20210343

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
FEBRUARY 7, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Bejan David Etemad, Petitioner-Appellant, vs. State of North Dakota, Respondent-Appellee,	Supreme Court No. 20210343 Case No. 18-2021-CV-00901 **Oral Argument Requested**

On appeal from the Order denying post-conviction relief
entered on December 10, 2021
Grand Forks County District Court
Northeast Central Judicial District
State of North Dakota
The Honorable Jay Knudson, Presiding

APPELLANT'S BRIEF

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[¶1] **Statement of the Issue**

I. Whether the district court erred by denying Mr. Etemad's application for post-conviction relief.

Statement of the Case

[¶2] This is an appeal from an order denying post-conviction relief regarding Bejan David Etemad (hereinafter referred to as "Mr. Etemad"). (Appellant's App. at 18). On May 10, 2021, Mr. Etemad filed a pro se Application for Post-Conviction Relief. (Appellant's App. at 6). Mr. Etemad was appointed an attorney and his attorney filed an amended petition. (Appellant's App. at 9). The State did not answer the petition. On November 5, 2021, the district court conducted an evidentiary hearing on Mr. Etemad's petition. (Appellant's App. at 1). On December 10, 2021, the district court issued an order denying Mr. Etemad any post-conviction relief. (Appellant's App. at 11). Mr. Etemad now appeals the December 10 order. (Appellant's App. at 18).

Request for Oral Argument

[¶3] The Appellant requests the Court schedule oral argument in this case. Mr. Etemad was permitted to represent himself at trial. However, the facts show that Mr. Etemad was suffering from mental illness at the time and that he did not voluntarily, knowingly and intelligently waive his right to be represented by counsel at trial. Oral argument will be helpful to aid the Court's understanding of the unique facts of the case.

Statement of the Facts

[¶4] In 2016, Mr. Etemad was charged with Terrorizing. (Appellant's App. at 11, ¶ 1). During the pendency of the criminal case, Mr. Etemad had three different attorneys. (11/5/21

Hearing Tr. at 8, ln. 13 - 18). Mr. Etemad's second attorney filed a motion for Mr. Etemad to receive a competency evaluation. (11/5/21 Hearing Tr. at 12, ln. 7 - 10). The evaluation showed that Mr. Etemad was competent to stand trial. (11/5/21 Hearing Tr. at 15, ln. 11 - 14). A finding that a defendant is competent to stand trial is not the same as a finding that a defendant can represent him or herself at trial. State v. Dahl, 2009 ND 204, ¶ 23 - 24, 776 N.W.2d 37.

[¶5] As the case progressed, Mr. Etemad was appointed his third attorney to represent him. His third attorney wanted Mr. Etemad to have a second competency evaluation. (11/5/21 Hearing Tr. at 12, ln. 23 - 13, ln. 7). His attorney was in the process of obtaining funding for a second competency evaluation, when Mr. Etemad asked her to file a motion to withdraw. See id. Mr. Etemad asked his attorney to file a motion to withdraw, because he wanted to represent himself. (11/5/21 Hearing Tr. at 21, ln. 8 - 12: at 23, ln. 2 - 5).

[¶6] On October 24, 2017, the district court conducted a hearing on the motion to withdraw. (10/24/17 Hearing Tr. at 9, ln. 10 - 17). During the course of the October 24, 2017, hearing, the trial court made only a limited inquiry into Mr. Etemad's ability to represent himself.

[¶7] The trial court asked Mr. Etemad whether he had ever represented himself in any prior court proceedings. (10/24/17 Hearing Tr. at 15, ln. 12 - 13). Mr. Etemad initially indicated that he had not. (10/24/17 Hearing Tr. at 15, ln. 14). Mr. Etemad then changed his answer and stated that he had represented himself in one prior criminal case, a few years prior. (10/24/17 Hearing Tr. at 15, ln. 15 - 25). Mr. Etemad explained that he had represented himself on a misdemeanor charge that was dismissed prior to trial. (10/24/17

Hearing Tr. at 15, ln. 25 - 16, ln. 3). Mr. Etemad also stated that he had "filed three different civil suits in federal court as a pro se litigant." (10/24/17 Hearing Tr. at 16, ln. 4 - 7). Mr. Etemad did not provide any case number or identifying information regarding these lawsuits, did not explain the nature of the suits and did not indicate whether any of those suits had gone to trial. See id. The trial court did not inquire any further about these "civil suits in federal court." See id.

