

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Omar Toure,)	
)	
Petitioner and Appellant,)	
)	Supreme Court No. 20200040
vs.)	
)	District Court No. 53-2018-CV-00677
State of North Dakota,)	
)	
Respondent and Appellee.)	

BRIEF OF PETITIONER AND APPELLANT TOURE

APPEAL FROM THE DISTRICT COURT'S
FEBRUARY 3, 2020 ORDER ON APPLICATION FOR POST-CONVICTION RELIEF
WILLIAMS COUNTY, NORTH DAKOTA
NORTHWEST CENTRAL JUDICIAL DISTRICT
HONORABLE BENJAMEN JOHNSON

NO ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

[¶1] The District Court improperly dismissed Toure's Application for Post-Conviction Relief after a hearing.

STATEMENT OF THE CASE

[¶2] Petitioner and Appellant Omar Toure (Toure) was charged in Williams County cases 53-2015-CR-769 with 3 counts of Terrorizing, Class C Felonies, 53-2015-CR-770 with 2 counts of Reckless Endangerment, Class C Felonies and 53-2015-CR-771 with Kidnapping, a Class B Felony and Aggravated Assault, a Class C Felony. The cases were tried to a jury in October 2016 and Toure was convicted of 2 counts of Terrorizing, Class C Felonies, 1 count of Reckless Endangerment, a Class C Felony, Kidnapping, a Class B Felony and Aggravated Assault, a Class C Felony.

[¶3] A presentence investigation was conducted and Toure was sentenced on or about January 30, 2017 by the District Court to a period of 10 years at the North Dakota State Penitentiary with credit for time served, and to a period of probation after his release from incarceration. Toure is presently incarcerated at the North Dakota Department of Corrections serving his sentence. Toure appealed his conviction to the North Dakota Supreme Court and the conviction was summarily affirmed. State v. Toure, 2017 ND 258, 903 N.W.2d 290.

[¶4] In May 2019 Toure filed his Post-Conviction Relief Application. Briefs were filed by the parties and the matter was argued before the District Court on or about November 21, 2019. On or about February 3, 2020 the District Court issued its Order on Application for Post-Conviction Relief. In its Order, the Court denied all of Toure's claims for Post-Conviction Relief. Toure currently appeals the Order of the District Court.

STATEMENT OF THE FACTS

[¶5] Petitioner and Appellant Omar Toure (Toure) was charged in Williams County cases 53-2015-CR-769 with 3 counts of Terrorizing, Class C Felonies, 53-2015-CR-770 with 2 counts of Reckless Endangerment, Class C Felonies and 53-2015-CR-771 with Kidnapping, a Class B Felony and Aggravated Assault, a Class C Felony. It was alleged that Toure had threatened several individuals at knifepoint, had acted with reckless disregard for human life and had kidnapped and assaulted an individual.

[¶6] English is not Toure's original, primary language. Toure is from Senegal, West Africa and speaks a dialect known as Wolof. English is Toure's second language and he is only moderately fluent in English. This becomes even more critical in legal proceedings where language becomes less conversational and more professionally specific in vocabulary. Consequently, at the time of his arrest, Toure was interviewed by law enforcement, but he did not understand many of the rights offered to him or the gravity of the interview due to his language skills. At trial, Toure testified on his own behalf but was unable to clearly confer to the jury his testimony as his English language skills were still not good. Toure alleges that, due to this language barrier, he should have had a translator in court at each and every stage of the proceedings. Critically, at his jury trial, there was no translator even though Toure took the stand to testify. Toure's trial counsel had waived Toure's right to a translator.

[¶7] The cases were tried to a jury in October 2016 and Toure was convicted of 2 counts of Terrorizing, Class C Felonies, 1 count of Reckless Endangerment, a Class C Felony, Kidnapping, a Class B Felony and Aggravated Assault, a Class C Felony. Toure appealed his convictions, and the convictions were summarily affirmed. State v. Toure, 2017 ND

258, 903 N.W.2d 290. Toure's appellate counsel neither briefed nor argued the language barrier issue on appeal.

