20150099
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 16, 2015
STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

RODNEY CHISHOLM, Appellant, vs. STATE OF NORTH DAKOTA, Appellee.	Supreme Court No. 20150099 District Court No. 18-2013-CV-01281

APPELLANT'S BRIEF

Appeal from the Order Denying Application for Post-Conviction Relief entered on March 12, 2015, by the Grand Forks County District Court, Northeast Judicial District, State of North Dakota, the Honorable Lawrence Jahnke presiding.

Nicholas D. Thornton (ND # 06210)
FREMSTAD LAW FIRM
P.O. Box 3143
Phone (701) 478-7620
Fax (701) 478-7621
E-Service: nick@fremstadlaw.com

ATTORNEYS FOR APPELLANT
RODNEY CHISHOLM

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[¶ 6] STATEMENT OF THE CASE

[¶ 7] Rodney Chisholm appeals from the district court's denial of his application for post-conviction relief, where he alleged his trial and appellate counsel, Steven Light, provided ineffective assistance.

[¶ 8] Chisholm was charged with the murder of his brother, Don Chisholm. Before trial, Chisholm confessed to law enforcement that he had killed his brother but acted in self-defense. The jury returned a guilty verdict and Chisholm was sentenced to 30 years. He appealed, arguing the court erred in refusing to allow him to present evidence about his brother's prior threats and violent behavior. See generally State v. Chisholm, 2012 ND 147, 818 N.W.2d 707 ("Chisholm I"). This Court upheld his conviction, concluding the court did not abuse its discretion in refusing to admit evidence regarding old incidents. Id. at ¶¶ 16-17.

[¶ 9] Chisholm sought post-conviction relief, claiming Light provided ineffective assistance. (App. at 1, 11-14). Chisholm requested

an evidentiary hearing. (App. at 13). The trial court summarily dismissed on its own motion. Chisholm appealed, arguing the court did not put him on proper notice that it was considering dismissal or afford him an opportunity to respond. See Chisholm v. State, 2014 ND 125, 848 N.W.2d 703 ("Chisholm II"). This Court reversed and remanded, concluding the trial court erred in summarily dismissing the application. Id.

[¶ 10] On remand, the district court allowed Chisholm an opportunity to present any additional evidence to support his ineffective assistance claim, along with the possibility of amending his brief in support of his claims. (App. at 47). Chisholm's counsel filed an amended brief, clarifying the issues he intended to present evidence on at the hearing. (App. at 48-49). Chisholm claimed Light was ineffective because (1) he failed to object to the introduction of his confession despite the fact it was obtained in violation of his rights under Miranda to terminate questioning; (2) Light failed to raise or present the Miranda issue for this Court's review on appeal; (3) Light failed to employ and present expert witness testimony regarding his psychological condition; (4) Light did not adequately advise Chisholm on the ramifications or ability to consider lesser included offenses; and (5) that Light did not

investigate and present evidence concerning Donald Chisholm's abuse of narcotics (App. at 48-49).

[¶ 11] The district court held an evidentiary hearing on February 19, 2015 (App. at 3). After the hearing, the district court again denied Chisholm's petition. (App. at 53-60). Chisholm now appeals, asserting Light provided ineffective assistance of counsel. (App. at 61-62).

[¶ 12] STATEMENT OF FACTS

[¶ 13] The facts in the underlying criminal case are contained in the direct appeal opinion, Chisholm I, 2012 ND 147, ¶¶ 2-8, 818 N.W.2d 707, and the first post-conviction relief appeal opinion, Chisholm II, 2014 ND 125, ¶¶ 2-6, 848 N.W.2d 703.

[¶ 14] On July 6, 2010, Chisholm was questioned in Nebraska by North Dakota law enforcement officers regarding Don Chisholm's disappearance. Chisholm was eventually transported back from Nebraska to North Dakota to continue the questioning on July 7, 2010. Chisholm confessed to hitting Don Chisholm with a piece of angle pipe until he lost consciousness, then placing a hose clamp around his neck and tightening it with a screwdriver. Chisholm I, 2012 ND 147, ¶ 4, 818 N.W.2d 707. Chisholm admitted he drove his brother's pickup to a

different location, walked several miles to his home, then drove another vehicle back to his brother's body so he could bury it. Id. at ¶ 5. On July 8, 2010, Chisholm was interviewed again.