[¶8] The district court asked Mr. Etemad about his education level. (10/24/17 Hearing Tr. at 16, ln. 8 - 11). Mr. Etemad indicated that he had a Bachelor of Science degree in electrical engineering. See id.

[¶9] The trial court asked Mr. Etemad whether anyone had threatened him or made any promises to him to encourage him to represent himself. (10/24/17 Hearing Tr. at 16, ln. 20 - 22). In response, Mr. Etemad provided a curious response. In response, Mr. Etemad stated, "Boy, that's -- you know, I don't know if we want to put this on the record, but I was threatened by the Grand Forks Police Department." (10/24/17 Hearing Tr. at 16, ln. 23 - 25). When asked to explain the nature of the threat, Mr. Etemad claimed that the police had threatened him, "That if I show up for this case on trial November 14th that they would make sure I would be dead before I ever got there." (10/24/17 Hearing Tr. at 17, ln. 1 - 5). Mr. Etemad explained that he had received this threat "over Facebook. Came from their instant messaging. It was also done via the Crookston police when I was staying in Crookston. It was passed on." (10/24/17 Hearing Tr. at 17, ln. 6 - 10). The district court did not make a further inquiry into this threat. (10/24/17 Hearing Tr. at 17, ln. 11 - 16).

[¶10] The trial court next inquired whether Mr. Etemad wanted to represent himself. In

response to the district court's question, Mr. Etemad again provided an equivocal response. The exchange occurred as follows:

> THE COURT: Even if we assume that statement is an accurate statement from the law enforcement community, is it your desire to proceed representing yourself?
> MR. ETEMAD:
> What I discussed with [third attorney] is is – we discussed this extensively. What I really wanted to do was do a co-chair where, you know, we could -- you know, she could be first chair; I could be second chair.
> She said, "Not a possibility. No chance whatsoever."
> So then I said, "Okay. Can I go pro se and still have you as an advisory role?" you know.
> And she said, "No, not a chance."
> So at that point in time, I guess, you know, the option was just pro se. Now I hear there's a standby. So personally I wanted to do a co-chair but, you know, then if that wasn't possible, then I wanted her as an advisory role. She said that was not possible. I'd like a standby counsel, if that's possible. If that's not possible, at the end of the day, I want to go pro se.

(10/24/17 Hearing Tr. at 17, ln. 14 - 18, ln. 9). The trial court made no further inquiry into what Mr. Etemad wanted, nor provided any further information regarding the role of an attorney at trial as compared to the role of standby counsel. See id.

[¶11] The trial court asked whether Mr. Etemad understood that the court was not requiring him to proceed to trial without an attorney. (10/24/17 Hearing Tr. at 18, ln. 10 - 11). Mr. Etemad again provided a very equivocal answer in response:

> I understand it absolutely. No, at this point in time, I'm done with the - you know, this is my third attorney. So, at this time, you know, I'd like that -- you know, I'd like either to have Henry Howe, or if there is Gereszek, but at this point in time, no, pro se is the only way I want to go.

(10/24/17 Hearing Tr. at 18, ln. 12 - 17). The names Henry Howe and Gereszek refer to two

prominent criminal defense attorneys in the Grand Forks area. The trial court explained that the Court does not determine which attorney gets appointed to a case, but did not make any further inquiry about whether he actually wanted a different attorney or wanted to proceed pro se. (10/24/17 Hearing Tr. at 18, ln. 18 - 24).

