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FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 26, 2023
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Richard Richardson, Petitioner / Appellant, vs. State of North Dakota, Respondent / Appellee.	))))))))))	Supreme Court No. 20220291 Grand Forks County District Court Case No. 18-2021-CV-02241

Brief of Appellee

APPEAL FROM ORDER DISMISSING APPLICATION FOR POST-CONVICTION RELIEF ENTERED ON SEPTEMBER 8, 2022, BY GRAND FORKS COUNTY DISTRICT COURT, NORTHEAST CENTRAL JUDICIAL DISTRICT, STATE OF NORTH DAKOTA, THE HONORABLE JUDGE JASON MCCARTHY PRESIDING

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES

[¶1] Whether Richardson met his burden of proof to establish his ineffective assistance of counsel claim?

ORAL ARGUMENT REQUESTED

[¶2] Appellant, Richard Richardson requested argument. The State also requests oral argument to discuss in further detail the arguments raised and answer any questions this Court may have about the facts of the case and to respond to any arguments made by Richardson's counsel.

STATEMENT OF THE CASE

[¶3] This matter began with the criminal case in 18-2019-CR-02197. An Information charging Richardson with Reckless Endangerment, a Class C Felony, was filed on October 7, 2019 (18-2019-CR-2197, Index 2). At the preliminary hearing on November 15, 2019, the district court found probable cause and bound Richardson over for arraignment. (18-2019-CR-2197, Index 21). Richardson pled not guilty and set the matter for trial. The jury trial was held on March 10, 2020, through March 12, 2020. The jury found Richardson guilty. (18-2019-CR-2197, Index 161). Richardson was sentenced to five years with the North Dakota Department of Corrections and Rehabilitation. (18-2019-CR-2197, Index 164).

[¶4] Richardson filed a direct appeal and argued that there was insufficient evidence to establish that he was not acting in self-defense. This Court affirmed the conviction in a unanimous per curium opinion. (State v. Richardson, 2020 ND 246, 950 N.W.2d 761).

[¶5] Richardson filed a petition for post-conviction relief in 18-21-CV-2241 on November 16, 2021 (18-21-CV-2241, Index 1). Richardson alleged:

1 – Ineffective assistance of counsel, court appoint[ed] counsel did not let me [participate] in jury selection, and failed to represent me to the best of her ability.

2 – Conviction obtained by the unconstitutional failure to allow Defendant to disclose evidence favorable to the defendant, prosecution did not allow me to present my evidence that I was acting in self-defense, and to show the support that I did not act recklessly.

3 – Conviction obtained by action of grand jury was unconstitutionally selected and impaneled, my court appointed counsel of that state did not allow me to [participate] in jury selection.

[¶6] On November 30, 2021, the State answered Richardson's petition. (18-21-CV-2241, Index 9). The State asserted the affirmative defense of res judicata and denied Richardson's allegations. (18-21-CV-2241, Index 9).

[¶7] Also on November 30, 2021, the State filed a separate motion to dismiss Richardson's petition for post-conviction relief which was supported by 12 exhibits. (18-21-CV-2241, Index 10-24).

[¶8] Post-conviction counsel was assigned on December 1, 2021. (18-21-CV-2241, Index 27).

[¶9] On December 29, 2021, post-conviction counsel responded and opposed the motion to dismiss. (18-21-CV-2241, Index 31).

[¶10] A post-conviction hearing was held on May 27, 2022. The district court denied Richardson's petition for post-conviction relief on September 8, 2022. (18-21-CV-2241, Index 65).

[¶11] This appeal follows.

STATEMENT OF THE FACTS AT TRIAL

[¶12] This appeal may require an in-depth review of the record of the trial. The State briefed the facts in the appeal following the criminal conviction. The State asks this Court to consider the facts presented in the State's brief in Supreme Court Case Number 20200083.[1]

[1] https://www.ndcourts.gov/supreme-court/dockets/20200083/33

STATEMENT OF THE FACTS – TESTIMONY FROM THE POST-CONVICTION HEARING

[¶13] The district court held a hearing on the post-conviction relief petition on May 27, 2022. Ms. Castro, Shawnqase Perry, and Russell Myhre testified at the hearing. (PCR Tr. 2[2]).

