2-25-2015

Fletcher v. State Appellant's Brief Dckt. 42568

IN THE SUPREME COURT OF THE STATE OF IDAHO

WILLIAM J. FLETCHER, Petitioner-Appellant, v. STATE OF IDAHO, Respondent.	NO. 42568 ADA COUNTY NO. CV 2014-8971 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

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Nature of the Case

William J. Fletcher appeals from the district court's Judgment dismissing his petition for post-conviction relief. He asserts that the district court erred when it denied his motion for the appointment of counsel, because he raised the possibility of a valid claim.

Statement of the Facts and Course of Proceedings

Mr. Fletcher was indicted by an Ada County grand jury on two counts of lewd conduct with a minor child under sixteen, felony, in violation of Idaho Code § 18-1508. (R., p.35.) The complaining witness was Mr. Fletcher's stepdaughter, who was between five and eight years old when the acts allegedly occurred. (R., p.35.) Mr. Fletcher initially entered a not guilty plea to the charges. (R., p.35.)

After Mr. Fletcher rejected at least two plea offers, the parties entered into a plea agreement. (R., pp.10-12, 35, 103.) Pursuant to the plea agreement, Mr. Fletcher entered an *Alford*[1] plea to an amended charge of injury to child, felony, in violation of Idaho Code § 18-1501(1). (R., pp.35, 91.) The district court followed the plea agreement and imposed a unified sentence of ten years, with three years fixed, and retained jurisdiction. (R., pp.35, 91.) After Mr. Fletcher participated in a "rider," the district court relinquished jurisdiction and executed the sentence. (R., p.92.) Mr. Fletcher then filed an appeal. (R., p.92.)

Meanwhile, Mr. Fletcher filed a Petition and Affidavit for Post Conviction Relief. (R., pp.4-18.) He also filed a Motion and Affidavit for Appointment of Counsel.

(R., pp.25-28.) The post-conviction petition raised three grounds for relief: (1) that Mr. Fletcher received ineffective assistance of counsel during his criminal case process, (2) that he received a sentence disproportionate to the offense for which he was convicted, and he should have received a sentence of four years for misdemeanor injury to child, and (3) that his race played a huge role in his criminal process, and his plea was not knowingly or voluntarily entered because he was persuaded by ineffective assistance of counsel. (R., p.5.)

Mr. Fletcher is an African-American. (*E.g.*, R., p.76.) On the claim that race played a huge role in his criminal process and his plea was not knowingly or voluntarily entered, Mr. Fletcher asserted that the police department was biased and targeted him because of the color of his skin, and that a full investigation was not done because the complaining witness was half-white. (R., p.6.) He further asserted that his plea was not knowingly or voluntarily entered because he was persuaded by trial counsel to take the plea instead of being convicted and receiving a life sentence, even though he might be innocent. (R., pp.6, 12.) When questioned, trial counsel told Mr. Fletcher such convictions had happened before and that he was in Ada County in the State of Idaho, which Mr. Fletcher took as a racial comment. (R., pp.6-7, 11.) He asserted that he "felt like I had no option and no other way around the situation." (R., p.12.)

The State then filed a Motion for Summary Dismissal. (R., pp.31-33.) The State argued that Mr. Fletcher's post-conviction petition did not raise a genuine issue of material fact that would entitle him to the requested relief. (R., p.31.) The State elaborated on this argument in its Answer and Brief in Support of Motion for Summary

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[1] *See Alford v. North Carolina*, 400 U.S. 25 (1970).

Dismissal of Petition for Post Conviction Relief. (R., pp.34-43.) On the claim that Mr. Fletcher's plea was not knowingly and voluntarily entered, the State argued that, at the change of plea hearing, Mr. Fletcher stated he was satisfied with trial counsel, understood the plea agreement, and wanted to plead guilty. (R., pp.41-42.) Because Mr. Fletcher did not assert what about the plea was not knowing or voluntary, his claim was "a bare and conclusory assertion which should be dismissed." (R., p.42.) As for race playing a role in Mr. Fletcher's case, the State contended that those allegations should be summarily dismissed for being bare and conclusory. (R., p.42.)