[¶12] The trial court explained that minimum and maximum penalties for the charge and Mr. Etemad acknowledged his understanding of those penalties. (10/24/17 Hearing Tr. at 18, ln. 25 - 19, ln. 20). The trial court explained that if Mr. Etemad were to proceed pro se, he would not be provided any special treatment and would be expected to follow the Rules of Criminal Procedure, the Rules of Evidence and the Rules of Court. (10/24/17 Hearing Tr. at 19, ln. 21 - 20, ln. 1). Mr. Etemad responded that was the reason why he wanted to have standby counsel. (10/24/17 Hearing Tr. at 20, ln. 2 - 3). The trial court advised Mr. Etemad that he "would need to follow those rules for all motions, voir dire and trial proceedings," and Mr. Etemad indicated that he understood that. (10/24/17 Hearing Tr. at 20, ln. 4 - 8). Mr. Etemad then indicated that he wanted to proceed to trial pro se, with his attorney to act in an advisory capacity. (10/24/17 Hearing Tr. at 20, ln. 12 - 21, ln. 13).

[¶13] The prosecutor indicated that he was concerned Mr. Etemad had indicated that he preferred to have his attorney act in a "co-counsel" situation and that Mr. Etemad was only proceeding pro se because his attorney had stated that such an arrangement was not possible. (10/24/17 Hearing Tr. at 23, ln. 17 - 24, ln. 7).

[¶14] At the conclusion of the October 24, 2017, hearing, the trial court granted the motion to withdraw, ordered his attorney to act as standby counsel. (10/24/17 Hearing Tr. at 32, ln. 3 - 22).

[¶15] The trial court commenced a jury trial on the felony charge on November 14, 2017, approximately two and half weeks later. The trial lasted three days. During the course of the trial, Mr. Etemad wore the jail inmate's uniform, which is an orange jumpsuit, and shackles or handcuffs. (11/5/21 Hearing Tr. at 16, ln. 19 - 17, ln. 7). The trial court cautioned Mr. Etemad against conducting the trial in such clothes and his standby attorney offered to provide him with plain clothes, but Mr. Etemad either turned down the offer or specifically asked not to wear plain clothes for the trial. See id. During the course of the trial, Mr. Etemad's mental health was a key issue. His standby attorney would later opine that during the trial, Mr. Etemad's "strongest defense was the lack of criminal responsibility." (11/5/21 Hearing Tr. at 11, ln. 4 - 12, ln. 1).

[¶16] Mr. Etemad was convicted after the jury trial and sentenced to a term of imprisonment. (Appellant's App. at 11, ¶ 1). Mr. Etemad appealed the criminal judgment and this Court summarily affirmed. State v. Etemad, 2018 ND 240, 919 N.W.2d 192.

[¶17] On May 10, 2021, Mr. Etemad filed a pro se Application for Post-Conviction Relief. (Appellant's App. at 6). The district court conducted an evidentiary hearing on Mr. Etemad's Application. (11/5/21 Hearing Tr. at 3, ln. 1 - 13). Mr. Etemad's standby counsel testified during the hearing. Mr. Etemad did not testify at the evidentiary hearing.

[¶18] On December 10, 2021, the district court issued an order denying Mr. Etemad any post-conviction relief. (Appellant's App. at 11). Mr. Etemad now appeals the December 10 order. (Appellant's App. at 18).

Law and Argument

[¶19] This is an appeal of an order denying post-conviction relief. (Appellant's App. at 42). This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6 and N.D.C.C. § 29-32.1-14. North Dakota Century Code Section 29-32.1-14 provides, "A final judgment entered under this chapter may be reviewed by the supreme court of this state upon appeal as provided by rule of the supreme court." Id.

Standard of Review

[¶20] Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Broadwell v. State, 2014 ND 6, ¶ 5, 841 N.W.2d 750. On appeal, findings of fact are reviewed under the "clearly erroneous" standard set forth in N.D.R.Civ.P. 52(a). See id. A finding of fact is clearly erroneous, "if it is not supported by any evidence or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made." Id. Questions of law are fully reviewable on appeal of a post-conviction relief proceeding. See id. Mr. Etemad argues that his constitutional right to counsel was violated. This Court reviews an alleged violation of a constitutional right de novo. State v. Dahl, 2009 ND 204, ¶ 22, 776 N.W.2d 37. To the extent that this Court finds Mr. Etemad's constitutional right to counsel was denied, the denial requires a reversal of his conviction, because, under those circumstances, prejudice is presumed. State v. Holbach, 2007 ND 114, ¶ 8, 735 N.W.2d 862.

