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Idaho Supreme Court
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**IN THE SUPREME COURT OF THE STATE OF IDAHO**

| | | |
|---|---|---|
| **JEREMY TODD HILL,** | ) | |
| | ) | **NO. 46780-2019** |
| **Petitioner-Appellant,** | ) | |
| **v.** | ) | **TWIN FALLS COUNTY** |
| | ) | **NO. CV42-18-4901** |
| **STATE OF IDAHO,** | ) | |
| | ) | **APPELLANT'S** |
| **Respondent.** | ) | **REPLY BRIEF** |
| ______________________________ | ) | |

# REPLY BRIEF OF APPELLANT

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

**HONORABLE BENJAMIN J. CLUFF**
**District Judge**

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## STATEMENT OF THE CASE

### Nature of the Case

Jeremy Hill contends that the district court erred by not ruling on his motion for counsel before ruling on the merits of his post-conviction petition and by not giving sufficient notice before dismissing his petition.

The State concedes that the district court abused its discretion by not ruling on the motion for counsel, but argues that error does not require remand. While the State correctly points out that, in light of the Supreme Court's denial of Mr. Hill's motion for judicial notice, one of the bases of his argument in that regard is not supported by the record, there are still sufficient facts in the record to show that appointment of counsel was appropriate in this case. As such, the district court's error in that regard was not harmless.

More importantly, however, the State's arguments on the notice issue are contrary to the applicable precedent. Under clear precedent, the one-sentence notice of intent in this case is not "sufficient" because it completely failed to provide any of the required particularized reasons for dismissal. Both the Idaho Supreme Court and the Idaho Court of Appeals have consistently recognized, including in the case upon which the State's argument relies, a challenge on that basis may be raised for the first time on appeal. As such, even if this Court does not remand for appointment of counsel, it should still remand because of the lack of notice prior to dismissal.

For either of these reasons, this Court should vacate the order of summary dismissal and remand this case for further proceedings.

Statement of the Facts and Course of Proceedings

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

## ISSUES

I. Whether the district court abused its discretion by summarily dismissing Mr. Hill's petition on the merits without first addressing his motion for appointment of counsel, particularly since there were facts showing the possibility of a valid claim for relief.

II. Whether the district court's notice of intent to dismiss failed to give sufficient notice, and so, was not a valid basis upon which the district court could summarily dismiss Mr. Hill's petition.

# ARGUMENT

## I.

## The District Court Abused Its Discretion By Summarily Dismissing Mr. Hill's Petition On The Merits Without First Addressing His Motion For Appointment Of Counsel, Particularly Since There Were Facts Showing The Valid Claim For Relief

The State has conceded that the district court abused its discretion by not ruling on Mr. Hill's motion for counsel before dismissing his petition. As such, the only debate is whether Mr. Hill articulated sufficient facts to show the possibility of a valid claim, such that this case should be remanded as a result of that error. *See, e.g., Hust v. State*, 147 Idaho 682, 685 (Ct. App. 2009).

To that point, given the fact that Idaho Supreme Court denied Mr. Hill's motion for judicial notice[1] (Order Denying Motion to Take Judicial Notice Without Prejudice, dated Aug. 23, 2019), the State correctly points out that Mr. Hill's argument about the denial of his Fifth Amendment rights is not supported by the information in this record. (Resp. Br., p.7.) As such, Mr. Hill is forced to withdraw the arguments in that regard, which he made in anticipation of his motion for judicial notice on appeal being granted. (*See* App. Br., p.7.) However, in light of the Supreme Court's ruling on the motion for judicial notice, the fact that Mr. Hill wanted to but failed to get those other documents before the post-conviction court actually demonstrates why the failure to rule on the motion for appointment of counsel was not harmless.

For example, one of the allegations in Mr. Hill's initial petition was that trial counsel had been ineffective in the sentencing phase of the case because trial counsel's performance meant the district court was not able "to consider the full totality of the surrounding circumstances of the case so that it could have presented additional mitigating evidence." (R., p.6; *see* Resp.

