

IN THE SUPREME COURT OF NORTH DAKOTA

Richard Dodge,)	Supreme Court File No.
)	20190286
)	
Petitioner and Appellant,)	Cass County No.
)	47-2018-CV-256
)	
v.)	
)	
State of North Dakota,)	APPELLANT’S BRIEF
)	
Respondent and Appellee.)	

Appeal from the order denying application for post-conviction relief entered September 12, 2019 in Stutsman County district court, south central judicial district, North Dakota, the Honorable Tristan Van de Streek presiding.

APPELLANT’S BRIEF
ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

JURISDICTION..... ¶ 1

STATEMENT OF ISSUES ¶ 2

STATEMENT OF CASE..... ¶ 3

STATEMENT OF FACTS..... ¶ 6

LAW AND ARGUMENT..... ¶ 18

I. Whether the district court erred by denying Mr. Dodge’s petition for
post-conviction relief ¶ 18

CONCLUSION..... ¶ 30

TABLE OF AUTHORITIES

Cases

<i>Delvo v. State</i> , 2010 ND 78, 782 N.W.2d 72 (N.D. 2010).....	¶ 18
<i>Garcia v. State</i> , 2004 ND 81, 678 N.W.2d 568 (N.D. 2004).....	¶ 22
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985).....	¶ 22
<i>Moore v. State</i> , 2013 ND 214, 839 N.W.2d 834 (N.D. 2013).....	¶ 22
<i>Peltier v. State</i> , 2015 ND 35, 859 N.W.2d 381 (N.D. 2015).....	¶ 19
<i>Roe v. State</i> , 2017 ND 65, 891 N.W.2d 745 (N.D. 2017).....	¶ 18
<i>State v. Blurton</i> , 2009 ND 144, 770 N.W.2d 231 (N.D. 2009).....	¶ 19
<i>State v. Pixler</i> , 2010 ND 105, 783 N.W.2d 9 (N.D. 2010).....	¶ 19
<i>State v. VanNatta</i> , 506 N.W.2d 63 (N.D.1993).....	¶ 20
<i>State v. Wallace</i> , 2018 ND 225, 918 N.W.2d 64 (N.D. 2018).....	¶ 19
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984).....	¶ 22
<i>Weaver v. Massachusetts</i> , 137 S.Ct. 1899 (2017).....	¶ 22

Statutes, Rules, Codes

N.D.C.C. § 12.1-04-04.....	¶ 20
N.D.C.C. § 12.1-04-06.....	¶ 23
N.D.C.C. § 12.1-04-08.....	¶ 23
N.D.C.C. § 29-28-03.....	¶ 1
N.D.C.C. § 29-28-06.....	¶ 1
N.D.C.C. § 29-32.1-01.....	¶ 1
N.D.C.C. § 29-32.1-14.....	¶ 1

N.D.R.Civ.P 52(a)..... ¶ 18
N.D.R.Crim.P 11 ¶¶ 19, 21, 22
N.D. Const. art. VI § 6 ¶ 1

Oral Argument:

Oral argument has been requested to emphasize and clarify the Petitioner’s written arguments on their merits.

Transcript References:

Mr. Dodge’s post-conviction relief hearings were held on May 14, June 20, and August 16, 2019. The transcripts of those hearings are referred to as PCR in this brief.

JURISDICTION

[¶ 1] The district court had jurisdiction under N.D.C.C. § 29-32.1-01. The North Dakota Supreme Court has jurisdiction over the appeal of this matter pursuant to N.D.C.C. § 29-32.1-14 which provides that, “[a] final judgment entered under this chapter may be reviewed by the supreme court of this state upon appeal as provided by rule of the supreme court.” Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provision article VI § 6, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

STATEMENT OF THE ISSUES

[¶ 2] I. Whether the district court erred by denying Mr. Dodge’s petition for post-conviction relief.

STATEMENT OF CASE

[¶ 3] This is an appeal from the Stutsman County Order Denying Application for Post-Conviction Relief, signed September 12, 2019 (Appendix p. 21). Mr. Dodge was charged with Felonious Restraint, Terrorizing, Robbery (2 counts), Criminal Conspiracy, and Carrying a Concealed Firearm in the underlying criminal case. The criminal complaint in case 47-2015-CR-829 was filed on December 10, 2015.