[¶8] Toure filed an Application for Post-Conviction Relief in May 2019. In his Application, Toure claimed that counsel was ineffective in representing him, both at the District Court and appellate level. The issue was briefed by the parties. Toure's foremost issue is the language barrier he faced during all of the proceedings. A hearing was held on the Application in November 2019. On or about February 3, 2020 the District Court issued its Order on Application for Post-Conviction Relief. In its Order, the Court denied all of Toure's claims for Post-Conviction Relief. Toure currently appeals the Order of the District Court.

ARGUMENT

STANDARD OF REVIEW

[¶9] This Court has jurisdiction under N.D. Const. Art. VI, §§ 2 and 6, to have appellate jurisdiction and act as a court of appeals, and under N.D.C.C. § 29-32.1-14. The North Dakota Supreme Court has defined its role in reviewing applications for post-conviction relief:

Proceedings on applications for post-conviction relief are civil in nature and governed by the North Dakota Rules of Civil Procedure. Rümmer v. State, 2006 ND 216, ¶ 9, 722 N.W.2d 528. The petitioner has the burden of establishing grounds for post-conviction relief. Flanagan v. State, 2006 ND 76, ¶ 10, 712 N.W.2d 602. The district court's findings of fact in a postconviction proceeding will not be disturbed on appeal unless they are clearly erroneous under N.D.R.Civ.P. 52(a). Laib v. State, 2005 ND 187, ¶ 11, 705 N.W.2d 845.

Tweed v. State, 2010 ND 38, ¶ 15, 779 N.W.2d 667 (citing Moore v. State, 2007 ND 96, ¶ 8, 734 N.W.2d 336).

A finding of fact is clearly erroneous if induced by an erroneous view of the law, if no evidence exists to support it, or if the reviewing court is left with a definite and firm conviction a mistake has been made. Bernhardt v. Harrington, 2009 ND 189, ¶ 5, 775 N.W.2d 682. Questions of law are fully reviewable on appeal in postconviction proceedings. Syvertson v. State, 2005 ND 128, ¶ 4, 699 N.W.2d 855 (citing Greywind v. State, 2004 ND 213, ¶ 5, 689 N.W.2d 390).

Id.

LAW AND ARGUMENT

[¶10] The District Court improperly dismissed Toure's Application for Post-Conviction Relief after a hearing.

[¶11] North Dakota law delineates the ground rules for filing and disposition of Post-Conviction Relief Applications. N.D.C.C. Ch. 29-32.1. The Application procedure and the contents of the Application are described therein. N.D.C.C. §§ 29-32.1-03, 29-32.1-04. The State is directed to respond, and the defendant or counsel are permitted supplemental filings. N.D.C.C. §§ 29-32.1-06, 29-32.1-07.

[¶12] Toure's arguments fall under the category of Ineffective Assistance of Counsel, a valid claim in a Post-Conviction Relief action under NDCC Chapter 29-31. Ineffective assistance of counsel at any phase of a criminal proceeding, if proven, violates a defendant's Sixth Amendment Rights to a fair trial and adequate representation. The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI. The companion North Dakota State Constitutional provision provides:

In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.

N.D. Const. Art. I, § 12.

[¶13] A claim of ineffective assistance of counsel essentially states that, even though Toure had legal representation, counsel was deficient to the point of negating Toure's Federal and State Constitutional Rights to be represented by competent counsel, and that the actions of counsel prejudiced him. In scrutinizing an ineffective assistance of counsel claim, the primary concern is to confirm whether counsel's conduct so undermined the working of the adversary process that the findings at trial are unjust. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[¶14] Strickland is the seminal case in determining claims of ineffective assistance of counsel, in which the United States Supreme Court set forth a two-part test to determine such a claim. Id. To prevail on his claim, Toure must meet both parts of the test; first, that his counsel's representation was defective, and second, that counsel's deficient performance affected the outcome of the case or that the defendant suffered prejudice as a result. Strickland at 687, see also Siers v. Weber, 259 F.3d 969, 974 (8th Cir. 2001).

