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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Miguel Humberto Medina-Romero, Petitioner/Appellant, vs. State of North Dakota, Respondent/Appellee.	Supreme Court No. 20140287 Pembina Co. No. 34-10-K-00242

APPEAL FROM THE ORDER DENYING APPLICATION FOR POST CONVICTION RELIEF ON INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ENTERED BY THE DISTRICT COURT FOR THE NORTHEAST JUDICIAL DISTRICT THE HONORABLE LAURIE FONTAINE PRESIDING ON JULY 21st, 2014.

BRIEF FOR THE APPELLANT

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JURISDICTIONAL STATEMENT

The judgment of the District Court for the Northeast Judicial District, County of Pembina, State of North Dakota was entered on July 23, 2014. Appellant gave timely notice of the appeal on August 14, 2014. An application for post conviction relief may be considered by any judge of the court in which the conviction took place. N.D.C.C. § 29-32.1-03(7) A final judgment in an action for post conviction relief "may be reviewed by the supreme court of this state upon appeal as provided by rule of the supreme court." N.D.C.C. § 29-32.1-14

STATEMENT OF THE ISSUES

I. Whether Romero's trial counsel's failure to investigate a material witness satisfies the Strickland test for ineffective assistance of counsel.

II. Whether Romero's trial counsel's failure to properly explain the voir dire and jury selection process to Romero satisfies the Strickland test for ineffective assistance of counsel.

NATURE OF THE CASE & PROCEDURAL HISTORY

¶1 On October 18, 2010, a Felony Complaint/Information was filed charging Miguel Humberto Medina-Romero ("Romero") with one count of unlawful possession/manufacture of a controlled substance (marijuana) and one count of murder. Docket 34-10-K-00242 (hereinafter, "Docket K-00242") (No.1). Attorney Robert Fleming ("Attorney Fleming") was retained in this matter; the State was represented by Attorneys Barbara Whelan, Cameron Sillers, and Stuart Askew ("Attorney Whelan", "Attorney Sillers", and "Attorney Askew", respectively). (App. 3). On January 7, 2011, an Amended Felony Complaint/Information was filed charging counts in addition to those charged on October 18, 2010: one count of unlawful possession of a controlled substance (cocaine) with intent to deliver and one count of tampering with physical evidence. Docket K-00128 (No. 15) (App. 9-11). A jury trial was held on August 1, 2011, through August 5, 2011. The fourth charge, tampering with physical evidence, was dismissed; however, Romero was convicted of the first three charges. Docket K-00242 (Nos. 62-64, 71). On October 18, 2011, Romero was sentenced and on October 21, 2011, criminal judgment was entered for the three convictions. Docket K-00242 (Nos. 89-91) (App. 12-14). On October 31, 2011, an amendment to the criminal judgment for count #2 was entered, changing it from a Class A Felony to a Class AA Felony. Docket K-00242 (No. 92) (App. 15).

¶2 On November 14, 2011, Romero timely filed notice of appeal in the Supreme Court of North Dakota from the judgment and amended judgment entered on October 21, 2011 and October 31, 2011 respectively. Docket K-00242 (No. 97). Romero requested and was granted appointed defense counsel; Attorney Ben Pulkrabek ("Attorney

Pulkrabek") was assigned on December 16, 2011. Docket K-00242 (No. 121). On April 30, 2012, Romero filed a motion and brief to hold a hearing at which time the court reporter who transcribed the Voir Dire during Romero's trial, Romero himself, and attorneys for both parties could be present to correct the Voir Dire Transcript, because it was found that certain parts of the transcript were indiscernible. Docket K-00242 (Nos. 130-31). This motion was granted via email dated April 25, 2012. Docket K-00242 (No. 133). On June 1, 2012, a hearing was held and Romero, Attorney Pulkrabek, Attorney Fleming, and Attorney Sillers were present. Docket K-00242 (No. 136). At this hearing, the Court and the parties went through the entire voir dire transcript and were able to correct most of the "indiscernible" responses. The Argument in this appeal was then heard in September 2012. (App. 16). The Judgment and Opinion of the Supreme Court of North Dakota were filed on May 14, 2013 and subsequently filed in the District Court on July 12, 2013. (App. 16, 17-30). Relief was denied and the judgment of the District Court affirmed. (App.16).

¶3 Following these events, Romero filed a letter dated July 8, 2013, with the Pembina County Clerk of Court, which stated he wanted to proceed with post conviction relief and requesting an attorney for assistance. Docket 34-2013-CV-00128 (hereinafter, "Docket CV-00128") (No.1) (App. 31-32, 46). The District Court notes that this letter was dated July 8, 2013, was signed on July 28, 2013, and was received in the Clerk's office on July 31, 2013. Docket CV-00128 (No. 1) (App. 31-32, 46). The Clerk treated it as a petition for post conviction relief and appointed an attorney. Jean Delaney, Assistant Director for the North Dakota Commission on Legal Counsel for Indigents, objected to the appointment via letter dated August 6, 2013, stating that the letter from Romero did

not meet the requirements of a petition for post conviction relief. Docket CV-00128 (No. 5) (App. 33, 46). Romero then filed an actual Application for Post Conviction Relief dated September 19, 2013. Docket CV-00128 (No. 6 & 7) (App. 34-36, 37, 46). However, the district court proceeded as though Romero's original letter request had met the requirements of a petition for purposes of consideration. (App. 46). Attorney Don Krassin ("Attorney Krassin") was appointed in this matter and the State was represented by Attorney Stephenie Davis ("Attorney Davis"). Docket CV-00128 (App. 38-42, 43-45). The district court granted an Evidentiary Hearing, which was held on June 23, 2014. The district court took the arguments of both parties under advisement and issued an Order Denying Application for Post Conviction Relief accompanied by an opinion, which was filed on July 23, 2014. Docket CV-00128 (No. 36) (App. 46-49).

