2-26-2013

Adams v. State Respondent's Brief Dckt. 39842

IN THE SUPREME COURT OF THE STATE OF IDAHO

IRWIN RAY ADAMS,	)	
	)	No. 39842
Petitioner-Appellant,	)	
	)	Jerome Co. Case No.
vs.	)	CV-2011-1256
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Irwin Ryan Ray Adams appeals from the district court's order summarily dismissing his petition for post-conviction relief.

Statement Of Facts And Course Of The Proceedings

The district court explained the factual background of Adams' underlying criminal case as follows:

> On October 24, 2009 the petitioner while driving a 1995 Saturn SL automobile at a high rate of speed southbound on 200 East road in Jerome County lost control of his vehicle resulting in the death of his passenger Allen Larsen.
>
> On May 11, 2010 the petitioner was charged with Vehicular Manslaughter, a felony. On May 17, 2010 the petitioner was appointed the Jerome County Public Defender. . . .
>
> On August 9, 2010 at the request of his appointed counsel the court authorized funds for the appointment of an investigator. On August 25, 2010 at the request of appointed counsel the court authorized funds to retain an expert in accident reconstruction.
>
> . . . On January 3, 2011 counsel for the petitioner advised the state and the court that the expert witness retained by the defense would not be called as a witness at trial. The trial commenced on March 9, 2011 and was concluded on March 11, 2011 with the jury retuning [sic] a verdict of guilty on the charge of vehicular manslaughter, a felony.
>
> It was the theory of the state at trial that on the night of October 24, 2009 the petitioner was chasing his girlfriend who was in a vehicle being driven by Brian Constable and that the petitioner at the time he lost control of his vehicle was travelling approximately 108 mph and that when the vehicle left the roadway it rolled causing the death of his passenger Allen Larsen. . . . The accident was investigated by Sean Walker and Denise Gibbs of the Idaho State Police. Trooper Walker took measurements at the scene of the accident. The evidence at the scene of the accident indicated that the petitioners [sic] vehicle at a crest in the roadway of 200 East went airborne and when it came back to ground it left two parallel

> gouge marks on the roadway surface approximately 7feet [sic] in length beginning at a distance of approximately 77-80 feet from where it went airborne. The vehicle then went into a "broad slide" for approximately 200 feet where it left the roadway. The vehicle after leaving the roadway traveled approximately another 19 feet until it struck an irrigation ditch and was tripped which caused the vehicle to roll and travel approximately another 138 feet to its point of rest on its side. Over all, the petitioner's vehicle from the time he lost control to the point of rest travelled approximately 578 feet. Master Corporal Denise Gibbs and accident reconstructionist for the Idaho State Police used what she described as the "fall formula" to estimate the speed of the petitioner's vehicle at the moment it went airborne. In order to obtain the necessary data for this formula she and Trooper Walker took the necessary measurements at the accident scene. This formula consisted of the distance traveled by the petitioner's vehicle from the takeoff point to the first gouges in the road which she determined at 80.33 feet; the height of the vehicle from the roadway surface which she determined to be 1.6 feet; and the takeoff angle which she determined to be 1.8 degrees. The necessary measurements and data was procured by Corporal Gibbs from the accident scene. Based on this formula she determined the speed of the petitioner's vehicle at takeoff to have been 108.02 mph.
>
> At trial it was the theory of the petitioner that at the time of the accident he was being chased by someone in a white or gray Honda and that he was not traveling faster than 75 mph. The petitioner did testify in his own defense at trial. According to the testimony of the petitioner on the night in question he had not seen his girlfriend Shayna Gonzales and that he and Allen Larsen had left his house to go to Twin Falls to purchase a fuel pump. That after he left his house there was a suspicious vehicle following him and that this vehicle was "pushing" him. He decided to go to the Jerome Police Department and was heading south on 200 East. He testified that the last time he looked at his speedometer he was doing approximately 75 mph and the other vehicle was right on his tail. After that he does not remember anything until after his car came to rest.

(R., pp.55-58.) The district court sentenced Adams to a unified term of ten years with three years fixed. (R., pp.4-5.) Adams filed an appeal from his judgment of conviction, which is still pending. (R., pp.5, 58.)

On November 21, 2011, Adams filed a *pro se* petition for post-conviction relief asserting, *inter alia*, that his trial counsel provided ineffective assistance by (1) failing to

call vehicle accident reconstructionist Carl Cover as an expert witness to testify that, in his opinion, Adams' vehicle was travelling between 70 and 75 miles per hour when the accident occurred, and (2) failing to present expert testimony that, based on the mechanical condition of its motor, Adams' vehicle could not have traveled at a rate of speed in excess of 75 miles per hour. (R., pp.19-24, 66-74.) The district court appointed Adams an attorney (R., p.53) and issued a Notice of Intent to Dismiss his post-conviction petition (R., pp.55-75). The state filed an Answer, requesting the district court to dismiss Adams' petition on several grounds, including that it "contains bare and conclusory allegations unsubstantiated by affidavits, records, or other admissible evidence, and therefore fails to raise a genuine issue of material fact." (R., pp.76-77.) After Adams filed a response to the district court's Notice of Intent to Dismiss (R., pp.91-107), the district court dismissed Adams' petition, concluding he failed to establish he was entitled to a hearing on any of his claims (R., pp.120-143). Adams filed a timely notice of appeal. (R., pp.155-159.)

ISSUES

Adams states the issues on appeal as:

1. Did the district court err in summarily dismissing Mr. Adams' Petition for Post-Conviction Relief as there was a genuine issue of material fact as to whether Mr. Adams was prejudiced by his counsel's failure to call his accident reconstructionist, who would have testified that Mr. Adams' car was traveling between 70 and 75 miles per hour at the time of the accident?

2. Did the district court err in summarily dismissing Mr. Adams' Petition for Post-Conviction Relief as there was a genuine issue of material fact as to whether his trial counsel was deficient in failing to present evidence that his motor was damaged prior to the accident and there was a genuine issue of material fact as to whether he was prejudiced by his counsel's deficient performance?

(Appellant's Brief, p.10.)

The state rephrases the issues as:

1. Has Adams failed to show he was entitled to an evidentiary hearing because he did not present a material issue of fact of whether his trial counsel was ineffective for failing to call his accident reconstruction expert to testify at trial?

2. Has Adams failed to demonstrate he was entitled to an evidentiary hearing because he did not present a material issue of fact of whether his trial counsel was ineffective for failing to present evidence that Adams' car motor could not produce speeds over 75 miles per hour?

ARGUMENT

I.
Adams Has Failed To Show He Was Entitled To An Evidentiary Hearing Because He Did Not Present A Material Issue Of Fact Of Whether His Trial Counsel Was Ineffective For Failing To Call His Accident Reconstruction Expert To Testify At Trial

A. Introduction

Prior to trial, the district court approved Adams' request for the appointment of a vehicle accident reconstruction expert, Carl Cover, to review the case and provide testimony at trial. (R., pp.146-147, 167-169.) Mr. Cover averred in two post-conviction affidavits that, prior to trial, he concluded Adams' car had been travelling between 70 and 75 miles per hour at the time of the accident, but he was not called as a witness during the trial. (R., pp.33-36, 86-90.) Adams testified at trial that his car was being chased by a light colored small car, and that in his attempt to evade the pursuing car, he reached a speed of about 75 miles per hour.[1] (#38910 Tr., p.301, L.5 - p.306, L.10; p.312, L.19 – p.314, L.22.)[2] The state's vehicle accident reconstruction expert, Idaho State Police Master Corporal Denise Gibbs, testified at trial that Adams' car was traveling 108 miles per hour "at the point of takeoff" when "he crested over the canal hill, which sent him airborne" for 80.33 feet before his car "touched down on the ground," leaving gouge marks in the pavement, then went broadside across the roadway and "off the edge . . . where the vehicle overturned and finally came to a rest." (Tr., p.135, L.11 – p.140, L.14.)

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[1] Adams was not certain whether the car chasing him had actually struck the rear of his car. (#38910 Tr., p.314, Ls.17-19.)

[2] On December 4, 2012, the Idaho Supreme Court granted Adams' motion requesting the Court take judicial notice of the trial transcript in Idaho Supreme Court Docket No. 38910.

In Adams' post-conviction proceeding, the district court held that Adams had established a *prima facie* claim that his trial counsel's failure to call Mr. Cover as an expert witness at trial constituted deficient performance under Strickland v. Washington, 466 U.S. 668 (1984). (R., pp.126-133.) However, the district court determined that Adams failed to demonstrate a viable claim that his trial counsel's deficient performance was prejudicial to the outcome of his trial, as required by Strickland. (R., pp.133-140.)

On appeal, Adams contends:

> Had the jury heard Mr. Cover's testimony that Mr. Adams was traveling at 75 miles per hour and found this testimony to be credible, there is a reasonable probability that the jury would have found all of Mr. Adams' testimony to be credible and found that he was, in fact, being chased. If the jury reached this conclusion, there is a reasonable probability that it would have either found Mr. Adams not guilty of any crime, or guilty of the lesser included offense of vehicular manslaughter without gross negligence.[3]

(Appellant's Brief, pp.17-18.) Despite his argument, Adams has failed to show any error in the district court's conclusion that, if Mr. Cover had testified at trial that, in his opinion, Adams' car was traveling between 70 and 75 miles per hour, the jury's verdict would not have been undermined.

B. Standard Of Review

In reviewing the summary dismissal of a post-conviction application, the appellate court reviews the record to determine if a genuine issue of material fact exists which, if resolved in petitioner's favor, would require relief to be granted. Nellsch v.

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[3] Vehicular Manslaughter with gross negligence (I.C. § 18-4006(3)(a)) is punishable as a felony by a fine up to $10,000 and/or imprisonment up to ten years (I.C. § 18-4007(3)(a)). Vehicular Manslaughter without gross negligence, and not done by an unlawful act amounting to a felony (I.C. § 18-4006(c)), is a misdemeanor punishable by a fine up to $2,000 and/or a jail sentence not exceeding one year (I.C. § 18-4007(3)(c)).

State, 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992). The court freely reviews the district court's application of the law. Id. at 434, 835 P.2d at 669. However, 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. Ferrier v. State, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001).

C. Adams Has Failed To Show Error In The District Court's Conclusion That His Trial Counsel's Performance Was Not Prejudicial

The district court concluded that, although Adams had presented a viable claim that trial counsel's failure to call Mr. Cover as an expert witness at trial constituted deficient performance, Adams failed to present evidence to support the second prong of Strickland – prejudice. (R. pp.133-140.) To demonstrate prejudice, Adams was required to "show a reasonable probability that the outcome of the trial would be different but for counsel's deficient performance." McKay v. State, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010) (citing State v. Row, 131 Idaho 303, 312, 955 P.2d 1082, 1091 (1998)). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Id. (quoting Strickland, 466 U.S. at 694).

