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& 20110042

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STATE OF NORTH DAKOTA

Supreme Court
State of North Dakota

Robert Lee Johnson Petitioner and Appellant	)	Supreme Court No. 20110041 & 20110042 Stutsman County No. 47-6-K-1017-2
v	)	
State of North Dakota Respondent and Appellee	)	

Appellee's Brief

Johnson appeals the 19 January 2011 district court judgment denying his 02 September 2009 application for post conviction relief.

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¶3 **ISSUE PRESENTED FOR REVIEW**

Whether the trial court properly granted summary judgment for failure to state a material issue.

¶4 **STATEMENT OF THE CASE**

¶5 **Nature of the case**

Johnson appeals the order granting summary judgment for the State, dismissing Johnson's application for post conviction relief filed on 02 September 2011.

¶6 **Statement of the facts combined with course of proceedings below**

¶7 **Trial** In a bifurcated trial addressing a lack of criminal responsibility defense, a jury found Johnson guilty of two counts of contact by bodily fluid on January 9, 2008. *Trial Court Register of Actions*, 47-06-K-01017, # 77 [hereinafter *Trial Action*]. Phyllis A. Ratcliffe, provided Johnson representation prior to and through trial. Phase one of the trial addressed the actus reus. The jury found he had committed the acts. Phase two of the trial addressed the mens rea component. The trial judge had Johnson proceed first in the mens rea phase. *Trial Transcript Day* 3, pp 1 & 98. Ratcliffe put the Defense's expert, Dr. Rodney Swenson on the stand, put forth Johnson's case that Johnson could not have formed the required intent, offered Swenson's report, and did not make a Rule 29 motion at any time in phase two.

¶8 **Appeal of Judgments of Conviction**

Johnson appealed on the 22nd of January 2008. *Trial Action* 83. In the words of his direct appeal attorney, Jessica Ahrendt, ". . . there was not sufficient evidence presented at trial to support his convictions." Supreme Court Docket nos. 20080021 & 20080022, #

2, *Brief of Appellant*, ¶ 19. Ahrendt further specified, ". . . there is insufficient evidence that he caused urine to come in contact with Brodigan," *id*. at ¶ 24, and ". . . there is insufficient evidence that he caused urine or spit to come in contact with Irish." *Id*. at ¶ 28. But Ahrendt did not advance the particular variation on the insufficiency argument that there was insufficient psychiatric evidence to support the conviction.

¶9 **Judgments affirmed on direct appeal**

The North Dakota Supreme Court affirmed the judgments with this paragraph. *State v. Johnson*, 2008 ND 168, 756 N.W.2d 548.

> Robert Johnson appeals two district court judgments entered after a jury found him guilty of contact by bodily fluids with a law enforcement officer and a person lawfully present in a correctional facility who is not an inmate, in violation of N.D.C.C. § 12.1-17-11(1)(a) and (c). Johnson argues there was insufficient evidence to sustain the jury verdict. Testimony and forensic evidence presented at the trial support the jury findings. Concluding the criminal judgments are supported by substantial evidence, we affirm the district court criminal judgments under N.D.R.App.P. 35.1(a)(3).

State v. Johnson, 2008 ND 168, 756 N.W.2d 548.

¶10 **2008 Application for Post Conviction Relief filed**

Johnson drafted his own application for post conviction relief and filed it on the 16th of October 2008. *Trial Actions* 100, 101, 102. Mark Blumer was appointed counsel.

¶11 Johnson's Application contained three allegations: (1) that his trial counsel, Ratcliffe, was ineffective because she failed to offer Dr. Swenson's report as evidence; (2) that the prosecutor had violated discovery rules by failing to offer videotapes as evidence, and (3) that Ratcliffe improperly prevented him from testifying. *Trial Action* 101.

¶12 The Prosecution answered Johnson's assertion that Ratcliffe had not offered Dr. Swenson's report by citing to the place in the transcript where Dr. Swenson's report had been received into evidence. *Trial Action* 103, at 1.

