11-30-2012

Adams v. State Appellant's Brief 1 Dckt. 39842

IN THE SUPREME COURT OF THE STATE OF IDAHO

IRWIN RYAN RAY ADAMS, Petitioner-Appellant,	)	NO. 39842
v.	)	
STATE OF IDAHO, Respondent.	)	APPELLANT'S BRIEF

BRIEF OF APPELLANT

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE CASE

Nature of the Case

Irwin Ryan Adams crashed his car and killed his passenger and best friend, Allen Larson. At trial, Mr. Adams testified that he was being chased by another car and was traveling at approximately 75 miles per hour when he lost control and crashed. The State, on the other hand, presented statements allegedly made by Mr. Adams asserting he was traveling over 100 miles per hour, and further presented testimony from an Idaho State Police (*hereinafter,* ISP) accident reconstructionist claiming that Mr. Adams was travelling at 108 miles per hour at the time of the crash.[1]

Mr. Adams filed a Petition for Post-Conviction Relief raising multiple issues which the district court summarily dismissed. Mr. Adams appeals from the district court's Judgment of Dismissal with Prejudice. He asserts that the district court erred in summarily dismissing two claims: that his trial counsel was ineffective in failing to present the testimony of his own accident reconstructionist who would have opined that Mr. Adams was travelling between 70 and 75 miles per hour at the time of the crash, and that his trial counsel was ineffective in failing to investigate and present evidence that, due to pre-existing damage to his car's motor, he could not have driven faster than 75 miles per hour at the time of the crash.

Statement of the Facts and Course of Proceedings

On October 24, 2009, while driving with his best friend in the passenger seat, 19-year old Irwin "Ryan" Adams lost control of his car (a 1995 Saturn) and careened into a

field, where the vehicle flipped, and Allen Larson died from the injuries he sustained. (Tr. 38910, p.204, L.23 – p.205, L.1, p.206, Ls.4-9.)[2] The following May, the State filed a Criminal Complaint charging Mr. Adams with vehicular manslaughter and, after a preliminary hearing, Mr. Adams was bound over into the district court in June of 2010. (R., p.56.)

At trial, the State presented accident reconstruction testimony tending to show that Mr. Adams' Saturn was going at least 108 miles per hour moments before the crash. (Tr. 38910, p.138, Ls.2-18.) The State also presented testimony from a number of individuals claiming to have heard Mr. Adams say that he was going anywhere from 100 to 110 miles per hour before the crash, and that he was chasing after his girlfriend, Shayna Gonzales, at the time. (Tr. 38910, p.82, L.17 – p.91, L.3 (Brian Constable testifying that after picking up Shayna Gonzales and her mother, Teresa Stone-Broncheau, at Shayna's home, he was followed by Mr. Adams), p.99, L.10 – p.116, L.2 (Ms. Stone-Broncheau testifying that after Mr. Constable picked her and Shayna up, they were all chased by Mr. Adams), p.218, Ls.3-10, 19-20 (Stephanie Nevarez, Allen's sister, testifying that Mr. Adams told her he was driving, "trying to get some other people to put a baby in a car seat or something," and "that he was probably going around a hundred"), p.225, Ls.17-18 (Josh Kimbrough testifying that Mr. Adams said "[h]e was going 110 and he was being—he was chasing Shayna and then they wrecked"), p.226,

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[1] Mr. Adams' direct appeal is the subject of Supreme Court docket number 38910 and is pending.

[2] Mr. Adams has filed a motion requesting that this Court take judicial notice of the transcripts of the jury trial as the district court has done so in this case. (*See* R., pp.58, 123.) Although no transcripts were specifically created for this appeal, citations to the transcripts herein will contain the designation "Tr. 38910." The motion for judicial notice is currently pending.