On appeal, Adams first argues that how fast he was driving just before the crash was a disputed fact in post-conviction. (Appellant's Brief, pp.14-16.) However, the issue before the district court was not Adams' speed, but whether Mr. Cover's proposed expert testimony created a reasonable probability the outcome of the trial would have been different. See McKay, 148 Idaho at 570, 225 P.3d at 703. In making that determination, the district court was required to accept Mr. Cover's allegations about how he would have testified – namely, that Adams' car was going 70 to 75 miles per

hour -- and determine what, if any, impact such testimony would have had on the jury's verdict. Id. In short, in determining whether there was prejudice under Strickland, the court was not required to accept, or conclude that the jury had to accept, the substance of Mr. Cover's testimony as settled fact. See Aragon v. State, 114 Idaho 758, 761, 760 P.2d 1174, 1177 (1988) (To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different); State v. Thornton, 122 Idaho 326, 332, 834 P.2d 328, 334 (1992) (no prejudice shown by trial counsel's failure to obtain the opinion of another handwriting expert).

The district court held that, even with Mr. Cover's testimony, the outcome of Adams' trial would not have been different. (R., p.133-140; see p.139 ("Whether the speed of the petitioner's vehicle was 75 or 108 mph or somewhere in between, by reason of the speed in the environment, given the roadway conditions; there was a lessening of control of the petitioner's vehicle to the point where such lack of effective control was likely to bring harm to another, i.e. Mr. Larsen as well as the petitioner.").) The court based its determination that Adams failed to prove prejudice as required by Strickland on the following factors:

> (1) There is no evidence Adams' car was struck in the rear by another vehicle (R., p.133[4]);
>
> (2) The jury did not accept the defense theory that Adams' car was being chased – vis-à-vis testimony by several witnesses that Adams' car was chasing a car driven by Brian Constable and occupied by Adams' recent girlfriend, Shayna Gonzalez, and her mother (id.);

[4] Pages 14 and 15 of the Order Dismissing Petition for Post-Conviction Relief are transposed in the Clerk's Record. (R., pp.133-134.)

(3) Mr. Cover's opinion that I.S.P. Master Corporal Gibbs erred in calculating the speed of Adams' car at the time of the accident (108 mph) is "conclusory and speculative" (R., p.137);

(4) It is undisputed that when Adams' car went over the crest of an elevated portion of the roadway, it went airborne for 80 feet before landing (R., pp.135-140); and

(5) "There is testimony in the record from trial that the petitioner made statements that he was travelling in excess of 100 mph and that Mr. Larsen asked the petitioner to stop and let him out of the vehicle" (R., p.139; see #38910 Tr., p.218, L.3 – p.219, L.19; p.224, L.5 – p.226, L.10; p.234, L.4 – p.236, L.8; p.241, L.16 – p.243, L.14; p.247, L.5 – p.249, L.6).

Based on the district court's well-reasoned legal and factual analysis of this issue, set forth in its Notice of Intent to Dismiss and its Order Dismissing Petition for Post-Conviction Relief, the state incorporates those opinions, attached as Exhibits A and B (respectively) to this Respondent's Brief, and relies upon them as if set forth fully herein. The physical evidence presented at trial alone showed that Adams drove with gross negligence; his car traveled a total of 578 feet after he lost control -- 80 feet in the air, 7 feet of gouge marks where his car landed, 200 feet before going into a skid, 152 feet in a sideways slide on the road, 11 feet off the road and into a ditch, and then it rolled another 130 feet. (#38910 Tr., p.137, L.3 – p.139, L.14; p.156, L.16 – p.157, L.22.) This led directly to the death of Mr. Larsen. The district court similarly observed:

> The fact remains that the defendant was driving at such a speed to cause his vehicle to go airborne and, when it returned to the roadway surface, the petitioner lost control which resulted in the death of Mr. Larsen. There can be no dispute that the petitioner's operation of his motor vehicle was a significant cause contributing to the death of Mr. Larsen and that the totality of the circumstances was sufficient to establish gross negligence on the part of the petitioner. The failure to present expert testimony that the petitioner's speed did not exceed 75 mph in a 50 mph zone does not "clear [Adams] of alleged guilt, excuse his actions, or reduce punishment." [*Baker v. State*, 142 Idaho 411, 422, 128 P.3d 948, 959 (2005)]. The

> petitioner has failed to present admissible evidence sufficient to undermine the verdict of the jury and, therefore, has failed to present a triable issue relative to the prejudice prong of *Strickland*.

(R., p.140.)

In short, the district court properly dismissed Adams' claim under I.C. § 19-4906(b), explaining, "based upon the deficiencies of the claims and evidence presented by the petitioner, no purpose would be served by further proceedings" and "there is no genuine issue of material fact, which would entitle petitioner to the requested relief." (R., p.142.) Adams has failed to show any error in the district court's ruling.

II.
Adams Has Failed To Demonstrate He Was Entitled To An Evidentiary Hearing Because He Did Not Present A Material Issue Of Fact Of Whether His Trial Counsel Was Ineffective For Failing To Present Evidence That Adams' Car Motor Could Not Produce Speeds Over 75 Miles Per Hour

Adams also contends the district court erred by failing to permit an evidentiary hearing on his claim that his trial counsel provided ineffective assistance for failing to present evidence that Adams' car motor was incapable of producing speeds over 75 miles per hour. (Appellant's Brief, p.19.)

The state relies upon the district court's Notice of Intent to Dismiss (Appendix A; R., pp.72-74) and its Order Dismissing Petition for Post-Conviction Relief (Appendix B; R., pp.140-142) for its response to this issue, and incorporates the relevant portions of those opinions into this section of this brief as if fully set forth herein. The state also relies upon its preceding argument I, supra, to show that Adams has failed to demonstrate any prejudice under Strickland in regard to this issue.

CONCLUSION

The state respectfully requests this Court affirm Adams' conviction and sentence.

DATED this 26th day of February, 2013.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 26th day of February, 2013, served a true and correct copy of the attached RESPONDENT'S BRIEF by causing a copy addressed to:

JASON C. PINTLER
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in the State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

John C. McKinney
Deputy Attorney General

JCM/pm

APPENDIX A

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

IRWIN RYAN RAY ADAMS, Petitioner,	)	
vs.	)	Case No. CV-2011-1256
STATE OF IDAHO, Respondent.	)	

NOTICE OF INTENT TO DISMISS

On November 21, 2011 the petitioner filed a Petition for Post-Conviction Relief. The Court, having reviewed the petition for post-conviction relief filed on November 21, 2011, and in accordance with Idaho Code § 19-4906(b), notifies petitioner that the petition, on its face, fails to meet the requirements of I.C. Section 19-4901 et seq. as set forth in further detail below.

I.

FACTUAL AND PROCEDURAL BACKGROUND

On October 24, 2009 the petitioner while driving a 1995 Saturn SL automobile at a high rate of speed southbound on 200 East road in Jerome County lost control of his vehicle resulting in the death of his passenger Allen Larsen.

On May 11, 2010 the petitioner was charged with Vehicular Manslaughter, a felony. On May 17, 2010 the petitioner was appointed the Jerome County Public Defender. A preliminary hearing was conducted on June 17, 2010 and the petitioner was bound over to District Court. On June 28, 2010 the petitioner entered a plea of not guilty and the matter was scheduled for trial on September 22, 2010.

On August 9, 2010 at the request of his appointed counsel the court authorized funds for the appointment of an investigator. On August 25, 2010 at the request of appointed counsel the court authorized funds to retain an expert in accident reconstruction.

The trial date was continued various times by counsel for both the state and the petitioner and the petitioner waived speedy trial on November 9, 2010. The trial was last continued to March 9, 2011. On January 3, 2011 counsel for the petitioner advised the state and the court that the expert witness retained by the defense would not be called as a witness at trial. The trial commenced on March 9, 2011 and was concluded on March 11, 2011 with the jury retuning a verdict of guilty on the charge of vehicular manslaughter, a felony.

It was the theory of the state at trial that on the night of October 24, 2009 the petitioner was chasing his girlfriend who was in a vehicle being driven by Brian Constable and that the petitioner at the time he lost control of his vehicle was travelling approximately 108 mph and that when the vehicle left the roadway it rolled causing the death of his passenger Allen Larsen. At trial there were no independent witnesses to the accident other than individuals who came on to the scene of the accident after it had occurred. There were no independent witnesses who observed the petitioner lose control of the vehicle or when it left the roadway and rolled. The accident was investigated by Sean Walker and Denise Gibbs of the Idaho State Police. Trooper Walker took measurements at the scene of the accident. The evidence at the scene of the accident

indicated that the petitioners vehicle at a crest in the roadway of 200 East went airborne and when it came back to ground it left two parallel gouge marks on the roadway surface approximately 7feet in length beginning at a distance of approximately 77-80 feet from where it went airborne. The vehicle then went into a "broad slide" for approximately 200 feet where it left the roadway. The vehicle after leaving the roadway traveled approximately another 19 feet until it struck an irrigation ditch and was tripped which caused the vehicle to roll and travel approximately another 138 feet to its point of rest on its side. Over all, the petitioner's vehicle from the time he lost control to point of rest travelled approximately 578 feet. Master Corporal Denise Gibbs and accident reconstructionist for the Idaho State Police used what she described as the "fall formula" to estimate the speed of the petitioner's vehicle at the moment it went airborne. In order to obtain the necessary data for this formula she and Trooper Walker took the necessary measurements at the accident scene. This formula consisted of the distance traveled by the petitioner's vehicle from the takeoff point to the first gouges in the road which she determined at 80.33 feet; the height of the vehicle from the roadway surface which she determined to be 1.6 feet; and the takeoff angle which she determined to be 1.8 degrees. The necessary measurements and data was procured by Corporal Gibbs from the accident scene. Based on this formula she determined the speed of the petitioner's vehicle at takeoff to have been 108.02 mph.

At trial it was the theory of the petitioner that at the time of the accident he was being chased by someone in a white or gray Honda and that he was not traveling faster than 75 mph. The petitioner did testify in his own defense at trial. According to the testimony of the petitioner on the night in question he had not seen his girlfriend Shayna Gonzales and that he and Allen Larsen had left his house to go to Twin Falls to purchase a fuel pump. That after he left his house

there was a suspicious vehicle following him and that this vehicle was "pushing" him. He decided to go to the Jerome Police Department and was heading south on 200 East. He testified that the last time he looked at his speedometer he was doing approximately 75 mph and the other vehicle was right on his tail. After that he does not remember anything until after his car came to rest.

On May 9, 2011, after a three (3) day jury trial, a Judgment of Conviction was entered on the felony charge of Vehicular Manslaughter. (*State v. Irwin Ryan Adams, Jerome County Case No. CR-2010-2839*). The petitioner filed a timely appeal of the Judgment of Conviction which appeal is presently pending.

On November 21, 2011 the petitioner filed his petition for post-conviction relief. The essence of the petition is that his appointed counsel, were ineffective in violation of the Sixth Amendment when they failed to properly investigate and present evidence that he was being chased; that he could not have been travelling faster than 75 mile per hour; and of the mechanical difficulties of his car. The petition is supported with the Affidavits of Carl Cover, Kevin Adams, Larry Harms, and Ron Stone. The petition also alleges to be supported by the Affidavit of Stacy Gosnell however, no such Affidavit is attached.

II.