[1] Mr. Hill filed the motion for judicial notice contemporaneously with his Appellant's Brief.

Br., p.1 (acknowledging this as one of Mr. Hill's claims).) In his response to the notice of intent to dismiss, Mr. Hill alleged that he could demonstrate trial counsel's ineffectiveness in this regard because he could have filed a motion to redact the PSI. (R., p.30.) Mr. Hill expressly asserted that he intended to file a copy of the motion to redact the PSI with his response. (R., p.28.) However, the record on appeal shows that no such exhibit was ultimately filed in the post-conviction case. (*See generally* R.)

These are precisely the sort of issues which the Idaho Supreme Court has recognized may arise when a post-conviction petitioner is forced to represent himself, and as such, which demonstrate the need for appointing post-conviction counsel: "[I]n determining whether to [appoint post-conviction counsel], every inference must run in the petitioner's favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts." *Charboneau v. State*, 140 Idaho 789, 793 (2004); *accord Brown v. State*, 135 Idaho 676, 679 (2001) (admonishing courts to remember that a *pro se* petitioner's filings will often be conclusory or incomplete because he does not know what facts are relevant, not because they do not exist), *superseded by statute on other grounds as stated in Charboneau*, 140 Idaho at 792 n.1. In other words, one of the reasons for appointing post-conviction counsel is to assist petitioners in filing the necessary responses and making sure the relevant exhibits get before the district court. *See id.*; *cf. Saykahmchone v. State*, 127 Idaho 319, 323 (1995) (criticizing post-conviction counsel for not ensuring that a relevant transcript was included in the record). Therefore, the fact that Mr. Hill wanted to but failed to get the motion to redact the PSI into the record in this case, in and of itself, shows why the district court's failure to rule on Mr. Hill's motion for counsel was not harmless.

That conclusion is further borne out by Mr. Hill's attempt to clarify his *Brady* claim. Specifically, in his response to the notice of intent to dismiss, he explained his *Brady* claim also related to the inaccuracy of the information in the PSI:

> As previously argued re: Brady v. Md., 373 U.S. 83, 87 (1963) (due process is also violated if either prosecution or even the 'defense counsel' suppresses material favorable to defense, as in this case of Mr. Hill. See also Bagley 473 U.S. 667, 676 (1995[sic]). Therefore without a New PSI and more importantly a valid PSI that is constitutionally sound the court lacked subject matter jurisdiction to impose sentence after the guilty plea. An invalid plea gives rise to actual prejudice.

(R., p.36 (grammatical errors corrected; capitalization altered).) Here, again, the most pertinent allegations of fact – what evidence had been withheld – are missing, but again, Mr. Hill's response suggest that those facts would have been in the motion to redact the PSI which he wanted to, but failed, to get into the post-conviction record. (*See generally* R., pp.24-40.)

However, as the Idaho Supreme Court has indicated (assuming the undisclosed evidence, in fact, existed), such allegations would give rise to *the possibility* of a *Brady* claim. *See Charboneau*, 140 Idaho at 793 ("If the Alonzo tape exists, Charboneau may have a valid *Brady* claim."). That means the failure to rule on the motion for counsel was not harmless, especially since "[i]t is unlikely that [the *pro se* petitioner] could properly raise a valid *Brady* claim and determine how to procure admissible evidence establishing all the elements of such a claim without the assistance of counsel." *Id*. Thus, the fact that Mr. Hill wanted to but failed to get the motion to redact the PSI into the record to support this claim, in and of itself, shows why the district court's failure to rule on Mr. Hill's motion for counsel was not harmless.

