

In the Supreme Court of the State of North Dakota

Richard Dodge)	
Appellant, Petitioner)	
)	
v)	20190286
)	
State of North Dakota)	
Appellee, Respondent)	

Appellee’s Brief

Dodge appeals the 12 September 2019 *Order Denying Application for Post-Conviction Relief* issued by Judge Tristan Van de Streek, District Court, Stutsman County, case number 47-2018-CV-00256

ORAL ARGUMENT REQUESTED

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Issue Presented for Review

1. Whether it is ineffective assistance of counsel when trial counsel who was appointed after the deadline for filing pretrial motions files a motion for psychiatric evaluation and it is denied due to being filed after the deadline.
2. Whether the trial court erred in denying Dodge's post-conviction motion to withdraw his guilty plea.

Statement of the Case and Nature of the Case

3. Dodge appeals the denial of his application for post-conviction relief.
4. Dodge claims his trial defense counsel, Myhre, was ineffective because Myhre filed a motion for a psychiatric evaluation after the deadline for pretrial motions had expired and the motion was denied because it was filed after the deadline. Appellant's Brief, ¶ 23; *Transcript of Proceeding Volume 1*, May 14, 2019, 10:12; 27:15 [hereinafter T 14 May 2019]. Dodge fails to note that by the time Myhre was appointed, the deadline for pretrial motions had already expired.
5. Dodge claims he was mentally incompetent to plead guilty and that it is manifest injustice to accept the guilty plea. Dodge maintains this despite:
 - A. The trial court having declared a week before Dodge's guilty plea that the trial court had no reasonable indication Dodge was incompetent to assist in his defense,
 - B. Having conferred effectively with his trial defense counsel about strategy immediately before pleading guilty,
 - C. Choosing to enter an *Alford* plea,

- D. Having gone through the Rule 11 colloquy,
 - E. Successfully negotiating the conditions of the Appendix A with the trial court, and
 - F. Having been evaluated for his ability to assist his post-conviction counsel and found to be fit to assist. Dodge was later evaluated for his competency to assist at the time of the guilty plea and Dr. Mugge reported the opinion that Dodge's mental illness *impaired* his ability to communicate with his attorneys. Eventually, Mugge testified Dodge was not competent on the date he pled guilty.
6. In his 20 July 2018 *Supplement to Application for Post-Conviction Relief and Response to State's Answer*, Dodge claimed he was coerced into pleading guilty. The basis for the claim was that when the court asked Dodge, "All right. Mr. Dodge, did anybody threaten you or coerce you in any way into entering those guilty pleas" Dodge replied, "not recently, no" and the court allegedly did not follow up on it. 47-2018-CV-256, Index # 37, ¶ 18. In his brief to this court, Dodge has not argued he was coerced to plead guilty, and has evidently abandoned the coercion claim.

Course of Proceedings and Disposition Below

- 7. The district court in the post-conviction relief case took judicial notice of the underlying criminal matter, 47-2019-CR-829. *Transcript of Proceeding Volume 2, June 20, 2019, 72:19* [hereinafter T 20 June 2019].
- 8. The district court judge denied Dodge's application for post conviction relief. The

district court made findings of fact and adopted all but paragraphs 26, 27, and 30 of the State's recitation of the facts contained in the *State's Argument on Application for Post-Conviction Relief. Order Denying Application for Post-Conviction Relief*, ¶20, Appellant's Appendix at 21 [hereinafter AAA]. Some of the district court's most important reasons for the denial follow.

- A. The trial court judge who had conducted hearings with Dodge was best situated to assess Dodge's fitness and had concluded Dodge was fit to proceed. *Id.*, ¶ 17.
- B. The post-conviction relief judge did not observe anything that suggested Dodge was incompetent to proceed in the post-conviction hearings. *Id.*, ¶ 18. On the contrary, the judge found Dodge to be intelligent and capable of manipulating the judicial process. *Id.*
- C. The post-conviction relief judge found Dr. Lisota's opinion that Dodge was malingering and able to assist when Dodge wanted to, persuasive. *Id.*, ¶ 19.
- D. The post-conviction relief judge noted that although Dr. Mugge's report indicated Dodge's ability to work with counsel were *impacted* and *impaired*, nowhere in the report did Dr. Mugge opine that Dodge was not competent at the time he pled guilty. *Id.* ¶ 16. The judge noted when Mugge appeared to testify orally she opined that Dodge was not competent. The judge found that the inconsistency between Mugge's report and her testimony hampered Mugge's persuasiveness. *Id.*

E. Regarding ineffective assistance of counsel claim, the post-conviction relief judge found no indication there was a lack of criminal responsibility defense, and that the denied motion for psychiatric evaluation was therefore no loss. *Id.*, ¶¶24-27. The judge went on to find that Dodge could have appealed the trial court's denial of motion for psychological evaluation during the time Dodge represented himself and/or on direct appeal but did neither and thereby has misused process. *Id.*, ¶28.

Statement of facts

9. On the 30th of December 2015, Dodge had a bond rehearing before Judge Hovey, with attorney Scott Brand representing Dodge. Attorney Brand told Judge Hovey that Dodge completed his undergraduate studies at Kaplan, that Dodge was a trade school graduate, a tooling and machine technician, was forklift and OSHA certified, and had obtained a GED. 47-2015-CR-829, Index # 83, *Transcript of Proceedings, December 30, 2015* [hereinafter T 30 Dec 2015]. Brand told Judge Hovey that Dodge had worked for three years for UTC [United Technologies Corporation] in Jamestown. T 30 Dec 2015, 2:18. During the hearing, the state's attorney characterized the offense involving Dodge discharging a firearm as a *violent offense*. T 30 Dec 2015, 6:11. Dodge advocated for himself by responding, "Johnson had possession of my gun. I mean, I gave it to him. It was in his hand. We were standing side by side in that field." T 30 Dec 2015, 8:11.
10. On the 3rd of February 2016, the case was assigned to Judge Thomas Merrick. *Notification of Assignment and Case Number*, 47-2015-CR-00829, Index # 14.

11. The *Notification of Assignment and Case Number* contained a 04 March 2016 deadline for pretrial motions.

The deadline for **MOTIONS** and **PLEA AGREEMENTS** in this case will be 3/4/2016. The Court must be notified of binding plea agreements by that date. Any pleas after that date will be open pleas.