[¶15] The first part of the Strickland test, defective performance, must be shown to a degree that Toure was essentially denied his Sixth Amendment Right to Counsel. Strickland at 687. Counsel's effectiveness is to be gauged by an "objective standard of reasonableness" considering "prevailing professional norms." Strickland at 688. To show prejudice under the second part of the Strickland test, Toure must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result . . . would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Siers, 259 F.3d at 974, quoting Strickland, 466 U.S. at 694. The Court is directed to review the totality of the evidence in determining the probability of a different outcome at trial. Id. As to the standard for the Court to use in such a

determination, the United States Supreme Court has stated that the reasonable probability standard is lower than the preponderance standard. Williams v. Taylor, 529 U.S. 362, 405-406 (2000).

[¶16] Toure claimed Post-Conviction Relief against both his trial attorneys and his appellate attorney. Toure claimed his trial counsel did not demand a speedy trial in the allowed time frame after the preliminary hearing, which would have caused the Court to rule in his favor on the Motion to Dismiss for the delay in bringing him to trial. Toure claimed his trial counsel did not file any motion to suppress the interview and confession that was obtained by law enforcement on the grounds that Toure did not know or understand his rights due to language issues. Toure claimed his trial counsel was deficient for failing to move for or insist upon having an interpreter for Toure so that Toure could fully understand and participate in pretrial hearings and the trial. Toure argued that all of the above deficiencies by counsel, individually and taken together as a whole, would have changed the outcome of the trial. Toure also claimed that appellate counsel was deficient for not arguing the lack of interpreter or language issue in her brief or at oral argument and thus missed a key issue on appeal that would have caused a reversal of his conviction.

[¶17] Throughout Toure's legal representation, it is apparent that an interpreter would have assisted him to understand and participate in the proceedings. An interpreter would have let Toure have a fighting chance in a legal system that is confusing even for individuals without language barriers. It is difficult to see how Toure would or could understand his rights from the initial event of his interview with law enforcement through his appeal. Even if he was properly Mirandized, he could not have made a knowing and voluntary confession. That interview and confession was effectively used against him at

trial.

[¶18] For a person with Toure’s limited English speaking capabilities, an interpreter is mandatory: “If a person with limited English proficiency or a deaf person is involved in a proceeding as a defendant, witness, person with legal decision-making authority, or person with a significant legal interest in the matter, the court must provide an interpreter.”

N.D.R.Crim.P. 28. The North Dakota Supreme Court has cited to this rule with approval:

Rule 28, N.D.R.Crim.P., states, "If a person with limited English proficiency or a deaf person is involved in a proceeding as a defendant . . . the court must provide an interpreter." The Rule's explanatory note states, "Rule 28 permits the court to appoint interpreters in appropriate circumstances. The purpose of the rule is to assist non-English-speaking or deaf defendants . . . in understanding the proceedings or in communicating with assigned counsel."

State v. Martinez, 2015 ND 173 ¶25, 865 N.W. 2d 391. Even if Toure understands basic conversational English, he is a “person with limited English Proficiency” as defined above and the Court “*must* provide an interpreter.” Id. It has long been held that, even in a civil action with a lower burden of proof than a criminal action, interpreters should be utilized in cases such as Toure’s:

[I]t was very difficult for the Chinamen who testified to understand the questions or to give, in English, any clear expression of his answers or understanding. He should be afforded an opportunity through an interpreter, or otherwise, of fully explaining his testimony. Accordingly, it is our opinion that the judgment should be reversed and a new trial granted with costs to abide the event. It is so ordered.

Laskin v. Lee, 198 N.W. 505, 507 (N.D. 1923), 50 N.D. 437, 442. Toure should have been offered a translator at all stages of the proceedings and in meetings with counsel to ensure adequate communication with his attorney, a fair trial would be conducted and that his Constitutional Rights would not be violated.