Ls.1-10 (same), p.234, L.11 (Brandy Kimbrough testifying that Mr. Adams said "he was going about 110"), p.235, Ls.7-18 (Brandy Kimbrough testifying that Mr. Adams said he "was chasing Shayna because they broke up and she got mad and left"), p.243, Ls.9-14 (Larry Kimbrough testifying that "[h]e [Mr. Adams] told me that he hit 110 chasing after Shayna" because they had had a fight and she left), p.249, Ls.3-6, 18-22 (Marissa Dempsey, Larry Kimbrough's girlfriend, testifying that Mr. Adams said he was going 110 mph, and that "he was chasing Shayna because they broke up and he was—he wanted to talk to her or something").)[3]

However, the State also offered substantial evidence tending to show that Mr. Adams was only going about 75 miles per hour, and that he was the one who was being chased. (Tr. 38910, p.158, L.20 – p.159, L.22 (Cpl. Sean Walker testifying that when he came upon the crash scene and interviewed Mr. Adams, who was extremely upset, he stated that he was not going over 75 mph, and that he had been chased), p.167, L.3 – p.168, L.1 (same), p.173, L.1 – p.174, L.14 (Sgt. Keith Thompson testifying that when he interviewed Mr. Adams at the crash scene, he indicated that he had been

[3] Later, Mr. Adams offered significant evidence tending to show that the conversations testified to by Ms. Nevarez and the Kimbrough family never happened. (*See, e.g.,* Tr. 38910, p.286, L.17 – p.289, L.5 (Kevin Adams, Ryan Adams' father, testifying that he was with his son at the hospitals (for much of the time that Ryan was there) where Ryan supposedly confessed to Ms. Nevarez and various members of the Kimbrough family, and that Ryan was not out of his sight and did not speak to the Kimbroughs), p.321, L.8 – p.322, L.19 (Mr. Adams testifying that he never spoke to Ms. Nevarez or the Kimbroughs about the crash), p.344, L.11 – p.349, L.13 (Shawna Lanting, Mr. Adams' father's fiancée, offering testimony that was substantively identical to that of Mr. Adams' father), p.367, L.18 – p.372, L.25 (LaRey Adams, one of Mr. Adams' sisters, testifying that she was with her brother at two of the three relevant hospitals, that Mr. Adams virtually never left her side, and that she never saw him speak to the Kimbroughs or talk to anyone about the crash), p.391, L.20 – p.397, L.2 (Kendra Adams, one of Mr. Adams' other sisters, offering testimony that was substantively identical to that of LaRey Adams).)

going approximately 75 miles per hour, and that he had been chased), p.190, Ls.1-4 (Det. Kirk Thorpe testifying that when he interviewed Mr. Adams at the crash scene, he indicated that he had been chased), p.196, Ls.13-16 (Dep. Lawrence Green testifying that when he interviewed Mr. Adams at the crash scene, Mr. Adams indicated that he had been chased), p.198, Ls.1-7 (Dep. Green testifying that, moments later, he overheard Mr. Adams talking to his father on the phone, stating that he was "doing about 80," and that he had been chased), p.198, Ls.7-13 (Dep. Green testifying that when he questioned Mr. Adams further, he reiterated that he had been chased), p.106, Ls.12-13 (Kathie Allison, a good Samaritan who happened to be the first person at the scene of the crash, testifying that Mr. Adams said he had been chased), p.218, Ls.4-15 (Stephanie Nevarez testifying that Mr. Adams initially told her that "he was probably going like around 65 or 70" and that he was being chased), p.248, L.24 – p.249, L.22 (Marissa Dempsey testifying that Mr. Adams initially stated that he had been chased).)

Mr. Adams himself testified that he was followed, and at times tailgated, by a light-colored car which turned when he turned, stopped when he stopped (even when he pulled over to let the car pass), and accelerated when he accelerated; he further testified that he was going approximately 75 mph shortly before he crashed, and he denied ever having told anyone that he was driving 110-120 miles per hour. (Tr. 38910, p.299, L.22 – p.306, L.10, p.312, L.16 – p.313, L.11.) In fact, he denied ever having spoken to Ms. Nevarez or the Kimbroughs about the crash at all. (Tr. 38910, p.321, L.8 – p.322, L.19.) Mr. Adams also offered the testimony of his father who, just like all of the police officers who testified, had heard him say that he had been chased. (Tr. 38910, p.336, Ls.7-13.)