Notification of Assignment and Case Number, 47-2015-CR-00829, Index # 14,
(emphasis in original).

12. On the 20th of April 2016, Dodge's counsel, Scott Brand, filed a motion to withdraw. 47-2015-CR-829, Index # 24.
13. On the 28th of April 2016, Judge Merrick presided over what had been slated to be a change of plea hearing. Brand informed the court that Dodge wanted to seek other counsel. 47-2015-CR-829, Index # 24, ¶2. Dodge informed the court that he would retain private counsel. *Pretrial Order*, 47-2015-CR-829, Index # 62, ¶4. On 28 April 2016, Judge Merrick granted Brand's motion to withdraw. 47-2015-CR-829, Index # 26.
14. On the 5th of May 2016, Dodge filed a pro-se request for a bond rehearing. 47-2015-CR-829, Index # 28. On the 11th of May 2016, Dodge filed a pro-se a request for discovery from the State and another request for bond reduction. 47-2015-CR-829, Index # 30. On the 19th of May 2016, Dodge signed an application for counsel containing the note he had fired Brand. 47-2015-CR-829, Index # 31.
15. On the 23rd of May 2016, Russell Myhre was appointed to represent Dodge. 47-2015-CR-829, Index # 32; T 20 June 2019, 27:24 (Myhre testified he was

appointed in May). By the time Myhre was appointed, the 04 March 2016 deadline for filing pre-trial motions had already passed. Myhre testified, ". . . I was successor counsel in all of this. Many of the deadlines had already passed, and we were on our way to trial." T 20 June 2019, 45:7. Current post-conviction relief defense counsel, Kraus-Parr recognized while questioning Myhre, "Obviously, you weren't the first attorney on the case, and so time limits or pretrial motion deadlines had already passed potentially when you got on the case; is that accurate?" T 20 June 2019, 58:13.

16. The trial was scheduled for the 31st of August 2016. *Order Setting Criminal Jury Trial*, dated 09 June 2016, 47-2015-CR-829, Index # 36.
17. Myhre testified he read the disclosed reports and realized that during Dodge's interview with a deputy, Dodge had given ". . . what appeared to be somewhat of a confession to the situation." T 20 June 2019, 29:10.
18. Myhre testified he talked with Dodge a few times on the telephone and then went to meet personally with Dodge in July 2016. T 20 June 2019, 29:12; 69:19; 71:5.
19. Myhre testified that when he met personally with Dodge in July 2016, Myhre laid out to Dodge the confessions Dodge had made and advised Dodge that if they went to trial there was a high likelihood of Dodge being convicted. T 20 June 2019, 32:17. Myhre suggested to Dodge that they look at minimizing the negative effects by negotiating a guilty plea. T 20 June 2019, 33:1.
20. Myhre testified that during the July meeting Dodge's attention to trial preparation waned. T 20 June 2019, 33:16. Myhre testified, "I do recall, after discussing the

statement to law enforcement and the witnesses, that my recollection is that Mr. Dodge indicated that he understood that he was likely going to be going to prison on this, though, and that was why he was so concerned about the silver ingots and having money." T 20 June 2019, 39:6. Myhre testified Dodge asked to hire Myhre to pursue prior trial defense counsel Brand for some silver ingots Dodge claimed Brand had swindled from Dodge. T 20 June 2019, 33:5. Dodge wanted to pursue the silver ingots to ensure Dodge had money in a commissary account at the prison. T 20 June 2019, 33:14; 36:15. Myhre testified most of the meeting Dodge was coherent and cogent, although Dodge " . . . was more concerned about the money than his case." T 20 June 2019, 42:10; 56:14. Myhre testified he felt Dodge's attention to the ingots was "understandable in the context of wanting to have money for his commissary account." T 20 June 2019, 42:15. Myhre felt Dodge was trying to extort money from Brand. T 20 June 2019, 62:8.

21. Myhre testified at the end of the interview Dodge told Myhre that Dodge had been sexually assaulted while in pre-trial detention at the Stutsman County Correctional Center. T 20 June 2019, 35. Myhre testified, after the meeting with Dodge, Myhre asked another inmate whom Myhre represented and a correctional officer whether either had heard anything about Dodge being assaulted and both responded they were not aware of any such allegation. T 20 June 2019, 35-36.
22. Myhre testified before moving for a psychiatric evaluation he discussed the motion with Dodge and that Dodge had agreed with it being filed. T 20 June 2019, 36:24 37:7; 65:12; (Dodge also testified he had agreed to file the motion)

Transcript of Proceedings Post-Conviction Hearing Volume 1, May 14, 2019, 33-34 [hereinafter T 14 May 2019]. Myhre testified,

Myhre: As we were discussing possible defenses at the beginning of the conversation, I had given him my honest evaluation about what would happen for the case, and I did, again briefly though, but I did bring up what are your defenses? And those defenses, of course, would be some sort of diminished capacity type of defense. From there it evolved intermittently during that conversation to filing a motion for psychological evaluation?

The Court: Was that at the client's direction?

Myhre: I believe it was a back and forth between the two of us; and, again discussing possible defenses. After all what do you do when you have a client who is confessed and has witnesses against him, what are your potential defenses in that situation. Alibi is out. Some of the other defenses are out. The remaining one would be basically incapacity type of defense, and so as we discussed those and like I say through the evolution of all this stuff, that's eventually how we got towards that filing a motion for psychological evaluation, and I very definitely got his approval for that which later we (sic) [he] rescinded, basically.

T 20 June 2019, 65. Myhre testified that he was unconvinced Dodge was incompetent and that if a defense of incapacity was going to be put forth they needed some documentation to support it. T 20 June 2019, 67:2. Myhre testified he felt that Dodge's uncorroborated claim of being gang raped at the Stutsman County Correctional Center was advanced ". . . during the time period that we were talking about doing the psychological evaluation, and I felt that it was something that he [Dodge] threw in to bolster his claim for psychological evaluation." T 20 June 2019, 63-64.