The State also argued that Mr. Fletcher's other claims should be dismissed. (R., pp.39-41.) Thus, the State requested that the district court grant its summary dismissal motion and deny the post-conviction petition without an evidentiary hearing. (R., p.42.)

Mr. Fletcher later filed a "Motion to Proceed with Petitioner Post-Conviction Relief." (R., pp.66-84.) He reiterated that, when he rejected a plea offer from the State, trial counsel stated that if Mr. Fletcher did not take the plea, he would not win at trial and would be convicted on the original charges of lewd conduct with a minor under sixteen, even though he might be innocent. (R., p.76.) When Mr. Fletcher asked how that could be possible, trial counsel told him to look where he was (Idaho), and that the jury would usually believe anything a child says. (R., p.76.)

Mr. Fletcher subsequently filed an "Addendum to Motion to Proceed with Petitioner Post Conviction Relief." (R., pp.85-90.) Attached to the addendum was a letter from the complaining witness and from Mr. Fletcher's son. (R., pp.85, 88.) The addendum also discussed similar injury to child cases. (R., p.86.)

The district court then issued a Notice of Intent to Dismiss. (R., pp.91-95.) The district court stated that, "Although the State's moving papers themselves show that summary dismissal is warranted, the Court will provide some additional analysis supporting that outcome, as well as supporting the conclusion that Fletcher is not entitled to appointed counsel." (R., p.92.)

The district court cited *Plant v. State*, 143 Idaho 758, 762 (Ct. App. 2006), for the proposition that, "Where . . . the defendant was convicted upon a guilty plea, to satisfy the prejudice element [for an ineffective assistance of counsel claim], the claimant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (R., p.93 (internal quotation marks omitted).) The petitioner in *Plant* asserted that his counsel talked him into pleading guilty without thoroughly investigating his case, but the petition did not describe the investigation that should have been done or describe the helpful information that might have been uncovered. (R., p.93 (citing *Plant*, 143 Idaho at 762).) The Idaho Court of Appeals held that the petition was too vague to suggest even the possibility of a valid claim, and that appointment of counsel to represent the petitioner was unwarranted. (R., p.93 (citing *Plant*, 143 Idaho at 762).)[2]

The district court then determined that Mr. Fletcher's "allegations are not materially better developed than those found in *Plant* to be insufficient to warrant even

[2] However, the Idaho Court of Appeals in *Plant* ultimately vacated the district court's order denying the defendant's motion for appointed counsel. *Plant*, 143 Idaho at 763. In response to the district court's notice of intent to dismiss, the defendant sent the district court a letter containing additional allegations "sufficient to raise at least the *possibility* of a valid claim . . . ." *Plant*, 143 Idaho at 762-63 (emphasis in original).

the appointment of counsel, much less to state a claim that is fit to avoid summary dismissal." (R., p.93.)

> The petition does not set forth a factual basis for concluding that Fletcher's trial counsel's performance was deficient. It also does not establish a reasonable probability that Fletcher would not have entered an *Alford* plea in the absence of some particular performance deficiency, as it does not draw a causal link between any such deficiency and Fletcher's decision to enter an *Alford* plea. As noted above, Fletcher does not explain how the investigation his trial counsel allegedly failed to perform could have generated evidence tending to disprove that he engaged in the particular conduct of which he was convicted. Consequently, under *Plant*, Fletcher's allegations are insufficient to either warrant the appointment of counsel or avoid summary dismissal.

(R., pp.93-94.)

Thus, the district court determined "that Fletcher is not entitled to the appointment of post-conviction counsel or to post-conviction relief and that no purpose would be served by any further proceedings." (R., p.94.) The district court gave Mr. Fletcher notice of its intent to deny the motion for appointment of counsel and dismiss the post-conviction petition, and granted him twenty days to respond. (R., p.94.)