[¶19] Toure’s first major court appearance was his preliminary hearing on or about June

4, 2015. An interpreter was not made available to Toure despite the fact that his trial attorney at the time stated unequivocally that an interpreter was needed. At his preliminary hearing, Toure's counsel asked on cross examination whether an interpreter was offered to Toure when he was interviewed by law enforcement. Preliminary Hearing Transcript, p. 20-21. The officer answered that she felt that Toure understood her although she realized he did not look like he was from the United States and knew that he was not from the United States. Id. at p. 20, l. 20-24. The officer testifying indicated that she did not feel that Toure needed an interpreter. Id. at p. 20-21. This was merely her opinion. The officer never asked Toure if he wanted or needed an interpreter. It is important to note that counsel for Toure directly informed the Court at the Preliminary Hearing that "We're going to need an interpreter for my client" Id. at p. 32, l. 19. The Court responded, "I have no problem doing it", "when you come to ask for the scheduling conference and you want an interpreter, I'll be happy to give one", and "If you're going to go trial, that's great, but I have to pay that interpreter whether you settle or not." Id. at p. 33, l. 2-11. The Court and the State were on notice from that point on that Toure would need an interpreter for any further proceedings.

[¶20] A Dispositional Conference was held on or about July 7, 2015 and a Pretrial Conference was held on or about July 13, 2015. An interpreter was not supplied to Toure for either hearing. A Motion Hearing was held on or about October 27, 2015. An interpreter was finally made available via telephone and used by the Court to allow Toure to participate in that hearing. It was difficult for Toure as the interpreter was on the phone, but he could follow the proceedings and communicate to the Court and his counsel. Counsel for Toure indicated to the Court that he was having difficulties communicating

with Toure and did not have adequate access to an interpreter for their meetings. Motion Hearing, p. 3, l. 10-12, l. 21-23. Counsel further stated that Toure “would be better served by a different public defender that has access to the state funded interpreters.” Id. at p. 4-5. The Court informed Toure that “we are going to make sure you get a lawyer and have the ability to speak to that lawyer so your questions can be answered.” Id. at p. 6, l. 7-9. Counsel was then given the courtroom to use to communicate with Toure through an interpreter after the hearing was concluded. Id. at p. 6, l. 14-17.

[¶21] Shortly after the Motion Hearing, on or about October 30, 2015, new trial counsel was appointed to represent Toure. From that point forward, until his Post-Conviction Hearing, Toure never again had access to an interpreter to meet with counsel or to appear in court with.

[¶22] A hearing was held on or about July 5, 2016 on a Motion to Dismiss filed by trial counsel. No interpreter was made available to Toure. Although he did not testify, it is doubtful that Toure understood the proceedings or the meaning of the hearing as legal procedure. Trial counsel argued that Toure was prejudiced by the length of time taken to adjudicate his case. The State argued that it was due to Toure’s demand for an interpreter. The State reminded the Court that “if you recall we had the final pretrial conference. And if you recall, Attorney Green was asking this Court for interpreter services for Wolof so that he could communicate with his client.” Motion to Dismiss Hearing, p. 11, l. 14-17. The State recalled that prior counsel “was having problems communicating with his client” and that Toure “wanted the Wolof interpreter” for that reason. Id. at p. 12, l. 5-7. The State further confirmed that, despite Toure’s need for an interpreter, “It was the defense that elected, after all other appearances being in English and he is here today in English . .

..” *Id.* at p. 12, l. 20-24. There was no request from trial counsel for an interpreter at this hearing even though the State expressed concern for Toure’s rights. The Court agreed that, “The interpreter issue has caused us problems.” *Id.* at p. 16, l. 4.

[¶23] A jury trial was held in the above matter on or about October 19, 2016 through October 21, 2016. At trial, defense counsel specifically waived Toure’s right to an interpreter despite acknowledging that Toure could not understand English well:

As the Court’s well aware, my client does not speak the best English; *he does not understand it*. So we would just ask that any witnesses – any time – that they instruct them to, maybe, speak a little slower, a little more clear. We are giving up our right to have a (sic) interpreter here; so I think that’s not unreasonable under the circumstances.”

Trial Transcript, p. 12, l. 16-22 (emphasis added). Crucial to Toure’s Post-Conviction arguments, it is immediately apparent that trial counsel knew Toure did not understand English but nonetheless waived Toure’s right to an interpreter. The Court allowed the waiver but did not inquire of Toure if he was willing to waive that right or if he was willing to proceed without an interpreter. The State again voiced reservations about trying the case without an interpreter for Toure, but the trial was still held. *Id.* at p. 13.