23. Myhre testified, ". . . it was after that [July] meeting that I filed the motion for psychological evaluation." T 20 June 2019, 37:20. Myhre testified, "[w]e filed the motion as quickly as possible . . ." adding that Dodge was also looking for a continuance. T 20 June 2019, 45:16. On 09 August 2016, Myhre filed a motion for psychiatric examination of Dodge. 47-2015-CR-829, Index # 45. The deadline for pretrial motions was 04 March 2016. *Notification of Assignment and Case Number*, 47-2015-CR-00829, Index # 14. Myhre was appointed on 23 May 2016, more than two months after the deadline for filing pre-trial motions had passed. *Notice of Eligibility for Appointed Counsel*, 47-2015-CR-829, Index # 32.
24. On the 20th of July 2016, Dodge filed a pro-se motion to dismiss his appointed counsel claiming Myhre had a conflict of interest and was unwilling to defend Dodge. 47-2015-CR-829, Index # 42; T 20 June 2019, 30:3. On the 22nd of July 2016, the court's *Order Denying Substitution of Counsel* was filed. 47-2015-CR-829, Index # 43.
25. On the 17th of August 2016, Dodge filed another pro-se request to dismiss Myhre, 47-2015-CR-829, Index # 48.
26. On the 17th of August 2016, Myhre filed a motion to withdraw as counsel. 47-2015-CR-829, Index # 48; *Pretrial Order*, 47-2015-CR-829, Index # 62, ¶5; T 20 June 2019, 30:3. On the 23rd of August 2016, Judge Merrick denied Myhre's motion for psychiatric examination explaining it was tardy and there was no basis for it. The judge wrote:

[T]he Defendant has only made a motion for a psychiatric exam

and the time for pretrial motions has passed. Thus the motion for psychiatric examination is untimely. **Furthermore, there has been no evidence provided by the Defendant, and the Court has made no observations, giving reasonable grounds to believe Mr. Dodge is not competent to stand trial.**

Order Denying Defendant's Motion for Examination, 47-2015-CR-829, Index # 55 (bold typeface added).

27. In a 26 August 2016 *Pretrial Order*, Judge Merrick appointed Myhre standby counsel, ruled on Dodge's request to dismiss Myhre, and found Dodge had voluntarily waived his right to counsel.

[12] . . . Trial is scheduled for next week. The State has subpoenaed several witnesses and is ready to proceed. It would be unfair to the State to continue this matter, and since Dodge remains in jail, it is also in his best interest to hold trial. **It does not appear that any attorney can satisfy Dodge**, because he does not listen to their advice, AND THE COURT FINDS **Dodge has voluntarily waived the right to counsel by his actions.**

[13] IT IS ORDERED:

- a. Trial will be held as scheduled;
- b. **Myhre shall be** present for the pretrial conference and trial in a **standby role**, but is relieved of any further obligation to consult with Dodge or to provide any of the items listed in paragraph 2(b) of the court's June 9, 2016 order;
- c. Myhre shall provide assistance to Dodge during trial in open court if specifically requested.

Pretrial Order, 47-2015-CR-829, Index # 62, ¶¶12-13 (bold typeface added). At the post-conviction relief hearing, Myhre testified, "My status I believe, in August was that I was appointed as standby counsel." T 20 June 2019, 30:10; 38:1. One post-conviction relief defense counsel, Amanda Harris, informed the court, "I have never worked as standby counsel. I don't like the idea of standby counsel. I

know Mr. Myhre was appointed standby counsel in the underlying trial, and that's probably why he's here today." *Transcript of Proceeding Post-Conviction Hearing, 15 January 2019*, 10:16. However, current post-conviction relief / appellate counsel told the post-conviction relief court, "He [Myhre] wasn't standby counsel. The order to let him withdraw was denied from the case." T 20 June 2019, 6:3.

28. On the 31st of August 2016, the trial court convened to conduct a three day jury trial. *Transcript of Proceedings Jury Trial, August 31, 2016* at 14 [hereinafter T 31 Aug 2016]. The judge noted the jury was in the courthouse. "We are in courtroom 3, out of the hearing of the jury." T 31 Aug 2016, 4.
29. Dodge had earlier raised a complaint that the *Register of Actions* characterized previous Trial Defense Counsel Brand as retained when in fact Brand's services had been procured by the government for Dodge. T 31 Aug 2016, 5-7. After a detailed explanation was given to Dodge, he was asked, "Mr. Dodge, did you have any questions about that explanation." T 31 Aug 2016, 7:5. Dodge replied, "No, that perfectly clears things up." T 31 Aug 2016, 7:7.
30. The trial court summarized Dodge had asked for both Brand and Myhre to be removed. T 31 Aug 2016, 7-11. The court provided Dodge with a *Faretta* warning. T 31 Aug 2016, 7-8; *Faretta v. California*, 422 U.S. 806 (1975). The court explained Myhre was in standby mode, "Mr. Myhre will remain in the courtroom. . . . If I feel for some reason it's needed, he could step in, or if you decide at some point that you need assistance, he could provide that." T 31 Aug

2016, 7:14; 9:5.

31. The trial judge told Dodge that the trial was not going to be continued and that Dodge had ". . . two choices . . . represent yourself or have Mr. Myhre represent you." T 31 Aug 2016, 9:12.

Trial court: So those are your two choices, Mr. Dodge.

Which do you wish to do?

Dodge: I choose Myhre. I don't know anything about representing myself. I have no desire to do so. I wouldn't sit here and pretend to. If that were the situation, I'd sit her and do absolutely nothing.

T 31 Aug 2016, 9:18; T 20 June 2019, 30:21 (Myhre testified consistently).

32. At this juncture, the trial court noted it had considered all ". . . your complaints, the letters, and so forth . . ." and thought Myhre representing Dodge was the "appropriate way to go" and that "[f]rom my point of view, as I've indicated before, any new counsel would be confronted with the same kind of conflict based on the history with both you and Mr. Brand." T 31 Aug 2016, 10:1.
33. Upon reactivation from standby to full status, the first issue raised by Myhre was that Dodge was wearing jail provided orange Crocs and that could create a "risk of reversal." Id., 13:8. The court made some suggestions for obtaining civilian shoes for Dodge. Id., 12-13. The court asked Dodge his opinion on wearing flip-flops or slip-ons and Dodge offered, "I was fine wearing these [orange Crocs], but he [Myhre] makes a good point." Id., 13:17.
34. The trial judge noted it is a three day trial with a 12 person jury. Id., 14. The alternatives of an alternate juror, no alternate, and agreeing to allow a jury of 11 to

deliver a verdict were all discussed with Dodge present. Myhre asked Dodge on the record whether Dodge would consent to a jury of 11 if need be. Dodge responded deferentially to Myhre, "That's something I would ask you about." *Id.* at 15:17. The judge asked whether there were any objections to the opening instructions. *Id.*, 21:3.