[¶ 15] During questioning, Chisholm sought to terminate questioning and to an attorney before making any of the incriminating statements ultimately used against him at trial. (Petitioner's Brief in Support of Application for Post-Conviction Relief, ¶¶ 19-20 (doc # 4) [hereinafter "Petitioner's Br."]). During the July 7, 2010 interview, Chisholm stated: "We're kind of getting nowhere here." Id. Chisholm then stated, "I think we're at the end," and "So, are we all done for today?" Id. In further attempts to stop questioning, Chisholm stated: "We've been beating on this for about three hours." Id. Chisholm then had the following exchange with the interviewer:

> **Chisholm**: Well, if we're just going to keep going on Donald, and stuff, I'm done because we've chased on it . . . so let's call it a wrap today. Let's go back so I can shower and shave and stuff, you know."
>
> **Gilpin**: It's unfortunate.
>
> **Chisholm**: Put the bad guy back in the cell.

(Petitioner's Br. ¶¶ 19-20).

[¶ 16] After this exchange, law enforcement continued to question Chisholm: "Why are you the bad guy?" "I mean, you cared about

Carolyn, you cared about David, you cared about your mom, you care about Keith, you care about Ken, I mean I don't see this big, violent person that people are talking about I don't see that." (Petitioner's Br. ¶ 21). The agents then asked: "You have a problem if we talk again in the future?" Id. The agents did not terminate the interview. Instead, the agents continued: "I learned that looking in your eyes you got something that's a burden on you, Rod, it's a burden, and it's something that you want to talk about but you just can't get over that hump." (Petitioner's Br. ¶ 22). Special Agent Ness prodded Chisholm: "I think what happened is something that was happenstance. It wasn't planned, it wasn't intended, it happened. And we need to find Don, and we're going to look [. . .] Rod, can I ask you something? If we went for a drive, would you show us where Don is?" (Petitioner's Br: ¶ 23).

[¶ 17] Eventually, Chisholm relented and agreed to "go for a drive" with law enforcement. Id. Chisholm showed law enforcement where Don Chisholm's body was buried and provided a statement indicating that the brothers were physical altercation that escalated into violence and lead to Don's death. See id. These incriminating statements were the basis for Chisholm's arrest and ultimately for his conviction.

[¶ 18] At the evidentiary hearing, Chisholm testified, stating that Light never discussed the possibility of presenting expert testimony regarding Chisholm's psychological conditions that may have explained his state of mind. Post-Conviction Relief Tr. 14:5 – 15:1. He testified that he never spoke with Light regarding lesser included offenses, or waiver of lesser included offenses. Id. at 15:2-17:17. Chisholm claimed that Light gave him some Xanax to calm him down toward the end of his trial. Id. at 17:20-18:19. Before jury instructions were given, Light elicited a waiver of lesser included offenses from Chisholm on the record, but Chisholm asserted the Xanax made him "fuzzy" and he did not recall the waiver. Id. at 19:7-20. On cross-examination, the State inquired about a statement made by Chisholm in a telephone call to his sister where he stated "I got greedy with the all or nothing." Id. at 33:8-10. Chisholm asserted the statement was taken out of context. Id. On redirect, Chisholm testified the telephone call to his sister was made after he had learned it was an all-or-nothing proposition. Id. at 40:8-15.

[¶ 19] Chisholm testified he asked Light to investigate Donald Chisholm's drug abuse and his prior history of violence. See id. at 20:14-21:15. Chisholm also testified that there were far more recent incidents of Don Chisholm's violence that were not presented to the

district court, despite being known by Light at the time. Id. at 21:14-23:7. Specifically, Chisholm testified that in 2009, Chisholm and Jason Bushaw were at his ranch when Don Chisholm came out and confronted Bushaw in a threatening way. Id. He also testified that "shortly before that," Don Chisholm had gone after Mike Sweeney with a shotgun after Sweeney had made a snide remark to him at a gas station. Id. Chisholm testified he was aware that since he could not find Sweeney, Don Chisholm shot up Sweeney's farm equipment. Id. Chisholm testified that Light confused and "garbled up" these incidents with incidents that had happened 10 to 20 years earlier, which is the basis for not allowing Chisholm to introduce evidence regarding those specific incidents of past conduct. See id.