JUDICIAL NOTICE

Pursuant to I.R.E. Rule 201, the court hereby takes judicial notice of the following proceedings:

1. The appellate transcript of the trial conducted on March 9-11, 2011(Tr.)
   (appellate transcript emailed to counsel at the time of service of this notice of intent to dismiss)

2. The Submission of Expert Witness Invoice "Under Seal"

III.

POST-CONVICTION RELIEF STANDARD

A petition for post-conviction relief is a civil proceeding, entirely distinct from the underlying criminal action. *Ferrier v. State*, 135 Idaho 797 (2001). If the petition fails to present or be accompanied by admissible evidence supporting its allegations, and making a prima facie case, *i.e.* establishing each essential element of the claim, then summary dismissal is appropriate. *Hernandez v. State*, 133 Idaho 794 (1999); *Martinez v. State*, 126 Idaho 813, 816 (Ct. App. 1995). While the Court is required to accept petitioner's unrebutted allegations, it need not accept petitioner's bare or conclusory allegations. *Berg v. State*, 131 Idaho 517 (1998); *King v. State*, 114 Idaho 442 (Ct. App. 1988). "An application for post-conviction relief differs from a complaint in an ordinary civil action[.]" *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376, 382 (2004) (quoting *Goodwin*, 138 Idaho at 271, 61 P.3d at 628)). The 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). *State v. Payne*, 146 Idaho 548, 560, 199 P.3d 123, 135 (2008); *Goodwin*, 138 Idaho at 271, 61 P.3d at 628. The application 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. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application is the procedural equivalent of summary judgment under I.R.C.P. 56. "A claim for post-conviction relief will be subject to summary dismissal . . . if the applicant has not presented evidence

making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148, 1152 (2009) (quoting *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738, 739 (1998)). Thus, summary dismissal is permissible when the applicant's evidence has raised no genuine issue of material fact that, 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. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Goodwin*, 138 Idaho at 272, 61 P.3d at 629. Summary dismissal of an application for post-conviction relief may be appropriate, however, even where 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. *Payne*, 146 Idaho at 561, 199 P.3d at 136; *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994).

Idaho Code section 19-4906 authorizes summary dismissal of an application for post-conviction relief pursuant to a motion by a party, which is the procedural equivalent of a motion for summary judgment. *See also* I.R.C.P. 56. Therefore, summary dismissal is only authorized if there is no genuine issue of material fact that, if resolved in the petitioner's favor, would entitle the petitioner to the requested relief. *Gonzales v. State,* 120 Idaho 759, 763 (Ct. App. 1991). Summary dismissal may be appropriate, however, even where the State does not controvert the petitioner's evidence because the Court is not required to accept either the petitioner's mere conclusory allegations, unsupported by admissible evidence, or the petitioner's conclusions of law. *Roman v. State,* 125 Idaho 644, 647 (Ct. App. 1994). Furthermore, our courts have held that post-conviction allegations are insufficient for the granting of relief when they are clearly disproved by the record. *Cootz v. State,* 129 Idaho 360, 368 (Ct. App. 1996).

When considering whether there exists a triable issue of fact, the Court should consider those matters of which the Court may take judicial notice as well as the "pleading, depositions,

and admissions together with any affidavits on file." *Ricca v. State,* 124 Idaho 894, 896 (Ct. App. 1993). Because this Court is the trier of fact in post-conviction cases, this Court is not constrained to draw inferences in favor of the non-moving party. This Court is free to arrive at the most probable inferences to be drawn from the uncontroverted evidence. *Hayes v. State*, 146 Idaho 353, 355 (Ct. App. 2008). The Court of Appeals in *Murphy v. State*, set forth the standard for ineffective assistance of counsel in claims of post-conviction relief as follows:

> In order to prevail on a claim of ineffective assistance of counsel, the post-conviction applicant must demonstrate both that her attorney's performance was deficient, and that she was thereby prejudiced in the defense of the criminal charge. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Hassett v. State,* 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct.App.1995); *Davis v. State*, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct.App.1989). To show deficient performance, a petitioner must overcome the strong presumption that counsel's performance was adequate by demonstrating "that counsel's representation did not meet objective standards of competence." *Roman*, 125 Idaho at 648-49, 873 P.2d at 902-03. See also *Vick v. State*, 131 Idaho 121, 124, 952 P.2d 1257, 1260 (Ct.App.1998). If a petitioner succeeds in establishing that counsel's performance was deficient, she must also prove the prejudice element by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 697. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

143 Idaho 139, 145, 139 P.3d 741 (2006).

IV.

MOTION FOR APPOINTMENT OF COUNSEL

In *Brown v. State,* 135 Idaho 676, 679, 23 P.3d 138, 141 (2001) the Court addressed the issue of appointment of counsel in post-conviction proceedings and stated as follows:

> As stated above, a needy applicant for post-conviction relief is entitled to court-appointed counsel unless the trial court determines that the post-conviction proceeding is frivolous. Idaho Code § 19-852(b)(3) sets forth the standard for determining whether or not a post-conviction proceeding is frivolous. It is frivolous if it is "not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense."

> When applying that standard to pro se applications for appointment of counsel, the trial court should keep in mind that petitions and affidavits filed by a pro se petitioner will often be conclusory and incomplete. Although facts sufficient to state a claim may not be alleged because they do not exist, they also may not be alleged because the pro se petitioner simply does not know what are the essential elements of a claim.
>
> It is essential that the petitioner be given adequate notice of the claimed defects so he has an opportunity to respond and to give the trial court an adequate basis for deciding the need for counsel based upon the merits of the claims. If the court decides that the claims in the petition are frivolous, the court should provide sufficient information regarding the basis for its ruling to enable the petitioner to supplement the request with the necessary additional facts, if they exist. Although the petitioner is not entitled to have counsel appointed in order to search the record for possible nonfrivolous claims, he should be provided with a meaningful opportunity to supplement the record and to renew his request for court-appointed counsel prior to the dismissal of his petition where, as here, he has alleged facts supporting some elements of a valid claim.

Brown, supra. See also Charboneau v. State, 140 Idaho 789, 792-93, 102 P.3d 1108, 1111-12 (2004).

Based on the procedural and factual background as set forth above, it would appear that the petitioner has set forth some claims of ineffective assistance of counsel as concerns counsel's investigation and preparation for trial in the underlying case. Therefore it appears that the petitioner may have a meritorious claim for the purposes of appointing counsel and the court will hereby appoint counsel, David Haley as appointed counsel for the petitioner in this proceeding. The motion for appointment of counsel is GRANTED.

V.

ANALYSIS

The sum and substance of the petitioner's claims for post-conviction relief is that his attorneys were ineffective in the investigation of his case and that his attorneys were ineffective in failing to call an expert witness or present certain evidence at trial.

The duty to investigate requires only that counsel conduct a reasonable investigation. *Mitchell v. State,* 132 Idaho 274, 971 P.2d 727 (1998). "It is well established that we will not

attempt to second-guess trial counsel's strategic decisions unless those decisions are made upon the basis of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation." *Murphy v. State,* 143 Idaho 139, 145, 139 P.3d 741, 747 (Ct. App. 2006). "Strategic choices made after incomplete investigations are reasonable only so far as reasonable professional judgments support the limitations on investigation." *Supra, Murphy v. State.* 143 Idaho at 146, 139 P.3d at 748 (citing *Wiggins v. Smith,* 539 U.S. 510, 533 (2003).

When it is claimed that trial counsel was ineffective in failing to call or employ expert witnesses at or in preparation for the trial, the petitioner must prove facts that would have been discovered that would undermine confidence in the verdict. *State v. Porter,* 130 Idaho 772, 948 P.2d 127 (1997). A defendant shows prejudice by establishing a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have probability sufficient to undermine confidence in the outcome. *Id.* at 793. The Supreme Court in *State v. Porter*, 130 Idaho 772, 793, 948 P.2d 127 (1997), stated:

> Porter claims that his counsel also rendered ineffective assistance when he failed to call expert witnesses at trial. In order for this claim to succeed, Porter must assert facts that would have been discovered by additional investigation and should offer expert testimony that would have been produced if the funds to hire experts had been requested. *Charboneau*, 116 Idaho at 139, 774 P.2d at 309.

The petitioner in his petition for post-conviction relief alleges in summary (1) that his attorneys were ineffective in failing to locate and interview "two (2) witnesses"; (2) that his attorneys failed to provide certain information to their expert, Carl Cover and failed to call Carl Covert as an expert at trial; (3) that his attorney Ms. Gosnell was misled by counsel Dan Taylor as to the expected testimony of Carl Cover; and (4) that his attorney was ineffective in failing to investigate and present evidence of the mechanical difficulties of his vehicle.

A. Failure to investigate and locate witnesses in the "Niccko" blog post.

The petitioner alleges that his attorneys, Dan Taylor and Stacy Gosnell were ineffective in failing to locate, identify and interview a "couple" identified in a Times News blog as "Niccko". Bare allegations that discovery was not properly conducted or that all avenues of investigation were not exhausted does not, by itself, give rise to a right to relief. It is the burden of the petitioner to provide some indication of what information was missing or how it would have been used by the defense. Without such a showing, there can be no evidence of prejudice and summary dismissal is appropriate. *Jones v. State,* 125 Idaho 294, 870 P.2d 1 (Ct. App. 1994).

In the trial there was testimony from Kathie Allison that she was one of the first persons on the scene of the accident. She testified that she did not see the accident happen and that as she turned the corner to go northbound on the subject road she saw a smaller, darker car parked on the side of the road which drove away slowly southbound. After she stopped at the accident scene, and after she called 911 another vehicle stopped at the scene that was occupied by a husband and wife. She did not know the name of this couple and there is no evidence that this couple was ever identified by name. According to the petitioner there was a posting on a blog site on the Times News Website by an online name "Niccko" and that the blog stated: "My wife and I pulled up behind a woman who got out there before us. My wife said she saw a grey car that looked like a Honda accord stopped where the vehicle had started losing control. The car turned around and speed off." The petitioner alleges that he advised his attorney of this information and requested that they identify who "Niccko" was for purposes of locating these potential witnesses. Kathie Allison was the first person on the scene and she admitted under oath she had not seen the accident occur and it stands to reason that the "couple" who arrived after her would not have seen the accident. The statement in the blog is hearsay and the statement of the

petitioner as to what the blog may have stated is hearsay. There is no evidence that any of these witnesses observed the petitioner being chased before the accident had occurred and there is no showing as to what their testimony would have been. One can assume that the couples' testimony would have been no different than the testimony at trial of Kathie Allison.

Assuming arguendo that counsel failed to locate, identify and interview these witnesses or call these witnesses at trial, the petitioner has failed to show that the alleged deficiency of counsel was prejudicial. The lack of evidence as to what that specific witness would have testified denies the trial court a basis to evaluate the probability of a different outcome, i.e. prejudice. *Wolfe v. State,* 117 Idaho 645, 791 P.2d 26 (Ct. App. 1990). There is no showing that the couple identified in the blog saw the petitioner being chased or that they saw the accident occur. They came on the scene after Kathie Allison who admitted under oath she did not see the accident occur and therefore could not testify that the petitioner was being chased.