[¶14] Ms. Castro testified that she has been practicing law for approximately five years. (PCR Tr. 12). Ms. Castro testified that she met with Richardson, in person, approximately seven times. (PCR Tr. 13-14). Ms. Castro also testified that she communicated with Richardson by phone. (PCR Tr. 14). Ms. Castro testified that she presented Richardson's self-defense claims to the best of her ability, by calling Richard. Richardson and Christopher Richardson to testify at the trial. (PCR Tr. 15-17).

[¶15] Ms. Castro testified that she spoke with Shawnqase Perry prior to the jury trial. (PCR Tr. 5-6). Ms. Castro testified that Mr. Perry would have testified in favor of Richardson – that the victim in the case "brandished a firearm at [Richardson]." (PCR Tr. 6). Ms. Castro testified that her memory was vague, but she didn't believe she subpoenaed Mr. Perry. (PCR Tr. 7). On redirect, Ms. Castro testified that she did subpoena Shawnqase Perry. (PCR Tr. 18).

[¶16] Shawnqase Perry, Richardson's cousin, testified at the post-conviction hearing. (PCR Tr. Tr. 19-24). Perry testified that he was with Richardson on the night of the offense. (PCR Tr. 20-21). Perry testified that he observed "one guy was hanging out the window with something in his hand, and me seeing and not having better visual than Richard, I said, 'They hanging out the window with a gun,' and Richard fired in self-

[2] The State is citing to the transcript of the post-conviction relief hearing, 18-2021-CV-02241, Index 77. I will cite the post-conviction relief transcript as (PCR Tr.)

defense." (PCR Tr. 21). Perry testified that Ms. Castro subpoenaed him for the trial. (PCR Tr. 22). Perry was asked why he didn't show up for trial, and Perry testified, "Honestly, I was working and I didn't get the e-mail or the exact court date. I just had it in my phone. And, honestly, I just forgot about it while I was working as much – working too much." (PCR Tr. 22-23). Perry also testified that Ms. Castro communicated with him prior to the trial. (PCR Tr. 23). Perry testified that he did not notify Ms. Castro that he wasn't going to be at the trial. Specifically, he testified, "I didn't let her know that I wasn't going to be available. I told her I would be there, and I didn't show because I was working." (PCR Tr. 23).

[¶17] On cross-examination, Mr. Perry admitted that he was notified of the court date by Ms. Castro. (PCR Tr. 23).

[¶18] The district court denied Richardson's petition for post-conviction relief on September 8, 2022. (18-21-CV-02241, Index 65). The district court wrote, in paragraph 23 of its order:

> Attorney Castro presented Richardson's self-defense claim to the best of her ability. Attorney Castro called Christopher Richardson ('Christopher'), Richardson's brother and witness to the incident regarding the underlying criminal case, to testify at the trial. (Doc # 17). Christopher testified that he was left with a swollen face and a black eye, and that Richardson was also injured during the fight. Christopher told the jury that he had seen threatening messages from one of the victims. These threatening messages were directed at Richardson. On cross-examination, Christopher admitted that he was not present when the crime occurred.

(18-21-CV-02241, Index 65, ¶ 23). The district court wrote, "Richardson testified that he saw the victim hanging out of a vehicle 'pointing his firearm at me as he was grinning with a smile.' Richardson testified, 'I pulled out my firearm, I chambered it, and I released my rounds towards the ground and at the tires of his vehicle.' Richardson testified that he shot

at the ground because he didn't want to hit buildings or any person." (18-21-CV-02241, Index 65, ¶ 24).

[¶19] The district court recognized that Ms. Castro subpoenaed Perry for trial, and that Perry did not show up because he forgot to come. (18-21-CV-02241, Index 65, ¶ 25). The district court analyzed Richardson's argument under both Strickland prongs.

[¶20] The district court decided that Ms. Castro's representation did not fall below an objective standard of reasonableness. (18-21-CV-02241, Index 65, ¶ 26). She did what she could. She made reasonable efforts to get Perry to come to court. Ms. Castro subpoenaed Perry and he was aware of the court date.

[¶21] The district court also analyzed Strickland's second prong. The district court wrote, "[f]urther, had Perry testified, his testimony would likely have been cumulative to the testimony from Christopher [Richardson] and [Richard] Richardson. The testimony from Christopher [Richardson] and [Richard] Richardson was not convincing to the jury, and there has not been a showing of a reasonable probability that the results of the case would have been different had Perry testified." (18-21-CV-02241, Index 65, ¶ 27).