¶13 The Prosecution answered Johnson's claim that he had not received the video tapes by explaining that all four video tapes had been disclosed during the discovery process, all four had been offered by the Prosecution as evidence at trial, two of the tapes four tapes offered had been received into evidence and published to the jury during trial, and those two tapes were sent with the jury into deliberations. *Trial Action* 103, at 2-3.

¶14 On the 23rd of October 2008, Judge Grosz issued what the clerk referred to as *Memorandum from Judge Grosz re Indigent Defense*. *Trial Action* 117. Judge Grosz qualified his thoughts as interlocutory and pointed out: (1) "[t]he record clearly reflects that Petitioner's expert witness' written evaluation was submitted to the Jury;" (2) "Petitioner needs to specify what video tapes did not go to the Jury and how this is a Brady violation" because some tapes had gone to the Jury; and (3)

> The alleged factual basis for this claim [that trial defense counsel had precluded him from testifying] must be supplemented by affidavit(s) of Petitioner's trial counsel. The record reflects that Petitioner was advised prior to jury trial of his right to testify or not testify as he determines and Petitioner acknowledged that he understood this right among other rights. The record also reflects that at no time during jury trial did Petitioner request to testify.

Trial Action 117.

¶15 Judge Grosz instructed the parties to submit statements of present status and scheduling requirements. *Trial Action* 117.

¶16 The Prosecution filed the *State's First Statement of Present Status and*

Scheduling Requirements saying now that a lawyer was appointed, the Prosecution expected an amended application and a hearing on the issue of what Ratcliffe told Johnson in regard to testifying. *Trial Action* 106.

¶17 Blumer filed *Petitioner's First Statement of Present Status and Scheduling Requirements*, explaining he was scheduled to meet with Johnson on the 1st of December 2008 and planned to discuss with Johnson whether to file an amended application. *Trial Action* 113.

¶18 Judge Grosz replied to the counsels' statements of present status with his *Memorandum Re: Amended Petition & Affidavits Granted* in which he instructed:

> [T]he only allegation in the Application which appears to be pending is Mr. Johnson's claim that his trial counsel failed to let him testify at trial. I will need an Affidavit (sic) from Mr. Johnson's trial counsel in order to properly review this claim to determine if further proceeding are justified and if further proceedings are justified, what type(s) . . .

Trial Action 118.

¶19 In response to Judge Grosz's memo, Blumer filed Ratcliffe's affidavit and a cover letter for the affidavit. *Trial Actions* 108 & 109. In Ratcliffe's affidavit she explained she had advised Johnson not to testify and it appeared to her he understood her advice and agreed with her that he ought not testify. *Trial Action* 109.

¶20 Mr. Blumer explained in his cover letter that no amended application would be filed and that the Defense conceded there were no *Brady* violations.

> I have met with Mr. Johnson and discussed the issues he raised along with the responses we have received from Mr. Fremgren (sic) and the Court. I talked to Mr. Johnson about the two video tapes which were offered by Mr. Fremgren (sic) but not received into evidence and after discussing it informed him that I do not find a Brady violation and the

> information he wanted presented through the videos was covered in the testimony, evaluation, and/or other videos which were received.
>
> After reviewing the file, and fully discussing this with Mr. Johnson I do not have any different, and/or additional allegations to file on his behalf.

Trial Action 108.

¶21 Judge Grosz acknowledged receipt of Ratcliffe's affidavit and confirmed that the only issue left was whether Johnson had been involuntarily precluded from testifying. Trial Action #111. Judge Grosz posited that if Johnson did not contradict Ratcliffe, then there were no issues of fact left. *Id.* Judge Grosz instructed Mr. Blumer to notify the court by the 17th of December 2008 if Johnson disputed Ms. Ratcliffe's version. *Id.*

¶22 Mr. Blumer replied that there is no factual dispute and no need for a hearing.

> I have reviewed the matter and discussed it with Mr. Johnson. I do not feel there is a factual dispute, however Mr. Johnson wanted the court (and Mr. Fremgren) (sic) to be aware that he has an IQ of 79 and was medicated at the time of trial when discussing his testimony with Ms. Ratcliffe. I don't know of any reason to have a hearing other than the fact Mr. Johnson wanted to have the court take that into consideration. I believe that all parties, and the court, were aware of that through trial testimony and the doctor's evaluation which was submitted at trial. I am not aware of any other issues.