Mr. Fletcher filed, within the twenty-day period, a "2nd Addendum to Motion to Proceed with Petitioner Post-Conviction Relief" (R., pp.96-101), and a "Motion Brief Reply to the Proposed Dismissal of Petitioner Post Conviction Relief." (R., pp.102-116.) He again asserted that he would have rejected the plea agreement but for the ineffective assistance of counsel. (R., p.103.) He repeated and expanded upon the assertion that his trial counsel told him he would be found guilty of the original charges if he did not accept the plea bargain, even though he might be innocent. (R., pp.103-04.) When Mr. Fletcher questioned the advice of trial counsel, she told him "that was [the]

way it goes and to look around [where] the petitioner was as his race was a big issue." (R., p.104.)

Additionally, Mr. Fletcher filed an "Affidavit of Sworn Statement in Support of Motion Brief Reply to the Proposed Motion Intent to Dismissal of Petitioner Post-Conviction Relief" (R., pp.117-20), and a "Motion: Right to Bail Pending Appeal Idaho Rules of Court 46(D)," pursuant to Idaho Criminal Rule 46(d). (R., pp.121-23.)

The district court then issued an Order of Dismissal. (R., pp.124-26.) The district court denied the Rule 46(d) motion for an appellate bond because it should have been filed "in his criminal case" and "his release would be inappropriate under I.C.R. 46(d) anyway, it appearing to the Court that the appeal is frivolous." (R., p.124.) The district court also determined that Mr. Fletcher had not shown "reason to allow this case to proceed further." (R., p.124.) Thus, the district court denied the motion for appointment of counsel and dismissed the post-conviction petition. (R., pp.125, 127-28.)

Mr. Fletcher subsequently filed a "Motion to Amend or Alter Judgment on Post Conviction Relief/Motion to Withdraw *Alford* Plea/Expungement of Conviction." (R., pp.129-31.) Mr. Fletcher asked the district court to amend or alter the Judgment. (R., p.129.) Additionally, he asked for leave to withdraw his guilty plea. (R., p.130.)

Mr. Fletcher also filed a Notice of Appeal timely from the district court's Judgment dismissing his post-conviction petition.[3] (R., pp.132-41.) On appeal, he challenges the district court's denial of his motion for the appointment of counsel.

[3] After Mr. Fletcher filed his Notice of Appeal here, the Idaho Court of Appeals affirmed the decision of the district court in the underlying criminal case. *See State v. Fletcher*, No. 41871, 2014 Unpublished Opinion No. 797 (Idaho Ct. App. Nov. 3, 2014).

ISSUE

Did the district court err when it denied Mr. Fletcher's motion for the appointment of counsel, because he raised the possibility of a valid claim?

ARGUMENT

The District Court Erred When It Denied Mr. Fletcher's Motion For The Appointment Of Counsel, Because He Raised The Possibility Of A Valid Claim

A. Introduction

Mr. Fletcher asserts the district court erred when it denied his motion for the appointment of counsel, because he raised the possibility of a valid claim. The district court used an improper legal standard when it denied the motion for the appointment of counsel, because it denied the motion, at least in part, on the basis that Mr. Fletcher had not met the higher threshold for surviving summary dismissal. Mr. Fletcher raised the possibility of a valid claim that trial counsel's ineffective assistance prevented him from entering a knowing, voluntary and intelligent plea, because he asserted that trial counsel intimated to him that local racial prejudice would make trying to put on a defense a futile gesture, even though he claimed he was innocent.

B. Standard Of Review And Applicable Law

"An application for post-conviction relief under the Uniform Post Conviction Procedure Act (UPCPA) is civil in nature." *Charboneau v. State*, 144 Idaho 900, 903 (2007). Like any other civil plaintiff, a petitioner for post-conviction relief must prove by a preponderance of the evidence the factual allegations upon which the application for post-conviction relief is based. *Id.* However, unlike a complaint in a normal civil action, "an application for post-conviction relief must include affidavits, records, or other evidence supporting its allegations, or must state why such supporting evidence is not included." *Id.* (citing I.C. § 19-4903).