In fact the statements under oath of the petitioner as set forth in his petition for post-conviction relief now suggest contrary to his trial testimony that on the night in question he had been following his girlfriend prior to the accident. At trial the petitioner testified that he had not seen his girlfriend that night and that he and Allen Larsen were going to Twin Falls to purchase a fuel pump. In his pending petition the petitioner states: "That Shayna, her mother, and Brian Constable then left petitioner's home with Constable driving. That petitioner's closest friend, Allen Larsen, was at petitioner's home at the time. That petitioner and Allen Larsen then got inot the Saturn intending to follow Shayna, her mother and Brian Constable." (Petition, ¶ (g), pg. 5-6). At trial the petitioner testified that he and Allen Larsen had been riding dirt bikes at Devils Corral from approximately 12 noon until they arrived home at his house at around 6:00pm. He also testified that he left his house that night with Allen Larsen to purchase a fuel pump in Twin

Falls. He was specifically asked if he had seen Shayna and he testified as follows (Tr. pg. 323, L. 19 to pg. 324, L. 12):

> Q. Where was Shayna when you left your home that day?
> A. I have no clue.
> Q. Did she drive your car earlier that day?
> A. Yes, she did.
> Q. Okay. And was that the same car that you drove that you had gotten in the crash with?
> A. Yes.
> Q. Did you see Shayna at all that day?
> A. Earlier that day when she left to go to her mother's house or was going to see her mother and Brian Constable.
> Q. Okay.
> A.. –she asked me if she could borrow the car to go to Eden.
> Q. Did you see her when she got back?
> A. No, I didn't.
> Q. You didn't see her at all?
> A. No.

The facts alleged in the petition also conflict with his testimony at trial as to his girlfriend borrowing his car the day of the accident. At trial he testified that at noontime he and Allen Larsen were riding dirt bikes at Devils Corral and that they finished riding between 5:30 and 6:00 pm (Tr. pg. 297, L. 22 to pg. 298, L. 25). In his petition he alleges that between 12:30 and 1:00 pm he was at a gas station with Shayna. (Petition, ¶. (c), pg. 5). The petitioner has failed to make a prima facie showing that the failure on the part of counsel in locating potential witnesses would have had the probability of changing the outcome of the trial and therefore the petitioner has failed to make a prima facie showing of deficiency or prejudice and therefore this claim should be dismissed.

B. Failure to provide information to defendant's expert witness and/or call said expert witness at trial.

The petitioner alleges that his attorneys, Dan Taylor and Stacy Gosnell were ineffective in failing to provide certain information to their expert, Carl Cover and were further ineffective

in failing to call Mr. Cover as a witness in his trial. There are also allegations that Counsel Dan Taylor may have misled counsel, Stacy Gosnell as to the sum and substance of the testimony of Carl Cover. According to Mr. Cover after receipt of the initial information form Dan Taylor, which included the ISP Accident Reconstruction Report, he never heard from counsel again and they did not respond to him with the additional information he had requested. On November 9, 2010 Mr. Cover submitted to counsel his invoice for the services rendered and the invoice was submitted to the court for payment on December 3, 2010. The invoice reflects that Mr. Cover reviewed the ISP vehicle collision report; Denise Gibbs scale diagram; Sean Walker's scene notes / measurements; Denise Gibbs collision reconstruction report; Sean Walker's Incident Report; Sgt. Thompson's Incident Report and narrative; the statements of Brian Constable, Bobbie Ambrose, Shanya Gonzalez, Teresa Stone-Broncheau, and Kathie Allison; the Arrest Affidavits dated 4/29/2010 and 5/6/2010; the Complaint Information sheets; Photographs of Adams vehicle; newspaper articles of the collision; photographs of the collision site; and recorded interviews of Kevin Adams, Shawna Lanting, Larey Adams, and Kendra Adams. The invoice further reflects that Mr. Cover conducted research of: the weather including sunset and moon data for October 24, 2009; the manufacturer's specifications for the Saturn; aerial photography for the collision site; street level photographs / topographical data. The invoice mentions contacts with Mr. Taylor and his office. In terms of analysis his invoice reflects that he scale diagramed the roadway and trooper's measurement; that he reviewed the ISP trajectory calculations; that he performed sensitivity evaluation for trajectory calculations and that he conducted an initial energy loss evaluation of the Saturn's speed. According to his invoice he spent 13.9 hours on the work he performed.

The petitioner supports his petition with the affidavit of Carl Cover. The decision whether to call witnesses is a strategic decision which ordinarily should not be second guessed by this court, unless it is shown that those decisions are made upon the basis of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation. *Aragon v. State,* 114 Idaho 758, 763, 760 P.2d 1174, 1179 (1988); *Nelson v. State,* 124 Idaho 596, 861 P.2d 1261 (Ct. App. 1993). Certainly, if Mr. Cover had admissible expert opinion testimony as to the speed of the petitioner's vehicle that could have rebutted the ISP accident reconstructionist testimony, counsel would be deficient in failing to provide the jury with such testimony. Further, if Mr. Cover had admissible expert opinion testimony that would have established that the petitioner's vehicle had been struck by another vehicle causing it to lose control, counsel would have been deficient in failing to provide the jury with such testimony.

In the underlying criminal case the court did grant to the defense funds to retain Mr. Cover as an accident reconstruction expert. Mr. Cover was retained by the defense in September 2010. Mr. Cover was provided by the defense attorney with (1) one disc containing photographs of the roadway; (2) one disc containing interviews of members of the Adams family; (3) the ISP Accident Reconstruction Report, which had been requested by Mr. Cover. Based on this information Mr. Cover states in his affidavit that,

> "based on the data, I conducted a review of the conclusions of the Idaho State Police investigator as to the estimated speed of the defendant's vehicle at the time of the crash. Based on my investigation, I conclude that the speed of the defendant's vehicle at the time of the crash was between seventy (70) and seventy-five (75) miles per hour, and that the findings of the Idaho State Police as to the rate of speed were clearly erroneous based on their own calculations." (Cover Affidavit, ¶. 4)

Mr. Cover in his affidavit opines that the petitioner's speed "at the time of the crash" was between 70 and 75 miles per hour. Mr. Cover does not define the phrase "at the time of the

crash". The term "crash" would imply to fall, land or hit with destructive force. The affidavit of Mr. Cover does not provide any opinion as to the speed of the petitioner's vehicle prior to the time he lost control.

Mr. Cover further stated in part that he advised Mr. Taylor, that,

> "if he intended to proceed to trial on the theory that the defendant's vehicle had been struck from behind by another vehicle, I would need to travel to Idaho to view the defendant's vehicle itself and in the event the case was going to proceed to trial, I would need to see photocopies of all photographs of the accident scene taken by the Idaho State Police investigator in order to finalize my findings as to the defendant's speed at the time of the accident. (Cover Affidavit, ¶. 4)

It is clear based on the affidavit of Mr. Cover that he could not express any opinion as to whether the petitioner was being chased or that his vehicle was struck from behind since the petitioner's vehicle was no longer available for inspection since the Adams family had disposed of the vehicle and it had been crushed in April 2010. It is clear from this record and the affidavit of Mr. Cover, that Mr. Cover never visited the accident scene nor has he ever viewed the petitioner's vehicle prior to its destruction. The affidavit of Mr. Cover in support of the petition for post-conviction relief does not contain any facts to suggest that the calculation of the speed of the petitioner's vehicle by Denise Gibbs was in error or otherwise not admissible.

> "The admission of expert testimony is within the sound discretion of the trial court. *Burgess v. Salmon River Canal Co., Ltd.*, 127 Idaho 565, 903 P.2d 730 (1995). Expert opinion must be based upon a proper factual foundation. "Expert opinion which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict, and therefore is inadmissible as evidence under Rule 702." *Ryan* at 46, 844 P.2d at 28. Expert opinion that merely suggests possibilities would only invite conjecture and may be properly excluded. *Elce v. State,* 110 Idaho 361, 716 P.2d 505 (1986)."
>
> *Bromley v. Garey,* 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999)

Mr. Cover in his affidavit does not set forth a proper factual foundation for his opinion of the speed of the petitioner's vehicle or that the calculation of the petitioner's speed by ISP was erroneous. The affidavit of Mr. Cover is merely conclusory. When it is claimed that trial counsel was ineffective in failing to call or employ expert witnesses at or in preparation for the trial, the petitioner must prove facts that would have been discovered that would undermine confidence in the verdict. *State v. Porter,* 130 Idaho 772, 948 P.2d 127 (1997). A defendant shows prejudice by establishing a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have probability sufficient to undermine confidence in the outcome. *Id.* at 793. The Supreme Court in *State v. Porter*, 130 Idaho 772, 793, 948 P.2d 127 (1997), stated:

> Porter claims that his counsel also rendered ineffective assistance when he failed to call expert witnesses at trial. In order for this claim to succeed, Porter must assert facts that would have been discovered by additional investigation and should offer expert testimony that would have been produced if the funds to hire experts had been requested. *Charboneau*, 116 Idaho at 139, 774 P.2d at 309.

Whether Mr. Adams was travelling 75 mph or 108 mph is not necessarily determinative as to whether he acted with gross negligence in a vacuum. It is an evaluation of the totality of the circumstances for the trier of fact to determine if the petitioner's conduct "amounts to a wanton, flagrant or reckless disregard of consequences or willful indifference of the safety or rights of others." (ICJI 342). "In determining whether [petitioner] drove his automobile in reckless disregard of the safety of others, the jury was entitled to consider all the facts and circumstances surrounding the accident. *State v. Aims,* 80 Idaho 146, 151, 326 P.2d 998, 1000 (1958). *Also see, Smith v. Sharp,* 85 Idaho 17, 375 P.2d 184 (1962). Mr. Cover in his affidavit does not contest the conclusion reached by Corporal Gibbs that the Adams vehicle went airborne:

> Q. And then from your complete investigation or reconstruction of this crash, what were your conclusions?

A. My conclusion was the driver of the vehicle, Mr. Adams, was driving at a minimum speed of 108 miles an hour when he crested over the canal hill, which sent him airborne, and once the vehicle touched down on the ground, left the gouge mark on the pavement.

For the frame to hit the pavement and make those gouge marks, all of the suspension had to come up underneath the car to a point where the frame was allowed to gouge, and all of that compression has to release at some point, and once the car- that compression caught up to itself and those springs and tires and everything released, it came up again almost like a bounce, which sent him into a broad slide across the roadway and off the edge of the road where the vehicle overturned and finally came to rest.