Trial Action 120.

¶23 **2008 Application summarily dismissed**

By *Order for Judgment and Judgment* dated 18 December 2008, Judge Grosz summarized that the Defense had withdrawn the alleged shortcoming regarding the VHS tape disclosure; the record obviated the fact that psychiatric report Johnson said had not been entered into evidence had been; and Ratcliffe testified by affidavit that she had reviewed Johnson's right to testify with him, advised Johnson not to testify, and that at

the time of trial he agreed with her advice. *Trial Action* 112. Judge Grosz pointed out that Johnson had acknowledged the truth of Ratcliffe's affidavit, via Blumer's 18 December 2008 letter. *Id*. Judge Grosz concluded,

> Because no factual dispute exists regarding this Application, and only matters of law remain, no evidentiary hearing is required. The law does not require or condone useless or idle acts. [Citations omitted.] Additionally, Petitioner through his attorney indicated that there is no reason for an evidentiary hearing. *Id.*

Trial Action 112. The trial judge summarily dismissed Johnson's 2008 application on the 22nd of December 2008 without any hearing. *Trial Action* 112.

¶24 The application for post conviction relief Robert Johnson filed pro-se in October 2008 did not contain any allegation that Ratcliffe had provided ineffective assistance by failing to make a Rule 29 motion aka a motion for directed verdict after the mental status phase. *Trial Action* 101. Ratcliffe had made a Rule 29 motion at the close of the first phase, the actus reus phase, of the bifurcated trial. *Trial Transcript Day* 2 at 124. Nor did Johnson submit any allegation that his appellate lawyer, Ahrendt, had improperly failed to raise a particular sufficiency of the evidence argument regarding the pivotal issue of lack of criminal responsibility. *Trial Action* 101.

¶25 **Appeal of the summary dismissal of the 16 October 2008 Application**

Johnson appealed the district court's summary dismissal of the 2008 application. *Trial Action* 128. Mr. Kent Morrow was appointed to provide Johnson legal services for the appeal. Morrow argued Blumer had implicitly claimed Johnson misunderstood his right to testify and that the trial court erroneously dismissed the application without a hearing when there was an inferred issue of fact. *Johnson v. State*, Supreme Court docket

no. 2009008, entry # 2, *Brief of Appellant*, at ¶12. Morrow never argued there was a conflict of interest between Blumer and Ahrendt. Morrow never argued that there was insufficient evidence in regard to the lack of criminal responsibility element.

District court's summary disposition of the 16 October 2008 *Application* affirmed on appeal

¶26 With the following two paragraphs, the Supreme Court of North Dakota affirmed the trial court's judgment. *Johnson v. State*, 2009 ND 92, 767 N.W.2d 529 (15 July 2009 mandate).

> Robert Johnson appeals from the district court's judgment summarily dismissing his application for post-conviction relief. Johnson argues the district court erred in failing to hold an evidentiary hearing on his application for post-conviction relief because a genuine issue of material fact exists regarding whether his decision not to testify was informed and voluntary.
>
> The district court's judgment is affirmed under N.D.R.App .P. 35.1(a)(6).

Id.

¶27 Johnson Subsequently wrote a letter to the district court, requesting an evidentiary hearing. *Johnson v. State*, 2010 ND 213, ¶ 3, 790 N.W.2d 741. The district court construed this letter as a second application for post conviction relief and denied the application as res judicata, finding no genuine issue of material fact. *Id.* No appeal was taken from that order. *Id.*

Application for post conviction relief filed on 02 September 2009

¶28 With the dismissal of Johnson's October 2008 *Application* final, Johnson filed another application for post conviction relief on 02 September 2009, again, pro-se. *Trial*

Action 136, *Appellant's App* at 15. Johnson listed three claims for relief. *Trial Action* 136; *Appellant's Appendix*, 16.