If a petitioner for post-conviction relief "is unable to pay court costs and expenses of representation . . . a court-appointed attorney may be made available to the applicant in the preparation of the application." I.C. § 19-4904. "The decision to grant or deny a request for a court-appointed attorney lies within the discretion of the district court." *Melton v. State*, 148 Idaho 339, 341 (2009). "However, at a minimum, the trial court must carefully consider the request for counsel, before reaching a decision on the substantive merits of the petition." *Id.* (internal quotation marks and alteration omitted). "For the purposes of I.C. § 19-4904, the trial court should determine if the petitioner is able to afford counsel and whether this is a situation in which counsel should be appointed to assist the petitioner." *Id.* at 341-42 (internal quotation marks omitted).

"The proper standard for determining whether to appoint counsel for an indigent petitioner in a post-conviction proceeding is whether the petition alleges facts showing the possibility of a valid claim that would require further investigation on the defendant's behalf." *Id.* at 342 (internal quotation marks and alteration omitted). "In determining whether the appointment of counsel would be appropriate, every inference must run in the petitioner's favor where the petitioner is unrepresented at that time and cannot be expected to know how to properly allege the necessary facts." *Id.* (internal quotation marks omitted).

> When considering a motion for appointment of counsel, the trial court must do more than determine whether the petition alleges a valid claim. The court must also consider whether circumstances prevent the petitioner from making a more thorough investigation into the facts. An indigent defendant who is incarcerated in the penitentiary would almost certainly be unable to conduct an investigation into facts not already contained in the court record. Likewise, a *pro se* petitioner may be unable to present sufficient facts showing that his or her counsel's performance was deficient or that such deficiency prejudiced the defense. That showing will often require the assistance of someone trained in the law.

Id. (quoting *Swader v. State*, 143 Idaho 651, 654-55 (2007)). "Therefore, the trial court should appoint counsel if the petition alleges facts showing the possibility of a valid claim such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claim." *Id.* (quoting *Swader*, 143 Idaho at 655). A petitioner may also make the required showing in documents filed after the petition. *Plant v. State*, 143 Idaho 758, 762-63 (Ct. App. 2006).

C. The District Court Used An Improper Legal Standard When It Denied Mr. Fletcher's Motion For The Appointment Of Counsel

As a preliminary matter, Mr. Fletcher asserts that the district court used an improper legal standard when it denied his motion for the appointment of counsel. The district court denied his motion for the appointment of counsel, at least in part, on the basis that Mr. Fletcher had not met the higher threshold for surviving summary dismissal. After discussing *Plant v. State*, 143 Idaho 758 (Ct. App. 2006), the district court determined that Mr. Fletcher's "allegations are not materially better developed than those found in *Plant* to be insufficient to warrant even the appointment of counsel, much less to state a claim that is fit to avoid summary dismissal." (R., p.93.) The district court then stated that Mr. Fletcher's petition was insufficient because it "does not establish a reasonable probability that Fletcher would not have entered an *Alford* plea in the absence of some particular performance deficiency . . . ." (R., p.94.)

The district court's statement on whether the petition established prejudice indicates that the district court used the standard for surviving summary dismissal when it denied the motion for the appointment of counsel, not the lower standard that applies to motions for the appointment of counsel. "The decision to appoint counsel and the

decision on the merits of the petition if counsel is appointed are controlled by two different standards." *Melton*, 148 Idaho at 342 (quoting *Swader*, 143 Idaho at 655). "[T]he threshold showing that is necessary in order to gain appointment of counsel [is] considerably lower than that which is necessary to avoid summary dismissal of a petition." *Judd v. State*, 148 Idaho 22, 24 (Ct. App. 2009) (citing *Swader*, 143 Idaho at 655).