[¶ 20] The State called three witnesses, (1) Dan Hopper, (2) Joel Lloyd, and (3) Michael Ness. Hopper was a third-year law student in Steve Light's office who assisted Light with Chisholm's trial. Id. at 41:8-14. He was present "on and off" throughout Chisholm's trial. Id. at 41:17-21. He testified he did not see Light give Chisholm any medication while he was present, but he was not there the whole day and did not recall being in the room where Chisholm asserted Light gave him Xanax. Id. at 41:24-42:7; 43:7-12.

[¶ 21] Lloyd testified that he works for the Grand Forks County Sheriff's Department, and that they did not find any firearms in Don Chisholm's house or vehicle, but did find an old rifle at shop and approximately 20 firearms in various other locations owned or rented by Don Chisholm. Id. at 44:4-25. Lloyd testified about the phone calls made between Chisholm and his sister. Id. at 49:22. Lloyd testified that in the phone calls, it appeared that Chisholm was satisfied with Light's representation, that Chisholm did not ask for lesser included offenses and that he knew the consequences, and that Chisholm did not mention to his sister that Light drugged him. Id. at 49:10-20.

[¶ 22] Finally, the State called Agent Michael Ness of the North Dakota Bureau of Criminal Investigation to testify. Ness testified that he had extensive interviews with Chisholm. Id. at 52:2-8. Ness testified Chisholm mentioned Donald threatening him with a gun in a videotaped reenactment on July 7, 2010. Id. at 52:9-20. Ness testified that he Mirandized Chisholm multiple times. Id. at 53. Ness testified that Chisholm never "unambiguously demand[ed] an attorney" or "unambiguously say I'm done speaking to you or cut off questioning." Id. at 53:25-54:5. On cross-examination, Ness did admit that the questioning was "a lengthy interview . . . it was a long day." Id. at 62:8-

12. Ness also admitted that Chisholm did tell him, "If we're just going to keep going on Donald and stuff, I'm done. Because we've chased on it" for three hours, yet he continued interviewing Chisholm after that statement. Id. at 64:6-14. Ness also admitted that Chisholm stated' I think we're done for today though" yet he continued to question him. Id. at 64:15-21. Light did not move to suppress the statements made after Chisholm made these assertions.

[¶ 23] JURISDICTIONAL STATEMENT

[¶ 24] The district court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. § 29-32.1-03. Chisholm's appeal is timely under N.D.R.App.P. 4(d). His notice of appeal was filed within sixty days after the district court's order denying his application for post-conviction relief was entered. This Court has jurisdiction under N.D. Const. art. VI, §§ 2 and 6, and N.D.C.C. § 29-32.1-14.

[¶ 25] ARGUMENT

[¶ 26] On appeal, Chisholm argues the district court erred in denying his application for post-conviction relief. Specifically, Chisholm argues that Light provided ineffective assistance of counsel, his performance was objectively unreasonable, and that Light's unreasonable performance prejudiced him in numerous ways. This Court

should reverse and remand this case with instructions for the district court to grant his post-conviction application.

[¶ 27] STANDARD OF REVIEW

[¶ 28] A post-conviction applicant carries the burden to establish a basis for relief. See Ellis v. State, 2003 ND 72, ¶ 5, 660 N.W.2d 603. Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure. Wilson v. State, 2013 ND 124, ¶ 9, 833 N.W.2d 492. "'The issue of ineffective assistance of counsel is a mixed question of law and fact which is fully reviewable by [the Supreme Court].'" Broadwell v. State, 2014 ND 6, ¶ 7, 841 N.W.2d 750 (quoting Garcia v. State, 2004 ND 81, ¶ 6, 678 N.W.2d 568). The district court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless they are clearly erroneous under N.D.R.Crim.P. 52(a). Wilson, at ¶ 9; see also Ellis, at ¶ 6; Hill v. State, 2000 ND 143, ¶ 17, 615 N.W.2d 135. "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, we are left with a definite and firm conviction a mistake has been made." Broadwell, at ¶ 5 (quotations omitted). Questions of law in a post-conviction relief proceeding are fully reviewable on appeal. Ellis, at ¶ 6.

[¶ 29] THE APPLICABLE LAW REGARDING A DEFENDANT'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

[¶ 30] Both the United States Constitution and the North Dakota Constitution guarantee the right to effective assistance of counsel. U.S. Const., Amend. VI; N.D. Const., Art. I, § 12; State v. Garg, 2012 ND 138, ¶ 10, 818 N.W.2 718. In order for a defendant to succeed on an ineffective assistance of counsel claim, the defendant must show that trial counsel's performance "fell below an objective standard of reasonableness and the deficient performance prejudiced him." State v. Kamara, 2003 ND 179, ¶ 5, 671 N.W.2d, 811, 813 (citing Strickland v. Washington, 466 U.S. 668, 688 (1984); State v. Robertson, 502 N.W.2d 249, 251 (N.D. 1993)). This two-prong test determines whether a granting of post-conviction relief is appropriate.