35. Myhre noted he'd just come out of standby status, that he would zealously advocate for Mr. Dodge, but that Myhre wanted some time to discuss strategy, tactics, and implementation of them with Dodge. *Id.*, 21-22. Myhre and Dodge were allowed to confer. *Id.*, 22:12; 29:17; 30:1.
36. The state's attorney had conveyed a sentence offer to the Defense. T 20 June 2019, 30-31; 43:20. Myhre testified that he reviewed the plea offer with the prosecutor, T 20 June 2019, 43:20, and then went to discuss the offer with Dodge. *Id.* Myhre testified he and Dodge conferred about the offer. T 20 June 2019, 30. Myhre testified Dodge ". . . wanted to make sure he did not admit guilt." T 20 June 2019, 43. Myhre understood Dodge to be conveying that Dodge wanted to enter an *Alford* plea. T 20 June 2019, 43:21.
37. The court reconvened in the presence of all the potential jurors T 31 Aug 2016, 30. The trial court had the clerk conduct a roll call of the potential jurors. *Id.* at 30. The parties were introduced and the potential jurors were told the trial was expected to last three days. *Id.* at 35. The court let the potential jurors know, ". . . the parties have indicated that they may have gotten this matter resolved, so we're going to . . . let the jurors have a break." *Id.* at 36:16.

38. Court reconvened outside the presence of the jurors. Id. at 37. The judge asked Myhre, "your client is going to plead guilty?" Id. at 37:17. Myhre responded ". . . I have just finished discussing this matter with my client. He has indicated that he is willing to enter all 4 pleas (sic) [*Alford*] pleas on all 5 of the counts. There is shall we say, a limited agreement with the State in terms of sentencing, but part of the agreement is that we do waive the right to a pretrial investigative report, and we proceed immediately to sentencing." Id. at 37:19. The Court asked, "Mr. Dodge, are you prepared to enter a plea at this time, then?" Id. at 38:6. Dodge replied, "yes." Id.

39. The judge asked Dodge about *Alford* pleas,

The Court: Would you stand up, sir. To - - and basically, your attorney has indicated you wish to enter what's called an *Alford* plea. What that means is that you are acknowledging that the State has enough evidence that if this were to proceed to trial, that you would be found guilty. Is that your understanding as well?

Dodge: Yes.

The Court: All right. We'll go through these each count.

T 31 Aug 2016, 38. Dodge pled guilty to all five counts. Id. 38-39. When the judge asked Dodge whether that included Count 5, carrying a concealed firearm, Dodge volunteered that he did and that "it was in the glove box." Id. at 39-40.

40. The judge conducted a Rule 11 colloquy with Dodge. Current post-conviction relief counsel for Dodge conceded the trial court conducted the required Rule 11 plea colloquy and Dodge is not challenging the plea colloquy. T 14 May 2019, 20:10.

Court: Mr. Dodge, did you discuss these *Alford* pleas with your attorney?

Dodge: Yes, I did.

Court: And I know that you had a number of disputes with him and with other counsel, but are you satisfied he's been giving you good advice here, at least this morning?

Dodge: Good as I'm going to get.

Court: All right. Mr. Dodge, did anybody threaten you or coerce you in any way into entering those guilty pleas?

Dodge: Not recently, no.

Court: Have there been any promises made to you to encourage you to enter those?

Dodge: Just that he would recommend 6 years.

Court: All right. And then do you understand they would have had to prove these all by proof beyond a reasonable doubt?

Dodge: I don't understand how I'd be - - I'll end up in the same situation if I go to trial is my understanding of this, and I'll be risking more jail time if I do.

Court: Okay.

Dodge: Is that true?

Court: Yeah, well, it could very well be. It sounds like - - yeah, that's the kind of the situation in a nut shell. I believe you're correct. I know, Mr. Dodge, when you've been in court, we on a number of occasions have advised you of your rights as a criminal defendant. Do you have any questions at all about those rights at this point?

Dodge: No.

Court: And you understand we had a jury sworn in and ready to go, so you could have had a jury trial on all this? Do you understand that?

Dodge: Yes.

Court: And do you understand that by entering these pleas, what we would do is - - you'd be giving up your right to a jury trial, so once these pleas are accepted, we'll go in and dismiss that jury. Do you understand that?

Dodge: Yeah.

T 31 Aug 2019, 40-41.

41. Dodge testified at post-conviction hearing that he pled guilty because he had lost confidence in the trial court and his defense counsel, so he wanted to appeal.

Kraus-Parr: So do you recall that you made an Alford Plea in this case?

Dodge: Yes. I - - the only way I would agree to plead guilty was an Alford Plea because I believed I had a better chance of defending myself from prison and on appeal than I would have defending myself here with Russell Myhre as my attorney.

T 14 May 2019, 37:13.

Kraus-Parr: Okay. Like direct appeal? Can you explain to the Court what you mean by that?

Dodge: To me it just meant that to go to prison, file an appeal with the Supreme Court and have the case looked over by a different court. I lost confidence in this court. I just - - there was nothing else I could do. Russell Myhre wasn't going to defend me or help me, and I had no way of proving; I didn't know what else to do.

T 14 May 2019, 38:7.

42. The state's attorney gave a factual basis. *Id.* at 43-50. Dodge personally made additions he thought corrected the factual basis. *Id.* at 51-52.

43. The court accepted the guilty pleas and was about to release the jury. *Id.*, 52. The state's attorney asked the court to sentence Dodge before the jury was released. *Id.*, 53. The court confirmed on the record that the manifest injustice standard for withdrawing a guilty plea applies after sentencing; not after the guilty plea is accepted. *Id.*, 53. The court sentenced Dodge before releasing the jury. *Id.*, 53.