> 5. Petitioner raises the following claims for relief:
>
> a. THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO SUPPORT THE VERDICTS FINDING PETITIONER DID NOT LACK CRIMINAL RESPONSIBILITY FOR HIS CONDUCT.
> b. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL AND DURING THE FIRST POST-CONVICTION RELIEF PROCEEDING.
> c. WAIVER OR MISUSE OF PROCESS SHOULD NOT BE APPLIED TO BAR CONSIDERATION OF THE ISSUES RAISED IN THIS PETITION.

Id.

¶29 In the body of his application Johnson explained allegation "5. b.".

> Petitioner's court appointed attorney for direct appeal was Jessica Ahrendt. Ms. Ahrendt failed to raise any issues on appeal other than to challenge the sufficiency of the evidence concerning the jury's verdicts finding Petitioner committed the acts charged. She did not challenge the jury's verdict finding there was no a lack of criminal responsibility due to mental disease or defect. Since that was the pivotal issue at trial, failure to challenge the finding on appeal was ineffective assistance of counsel.

After the appeal, Ahrendt left the firm and Blumer joined it. Blumer was appointed as post conviction relief counsel. Johnson argued this was an "obvious conflict of interest" because "Blumer was not going to claim a member of his own firm had provided ineffective assistance of counsel to Petitioner on direct appeal." *Id.*

¶30 In essence, Johnson argued his appellate lawyer, Ahrendt, should have claimed the State failed to prove Johnson had the requisite level of culpability and his first post conviction relief lawyer, Blumer, erred when Blumer did not argue Ahrendt erred. Johnson has not said how any of this harmed his case.

District court summarily dismissed the 02 September 2009 Application

¶31 The same day Johnson filed his Application, the district court on its own volition summarily dismissed Johnson's second application with a single paragraph. *Trial Action* 140-142 in *Appellant's Appendix* at 20.

¶32 Johnson appealed the summary dismissal of the 2009 application. Robert Quick was appointed as his appellate lawyer.

Summary dismissal of September 2, 2009 application reversed and remanded

¶33 North Dakota Supreme Court reversed and remanded indicating the district court should not have summarily disposed of the application on the district court's own motion. *Johnson v. State*, 2010 ND 213, ¶ 10, 790 N.W.2d 741. Res judicata is an affirmative defense and the state never had the opportunity to assert it before the district court dismissed the application. *Id.* Besides that, the district court had misconstrued the per curium opinion when the district court concluded the opinion had addressed the issue of whether there was sufficient evidence showing Johnson committed the mens rea. *Johnson v. State*, 2010 ND 213, ¶ 9.

Acts in the district court after the remand

¶34 By memo dated 01 December 2010, the district court instructed the parties to serve and file prior to the 16th of December 2010 any pre-hearing motion, defense, or claim that must or could be brought prior to a hearing or final ruling.[1]

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[1] Clerk of Court Stutsman County did not record Judge Grosz's administrative memo among the actions in the *Register of Actions*. However, both the Defense and State refer to the contents of the memo and seem without question to concur that its publication to the parties was an event that took place. See *Brief of Appellant* at ¶ 5.

¶35 On the 13th of December 2010, the State filed its answer to Johnson's 02 September 2009 Application. *Trial Action* 158. In its 16 December 2010 *Supplemental Application for Post-Conviction Relief* the Defense raised no new issues, asked for a hearing, and claimed the State had not properly moved for summary disposition. *Trial Action* 162, *Appellant's App* at 40. The State filed and served a *Notice of Motion, Motion for Summary Disposition, and Certificate of Service* on the same date. *Trial Action* 160. The Defense responded to the *Motion for Summary Disposition* with virtually the exact document it had filed on 16 December 2010, asking for a hearing and erroneously stating the state had failed to file and serve a motion for summary disposition. *Trial Action* 167, *Appellant's App 44.*

¶36 The district court granted the State's motion for summary disposition and issued an order for judgment and judgment. *Trial Action* # 168, *Appellant's App 48.* Johnson appealed.

¶37 **Standard of Review**

The method of review for summary dismissal of a post-conviction relief application alleging ineffective assistance of counsel was summarized in *Ude v. State*, 2009 ND 71, ¶¶ 8-10, 764 N.W.2d 419, 422 -423.