CONTROLLING LEGAL PRINCIPLES

[¶22] The Sixth Amendment and Article I, section 12 of the North Dakota Constitution guarantee a criminal defendant the right to the effective assistance of counsel.

> A criminal defendant has the right to be represented by counsel under the Sixth Amendment to the United States Constitution and Article I, Section 12 of the North Dakota Constitution. The constitutional right to counsel guarantees effective assistance of counsel. When reviewing claims of ineffective assistance of counsel, we apply the United States Supreme Court's two-part test from Strickland: First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense.

State v. Garge, 2012 ND 138, ¶ 10, 818 N.W.2d 718 (citing State v. Dahl, 2009 ND 204, ¶ 22, 776 N.W.2d 37; Abdi v. State, 2000 ND 64, ¶ 29, 608 N.W.2d 292; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (internal citations omitted)).

[¶23] This Court explained the Strickland two-prong test in Everett.

> The first prong of the Strickland test is measured using "prevailing professional norms," and is satisfied if an applicant proves counsel's conduct consisted of errors serious enough to result in denial of the counsel guaranteed by the Sixth Amendment. A defendant must overcome a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance and courts must consciously attempt to limit the distorting effect of hindsight. The second prong requires an applicant to show that there is a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different.

Everett v. State, 2015 ND 149, ¶ 8, 864 N.W.2d 450 (citing Sambursky v. State, 2006 ND 223, ¶ 13, 723 N.W.2d 524; Flanagan v. State, 2006 ND 76, ¶ 10, 712 N.W.2d 602 (internal citations omitted).

> Surmounting Strickland 's high bar is never an easy task. An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial or in pretrial proceedings, and so the Strickland standard must be applied with scrupulous care, lest intrusive post-trial inquiry threaten the integrity of the very adversary process the right to counsel is meant to serve. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one.... It is all too tempting to second-guess counsel's assistance after conviction or adverse sentence.

Lindsey v. State, 2014 ND 174, ¶ 19, 852 N.W.2d 383.

[¶24] In Booth, this Court wrote:

> Courts need not address both prongs of the Strickland test, and if a court can resolve the case by addressing only one prong it is encouraged to do so. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Booth v. State, 2017 ND 97, ¶ 8, 893 N.W.2d 186 (citing Osier v. State, 2014 ND 41, ¶ 11, 843 N.W.2d 277; Broadwell v. State, 2014 ND 6, ¶ 7, 841 N.W.2d 750; Garcia v. State, 2004 ND 81, ¶ 5, 678 N.W.2d 568 (internal citations omitted).

[¶25] Richardson raised multiple issues at the district court level, but is appealing only one issue. In Hajicek, this Court wrote, "[i]ssues raised on appeal should be fully briefed, with a fair and adequate opportunity for response from opposing parties. Moreover, we will not consider issues not briefed on appeal." State v. Hajicek, 2020 ND 231, ¶ 16, 951 N.W.2d 203 (quoting Roise v. Kurtz, 1998 ND 228, ¶ 10, 587 N.W.2d 573). This Court has also decided that "[i]ssues not briefed by an appellant are deemed abandoned, and thereby become the law of the case and will not be considered on appeal. State v. Duchene, 2007 ND 31, ¶ 10, 727 N.W.2d 769 (citing Lawrence v. Delkamp, 2006 ND 257, ¶ 13, 725 N.W.2d 211; Haugenoe v. Bambrick, 2003 ND 92, ¶ 14, 663 N.W.2d 175; State v. Keilen, 2002 ND 133, ¶ 13 n. 1,

649 N.W.2d 224; Estate of Murphy v. Maus, 2001 ND 87, ¶ 13 n. 1, 626 N.W.2d 281). This Court's review, then, is limited to the issue Richardson has briefed. This Court's review is limited to whether Ms. Castro was ineffective for failing to ensure Perry testified or failing to make an offer of proof with regard to what his testimony would be.

ARGUMENT

[¶26] Ms. Castro provided effective assistance in this case. Her performance did not fall below an objective standard of reasonableness. The record from the post-conviction hearing shows Ms. Castro did everything a reasonable attorney would do to get Perry to come to court. Perry was aware of the court date and agreed he had been subpoenaed. He failed to show up for trial because he forgot about it. We cannot use Perry's carelessness as proof of Ms. Castro's ineffective assistance. Ms. Castro's performance did not fall below an objective standard of reasonableness.