[¶24] In the Preliminary Instructions to the jury, there was no mention of an interpreter or any language deficiency on Toure’s part. The jury was not made aware of any such issues for trial. Likewise, there was no mention of any interpreter or language issue in the Court’s closing instructions to the jury.

[¶25] At trial, Toure testified on his own behalf. When the Court asked Toure if he wanted to take the witness stand, Toure answered, “What does that mean?” Trial Transcript, p. 287, l. 20. The jury was never instructed to give Toure any leeway due to his lack of English skills. Trial counsel never mentioned any language barrier in his

opening statement to the jury prior to Toure's testimony. Id. at p. 291-298. Trial counsel never mentioned any language barrier in his closing statement to the jury. Id. at p. 416-436. Trial counsel never attacked the interview and confession elicited by law enforcement, or even mentioned to the jury that it might be suspect.

[¶26] During Toure's testimony on direct examination by trial counsel, Toure was able to answer simple straightforward questions. However, his lack of language skills kept him from staying with trial counsel's attempts to elicit certain information, drawing objections from the State for nonresponsive answers. Trial Transcript, p. 325, 327, 328, 333, 341, 353. Eventually, trial counsel had to request latitude for questions and answers, admitting that, "We have a language barrier, Your Honor." Id. at p. 327, l. 14-17. The Court agreed, responding, "I understand." Id. at p. 327, l. 16. Toure was confused as to several simple questions from trial counsel, required repeated attempts at the same question. Id. at p. 336-337. There were several times that the court recorder could not decipher what Toure was saying. Id. at p. 349, l. 20-22; p. 350, l. 4; p. 352, l. 13; p. 360-361. Toure had difficulty with basic English terms: not knowing what the blade of a knife was called. Id. at p. 350, l. 9-13; p. 359, l. 1-4. Toure had difficulty understanding and responding to questions from the State on cross examination. Id. at p. 364-365. Of particular importance is the Certificate of Court Reporter at the end of the jury trial transcript, certifying the truth, accuracy and completeness of the transcript, "*with the following exception: the testimony of Omar Toure cannot be certified due to (1) his accent and speaking in broken English, and (2) many incidents of his speech being garbled or distorted . . .*" Id. at end of trial transcript, no page number (emphasis added). If the Court Reporter, with experience in courtroom testimony and deciphering accents and slang, could not fully understand Toure,

it stands to reason that the jury would have had significant trouble as well. This further demonstrates Toure's limited English skills and his need for an interpreter.

[¶27] At trial, Toure was attempting to communicate to the jury and the Court the relevant reasons for his coming to North Dakota, possessing a knife and other important issues. Trial Transcript, p. 166-172. With an interpreter, Toure would have been able to testify that he had knowledge that the victim had a significant substance abuse problem and part of his coming to North Dakota was to get her into treatment in Ohio, where they had lived and where the children were. He did not know who she would be with or if her companions would be drug dealers that may be armed. The knife was for self-defense in case he was attacked. Toure would have been able to testify that there were issues with the children's custody and the victim due to her substance abuse and failure to obtain treatment or care for the children appropriately. Toure would have been able to present evidence that the victim testified untruthfully and would have been able to attack her credibility.

[¶28] Toure was convicted by the jury. The Court ordered a Pre-Sentence Investigation Report (PSIR) to be conducted. Trial Transcript, p. 457. There is no indication that the PSIR writer utilized an interpreter or that he fully understood Toure's answers. There is no indication that Toure fully understood the PSIR writer's questions.

[¶29] Toure's difficulties in understanding and answering questions at trial had a direct impact on his conviction. Toure's limited grasp of English is evidenced by English test results from July 10, 2017, 6 months after his conviction. Appendix 30. Not one of his scores shows above 33% correct, his reading content is noted as "Beginning ABE Literacy" and he is scored as "Non-Mastery" in all the reading divisions. Id.

