R.*, p.38.) The State asked the district court to enter a judgment against Mr. Bennett and for the State, denying Mr. Bennett the relief sought in the petition. (*R.*, p.38.)

The State also filed a Motion for Summary Dismissal. (*R.*, pp.40-44.) The State wrote that Mr. Bennett "alleges that his 6th Amendment rights were violated and that his counsel was ineffective." (*R.*, p.40.) The State "synthesized" Mr. Bennett's assertions into two claims: (1) that his first trial counsel "did not forward an offer he would have taken"; and (2) that his second trial counsel "was ineffective at trial because he did not object at times that Petitioner felt like he should have objected, did not call a witness, and advised Petitioner not to testify." (*R.*, p.40.)

The State contended Mr. Bennett had provided no admissible evidence his first trial counsel failed to convey a plea offer, because Mr. Bennett's statement that the plea offer was given to counsel but never delivered to him, was inadmissible hearsay. (*See R.*, pp.41-42.) The State then argued Mr. Bennett had not established his second trial counsel was ineffective under *Strickland v. Washington*, 466 U.S. 668 (1984), because counsel's actions or inactions were strategic or tactical decisions, as Mr. Bennett had acknowledged. (*See R.*, pp.42-43.) The State asked the district court to dismiss the petition. (*R.*, p.43.) However, the State's motion for

summary dismissal did not further address Mr. Bennett's Confrontation Clause claim as a separate claim, nor did it articulate any grounds for dismissing that claim. (*See R.*, pp.40-44.)

The district court scheduled a hearing on the motion for summary dismissal. (*R.*, pp.45-46.) Over a year later, after multiple continuances, the district court conducted the hearing. (*See R.*, pp.47-66, 68-76, 79-94.) The State argued, "there just simply is not the evidence to proceed with this claim. . . . [T]here simply hasn't been any sort of admissible evidence that's been brought forward to support either the claim that there was an offer that was—failed to be communicated by counsel or sufficient evidence to meet the Strickland test for ineffective assistance of counsel." (*Tr.*, p.4, L.21 – p.5, L.11.)¹

Mr. Bennett's post-conviction counsel asserted, "there are some things that I think if properly pled could give rise to a review for post-conviction that I think would overcome summary dismissal. I'm not conceding that his petition, his affidavit are not appropriate. I would just ask the court to take it under advisement." (*Tr.*, p.7, L.21 – p.8, L.2.) Post-conviction counsel also asserted, "I think there's a colorable claim that [second trial counsel] should have done more to object to certain testimony that was relied upon by the State for identification purposes." (*Tr.*, p.10, Ls.7-14.)

The district court determined, "nothing in the petition really presents any concrete evidence. There'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." (*Tr.*, p.16, Ls.10-17.) The district court continued: "So I'm just not seeing the evidence . . . that would actually support this case going forward and to

withstand a motion for summary dismissal. So I am going to grant the motion, and this case will be dismissed.” (Tr., p.16, Ls.18-22.) The district court did not provide any grounds for dismissing the Confrontation Clause claim. (*See* Tr., p.15, L.12 – p.16, L.23.)

The district court entered an Order of Dismissal, which determined “that Petitioner has failed to provide sufficient evidence to support his claim. Accordingly, Defendant’s motion for summary dismissal is granted.” (R., pp.95-96.) The district court also entered a Judgment dismissing Mr. Bennett’s petition with prejudice. (R., pp.97-98.)

Mr. Bennett filed a Notice of Appeal timely from the district court’s Order of Dismissal and Judgment. (R., pp.105-08.)²

¹ All citations to “Tr.” refer to the February 2, 2017 hearing on the motion for summary dismissal.

² Mr. Bennett also filed a timely Motion to Reconsider under I.R.C.P. 11.2. (R., pp.99-101.) The motion to reconsider asserted that the State had not met its statutory obligation under I.C. § 19-4906(a) to file the relevant portions of the record, precluding the State from seeking summary dismissal, and that Mr. Bennett had raised a genuine issue of material fact on trial counsel’s failure to more aggressively cross-examine the confidential informant. (*See* R., pp.99-100.)

The State filed a motion to take judicial notice of the file in the underlying criminal case. (R., pp.646-47.) Additionally, the State filed an Opposition to Motion to Reconsider, arguing Mr. Bennett had not addressed the evidence in possession of trial counsel when he decided not to cross-examine the confidential informant, or explained how cross-examining the confidential informant would have changed the outcome of the case. (*See* R., pp.650-52.)

After conducting the hearing on the motion to reconsider (R., p.654), the district court entered an Order denying the motion to reconsider (R., p.655-59). The district court determined I.C. § 19-4906(a) did not oblige the State to file the record based on the mere possibility some part of the record would be relevant to a claim. (R., p.656.) The district court then determined Mr. Bennett had not established his attorneys’ alleged conduct was deficient or prejudicial. (*See* R., p.658.)