¶4 Subsequent to the post conviction proceedings, an Order for Transcript and a Notice of Appeal from Order Denying Application for Post Conviction Relief were filed on August 14, 2014. Docket CV-00128 (No. 37 & 38) (App. 50).

STATEMENT OF THE FACTS

¶5 As previously stated, the jury trial was held on August 1, 201,1 through August 5, 2011. On August 5, 2011, the jury returned a verdict of guilty for Romero on three counts charged by the State: murder, unlawful possession/manufacture of a controlled substance (marijuana), and unlawful possession of a controlled substance (cocaine) with intent to deliver. Docket K-00128 (Nos. 62-64). A Presentence Investigation was ordered and sentencing took place on October 18, 2011. Docket K-00128 (Nos. 80-81). Criminal judgments were subsequently entered on October 21, 2011, with an amended criminal judgment for the murder charge being filed on October 31, 2011. Docket K-00128 (Nos. 89-92) (App. 12-15). Romero was sentenced to concurrent time with the Department of Corrections, specifically: ten (10) years for the unlawful possession/manufacture of a controlled substance (marijuana) charge, twenty (20) years for the unlawful possession of a controlled substance (cocaine) with intent to deliver charge, and life without parole for the murder charge. Docket K-00128 (Nos. 89-92) (App. 12-15).After the trial, Romero appealed the final judgments of the District Court. Docket K-00128 (Nos. 97). After briefs and a hearing to recreate the voir dire transcripts, the Supreme Court of North Dakota affirmed the judgments of the District Court. Docket K-00128 (Nos. 139-140) (App. 16, 17-30).

¶6 Following the appeal, an evidentiary hearing was held in the post conviction matter on June 23, 2014. During the hearing, testimony was taken from Romero, trial counsel Attorney Fleming, and a witness to the alleged crime, Jace Brown. At this hearing, it was adduced by Attorney Krassin that Attorney Fleming did not call a witness that Attorney Fleming had the opportunity to call during trial, namely “Rica Senum”

("Senum"). June 23, 2014 Tr. 57. Attorney Fleming testified that the reason he did not call Senum as a witness was because he recalled no mention of her in the police reports or other discovery documents. June 23, 2014 Tr. 53. He further testified that he did not call another eyewitness, Ben Ohmann, for very specific reasons; however, because Romero would not waive his attorney client privilege he could not divulge these reasons. June 23, 2014 Tr. 53. Attorney Krassin presented Attorney Fleming with Senum's Pembina County Sheriff's Office voluntary statement form, which established Senum as an eyewitness. When questioned as to whether he was aware of this document, Attorney Fleming responded that he had no recollection of it at this point. June 23, 2014 Tr. 56-57.

¶7 Furthermore, Romero was never provided with discovery until after convicted and serving time in prison. June 23, 2014 Tr. 11. Romero testified that he was made aware of Senum's existence after reviewing the discovery post-trial. Romero testified that he believed it would have been effective to call her as a witness. June 23, 2014 Tr. 22. Upon review of the discovery, Romero discovered inconstancies in a number of the trial witnesses' statements. For example, Jace Brown ("Jace") initially told police that he was not present at the scene, but later changed his story. June 23, 2014 Tr. 14-15. Further, that Jace's brother Beau stated to police that it was too dark to see if the victim had a weapon in his hand, yet claimed that he clearly saw that the victim did not have anything his hand. June 23, 2014 Tr. 16-17.

¶8 Lastly, during the evidentiary hearing, Attorney Krassin asked Romero if he understood what the Judge meant by "objection to a juror for cause[,]" at which time Attorney Krassin needed to explain the jury selection and voir dire process to Romero. June 23, 2014 Tr. 24-25. Romero did not understand how a jury was selected. June 23,

2014 Tr. 24. Subsequent to this, the State asked Romero if he remembered the jurors explaining that they could be unbiased. June 23, 2014 Tr. 31. Romero answered that they all knew the victim or family in some way. June 23, 2014 Tr. 31. Attorney Krassin then followed up with Romero, asking if Romero had any idea what grounds would be used to exclude a juror. June 23, 2014 Tr. 32 Romero responded, "No, I just use my common sense[,]" signifying that he did not know the legal basis for what makes a juror biased or not, and did not understand what process was used for striking jurors. June 23, 2014 Tr. 31-32.

LAW AND ARGUMENT

STANDARD OF REVIEW

¶9 The standard of review in a post conviction of varies depending on what is being addressed by the appeal. Questions of law are fully reviewable on appeal. Peltier v. State, 2003 ND 27, ¶ 6, 657 N.W.2d 238. Findings of fact will not be disturbed, though, unless they are clearly erroneous under N.D.R.Civ.P. 52(a). Cue v. State, 2003 ND 97, ¶ 10, 663 N.W.2d 637.