[¶ 4] The initial appearance was held on December 11, 2015. Mr. Dodge was appointed Attorney Sandness. Attorney Scott Brand replaced Mr. Sandness due to a conflict. Appendix p. 30, *Status Conference*, August 25, 2016, p. 5, *see Supplement to Application*, Index #37 p. 1. The preliminary hearing was held on February 3, 2016. On April 20, 2016, Mr. Brand motioned to withdraw as counsel, citing irreconcilable differences. *Id.* On April 28, 2016, the court granted Mr. Brand's motion. On May 23, 2016, Attorney Myhre was assigned to the case. A jury trial was set in the underlying criminal case, however, Mr. Dodge ultimately changed his plea on August 31, 2016, instead of proceeding to trial.

[¶ 5] Mr. Dodge filed a petition for post-conviction relief on April 16, 2018. He alleged the conviction was obtained in violation of the laws of the constitution of the United States. He also alleged that his plea was unlawfully induced and not voluntarily made and that he had ineffective assistance of counsel. He was appointed Attorney Harris to represent him in

May of 2018. On September 14, 2018, Ms. Harris filed an agreement between her and Mr. Dodge for withdrawal of her representation. Eventually Ms. Harris was allowed to withdraw as counsel. On January 24, 2019, the undersigned attorney was appointed to represent Mr. Dodge. Despite the petitioner's repeated requests to continue or stay proceedings until a retrospective psychological evaluation and report could be completed the court began taking testimony in the post-conviction matter on May 14, 2019. Additional evidentiary hearings in this matter were then held on June 20 and August 16, 2019. The district court ultimately denied Mr. Dodge's application for post-conviction relief. Mr. Dodge timely appealed from that order.

STATEMENT OF FACTS

[¶ 6] On May 23, 2016, Attorney Myhre was assigned to the case. Case 47-2015-CR-829, Index #32. Mr. Myhre testified that he spoke over the phone with Mr. Dodge a few times and met with him in person once before the scheduled trial date. Mr. Myhre said that Mr. Dodge spoke repeatedly about conspiracies against him, that his former attorney had been working against him, that he had been assaulted in the jail in Stutsman county, and that Mr. Dodge had made accusations against Mr. Myhre. Mr. Myhre testified that after the in-person conversation which involved the accusation of being a "rat" and other allegations, Mr. Myhre could not effectively communicate with Mr. Dodge. PCR Vol II p. 29. *See also* Myhre Affidavit, Case 47-2015-CR-829 Index # 52. Mr. Dodge requested Mr. Myhre be

removed from his case due to a conflict of interest on July 20, 2016. On August 8, 2016 Mr. Myhre filed a motion for psychiatric examination with the Court. Case 47-2015-CR-829 Index #45. On August 17, 2016 Mr. Dodge filed another request for different counsel citing a conflict of interest. Case 47-2015-CR-829 Index #48.

[¶ 7] Mr. Myhre testified that Mr. Dodge made statements that were not rational. He said, “It was at that point that Mr. Dodge, raised the issue of silver ingots and his belief Mr. Brand had somehow swindled him through something involving a power of attorney so that he could get his hands on the silver ingots.” PCR Vol II p. 33. Mr. Myhre testified that Mr. Dodge was not interested in preparing for trial and he seemed fixated on Mr. Brand and that he disclosed to Mr. Myhre that he had been gang raped in Stutsman county jail. *Id.* at 35, 36. After his hour long in-person conversation Mr. Dodge in July of 2016, Mr. Myhre testified he felt that there might be some psychological issues with Mr. Dodge. *Id.* at 36. He testified that MR. Dodge had told him he wanted to leave Stutsman County as soon as possible. PCR Vol II p. 43.