44. During sentencing, Dodge told the trial court he had spent two years at Kaplan University for psychology and another two years of trade school to become a

machinist. T 31 Aug 2016, 59:7. When the court covered the part of the Appendix A pertaining to maintaining employment, Dodge personally interjected, "That's going to be a big problem. My entire field relies on having a clean record. My aerospace machine stuff will be over." T 31 Aug 2016, 61:12. In regard to the Appendix A prohibition against possessing surveillance devices, Dodge himself interjected that his apartment had been broken into and that surveillance devices are ". . . something I really should have owned." Id., 62:23. Consequently, the court removed the prohibition on surveillance devices. Id., 63:13.

45. The court noted the last provision of the Appendix A ". . . says that I acknowledge that this has been readily explained to you, and that you understand these stated conditions of probation. Is that true?" Id., 64:22. Dodge replied, "That's true." Id., 65:2.

46. The judge went back to release the jurors noting to them.

Before you all scream that this has been a waste of time, I do want to let you know that at least from my point of view, it has not been.

Often times, the reality of having a jury here, people other than cell mates and buddies that they meet at the bar, give somebody a little different viewpoint on how things are going to occur. And so even though you did not end up making a decision today, you were helpful in the process of getting this matter resolved.

T 31 Aug 2016, 65.

47. Dodge testified at post conviction relief hearing that he was assaulted by Stutsman County Correctional Center's Correctional Officer Richard Barnes and that Dodge was coerced into pleading guilty. T 14 May 2019, 36:9.

J. Van de Streek: When you say "he was coercing you to pleading

guilty," what do you mean by that?
Dodge: I mean he [Barnes] told me to plead guilty and struck me over the head, and we began fighting.
J. Van de Streek: Okay. And that would have been before your change of plea?
Dodge: That was the change of plea hearing right before and during it because we went into the hearing and I wasn't cooperating, and I then went back into the hallway and more arguing, more fighting, back into the *37 the courtroom. I didn't cooperate. I wasn't pleading guilty, and they treated me bad until they finally got what they wanted out of me.

T 14 May 2019, 36-37. Dodge elucidated, testifying that his attorney, Russ Myhre, personally witnessed "violent, physical, confrontation and coercion going on between myself and Lieutenant Rich Barnes in the hallway. His [Myhre's] exact words were, 'I didn't see anything.'" T 14 May 2019, 43:13. Dodge claimed, "I was talking to a bunch of people who knew I was being coerced." T 14 May 2019, 41:21. Dodge has never identified any of these people nor has anyone testified in support of Dodge's coercion/assault claim.

48. Myhre testified Dodge had not told Myhre that any Stutsman County Correctional officer had assaulted Dodge. T 20 June 2019, 57:16. The judge asked Myhre whether Myhre had ever seen a correctional officer assault Dodge in one of the court house's back hallways. T 20 June 2019, 48. Myhre answered he had never seen anything like that. T 20 June 2019, 48:5. Myhre added Dodge had never discussed with Myhre any correctional officer attempting to coerce Dodge into pleading guilty. T 20 June 2019, 48:9.

49. Correctional officer Barnes testified he'd never had any kind of physical

altercation with Dodge. T 20 June 2019, 76. Barnes testified there was no assault. Id. Barnes testified he wasn't aware of any correctional officer trying to influence or stress to Dodge that he ought to plead guilty. Id.

50. Dr. Mugge authored a twenty six page report about Dodge entitled *Psychological Evaluation*. 47-2018-CV-256, Index # 181, AAA 39.

51. On page 25 of the report, Mugge offered, "**Whether intentionally produced or unintentionally experienced**, delusional statements and accusations have **impaired** his ability to interact and communicate with his attorneys." AAA, 63.

Dr. Mugge was uncertain whether Dodge's accusations were *intentionally produced* or *unintentional delusions*. Id.

52. Mugge went on to opine that Dodge's accusations **impacted** on his ability to guide decisions.

While this certainly is challenging case in which reasonable professionals may disagree, it appears that given the available information, Mr. Dodge's observed *difficulty communicating with his former attorney's impacted his ability* to guide decisions in his case (e.g. accepting a plea deal, pleading guilty) and exhibit appropriate behavior within the courtroom.

Id. Mugge testified she believed the language quoted above conveyed to her peers that she had concluded Dodge was unfit to assist in his defense. Id., 33:23.

53. When Dr. Mugge testified, she offered the following opinion: *at the time Dodge changed his plea he was not competent to do so*. T 16 Aug 2019, 18:11. Post-conviction relief counsel explained the reason this opinion was not in Mugge's reports was Mugge ". . . can't make a legal conclusion." Id., 20:12.

54. Mugge acknowledged she'd testified to the ultimate issue, but did not give the opinion in her report. *Id.*, at 29:15. Mugge explained the absence of a conclusion in her report with, ". . . in those trainings, we are guided to avoid addressing the ultimate decision and leaving the ultimate decision to the fact finder in the case." *Id.*, at 23:10.

55. Dr. Mugge's report was based in part on an instrument called *Evaluation of Competency to Stand Trial Revisited* (ECST-R). Mugge's *Psychological Evaluation*, 20; AAA, 59. Mugge acknowledged the ECST-R is comprised of 18 items and three individual scales, but that Mugge did not include in her report her scoring on any of them. T 16 Aug 2019, 46:20.

56. On cross examination, Mugge was asked,

state's attorney: If he had a delusion on the date that he pled guilty it did not override his will to exercise and make a decision on whether to plead guilty or not, did it?

Mugge: Based on your questioning and the trial transcript, no.

57. Dr. Lisota evaluated Dodge in 2018 to determine whether Dodge was competent to assist his post-conviction relief counsel. Lisota's 9 page report entitled *Psychological Evaluation Competency to Stand Trial*, was received in evidence. 47-2018-CV-256, Index # 198. At page seven of his report Dr. Lisota gave the following opinion.

To a reasonable degree of psychological certainty based on his performance in the interview and on the RCAI the undersigned believes that Mr. Dodge is fit to proceed if he chooses to be. At the present time and historically this has not been the case, though

this appears to be a conscious decision on his part to not work with attorneys provided rather than the product of legitimate mental illness.

At page five of his report Dr. Lisota explained, based on his experience, it is apparent that Dodge is choosing to hold up the legal system.

