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

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IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHNNY JAY DIAMOND,)	
)	NO. 43336
Petitioner-Appellant,)	
v.)	TWIN FALLS CO. NO. CV 2015-444
)	
STATE OF IDAHO,)	APPELLANT'S
)	REPLY BRIEF
Respondent.)	
_____)	

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 G. RICHARD BEVAN
District Judge**

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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	2
ARGUMENT	3
The District Court Erred When It Summarily Dismissed Mr. Diamond’s Amended Petition For Post-Conviction Relief	3
A. Introduction	3
B. The District Court Did Not Address The Claims Raised By The Initial Petition	3
CONCLUSION	5
CERTIFICATE OF MAILING	6

TABLE OF AUTHORITIES

Cases

Crabtree v. State, 144 Idaho 489 (2006) 4

State v. Diamond, docket no. 34554 (Ct. App. May 7, 2008) 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. This Reply Brief addresses the State's assertion that the amended petition did not incorporate the claims raised in the initial petition.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Diamond'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 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. The District Court Did Not Address The Claims Raised By The Initial Petition

On appeal, Mr. Diamond has asserted that the district court erred by failing to address the claims raised in Mr. Diamond's initial petition where the amended petition specifically incorporated the prior claims. The State acknowledges that the district court did not address these claims, but asserts that the amended petition did not incorporate those claims. This is despite the fact that the amended petition specifically incorporated those claims. (R., p.56.)

As noted in the Appellant's Brief, Mr. Diamond asserted that he requested that his attorney file an appeal but he never heard anything further about it and it was time barred. (R., p.12.) He also asserted that he had been incarcerated beyond his release date and that this was an Eighth Amendment violation. (R., pp.13-14.) The State asserts that the claim regarding an appeal was not incorporated into the amended petition because the amended petition acknowledged that he had a prior appeal. (Respondent's Brief, p.7.) The amended petition does state that Mr. Diamond appealed "from the judgment of conviction or imposition of sentence." (R., p.55.) This is correct;

Mr. Diamond did appeal from his original judgment of conviction. See *State v. Diamond*, docket no. 34554 (Ct. App. May 7, 2008)(unpublished). The instant post-conviction petition, however, stems from the order revoking probation, not the judgment of conviction, and the amended petition does not allege that there was an appeal from the order revoking probation.

With regard to the Eighth Amendment claim, the State asserts that the amended petition listed the specific grounds upon which relief was sought, that the Eighth Amendment was not listed, and that the relief sought was to be placed back on probation, not that he be released. (Respondent's Brief, pp.13.-15.) Again, this ignores the statement in the amended petition that the allegations in the initial petition were being incorporated. Further, whether Mr. Diamond would prevail on the claim misses the point. The claim on appeal is that Mr. Diamond was not placed on notice that the claim was being dismissed, and thus was unable to address any deficiency with regard to the Eighth Amendment claim in the district court or to address his claim for relief. While there may have been valid reasons to dismiss the petition *had the court given notice and Mr. Diamond afforded an opportunity to respond*, that is not what occurred in this case.

The case law is clear as is set forth in the Appellant's Brief. As the Court of Appeals noted in *Crabtree v. State*, 144 Idaho 489 (2006), "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 because the amended petition specifically incorporated the claims raised in the initial petition.

CONCLUSION

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

DATED this 2nd day of June, 2016.

_____/s/_____
JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of June, 2016, 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:

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_____/s/_____
EVAN A. SMITH
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JMC/eas