The jury was instructed both on vehicular manslaughter *with* gross negligence, and the lesser included offense of vehicular manslaughter *without* gross negligence, as well as the definitions of "gross negligence" and "negligence." (Tr. 38910, p.424, L.12 – p.428, L.1.) Mr. Adams was found guilty of the greater offense of vehicular manslaughter by gross negligence. (Tr. 38910, p.485, L.12 – p.486, L.1.)

Mr. Adams filed a timely Petition for Post-Conviction Relief raising three main claims of ineffective assistance of counsel: 1) Both his first attorney, Dan Taylor, and his second attorney, Stacy Gosnell, failed to properly investigate the identity of two witnesses, one of whom posted information on an on-line news site that he and his wife had come upon the accident shortly after it occurred; 2) both Mr. Taylor and Ms. Gosnell failed to properly communicate with and ultimately call as a witness, Carl Cover, an accident reconstructionist hired by Mr. Taylor, who would have testified that the calculations made by the ISP were erroneous, and that by his own calculations Mr. Adams was traveling between 70 and 75 miles per hour at the time of the crash; and 3) Ms. Gosnell failed to investigate information provided by Mr. Adams that his car's engine was damaged prior to the accident rendering it incapable of producing enough power to get the car to travel more than 75 miles per hour. (R., pp.4-25.) Mr. Adams asserted in his verified petition that, prior to the accident, he had noticed damage to his motor and that he could hear a constant knocking noise, and he asked Ms. Gosnell about pursuing this line of defense, but she told him "'We have this in the bag, so keep it simple, stupid.'" (R., pp.4-25.) He also reiterated his claim that he was traveling no more than 75 miles per hour and being chased by another vehicle at the time of accident. (R., pp.4-25.)

In support of his petition, Mr. Adams provided affidavits from his father, Kevin Adams, who stated that after 4 or 5 days in an impound yard, Kevin Adams had the car at his home for about six months before he sold it to Larry Harms. (R., pp.30-32.) Kevin Adams further stated that he retrieved the engine in July of 2011 from Mr. Harms. (R., pp.30-32.) Larry Harms provided an affidavit stating that 2 or 3 weeks after taking possession of the car, he removed the motor and crushed the body – he did not try to start or alter the motor in any way before Kevin Adams retrieved it. (R., pp.46-48.) Ron Stone, the service manager at a car repair shop, provided an affidavit attesting to the damage to the motor and that, "while it is within the realm of possibility that the motor I disassembled and observed could have still produced speeds of up to one hundred eight (108) miles per hour, in my opinion it is highly unlikely due to its mechanical condition." (R., pp.26-29.) Finally, Mr. Adams provided an affidavit and accompanying documentation from Carl Cover, the accident reconstructionist hired by Dan Taylor, who attested that, based upon the documentation he was provided by Mr. Taylor, he concluded that the Idaho State Police calculations of speed "were clearly erroneous based on their own calculations" and that he believed Mr. Adams was traveling between 70 and 75 miles per hour at the time of the crash. (R., pp.33-45.) Mr. Cover further attested that he communicated his conclusions to Mr. Taylor via a telephone call and asked for more information to determine the possibility of whether Mr. Adams' car was struck from behind causing the accident, but he never heard from Mr. Taylor again, and he had never heard of Ms. Gosnell at all. (R., pp.33-45.)

The district court appointed counsel and entered a Notice of Intent to Dismiss. (R., pp.55-75.)[4] The State filed an Answer. (R., pp.76-78.)[5] Mr. Adams filed a Memorandum in Opposition to Notice of Intent to Dismiss, wherein he conceded that he had no further information on whom the two potential witnesses are, but he also asserted that his remaining claims require an evidentiary hearing. (R., pp.91-107.) Mr. Adams included an additional affidavit from Mr. Cover explaining further the bases of his calculations and conclusions that the ISP reconstructionists were wrong, and that Mr. Adams was traveling between 70 and 75 miles per hour at the time of the crash. (R., pp.86-90.) Mr. Adams further provided an affidavit from Stacy Gosnell who attested that Mr. Taylor relayed to her that Mr. Cover's conclusion was that Mr. Adams was traveling at 90 miles per hour at the time of the crash, and that had she known that Mr. Cover would have testified that Mr. Adams was traveling between 70 and 75 miles per hour, she would have called him to testify. (R., pp.109-115.) Mr. Adams provided an additional affidavit from his father, Kevin Adams, providing greater detail about his handling of the car and its engine. (R., pp.116-119.)