(Tr. pg. 139, L.20 to pg. 140, L.14)

There was testimony that the petitioner was chasing the Constable vehicle. The petitioner was driving his vehicle in any case at a rate of speed well in excess of the posted speed limit. He was driving on a narrow country road with one lane of travel in each direction. He was traveling on a road that was not flat or level and had significant rises and falls of the roadway surface. There was evidence that the vehicle because of the speed went airborne and when it returned to the roadway surface it left two parallel gouges approximately seven feet in length and that the vehicle was out of control for a distance in excess of 500 feet. The petitioner as the driver was responsible for the safety of himself and his passenger and others travelling on that roadway. The petitioner had the duty and responsibility to drive in control. Perhaps if the petitioner was in fact being chased or had been struck from behind that might have mitigated his culpability, however, other than the testimony of the petitioner there is no evidence that he was being chased or was struck from behind and in fact the evidence at trial supported the conclusion that it was the petitioner who was the chaser, of the Constable vehicle on October 24, 2009. At trial the petitioner testified that when he and Allen Larsen left his house he did not know where Shayna was and that he and Allen Larsen were going to Twin Falls to purchase a fuel pump. In his petition for post-conviction relief he now states under oath that when he left his residence with

Allen Larsen that they "intending to follow Shayna, her mother and Brian Constable." (Petition, ¶. (g), pg. 5-6). It is undisputed that the testimony of Mr. Cover could not have supported petitioner's claim that he was being chased or that he had been struck from behind by another vehicle and the petitioner has presented no facts to show how the ISP calculation of speed was erroneous. Mr. Cover does not challenge the reliability of the formula utilized by Denise Gibbs to establish the speed of the petitioner's vehicle at the time of takeoff. Mr. Cover does not challenge the testimony of Denise Gibbs that the two parallel gouge marks on the roadway resulted when the vehicle made impact with the roadway surface. Mr. Cover does not challenge the testimony of Gibbs that the petitioner's vehicle traveled approximately 80 feet and that the height of the vehicle was approximately 1.6 feet and that the takeoff angle was 1.8 degrees. Nor does he challenge the validity of the formula used by Denise Gibbs to estimate the speed of the petitioner's vehicle. The petitioner has failed to make a prima facie factual showing that the testimony of Carl Cover would have altered the outcome of the trial. The petitioner has failed to present a prima facie case that counsel was deficient in failing to call an expert witness or that he was prejudiced by counsel's failure to call Mr. Cover as an expert witness at trial.

C. Failure to investigate and present evidence at trial of mechanical deficiencies of the defendant's car.

The petitioner alleges that counsel was ineffective in failing to investigate or present evidence as to the mechanical deficiencies of his car that he claims could not have travelled at a rate of speed in excess of 75 mph. It is this claim that is based on the affidavits of Kevin Adams, Ron Stone and Larry Harms. The petitioner admits that he never disclosed such a claim or defense to Dan Taylor and he asserts he first brought this to the attention of Stacy Gosnell some time prior to his trial.

The petitioner and his family disposed of the vehicle prior to him being charged by the State. The vehicle was sold in April 2010 and while the engine may have been retained, the remainder of the vehicle was no longer available for further inspection. If the petitioner was of the belief he held as to the mechanical condition of his vehicle it was his obligation to preserve the evidence which the petitioner failed to do. If the petitioner had attempted to introduce such testimony at trial, the doctrine of spoliation would have applied which "provides that when a party with a duty to preserve evidence intentionally destroys it, an inference arises that the destroyed evidence was unfavorable to that party." *Ada County Highway District v. total Success Invs. LLC,* 145 Idaho 360, 368, 170 P.3d 323, 331 (2008). As the court held in *Bromley v. Garey, supra.*,

> The evidentiary doctrine of spoliation recognizes it is unlikely that a party will destroy favorable evidence. Thus, the doctrine of spoliation provides that when a party with a duty to preserve evidence intentionally destroys it, an inference arises that the destroyed evidence was unfavorable to that party. *Stuart v. State,* 127 Idaho 806, 907 P.2d 783 (1995). Spoliation is a rule of evidence applicable at the discretion of the trial court. *Vodusek v. Bayliner Marine Corp.,* 71 F.3d 148 (4th Cir.1995).

Id. 132 Idaho at 812, 979 P.2d at 1170.

If the petitioner intended to raise as a defense the mechanical condition of his vehicle it was his duty to preserve it for trial and he failed to do so and it was not the fault of counsel that the vehicle was destroyed since its destruction occurred prior to the time that counsel was appointed for the defendant.

The affidavit of Ron Stone does state in part that it is "possible" that the engine of the petitioner's car could attain a speed of 108 mph. The petitioner himself at trial also testified that it is possible he was traveling faster than 75 mph. Since it was the petitioner and his family that destroyed the evidence and there was a presumption that the evidence would have been

unfavorable to the petitioner, it cannot be said that counsel was ineffective in failing to present evidence at trial of mechanical difficulties of the petitioner's vehicle when the evidence had been destroyed by the petitioner's family.

VI.

CONCLUSION AND ORDER

Pursuant to I.C. Section 19-4906(b), petitioner is hereby notified that based upon the Petition and the record presented to the Court, the Court provisionally intends to dismiss the Petition for the reasons set forth above. Petitioner is hereby notified that he is entitled to reply to this notice of intent to dismiss within twenty (20) days following the date of this order. In the event that petitioner shall fail to respond or shall fail to make timely or adequate response, the petition will be dismissed without further notice or hearing pursuant to I.C. Section 19-4906(b).

IT IS SO ORDERED.

DATED this 12 day of December, 2011

John K. Butler, District Judge

SEAL OF THE DISTRICT COURT, JEROME COUNTY, IDAHO · Fifth Judicial District

CERTIFICATE OF MAILING/DELIVERY

I, undersigned, hereby certify that on the 12th day of December, 2011, a true and correct copy of the foregoing NOTICE OF INTENT TO DISMISS was mailed, postage paid, and/or hand-delivered to the following persons:

Jerome County Prosecuting Attorney
233 W. Main Street
Jerome, Idaho 83338

David Haley
Attorney at Law
161 5th Avenue South, Ste. 103
P.O. Box 1803
Twin Falls, Idaho 83303

Irwin Ryan Adams
IDOC # 99854
I.S.C.I. Unit 15
Boise, Idaho 83707

Deputy Clerk

APPENDIX B

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

IRWIN RYAN RAY ADAMS, Plaintiff, vs. STATE OF IDAHO, Defendants.	)	Case No. CV-2011-1256

ORDER DISMISSING PETITION FOR POST-CONVICTION RELIEF

On November 21, 2011, the petitioner, Irwin Ryan Ray Adams, filed his Petition for Post-Conviction Relief. The Court issued its Notice of Intent to Dismiss on December 12, 2011. On January 3, 2012, the petitioner, through his appointed counsel, filed his Memorandum in Opposition to the Court's Notice of Intent to Dismiss, together with a Supplemental Affidavit of Carl Cover. On January 12, 2012, counsel for the petitioner filed the Affidavit of Stacey Gosnell and a Supplemental Affidavit of Kevin Adams.

I.

POST-CONVICTION RELIEF STANDARD

A petition for post-conviction relief is a civil proceeding, entirely distinct from the underlying criminal action. *Ferrier v. State*, 135 Idaho 797, 798 (2001). If the petition fails to present or be accompanied by admissible evidence supporting its allegations, and making a prima facie case, i.e. establishing each essential element of the claim, then summary dismissal is appropriate. *Hernandez v. State*, 133 Idaho 794, 797 (1999); *Martinez v. State*, 126 Idaho 813, 816 (Ct. App. 1995). While the Court is required to accept petitioner's unrebutted allegations, it need not accept petitioner's bare or conclusory allegations. *Berg v. State*, 131 Idaho 517, 518 (1998); *King v. State*, 114 Idaho 442, 446 (Ct. App. 1988). "An application for post-conviction relief differs from a complaint in an ordinary civil action[.]" *Dunlap v. State*, 141 Idaho 50, 56, 106 P.3d 376 (2004) (quoting *Goodwin v. State*, 138 Idaho 269, 271, 61 P.3d 626 (Ct. App. 2002)). The 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). *State v. Payne*, 146 Idaho 548, 560, 199 P.3d 123 (2008); *Goodwin*, 138 Idaho. The application 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. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application is the procedural equivalent of summary judgment under I.R.C.P. 56. "A claim for post-conviction relief will be subject to summary dismissal . . . if the applicant has not presented evidence

making a prima facie case as to each essential element of the claims upon which the applicant bears the burden of proof." *DeRushé v. State*, 146 Idaho 599, 603, 200 P.3d 1148 (2009) (quoting *Berg v. State*, 131 Idaho 517, 518, 960 P.2d 738 (1998)). Thus, summary dismissal is permissible when the applicant's evidence has raised no genuine issue of material fact that, 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. *Payne*, 146 Idaho at 561; *Goodwin*, 138 Idaho at 272.

Idaho Code § 19-4906 authorizes summary dismissal of an application for post-conviction relief pursuant to a motion by a party, which is the procedural equivalent of a motion for summary judgment. *See also* I.R.C.P. 56. Therefore, summary dismissal is only authorized if there is no genuine issue of material fact and, if resolved in the petitioner's favor, would entitle the petitioner to the requested relief. *Gonzales v. State,* 120 Idaho 759, 763, 819 P.2d 1159 (Ct. App. 1991). Summary dismissal may be appropriate even where the State does not controvert the petitioner's evidence because the Court is not required to accept either the petitioner's mere conclusory allegations, unsupported by admissible evidence, or the petitioner's conclusions of law. *Roman v. State,* 125 Idaho 644, 647, 873 P.2d 898 (Ct. App. 1994). Furthermore, our courts have held that post-conviction allegations are insufficient for the granting of relief when they are clearly disproved by the record. *Cootz v. State,* 129 Idaho 360, 368, 924 P.2d 622 (Ct. App. 1996).

When considering whether there exists a triable issue of fact, the Court should consider those matters of which the Court may take judicial notice, as well as the "pleading, depositions, and admissions together with any affidavits on file." *Ricca v. State,* 124 Idaho 894, 896, 865 P.2d 985 (Ct. App. 1993). Because this Court is the trier of fact in post-conviction cases, this Court is not constrained to draw inferences in favor of the non-moving party. This Court is free to arrive at the most probable inferences to be drawn from the uncontroverted evidence. *Hayes v. State,*

146 Idaho 353, 355, 195 P.3d 712 (Ct. App. 2008). The Court of Appeals in *Murphy v. State*, set forth the standard for ineffective assistance of counsel in claims of post-conviction relief, as follows:

> In order to prevail on a claim of ineffective assistance of counsel, the post-conviction applicant must demonstrate both that her attorney's performance was deficient, and that she was thereby prejudiced in the defense of the criminal charge. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674, 693 (1984); *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct.App.1995); *Davis v. State*, 116 Idaho 401, 406, 775 P.2d 1243, 1248 (Ct.App.1989). To show deficient performance, a petitioner must overcome the strong presumption that counsel's performance was adequate by demonstrating "that counsel's representation did not meet objective standards of competence." *Roman*, 125 Idaho at 648-49, 873 P.2d at 902-03. See also *Vick v. State*, 131 Idaho 121, 124, 952 P.2d 1257, 1260 (Ct.App.1998). If a petitioner succeeds in establishing that counsel's performance was deficient, she must also prove the prejudice element by showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068, 80 L.Ed.2d at 697. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

143 Idaho 139, 145, 139 P.3d 741 (2006).

II.

JUDICIAL NOTICE

Pursuant to I.R.E. Rule 201, the court has reviewed and hereby takes judicial notice of the following proceedings/documents:

1. The appellate transcript of the trial conducted on March 9-11, 2011(Tr.)[1]
2. The Submission of Expert Witness Invoice "Under Seal"
3. Order Re: Motions to Retain Expert and Additional Funding for Investigator, filed August 25, 2010
4. Pre-trial Conference, held September 13, 2010 (Digital Recording)

[1] Appellate transcript emailed to counsel at the time of service of this notice of intent to dismiss.