[¶27] Further, even if this Court disagrees as to whether Ms. Castro's performance fell below an objective standard of reasonableness, the district court's decision that Mr. Perry, had he been there, would not have made a difference, should not be reversed.

I. Ms. Castro's performance did not fall below an objective standard of reasonableness

[¶28] The State is aware of no factually identical case that has been analyzed by this Court. However, this Court, in Heckelsmiller, considered an ineffective assistance argument dealing with an attorney's failure to make an offer of proof for a witness who wasn't able to testify at the trial.

[¶29] Heckelsmiller was convicted of criminal trespass.

> Andrew Heckelsmiller and a friend entered a trailer house owned by Andrew Heckelsmiller's uncle, Tim Heckelsmiller. Upon being discovered, Andrew Heckelsmiller fled the trailer house through a back window and was later arrested. Andrew Heckelsmiller testified that everyone in his family had a right to stay at the trailer house while in Bismarck because his grandmother, Donna Heckelsmiller, repaid a loan associated with the trailer house.

Heckelsmiller v. State, 2004 ND 191, ¶ 2, 687 N.W.2d 454.

[¶30] Heckelsmiller raised an ineffective assistance claim against trial counsel. At the trial, trial counsel

> requested the sequestration of witnesses at trial, yet two potential witnesses for the defense, Donna Heckelsmiller and William Heckelsmiller, Andrew Heckelsmiller's grandmother and father, were denied the opportunity to testify because they did not comply with the sequestration order. For purposes of the post-conviction proceeding, these witnesses prepared affidavits to establish what their testimony would have been at trial. Donna Heckelsmiller would have testified to her payment of a loan associated with the trailer house and the existence of a subsequent agreement between herself and Tim Heckelsmiller that allowed family members, such as Andrew Heckelsmiller, to stay in the trailer house while in Bismarck. William Heckelsmiller would have offered testimony supporting the existence of this family agreement. William Heckelsmiller would have further testified that he told Andrew Heckelsmiller to stay at the trailer house on the evening in question. Finally, William Heckelsmiller would have testified as to Tim Heckelsmiller's alleged resentment toward Andrew Heckelsmiller and to his belief that Andrew Heckelsmiller fled the trailer house because he knew that Tim Heckelsmiller would chew him out or give him a bad time for being there, in spite of the family policy.

Id. At the post-conviction hearing in Heckelsmiller, trial counsel testified that he "chose not to put these witnesses on the stand due to credibility concerns. And, given that he did not plan to call Andrew Heckelsmiller's grandmother or father to testify, there was no need to sequester them." Id.. Later in the trial, though, trial counsel changed his mind and decided that he did, in fact, desire to call them as witnesses. Id.. But, because they did not comply with the sequestration order, the district court prohibited them from testifying. This Court wrote, then, that trial counsel should have provided an offer of proof. Id.. The only defense in Heckelsmiller was the family arrangement that allowed the defendant to stay at the trailer. Id. at ¶ 9.

[¶31] This Court considered the importance of Donna and William to Heckelsmiller's defense. They would have been the only witnesses who could have offered

corroborating testimony to bolster Heckelsmiller's defense theory. Id. at ¶ 10. This Court found that Heckelsmiller's trial counsel's failure to provide an offer of proof prevented a meaningful appellate review, and trial counsel was therefore ineffective. Id. at ¶ 11.

[¶32] Heckelsmiller is distinguishable from Richardson. The witnesses in Heckelsmiller were not able to testify because of trial counsel's failure to ensure that they were sequestered, as well as trial counsel's subsequent failure to make an offer of proof which could have properly preserved an appellate record. In Richardson's case, the failure of the witness to testify cannot be ascribed to Ms. Castro.

[¶33] The record at the post-conviction hearing shows that Ms. Castro tried to secure Shawnqase Perry's testimony. Ms. Castro testified that she subpoenaed Perry. (PCR Tr. 18). Perry agreed that Ms. Castro subpoenaed him. (PCR Tr. 22). Perry testified that Ms. Castro talked to him about the trial. (PCR Tr. 23). Perry testified that he did not notify Ms. Castro that he wasn't going to be at the trial, saying, "I didn't let her know that I wasn't going to be available. I told her I would be there, and I didn't show because I was working." (PCR Tr. 23).