¶10 The Uniform Post-Conviction Procedure Act states:

> 1. A person who has been convicted of and sentenced for a crime may institute a proceeding applying for relief under this chapter upon the ground that:
>
>   a. The conviction was obtained or the sentence was imposed in violation of the law or the Constitution of the United States or the law or Constitution of North Dakota . . .

N.D.C.C. § 29-32.1-01. Ineffective assistance of counsel is a claim that may be brought as a Post Conviction Relief Claim under Chapter 29-32.1; ineffective assistance of counsel at any phase of a criminal proceeding, if proven, violates a defendant's Sixth Amendment Rights. The Sixth Amendment specifically articulates:

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

U.S. Const. Amend. VI. Furthermore, the North Dakota State Constitution is not dissimilar, and provides the following:

> In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court

> to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.

N.D. Const. Art. I, § 12. Therefore, under both the Federal and North Dakota State Constitutions, Romero and all other defendants have the right to effective counsel; and if counsel is found to be deficient to the point of violating the rights of those defendants, then relief should be granted. In analyzing whether or not the a claim for ineffective assistance of counsel is valid and should be granted, the Court uses what is commonly referred to as the "Strickland Test".

¶11 In Strickland, the Court clearly set forth the standards which must be met in order for a defendant to show ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). It is a two prong test; at its most basic, it requires that the defendant show: 1) "[C]ounsel's performance was deficient" and 2) "the deficient performance prejudiced the defense." Id. at 687. Both factors must be proven for the defendant to succeed on a claim, or "it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable." Id.

¶12 The first prong is commonly referred to as the "performance prong" and is satisfied if counsel's performance is deficient, specifically, if "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. Under this prong, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." State v. Myers, 2009 ND 141, ¶14, 770 N.W.2d 713. The 8th Circuit further explained that there is a "presumption [of competence] in favor of counsel." Kenley v. Armontrout, 937 F.2d

1298, 1304 (8th Cir. 1991). Finally, the Supreme Court has held that "strategic choices [of counsel] made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690-91 (1984).

¶13 The second prong, that counsel's deficient performance prejudiced the defense, is satisfied if the defendant shows "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. The Supreme Court of North Dakota clarified in State v. McLain that the question would be "whether or not there is a reasonable probability that, *but for* counsel's unprofessional conduct, the proceeding's result would have been different." McLain, 403 N.W.2d 16, 18 (N.D. 1987) (citing State v. Micko, 393 N.W.2d 741, 747 (N.D. 1986) and State v. Thompson, 359 N.W.2d 374 (N.D. 1985)). This Court went on to say that "[i]n a criminal case the question becomes whether or not 'there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting the accused's guilt." Id. The Court in Strickland defined "reasonable probability" as a probability "sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. This Court further defined the second factor of Strickland, stating that the prejudice element requires the defendant to not only establish that "but for his counsel's errors, the result of the proceeding would have been different[,]" but also to "specify how and where trial counsel was incompetent and the probable different result." McMorrow v. State, 2003 ND 134, ¶10, 667 N.W.2d 577 (citing Syvertson v. State, 2000 ND 185, ¶22, 620 N.W.2d 362 and State v. Palmer, 2002 ND 5, ¶11, 638 N.W.2d 18).

¶14 Based on the subsequent arguments, Romero's trial counsel, Attorney Fleming, provided ineffective assistance of counsel and the court erred in denying his

motion for post conviction relief. Attorney Fleming failed to investigate a material witness for Romero's case and Attorney Fleming failed to explain the voir dire and jury selection process. Both of these failures meet the Strickland test for ineffective assistance of counsel, and therefore, Romero should have been granted his motion for post conviction relief.

I. The District Court Erred In Denying Defenses' Motion For Post Conviction Relief When Romero's Trial Counsel Failed To Interview And Call A Material Witnesses Whose Testimony Could Have Proven Beneficial And Exculpatory.

¶15 Romero's trial counsel, Attorney Fleming, did not call a material witness to the stand. Based on this, Romero was able to meet his burden on both prongs of the Strickland test. This lack of diligent trial preparation and investigation on Attorney Fleming's part is an example of what the Court in Strickland and the cases that followed have deemed sufficient to form the foundation of an ineffective assistance of counsel claim. As previously stated, there are two basic factors this Court must consider under the Strickland test and that Romero has the burden to prove before this Court may grant post conviction relief to Romero.

A. Attorney Fleming Did Not Provide Reasonably Effective Assistance When He Failed To Conduct An Adequate And Through Trial Preparation And Investigation, Resulting In A failure To Interview And Call An Eye Witness To The Crime, Rica Senum, At Trial.

¶16 The district court did not rule on the 'performance prong' of the Strickland test. It instead proceeded straight to the prejudice prong and concluded that there was no prejudice to the defendant. The North Dakota Supreme Court has stated that ″[i]f it is easier to dispose of an [ineffective assistance of counsel] claim on the ground of lack of sufficient prejudice, . . . that course should be followed." Myers, 2009 ND 141, ¶16, 770

N.W.2d 713. However, it can be inferred that the district court concluded Attorney Fleming's trial preparation and conduct was reasonable.[1]

¶17 Under the Strickland test as noted above, when presenting a claim of ineffective assistance of counsel a two-prong test must be satisfied. The first prong requires a showing that a trial attorney's conduct was unreasonable and the second prong requires a demonstration that prejudice occurred as a result of such conduct. A defendant "has a heavy burden of proving counsel's representation fell below an objective standard of reasonableness and the defendant was prejudiced by counsel's deficient performance." Myers, 2009 ND 141, ¶13, 770 N.W.2d 713.