At this stage in the proceedings, when all the inferences are run in Mr. Hill's favor, there is *the possibility* that Mr. Hill could make out a valid claim about ineffective assistance of counsel during the sentencing phase of his case or about a *Brady* violation. *See also Brown*, 135

Idaho at 679 (explaining that a petitioner should be allowed to renew his request for court-appointed counsel "where, as here, he has alleged facts supporting *some* elements of a valid claim") (emphasis added). As such, this case should be remanded for the district court to actually consider and rule on Mr. Hill's motion for appointment of counsel. *See also Montgomery v. Montgomery*, 147 Idaho 1, 6-7 (2009) (explaining that, when a discretionary decision is affected by an error of law, the appellate court will simply note the error and remand the case so the district court can actually make the discretionary decision in the first instance); *accord H2O Environmental, Inc. v. Farm Supply Distributors*, 164 Idaho 295, 300-01 (2018) (same).

II.

The District Court's Notice Of Intent To Dismiss Failed To Give Sufficient Notice, And So, Was Not A Valid Basis Upon Which The District Court Could Summarily Dismiss Mr. Hill's Petition

Regardless of how this Court rules on the appointment of counsel issue, it should still remand this case because the one-sentence notice of intent to dismiss in this case was insufficient to meet the requirements of due process because it did not provide any of the required particularized reasons for dismissing Mr. Hill's claims. The State makes two arguments in response, both of which run directly contrary to the established precedent. As such, those arguments should be rejected.

A. Mr. Hill's Argument, That The Notice Of Intent Was Not "Sufficient" Because It Did Not Provide Any Of The Particularized Reasons For Dismissing His Claims, Is Properly Raised For The First Time On Appeal

The State contends Mr. Hill's notice argument cannot be raised for the first time on appeal because it is merely a "sufficiency" argument. (Resp. Br., pp.11-12.) That argument is improper because it fails to recognize that the term "insufficient" has two different, though

related, uses: it can mean "not sufficient; lacking in what is necessary or required" or it can mean "deficient in force, quality, or amount; inadequate." Dictionary.com, available at https://www.dictionary.com/browse/insufficient?s=t (last accessed Dec. 9, 2019). Idaho case law, including the case upon which the State's argument is based, recognizes the distinction in this regard, as appellate decisions have consistently held that arguments under the former definition may, in fact, be raised for the first time on appeal, while arguments under the latter definition may not.

Under the first of those two definitions, the term "insufficient" in this context is used to argue that the necessary or required analysis was lacking in the notice of intent to dismiss; that the required notice was not given at all. This is the way the Idaho Supreme Court used the term in *Banks v. State*:

> The basis for the district court's contemplated dismissal as contained in its Intent to Dismiss was not *sufficiently* specific to meet the 'reasons' requirement of I.C. § 19-4906. For its rationale, the district court merely echoed language found in that statute and then noted that Banks was not entitled to the relief he sought.

*Banks v. State*, 123 Idaho 953, 954 (1993) (emphasis added, footnotes omitted). The *Banks* Court proceeded to hold, without any indication that the lack of notice issue had been raised below, that, because "the district court's Notice of Intent to Dismiss did not *adequately* notify Banks of the court's reasons, thereby precluding Banks from a meaningful opportunity to reply to the proposed dismissal," remand was required. *Id*. (emphasis added); *accord Garza v. State*, 139 Idaho 533, 537-38 (2003) (specifically allowing such arguments to be raised for the first time on appeal), *abrogated on other grounds*.

Under the second of the two definitions, the term "insufficient' in this context would be used to argue that, though some analysis was actually given by the district court, that analysis

was deficient in force, quality or amount; that it was inadequate to meet the standards set by the statute. This is the way the Supreme Court used the term in *DeRushé v. State*:

> The State specified the grounds for its motion, and DeRushé responded to the motion and argued it without challenging the sufficiency of the State's grounds.[2] If the grounds lacked *sufficient* particularity, DeRushé should have presented that issue to the district court and obtained a ruling on it. We would then have reviewed that ruling on appeal.