On appeal, Mr. Bennett does not challenge the district court’s denial of the motion for reconsideration.

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. Standard Of Review

As the Idaho Supreme Court has explained, “[a]n application for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is civil in nature.” *Charboneau v. State*, 144 Idaho 900, 903 (2007). “[T]he applicant for post-conviction relief must prove by a preponderance of evidence the allegations upon which the application for post-conviction relief is based.” *Id.* “[A]n application for post-conviction relief must contain more than ‘a short and plain statement of the claim’ that would suffice for a complaint under I.R.C.P. 8(a)(1)”; it “must be verified with respect to facts with the personal knowledge of the applicant.” *Id.* (citing I.C. § 19-4903). “The application must include affidavits, records, or other evidence supporting its allegation, or must state why such supporting evidence is not included.” *Id.*

“Summary disposition of a petition for post-conviction relief is appropriate if the applicant’s evidence raises no genuine issue of material fact.” *Id.* (citing I.C. § 19-4906(b) & (c)). The *Charboneau* Court held that, “[o]n review of a dismissal of a post-conviction relief application without an evidentiary hearing, 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.* “A court is required to accept the petitioner’s un rebutted allegations as true, but need not accept the petitioner’s conclusions.” *Id.* “When the alleged facts, even if true, would not entitle the applicant to relief, the trial court may dismiss the application without holding an evidentiary hearing.” *Id.* “Allegations contained in the application are insufficient for the granting of relief when (1) they are clearly disproved by the record of the original proceedings, or (2) do not justify relief as a matter of law.” *Id.*

C. 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. However, the district court did not provide Mr. Bennett with any notice of the grounds for dismissal of the Confrontation Clause claim.

The Idaho Supreme Court has held, “[a] court may grant the motion [for summary dismissal] of either party under I.C. § 19-4906(c), or may dismiss the application *sua sponte* under I.C. § 19-4906(b).” *Workman v. State*, 144 Idaho 518, 523 (2007). For *sua sponte* dismissals, when a district court is satisfied “on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing.” I.C. § 19-4906(b). “The applicant shall be given an opportunity to reply within 20 days to the proposed dismissal.” *Id.* In other words, “[a]

petitioner is entitled to notice of the trial court's contemplated grounds for dismissal and an opportunity to respond before a petition for post-conviction relief is dismissed." *Ridgley v. State*, 148 Idaho 671, 676 (2010).

A district court may grant a party's motion for summary disposition of a post-conviction application "when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." I.C. § 19-4906(c). The Idaho Supreme Court has held that, "[b]ecause a post-conviction relief proceeding is governed by the Idaho Rules of Civil Procedure, a motion for summary disposition must state with particularity the grounds therefor." *DeRushe v. State*, 146 Idaho 599, 601 (2009) (citations and internal quotation marks omitted).

Here, the State never stated with particularity any grounds for dismissal of the Confrontation Clause claim in its motion for summary dismissal. The State's motion for summary dismissal initially recognized Mr. Bennett had alleged "that his 6th Amendment rights were violated and that his counsel was ineffective." (R., p.40.) However, the State synthesized Mr. Bennett's claims into two ineffective assistance of counsel claims; namely, that (1) his first trial counsel "did not forward an offer he would have taken," and (2) his second trial counsel "was ineffective at trial because he did not object at times that Petitioner felt like he should have objected, did not call a witness, and advised Petitioner not to testify." (*See* R., p.40.) The State argued Mr. Bennett had not presented sufficient evidence to support those ineffective assistance of counsel claims. (*See* R., pp.41-42.) The State's motion did not articulate any grounds for dismissal of the Confrontation Clause claim as a separate claim. (*See* R., pp.40-42.)

The Idaho Supreme Court has held, “[w]here the state has filed a motion for summary disposition, but the court dismisses the application on grounds different from those asserted in the state’s motion, it does so on its own initiative and the court must provide twenty days notice.” *Saykhamchone v. State*, 127 Idaho 319, 322 (1995). In the instant case, 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 id.*

But the district court did not provide Mr. Bennett with any notice of the contemplated grounds for dismissing the Confrontation Clause claim. During the hearing on the motion for summary dismissal, the district court focused on the ineffective assistance of counsel claims: “[N]othing in the petition really presents any concrete evidence. There’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.” (Tr., p.16, Ls.10-17.) The district court did not see evidence “that would actually support this case going forward and to withstand a motion for summary dismissal.” (Tr., p.16, Ls.18-21.)

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.) Thus, the district court did not provide Mr. Bennett with any notice of the grounds for dismissal of the Confrontation Clause claim.

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, 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 18th day of December, 2017.

_____/s/_____
BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 18th day of December, 2017, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

JOSHUA THOMAS BENNETT
11940 W CLOVERBROOK LANE #20
BOISE ID 83713

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»