> Section 29-32.1-04, N.D.C.C., provides the requirements for an application for postconviction relief under the Uniform Postconviction Procedure Act. A petitioner must "set forth a concise statement of each ground for relief, and specify the relief requested," refer to the pertinent portions of the record of prior proceedings, and if those portions are not in the record, the petitioner must attach those portions to the application. *State v. Bender,* 1998 ND 72, ¶ 19, 576 N.W.2d 210. A petitioner may attach affidavits or other supporting materials to the application, but they are unnecessary. *Id.* A petitioner is not required to provide evidentiary

support for his petition until he has been given notice he is being put on his proof. *Id.* at ¶ 20. At that point, the petitioner may not merely rely on the pleadings or on unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact. *Wheeler v. State,* 2008 ND 109, ¶ 5, 750 N.W.2d 446. If the petitioner presents competent evidence, he is then entitled to an evidentiary hearing to fully present that evidence. *Steinbach v. State,* 2003 ND 46, ¶ 17, 658 N.W.2d 355.

While summary dismissal generally is not appropriate for post-conviction claims of ineffective assistance of counsel, it is appropriate if the petitioner does not raise a genuine issue of material fact. *Klose v. State,* 2008 ND 143, ¶ 9, 752 N.W.2d 192. "To avoid summary dismissal of an ineffective assistance of counsel claim, the post-conviction applicant must present some evidence that his counsel's performance fell below an objective standard of reasonableness, and he must overcome the presumption that his counsel's performance was within the broad range of reasonableness." *Id.* at ¶ 13. The petitioner "must specify how and where counsel was incompetent and the probable different result." *Id.* A petitioner's failure to "show how, but for the attorneys' errors, the results of the proceedings would have been different" justifies a district court's decision to summarily dismiss the ineffective assistance of counsel claims. *Hughes v. State,* 2002 ND 28, ¶ 7, 639 N.W.2d 696.

We explained our review of a summary dismissal of post-conviction relief in *Klose,* 2008 ND 143, ¶ 9, 752 N.W.2d 192:

> We review an appeal from summary denial of post-conviction relief as we would review an appeal from a summary judgment. The party opposing the motion for summary disposition is entitled to all reasonable inferences to be drawn from the evidence and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact. For summary judgment purposes, the evidentiary assertions of the party opposing the motion are assumed to be true.

Ude v. State, 2009 ND 71, ¶¶ 8-10, 764 N.W.2d 419, 422 -423.

¶38 **Argument**

¶39 **Granting summary judgment for failure to raise an issue of material fact was proper.**

"To avoid summary dismissal of an ineffective assistance of counsel claim, the

post-conviction applicant must present some evidence that his counsel's performance fell below an objective standard of reasonableness, and he must overcome the presumption that his counsel's performance was within the broad range of reasonableness." *Ude v. State*, 2009 ND 71, ¶ 13, 764 N.W.2d 419. The petitioner "must specify how and where counsel was incompetent and the probable different result." *Id.* A petitioner's failure to "show how, but for the attorneys' errors, the results of the proceedings would have been different" justifies a district court's decision to summarily dismiss the ineffective assistance of counsel claims. *Ude v. State*, 2009 ND 71, ¶¶ 8-10, 764 N.W.2d 419, 422 - 423 (quoting *Klose v. State*, 2008 ND 143, ¶ 13, 752 N.W.2d 192).

¶40 Johnson did not say how either (1) a trial counsel's motion for judgment of acquittal, (2) an appellate counsel's argument on sufficiency of the evidence, or (3) a post conviction relief counsel's allegation of ineffective counsel, would have made a difference.

¶41 From Johnson's point of view, his appellate attorney, Ahrendt, provided ineffective assistance simply because she did not mount a challenge to the jury's finding on the pivotal issue in the case. Johnson's exact language follows.