[¶ 31] The first element, that trial counsel's performance was objectively below a reasonable standard of performance, is determined by whether there were "errors so serious" that the defendant was not provided counsel as guaranteed by the Sixth Amendment. DeCoteau v. State, 2000 ND 44, ¶ 8, 608 N.W.2d at 242 (quoting State v. McLain, 403 N.W.2d 16, 17 (N.D. 1987); Strickland, 466 U.S. at 687)). The effectiveness of counsel is measured by an objective standard of reasonableness as measure by prevailing professional norms. Lange v.

State, 522 N.W.2d 179, 181 (N.D. 1994). The petitioner must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Stoppleworth v. State, 501 N.W.2d 325, 327 (N.D. 1993) (quoting Strickland, 466 U.S. at 689). Trial counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the distorting effect of hindsight. Lange, 522 N.W.2d at 181.

[¶ 32] The second prong of the test established in Strickland requires the defendant demonstrate prejudice as a result of the ineffective assistance:

> [t]he 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

See Kruckenberg, 2012 ND 162, ¶ 10, 820 N.W.2d at 317 (quoting Murchison v. State, 2011 ND 126, ¶ 8, 799 N.W.2d 360). In other words, a petitioner must also establish that but for counsel's unprofessional errors, there is a reasonable probability that the result would have been different.

[¶ 33] CHISHOLM RECEIVED THE INEFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL AND ON APPEAL

[¶ 34] Chisholm asserts his trial and appellate counsel, Steve Light, provided him ineffective assistance of counsel because (1) he failed to challenge Chisholm's confession despite the fact it was obtained in violation of his Miranda rights; (2) Light failed to raise or present the Miranda issue for this Court's review on appeal; (3) Light failed to employ and present expert witness testimony regarding his psychological condition and state of mind; (4) Light did not adequately advise Chisholm on the ramifications or ability to consider lesser included offenses and get the jury instructions correct; and (5) that Light did not investigate and present evidence concerning Donald Chisholm's abuse of narcotics. Chisholm argues Light's failure to do these things were objectively unreasonable, and had Light performed in an objectively reasonable manner, the results of the trial would have been different. Chisholm has met his burden. Consequently, Chisholm's application for post-conviction relief claiming ineffective assistance of counsel should have been granted. This Court should reverse and remand this matter with instructions for the district court to grant Chisholm a new trial.

[¶ 35] Chisholm first argues the district court erred when it failed to grant his post-conviction petition based on trial counsel's failure to file a motion to suppress Chisholm's confession in violation to his

Miranda rights. This Court applies "a de novo standard of review to a claim of a constitutional violation." State v. Duncan, 2011 ND 85, ¶ 10, 796 N.W.2d 672 (citing State v. Aguero, 2010 ND 210, ¶ 16, 791 N.W.2d 1).

[¶ 36] First, Chisholm must establish his confession was obtained in violation of his Miranda rights. There is no dispute in this case that Chisholm was under interrogation when he invoked his right to counsel and to cut off questioning on the day of his admission to the killing of his brother. The only dispute is whether Chisholm's invocation of the right was sufficient to trigger the constitutional protection afforded by Miranda. Miranda v. Arizona, 384 U.S. 436 (1966).

[¶ 37] Failure to file a motion to suppress by trial counsel is not, by itself, sufficient to prevail on an ineffective assistance of counsel claim. Kinsella v. State, 2013 ND 238, ¶ 9, 840 N.W.2d 625 (citing Roth v. State, 2007 ND 112, ¶ 10, 735 N.W.2d 882. North Dakota follows the United States Supreme Court analysis in Kimmelman v. Morrison, 477 U.S. 365, 375 (1986) which instructs:

> Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to

> demonstrate actual prejudice. Thus, while respondent's defaulted Fourth Amendment claim is one element of proof of his Sixth Amendment claim, the two claims have separate identities and reflect different constitutional values.

Kimmelman, at 375.