[4] Although Mr. Adams believes the district court was incorrect in some of the analysis provided in its Notice of Intent to Dismiss, he does not claim that he was deprived proper notice of the court's purported reasons for dismissal. The district court's Order Dismissing Petition for Post-Conviction Relief was detailed and, therefore, the contents of the court's notice will not be discussed in detail in this Appellant's Brief.

[5] Because the district court did not ultimately base its dismissal on the State's Answer, the contents of the Answer will not be discussed in this Appellant's Brief.

The district court entered an Order Dismissing Petition for Post-Conviction Relief explaining the court's reasoning for dismissing the petition.[6] (R., pp.120-143.) The district court found that Mr. Adams failed to demonstrate what the two witnesses who were not found by his attorneys would have testified to and, therefore, found that Mr. Adams failed to show that, had the witnesses been called, there is a reasonable probability that the result would have been different.[7] (R., pp.124-126.) Regarding the failure to provide his accident reconstructionist's testimony, the district court found that there was a genuine issue of material fact as to whether his counsel was deficient. (R., pp.126-134.) However, the court weighed the testimony of the ISP accident reconstructionist against the affidavits of Mr. Cover; concluded that the ISP reconstructionist's testimony was more believable and that Mr. Cover's proposed testimony was speculative; found that the evidence at trial supported the conclusion that Mr. Adams was grossly negligent, regardless of whether he was travelling 75 miles per hour or 108 miles per hour; found that the issue of gross negligence "is a matter for direct appeal and is not subject to post conviction relief"; and found that Mr. Adams "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., pp.134-140.) Finally, the district court found there was no showing of how long before trial Mr. Adams informed his counsel about the motor's condition, and found that even if the evidence was admitted, it would have shown that Mr. Adams was

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[6] The district court filed a document entitled Judgment of Dismissal with Prejudice four days later. (R., pp.144-145.) Mr. Adams' Notice of Appeal is timely from both documents. (R., pp.155-159.)

[7] Mr. Adams does not challenge the dismissal of this claim in this appeal.

attempting to drive as fast as possible, which would not undermine the jury's verdict.[8] (R., pp.140-142.) Mr. Adams filed a timely Notice of Appeal. (R., pp.155-159.)

[8] The district court also found that the doctrine of spoliation would apply, apparently preventing Mr. Adams from presenting evidence of the condition of the vehicle, which had been destroyed, after the motor was removed. Although Mr. Adams does not dispute that evidence of the condition of the body of the car could not be presented in his post-conviction proceedings due to the fact that it no longer exists, he asserts that the doctrine of spoliation would not apply as the car was sold to the wrecker by his father, who was not a party to the litigation, and the car was sold prior to the State filing charges, i.e., when no litigation was actually pending.

ISSUES

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?

ARGUMENT

I.

The District Court Erred 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

A. Introduction

The district court erroneously weighed the trial testimony of the State's accident reconstructionist against the affidavits of Carl Cover, reached its own conclusions as to the purported flaws in Mr. Cover's conclusions, and deemed that, even if his testimony was presented, it would not have made a difference. In essence, the district court made factual determinations despite there being a genuine issue of material fact, without conducting an evidentiary hearing, and further concluded that even if the jury heard the testimony that the court itself would not hear, the jury would have still concluded that Mr. Adams was guilty of vehicular manslaughter with gross negligence, rather than without gross negligence, or not guilty of any crime. The district court erred and this Court should remand the case for an evidentiary hearing.