5. Defendant's Disclosure of Expert Witness, filed October 10, 2010

6. Final Status Conference, held November 15, 2010 (Digital Recording)

7. Motion in Limine/Motion to Compel hearing, held January 3, 2011(Digital Recording)

8. C. Bradley Calbo, Investigator Invoice No. 2

III.

ANALYSIS

The petitioner agrees in his response that the petitioner seeks relief based on: (1) that counsel was ineffective in failing to locate and interview two witnesses; (2) that counsel was ineffective in providing information to the retained expert, Carl Cover, and in failing to call Carl Cover as a witness at the trial; (3) that counsel was misled by prior counsel as to the expected testimony of Carl Cover; and (4) that counsel was ineffective in failing to investigate and present evidence of the mechanical difficulties of the petitioner's vehicle.

A. Failure to Locate and Interview Two Witnesses

The petitioner does not dispute that as to the claim that counsel failed to locate and interview two witnesses, the petitioner bears the burden of the petitioner to provide some indication of what information was missing or how it would have been used by the defense. Without such a showing, there can be no evidence of prejudice and summary dismissal is appropriate. *Jones v. State,* 125 Idaho 294, 296, 870 P.2d 1 (Ct. App. 1994). Further, the lack of evidence as to what that specific witness would have testified to denies the trial court a basis to evaluate the probability of a different outcome, i.e. prejudice. *Wolfe v. State,* 117 Idaho 645, 647, 791 P.2d 26 (Ct. App. 1990). The petitioner has failed to provide any admissible evidence as to what these two witnesses would have testified to, which would have changed the outcome of the

trial. The petitioner merely relies upon hearsay statements in a blog. At the trial, the jury heard the testimony under oath of Bobbie Ambrose and Kathie Allison.

Bobbie Ambrose testified that she was at her parent's home at the intersection of 200 East road and Highway 25; that she did not see the petitioner's vehicle initially leave the road, but observed it "in a nosedive in the air"; that she observed a vehicle in the vicinity of some trees south of the accident scene proceeding southbound to the intersection, stopped at the stop sign, and turned to proceed west on Highway 25. (Tr. pg. 13-22). Ms. Ambrose then saw a car turn off Highway 25 and proceed north on 200 East, slowing at the accident scene but not stopping. (Tr. pg. 23).

Kathie Allison testified that she had turned north on to 200 East from Highway 25 and was the first vehicle to stop at the accident scene. She observed a vehicle, a "smaller darker car," parked on the side of the road and then saw it start driving slowly south. (Tr. Pg. 203-04). She further testified that after she got out of her car, "another couple pulled up behind me." (Tr. Pg. 204-05). She further testified that this couple knew the make and model of the car that Ms. Allison saw parked and then drive slowly south bound. (Tr. pg. 210).

The evidence at trial was undisputed that Ms. Ambrose was the only witness to have observed the petitioner's vehicle out of control, which was after it had left the roadway. The "couple" who arrived on the scene and observed the same car as Ms. Allison, would have had no information relative to the driving of Mr. Adams and did not see the accident occur.

While the petitioner wants an opportunity to locate this "couple," there is no showing that their testimony would have altered or changed the outcome of the trial.

> Whether to authorize discovery is a matter directed to the discretion of the trial court. I.C.R. 57(b); *Aeschliman v. State,* 132 Idaho 397, 402, 973 P.2d 749, 754 (Ct.App.1999); *Fairchild v. State,* 128 Idaho 311, 319, 912 P.2d 679, 687 (Ct.App.1996). The district court is not required to order discovery "unless necessary to protect an applicant's

substantial rights." *Griffith v. State,* 121 Idaho 371, 375, 825 P.2d 94, 98 (Ct.App.1992). " Reasonable discovery may be permitted subject to supervision and firm control by the trial court to prevent abuses." *Merrifield v. Arave,* 128 Idaho 306, 310, 912 P.2d 674, 678 (Ct.App.1996). "Fishing expedition" discovery should not be allowed. The UPCPA provides a forum for known grievances, not an opportunity to research for grievances. *See Charboneau v. State,* 140 Idaho 789, 793, 102 P.3d 1108, 1112 (2004). Hence, a post-conviction action is not a vehicle for unrestrained testing or retesting of physical evidence introduced at the criminal trial.

Murphy v. State, 143 Idaho 139, 148, 139 P.3d 741 (Ct. App. 2006).

Irrespective of whether counsel was deficient in failing to locate and interview these two witnesses, there has been no showing as to how this alleged deficiency was prejudicial to the petitioner, or that their testimony would "yield exculpatory evidence," or that the testimony of the two witnesses is necessary to protect the substantial rights of the petitioner. *Murphy*, 143 Idaho at 148. Therefore, the claim that counsel was ineffective in failing to locate and interview these two witnesses should be dismissed.

B. Failure to Provide Expert Testimony at Trial

The petitioner, in his petition and his response to the court's notice of intent to dismiss, argues that counsel was ineffective in failing to call Carl Cover as an expert witness. The petitioner also argues that counsel failed to provide certain information to the expert, as well as that prior counsel, Dan Taylor, had misled counsel, Stacey Gosnell, as to the expert's anticipated testimony as to the speed of the petitioner's vehicle. The petitioner has provided, in response to the notice of intent to dismiss, a supplemental affidavit of Carl Cover and the affidavit of petitioner's trial counsel, Stacey Gosnell.

At trial, it was the theory of the State that the defendant was chasing the Constable vehicle southbound on 200 East Road at a rate of speed of approximately 108 mph; that the petitioner's vehicle went airborne; that when the vehicle returned to the surface of the roadway, the defendant lost control; that the vehicle then left the roadway; and it over turned, resulting in

the death of Mr. Larsen. It was the defense's theory that the petitioner's vehicle was being chased by another vehicle southbound on 200 East Road and that this other vehicle may have struck the rear of the petitioner's vehicle, causing petitioner to lose control of his vehicle, which was not traveling faster than 75 mph.

The petitioner has the burden to prove that trial counsel was deficient in her representation of the defendant, in failing to call an expert witness. As to whether trial counsel may have been deficient, it is the general rule that the failure to call a witness is a strategic decision that will not be second guessed by this court, unless the decision is made upon a basis of inadequate preparation, ignorance of the relative law, or other shortcomings capable of objective evaluation. *Davis v. State,* 116 Idaho 401, 406, 775 P.2d 1243 (Ct. App. 1989). If trial counsel is determined to have been deficient in failing to have called a particular witness, the petitioner would then have the burden to prove that counsel's failure to call an expert witness was prejudicial to the petitioner, i.e. counsel's deficient conduct contributed to the petitioner's conviction. *Cunningham v. State,* 117 Idaho 428, 432, 788 P.2d 243 (Ct. App. 1990); *Drapeau v. State,* 103 Idaho 612, 615, 651 P.2d 546 (Ct. App. 1982). To evaluate the petitioner's claim of ineffective assistance of counsel, this court must apply the standard established in *Strickland v. Washington,* 466 U.S. 668, 686 (1984) (stating "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result."). Two elements must be proved in order to prevail on such a claim.

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defendant. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. To establish the first component, deficiency of the attorney's performance, the claimant must show that the attorney's representation "fell below an objective standard of reasonableness." The second component, prejudice to the defendant, is established only if the claimant shows that, but for the attorney's misfeasance, the result of the proceeding would have been different. *Id.* at 694. *See also Gibson v. State,* 110 Idaho 631, 634, 718 P.2d 283 (1986); *Paradis v. State,* 110 Idaho 534, 541, 716 P.2d 1306 (1986).

In this case, the issue of deficiency of trial counsel is to be evaluated based on the affidavit of Ms. Gosnell, dated December 30, 2011, and the affidavit of Mr. Cover, dated July 22, 2011; as well as judicial notice of the proceedings in the underlying criminal action, CR-2010-2839, consisting of:

-Order Re: Motions to Retain Expert and Additional Funding for Investigator, filed August 25, 2010

-Pre-trial Conference, held September 13, 2010

-Defendant's Disclosure of Expert Witness, filed October 10, 2010

-Final Status Conference, held November 15, 2010

-Motion in Limine/Motion to Compel hearing, held January 3, 2011

-C. Bradley Calbo investigator Invoice No. 2

a. Gosnell Affidavit, dated December 30, 2011

Petitioner's counsel at trial, Ms. Gosnell, in her affidavit, claims: (1) that she "was not actively involved in the representation of Irwin Adams until approximately the end of December 2010"; (2) that prior to her assuming the defense she "had appeared at a few hearings" and she was aware that a motion had been filed for Mr. Cover to investigate the accident; (3) that "prior to covering one (1) hearing I questioned Mr. Taylor regarding the expert and the status of the

report from the expert. I was told by Mr. Taylor that the defense would not be calling the expert as a witness, that a report would not be requested or presented and to inform the Court and the State of such at the scheduled status hearing"; (4) that "Mr. Taylor informed me that Mr. Cover's expert opinion would place the speed of Mr. Adams vehicle ..... in excess of ninety (90) miles per hour and would not be beneficial to the defense"; (5) that in "...January of 2011...I again confirmed with Mr. Taylor that Mr. Cover's opinion would not be beneficial to the defense..."; (6) that based on the statements of Mr. Taylor, Ms. Gosnell "did not attempt to contact Mr. Cover and I did nothing further to follow up with him to confirm his findings nor to question him about his expected testimony..."

On August 25, 2010, the court appointed Mr. Cover, as an expert for the defense in accident reconstruction, and C. Bradley Calbo, as the defense investigator. On August 30, 2010, Ms. Gosnell appeared for the defense at a status hearing. On September 13, 2010, Ms. Gosnell appeared at the Pre-trial Conference. At this hearing the court was advised of the need to continue the trial date, because Mr. Cover's report had not yet been received. Ms. Gosnell advised the court that their last contact with the expert indicated they would need 3 to 4 weeks to get the report. (The court will take judicial notice of the digital recording of that hearing.) On October 5, 2010, counsel, Dan Taylor, filed a Disclosure of Expert Witness, disclosing Mr. Cover and his CV. On November 8, 2010, a Pre-trial Conference was held and Ms. Gosnell appeared on behalf of the defendant. On November 15, 2010, a Final Status Conference was held and Ms. Gosnell appeared on behalf of the defendant. At the time of this hearing the parties stipulated to continue the trial, because the defense still had not received Mr. Cover's report. According to the digital recording of the November 15 hearing, Ms. Gosnell stated to the court, **"I have been in touch with Mr. Cover, unfortunately he was in trial for approximately two**

weeks, it is my anticipation that I should have that report within the next two weeks." The trial then was continued pursuant to the stipulation of counsel. On January 3, 2011, a hearing was conducted on the State's Motion in Limine, or in the alternative a Motion to Compel relative to the report of Mr. Cover. Ms. Gosnell appeared on behalf of the defendant and, according to the digital recording, stated to the court:

> Thank you, Your Honor. Your Honor, and I understand the State's frustration. I have not received a report. I will let the court and counsel know that I spoke to Mr. Horgan about this this morning. **Having spoken to the expert on the phone, based on what he's told me, it would not be my intention to actually use his report at trial,** not leaving the state with the requirement of having a rebuttal. However, I only have so much control and I have called multiple times and begged for that report and I haven't seen it.