In the undersigned's experience, someone with a similar presentation and legitimate mental illness would be evidencing symptoms of paranoia to a much broader extent, e.g. they would be unable to participate in the evaluation with the undersigned or the symptoms would extend much further into areas of general life functioning. Further, such individuals typically do want to represent themselves in the undersigned's experience, which Mr. Dodge clearly does not. Mr. Dodge has essentially brought his legal proceedings to a halt because every attorney he is assigned is part of the "conspiracy" against him (and after this report is filed, the undersigned will likely be a part of the "conspiracy" as well) and he cannot work with them nor is he willing to represent himself. Overall the results very strongly suggest that Mr. Dodge is fit to proceed, he's simply quite intelligent, has an extensive knowledge of the legal system and how to manipulate it, and is doing so rather effectively.

Psychological Evaluation Competency to Stand Trial, at 5, 47-2018-CV-256,

Index # 198.

58. Lisota testified that "My opinion was that Mr. Dodge is competent to assist in his defense if he chooses to do so. He has an excellent foundation for his general legal knowledge and court procedures which is a considerable part of the, um, competency issues . . ." T 16 Aug 2019, 82:10.
59. Trial Defense Counsel Myhre testified he is a lawyer with over 40 years of experience the primary focus of which is criminal defense. T 20 June 2019, 49-
50. Myhre testified, "I felt that he was competent to enter his own plea." T 20

June 2019, 47:15. Myhre testified his lay opinion is that, ". . . on the day in question I believe that he [Dodge] made a knowing and intelligent plea. He articulated to me that he wanted to leave Stutsman County as soon as possible." T 20 June 2019, 43:1; 57:8. Myhre testified that had he thought Dodge was not making the guilty plea knowingly and voluntarily that Myhre ". . . would have made a big fuss . . ." T 20 June 2019, 47:8.

60. Myhre testified Dodge is what he calls a "chaos client" one who attempts to throw out as many odd things as possible to achieve whatever ends it may be, continuance, not guilty plea, or some other benefit. T 20 June 2019, 42:6.
61. Examined by his counsel at the post-conviction hearing, Dodge claimed he'd been an inpatient for 9 weeks in Naperville, Illinois.

Kraus-Parr: And you said there was a - - you were in inpatient treatment when you were a child.
Dodge: Yes, nine weeks.
Kraus-Parr: Nine weeks? How old were you?
Dodge: 12 years old.
Kraus-Parr: Do you recall what condition they were treating you for?
Dodge: Not really sure. They never discussed it with me.
Kraus-Parr: Where would that have been?
Dodge: Linden Oaks Mental Hospital in Naperville, Illinois.

T 14 May 2019, 34. On cross examination Dodge offered that he was born in Palos Heights, Illinois. Id., at 44:9. Asked how far Naperville was from Palos Heights, Dodge offered he'd never been in either Palos Heights or Naperville, Illinois. T 14 May 2019, 44:20.

Standard of review for order denying post-conviction relief claim of ineffective

assistance of counsel, clearly erroneous.

62. In the 2008 case *Patten v. State*, the Court set out the standard of review for post conviction relief claims of ineffective assistance of counsel related to guilty pleas as follows.

In *Heckelsmiller v. State*, 2004 ND 191, ¶ 5, 687 N.W.2d 454, this Court explained the standard of review for a claim of ineffective assistance of counsel in a post-conviction relief proceeding:

“Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. *Varnson v. Satran*, 368 N.W.2d 533, 536 (N.D.1985). The issue of ineffective assistance of counsel is a mixed question of law and fact that is fully reviewable by this Court. *Breding v. State*, 1998 ND 170, ¶ 4, 584 N.W.2d 493 (citing *Falcon v. State*, 1997 ND 200, ¶ 21, 570 N.W.2d 719). Nonetheless, a trial court's findings of fact in a post-conviction relief proceeding will not be disturbed unless **clearly erroneous**. N.D.R.Civ.P. 52(a); *Frey v. State*, 509 N.W.2d 261, 263 (N.D.1993). 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. *Burlington Northern and Sante Fe Railway Co. v. Burlington Resources Oil & Gas Co.*, 1999 ND 39, ¶ 10, 590 N.W.2d 433.”

The “heavy burden” required for a post-conviction relief applicant to prevail on an ineffective assistance of counsel claim was also described in *Heckelsmiller*, 2004 ND 191, ¶ 3, 687 N.W.2d 454:

“[A] defendant claiming ineffective assistance of counsel has a heavy burden of proving (1) counsel's representation fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel's deficient performance.” *DeCoteau [v. State]*, 1998 ND 199, ¶ 6, 586 N.W.2d 156 (citing *Mertz v. State*, 535 N.W.2d 834, 836 (N.D.1995)). “Effectiveness of counsel is measured by an ‘objective standard of reasonableness’ considering

‘prevailing professional norms.’ ” *Lange v. State*, 522 N.W.2d 179, 181 (N.D.1994) (quoting *Strickland [v. Washington]*, 466 U.S. 668, 688, [104 S.Ct. 2052, 80 L.Ed.2d 674] (1984)). The defendant must first overcome the “strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” *Stoppeworth v. State*, 501 N.W.2d 325, 327 (N.D.1993) (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). “ Trial counsel's conduct is presumed *629 to be reasonable and courts consciously attempt to limit the distorting effect of hindsight. *Lange*, 522 N.W.2d at 181.”

In the context of guilty pleas, the second prong of the test is satisfied if the defendant shows “ ‘there is a reasonable probability that, but for counsel's errors, **he would not have pleaded guilty and would have insisted on going to trial.**’ ” *Ernst v. State*, 2004 ND 152, ¶ 10, 683 N.W.2d 891 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)).

Patten v. State, 2008 ND 29, ¶¶ 7-9, 745 N.W.2d 626, 628–29.

Standard of review for order denying post-conviction relief request to withdrawal of guilty plea, abuse of discretion.

63. A district court's decision on a post-conviction relief request to withdraw a guilty plea is reviewed for abuse of discretion.