By determining that the petition did not "*establish* a reasonable probability" that he was prejudiced by any deficient performance by trial counsel (R., p.94 (emphasis added)), the district court suggested that Mr. Fletcher's claim was not supported by evidence sufficient to survive summary dismissal.[4] *See Melton*, 148 Idaho at 342. But in determining whether a petitioner has "raised the possibility of valid claim," such that counsel should be appointed, a court instead considers "whether appointment of counsel would have assisted him in conducting an investigation into facts not in the record and whether a reasonable person with adequate means would have been willing to retain counsel to conduct that further investigation into the claim." *See id.*; *Swader*, 143 Idaho at 655. The district court should have based its decision on the motion for the appointment of counsel on those considerations, not on whether Mr. Fletcher's claim would survive summary dismissal on the merits. Thus, the district court used an improper legal standard when it denied the motion for the appointment of counsel.

However, the district court's use of an improper legal standard does not end this Court's analysis. "When addressing the issue of appointment of counsel in post-

[4] "Summary disposition of a petition for post-conviction relief is appropriate if the applicant's evidence raises no genuine issue of material fact." *Charboneau* 144 Idaho at 903. (citing I.C. § 19-4906(b) & (c)).

conviction proceedings, this Court examines whether the possibility of a valid claim exists before determining that an error in failing to appoint counsel requires remand." *Melton*, 148 Idaho at 342. If a petitioner does not raise the possibility of a valid claim, then the district court's error did not affect the petitioner's substantial rights. *Id.* Courts disregard any error which does not affect the substantial rights of the parties. *Id.* (quoting I.R.C.P. 61).

D. Mr. Fletcher Raised The Possibility Of A Valid Claim That Trial Counsel's Ineffective Assistance Prevented Him From Entering A Knowing, Voluntary And Intelligent Plea

Mr. Fletcher asserts that he raised the possibility of a valid claim that trial counsel's ineffective assistance prevented him from entering a knowing, voluntary and intelligent plea, because he asserted that trial counsel intimated to him that local racial prejudice would make trying to put on a defense a futile gesture, even though he claimed he was innocent.

The Sixth Amendment of the United States Constitution, made applicable to the States via the due process clause of the Fourteenth Amendment, guarantees criminal defendants the effective assistance of counsel. *Aragon v. State*, 114 Idaho 758, 760 (1988). Similarly, Article I, § 13 of the Idaho Constitution guarantees criminal defendants "reasonably competent assistance of counsel." *Gibson v. State*, 110 Idaho 631, 635 (1986).

A claim of ineffective assistance of counsel may properly be brought under the UPCPA. *Barcella v. State*, 148 Idaho 469, 477 (Ct. App. 2009). "Claims for ineffective assistance of counsel are reviewed utilizing the two-prong test set forth in *Strickland v. Washington*, [466 U.S. 668 (1984)]." *State v. Yakovac*, 145 Idaho 437, 444 (2008). "To

prevail on such a claim, the applicant for post-conviction relief must demonstrate (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different." *Id.* To establish a deficiency, the petitioner must show that the attorney's performance fell below an objective standard of reasonableness. *McKay v. State*, 148 Idaho 567, 571 (2010). To establish prejudice, the petitioner must show a reasonable probability that the outcome of the trial would have been different but for the attorney's deficient performance. *Id.* at 571-72.

An appellate court reviews the district court's factual findings in an ineffective assistance of counsel claim for clear error, and exercises free and independent review of the district court's application of law. *State v. Wood*, 132 Idaho 88, 96 (1998).