[¶ 8] Mr. Dodge indicated in his request for new counsel that if he stayed in Stutsman county correction center he would be killed because Mr. Myhre believed him to be a “rat.” Myhre Affidavit, Case 47-2015-CR-829 Index # 52, PCR Vol II p. 37. Mr. Myhre repeatedly stated and twice wrote to the Court, once on August 17 and once on August 22, that the attorney client

relationship had completely broken down, and that all lines of communication were “hopelessly, irreparably, and irrevocably destroyed.” Case 47-2015-CR-829 Index # 49, 52. On July 15, 2016 Mr. Myhre wrote an email to the State where he disclosed, “let me just characterize his side of the conversations as appearing to be somewhat delusional and/or conspiratorially oriented...**I am not convinced about my client’s legal capacity to stand trial based on those conversations or his ability to provide assistance of counsel.**” *Emphasis added*, See Emails, Index 38. Mr. Myhre testified that he felt hesitant about meeting with Mr. Dodge one-on-one after he accused him of being a rat. He testified that he wanted to have a witness on for their conversations and so they did not speak again until the day of trial. PCR Vol II p. 42. Mr. Myhre also testified that for most of the July meeting, he thought that Mr. Dodge was coherent and cogent although obsessed with the silver ingots.

[¶ 9] On August 17, 2016 Mr. Myhre motioned the Court to withdraw from representing Mr. Dodge. Mr. Myhre filed an affidavit on August 22, 2016 supporting his motion to withdraw detailing attorney-client communications. On August 23, 2016 the Court denied the request for a psychological evaluation because Mr. Dodge’s trial attorney, Mr. Myhre, did not timely notice the defense of lack of criminal responsibility in the underlying criminal case.

[¶ 10] On August 25, 2016 a status conference was held to address Mr. Myhre’s continued representation of Mr. Dodge. Mr. Myhre told the Court, “If I were to continue as counsel, with trial coming up on August 30th, there would be no way that I could effectively represent Mr. Dodge.” Appendix p. 30, *Status Conference, August 25, 2016*, p. 6. He told the Court he could not meet with Mr. Dodge alone, maintain communication with him, or “go into trial with any kind of effective trial strategy or otherwise.” *Id.* at pp. 6-7.

[¶ 11] At the Status conference held on August 25, 2016, Mr. Dodge told the Court that he had given testimony against associates of Mr. Myhre and that he indicated before Mr. Myhre was appointed that there was a conflict of interest. The Court responded that it appeared to the Court that Mr. Dodge was “kind of delusional.” *Id.* at p. 10. Mr. Dodge went on to tell the Court that Attorney Brand was working with Casandra Ritchie, who had been breaking into his home and stealing from him. *Id.* at p. 14. Mr. Dodge also indicated that Mr. Brand was representing individuals in 2010 who were stealing from him. *Id.* The State told the Court that Mr. Dodge believed every lawyer provided to him has victimized him. *Id.* Mr. Dodge ended the status conference on August 25, 2016 explaining to the Court that he was not lying, and that Mr. Brand had been involved with a fraud investigation with his Chase bank account. *Id.* at p. 19.

[¶ 12] On the day of Mr. Dodge’s jury trial, August 31, 2016, the Court asked if Mr. Dodge wanted to proceed with Mr. Myhre or handle the trial

himself. Mr. Dodge indicated he had no idea how to conduct a trial and so he would take Mr. Myhre. Appendix p. 36, *Trial* August 31, 2016, p. 8. Mr.

Myhre told the Court at that time, just before trial was to begin, “because of the relationship that has been documented before this Court with Mr. Dodge, that our communication leading up to this matter have been not just minimal, but **nonexistent**.” *Emphasis added; Id.* at p. 22.

[¶ 13] At the change of plea, the Court inquired if Mr. Dodge was satisfied with his attorney’s representation. Mr. Dodge replied the representation was as good as he was going to get. *Id.* at p. 40. The Court asked Mr. Dodge if anyone threatened or coerced him into pleading guilty. Mr. Dodge responded “not recently.” *Id.* The Court accepted *Alford* pleas to all the counts. At the post-conviction hearing Mr. Dodge testified that he was physically assault and that was why he changed his plea.

[¶ 14] After Mr. Dodge filed for post-conviction relief and Ms. Harris was appointed to represent him, she requested a psychological evaluation. A status conference was held on September 25, 2018. Ms. Harris requested that the Court have Mr. Dodge evaluated for fitness to proceed at the time of the change of plea and for his present ability to assist counsel. The Court Ordered Mr. Dodge be evaluated for his present, then fall of 2018, fitness to proceed. Dr. Lisota determined Mr. Dodge was fit to proceed at that time. Dr. Lisota’s report, dated November 11, 2018, indicated Mr. Dodge exhibited difficulties with regard to his ability to rationally cooperate with and disclose