[¶30] A sentencing hearing was held for Toure on or about January 30, 2017. As before,

no interpreter was made available to Toure and trial counsel did not request an interpreter. Trial counsel made no reference to the language difficulties that Toure had throughout the case. The Court noted that English is not Toure's first language, showing that the Court was continually aware of the language deficiencies and issues plaguing Toure during the entirety of the legal proceedings. Sentencing Hearing, p. 16, l. 11. By never mentioning or objecting to any issue based upon language difficulties during the trial and, in fact, waiving the use of an interpreter, trial counsel did not properly preserve the issue of language barriers for appeal.

[¶31] At the Post-Conviction Relief hearing, Toure began his testimony by explaining his difficulties with the English language. He stated that other inmates at the ND Department of Corrections helped him with drafting his Application for Post-Conviction Relief. Post-Conviction transcript p. 14-15. He also testified that he could speak conversational English but that when the language turns technical, he has difficulties. Id. at p. 15. The technical legal language led to his fundamental confusion as to what was happening and his inability to understand or effectively communicate with his attorneys. Id. at p. 16-17. Toure testified that one of his attorneys told the Court that an interpreter would be necessary. Id. at p. 17.

[¶32] Toure also recalled that, even with a telephone translator, he had difficulties. Post-Conviction Transcript at p. 18. Toure further testified that he inquired of his trial attorney in the middle of the trial as to why he did not have a translator. Id. at p. 19. Toure indicated that he did not understand when or why his trial counsel waived the need for an interpreter. Id. at p. 20. At the hearing, the State objected to nonresponsive answers, further showing that Toure was having difficulties understanding questions and giving appropriate answers

even with a translator. Id. The State even referred to Toure's testimony as "gibberish." Id. at p. 20, l. 20. Toure told his trial attorney that he did not understand, but his trial counsel did not correct the issue. Id. at p. 23-24. Toure testified that he specifically had problems understanding what was said at trial and in his own testimony at trial. Id. at p. 25-26.

[¶33] At the Post-Conviction Hearing, Toure gave testimony as to what he wanted to convey at trial but had not been able to because of the lack of translator at the trial. Post-Conviction Transcript at p. 25-30. The Court also received an exhibit of an English test that was administered to Toure at the ND Department of Corrections that showed Toure's deficiencies in the English language. Id. at p. 34.

[¶34] Toure's trial counsel testified at the Post-Conviction Hearing that, although Toure did not specifically request an interpreter, Toure "asked me a lot of questions so I knew he wasn't understanding." Post-Conviction Hearing transcript p. 86, l. 3-4. "He would ask me questions about the process, about questions about not understanding the line of questioning, what was going on, and he didn't understand why a certain witness was even called. Things of that nature." Id. at p. 89, l. 20-23.

[¶35] "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." N.D.R.Prof.Conduct Preamble. It was incumbent upon Toure's trial counsel to acquire an interpreter to communicate effectively with Toure and to ensure that an interpreter was available at pretrial hearings and at his jury trial to ensure that Toure could understand and participate in a fair trial.

[¶36] The question under the first test in Strickland is whether the failure to obtain and/or provide an interpreter by counsel is deficient conduct. Strickland at 687. Toure argues that it is. Counsel is presumed to be able to effectively communicate with his client and allow for his client to effectively understand the legal proceedings and communicate via testimony to the jury. By not filing a demand for speedy trial in a timely fashion, or at all, trial counsel was deficient below the standard in the community. By not filing a motion to suppress the interview and confession due to language issues, trial counsel was deficient below the standard in the community. By not obtaining an interpreter to communicate with counsel, for pretrial hearings and for the jury trial, trial counsel was deficient below the standard in the community. By not briefing or arguing the issue of the language deficiency on appeal, appellate counsel was deficient below the standard in the community.

[¶37] The second test in Strickland is essentially; was Toure's case prejudiced by trial counsel's actions and would that prejudice have made a difference in the outcome. Strickland at 694. Toure argues that his case was prejudiced, and that counsel's errors did make a difference in the outcome. As stated above, a demand for speedy trial would have changed the outcome of the motion to dismiss for the delay in trial, a suppression motion would have changed the admissibility of the interview and confession by Toure. An interpreter would ensure that Toure was able to effectively speak with his attorney, prepare for trial and answer questions on both direct and cross examination at trial. Toure was unable to communicate to the jury his side of the story and was unprepared for direct and cross examination at trial. Arguing the issue of language and lack of interpreter on appeal would likely have changed the decision of the Supreme Court, resulting in a remand for a new trial with an interpreter.