1. Ineffective Assistance Of Counsel, Including Leading A Defendant To Believe That Racial Prejudice Would Determine The Jury Verdict And Make Trying To Put On A Defense Futile, May Prevent A Defendant From Entering A Knowing, Voluntary, And Intelligent Plea

Ineffective assistance of counsel may prevent a defendant from entering a knowing, voluntary and intelligent plea. *McMann v. Richardson*, 397 U.S. 759, 774 (1970). "For a guilty plea to be valid, the entire record must demonstrate that the plea was entered into in a voluntary, knowing, and intelligent manner." *Workman v. State*, 144 Idaho 518, 527 (2007). That analysis involves inquiry into three areas: "(1) whether the defendant's plea was voluntary in the sense that he understood the nature of the charges and was not coerced; (2) whether the defendant knowingly and intelligently waived his rights to a jury trial; and (3) whether the defendant understood the consequences of pleading guilty." *Id.*

"The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Dunlap v. State*, 141 Idaho 50, 60 (2004) (quoting *Hill v. Lockhart*, 474 U.S. 52, 56 (1985)) (internal quotation marks omitted). "Where . . . a defendant is represented by counsel during the plea process and enters a plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Id.* (quoting *Hill*, 474 U.S. at 56) (internal quotation marks omitted). "Strategic or tactical decisions made by counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation, ignorance of relevant law, or other shortcomings capable of objective evaluation." *Id.*

Counsel may be ineffective, and prevent a defendant from entering a knowing, intelligent, and voluntary plea, by leading a defendant to believe that racial prejudice would determine the jury verdict and make trying to put on a defense futile. In a case before the United States Court of Appeals for the Eighth Circuit, the district court concluded that a defendant in a federal *habeas corpus* proceeding was denied effective assistance of counsel in the underlying criminal case because, *inter alia*, counsel gave the defendant and his family "the impression that a trial would be futile because of racial prejudice." *Thomas v. Lockhart*, 738 F.2d 304, 306-07 (8th Cir. 1984). The defendant, Thomas, was a black man, and his court-appointed counsel, Barker, "made several vague statements" to Thomas and his family about counsel's "own racial prejudice" and "also told them he doubted that a jury would believe a black man's testimony instead of that of a white victim." *Id.* at 306-07. Thomas then entered a guilty plea without going

to trial. *Id.* at 306. The district court concluded that Barker's comments and his other acts and omissions "prevented Thomas from entering a knowing, voluntary, and intelligent plea." *Id.* at 307.

On review, the Eighth Circuit elaborated on Barker's comments to Thomas and his family, and the effects of counsel's comments:

> Barker also gave Thomas and his family the impression that Thomas would have to prove his innocence. Barker's remarks led Thomas *to believe that racial prejudice would determine the jury verdict* and that Barker did not want to handle the case because of its interracial aspect. Thomas, for example, testified that Barker told him a jury would not believe a black man accused of the rape of a white woman. Similarly, Thomas' mother recalled that Barker indicated that Thomas did not have "a prayer because there was a black man against a white lady, that [Thomas] would get fifty [years] to life in the pen." Barker indicated that he would feel "funny" representing a black man accused of raping a white woman. He admitted that when Thomas' mother told him that, according to her Bible, race should not make any difference, he replied, "'Sister, you're not in the church house, you're in the courthouse in Monticello.'" Barker may have been trying conscientiously to alter Thomas and his family to potential problems arising from racial prejudice. Nevertheless his statements left them with the understanding that he did not want to represent a black man accused of rape and that to go to trial would be an exercise in futility. Thomas' step-father declined to hire an attorney for Thomas after Barker suggested that Thomas did not have any chance of a result in his favor. The state trial court's perfunctory mention of the presumption of innocence and the state's burden of proof was insufficient to dispel the inferences Thomas and his family necessarily drew from Barker's remarks and from his attitude.

Id. at 309. (alterations in original) (emphasis added) (citations omitted).

The Eighth Circuit held that counsel's above comments, as well as other acts and omissions by counsel, amounted to ineffective assistance of counsel. *Id.* at 310. The *Thomas* Court concluded "that the findings of fact of the District Court are not clearly erroneous and that the District Court did not commit any error of law." *Id.* "We agree with the District Court that Thomas has made a convincing showing that his appointed

counsel did not fulfill his responsibility as an advocate on Thomas' behalf, thereby preventing a voluntary, knowing, and intelligent choice by Thomas to plead guilty." *Id.* Thus, counsel may be ineffective, and prevent a defendant from entering a knowing, intelligent, and voluntary plea, by leading a defendant to believe that racial prejudice would determine the jury verdict and make trying to put on a defense futile.