[¶34] The record is clear in this case. Ms. Castro's representation did not fall below an objective standard of reasonableness simply because Mr. Perry didn't show up. The witnesses in Heckelsmiller didn't testify because trial counsel asked for sequestration of witnesses and then failed to sequester potential witnesses. Heckelsmiller's attorney can rightfully be blamed for his witnesses' inability to testify. The same cannot be said for Ms. Castro. She cannot be blamed because Perry was irresponsible and didn't even notify Ms. Castro that he wouldn't be there.

[¶35] In this case, Richard Richardson argues that his attorney was ineffective because his cousin, Shawnqase Perry, neglected his subpoena and failed to show up for trial and failed to notify Ms. Castro. To determine that a defense attorney is "ineffective" is no small thing. This Court should not find Ms. Castro at fault under these circumstances. Mr. Perry told Ms. Castro he would be there, and didn't show up. Ms. Castro did what a reasonable defense attorney would do. To find that Ms. Castro's representation in this case fell below an objective standard of reasonableness would impose an undue burden on the defense bar. Defense attorneys must not be held accountable for their witnesses' irresponsibility.

II. **Mr. Perry's testimony would not have made a difference**

[¶36] Strickland's second prong requires an applicant to show that there is a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. Everett v. State, 2015 ND 149, ¶ 8, 864 N.W.2d 450 (citing Sambursky v. State, 2006 ND 223, ¶ 13, 723 N.W.2d 524; Flanagan v. State, 2006 ND 76, ¶ 10, 712 N.W.2d 602). In this case, Richardson must show that, had Shawnqase Perry testified, the result would have been different, and the jury would have found him not guilty. In other words, Perry's testimony would have had to have been so powerful that it overwhelmed all the other evidence against him, and would have convinced the jury that Richardson acted in self-defense.

[¶37] Richardson was convicted of reckless endangerment for his actions on October 7, 2019, at approximately 5:38 p.m. Richardson fired seven bullets at a car carrying three individuals, Charles Gust, Joel Gonzalez, and Demarco Brown. In addition to these individuals and this vehicle being within Richardson's direct line of fire, there was

heavy weekday traffic and multiple businesses and other buildings, including a church, just beyond. John Doe 1, John Doe 2, and A.J.S. were in a vehicle on South Washington street at a nearby stoplight on their way home from football practice. (March 10 Trial Tr. P. 66[3]). John Doe 1 and 2 testified that at least one of Appellant's rounds made a "whistling noise" within mere feet of their vehicle. (March 10 Trial Tr. P. 77-78, 82).

[¶38] Joel Gonzalez testified for the State. He testified that neither he, nor Demarco Brown, nor Charles Gust had a gun or pointed a gun at anybody. (March 10 Trial Tr. P. 35-36). Demarco Brown testified at the trial. Demarco Brown testified that neither he, nor Joel Gonzalez, nor Charles Gust, had a gun. (March 10 Trial Tr. P. 49-50, 54-55). The State also called several passengers in a vehicle that observed the shooting. A.J.S. testified that he saw Richardson, who he described as the person near the gas pumps, walk toward the vehicle on the frontage road and fire five to seven shots at the vehicle. (March 10 Trial Tr. P. 69). A.J.S. saw muzzle flash when Richardson fired his gun. (March 10 Trial Tr. P. 70).

[¶39] John Doe 1, another witness, testified that he remembered hearing bullets "flying by" and making a "whistling noise." (March 10 Trial Tr. P. 78). John Doe 2 also testified to hearing bullets "whistle" past his vehicle. (March 10 Trial Tr. P. 82).

[¶40] Joel Gonzalez' mother, Roxanne Sosa, testified that Gonzalez, Gust, and Brown came to her house after their vehicle had been shot at. She saw bullet holes in the vehicle her son was in. (March 10 Trial Tr. P. 88). Sosa tesfieid that Gonzalez "has never owned a gun" and that she did not observe a gun on Gonzalez, Gust, or Brown on October

[3] I am citing to the March 10 criminal jury trial transcript, located at 18-2019-CR-02197, index 202. I will cite this as (March 10 Trial Tr. P.)