[¶38] Trial counsel's deficient representation of Toure affected the outcome of the case and prejudiced Toure. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Siers, 259 F.3d at 974, quoting Strickland, 466 U.S. at 694. Toure has shown that a reasonable probability exists that the outcome of the trial would be different in that with an ability to understand the proceedings and communicate to the jury, he would likely not have been convicted. Toure should have been given access to the service of an interpreter at all the pretrial hearings and at his jury trial. It was trial counsel's duty to ensure that Toure had an interpreter due to the language deficiencies. It was appellate counsel's duty to argue the issue of language deficiency on appeal. Had Toure been able to communicate effectively he would have been able to assist counsel in attacking the victim's credibility and he would have been able to communicate facts in his favor surrounding the charges to the jury.

[¶39] Issuing its Order on Application for Post-Conviction Relief, the trial court correctly summarized the issue:

Ultimately, the issue of the assistance of an interpreter comes down to the factual determination of whether or not Toure is proficient in speaking and understanding English. If Toure cannot speak and understand English, his failure to have an interpreter at trial and the failure to move to suppress the interview would be ineffective assistance of counsel.

Order at ¶10. However, in its Order, the District Court found that "Toure has not proven that he is unable to understand and speak English." Order at ¶13. As the issue of English proficiency is the central issue to all of Toure's arguments in his Application, this finding by the District Court allowed it to deny all of the issues raised by Toure.

[¶40] Toure disagrees with the Order issued by the District Court. Toure argues that even though he may be able to converse in broken English, his lack of English language skills

required an interpreter for the complexities of a jury trial. In addition, the jury trial was several years prior to the hearing on his Application for Post-Conviction Relief and his English skills and comprehension skills were even worse at the time of trial. Toure argues that the District Court's Order finding that he did not need an interpreter was clearly erroneous, "induced by an erroneous view of the law" and that there is "a definite and firm conviction a mistake has been made." Tweed v. State, 2010 ND 38, ¶ 15, 779 N.W.2d 667.

CONCLUSION

[¶41] From the arguments set forth above, and from the Record in this matter, Toure requests that this Court reverse the District Court's Order denying his Application for Post-Conviction Relief and remand the matter to the District Court for a new trial with an interpreter on the merits of Toure's claims.

CERTIFICATION OF COMPLIANCE

[¶42] Steven Balaban, the attorney for Defendant and Appellant in the above action, hereby certifies that the form of the Brief is in compliance with N.D.R.App.P. 32(e). Specifically, under N.D.App.P. 32(a)(8), the Brief of Defendant and Appellant Washington consists of 23 pages and thus does not exceed the 38-page limit.

[¶43] Dated this Monday, May 11, 2020.

/s/_____
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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Omar Toure,)	Supreme Court No. 20200040
)	
Petitioner and Appellant,)	District Court No. 53-2018-CV-00677
)	
vs.)	CERTIFICATE OF SERVICE
)	
State of North Dakota,)	
)	
Respondent and Appellee.)	

¶1 Steven Balaban, the attorney for Petitioner and Appellant in the above action, hereby certifies under N.D.R.Civ.P. 5(f), that on Monday, May 11, 2020, he served the attached:

BRIEF OF PETITIONER AND APPELLANT TOURE
and **APPENDIX TO BRIEF OF PETITIONER AND APPELLANT TOURE**

upon Nathan Madden, Burleigh County Assistant States Attorney, attorney for Respondent and Appellee, State of North Dakota, by e-mail to the addresses nathanm@co.williams.nd.us and 53sa@co.williams.nd.us as listed on the North Dakota Supreme Court Website on Monday, May 11, 2020,

and upon Omar Toure, Petitioner and Appellant, by US Mail, with sufficient postage attached, to the address:

Omar Toure
North Dakota State Penitentiary
P.O. Box 5521
Bismarck, ND 58506-5521

/s/ _____
Steven Balaban