I. The district court erred by denying Mr. Etemad's application for post-conviction relief.

[¶21] The United States Constitution and the North Dakota Constitution guarantee the criminally accused defendant the right to be represented by an attorney. U.S. Const. amend. VI. N.D. Const. art. I, § 12. As a corollary, a criminally accused defendant has the right to self-representation. State v. Dahl, 2009 ND 204, ¶ 22, 776 N.W.2d 37. See also Faretta v. California, 422 U.S. 806, 819 (1975). N.D.R.Crim.P. 44(a)(1) provides, "An indigent defendant facing a felony charge in state court is entitled to have counsel provided at public expense to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right." Id.

[¶22] Criminally accused defendants "who represent themselves must voluntarily, knowingly, and intelligently relinquish the benefits of counsel." Wilson v. State, 2013 ND 124, ¶ 20, 833 N.W.2d 492 (quoting Adoption of S.A.L., 2002 ND 178, ¶ 17, 652 N.W.2d 912). Whether the defendant's waiver was voluntary, knowing and intelligent depends on the facts and circumstances of each case. See id. "To intelligently and knowingly choose self-representation, a defendant should be aware of the dangers and disadvantages of proceeding without the skill and experience of counsel." Id. The record must establish that the defendant's choice was made "with eyes open." Id.

[¶23] The Court has not prescribed any formula or script to be read to a defendant who states that he or she wants to proceed without counsel. State v. Jones, 2011 ND 234, ¶ 13, 817 N.W.2d 313 (quoting Iowa v. Tovar, 541 U.S. 77, 88 (2004)). Instead, the information

the defendant must possess in order to make an intelligent election "will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding." Id. The stage of the proceeding is particularly important. A less searching or formal colloquy may suffice for an earlier stage in the criminal court case process, however, a warning of the pitfalls of proceeding to trial without counsel must be rigorously conveyed. See id. When the defendant wants to represent him or herself at trial, rather than to simply plead guilty without an attorney, the trial court should take special care to advise the defendant as to the pitfalls of self-representation. Jones, at ¶ 14 (quotations omitted).

[¶24] In this case, Mr. Etemad was found to be mentally competent to stand trial. (11/5/21 Hearing Tr. at 15, ln. 11 - 14). The test to determine whether a defendant is competent to stand trial is "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and has a rational as well as factual understanding of the proceedings against him." State v. Dahl, 2009 ND 204, ¶ 23, 776 N.W.2d 37 (citing Dusky v. United States, 362 U.S. 402 (1960)). However, the standard for self-representation is higher than competency to stand trial. The Court noted, "In certain instances an individual may well be able to satisfy Dusky's mental competence standard, for he will be able to work with counsel at trial, yet at the same time he may be unable to carry out the basic tasks needed to present his own defense without the help of counsel." Dahl at ¶ 24 (quoting Indiana v. Edwards, 554 U.S. 164 (2008)). Allowing an individual to proceed without counsel in such circumstances could result in trials that are not fair or do not appear fair to all who observe them. Dahl at ¶ 24.

A. The trial court erred in determining Mr. Etemad's waiver of counsel was voluntary.

[¶25] In this case, the trial court erred when it determined that Mr. Etemad's waiver of counsel was voluntary, knowing and intelligent. See Wilson v. State, 2013 ND 124, ¶ 20, 833 N.W.2d 492. The trial court failed to conduct an exhaustive effort to determine whether Mr. Etemad's decision was voluntarily made. Mr. Etemad had a limited understanding of the criminal justice system and the respective roles, rights and obligations of attorneys and litigants. This became obvious during the October 24 hearing.