7, 2019. (March 10 Trial Tr. P. 89). Sosa also testified that there were no guns in either her house or Gonzalez's car. (March 10 Trial Tr. P. 90).

[¶41] Officer Foley testified at the trial. He testified that Gonzalez's bedroom was searched and no weapons were located. (March 10 Trial Tr. P. 129). Detective Essig testified that Gust, Gonzalez, and Brown were patted down, and none of them had weapons, nor were any weapons found after the vehicle they were in was searched. (March 11 Trial Tr. P. 92-93[4]).

[¶42] Officer Brown testified at the jury trial that he collected the shell casings that were discovered at the scene of the shooting. (March 10 Trial Tr. P. 137-138). The shell casings were entered into evidence.

[¶43] Corporal Nicholas testified at the trial that he interviewed Richardson. During his initial encounter, Richardson said Demarco Brown was "holding something dark, black, but he could not tell exactly what it was." (March 11 Trial Tr. P. 14-15). Richardson admitted to Corporal Nichols that he fired seven rounds from his pistol. (March 11 Trial Tr. P. 16). Corporal Nichols located the handgun Richardson used to shoot at the vehicle, and discovered that it was under a couch cushion in Richardson's apartment. (March 11 Trial Tr. P. 20).

[¶44] Detective Wright testified to interviewing Richardson. Richardson told Detective Wright that he fired his gun at the vehicle after Brown had started getting back into the car. (March 11 Trial Tr. P. 36-37).

[¶45] Richard Richardson also testified at the trial. He testified that he felt threatened by Brown, because Brown had been sending him threatening messages. He then

[4] I am citing to the March 11 criminal jury trial transcript, located at 18-2019-CR-02197, index 203. I will cite this as (March 11 Trial Tr. P.)

admitted that, despite the fact that he was afraid, he invited Brown to come to his house and talk. (March 11 Trial Tr. P. 126). Richardson testified that when he saw Brown, he left his vehicle and walked toward Brown. (March 11 Trial Tr. P. 133-34). Richardson testified that he fired at Brown only after Brown was getting back into his vehicle. Richardson testified, "[s]o when I pulled my firearm, that's when he was like retreating." (March 11 Trial Tr. P. 136).

[¶46] This was the trial testimony. No gun was ever found on Gust, Gonzalez, or Brown. No gun was ever found in the house Gust, Gonzalez, or Brown went to after there vehicle was shot. Richardson could have run into the brick building of the Cenex. He could have gotten into his car and sped away. Instead, he chose to advance on a vehicle and fire seven shots at a vehicle that was retreating. He fired seven shots and missed several times. The bullets that didn't hit his target went sailing into the community. One of Richardson's bullets "whistled by" a vehicle containing innocent bystanders.

[¶47] Despite the fact that Richardson admitted at the trial that he fired his gun at a retreating man, Richardson now claims that the testimony of Shawnqase Perry would have convinced the jury to believe his argument that he was defending himself when he shot his gun at a retreating vehicle.

[¶48] The district court judge who addressed the post-conviction relief matter was the same judge who presided over the criminal jury trial. The district court properly found that "attorney Castro presented Richardson's self-defense claim to the best of her ability. . . . The jury decided Richardson did not act in self-defense. The Supreme Court of North Dakota affirmed the conviction, deciding that there was sufficient evidence that he did not act in self-defense." (Order denying petition for post-conviction relief, 18-21-CV-02241,

Index 65, ¶ 26). The district court further recognized that if Perry had testified, "his testimony would likely have been cumulative to the testimony from Christopher and Richardson. The testimony from Christopher and Richardson was not convincing to the jury, and there has not been a showing of a reasonable probability that the results of the case would have been different had Perry testified." (Order denying petition for post-conviction relief, 18-21-CV-02241, Index 65, ¶ 27). Richardson failed to establish that the result of the trial would have been different if Perry testified.

CONCLUSION

[¶49] The district court properly analyzed both Strickland prongs and correctly denied Richardson's post-conviction relief petition.