On May 6, 2011, this court approved for payment Invoice No. 2, submitted for payment by the defense investigator, Mr. Calbo, which reflected that on February 23, 2011, Mr. Calbo had a "Phone Interview of Defense Expert regarding Accident Reconstruction Report and findings," which was 1.5 hours in length.

b. Cover Affidavit, dated July 22, 2011

Mr. Cover, in his original affidavit attached to the petition for post-conviction relief, states that he was retained by Mr. Taylor in September 2010 and: (1) that he conducted a "review of the conclusions of the Idaho State Police investigator as to the estimated speed of the defendant's vehicle at the time of the crash"; (2) that based "on my investigation, I concluded that the speed of the defendant's vehicle at the time of the crash was between seventy (70) and seventy-five (75) miles per hour and that the findings of the Idaho State Police as to rate of speed were clearly erroneous based on their own calculations"; (3) that on November 1, 2010, he telephoned Mr. Taylor and advised him of the results of his analysis and review; (4) that he advised Mr. Taylor that in order to finalize his findings he would need photocopies of all ISP photographs of the accident scene; (5) that after November 1, 2010, he never had any

communication from Mr. Taylor or anyone from his office and was never provided with the photographs of the accident scene taken by ISP (however, Mr. Cover's Invoice does reflect that he reviewed collision site photographs); and (6) he sent a faxed letter to Mr. Taylor on December 7, 2010, which was a follow up on obtaining the ISP photographs, so he could use them "...to critique their evaluation of the loss of control, the vehicle speed and to check for evidence of a vehicle to vehicle impact. I never have received them and did not hear back from you...."

1. Was trial counsel deficient in failing to call Mr. Cover as an expert witness?

Taking the affidavits of Mr. Cover and Ms. Gosnell at face value, this court concludes that the petitioner has made a prima facie showing of deficiency on the part of trial counsel. This is based on the fact that Ms. Gosnell stated she never made an effort to confer with Mr. Cover, as to his opinions, for trial. The court in *Murphy v. State,* observed, with respect to counsel's affidavit, "[w]hile trial counsel's candor is commendable, we assess his conduct by way of an objective review of reasonableness under prevailing professional norms so as to eliminate the distorting effects of hindsight. *Wiggins,* 539 U.S. at 523, 123 S.Ct. at 2536, 156 L.Ed.2d at 485. We must also make every effort to avoid a *post hoc* rationalization of the attorney's conduct. *Id.* at 526–27, 123 S.Ct. at 2537–38, 156 L.Ed.2d at 487–88." 143 Idaho at 147. Counsel in *Murphy* admitted that he had never consulted with a pathologist as to the cause of death in a murder case, because the State's pathologist, prior to trial, could not determine the cause of death, i.e. homicide v. suicide.

In the petitioner's case, it is clear that the defense was aware of the fact that the State intended to put on expert testimony concluding the petitioner was traveling 108 mph when his vehicle went airborne. Petitioner's counsel applied to the court to retain an expert in accident reconstruction and the motion was granted. Certainly a qualified expert in the field of accident

reconstruction could testify as to the speed, roadway conditions, crash sequences, reason for loss of control, crash scene evidence, and, in effect, recreate the circumstances resulting in a crash, including the factors that played a part in its cause. It is reasonable to assume that once an expert is retained, counsel will consult with that expert before making a decision, regarding whether or not to call that witness at trial.

Trial counsel for the petitioner, in her affidavit, testified that she never had any contact with the retained expert, Mr. Cover, and Mr. Cover testified that he never had any contact or communication with petitioner's trial counsel. The court finds these statements troubling, as compared to the record of the proceedings in the underlying criminal case. On November 15, 2010, Ms. Gosnell represented to the court, on the record, that she had been in contact with Mr. Cover and that the report had been delayed because Mr. Cover had been involved in a trial. On January 3, 2011, Ms. Gosnell represented to the court, on the record, that she had spoken to Mr. Cover by phone and that, based on what he told her, she would not be utilizing him as a witness at trial. Lastly, Mr. Calbo billed the County for 1.5 hours for a "Phone Interview of Defense Expert regarding Accident Reconstruction Report and findings" on February 23, 2011. This phone interview would have occurred 15 days prior to commencement of the trial. The court will remind counsel of Rule 3.3(a)(1) of the Idaho Rules of Professional Conduct.

Rule 3.3: CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
(2)....
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence in a criminal matter, that the lawyer reasonably believes is false.

mph or that his vehicle may have been struck from the rear by another vehicle. At trial, it was the defense's theory that the petitioner was being chased by another vehicle, which the defense argued was the reason for his vehicle's speed. As the court held in *Swa v. Farmers Ins. Exchange,* 93 Idaho 275, 277, 460 P.2d 410, 412 (1969),

> It does not constitute negligence when one who without fault is suddenly and unexpectedly placed in a perilous situation, so as to be compelled to act instantly and without opportunity to exercise deliberate judgment. One is not chargeable with negligence if in attempting to escape from the peril or to avoid or minimize the threatened injury, he acts as a person of reasonable prudence would have acted in the same or similar situation. *Dewey v. Keller*, 86 Idaho 506, 388 P.2d 988 (1964); *Bale v. Perryman*, 85 Idaho 435, 380 P.2d 501 (1963).

The petitioner concedes, in his response, that Mr. Cover would not be able to testify that his vehicle was struck by another vehicle causing it to lose control, since the petitioner's family caused the vehicle to be unavailable for any such expert examination. There would have been no foundation for such testimony. Therefore, the failure to call Mr. Cover in an attempt to prove a vehicle to vehicle impact was not prejudicial to the defense, since he could not establish the petitioner's claim of a rear end impact or the claim that the petitioner was being chased. Further, it is reasonable to assume, based on the evidence at trial, that the jury did not accept the defense's theory that the petitioner was being chased.

As to the issue of the speed of the petitioner's vehicle, the petitioner argues that had Mr. Cover testified that his speed could not have been greater than 75 mph, he would only have been convicted of misdemeanor vehicular manslaughter and not felony vehicular manslaughter. The petitioner did testify in his own defense and testified that he was not traveling faster than 75 mph; although he also testified it was possible he could have been travelling faster when he lost control. The State charged the petitioner in the underlying criminal action with commission of a non-felonious act, committed with gross negligence. The State argued that the petitioner's

Either Ms. Gosnell or Mr. Cover have not truthfully disclosed their communications or, at the hearings noted above, counsel misrepresented to the court her contacts with Mr. Cover. If, in fact, there was no contact between counsel and Mr. Cover after November 1, 2010 and counsel made no effort to communicate with the retained expert to discover his opinions, then counsel would have been deficient. Further, there is no disclosure of what Mr. Cover and Mr. Calbo discussed for 1.5 hours on February 23, 2011. A reasonable person would surmise that Mr. Cover would have disclosed to Mr. Calbo his opinions as to the speed of the petitioner's vehicle. If he had stated to Mr. Calbo that, in his opinion, the speed did not exceed 75 mph, one would think that Mr. Calbo would have communicated such information to counsel and counsel would have brought the alleged misrepresentation of prior counsel to the court's attention. In either case, this court must conclude, based on the current record, that there is a triable issue of fact as to whether counsel for the petitioner was deficient and there has been a prima facie showing as to the first element of ineffective assistance of counsel.

2. Was the failure to call Mr. Cover as an expert witness prejudicial?

> To justify an evidentiary hearing in a post-conviction relief proceeding, it is incumbent on the applicant to tender written statements from potential witnesses who are able to give testimony themselves as to facts within their knowledge. *Drapeau v. State,* 103 Idaho 612, 617, 651 P.2d 546, 551 (Ct.App.1982). It is not enough to simply allege that an expert should have been secured without providing, through affidavits, evidence of the substance of the expert's testimony. *Hall v. State,* 126 Idaho 449, 453, 885 P.2d 1165, 1169 (Ct.App.1994). Absent an affidavit from the expert explaining what he or she would have testified to, or some other verifiable information about what the substance of the expert's testimony would have been, a [sic] applicant fails to raise a genuine issue of material fact. *See generally Drapeau,* 103 Idaho at 617, 651 P.2d at 551.

Self v. State, 145 Idaho 578, 581, 181 P.3d 504 (Ct. App. 2007).

The petitioner alleges that he was prejudiced because the jury never had the opportunity to hear from the defense's expert that the petitioner could not have been travelling faster than 75

operation of the vehicle was a significant cause contributing to the death of Mr. Larsen. The non-felony offenses alleged by the State were (1) reckless driving; (2) inattentive driving; and (3) speeding.

According to the expert, Mr. Cover, it is his opinion that the petitioner's vehicle could not having been traveling faster than 75 mph and that the calculations of ISP Trooper Gibbs regarding the speed are in error. On this basis, the petitioner claims that the speed of his vehicle would have altered the outcome of the trial and he would only have been convicted of misdemeanor vehicular manslaughter, not felony vehicular manslaughter. There is no dispute that the petitioner's vehicle, prior to the loss of control, went airborne. There is no other explanation for the two parallel seven foot gouge marks on the roadway surface. Mr. Cover, in his affidavits, does not dispute that the vehicle did go airborne. There is no dispute that Trooper Gibbs utilized the "fall formula" or, as characterized by Mr. Cover, the "airborne equation" to calculate the speed of petitioner's vehicle at the point in which it went airborne. Mr. Cover, in his supplemental affidavit, states:

> ...Because airborne equations involve trigonometric functions, a small error in the field data (especially at low launch angles) may produce a large error in the calculated speed results. **The investigating officer's report and calculations indicate an angle of 1.8 degrees was used for the take-off angle. The officer did not note in any material provided to me how the take-off angle was measured nor how the vertical fall distance was measured. There was also no indication of how the take-off point was established in order to measure an airborne distance....**

Supplemental Affidavit, Exhibit "A", ¶ 3 (emphasis added).

Mr. Cover's criticism of the airborne calculation is based on a lack of information in the investigative reports, not based on Gibb's testimony at trial. Mr. Cover makes no mention of Trooper Gibb's trial testimony. Gibbs testified that the take-off point was the crest of the roadway surface, north of the gouge marks. Based on the evidence at trial, the crest of the

roadway, north of the gouge marks, is the only area of the roadway that could have been the "take-off point." The take-off angle or "launch angle" was measured at the crest of the roadway with a digital level, which recorded a launch angle of 1.8 degrees. Trooper Gibbs and Trooper Walker then measured with a "level line with a line level" from where the level sat on the roadway surface to the "touchdown marks," i.e. the gouges in the roadway surface, to get the height measurement of how far the car fell, which was 1.6 feet, the overall distance from take-off to touchdown was 80.33 feet. Mr. Cover does not challenge the trial testimony of Trooper Gibbs. Mr. Cover, in his original affidavit dated July 22, 2011, stated that "...the findings of the Idaho State Police as to rate of speed were clearly erroneous **based on their own calculations.**" (Emphasis added). Mr. Cover was aware that Trooper Gibbs calculated the speed of the petitioner's vehicle with the "airborne calculation" and the statement by Mr. Cover that the rate of speed was "clearly erroneous based on their own calculations," at least implies to the court that he recalculated the rate of speed using the same inputs as relied upon by Trooper Gibbs; yet the opinion of Mr. Cover is suspect based on his supplemental affidavit. Mr. Cover in his supplemental affidavit goes on to state as follows,

> ...Without details concerning the exact measurements and procedures utilized by the investigating officers I cannot say where the error did occur in their airborne calculation, only that it is my opinion that an error did occur and given the roadway geometry and physical evidence available it is my expert opinion that an airborne evaluation error would be easy to make.