pertinent information to counsel. He also testified that Mr. Dodge had been tested for malingering at the time of his evaluation, but the tests indicated that Mr. Dodge was not malingering. PCR Vol III p. 84. However, Dr. Lisota testified that because of his personal experience he believed Mr. Dodge's delusions regarding rampant tales of sexual abuse, biker gangs, and conspiracies would not be so compartmentalized if he were not malingering. *Id.* at 85. Dr. Lisota never evaluated Mr. Dodge's competency when he changed his plea on August 31, 2016. PCR Vol III p. 95. In his report Dr. Lisota listed Delusional disorder as a diagnosis that should be investigated to be ruled out, however he did not evaluate Mr. Dodge to see if he had delusional disorder. PCR Vol III p. 103.

[¶ 15] Petitioner, through his counsel, requested a psychological evaluation that assessed his criminal responsibility and competency at the time of the crime and his change of plea, respectively. Mr. Dodge was evaluated by Dr. Mugge. In her report (Appendix p. 39) and in her testimony Dr. Mugge diagnosed Mr. Dodge as experiencing a Delusional Disorder, Persecutory Type. PCR Vol III p.15. Additionally, Dr. Mugge's report found that Dr. Lisota's basis for his conclusion of malingering was not supported by recognized standard diagnosis. PCR Vol III p. 58. Dr. Mugge stated that according to the DSM-5, delusional disorder is limited to the experience of delusions, or compartmentalized. *Id.* at p. 57. Mr. Dodge's compartmentalized, or narrow, delusions were the only scientific reason Dr.

Lisota stated that Mr. Dodge was malingering with regard to his “tales” of conspiracy. However, delusions are fixed beliefs that are not easily changed in response to conflicting evidence, according to the DSM-5. While delusional content may involve many themes, persecutory themes are most common, as is the case for Mr. Dodge. *Id.* at p. 17. These persecutory delusions typically involve one’s conviction that they are being conspired against, among other things. As part of the criteria to substantiate a diagnosis of Delusional Disorder, which Dr. Lisota did not test for, the individual’s functioning must not be markedly impaired apart from the direct impact of the delusion and their behavior is not obviously bizarre or odd. Dr. Mugge Evaluation p. 23. Furthermore, the DSM-5 explicitly states, “A common characteristic of individuals with delusional disorder is the apparent normality of their behavior and appearance when their delusional ideas are not being discussed or acted on.” *Dr. Mugge Evaluation* p. 24.

[¶ 16] Dr. Mugge opined Mr. Dodge’s serious mental disease manifested as persecutory ideation. During her interview of Mr. Dodge, he conveyed intensely held beliefs regarding others plotting against or stalking him in attempts to rob, exploit, and or sexually assault him. His responses to psychological testing confirmed this suspicious and paranoid predisposition. Dr. Mugge Evaluation p. 23. Dr. Mugge testified that she did not believe that Mr. Dodge was fit to proceed when he changed his plea. And that she believed her report conveyed that. PCR Vol III p. 18, 33. Dr. Lisota testified that if Mr.

Dodge's difficulties communicating with his assigned counsel were due to a mental defect, even as a result of voluntary drug use, he would not be fit to proceed. PCR Vol III pp. 105-107. Both Dr. Muggge and Dr. Lisota testified that if a paranoid delusion caused Mr. Dodge to accuse his counsel of improper behavior and that led to an inability to communicate with them, Mr. Dodge would not be fit to proceed.

[¶ 17] Dr. Mugge used the ECST-R, a semi-structured interview designed to assess dimensions of competency to stand trial. It is comprised of 18 items and three individual scales that assess separate dimensions of competency to stand trial: Factual Understanding of the Courtroom Proceedings, Rational Understanding of the Courtroom Proceedings, and Ability to Consult with Counsel. *Dr. Mugge Evaluation* p. 20. Dr. Mugge stated that while Mr. Dodge appeared to have a basic understanding of the adversarial nature of a typical criminal proceeding, his statements revealed bizarre and paranoid ideation, of likely delusional proportions, and there was evidence to suggest his rational understanding had been impaired by psychotic symptoms during previous hearings and interactions with attorneys. *Dr. Mugge Evaluation* p. 21. She testified that Mr. Dodge had delusional disorder-paranoia type. This mental condition, resulting in delusional statements and accusations, impaired Mr. Dodge's ability to interact and communicate with his attorneys. Dr. Mugge testified that Mr. Dodge's observed difficulty communicating with his former attorneys

impacted his ability to guide decisions such as accepting a plea deal and pleading guilty in this matter.