> The verdict in this case finding Petitioner was criminally responsible for his conduct was contrary to law and against the weight of evidence. The court should have granted a directed verdict in favor of Petitioner and committed him to a mental hospital.
>
> Petitioner's court-appointed attorney for direct appeal was Jessica Ahrendt. Ms. Ahrendt failed to raise any issues on appeal other than to challenge the sufficiency of the evidence concerning the jury's verdicts finding Petitioner committed the acts charged. She did not challenge the jury's verdict finding there was not a lack of criminal responsibility due to mental disease or defect. *Since that was the pivotal issue at trial, failure to challenge the finding on appeal was ineffective assistance of counsel*.

Id. (italics added). Johnson is wrong. Refraining from appealing the sufficiency of the evidence on the pivotal issue in the case does not automatically constitute ineffective assistance. Nor is it substandard performance if it would be a complete waste of time to advance the argument.

¶42 There was no merit to a sufficiency of the evidence argument on the psychiatric battle. On the third day of the trial, the opposing experts testified. Dr. Rodney Swenson testified as Johnson's witness that Johnson had neurological damage of his executive functioning. *Trial Transcript Day* 3, pages 1- 97. Dr. Lincoln Coombs testified for the State that Johnson was criminally responsible. *Trial Transcript Day* 3, pages 98 -175. Johnson's expert, Dr. Swenson, was well credentialed, testified well, and had cogent reasons for is opinion. But the jury chose to believe the valid opinion of Dr. Lincoln Coombs, the State's well credentialed expert. It would have been a waste to time for Ahrendt, Blumer or any other lawyer thereafter to argue there was insufficient evidence. Had any done it, the Prosecution would have pointed out that in a lack of criminal responsibility case due to mental disease or defect the law does not even require the State to provide an opposing expert witness to rebut the defense's expert in order for the State to prevail. This principle was clearly stated in *Mims v. U.S.*.

> . . . the prosecution has the burden of proving the mental capacity of the accused beyond a reasonable doubt. However, no case has been cited to us, and we have found none, laying down the arbitrary rule that an accused is entitled to a judgment of acquittal merely because he offers expert opinion evidence on the issue of his insanity and the prosecution attempts to rebut it without expert witnesses. On the other hand, one of the most generally accepted rules in all jurisprudence, state and federal, civil and criminal, is that the questions of the credibility and weight of expert opinion testimony are for the trier of facts, and that such testimony is

> ordinarily not conclusive even where it is uncontradicted. The Supreme Court of the United States has said that the trier of the facts is not limited to a compromise and balancing of opinions of expert witnesses in reaching its decisions, and that there is no rule of law that requires the judgment of witnesses to be substituted for that of the jury.

Mims v. U.S., 375 F.2d 135, 140-41 (C.A. Fla. 1967) (See also *U.S. v. Dresser*, 542 F.2d 737, 742 (C.A. Mo. 1976); see also *State v. Klose*, 2003 ND 39, ¶ 26. If the State can legitimately win on a lack of criminal responsibility case, as it did in the Klose murder case, without providing an opposing expert, there was no meritorious claim to raise in Johnson's case where there had been a full battle of opposing experts.

¶43 In dismissing Johnson's allegation, the trial judge pointed out how it was fundamentally flawed.

> The trial record clearly, unequivocally, and completely rebuts Petitioner's factual claim that there was insufficient evidence presented to the Jury to find criminal responsibility. As shown by this record, extensive testimony was received by this Jury from Petitioner's expert witness who opined that Petitioner was not criminally responsible, and extensive testimony from the State's expert witness that Petitioner was criminally responsible. Petitioner submits no factual assertions that in any way contradict this trial record and therefore there is no dispute of material factor inference from undisputed fact. This trial record shows that there was sufficient evidence presented to this Jury through the State's expert witness for this Jury to find Petitioner criminally responsible. If the Jury had determined lack of criminal responsibility, the extensive testimony of Petitioner's expert witness would have provided sufficient evidence for the Jury to determine Petitioner not criminally responsible. The Jury did what the Jury is supposed to do, evaluate the evidence presented and make a choice according to the law given to them. The Jury made its choice and much as it is understandable that Petitioner does not like the choice made, the law requires the Petitioner to live with that choice because the trial record shows that the Jury was presented with extensive opposing evidence on the issue of criminal responsibility.