¶18 The first prong, commonly referred to as the 'performance prong,' contains the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. The second prong of the Strickland test requires a showing of prejudice to be satisfied. "The defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, and the defendant must specify how and where trial counsel was incompetent and the probable different result." Id. at 719. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the jury verdict." Id. Therefore, a defendant must demonstrate that the errors of his trial counsel are, under the totality of the circumstances, serious enough that defendant's 6th amendment right to counsel has been violated.

¶19 To succeed on a claim of ineffective assistance of counsel, under the first prong it must be established that Attorney Fleming's performance did not fall within "the

[1] "Mr. Robert Fleming and Mr. Neil Fleming represented the Petitioner's argument within the range of reasonable assistance." Page 4 of Judge Laurie A. Fontaine's decision

wide range of reasonable professional assistance." Id. at 718 Therefore, it "was not protected by the presumption [of competence] in favor of counsel" Kenley, 937 F.2d at 1304. The Supreme Court has held that "strategic choices [of counsel] made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Strickland, 466 U.S. at 690-691. In regard to calling witnesses, the North Dakota Supreme Court has given great deference to trial counsel that has engaged in a thorough investigation of the facts and after speaking with witnesses, strategically decides not to call certain individuals. State v. Skaro, 474 N.W.2d 711, 716 (N.D. 1991).

¶20 However, Romero's situation can be distinguished from that of Skaro: there is no assertion that Attorney Fleming used poor trial strategy in forgoing to call an eyewitness, Rica Senum ("Senum"), at trial. Rather, no trial strategy at all was utilized by Attorney Fleming in regard to this matter. "Failing to interview witnesses or discover mitigating evidence relates to trial preparation and not trial strategy." Kenley, 937 F.2d at 1304.

¶21 Unlike the situation presented in Skaro, Attorney Fleming did not review discovery or investigate potential exculpatory witnesses adequately. Therefore, he was not privy to Senum's existence. Attorney Fleming's failure to call her as a defense witness was the result of a lack of knowledge and therefore not attributable to any type of trial strategy, strong or poor.

¶22 Eyewitnesses are material in a murder trial. When testimony is harmful to a defendant the most effective tool for the defense is rebuttal eyewitness testimony. However, such a tool is not always available. It is only after a diligent review of the discovery that it can be concluded whether a favorable eyewitness account exists. Had

Attorney Fleming conducted a diligent review, he would have discovered Senum's statement to police. Failing to do so was neglectful. Finding an eyewitness for Romero's trial was imperative for two reasons. First, acquaintances of Romero, who were present when the alleged crime occurred, were going to be testifying against him. Second, Attorney Fleming and Romero had concerns about the impartiality of the jury at trial. The case was to be tried in a small town where the jury had been well acquainted with the victim. June 23, 2014 Tr. 48. In light of this, Attorney Fleming's neglectful conduct becomes even more harmful to Romero's case.

¶23 "Strickland does not establish that a cursory investigation automatically justifies a tactical decision rather, a reviewing court must consider the *reasonableness* of the investigation said to support that strategy."(emphasis added) Wiggins v. Smith, 539 U.S. 510, 527 (2003). The 8th circuit court of appeal echoed the Supreme Court by stating that "strategic choices resulting from lack of diligence in preparation and investigation [are] not protected by the presumption in favor of counsel." Kenley, 937 F.2d at 1304. Thus, even if an attorney can demonstrate that their decision making process was strategic, if such strategy was not based on an adequate investigation, an attorney's conduct will not be covered by the presumption of reasonableness.

¶24 The presumption in favor of counsel will not apply when it can be demonstrated that during the heat of trial an attorney's strategic decisions were based on a poorly prepared trial strategy. Thus, it would follow that actions or omissions that are the result of a lack of diligence, leaving the attorney unaware of material facts and unable to formulate any trial strategy, would certainly not be covered by the presumption. "It is undoubtedly true that a defense attorney's failure to investigate potentially meritorious

defenses or failure to interview witnesses whose testimony *could* prove beneficial and exculpatory can constitute ineffective assistance of counsel *if no reasonable basis exists* for counsel's failure." (emphasis added) State v. Skjonsby, 417 N.W.2d 818, 829 (N.D. 1987) (citing Com. v. McNeil, 487 A.2d 802, 806 (1985)). In other words, neglect is not a reasonable excuse for failure to call a material witness.

¶25 Not every occasion when a lawyer's "performance [falls] below an objective standard of reasonableness" will a constitutional violation be found. Coppage v. State, 2013 ND 10, ¶11, 826 N.W.2d 320. It need be demonstrated "that the [attorney's] deficient performance prejudiced [a defendant]." Strickland, 466 U.S. at 686. For example, that "the testimony of the uninterviewed witness would have been beneficial under the facts and circumstances of his case." McNeil, 487 A.2d at 806. If prejudice can be shown, a 6th amendment violation will be found and the two prongs of the Strickland test will be satisfied.

