

1-13-2016

# Diamond v. State Appellant's Brief Dckt. 43336

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs)

---

## Recommended Citation

"Diamond v. State Appellant's Brief Dckt. 43336" (2016). *Idaho Supreme Court Records & Briefs*. 6030.  
[https://digitalcommons.law.uidaho.edu/idaho\\_supreme\\_court\\_record\\_briefs/6030](https://digitalcommons.law.uidaho.edu/idaho_supreme_court_record_briefs/6030)

This Court Document is brought to you for free and open access by Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Idaho Supreme Court Records & Briefs by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHNNY JAY DIAMOND, )  
 )  
 Petitioner-Appellant, )  
 )  
 v. )  
 )  
 STATE OF IDAHO, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

NO. 43336  
TWIN FALLS NO. CV 2015-444  
APPELLANT'S BRIEF

RECEIVED  
IDAHO SUPREME COURT  
COURT OF APPEALS  
2016 JAN 13 PM 2:18

\_\_\_\_\_  
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 G RICHARD BEVAN  
District Judge  
\_\_\_\_\_

SARA B. THOMAS  
State Appellate Public Defender  
State of Idaho  
I.S.B. #5867

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

JUSTIN M. CURTIS  
Deputy State Appellate Public Defender  
I.S.B. #6406  
P.O. Box 2816  
Boise, ID 83701  
(208) 334-2712

ATTORNEYS FOR  
PETITIONER-APPELLANT

ATTORNEY FOR  
RESPONDENT

FILED - COPY  
JAN 13 2016  
Supreme Court \_\_\_\_\_ Court of Appeals \_\_\_\_\_  
Entered on ATS by \_\_\_\_\_

## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF THE CASE.....	1
Nature of the Case .....	1
Statement of the Facts and Course of Proceedings .....	1
ISSUE PRESENTED ON APPEAL .....	3
ARGUMENT.....	4
The District Court Erred When It Summarily Dismissed Mr. Diamond’s Amended Petition For Post-Conviction Relief .....	4
A. Introduction.....	4
B. General Post-Conviction Law .....	4
C. The District Court Did Not Address The Claims Raised By The Initial Petition.....	5
CONCLUSION .....	7
CERTIFICATE OF MAILING.....	8

## TABLE OF AUTHORITIES

### Cases

<i>Clark v. State</i> , 92 Idaho 827 (1969) .....	4
<i>Crabtree v. State</i> , 144 Idaho 489 (2006) .....	6
<i>Downing v. State</i> , 132 Idaho 861 (Ct. App. 1999) .....	6
<i>Garza v. State</i> , 139 Idaho 533 (2003) .....	6
<i>Goodwin v. State</i> , 138 Idaho 269 (Ct. App. 2002) .....	4, 6
<i>Martinez v. State</i> , 126 Idaho 813 (Ct. App. 1995) .....	7
<i>Murray v. State</i> , 121 Idaho 918 (Ct. App. 1992) .....	4
<i>Ricca v. State</i> , 124 Idaho 894 (Ct. App. 1993) .....	5
<i>State v. Bearshield</i> , 104 Idaho 676 (1983) .....	4
<i>State v. Martinez</i> , 130 Idaho 530 (Ct. App. 1997) .....	5

### Statutes

I.C. § 19-4906 .....	4, 5, 6
----------------------	---------

### Rules

I.R.C.P. 56 .....	4
I.R.C.P. 8(a)(1) .....	4

## STATEMENT OF THE CASE

### Nature of the Case

Johnny Jay Diamond appeals from the district court's order summarily dismissing his petition for post-conviction relief. He submits that the district court erred by failing to address the claims raised in his initial petition when the amended petition incorporated the claims from the initial petition.