[¶50] First, Ms. Castro was not ineffective. She did everything she could to get Perry to testify. Ms. Castro subpoenaed Mr. Perry. Ms. Castro spoke to him about the trial. Mr. Perry didn't show up because he was working and he forgot about it. Further, Mr. Perry didn't even tell Ms. Castro that he wasn't going to be there. To find that Ms. Castro is an ineffective attorney because Mr. Perry didn't get to court would not serve the interests of justice. It would be inappropriate to hold defense attorneys accountable for things that are outside their control. We cannot find that Ms. Castro was ineffective simply because Shawnqase Perry was irresponsible. Defense attorneys cannot be held to such a standard, and should not be deemed ineffective because they have irresponsible witnesses.

[¶51] Second, Shawnqase Perry's testimony would not have made a difference at the trial. Richardson admitted, at the trial, that he fired seven bullets at somebody who was "retreating." He was attacking somebody who was driving away. Shawnqase Perry's testimony would not have moved the needle, and would not have overcome the overwhelming evidence that Richardson did not act in self-defense when he shot at a person who was retreating.

[¶52] This Court held in Booth that courts "need not address both prongs of the Strickland test, and if a court can resolve the case by addressing only one prong it is encouraged to do so. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." Booth v. State, 2017 ND 97, ¶ 8, 893 N.W.2d

186 (citing Osier v. State, 2014 ND 41, ¶ 11, 843 N.W.2d 277; Broadwell v. State, 2014 ND 6, ¶ 7, 841 N.W.2d 750; Garcia v. State, 2004 ND 81, ¶ 5, 678 N.W.2d 568 (internal citations omitted)).

[¶53] Richardson failed to establish both Strickland prongs, and the State asks this Court to affirm the order of the district court.

DATED this 26th day of January, 2023.

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ACE/bjd

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	)	
Petitioner / Appellant,	)	**Supreme Court No. 20220291**
	)	
vs.	)	
	)	
State of North Dakota,	)	**Grand Forks County District Court**
	)	**Case No. 18-2021-CV-02241**
Respondent / Appellee.	)	
	)	

CERTIFICATE OF COMPLIANCE

SA#152920

[¶1] The State of North Dakota, by and through Assistant State's Attorney Andrew C. Eyre hereby certifies that the attached brief complies with the page limitation as set forth in Rule 32 of the North Dakota Rules of Appellate Procedure. The electronically filed brief contains 24 number of pages.

Dated this 26th day of January, 2023.

/s/ Andrew C. Eyre

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bjd

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State of North Dakota,	)	**Grand Forks County District Court**
	)	**Case No. 18-2021-CV-02241**
Respondent / Appellee.	)	
	)	

DECLARATION OF SERVICE BY ELECTRONIC FILING
SA# 152920

The undersigned, being of legal age, declares under penalty of perjury under the law of North Dakota, that the foregoing is true and correct, that on the 26th day of January, 2023, she served true copies of the following documents:

CERTIFICATE OF COMPLIANCE;
BRIEF OF APPELLEE

electronically through the Supreme Court Electronic Filing System to:

Benjamin C. Pulkrabek (ND Bar ID#02908)
Attorney for Appellant
402 1st St NW
Mandan, ND 58554
E-service: pulkrabek@lawyer.com

At the office of the Grand Forks County States Attorney's Office.

Signed on the 26th day of January, 2023, at Grand Forks, North Dakota, United States.

/s/ ***Bobbi J Davidson***
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	)	
State of North Dakota,	)	**Grand Forks County District Court**
	)	**Case No. 18-2021-CV-02241**
Respondent / Appellee.	)	
	)	

AMENDED DECLARATION OF SERVICE BY ELECTRONIC FILING
SA# 152920

The undersigned, being of legal age, declares under penalty of perjury under the law of North Dakota, that the foregoing is true and correct, that on the 26th day of January, 2023, she served true copies of the following documents:

CERTIFICATE OF COMPLIANCE;
BRIEF OF APPELLEE

electronically through the Supreme Court Electronic Filing System to:

Benjamin C. Pulkrabek (ND Bar ID#02908)
Attorney for Appellant
402 1st St NW
Mandan, ND 58554
E-service: pulkrabek@counsellor.com

At the office of the Grand Forks County States Attorney's Office.

Signed on the 26th day of January, 2023, at Grand Forks, North Dakota, United States.

/s/ ***Bobbi J Davidson***
Legal Secretary
Grand Forks County
P.O Box 5607
Grand Forks, ND 58206
(701) 780-8281
E-Service Address: sasupportstaff@gfcounty.org