2. Mr. Fletcher Raised The Possibility Of A Valid Claim That Trial Counsel's Ineffective Assistance Prevented Him From Entering A Knowing, Voluntary, And Intelligent Plea, Because Trial Counsel Intimated To Him That Local Racial Prejudice Would Make Trying To Put On A Defense Futile

Mr. Fletcher asserts that the facts alleged in his petition and subsequent filings raise the possibility of a valid claim that trial counsel's ineffective assistance prevented him from entering a knowing, voluntary and intelligent plea. Like the defendant in *Thomas*, Mr. Fletcher asserted that trial counsel intimated to him that local racial prejudice would make trying to put on a defense a futile gesture, even though Mr. Fletcher claimed he was innocent. *See Thomas*, 738 F.2d at 309; *see also Bouchillon v. Collins*, 907 F.2d 589, 596 n.24 (5th Cir. 1990) (comparing the counsel in *Thomas* to a counsel who refused to put on an insanity defense).

In his petition, Mr. Fletcher asserted that his plea was not knowingly or voluntarily entered because trial counsel persuaded him to take a plea bargain instead of a life sentence upon conviction, even though he might be innocent. (R., p.6.) When questioned, trial counsel told Mr. Fletcher that it had happened before, and that he was in Ada County in the State of Idaho. (R., pp.6-7.) Mr. Fletcher interpreted that as a "racial comment." (R., p.7.)

Later in the petition Mr. Fletcher asserted that, after he rejected a plea offer, trial counsel told him if he did not take it, he would be automatically convicted of the original charges, even though he might be innocent. (R., p.11.) Mr. Fletcher asserted that the accusations against him were not true. (R., p.10.) When Mr. Fletcher asked trial counsel how he would be automatically convicted, she "told me look where I'm at and [it's] Idaho. I took it as a racial comment." (R., p.11.) She also told him he had a choice between life sentences for the original charges or a sentence of ten years under the plea offer. (R., p.12.) According to Mr. Fletcher, "I felt like I had no option and no other way around the situation. I knew I would not give up on my case because the things that happen[ed] to me [were] wrong and I was judge[d] on [the] color of my skin." (R., p.12.)

In his subsequent filings, Mr. Fletcher reiterated that trial counsel told him "that if he didn't take the deal that he will not win his trial and the defendant would be convicted of [the] original charge of lewd conduct with [a] minor under 16 although you might be innocent." (R., p.76.) When Mr. Fletcher asked how that was possible when he should receive a fair trial and trial counsel was supposed to represent him, trial counsel told him "to look where he was which she was referring to Idaho, and [the] jury will usually believe anything a child says and it has happen[ed] before." (R., p.76.) Mr. Fletcher also asserted that trial counsel told him "that was [the] way it goes and to look around [where] the petitioner was as his race was a big issue." (R., p.104.) Mr. Fletcher felt he "was in a lose-lose situation just because he was an African-American, loving Christian husband, loving father, a student and honor[ed] military veteran." (R., p.76.) Trial

counsel further assured him that, looking at the situation, it was either life sentences or a ten-year sentence. (R., p.77.)

With every inference running in his favor, the facts alleged in Mr. Fletcher's petition and subsequent filings raise the possibility of a valid claim that trial counsel's ineffective assistance prevented him from entering a knowing, voluntary and intelligent plea. *See Melton*, 148 Idaho at 342; *Swader*, 143 Idaho at 654-55; *Plant*, 143 Idaho at 762-63. Like the defendant in *Thomas*, Mr. Fletcher asserted that trial counsel intimated to him that local racial prejudice would make trying to put on a defense a futile gesture, even though Mr. Fletcher claimed he was innocent. Similar to the counsel in *Thomas*, 738 F.2d at 307, 309, Mr. Fletcher's trial counsel told him that he would automatically lose his trial if he did not take the plea offer. (R., pp.11-12, 76.) Trial counsel then told Mr. Fletcher that the reason for that was because he was in Idaho and his race was a big issue (R., pp.11-12, 76, 104), akin to the *Thomas* counsel's comments that the defendant's race would be a crucial factor because he was "in the courthouse in Monticello." *See Thomas*, 738 F.2d at 309.