### Statement of the Facts and Course of Proceedings

In 2007, Mr. Diamond was convicted of aiding and abetting a robbery. (R., p.11). He was placed on probation, which was revoked on October 24, 2014. (R., p.25.) Mr. Diamond then filed the instant petition for post-conviction relief, which raised several issues. (R., p.11.) For instance, Mr. Diamond asserted that he requested that his attorney file an appeal but he "never heard any further about it" and was time barred. (R., p.12.) He also asserted that he had been incarcerated beyond his release date. (R., p.13.) Mr. Diamond alleged that this was a violation of the Eighth Amendment. (R., p.14.)

Mr. Diamond subsequently filed an Amended Petition which raised one additional issue:

The basis for the last Motion to Revoke Probation was on the Petitioner's failure to pay fines, fees and restitution. However, the Petitioner had no ability to make such payments. Petitioner received advice from his prior counsel that he should admit to the probation violation and Petitioner was not advised that a defense to the probation violation would be inability to pay. As such, the Petitioner was denied effective assistance of counsel and denied due process. Had Petitioner been advised that he had a defense to the probation violation he would have insisted on an evidentiary hearing, would have prevailed and would not have been committed.

(R., p.55-56.) The Amended Petition also clearly incorporated the original petition and affidavit. (R., p.56.) The State submitted an Answer to the amended petition and a request for the court to take judicial notice. (R., pp.58, 62.) The State submitted the transcripts of the admit/denying hearing and the disposition hearing. (R., pp.79, 86.)

The district court issued a notice of intent to dismiss which only addressed the additional claim raised in the amended petition. (R., p.147.) The court determined that Mr. Diamond's claim was bare and conclusory. (R., p.149.) Further, the court noted that counsel at the disposition hearing did assert that Mr. Diamond was unable to pay. (R., p.150.) The court concluded that it had listened to the arguments and determined that Mr. Diamond's violation was willful. (R. p.151.)

Mr. Diamond responded, asserting that counsel's argument was made at disposition, not as a defense. (R., p.154.) The court then dismissed the petition, holding that Mr. Diamond's argument "conflates a finding of a probation violation with a finding that the violation was willful." (R., p.159.) The court held that counsel raised the inability to pay defense at the proper time – the disposition hearing. (R., p.160.) The court recognized that it could only revoke probation for a willful violation, and the court held that it entertained the argument that the violation was not willful and rejected it by finding a willful violation at disposition. (R., pp.159-160.)

Mr. Diamond appealed. (R., p.164.) He submits that the district court erred by failing to address the claims raised by his initial petition

## ISSUE

Did the district court err by summarily dismissing Mr. Diamond's amended petition for post-conviction relief because the court did not address the issues raised in the initial petition?

## ARGUMENT

### The District Court Erred When It Summarily Dismissed Mr. Diamond's Amended Petition For Post-Conviction Relief

#### A. Introduction

The district court erred when it summarily dismissed Mr. Diamond's amended petition for post-conviction Relief. He submits that the district court erred by failing to address the claims raised by his initial petition when the amended petition incorporated the claims from the initial petition.

#### B. General Post-Conviction Law

An application for post-conviction relief initiates a proceeding that is civil in nature. *Goodwin v. State*, 138 Idaho 269, 271 (Ct. App. 2002) (citing *State v. Bearshield*, 104 Idaho 676, 678 (1983); *Clark v. State*, 92 Idaho 827, 830 (1969); *Murray v. State*, 121 Idaho 918, 92 (Ct. App. 1992)). "Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56." *Goodwin*, 138 Idaho at 271 (citations omitted). "Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based." *Id.* Moreover, "[a]n application for post-conviction relief differs from a complaint in an ordinary civil action, however, an application must contain much more than 'a short and plain statement of the claim' that would suffice for a complaint under I.R.C.P. 8(a)(1)." *Id.* And, "an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such



supporting evidence is not included with the application.” *Id.* at 271-72 (citation omitted). “In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.” *Id.* at 272.