LAW AND ARGUMENT

I. Whether the district court erred by denying Mr. Dodge’s petition for post-conviction relief.

Standard of Review

[¶ 18] Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure. *Delvo v. State*, 2010 ND 78, ¶ 10, 782 N.W.2d 72. This Court applies a ‘clearly erroneous’ standard found in N.D.R.Civ.P. Rule 52(a) when reviewing a district court’s findings of fact on an appeal under the Uniform Post-Conviction Procedure Act. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made. *Roe v. State*, 2017 ND 65, ¶ 5, 891 N.W.2d 745.

[¶ 19] A guilty plea “must be entered knowingly, intelligently, and voluntarily to be valid.” *Peltier v. State*, 2015 ND 35, ¶ 14, 859 N.W.2d 381. Rule 11, N.D.R.Crim.P., is the framework the court uses to determine if a plea is entered into knowingly, intelligently, and voluntarily. *State v. Wallace*, 2018 ND 225, ¶ 6, 918 N.W.2d 64; *State v. Blurton*, 2009 ND 144, ¶ 10, 770 N.W.2d 231. N.D.R.Crim.P. 11(b)(1) requires the court, “to address the defendant personally in open court, informing the defendant of his rights

and determining whether the defendant understands those rights.” *State v. Pixler*, 2010 ND 105, ¶ 8, 783 N.W.2d 9. Rule 11(b)(1) states:

The court may not accept a plea of guilty without first, by addressing the defendant personally...in open court, informing the defendant of and determining that the defendant understands the following:

- (F) the nature of each charge to which the defendant is pleading;
- (G) any maximum possible penalty, including imprisonment, fine, and mandatory fee;
- (H) any mandatory minimum penalty. N.D.R.Crim.P. 11(b)(1).

After the court has accepted a plea and imposed sentence, the defendant cannot withdraw the plea unless withdrawal is necessary to correct a manifest injustice. A manifest injustice includes procedural errors by a sentencing court. *State v. Gunwall*, 522 N.W.2d 183, 185 (N.D. 1994).

[¶ 20] Mr. Dodge’s conviction was obtained in violation of the laws of the constitution of the United States, because his plea was not voluntarily, intelligently and knowingly made, he did not received effective assistance of counsel, and he was not fit at the time of his change of plea. The Fourteenth Amendment confers the right to due process and N.D.C.C. 12.1-04-04 requires that all criminal defendants be competent. A person cannot stand trial or be sentenced if they are deemed incompetent. Competency must be required before a defendant can be required to stand trial or sentenced. This standard is in place to preserve a fundamental fairness of the justice system, or due process. The standard for determining if a criminal defendant is competent to stand trial is set forth in *State v. Gleeson*:

“It has long been held the conviction of a mentally incompetent accused is a violation of constitutional due process. *Dusky v. United States*, 362 U.S. 402 (1960). The United States Supreme Court has summarized the test for determining if an accused is mentally competent to stand trial. *Id.* A defendant is incompetent when he lacks (1) ‘sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding’ or (2) ‘a rational as well as factual understanding of the proceedings against him.’ *Dusky*, 362U.S. at 402. This test is essentially codified at section 12.1-04-04, N.D.C.C., which states: ‘No person who, as a result of mental disease or defect, lacks capacity to understand the proceedings against the person or to assist in the person’s own defense shall be tried, convicted, or sentenced for the commission of an offense so long as such incapacity endures.’”2000 ND 205, ¶9, 619 N.W.2d858. Being able to “consult with a lawyer with a reasonable degree of rational understanding” is being able to “confer coherently with counsel and provide necessary and relevant information to formulate a defense.”

State v. VanNatta, 506 N.W.2d 63, 65, 68 (N.D.1993). In the case before the Court, Mr. Dodge’s counsel, Mr. Myhre specifically, the Court, and Dr. Mugge all stated that Mr. Dodge was not able to “confer coherently” with counsel at some point in their representation.