B. Standards Of Review

A post-conviction petition initiates a proceeding that is civil, rather than criminal, in nature, and like the plaintiff in a civil action, the applicant must prove his or her allegations upon which the requests for relief are based by a preponderance of the evidence. *State v. Yakovac*, 145 Idaho 437, 443 (2008). However, unlike a plaintiff in other civil cases, the original post-conviction petition must allege more than merely "a

short and plain statement of the claim." *Id.* at 443-444. The application must present or be accompanied by admissible evidence supporting the allegations contained therein, or else the post-conviction petition may be subject to dismissal. *Id.* In addition, the post-conviction petition must set forth with specificity the legal grounds upon which the application is based. *Ridgley v. State*, 148 Idaho 671, 675 (2010).

A claim of ineffective assistance of counsel may properly be brought through post-conviction proceedings. *Thomas v. State*, 185 P.3d 921 (Ct. App. 2008). To prevail on a claim of ineffective assistance of counsel, a petitioner must first show that trial counsel's performance was constitutionally deficient. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); A*ragon v. State*, 114 Idaho 758, 760 (1988). Where a defendant shows that his counsel was deficient, prejudice is shown if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, at 694; *Aragon* at 760.

A district court may summarily dismiss a post-conviction petition only where the petition and evidence supporting the petition fail to raise a genuine issue of material fact that, if resolved in the petitioner's favor, would entitle him or her to the relief requested. *Yakovac*, 145 Idaho at 444. "A material fact has 'some logical connection with the consequential facts[,]' *Black's Law Dictionary,* 991 (7th Ed.1999), and therefore is determined by its relationship to the legal theories presented by the parties." *Id.* On review of a dismissal of a post-conviction relief application without an evidentiary hearing, the appellate court must determine whether a genuine issue of fact exists based on the pleadings, depositions and admissions together with any affidavits on file. *Ricca v. State,* 124 Idaho 894, 896 (Ct. App. 1993). "'[W]here the evidentiary facts **are**

not disputed and the trial court rather than a jury will be the trier of fact, summary judgment is appropriate, despite the possibility of conflicting inferences because the court alone will be responsible for resolving the conflict between those inferences.'" *Yakovac*, 145 Idaho at 444 (quoting *Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 519 (1982) (emphasis added).) Furthermore, the *Yakovac* Court stated:

> "When an action is to be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from uncontroverted evidentiary facts."

Id. (quoting *Loomis v. City of Hailey,* 119 Idaho 434, 437 (1991).)

The United States Supreme Court has defined the standard for whether there exists a genuine issue of material fact as whether "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words, there are any genuine factual issues that properly can be resolved in favor of either party." *Id.* at 250. If a genuine factual issue is presented, an evidentiary hearing must be conducted. *Yakovac*, 145 Idaho at 444. The underlying facts alleged by the petitioner "must be regarded as true" for purposes of summary dismissal. *Rhoades v. State*, 148 Idaho 247, 250 (2009). Any disputed facts are construed in favor of the non-moving party, and "all reasonable inferences that can be drawn from the record are drawn in favor of the non-moving party." *Vavold v. State*, 148 Idaho 44, 45 (2009).

C. The District Court Erred In Dismissing Mr. Adams' Claim That His Trial Counsel's Failure To Present The Testimony Of His Accident Reconstructionist Was Prejudicial

Despite there being two opposing conclusions, offered by experts for each party, as to how fast Mr. Adams was traveling at the time of the crash, the district court erroneously weighed the affidavits of Mr. Cover against the testimony of the ISP reconstructionist, and concluded that the ISP reconstructionist was correct. The court further reached the erroneous legal conclusion that even if the jury believed that Mr. Adams was traveling no more than 75 miles per hour at the time of the crash, it would have still found him guilty of the greater offense of vehicular manslaughter *with* gross negligence.

1. The District Court Erroneously Weighed Disputed Facts In Favor Of Its Own Viewpoint, Rather Than In Favor Of The Non-Moving Party, Mr. Adams

In both its Notice of Intent to Dismiss and in its Order Dismissing Petition for Post-Conviction Relief, the district court indicated that it believed that, despite the fact that there was a genuine issue of material fact, an evidentiary hearing was not necessary because the district court was the trier of fact. (R., p.60 ("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." (citing *Hayes v. State*, 146 Idaho 353, 355 (Ct. App. 2008)); pp.122-123 (same).) The court's understanding of its powers and responsibilities in this regard was erroneous.