Idaho Code § 19-4906 authorizes summary disposition of an application for post-conviction relief either pursuant to a motion of a party or on the district court’s own initiative. *State v. Martinez*, 130 Idaho 530, 532 (Ct. App. 1997) (citations omitted). “Summary dismissal is proper only when the evidence presents no genuine issues of material fact which, if resolved in the applicant’s favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted.” *Id.* (citation omitted). Summary dismissal of an application for post-conviction relief may be appropriate even if the State “does not controvert the applicant’s evidence because the Court is not required to accept either the applicant’s mere conclusory allegations, unsupported by admissible evidence, or the applicant’s conclusions of law.” *Goodwin*, 138 Idaho at 272 (citations omitted).

On review of a summary dismissal of a post-conviction relief petition without an evidentiary hearing, the appellate court determines “whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file; moreover, the court liberally construes the facts and reasonable inferences in favor of the non-moving party.” *Ricca v. State*, 124 Idaho 894, 896 (Ct. App. 1993).

C. The District Court Did Not Address The Claims Raised By The Initial Petition

The district court may not summarily dismiss a petition for post-conviction relief without first providing an applicant with adequate notice of its reasons for dismissal.

*Downing v. State*, 132 Idaho 861, 863 (Ct. App. 1999). The district court must identify with particularity why an applicant's evidence or legal theories are considered deficient. *Id.* at 864. The district court must give notice of any deficiency in the applicant's evidence or any legal analysis that he needs to address in order to avoid dismissal of his petition. *Martinez v. State*, 126 Idaho 813, 818 (Ct. App. 1995). The district court may only dismiss a petition based on the rationale articulated in the notice provided. *Id.* at 817-18. "A dismissal under I.C. § 19-4906(b), whether the petitioner responds to a notice of intent to dismiss or not, is a determination on the merits of the claims and is subject to appellate review." *Garza v. State*, 139 Idaho 533, 537 (2003).

In this case, Mr. Diamond's initial petition raised several issues. (R., p.11.) For instance, Mr. Diamond asserted that he requested that his attorney file an appeal but he "never heard any further about it" and was time barred. (R., p.12.) He also asserted that he had been incarcerated beyond his release date. (R., p.13.) Mr. Diamond alleged that this was a violation of the Eighth Amendment. (R., p.14.)

Mr. Diamond's amended petition raised another issue which raised one additional issue and also clearly incorporated the original petition and affidavit. (R., p.56.) The district court issued a notice of intent to dismiss which only addressed the additional claim raised in the amended petition. (R., p.147.) At no point did the district court address the claims raised by the initial petition.

*Crabtree v. State*, 144 Idaho 489 (2006), involves a similar situation. In *Crabtree*, the Court of Appeals noted, "the district court's notice of intent to dismiss did not address each of Crabtree's claims." *Id.* at 495. Because of this, the Court concluded, "the district court's reasoning for its intended dismissal failed to identify with particularity

why each of Crabtree's claims were unsupported or without merit." *Id.* The Court therefore remanded the case for consideration of the unaddressed claims. *Id.* at 496.

The same should happen in this case. The district court's notice of intent to dismiss put Mr. Diamond on notice only that the court intended to dismiss the claim raised in the amended petition. It did not address the claims raised in the initial petition. This is not sufficient to dismiss the entire petition, which the court ultimately did. This case must be remanded for consideration of the unaddressed claims.

CONCLUSION

Mr. Diamond requests that the district court's order summarily dismissing his petition or post-conviction relief be vacated.

DATED this 13<sup>th</sup> day of January, 2016.

  
\_\_\_\_\_  
JUSTIN M. CURTIS  
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 13<sup>th</sup> day of January, 2016, 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:

JOHN JAY DIAMOND  
INMATE #59905  
ISCC  
PO BOX 70010  
BOISE ID 83707

G RICHARD BEVAN  
DISTRICT COURT JUDGE  
E-MAILED BRIEF

TIM J WILLIAMS  
ATTORNEY AT LAW  
E-MAILED BRIEF

KENNETH K JORGENSEN  
DEPUTY ATTORNEY GENERAL  
CRIMINAL DIVISION  
PO BOX 83720  
BOISE ID 83720-0010  
Hand delivered to Attorney General's mailbox at Supreme Court.



EVAN A. SMITH  
Administrative Assistant

JMC/eas