[¶ 21] In this case, defense attorney Myhre presented his concerns to the prosecution via an e-mail regarding Mr. Dodge’s competency. This was in July of 2016. The State already knew that Mr. Dodge had concerns regarding motorcycle gangs from his interview with Detective Falk. In the transcript of Detective Faulk’s interview with Mr. Dodge on page 19, he alludes to being sent to North Dakota on orders of a motorcycle gang and being placed on house arrest by them. See Docket ID# 73 Case. 47-2016-CR-829. The Court stated that Mr. Dodge is delusional, but denied a psychiatric evaluation and accepted a change of plea from Mr. Dodge. However, if Mr. Dodge was not fit at the time of his change of plea, his plea was not voluntarily or intelligently

made. The interests of justice would require the removal of Mr. Dodge's plea under N.D.R.Crim.P. 11(d)(2) to correct a manifest injustice.

[¶ 22] Mr. Dodge's application alleges ineffective assistance of counsel. "To succeed on a claim for ineffective assistance of counsel, a petitioner must prove counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced him." *Garcia v. State*, 2004 ND 81, ¶ 5, 678 N.W.2d 568, (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The first prong of the Strickland test requires that an attorney's performance be measured by an objective standard of reasonableness, considering the prevailing professional norms. *Garcia* at ¶ 5. The second prong of the Strickland test requires a showing of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* The two-pronged Strickland test also applies to challenges to guilty pleas that were entered as a result of ineffective assistance of counsel. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). When the claim of ineffective assistance of counsel relates to a guilty plea, the Court has held that the application is treated as one made under Rule 11(d) of the North Dakota Rules of Criminal Procedure. *Moore v. State*, 2013 ND 214, ¶ 10, 839 N.W.2d 834. Withdrawal of the guilty plea is allowed when necessary to correct a manifest injustice. *See Id.* The prejudice required in the context of a guilty plea is not ultimate success at trial but if not for counsel's

error Mr. Dodge would not have pled guilty. *See Weaver v. Massachusetts*, 137 S.Ct. 1899 (2017).

[¶ 23] Mr. Myhre failed to request a psychological evaluation in a timely manner. Additionally, Mr. Myhre, although stating concerns to the State about his client's competency, did not make a motion for evaluation and to stay proceedings as outlined in N.D.C.C. § 12.1-04-06 and N.D.C.C. § 12.1-04-08. Furthermore Mr. Myhre indicated to the Court on the day of trial he was not prepared to proceed to trial and had not been in contact with his client. All these behaviors fall below an objective standard of reasonableness. Additionally, if Mr. Myhre had Mr. Dodge properly evaluated for his competency the proceeding would have been stayed and Mr. Dodge would not have pleaded guilty.

[¶ 24] The district court's order denying Mr. Dodge's post-conviction application at paragraph 13 finds that Dr. Mugge's report does not expressly indicate that Mr. Dodge was not competent when he changed his plea. This finding of fact is clearly erroneous it is not supported by any evidence, or if, although there is some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made. Multiple times Dr. Mugge in her report indicated that Mr. Dodge's disorder impaired his communication with his attorneys. Additionally, Dr. Muggie testified and her report expressly stated that she believed Mr. Dodge was suffering from

delusion disorder at the time of his change of plea. She testified that Mr. Dodge was not fit at the time of his change of plea.

[¶ 25] The district court's order denying Mr. Dodge's post-conviction application at paragraph 16 finds that Dr. Mugge was not persuasive because her sworn testimony was in conflict with her report. This finding by the court is not supported by any evidence. Nothing in Dr. Mugge's report is in conflict with her sworn testimony. The State indicated she did not come to the ultimate conclusion in her report, and Dr. Muggie testified she was trained to leave ultimate legal conclusions to the fact finder unless she is specifically asked under oath. However, nothing in her report is contradictory to her testimony and that find is clearly erroneous. The court also said Mr. Dodge did not meet his burden because no contemporaneous medical records to support Dr. Mugge's position. First that is a clearly erroneous finding as that is not the standard for competency. Additionally, it is an alarming position for the court to take, as one of Mr. Dodge's allegations is that his trial counsel was ineffective for not requesting an evaluation at the time of the change of plea. For the court to find that because trial counsel did not request an evaluation, so now none exists from that timeframe, it is forever impossible to prove competency at the time of the change of plea is clearly erroneous.