[¶26] The trial court made a very limited inquiry into whether Mr. Etemad wanted to represent himself. The trial court asked, "... is it your desire to proceed representing yourself?" (10/24/17 Hearing Tr. at 17, ln. 14 - 16). This is a very straightforward question. For anyone who wanted to proceed pro se, the answer would be a simple "yes." However, Mr. Etemad provided a very equivocal answer:

> What I discussed with [third attorney] is is – we discussed this extensively. What I really wanted to do was do a co-chair where, you know, we could -- you know, she could be first chair; I could be second chair.
> She said, "Not a possibility. No chance whatsoever."
> So then I said, "Okay. Can I go pro se and still have you as an advisory role?" you know.
> And she said, "No, not a chance."
> So at that point in time, I guess, you know, the option was just pro se. Now I hear there's a standby. So personally I wanted to do a co-chair but, you know, then if that wasn't possible, then I wanted her as an advisory role. She said that was not possible. I'd like a standby counsel, if that's possible. If that's not possible, at the end of the day, I want to go pro se.

(10/24/17 Hearing Tr. at 17, ln. 17 - 18, ln. 9). Mr. Etemad's response was not a simple "Yes. I want to represent myself." Instead, when asked "is it your desire to proceed

representing yourself," his first response is "What I really wanted to do was do a co-chair where, you know, we could -- you know, she could be first chair; I could be second chair." His first response is that he wants to be represented by an attorney, but maintain some control over the process. Mr. Etemad then explains that it is only when his attorney told him that was not a possibility, that he stated that he would represent himself and have his attorney act in "an advisory role." As he continued to explain, Mr. Etemad again reiterated, "So personally I wanted to do a co-chair but, you know, then if that wasn't possible, then I wanted her as an advisory role." Mr. Etemad only indicated that he wanted to proceed pro se, "if that's not possible." Unfortunately, the trial court did not make any further inquiry into what Mr. Etemad meant by these statements. It was error to consider these statements as a voluntary waiver of Mr. Etemad right to an attorney.

[¶27] Mr. Etemad explained to the trial court "What I really wanted to do was do a co-chair where, you know, we could -- you know, she could be first chair; I could be second chair." Mr. Etemad's desire was never discussed any further with the trial court, so the record is somewhat limited what Mr. Etemad exactly meant by this statement. Clearly, he was expressing some desire to maintain some level of control over his case. In the typical first chair / second chair trial situation, the "first chair" is a more experienced attorney who is actively questioning witnesses and making arguments, while the "second chair" is a less experienced attorney or paralegal, who is actively supporting and assisting the first chair by managing the exhibits, witness statements and reports, and providing general strategy assistance and insights to the first chair. To the extent that Mr. Etemad was saying that he wanted to be represented by an attorney, but wanted to actively assist the attorney in his own

defense and maintain some control over the defense that is presented, that is a completely permissible situation. In fact, that is exactly the situation the criminal justice should foster. The criminal justice system should strive to create an atmosphere where a criminal defendant actively participates in his or her own defense. Instead, the district court ignored this express statement of his desire and found that he had voluntarily relinquished his right to be represented at trial. This was error.

[¶28] The North Dakota Rules of Professional Conduct are instructive in this regard. N.D.R.Prof.Conduct 1.2 deals with the allocation of authority between the client and the lawyer and states in relevant part, "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." Id. That is the situation that would occur during the trial if Mr. Etemad's attorney acted as the "first chair" and Mr. Etemad acted as a "second chair." After consulting with Mr. Etemad, the attorney would be responsible for actively questioning witnesses and making arguments, with Mr. Etemad's assistance. To the extent that Mr. Etemad expressed a desire to be represented by an attorney, but wanted to assist in his defense and maintain some control over his case, that is exactly what the Rules of Professional Conduct envision. However, the trial court ignored Mr. Etemad express desire in this regard.

[¶29] After hearing Mr. Etemad's equivocal response to whether he wanted to represent himself, the trial court followed up by asking him whether he understood that the court was not requiring him to represent himself. (10/24/17 Hearing Tr. at 18, ln. 10 - 11). Again, the trial court asked a very straightforward question and for anyone who wanted to proceed pro

se, the answer would be a simple "yes." That was not Mr. Etemad's answer. Instead, he responded by saying:

> I understand it absolutely. No, at this point in time, I'm done with the - you know, this is my third attorney. So, at this time, you know, I'd like that -- you know, I'd like either to have Henry Howe, or if there is Gereszek, but at this point in time, no, pro se is the only way I want to go.