The statement in *Hayes*, relied upon by the district court in this case, is taken from *State v. Yakovac* – a case in which the underlying operative facts were actually not

in dispute by the parties, as they involved trial counsel's failure to make certain evidentiary objections – the absence of which was apparent from the face of the trial record. *See Hayes* at 355 (citing *State v. Yakovac*, 145 Idaho 437); *see also Yakovac*, at 444-447. In that context, the Idaho Supreme Court held that:

> When an action is to be tried before the court without a jury, the judge is not constrained to draw inferences in favor of the party opposing a motion for summary judgment but rather the trial judge is free to arrive at the most probable inferences to be drawn from **uncontroverted** evidentiary facts.

Yakovac, 145 Idaho at 444 (quoting *Loomis v. City of Hailey,* 119 Idaho 434, 437 (1991) (emphasis added)).

This rule was taken from the prior civil case of *Loomis v. City of Hailey*. In *Loomis*, the parties **stipulated** to the fact that there were no genuine issues of material facts – only questions of how the law should apply to the facts that were agreed upon by all parties. *Loomis*, 119 Idaho at 437. Thus, the rule articulated in *Hayes* and relied upon by the district court, arose from both *Yakovac* and *Loomis*, and is expressly limited to only those cases where there is no disputed evidence regarding the issue to be determined by the trial court for summary disposition purposes. The standard that should have been applied by the district court is stated in *Vavold v. State*, 148 Idaho 44 (2009). "**Disputed facts** should be construed in favor of the non-moving party, and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Vavold*, 148 Idaho at 45 (emphasis added).

In the present case, Mr. Adams clearly established a genuine issue of material fact as to a core issue in his case – how fast he was traveling at the time of the crash. The State claimed that he was traveling 108 miles per hour based upon its own expert's testimony, while Mr. Adams claimed *both at trial and in his post-conviction petition*, that

he was traveling no more than 75 miles per hour at the time of the crash. This, of course, meets the definition of an issue of material fact. However, rather than recognizing that the court needed to conduct an evidentiary hearing where Mr. Cover could present his testimony live, with each of the parties questioning him on the quality of his credentials, and the accuracy of his calculations, the district court weighed the evidence in favor of the State and criticized the specifics of Mr. Cover's conclusions. (R., pp.135-136 (noting that Mr. Cover had not reviewed Trooper Gibb's testimony and, therefore, his criticism is based upon an incomplete understanding of the testimony), p.136 (finding that Mr. Cover's opinion "is suspect based on his supplemental affidavit"), pp.136-137 (finding that Mr. Cover's opinions are "conclusory and speculative" and inferring he lacks credibility because, although he asked trial counsel for photographs of the scene of the accident, he did not believe they would change his opinion.) Of course, had the district court actually conducted the required evidentiary hearing, Mr. Cover would have been allowed to explain these issues that the district court found so perplexing. The district court's failure to conduct an evidentiary hearing is erroneous, and this Court should remand this case with instructions that such an evidentiary hearing be conducted.

2. The District Court Erred In Finding That Even If Trial Counsel Had Presented Mr. Cover's Testimony, The Result Of The Trial Would Not Have Changed

In addition to questioning the veracity of Mr. Cover's proffered testimony, the district court found that even had that testimony been presented, Mr. Adams did not meet the prejudice prong of *Strickland.* The district court again erred.

The district court found that the evidence presented demonstrated that Mr. Adams was chasing another car, and not the other way around, apparently based upon the disputed trial testimony. (R., pp.138-139.) The court reasoned that a jury would conclude that Mr. Adams was acting with gross negligence regardless of whether he was traveling between 20 and 25 miles per hour over the posted speed limit of 50 miles per hour, or 50 to 60 plus miles per hour over the posted speed limit. (R., pp.138-140.) The district court concluded, "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.)