¶26 On June 23, 2014, the District Court conducted an evidentiary hearing to determine whether Romero had received ineffective assistance of counsel based upon his allegation that Attorney Fleming failed to call an eyewitness to the crime, Senum, at trial. Testimony was taken from Romero, Attorney Robert Fleming, and a witness to the alleged crime, Jace Brown ("Brown").

¶27 It can be inferred from the record that Attorney Fleming was not aware that Senum was an eyewitness to the alleged crime. Attorney Fleming testified that the reason he did not call Senum as a witness was because he recalled no mention of her in the police reports or other discovery documents. June 23, 2014 Tr. 53. Attorney Fleming had received the complete discovery prior to Romero's trial in 2011. Thus, Senum's Pembina

County Sheriff's Office voluntary statement form would have been in his possession before the commencement of trial. Had Attorney Fleming thoroughly viewed the discovery, as he should have, he would have become aware of Senum's statement form. Yet, Attorney Fleming appears to have only become aware of Senum's existence during the June 23, 2014 evidentiary hearing, where he was presented with her voluntary statement form. When questioned as to whether he was aware of the document, he responded that he had no recollection at this point. June 23, 2014 Tr. 56-57. The Supreme Court of the United States, following the ABA Standards for Prosecution and Defense Functions, held in Rompilla that:

> The state court's conclusion that defense counsel's efforts to find mitigating evidence by other means were enough to free them from further enquiry fails to answer the considerations set out here, to the point of being objectively unreasonable. No reasonable lawyer would forgo examination of the file . . . .

Rompilla v. Beard, 545 U.S. 374, 375 (2005). Similar to Romero's case, Attorney Fleming should have reviewed his file more thoroughly, no matter what other evidence he may have had to corroborate Romero's own story. The Court in Rompilla held that any reasonable attorney would take the opportunity to examine "a file disclosing what the prosecutor knows . . . ." Id. at 376. Attorney Fleming failed to meet this standard when he failed to examine the reports disclosing Senum as an eyewitness to the incident involving Romero.

¶28 In addition to not conducting a thorough investigation, Attorney Fleming did not provide Romero with discovery until after the completion of trial. June 23, 2014 Tr. 11. Therefore, Romero was unable to assist when his attorney was failing to conduct a proper investigation. Had Romero been provided the complete discovery materials, he

could have conducted a thorough review of the documents and become aware of Senum's existence. Instead, Romero was unable to provide assistance and direction to Attorney Fleming as he was without proper knowledge. Romero was forced to rely solely on his attorney to diligently prepare for his trial. June 23, 2014 Tr. 12.

¶29 This Court must now determine if Attorney Fleming's failure to call Senum as a witness was "due to inadequate trial preparation and investigation." Kenley, 937 F.2d at 1304. If so, then it can be concluded that it was "through neglect [that Attorney Fleming] failed to discover" Senum as an eyewitness and then to subsequently interview and or call her as a witness. Id. The "abdication of [an attorneys] investigative duty" cannot be found to be reasonable conduct. Id. This is not to say that Attorney Fleming conducted no investigation or trial preparation; rather that his performance did not live up to his investigative duty as an attorney. "The Supreme Court requires that counsel make a reasonable investigation in the preparation of a case or make a reasonable decision not to conduct a particular investigation." Id. Therefore, the district court erred in ruling that Attorney Fleming provided reasonable professional assistance to Romero.

¶30 Attorney Fleming neglected to conduct a thorough review of discovery and therefore failed to notice Senum's Pembina County Sheriff's Office voluntary statement form. Romero testified that he was made aware of Senum's existence after reviewing the discovery post-trial. In the documents was Senum's statement that she was in the vicinity of where the shooting took place. Romero testified that he believed it would have been effective to call her as a witness. June 23, 2014 Tr. 22. While Romero's and Attorney Fleming's testimony differed in regard to Senum, they did agree on the fact that such a witness would have been effective. Attorney Fleming testified "I have no idea who that

is, I don't recall any police reports, any statements that there was a vic—or a woman walking by, or we'd have called her." June 23, 2014 Tr. 53. However, when shown evidence that Senum was an eyewitness and when explained that this evidence would have been in his possession before and during trial, Attorney Fleming offered no trial strategy reasons for failing to call her as witness.

> Q. (by Mr. Krassin) As to the lady witness, my client's provided me a copy of Pembina County Sheriff's Office voluntary statement form of a Rica Senum, S-E-N-U-M, appears to be an eyewitness, you weren't aware of that?
>
> A. I guess I have no recollection of that at this point, no.

June 23, 2014 Tr. 56-57.

¶31 Romero and Attorney Fleming are clearly in agreement that, had Senum been known to them before trial they would have called her as a witness or at the very least interviewed her. If Attorney Fleming had good reason, or any reason, for why he did not interview or call Senum as a witness, he failed to disclose that to the court at the evidentiary hearing. In an ineffective assistance claim, it should be clear whether the attorney's conduct was the result of a "lack of diligence in [trial] preparation and investigation" or the result of trial strategy. Kenley, 937 F.2d at 1304. If Attorney Fleming worried he would be breeching his attorney client confidentially with Romero in divulging any reasons then he could have addressed the issue as he did with another potential witness Ben Ohmann ("Ohmann"). When asked why he did not call Ohmann to the stand Attorney Fleming testified:

> A. "there was a very specific reason we didn't call Mr. Ohmann, and because he won't waive attorney-client privilege we're not going to be able to get into it."
>
> Q. (Ms. Davis) That's sufficient.