[¶ 3] An application for post-conviction relief, where the defendant is seeking to withdraw a guilty plea, is treated as a request under N.D.R.Crim.P. 11(d). *Eaton v. State*, 2011 ND 35, ¶ 5, 793 N.W.2d 790 (citing *Patten v. State*, 2008 ND 29, ¶ 14, 745 N.W.2d 626). “After a court has accepted a guilty plea and imposed sentence, a defendant cannot withdraw a plea unless withdrawal is necessary to correct a manifest injustice.” *Id.* (citing *677 *State v. Bates*, 2007 ND 15, ¶ 6, 726 N.W.2d 595). **The court has discretion in finding whether a manifest injustice necessitating the withdrawal of a guilty plea exists, and we review the court's decision for abuse of discretion.** *Id.* (citing *Bates*, at ¶ 6). An abuse of discretion under N.D.R.Crim.P. 11(d) occurs when the court's legal discretion is not exercised in the interest of justice. *Bates*, at ¶ 6.

State v. Howard, 2011 ND 117, ¶ 3, 798 N.W.2d 675, 676–77. “A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or it misinterprets or misapplies the law.” *State v. Garge*, 2012 ND 138, ¶ 8, 818 N.W.2d 718, 720–21.

Argument

64. Post-conviction relief / appellate counsel repeatedly told the trial court and this court that Trial Defense Counsel Myhre was ineffective because Myhre filed the motion for psychiatric evaluation after the deadline for pretrial motions had expired.
- A. "Mr. Myhre failed to request a psychological evaluation in a timely manner." Appellant's Brief, ¶ 23.
 - B. "If you look at why Mr. Myhre's request for evaluation was denied, it was untimely. He missed his deadline." T 14 May 2019, 10:12.
 - C. "I must prove two prongs to the Court, the first being there was a defect in the representation, which I think the Order speaks for itself. He missed the deadline. I don't know by how much." T 14 may 2019, 27:12.
65. When, on the 23rd of May 2016, Russell Myhre was appointed to represent Dodge, the 04 March 2016 deadline for filing pre-trial motions had already passed. The 03 February 2016 *Notification of Assignment and Case Number* contained a 04 March 2016 deadline for pretrial motions. 47-2015-CR-00829, Index # 14. Current post-conviction relief / appellate counsel recognized while questioning

Myhre, "Obviously, you weren't the first attorney on the case, and so time limits or pretrial motion deadlines had already passed potentially when you got on the case; is that accurate?" T 20 June 2019, 58:13.

66. "[A] defendant claiming ineffective assistance of counsel has a heavy burden of proving (1) counsel's representation fell below an objective standard of reasonableness." *DeCoteau v. State*, 1998 ND 199, ¶ 6, 586 N.W.2d 156. Dodge's current position that Myhre's missing a deadline that had passed before Myhre was even appointed to the case is untenable. It is not an objectively reasonable measure of performance. No lawyer appointed to a case on the 23rd of May 2016 can satisfy a 04 March 2016 deadline because the deadline expired two months before the lawyer was appointed.
67. The second prong of ineffective assistance of counsel is that ". . . the defendant was prejudiced by counsel's deficient performance." *DeCoteau v. State*, 1998 ND 199, ¶ 6, 586 N.W.2d 156. In the post-conviction relief hearing, Dodge gave reasons why he pled guilty and the reasons had nothing to do with the time of the filing of the motion.

Kraus-Parr: So do you recall that you made an Alford Plea in this case?
Dodge: Yes. I - - the only way I would agree to plead guilty was an Alford Plea because I believed I had a better chance of defending myself from prison and on appeal than I would have defending myself here with Russell Myhre as my attorney.

T 14 May 2019, 37:13.

Kraus-Parr: Okay. Like direct appeal? Can you explain to the Court what you mean by that?

Dodge: To me it just meant that to go to prison, file an appeal with the Supreme Court and have the case looked over by a different court. I lost confidence in this court. I just - - there was nothing else I could do. Russell Myhre wasn't going to defend me or help me, and I had no way of proving; I didn't know what else to do.

T 14 May 2019, 38:7. Dodge revealed he didn't have confidence in the trial court or his trial defense counsel so he chose to plead guilty to try to get another chance at having his case reviewed. Other than the mistaken argument about a missed deadline, Dodge has not briefed anything he wanted his trial defense counsel to do that ought to have been done and was not done. The trial transcript and the testimony of Dodge and Myhre show that Dodge and Myhre worked constructively on the morning of trial once Dodge decided he wanted to work with Myhre. Myhre testified he and Dodge conferred on the sentence offer from the State and Dodge wanted to enter *Alford* pleas. T 20 June 2019, 43:21. Myhre quickly advocated for civilian shoes rather than jail issue Crocs and Dodge offered that he appreciated the wisdom of Myhre's request. T 31 Aug 2016, 13:17. Myhre and Dodge conferred about whether to allow 11 jurors to decide the case if one juror became unavailable and Dodge responded deferentially, "That's something I would ask you [Myhre] about." T 31 Aug 2016, 15:17.

68. In earlier pleadings, Dodge has alleged coercion as the basis for his ineffective assistance of counsel claim. In his 20 July 2018 *Supplement to Application for Post-Conviction Relief and Response to State's Answer*, Dodge claimed he was coerced into pleading guilty. 47-2018-CV-256, Index # 37. The basis for that

claim was that when the court asked Dodge, "All right. Mr. Dodge, did anybody threaten you or coerce you in any way into entering those guilty pleas" Dodge replied, "not recently, no." 47-2018-CV-256, Index # 37, ¶ 18. When Dodge testified at his post-conviction relief hearing he accused Correctional Officer Barnes of assaulting and pressuring Dodge to plead guilty and claimed Trial Defense Counsel Myhre saw this and laughed remarking, *I didn't see anything*. T 14 May 2019, 43:13. Dodge claimed, "I was talking to a bunch of people who knew I was being coerced." T 14 May 2019, 41:21. Dodge has never identified any of these people and nobody has testified in support of Dodge's coercion/assault claim. Both Myhre and Barnes denied any incident like Dodge described ever occurred. In his brief to this court, Dodge has not argued he was coerced to plead guilty, and has evidently abandoned the coercion claim. The district court judge correctly relied on the testimony of Barnes and Myhre in support of the conclusion ineffective assistance had not been proven. *Order Denying Application for Post-Conviction Relief*, ¶ 23.