*DeRushé v. State*, 146 Idaho 599, 602 (2009) (emphasis added). That sort of argument, the Supreme Court held, must be raised first in the district court. *Id.*

However, *DeRushé* specifically drew a distinction between that type of argument and the type of argument made in *Garza* (and, by extension, *Banks*):

> In *Garza*, the district court sua sponte gave notice of its intent to dismiss Garza's petition pursuant to Idaho Code § 19-4906(b), which requires the court to "indicate to the parties its intention to dismiss the application and *its reasons for so doing*." (Emphasis added.) . . . We held that Garza's failure to respond to the district court's notice did not bar appeal of the dismissal. After considering the notice given by the district court, we held, "The district court did not give the rationale for dismissing the claims. The notice was <u>insufficient</u> and the dismissal on these grounds is vacated." *Id.* at 538, 82 P.3d at 450.

*DeRushé*, 146 Idaho at 603 (underlining added). The Supreme Court then reaffirmed the propriety of the decision in *Garza*: "The district court cannot dismiss claims on its own motion if it does not give the parties a twenty-day prior notice *stating its reasons for doing so as required by* Idaho Code § 19-4906(b). *Garza v. State*." *DeRushé*, 146 Idaho at 603 (also reaffirming the district court cannot dismiss a petition on a ground not particularly asserted by the State in a motion for summary dismissal) (emphasis added). As such, even under *DeRushé*,

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[2] The *DeRushé* Court repeatedly noted the fact that the petitioner in that case had the assistance of post-conviction counsel in responding to the State's motion for summary dismissal. *See DeRushé*, 146 Idaho at 602. Mr. Hill did not have such assistance because, as discussed in Section I, *supra*, the district court did not rule on his motion for counsel as it was required to do. As such, if this Court were inclined to accept the State's arguments under *DeRushé* on this issue, that would only serve to further demonstrate how the error in not ruling on Mr. Hill's motion for post-conviction counsel was not harmless.

arguments that the notice was "insufficient," in that it did not provide any of the required particularized reasons for dismissal, may still be raised for the first time on appeal. *See id*.

The Court of Appeals has actually recognized this point and given effect to this distinction following the decision in *DeRushé*, allowing the *Banks*/*Garza*-type arguments to proceed to a decision on the merits even though they were not raised below. *See, e.g., Buss v. State*, 147 Idaho 514, 518 (Ct. App. 2009) (remanding a case based on a lack of notice without any indication that the issue had been raised below); *see also Keller v. State*, 2011 WL 11038983 *4 (Ct. App. 2011) (specifically rejecting a preservation argument under *DeRushé* based on *Banks*)[3]; *see also Barcella v. State*, 148 Idaho 469, 473-74 (Ct. App. 2009) (accepting the petitioner's clarification that his argument that the notice was "insufficient" was an assertion that it did not provide any of the necessary notice, and considering for the first time on appeal the "threshold question" of "whether appropriate notice was given").

Mr. Hill's argument, like the arguments in *Garza* and *Banks*, was that the notice was "insufficient" because it did not provide the necessary particularized reasons for dismissal at all. (App. Br., pp.8-10 (citing, *inter alia*, *Garza*, 139 Idaho at 537-38).) That challenge, as even *DeRushé* noted, can be raised for the first time on appeal.

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[3] Mr. Hill recognizes that unpublished decisions do not constitute precedent, and he does not cite *Keller* as authority for a particular decision in this case. Rather, he merely references it as a historical example of how a learned court has analyzed this same issue. *Compare Staff of Idaho Real Estate Comm'n v. Nordling*, 135 Idaho 630, 634 (2001) (quoting *Bourgeois v. Murphy*, 119 Idaho 611, 617 (1991)) ("When this Court had cause to consider unpublished opinions from other jurisdictions because an appellant had discussed the cases in his petition, we found the presentation of the unpublished opinions as 'quite appropriat[e].' Likewise, we find the hearing officer's consideration of the unpublished opinion, not as binding precedent but as an example, was appropriate.").