(10/24/17 Hearing Tr. at 18, ln. 12 - 17). This statement is the definition of ambiguity. In the same sentence, Mr. Etemad indicates that he wants to be represented by one of two prominent defense attorneys, but also indicates that proceeding pro se is the only way that he wants to proceed. In the face of a clearly ambiguous statement, the trial court did not make a further inquiry about his desire to have a different attorney or proceeding pro se. (10/24/17 Hearing Tr. at 18, ln. 18 - 24). For the trial court to later find Mr. Etemad's waiver of his right to counsel was voluntary in the face of such statements was error.

[¶30] When considering the trial court's efforts, the State and the district court pointed to Mr. Etemad's statements that he wanted to represent himself. Admittedly, he indicated that he wanted to represent himself. At one point during the October 24 hearing, Mr. Etemad told the trial court, "Your Honor, no more attorneys. Pro se. Let's do this November 14th with [third attorney] as advisory." (10/24/17 Hearing Tr. at 21, ln. 11 - 13: Appellant's App. at 13 - 14, ¶ 7). However, the trial court erred by considering that single statement out of context. That statement cannot be considered in a vacuum. Instead, it must be considered along with Mr. Etemad's other statements. Those statements include: "What I really wanted to do was do a co-chair where, you know, we could -- you know, she could be first chair; I could be second chair," and "you know, I'd like either to have Henry Howe, or if there is

Gereszek." When considering these statements, it is impossible to say that Mr. Etemad made an unequivocal, voluntary waiver of counsel.

B. The trial court erred in determining Mr. Etemad's waiver of counsel was knowing and intelligent.

[¶31] In addition to being voluntary, a waiver of counsel must also be knowing and intelligent. When discussing whether a waiver was a knowing and intelligent waiver, the trial court should ensure the defendant is aware of the dangers and disadvantages of such a waiver. The trial court did little to determine that Mr. Etemad's wavier of counsel was knowing and intelligent and failed to properly warn him of the perils of representing himself during a trial where his own mental illness would be a key issue.

[¶32] The trial court inquired whether Mr. Etemad had represented himself in any prior court proceeding. (10/24/17 Hearing Tr. at 15, ln. 12 - 13). Mr. Etemad answered that he had represented himself on a misdemeanor charge that was dismissed prior to trial and had "filed three different civil suits in federal court as a pro se litigant." Mr. Etemad did not say anything about whether he understood jury selection, trial procedure or trial strategy. The trial court should have inquired about whether these suits provided Mr. Etemad with any knowledge about the jury trial process, and, if it did not, explained the process and perils of self-representation during such a process. However, the trial court failed to do so.

[¶33] The trial court advised Mr. Etemad of the minimum and maximum penalties for the charge and informed him that he would be expected to follow the Rules of Criminal Procedure, the Rules of Evidence and the Rules of Court. (10/24/17 Hearing Tr. at 19, ln. 21 - 20, ln. 1). However, the trial court did not explain anything further about criminal

procedure or evidentiary rules, nor did anything to ensure that Mr. Etemad actually knew how to represent himself at a trial.

[¶34] When considering whether a waiver is intelligent, the court should consider the defendant's education and sophistication, the complexity of the case and the stage in the proceeding. See State v. Jones, 2011 ND 234, 817 N.W.2d 313. With regards to Mr. Etemad's education, he informed the Court that he had obtained a Bachelor of Science degree in electrical engineering. (10/24/17 Hearing Tr. at 16, ln. 8 - 11). Admittedly, this is an advanced science degree. However, scientific knowledge and training are not particularly helpful when trying to persuade a jury on a particular fact or trying to argue a point of law to a judge. With regards to sophistication, the trial court made no real inquiry into Mr. Etemad's level of sophistication. At the time, the trial court was aware that Mr. Etemad had been evaluated and it was determined that he was competent to stand trial. Although he met this very basic level of competency, it was clear that Mr. Etemad was suffering from some level of mental illness at the time. The trial court failed to consider whether Mr. Etemad's mental illness deprived him of the level of sophistication necessary to represent oneself in a jury trial.