Supplemental Affidavit, Exhibit "A", ¶ 7.

Mr. Cover, in his affidavit, does not challenge or contest the trial testimony of Trooper Gibbs "concerning the exact measurements and procedures utilized by the investigating officers." Mr. Cover has never examined the scene of the accident and he stated to Mr. Taylor that he would like to see the ISP photographs, but that "...I did not believe my initial findings

would change in any way based on the Idaho State photographs or on my viewing the accident scene..." (Original Affidavit of Mr. Cover, pg. 3, ¶ 4). Apparently, Mr. Cover is of the opinion that it is unnecessary to view the accident scene to determine the location of the take-off point or to measure the launch angle; yet he opines that the ISP investigation is in error, without being able to say where the alleged error occurred. One would expect that an expert who intends to challenge the opinion of another expert as to the "airborne calculation" would return to the scene of the accident, evaluate and determine the "launch angle," measure the distance from take-off to touchdown and determine the height of the vehicle while airborne. The opinions of Mr. Cover at conclusory and speculative. As our courts have stated,

> The admission of expert testimony is within the sound discretion of the trial court. *Burgess v. Salmon River Canal Co., Ltd.,* 127 Idaho 565, 903 P.2d 730 (1995). Expert opinion must be based upon a proper factual foundation. "Expert opinion which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict, and therefore is inadmissible as evidence under Rule 702." *Ryan* at 46, 844 P.2d at 28. Expert opinion that merely suggests possibilities would only invite conjecture and may be properly excluded. *Elce v. State,* 110 Idaho 361, 716 P.2d 505 (1986).

Bromley v. Garey, 132 Idaho 807, 811, 979 P.2d 1165, 1169 (1999).

In *Baker v. State,* 142 Idaho 411, 128 P.3d 948 (2005), the petitioner therein alleged that counsel was ineffective in failing to discover that the ISP reconstructionist incorrectly estimated his speed at 97 mph. Mr. Baker had always contended that he was only doing 66 mph in a 35 mph zone. The court, in affirming the summary dismissal, stated:

> Even if Baker's counsel had discovered that the accident reconstruction estimate of 97 mph was incorrect, in light of the evidence in the case, the information that Baker may have been travelling as little as 66 mph would not have provided the basis of a viable defense to the charge of vehicular manslaughter.

Id. at 417.

There is no dispute that the posted speed limit on 200 East Road was 50 mph. There is no dispute that the petitioner was driving well in excess of the posted speed limit. The State's theory of the case is that the petitioner was chasing the Constable vehicle. At trial the petitioner testified he had not seen Shayna Gonzales when he and Mr. Larsen left his house; yet now, in his petition, he alleges that he and Mr. Larsen left his house "intending to follow Shayna, her mother, and Brian Constable." Brian Constable testified at trial that he and the occupants of his vehicle were being chased by the petitioner. The petitioner was traveling southbound on 200 East Road at a speed well in excess of the posted speed limit. The road in question was documented with photographs at trial. The road was a narrow, rural, county road with only one lane of travel in each direction. The roadway surface would have been readily apparent to the petitioner to judge an appropriate speed. The road was not flat and had hills and valleys. The evidence at trial demonstrated that just north of where the petitioner's vehicle came to rest, there was a rise in the in the roadway surface for southbound traffic and that from the top of the rise of the roadway surface, the roadway surface dropped down into a valley. It was the testimony of Troopers Walker and Gibbs that it was at the crest of the rise of the roadway surface that was the take-off location for the petitioner's vehicle. It was at this point petitioner's vehicle went airborne. Troopers Gibbs and Walker testified that from the crest of the rise to the touchdown marks on the roadway (two parallel 7 foot gouge marks) was 80.33 feet. Mr. Cover does not dispute the ISP finding that the petitioner's vehicle did, in fact, go airborne. He does state at what speed the petitioner would have to travel to become airborne, given the roadway conditions.

The evidence at trial supported the conclusion that the petitioner was needlessly chasing the Constable vehicle at such a high rate of speed as to cause it to go airborne for approximately 80 feet and that when it returned to the roadway surface, the vehicle went out of control,

resulting in the death of Mr. Larsen. Whether the speed of the petitioner's vehicle was 75 mph or 108 mph or somewhere in between, by reason of the speed in the environment, given the roadway conditions; there was a lessening of control of the petitioner's vehicle to the point where such lack of effective control was likely to bring harm to another, i.e. Mr. Larsen as well as the petitioner. In the civil context, a jury finding of gross negligence may be based upon evidence tending to show a series or a combination of negligent acts on the part of the defendant. *Swa*, 93 Idaho at 277.

The difference between a misdemeanor and a felony conviction is whether or not the petitioner acted with gross negligence in the operation of his motor vehicle. Gross negligence means "such negligence as amounts to a wanton, flagrant, or reckless disregard of consequences or willful indifference of the safety or rights of others." Idaho Criminal Jury Instruction 342; *State v. Sibley,* 138 Idaho 259, 263-64, 61 P.3d 616 (Ct. App. 2002). There is testimony in the record from trial that the petitioner made statements that he was travelling in excess of 100 mph and that Mr. Larsen asked the petitioner to stop and let him out of the vehicle. It was for the jury to give such testimony the weight it was entitled. The State had the burden to prove beyond a reasonable doubt that the petitioner, while operating a motor vehicle, committed an unlawful act and that the unlawful act was committed with gross negligence. The State charged that the unlawful act consisted of either: (1) reckless driving; (2) inattentive driving; and/or (3) speeding. An infraction, such as speeding, can constitute the unlawful act. *State v. Bennion,* 112 Idaho 32, 45-46, 730 P.2d 952 (1986). Whether the petitioner was traveling 25 mph over the posted speed limit or 50+ mph over the posted speed limit does not alter the fact that the petitioner, beyond a reasonable doubt, committed an infraction. The finding of gross negligence by the jury would not have been limited to the speed of the petitioner's vehicle. The sufficiency of the evidence as to a

finding of gross negligence is a matter for a direct appeal and is not subject to post conviction relief. A claim or issue, which was or could have been raised on appeal may not be considered in post-conviction proceedings. *Whitehawk v. State,* 116 Idaho 831, 832–33, 780 P.2d 153 (Ct. App. 1989).

The court is aware that the petitioner has a direct appeal of his conviction pending. The fact remains that the defendant was driving at such a speed to cause his vehicle to go airborne and, when it returned to the roadway surface, the petitioner lost control which resulted in the death of Mr. Larsen. There can be no dispute that the petitioner's operation of his motor vehicle was a significant cause contributing to the death of Mr. Larsen and that the totality of the circumstances was sufficient to establish gross negligence on the part of the petitioner. The failure to present expert testimony that the petitioner's speed did not exceed 75 mph in a 50 mph zone does not "clear [Adams] of alleged guilt, excuse his actions, or reduce punishment." *Baker*, 142 Idaho at 422. The petitioner has failed to present admissible evidence sufficient to undermine the verdict of the jury and, therefore, has failed to present a triable issue relative to the prejudice prong of *Strickland.*

C. Failure to Put on Evidence of the Mechanical Condition of Petitioner's Vehicle

Lastly, the petitioner asserts that counsel was ineffective in failing to put on evidence that the mechanical condition of his vehicle would make it difficult to reach speeds of 70 mph or greater. Petitioner admits he never advised his original attorney of the mechanical condition of his car and only states he attempted to discuss the condition of his car with Ms. Gosnell prior to the commencement of his trial, but he is not specific as to when.

Further, the family, prior to the defendant being charged, had the petitioner's vehicle destroyed and the vehicle was no longer available for examination and testing. If the petitioner had attempted to introduce such testimony at trial, the doctrine of spoliation would have applied, which "provides that when a party with a duty to preserve evidence intentionally destroys it, an inference arises that the destroyed evidence was unfavorable to that party." *Ada County Highway District v. Total Success Invs. LLC,* 145 Idaho 360, 368, 170 P.3d 323 (2008). As the court held in *Bromley v. Garey,*

> The evidentiary doctrine of spoliation recognizes it is unlikely that a party will destroy favorable evidence. Thus, the doctrine of spoliation provides that when a party with a duty to preserve evidence intentionally destroys it, an inference arises that the destroyed evidence was unfavorable to that party. *Stuart v. State,* 127 Idaho 806, 907 P.2d 783 (1995). Spoliation is a rule of evidence applicable at the discretion of the trial court. *Vodusek v. Bayliner Marine Corp.,* 71 F.3d 148 (4th Cir.1995).

132 Idaho at 812.

The petitioner's family did not make any attempt to retrieve the motor until approximately four months after the petitioner's trial. There is no showing that the petitioner or his family ever advised the petitioner as to the whereabouts of the vehicle or its engine. Further, it is clear that the engine had been out of the possession of the petitioner for almost a year, prior to the trial. Lastly, there is no showing as to when, in relation to the start of the trial, counsel was allegedly informed of any mechanical deficiencies.

At trial, the petitioner, in his testimony, admitted that it was possible he was traveling faster than 75 mph before he lost control. Ron Stone, in his affidavit, stated that after disassembling and observing the engine, it was "within the realm of possibility" that the engine "could have still produced speeds of up to one hundred eight (108) miles per hour."

This claim, in part, relates to the purported testimony of Carl Cover that the petitioner would not have been driving faster than 70 -75 mph. However, if the court takes the alleged

mechanical deficiencies of the petitioner's vehicle and the testimony of Cover that the petitioner could not have been traveling faster than 75 mph, at face value, this leads to but one conclusion; that the petitioner was attempting to drive the vehicle at the fastest possible speed.

This claim, as with the testimony of the petitioner's expert, only goes to the attainable speed of the petitioner's vehicle, which for the same reasons stated above, does not undermine the verdict of the jury, nor does it satisfy the prejudice prong of *Strickland.*

IV.

CONCLUSION AND ORDER

Accordingly, based upon the deficiencies of the claims and evidence presented by the petitioner, no purpose would be served by further proceedings in this matter. As such, pursuant to I.C. § 19-4906(b), the petition for post-conviction relief, filed by the petitioner, is hereby DISMISSED, as there is no genuine issue of material fact, which would entitle petitioner to the requested relief.

IT IS SO ORDERED.

DATED this 7 day of February, 2012

John K. Butler, District Judge

CERTIFICATE OF MAILING/DELIVERY

I, undersigned, hereby certify that on the 9th day of Feb., 2012 a true and correct copy of the foregoing ORDER DISMISSING PETITION FOR POST-CONVICTION RELIEF was mailed, postage paid, and/or hand-delivered to the following persons:

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