June 23, 2014 Tr. 53.

¶32 If Attorney Fleming can remember the specific reason why he did not call Ohmann to the stand then he should remember the reason he did not call Senum, an eyewitness to the crime. By his own admission, Attorney Fleming admits that had he known of Senum he would have called her. The testimony of Attorney Fleming shows that he could recall information relating to a portion of the discovery that he investigated but could not in a portion of the material he did not, specifically that relating to Senum.

¶33 Attorney Fleming did not conduct an adequate trial preparation and investigation. He appeared to not have been aware of Senum's existence at the time of the trial. Therefore, the reason she was not called was due to a lack of knowledge as opposed to a well thought out trial strategy. The Supreme Court in Kenley required that counsel "make a reasonable decision not to conduct a particular investigation." 937 F.2d at 1304. "Counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when she has not yet obtained the facts on which such a decision could be made." Id. at 1308. Therefore, it must be concluded that the district court erred in ruling that Attorney Fleming's conduct at trial fell within the range of reasonable professional assistance. Attorney Fleming's performance fell below the objective standard of reasonableness when he failed to conduct a thorough trial preparation and investigation. This failure to be diligent satisfies the "performance prong" of Strickland.

B. If Attorney Fleming had called Rica Senum as an eye witness at trial, her testimony would have discredited key witnesses.

¶34 The second prong of the Strickland framework requires a showing of prejudice to be satisfied. "The defendant must establish a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceeding would have been different." Myers, 2009 ND 141, ¶15, 770 N.W.2d 713. "A reasonable probability is a probability sufficient to undermine confidence in the outcome of the jury verdict." Id. at 719. Thus, Romero must demonstrate that, but for Attorney Fleming's inadequate trial preparation and investigation, resulting in a failure to call an eyewitness at trial, there is a reasonable probability that the outcome of the criminal proceedings against him would have been different.

¶35 Romero was able to demonstrate to the district court that Attorney Fleming's incompetence in failing to conduct an adequate investigation of the discovery. Romero as well proved that he was unable to rectify his attorney's oversights because he was never given an opportunity to review the discovery before trial. If he had been he would have likely discovered Senum and advised his attorney to call her as an eyewitness.

¶36 Romero presented, with specificity, the prejudice Attorney Fleming's incompetent trial preparation caused. Senum's testimony could have, at a minimum, discredited key witnesses by highlighting the inconsistencies in their testimony. For example, she could have clarified how dark it was outside, the number of individuals she witnessed at the scene, and where they were positioned in relation to Romero and the victim. There is a reasonable probability that a jury would be have been less likely to convict Romero had the reliability of key witness testimony been called into question. Eyewitness accounts appear to have formed the foundation of the jury's finding of guilt. To attack the validity of such testimony would have created reasonable doubt as to Romero's guilt.

¶37 Romero testified that he believed Senum's testimony could have changed the results of his trial. Specifically, Senum could have identified another individual as the culprit or she could have discredited other witnesses who Romero allege lied during their testimony. June 23, 2014 Tr. 22-23. For example, Brown testified that he initially told police that he was not present at the scene, but later changed his story. June 23, 2014 Tr. 14-15. Romero testified that Brown's brother Beau stated to police that it was too dark to see if the victim had a weapon in his hand. However, at trial Beau claimed that he clearly saw that the victim did not have anything his hand. June 23, 2014 Tr. 16-17. Senum's testimony may have clarified these inconsistencies and would arguably have held more weight than the testimony of the Brown brothers because she did not have a stake in the case.

¶38 To require a fully accurate prediction of the difference in the outcome of trial had the prejudice not existed would be unreasonable. Justice Marshall, dissenting in Strickland, explained that "it may be impossible" for a court to ascertain based on a cold record what the strength and reliability of witness would have been "against rebuttal and cross-examination by a shrewd, well-prepared lawyer." Strickland, 466 U.S. at 710. The North Dakota Supreme Court has stated that what must be shown to succeed on the prejudice prong is a "probable different result," not a certain result. To impose the later burden on Romero, "whose lawyer has [already] been shown to have been incompetent," would be unfair and illogical. Id. Romero made it very clear to the court that the state's witness would have been discredited had the inconsistencies in their testimony been highlighted. It is probable that had the credibility of the State's eyewitnesses been

attacked, reasonable doubt as to the guilt of Romero would have been raised and the trial would have ended in a different result.

¶39 Therefore, but for Attorney Fleming's inadequate trial preparation and investigation, resulting in a failure to call an eyewitness at trial, there is a reasonable probability that the outcome of the criminal proceedings against Romero would have been different. In demonstrating such, Romero has met the second prong of the Strickland test.

¶40 Romero has specified "how and where [Attorney Fleming] was incompetent," hence satisfying the first (performance) prong of the Strickland test. Myers, 2009 ND 141, ¶15, 770 N.W.2d 713. He as well clearly displayed what the "probable different result" of his trial would have been had his attorney provided proper assistance, hence satisfying the second (prejudice) prong of the Strickland test. Id. Romero has met his burden in demonstrating that Attorney Fleming's preparation for and conduct at his trial was ineffective.

II. The District Court Erred In Denying Defenses' Motion For Post Conviction Relief When Romero's Trial Counsel Failed to Explain The Voir Dire And Jury Selection Process Properly To Romero.