[¶35] One particular fact illustrates Mr. Etemad's lack of sophistication regarding the trial process. During the trial, Mr. Etemad wore the jail inmate's uniform, which is an orange jumpsuit, and shackles or handcuffs. (11/5/21 Hearing Tr. at 16, ln. 19 - 17, ln. 7). The trial court cautioned Mr. Etemad against conducting the trial in such clothes and his attorney offered to provide him with plain clothes. See id. Despite the judge's warnings and his attorney's offer, Mr. Etemad elected to wear jail attire, rather than plain cloths, in front of the

jury. See id. The record is not clear why Mr. Etemad would make such choice. Although this Court has held that appearing in jail or prison attire does not automatically vitiate a conviction, it is hard to imagine a good reason Mr. Etemad believed it would be helpful for the jury to view him in jail attire during the course of the three-day trial. See State v. Steen, 2004 ND 228, ¶ 19, 690 N.W.2d 239. The most likely conclusion is a lack of sophistication and understanding about the psychology of jurors, jury trials and implicit bias.

[¶36] With regard to the complexity of the case, this factor clearly points to the conclusion that Mr. Etemad should not have been able to represent himself. Mr. Etemad was charged with a Class C felony. This was a serious charge. If found guilty, he could be sentenced to up to five years in prison. In addition, the strongest defense that Mr. Etemad had was to argue a lack of criminal responsibility. (11/5/21 Hearing Tr. at 11, ln. 4 - 12, ln. 1). This is a difficult argument for an attorney to make and typically involves one or more expert witnesses. This was not a simple fact-based defense, such as someone else committed the crime or the defendant did not intend to commit the crime. For a pro se litigant to argue such a defense is nearly impossible. The decision to represent oneself can hardly be considered "intelligently made" under the circumstances.

[¶37] The final factor for the Court to consider may be the most important. With regard to the stage in the proceeding, this Court has said that, "A less searching or formal colloquy may suffice for earlier stages in the criminal court case process, however, a warning of the pitfalls of proceeding to trial without counsel must be rigorously conveyed. State v. Jones, 2011 ND 234, ¶ 13, 817 N.W.2d 313 (quoting Iowa v. Tovar, 541 U.S. 77, 88 (2004)). In this case, the hearing was approximately two and half weeks prior to trial. There was no

question whether the case would be tried to a jury. The only question was whether Mr. Etemad would be represented by an attorney or would proceed pro se. Given the fact that this was for trial, rather than a guilty plea, this factor points towards the conclusion that Mr. Etemad should not have been permitted to represent himself.

[¶38] A review of the transcript shows that the trial court did little to advise Mr. Etemad of the dangers of self-representation. In addition, the record shows that Mr. Etemad's waiver was not voluntarily, knowingly and intelligently made. Under the circumstances, it was error to permit Mr. Etemad to waive his constitutional right to counsel. This case should be remanded for a new trial, where Mr. Etemad can be competently represented.

Conclusion

[¶39] For the foregoing reasons, Mr. Etemad respectfully requests that the district court's order denying post-conviction relief be reversed and remanded for further proceedings.

Dated this 7th day of February, 2022.

/s/ Scott O. Diamond

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Certificate of Compliance

[¶40] Pursuant to N.D.R.App.P. 32(e), the undersigned attorney certifies that this Brief consists of 23 pages and complies with 38 page limitation.

Dated this 7th day of February, 2022.

/s/ Scott O. Diamond

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Bejan David Etemad, Petitioner-Appellant, vs. State of North Dakota, Respondent-Appellee,	Supreme Court No. 20210343 Case No. 18-2021-CV-00901 **Certificate of Service**

[¶1] I hereby certify that on the 8th day of February, 2022, the following documents:

1. Amended Appellant's Brief; and
2. Certificate of Service.

were served, via email, upon the following individual:

Email: sasupportstaff@gfcounty.org
Ashlei Anne Neufeld
Grand Forks County State's Attorney Office

and were served, via email, upon the Petitioner-Appellant, as follows:

Email: detemad@msn.com
Bejan David Etemad

Dated this 8th day of February, 2022.

/s/ Scott O. Diamond

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