B. <u>The District Court's One-Sentence Notice Was "Insufficient" Because It Did Not Provide Any Of The Particularized Reasons For Dismissing His Claims, As Required By Statute</u>

As Mr. Hill pointed out in his Appellant's Brief, the one-sentence notice of intent to dismiss issued in this case did not actually give any of the required notice because all it did was parrot the language of the statute. (App. Br., p.9.) The State did not address his analysis under *Garza* in its Response Brief. (*See generally* Resp. Br., pp.10-12 (mentioning *Garza* only once, in its discussion of the relevant standards).) Rather, it only attempted to undercut his reliance on *Crabtree v. State*, 144 Idaho 489, 494 (Ct. App. 2006), by trying to factually distinguish that case from Mr. Hill's. Its attempt to distinguish *Crabtree* is not persuasive.

The State's only basis for distinguishing *Crabtree* was on the idea that the petitioner in that case had actually identified several potential claims, each of which was based on a different factual ground, and that he had cited legal authority and facts to support his claims. (Resp. Br., p.10.) However, the State's own recitation of the facts, as well as the record itself, belie its attempt to distinguish *Crabtree* on this basis.

For example, as the State acknowledged Mr. Hill had made identified two potential claims – that his attorney had given deficient performance and that the prosecutor had withheld evidence. (Resp. Br., p.1.) Those are, like the claims in *Crabtree*, distinct claims for relief based on different factual allegations. *See, e.g., Mata v. State*, 124 Idaho 588, 593 (Ct. App. 1993) (holding that a petitioner's verified pleadings alone can establish a genuine issue of material fact); *see also Charboneau*, 140 Idaho at 793 (reminding courts that *pro se* petitions may be conclusory or incomplete because the petitioner does not know what facts are needed or how to properly present them, and not because those facts do not exist). Mr. Hill also identified the legal authorities relevant to both those claims in his petition. (R., p.6 (in his claim about trial counsel's failure to prevent additional mitigating evidence, citing *inter alia*, "Strickland 466 U.S.

at 687, 691-92”[4]); R., pp.7-8, 35-37 (in his claim about the prosecutor withholding evidence, which resulted in a “tainted PSI,” citing, *inter alia*, “Brady v. Md., 373 U.S. 83, 87 (1963); see also U.S. v. Bagley, 473 U.S. 667, 682 (1985)”).) As such, the State’s attempt to factually distinguish *Crabtree* is meritless, since Mr. Hill did the same thing the petitioner in *Crabtree* did in terms of his allegations.

The only real difference, then, between this case and *Crabtree*, according to the State, was the alleged sufficiency of the allegations. (*See* Resp. Br., p.10.) However, the question in this appeal is whether proper notice of those alleged deficiencies was given to Mr. Hill. As such, the basis of the State’s attempt to distinguish *Crabtree* is actually irrelevant because the question at issue in this appeal is whether *the district court gave Mr. Hill notice of those alleged deficiencies before dismissing the petition.* Since the district court’s one-sentence notice does not provide any such notice, even if the State is correct as to the merits of this issue, this Court still could not affirm the summary dismissal of Mr. Hill’s claims on that basis. *See, e.g., DeRushé*, 146 Idaho at 603; *Garza*, 139 Idaho at 537-38; *Banks*, 123 Idaho at 954; *Buss*, 147 Idaho at 518; *Crabtree*, 144 Idaho at 495. As such, the State’s argument in this regard is meritless, and this Court should remand this case for further proceedings that satisfy the requirements of due process.

[4] *Strickland v. Washington*, 466 U.S. 668 (1984).

## CONCLUSION

Mr. Hill respectfully requests this Court vacate the order summarily dismissing his petition and remand this case for further proceedings after the appointment of counsel.

DATED this 12th day of December, 2019.

/s/ Brian R. Dickson
BRIAN R. DICKSON
Deputy State Appellate Public Defender

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of December, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

KENNETH K. JORGENSEN
DEPUTY ATTORNEY GENERAL
E-Service: ecf@ag.idaho.gov

/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

BRD/eas