Trial Action 168, *Appellant's App* 48.

¶44 It is quite probable that Ahrendt[2] and the lawyers who followed were well aware that the State had done more than enough to prevail on a sufficiency of the evidence allegation. Under the circumstances of the case, the law on the topic, and with Johnson failing to point out how Ratcliffe, Ahrendt, and or Blumer would have improved his situation if they had acted as he implies, the summary judgment was legal, reasonable, and correct. There was no genuine issue of material fact.

Defense's freshest argument, failure to make a Rule 29 objection is something a trial defense counsel should never do

¶45 Current counsel, Mr. Pulkrabek, cites to *State v. Deutscher* as an instance of trial defense counsel's failing to make a Rule 29 motion causing an irreversible problem for a defendant. *State v. Deutscher*, 2009 ND 98, 766 N.W.2d 442. *Deutscher* is an interesting case, but Pulkrabek never says how it has any material bearing on this case. The similarities Pulkrabek brings forth end with the fact that both trial defense lawyers refrained from making a Rule 29 motion at the close of the State's case. In *Deutscher*, the jury convicted the defendant of theft by passing a counterfeit cashier's check. *Deutscher*, 2009 ND 98, ¶ 2. After the jury's verdict came in, the judge set aside the jury's verdict. *Deutscher*, 2009 ND 98, ¶ 4. *Deutscher* has no material relevance to Johnson's case. Judge Grosz filed his point of view on this case on 04 September 2009 in essence saying it was a fair trial. Opposing experts disagreed and the jury selected one side's argument.

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[2] Ahrendt was the public defender on direct appeal, not the trial counsel. At paragraph 27 of his brief to this court, Mr. Pulkrabek accidentally mishandled his quoted material and identified Ahrendt as the trial defense counsel. Ratcliffe was the trial defense counsel.

That is what happens at trial. *Trial Action* 140, *Appellant's App* 20. Judge Grosz filed the same essential view again in 2011. *Trial Action* 168, *Appellant's App* 48. In *Deutscher*, the judge was obviously skeptical about the state of the evidence when it went to the jury because between the date of verdict, 16 June 2008, and the date of sentencing, 08 August 2008, the judge had the testimony transcribed, reviewed it, and came to sentencing prepared to pronounce he was setting aside the jury's verdict. *Deutscher*, 2009 ND 98, ¶ 4 We have noting like that. Basically, Mr. Pulkrabek has found a trial defense counsel shortcoming and given no indication how if it had not happened, Johnson's case would have improved. Until there is specification on what the different result would have been, we do not have an ineffective assistance of counsel situation, we have an immaterial mistake by a lawyer at trial. The petitioner "must specify how and where counsel was incompetent and the probable different result." *Klose v. State,* 2008 ND 143, ¶ 13, 752 N.W.2d 192.

¶46 Finally, Mr. Pulkrabek says that there was an issue before the court that the district court did not address and should have, allegedly, that Johnson had an alleged IQ of 79, that Blumer knew it, that Blumer relied on Johnson to identify for Blumer appellate issues, that Blumer had a conflict of interest because he did not want to criticize a former member of his firm Ahrendt. Here we go again.

¶47 "To avoid summary dismissal of an ineffective assistance of counsel claim, the post-conviction applicant must present some evidence that his counsel's performance fell below an objective standard of reasonableness, and he must overcome the presumption that his counsel's performance was within the broad range of reasonableness." *Ude v.*

State, 2009 ND 71, ¶ 13, 764 N.W.2d 419. The petitioner "must specify how and where counsel was incompetent and the probable different result." *Id.* A petitioner's failure to "show how, but for the attorneys' errors, the results of the proceedings would have been different" justifies a district court's decision to summarily dismiss the ineffective assistance of counsel claims. *Ude v. State*, 2009 ND 71, ¶¶ 8-10, 764 N.W.2d 419, 422 - 423 (quoting *Klose v. State*, 2008 ND 143, ¶ 13, 752 N.W.2d 192).