Additionally, trial counsel told Mr. Fletcher that he would get a life sentence if he did not take the plea offer (R., pp.12, 77), much like the counsel in *Thomas* indicated that the defendant did not have a prayer and would get fifty years to life. *Thomas*, 738 F.2d at 309. Mr. Fletcher decided to take the plea offer after trial counsel convinced him he "had no option and no other way around the situation" (*see* R., p.12), just as the defendant in *Thomas* decided to plead guilty after counsel "suggested that Thomas did not have any chance of a result in his favor." *See Thomas*, 738 F.2d at 309. In sum, while trial counsel "may have been trying conscientiously to alert [Mr. Fletcher] to

potential problems arising from racial prejudice," her statements nevertheless left Mr. Fletcher "with the understanding that [she] did not want to represent a black man accused of [lewd conduct] and that to go to trial would be an exercise in futility." *See id.*

Like the defendant in *Thomas*, Mr. Fletcher asserted that trial counsel intimated to him that local racial prejudice would make trying to put on a defense a futile gesture, even though Mr. Fletcher claimed he was innocent. *See id.*; *Bouchillon*, 907 F.2d at 596 n.24. In *Thomas*, the defendant's assertion helped support a valid claim that trial counsel's ineffective assistance prevented him from entering a knowing, voluntary and intelligent plea. *See Thomas*, 738 F.2d at 309-10. Based on the similarities of the facts in this case to those in *Thomas*, a reasonable person with adequate means in Mr. Fletcher's position would be willing to retain counsel to investigate the possibility of such a claim here. *See Swader*, 143 Idaho at 654. Thus, the facts alleged in Mr. Fletcher's petition and subsequent filings raise the possibility of a valid claim that trial counsel's ineffective assistance prevented him from entering a knowing, voluntary and intelligent plea. *See Thomas*, 738 F.2d at 309-10; *Melton*, 148 Idaho at 342; *Plant*, 143 Idaho at 762-63.

Because Mr. Fletcher raised the possibility of a valid claim that trial counsel's ineffective assistance prevented him from entering a knowing, voluntary, and intelligent plea, the district court erred when it denied his motion for the appointment of counsel. *See Melton*, 148 Idaho at 342; *Swader*, 143 Idaho at 654-55. Thus, the judgment dismissing Mr. Fletcher's petition for post-conviction relief should be vacated, the order denying his motion for the appointment of counsel should be reversed, and the case

should be remanded to the district court for further proceedings. *See Swader*, 143 Idaho at 655.

CONCLUSION

For the above reasons, Mr. Fletcher respectfully requests that this Court vacate the judgment dismissing his petition for post-conviction relief, reverse the order denying his motion for the appointment of counsel, and remand the case to the district court for further proceedings.

DATED this 25th day of February, 2015.

BEN P. MCGREEVY
Deputy State Appellate Public Defender

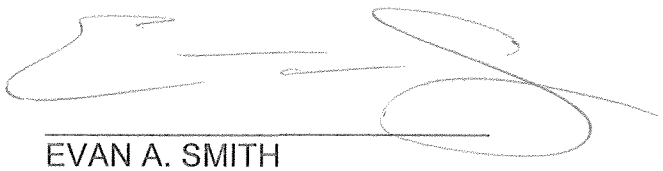
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25th day of February, 2015, 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:

WILLIAM J FLETCHER
INMATE #109593
ISCC
PO BOX 70010
BOISE ID 83707

JASON D SCOTT
DISTRICT COURT JUDGE
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

BPM/eas