¶41 Romero's trial counsel, Attorney Fleming, did not explain the voir dire and jury selection process properly to Romero, failing both prongs of the Strickland test. This lack of guidance and assistance on Attorney Fleming's part is a perfect example of what the Court in Strickland and the cases that followed should have been trying to remedy when it chose to recognize the factors considered in an ineffective assistance of counsel claim. As previously stated, there are two basic factors this Court must consider under

the Strickland test and that Romero has the burden to prove before this Court may grant post conviction relief to Romero.

A. Attorney Fleming did not provide reasonably effective assistance when he failed to properly explain the voir dire and jury selection process to Romero.

¶42 The State may try to argue that the issue of jury selection cannot be addressed because the court stated during the post conviction action that there were no objections to the jury selection process that were not granted and there were no challenges for cause not granted to the during jury selection; the court further stated in the post conviction action that it found this to not be an issue, particularly because this Court did not find it to be an issue, citing to this Court's record at 790 N.W.2d 757. June 23, 2014 Tr. 3. However, this would be an erroneous argument on the State's part. The issue being argued is not whether the selection process was proper; the issue is whether or not Attorney Fleming assisted Romero by properly explaining the selection process to him. Therefore, this issue is squarely within this Court's discretion to decide.

¶43 The Criminal Justice Standards set forth by the American Bar Association contains a section specifically tailored to the Defense Function. Under the General Standards, it states that the function of the standards is to be "used as a guide to professional conduct and performance[,]" and "not intended to be used as criteria for the judicial evaluation of alleged misconduct of defense counsel to determine the validity of a conviction." American Bar Association, ABA Standards for Criminal Justice: Prosecution and Defense Function 119-120 (3d 1993) (hereinafter "ABA"). However, this section goes on to explain that these standards "may . . . be relevant in such judicial evaluation, depending upon all the circumstances." Id. at 119. The standards, in Section 4-5.2, state that strategic and tactical decisions should be made by defense counsel. ABA

200. These types of decisions include what jurors to accept or strike. Id. at 200. Despite the defense counsel's right to make these decisions, the standard also sets forth that any tactical or strategic decision should be made after consultation with the client where feasible and appropriate. Id. at 200.

¶44 While this Court may feel uncomfortable following ABA Standards as opposed to precedent, the Court can follow it knowing that the Supreme Court of the United States has used this same set of Standards in its decisions. In Rompilla, the Court stated that the obligations of an attorney are not just common sense, "but [are] also described in the American Bar Association Standards for Criminal Justice. . . ." Rompilla, 545 U.S. at 375 (2005) (citing Wiggins v. Smith, 539 U.S. 510, 524 (2003)). the Court held that The American Bar Association Standards for Criminal Justice may be used as "guides to determining what is reasonable[.]" Id.

¶45 The Court held "that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance." Geders v. U.S., 425 U.S. 80, 88 (1976). It is not disputed that Attorney Fleming consulted with Romero during the voir dire process about the decisions made on which jurors to accept or strike. T. 31 However, there could not have been any meaningful consultation between Romero and Attorney Fleming. Romero testified that jurors stated they could be unbiased. June 23, 2014 Tr. 31 But, Romero did not have a proper understanding of just what makes a legally unbiased juror, as evidenced when he explained what he thought made the jurors biased: " … I just use my common sense." June 23, 2014 Tr. 31-32 The State tried to portray that Romero should have known that the jurors were not biased. June 23, 2014 Tr. 32 Attorney Krassin pointed out,

though, that Romero clearly did not know the grounds to exclude jurors and was not aware of what a judge may consider to exclude jurors, confirmed by the fact that Romero answered in the negative to both inquiries. June 23, 2014 Tr. 32 Romero stated that he would use his common sense. June 23, 2014 Tr. 32. Furthermore, Romero stated earlier in the questioning that he did not understand, even after the trial, how the jury was selected. June 23, 2014 Tr. 24. Romero did not understand what was meant to have a challenge for cause denied, and Attorney Krassin needed to explain it to Romero. June 23, 2014 Tr. 24-25. It was definitely not the job of Attorney Krassin to explain the jury selection process to Romero after the fact; it was Attorney Fleming's duty to explain the voir dire and jury selection process to Romero prior to trial so that Romero could make informed decisions and consult with him where it was clearly feasible for him to do so. This part of the process was clearly not explained properly to Romero or he would have understood what would be happening during the voir dire and would have known how jurors were selected.

¶46 Without a proper understanding of the jury selection process, it would be impossible for Romero, or any client for that matter, to consult with their attorney regarding the strategic and tactical decisions involved in what jurors to accept or strike. In every case, the composition of the jury is integral in how a trial will play out. Therefore, it is not only appropriate as stated in Section 4-5.2 of the Criminal Justice Standards Defense Function, but necessary, for the client to be able to consult with the attorney during the voir dire and jury selection. ABA, supra. Furthermore, it is clearly feasible to consult with the client regarding the process. Id.