¶48 What did Blumer do that was a mistake? And if he made any mistake how did it make a material difference to Johnson's case? How did the representation Johnson received result in his case being ruined? Mr. Pulkrabek has pointed out a string of circumstances he aligns to suggest there was a shortcoming, but forced by some sense of honesty feels compelled to stop after only having suggested it is possible there was a detrimental effect. The string of circumstances produced no shortcoming that has any material bearing on the outcome of the case.

¶49 In his 02 September 2009 application for post conviction relief, Johnson said,

> "Mr. Blumer did consult with Petitioner, but it appears from the record that he relied on Petitioner to decide what issues to raise. Mr. Blumer did not amend the petition to add any additional claims, such as to challenge the verdicts finding Petitioner did not lack criminal responsibility. Mr. Blumer should have done so, as well as added a claim of ineffective assistance of appellate counsel. However, it should be pointed out that Mr. Blumer is with the same law firm as the appellate attorney had been with, which created an obvious conflict of interest. Certainly, Mr. Blumer was not going to claim a member of his own firm had provided ineffective assistance of counsel to Petitioner on direct appeal. The fact is, however, it was professionally irresponsible for Mr. Blumer to rely exclusively on the ideas advanced by his mentally ill client, who has an I.Q. of only 79, for the post-conviction relief proceeding. To ignore the fact that ***additional issues*** with potential merit existed constitutes ineffective assistance on the part of Mr. Blumer as well.

Trial Action 136, *Appellant's App* 16-17 (emphasis of italics and bold typeface added).

¶50 What additional issues? None have ever been stated. As to the issue that was stated: failure to argue sufficiency of the evidence regarding the mens rea, that was addressed in the paragraphs above in this *Brief* and in the State in it's *Notice of Motion, Motion for Summary Disposition, and Brief in Support of Motion*, *Trial Action* 160, *Appellants App* at 33-34.

¶51 Pulkrabek mistakenly argues the "State's Motion and Notice are not adequate to put a Petitioner on notice he needs to put on proof." *Appellant's Brief* ¶ 30-32. As authority for his position, Pulkrabek cites to *Parizek, Wilson, and Bender* where the State filed bare bones answers, not fleshed out motions for summary disposition. *Id*. In *Wilson*, it was noticed, ". . . the State's motion to dismiss and supporting brief, little more than a paragraph in length, was not adequate to put Wilson on notice he needed to put on proof." *Wilson v. State*, 1999 ND 222, ¶17, 603 N.W.2d 47, 52. In *Parizek*, ". . .the State did not file a motion for summary dismissal of Parizek's application for post-conviction relief but only filed an opposition to the application for post-conviction relief which appears to be in the nature of an answer to the application. The State did not move for nor did it ask for summary dismissal of Parizek's application. Rather, the district court summarily dismissed Parizek's application on its own accord. We review its decision in that light." *Parizek v. State*, 2006 ND 61, ¶ 8, 711 N.W.2d 178, 182.

¶52 Those cases are inapplicable because in this case the State filed a developed *Motion for Summary Disposition* including a brief in which it argued for five pages, citing to the record and supporting law, that there was no material issue of fact raised by

Johnson. *Trial Action* 160, *Appellants App* at 33-38. In its *Motion for Summary Disposition*, the State concluded: "Johnson has failed to provide anything suggesting how he would rebut the presumption that counsel's representation was adequate. Johnson has failed to provide anything that begins to show how it would have made any difference if either Ahrendt or Blumer had argued what he now wishes they would have." *Id.* The State went on to ask for summary disposition due to failure to advance an issue of material fact. *Id.* This is satisfactory notice that a petition must put forth his proof.

¶53 Conclusion

The State asks this Court to affirm the summary judgement dismissing Johnson's 02 September 2009 application for post conviction relief.

Dated 08 April 2011

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¶54 CERTIFICATE OF SERVICE

On 08 April 2011, a copy of the Appellee's Brief was served by e-mail to:

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On 08 April 2011, a copy of the Appellee's Brief was filed electronically with the Clerk of the North Dakota Supreme Court by e-mailing to: supclerkofcourt@ndcourts.gov

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