69. Dodge has failed to show ineffective assistance of counsel and has failed to show how any action or inaction of counsel resulted in harm to Dodge. The jury was cued up and ready to hear Dodge's case. T 31 Aug 2019, 40-41. Dodge could have had a trial with Myhre representing him or could have gone pro-se. T 31 Aug 2019, 40-41.
70. Dodge has failed to give any evidence showing " . . . there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and

would have insisted on going to trial.' ” *Patten v. State*, 2008 ND 29, ¶¶ 7-9, 745 N.W.2d 626, 628–29.

71. Dodge argues he was unfit to assist in his defense. The evidence he relies on in support of the claim is that he repeatedly accused his counsels of nefarious actions against Dodge and the opinions of Dr. Mugge.
72. North Dakota Century Code § 12.-04-07(2)(e) on competency evaluations specifies that the report of the examining psychiatrist or psychologist must include: "*An opinion as to whether the defendant is fit to proceed or is unable to effectively communicate with counsel . . .*" Dr. Mugge's report contained no opinion on whether Dodge was *fit* or *unable*, but vague observations that Dodge's claims impacted and/or impaired his relations with his lawyers.
73. The United States Supreme Court has ". . . previously emphasized the difficulty of retrospectively determining an accused's competency to stand trial." *Pate v. Robinson*, 383 U.S. 375, 387, (1966) citing *Dusky v. United States*, 362 U.S. 402. The Ninth Circuit sets out ". . . two major factor we consider [in retrospective evaluations]: the passage of time and the availability of medical reports contemporaneous to the time of the initial hearing." *McMurtrey v. Ryan*, 539 F.3d 1112, 1131 (9th Cir. 2008). Dr. Mugge acknowledged the difficulty, "Research has shown that retrospective analysis of an individual's trial competency . . . may be complicated by the passage of time and availability of relevant records in order to construct the defendant's mental state post-verdict." AAA, 60, *Psychological Evaluation*, page 22, ¶ 5. Mugge's retrospective evaluation was conducted three

years after the guilty plea with no psychological records that were contemporaneous with the guilty plea.

74. Dr. Mugge seems effected by the inherent difficulty of retrospective evaluation. Mugge indecisively offered, "**Whether intentionally produced or unintentionally experienced**, delusional statements and accusations have impaired his ability to interact and communicate with his attorneys." Mugge seems to be unwilling to conclude Dodge's accusations were the product of delusions and leaves open the possibility Dodge was simply intentionally harassing his lawyers. *Psychological Evaluation*, ¶25, AAA, 63.
75. Judge Merrick, an experienced trial court judge, opined on the 23rd of August 2016, a week before the 31 August 2016 guilty plea, "there has been no evidence provided by the Defendant, and the Court has made no observations, giving reasonable grounds to believe Mr. Dodge is not competent to stand trial." *Order Denying Defendant's Motion for Examination*, 47-2015-CR-829, Index # 55.
76. Russell Myhre, a lawyer with over 40 years of experience primarily focused on criminal defense testified his lay opinion is, ". . . on the day in question I believe that he [Dodge] made a knowing and intelligent plea. He articulated to me that he wanted to leave Stutsman County as soon as possible." T 20 June 2019, 43:1; 49-50; 57:8. Myhre testified that had he thought Dodge was not making the guilty plea knowingly and voluntarily that Myhre ". . . would have made a big fuss . . ." T 20 June 2019, 47:8. Myhre testified, "I felt that he was competent to enter his own plea." T 20 June 2019, 47:15.

77. Dr. Lisota is a psychologist who has been conducting forensic examinations since 2008. Lisota, *Curriculum Vitae, State's Exhibit 1*, 47-2018-CV-256, Index # 197. Lisota's opinion is that ". . . Mr. Dodge is fit to proceed if he chooses to be." *Psychological Evaluation Competency to Stand Trial*, at 7, 47-2018-CV-256, Index # 198. Lisota relied on his experience and testing for his opinion that ". . . someone with a similar presentation and legitimate mental illness would be evidencing symptoms of paranoia to a much broader extent, e.g. they would be unable to participate in the evaluation with the undersigned or the symptoms would extend much further into areas of general life functioning." *Psychological Evaluation Competency to Stand Trial*, at 5, 47-2018-CV-256, Index # 198.
78. The post-conviction relief trial judge, found that Dodge is ". . . intelligent and understands how to manipulate a court proceeding." *Order Denying Application for Post-Conviction Relief*, ¶ 18, AAA, 25. The judge found Dr. Mugge's report and testimony "were not persuasive." *Id.*, ¶ 16. Although great deference is given to the opinions of experts like Dr. Mugge, *Interest of Tanner*, 2017 ND 153, ¶4, 897 N.W.d 901, the court is not to sacrifice its independent judicial decision making to experts. *In re Hehn*, 2008 ND 36, ¶21, 745 N.W.2d 631, 636.
79. The district court judge deciding the post-conviction application gave significant weight to and found as credible the assessments on competency made by the trial court judge and the trial defense counsel, both of whom were present with Dodge at and around the time of sentencing. *Order Denying Application for Post-Conviction Relief*, ¶ 17, ¶20 (adopting ¶10 et al. of *State's Argument on*

Application for Post Conviction Relief Index # 201, summarizing Myhre's opinion
Dodge was competent when he pled guilty); AAA 24, 25.

Conclusion

80. The State asks this Court to affirm the lower court's denial of Dodge's application for post-conviction relief.

Rule 28(h) of the North Dakota Rules of Appellate Procedure explanation of why oral argument would be helpful to the court.

81. The combined procedural histories of the criminal case and the post-conviction relief case are moderately complex. This advocate's intent is to ensure that the pivotal junctures in the history are emphasized adequately. This advocate harbors a natural apprehensiveness that what stands in the ranks and files of a brief may not step forward and make itself known.

Rule 32(e) of the North Dakota Rules of Appellate Procedure Certificate of Page Number Compliance.

82. This *Appellee's Brief* complies with the 38 page limit in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure. This brief is 37 pages.

Dated 22 January 2020.

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CERTIFICATE OF SERVICE

83. On 22 January 2020, the *Appellee's Brief* was served by e-mail to Kiara Kraus-Parr, attorney for the Appellant, at service@kpmwlaw.com
84. On 22 January 2020, the *Appellee's Brief* was filed electronically with the Clerk of the North Dakota Supreme Court by e-mailing to:
supclerkofcourt@ndcourts.gov

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