¶47 In a jury trial, where the key component is the jury itself, it would be erroneous to find that a client's lack of understanding of the jury selection process was not a failure on the attorney's part which amounts to reasonably ineffective assistance. Prior to Geders, the Court held that a defendant "lacks both the skill and knowledge adequately to prepare his defense, even though he (may) have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him." Powell v. Alabama, 287 U.S. 45, 68-69 (1932). If the Court in Powell and Geders were examining Romero's case, they would find that the guiding hand Romero required was not supplied by Attorney Fleming with regard to voir dire and jury selection. Romero has demonstrated that he was ill-equipped to understand this part of the trial process and Attorney Fleming's guidance did not suffice for purposes of the Strickland test.

¶48 Therefore, Romero has satisfied the first prong of the Strickland test, showing that Attorney Fleming did not provide reasonably effective assistance when he failed to properly explain the voir dire and jury selection process to Romero.

B. If Attorney Fleming had properly explained voir dire and the jury selection process to Romero, Romero could have waived his right to a jury trial.

¶49 This Court in McClain holds that there is proof of prejudice if there is a reasonable probability "that, but for counsel's unprofessional conduct, the proceeding's result would have been different." McClain, 403 N.W.2d at 18. This Court in McMorrow went further to state that prejudice can only be shown if the defendant can show the "probable different result." McMorrow v. State, 2003 ND 134, ¶10, 667 N.W.2d 577 (citing State v. Palmer, 2002 ND 5, ¶11, 638 N.W.2d 18). Pursuant to McClain and McMorrow, Romero has shown that, but for the counsel's errors, the result would have been different as well as the probable different result: trial counsel did not properly

explain the voir dire and jury selection process to Romero and, if trial counsel had done so, Romero could have waived his right to a jury trial.

¶50 Attorney Fleming's error was that he did not properly explain the voir dire and jury selection process to his client, Romero. Therefore, the next step is to ascertain whether or not Romero was prejudiced by this error. Romero was, indeed, prejudiced by Attorney Fleming's failure to properly explain the voir dire and jury selection process to Romero. As stated previously, the jury is integral in the outcome of a trial; therefore, the composition of a jury is of the utmost importance to a case. If Attorney Fleming had explained to Romero that jury selection was not done based on "common sense" as Romero thought it was, but that it was based on the objective standard of a juror stating that she has no bias and can be objective, then Romero may have taken a different approach as to which type of trial he wanted. Specifically, if Romero had known that he would not be granted a venue change and would be subjected to the jurors of that jurisdiction, which was the case here, then Romero may have requested a bench trial instead.

¶51 The State may contend that this is not a valid argument because the State would need to agree to a bench trial and there is no evidence that the State would have agreed to this. However, evidence that the State would not have agreed if Romero had moved for a bench trial is lacking. If the request was in the name of judicial economy and in light of the inability to change venues, the State would be compelled to act reasonably and agree to the bench trial.

¶52 It is clear that prejudice is shown. Pursuant to McClain, we have demonstrated that, but for Attorney Fleming failing to properly explain voir dire and the

jury selection process to Romero, Romero could have received a different result in his trial; and, pursuant to McMorrow, we have demonstrated a probable different result, which is that Romero may have requested a bench trial. The State may argue that result may have been the same had Romero been given a bench trial; however, McMorrow does not require a certain different result, it only requires "a reasonable probability that . . . the result of the proceeding would have been different." McMorrow , 2003 ND 134, ¶10, 667 N.W.2d 577 (citing Syvertson v. State, 2000 ND 185, ¶22, 620 N.W.2d 362). Furthermore, McClain requires only that there be a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting the accused's guilt." McClain, 403 N.W.2d at 18.

¶53 Pursuant to Powell, Geders, and the ABA Criminal Justice Standards, because Attorney Fleming did not provide reasonably effective assistance of counsel when he failed to properly explain the voir dire and jury selection process to Romero has satisfied the first prong of the Strickland test. Pursuant to McClain and McMorrow, Romero has shown that a different result could have been obtained but for Attorney Fleming's failure and the probable different result would have been Romero's ability to choose a different type of trial, thereby satisfying the second prong of the Strickland test. Having satisfied both prongs of the Strickland test, the Court should find that Romero has met the burden of proving ineffective assistance of counsel.

CONCLUSION

¶54 For the foregoing reasons, we respectfully request this Court to find that Attorney Fleming was ineffective.

Dated this 10th Day of October, 2014:

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Miguel Humberto Medina-Romero, Petitioner/Appellant, vs. State of North Dakota, Respondent/Appellee.	AFFIDAVIT OF SERVICE Supreme Court No. 20140287 Pembina Co. No. 34-10-K-00242

The undersigned, being of legal age, being first duly sworn deposes and says that on the 20th day of October, 2014, she served true copies of the following documents:

Brief of Appellant
Appendix

And that said copies were served upon:

Miguel Medina-Romero
c/o NDSP
PO Box 5521
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by email.

Dated this 20th day of October, 2014.

JAY KNUDSON
Notary Public
State of North Dakota
My Commission Expires Jan. 12, 2017

Holly Bicker

Subscribe and sworn to before me this 20th day of October, 2014.

Notary Public
County of Grand Forks
State of North Dakota

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The undersigned, being of legal age, being first duly sworn deposes and says that on the 20th day of October, 2014, she served true copies of the following documents:

Corrected Brief of Appellant

And that said copies were served upon:

Stephenie L. Davis
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by email.

Dated this 20th day of October, 2014.

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My Commission Expires Jan. 12, 2017

Holly Bicker

Subscribe and sworn to before me this 20th day of October, 2014.

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