The district court failed to recognize that Mr. Adams' speed was relevant not only to his culpability, but to his credibility. Mr. Adams maintained that he was traveling no more than 75 miles per hour and being chased by another car, while other evidence suggested that Mr. Adams was the one doing to the chasing. The State's expert testified that Mr. Adams was traveling 108 miles per hour at the time of the crash. A jury could certainly conclude that if Mr. Adams was lying about his speed, which if they believed the State's experts they no doubt would believe Mr. Adams was lying about his speed, then there exists a reasonable possibility that the jury would believe he was lying about being chased. 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. In fact, had a single juror found Mr. Adams' story to be credible, there is a reasonable probability that the jury would have been unable to agree upon a verdict and a mistrial would have been declared – a result different than a conviction.

Furthermore, Mr. Adams' speed was certainly a critical consideration for the jury. Had the jury concluded that Mr. Adams was traveling between 70 and 75 miles per hour, the jury may have concluded that his actions did not amount to gross negligence - "a wonton, flagrant or reckless disregard of consequences or willful indifference of the safety or rights of others" - and may have found that he merely acted negligently - "a lack of that attention to the probable consequences of an act or omission which a prudent person ordinarily would apply to the person's own affairs." (*See* Tr. 38910, p.424, L.12 – p.428, L.1 (jury instructions).) Drivers speed all of the time - most drivers do not travel more than twice the speed limit. Whether a person drives 40 miles per hour in a 20 mile per hour school zone, 70 miles per hour down a state highway located within a city's limits, or 150 miles per hour on a rural interstate, a jury is likely to find that person is demonstrating a reckless disregard for the safety of others. While driving 20 to 25 miles per hour over the speed limit should not be encouraged, there is a reasonable probability that a jury would have concluded that, at worse, this is negligent behavior – not gross negligence.

The district court erred in summarily dismissing Mr. Adams' claim that his trial counsel was ineffective in failing to present Mr. Cover's testimony.

II.

The District Court Erred 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

The district court found that even if evidence was presented demonstrating that the motor could not produce speeds in excess of 75 miles hour, such evidence would not undermine the verdict and, therefore, was not prejudicial. The district court's dismissal of this claim is in error.

The district court found that "there is no showing as to when, in relation to the start of the trial, counsel was allegedly informed of any mechanical deficiencies." (R., p.141.) Mr. Adams attested in his verified petition, and it was not disputed by any other evidence, that he informed Ms. Gosnell of this issue prior to trial. (R., p.18.) Had the district court considered the timing of this communication crucial to its conclusion, the district court should have had an evidentiary hearing to determine exactly how close to the start of the trial this question was raised. The district court erred in failing to conduct an evidentiary hearing on his issue.

In addition, the court found that for the same reasons it stated in relationship to Mr. Cover's proposed testimony, there was no prejudice. (R., p.142.) For the same reasons articulated in section I(C)(2) above, the district court's conclusion is in error. The district court erred in summarily dismissing this claim.

CONCLUSION

Mr. Adams respectfully requests that this Court vacate the district court's order summarily dismissing his petition for post-conviction relief and remand his case to the district court with instructions that an evidentiary hearing be conducted on the issues of whether trial counsel was ineffective in failing to present Mr. Cover's expert accident reconstruction testimony, and whether trial counsel was ineffective in failing to present evidence of the condition of the motor prior to the accident.

DATED this 30th day of November, 2012.

JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

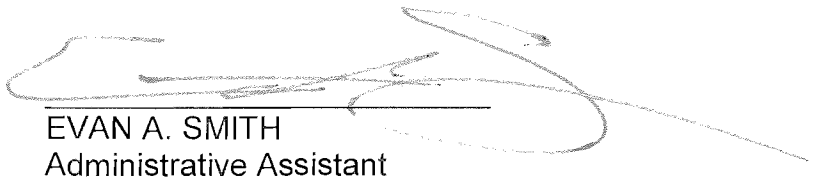
I HEREBY CERTIFY that on this 30th day of November, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

IRWIN RYAN RAY ADAMS
INMATE #99854
ISCI
PO BOX 14
BOISE ID 83707

JOHN K BUTLER
DISTRICT COURT JUDGE
E-MAILED BRIEF

DAVID W HALEY
MINIDOKA COUNTY PUBLIC DEFENDER
E-MAILED BRIEF

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



EVAN A. SMITH
Administrative Assistant

JCP/tmf