[¶ 26] The district court's order denying Mr. Dodge's post-conviction application at paragraph 17 found that the district court judge had no indication that Mr. Dodge was incompetent. And in paragraph 18 that the

post-conviction court did not observe anything to suggest he was incompetent is an erroneous legal conclusion. This factual finding is clearly erroneous because it is induced by an erroneous view of the law. Dr. Mugge testified that it was Mr. Dodge's communications, or lack thereof, with his counsel that made him unfit to proceed. Suggesting that the trial court's interactions either at the post-conviction hear, which is irrelevant, or at the time of Mr. Dodge's change of plea are dispositive in this case is clearly erroneous. The issue before the court was whether or not Mr. Dodge could effectively communicate with his counsel. And even Mr. Myhre testified that they could not effectively communicate. Dr. Mugge testified that was due to Mr. Dodge's disorder.

[¶ 27] The district court's order denying Mr. Dodge's post-conviction application at paragraph 19 found Dr. Lisota's report and testimony should be given credit because it is consistent, and he has more experience. This is an erroneous conclusion because Dr. Lisota did not evaluate Mr. Dodge at the time of his change of plea. Dr. Lisota specifically testified that his report was only in regard to the time it was conducted, Fall of 2018. Additionally, Dr. Lisota's report did not follow the standard medical diagnosis found in the DSM-5. In so far as Dr. Lisota found that Mr. Dodge was malingering in Fall of 2018, which is irrelevant, the entire psychological community disagrees with his conclusions based on the symptomology in the DSM-5.

[¶ 28] The court adopted the State's findings of fact in their closing brief paragraphs 26, 27, and 30. Paragraph 26 found that Mr. Dodge never claimed a psychological problem in his testimony. Given the nature of a delusional disorder that would seem to be consistent with the diagnosis. Paragraph 27 found that Dr. Lisota's report corroborates what the courts have found. This is clearly erroneous no court has found that Mr. Dodge is malingering because Mr. Dodge had never been evaluated prior to Fall of 2018. Additionally, Dr. Lisota's report is irrelevant to the question of whether Mr. Dodge was competent in 2016. The State found that Mr. Myhre's motion for evaluation was timely. This is clearly erroneous as the explicit reason the court gave for denying his request was that it was untimely, or past the motion deadline. Furthermore, the obligation to request a motion to stay and seek a competency evaluation is on going regardless of any motions deadline, and that did not occur in this case even though Mr. Myhre testified to the court there was no communication between Mr. Dodge and himself and he also wrote to the State indicating that he believed Mr. Dodge may not be fit.

[¶ 29] The district court's order denying Mr. Dodge's post-conviction application at paragraph 21 found that Mr. Dodge did not establish he lacked competency at the time of his change of plea. This is a clearly erroneous finding. There is uncontroverted evidence supplied by Mr. Dodge, through a medical report and expert testimony, that he has a psychiatric diagnosis and that diagnosis caused him to be incompetent at the time of his change of plea.

CONCLUSION

[¶ 30] Mr. Myhre did not request or timely request an appropriate evaluation of Mr. Dodge his representation fell below an objective standard of reasonableness and but for that error Mr. Dodge would not have pleaded guilty or been allowed to change his plea. Therefore, to correct a manifest injustice Mr. Dodge's request for post-conviction relief must be granted and the criminal judgment vacated.

[¶ 31] WHEREFORE, Mr. Dodge respectfully requests that this Court reverse the district court's order denying his application for post-conviction relief and the case be remanded to allow Mr. Dodge's plea to be withdrawn in case number 47-2016-CR-829.

Dated this 26th day of December, 2019

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State of North Dakota,)	CERTIFICATE OF
)	COMPLIANCE
Respondent and Appellee.)	

[¶ 1] This Appellant’s Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: December 23, 2019.

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v.)	
)	
State of North Dakota,)	CERTIFICATE OF SERVICE
)	
Respondent and Appellee.)	

[¶1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant’s Brief with Certificate of Compliance
Appellant’s Appendix

[¶2] And that said copies were served upon:

Frederick Fremgen, State’s Attorney, attorney@stutsmancounty.gov

by electronically filing said documents through the court’s electronic filing system and upon:

Richard Dodge #45634
c/o ND DOCR
PO Box 5521
Bismarck, ND 58506

by placing a copy of said documents in a sealed envelope with USPS.

Dated: December 26, 2019.

/s/ Kiara Kraus-Parr
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