[¶ 38] In order to bring a successful claim for ineffective assistance of counsel based on a constitutional issue in North Dakota, the defendant must prove he would have likely prevailed on his motion to suppress and that "there is a reasonable probability a successful motion would have affected the outcome of the trial." Kinsella, at ¶ 9 (citations omitted). Unlike in Kinsella, in this case, there is sufficient basis for a motion to suppress the confession introduced at trial.

[¶ 39] According to this Court, an involuntary confession violates the defendant's Fifth Amendment's protection against compelled self-incrimination, which is applicable to the state by the Fourteenth Amendment. See State v. Taillion, 470 N.W.2d 226, 228 (N.D. 1991) (citing Malloy v. Hogan, 378 U.S. 1, 6 (1964); State v. Metzner, 244 N.W.2d 215, 223 (N.D. 1976)). This Court has previously held that a confession is only voluntary it is the product of the defendant's "free choice" and not the product of coercion. See Taillion at 228 (citing Blackburn v. Alabama, 361 U.S. 199, 206 (1960)).

[¶ 40] In North Dakota, previous case law on this matter illustrates that had a suppression motion been sought by trial counsel, it would have likely been granted based on previous case law, which would have affected the trial in favor of a positive outcome for Chisholm.

[¶ 41] In Taillion, the defendant was questioned for approximately one hour and fifteen minutes regarding the murder of a woman found in the Red River near Lincoln Park in Grand Forks, North Dakota. Taillon, at 227. Eventually, Taillon stated to police, "Well, then I'm not talking anymore, because I didn't do nothin' to her." Id. at 228. In Taillon, the investigator continued to question Taillon until Taillon stated, "I want a lawyer." The investigator then state, "Do you want a lawyer, now? Do you want me to stop talking at this time, or do you want to get this done?" Taillon responded with, "I want to get this done." Id. Shortly after invoking his Miranda rights, Taillon made several incriminating statements and was arrested at the end of the interview and was charged with murder. Id.

[¶ 42] Taillon moved to suppress his statements that led to the murder charge. The district court granted the suppression motion and the State appealed. This Court upheld the district court's ruling based on the "totality of the circumstances surrounding the confession."

Id. The inquiry is based on two elements: (1) the characteristics and condition of the accused at the time of the confession; and (2) the details of the setting in which the confession was obtained. Id. (citing Blackburn v. Alabama, 361 U.S. 199, 206 (1960); Colorado v. Connelly, 479 U.S. 157 (1986); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Culombe v. Connecticut, 367 U.S. 568 (1961)).

[¶ 43] In Taillon, the essence of the district court's decision on the motion to suppress was law enforcement's conduct after Taillon had invoked his right to remain silent and the lack of time in between his invocation and the continuation of the interview at the insistence of law enforcement. In its affirmation of the district court's decision, this Court explained:

> The district court found it was the investigator who kept the conversation going through Taillon's hesitations and Taillon's attempts to stop the interview and to secure an attorney. The court reasoned that the investigator's prodding Taillon to continue the interview after he had indicated he wanted to end the session amounted to psychological coercion. In particular, the district court noted "the fact that there was no meaningful break in the interview after the invocation of the right to silence (nor later after the request for an attorney).

Id. at 230 (emphasis added.)

[¶ 44] Similarly, in this case, the Taillon analysis applies. Like in Taillon, Chisholm was questioned by law enforcement for a

significant amount of time. The record shows the interrogation didn't just last a few hours, but rather was spread over the course of more than one day and through more than one state. On the day of Chisholm's incriminating statements regarding the death of Don Chisholm, similar interrogation tactics were used as those found unconstitutional in Taillon and Chisholm was interrogated for over three hours, just on that day alone.

[¶ 45] In this case, without analysis, the district court concluded that Chisholm did not clearly and unambiguously assert the right to cut off questioning. Instead, the district court summarily concluded that Chisholm had been read his Miranda rights, appeared to understand them, and that he did not clearly and unambiguously assert the right to counsel. (App. at 58). The court did not refer to or discuss Chisholm's right to cut off questioning concerning his right to remain silent. Id.

[¶ 46] In its previous memorandum decision summarily dismissing Chisholm's claims, the district court provided more reasoning for its decision. (App. at 39-42). There, the court determined that Light's performance did not fall below an objective standard of reasonable representation because Chisholm did not clearly and unambiguously

assert his right to cut off questioning. (App. at 39). Under the "clear articulation rule" announced in Davis v. United States, 512 U.S. 452, 459 (1994), there must be "some statement that can be reasonably construed as to be an expression of a desire for the assistance of an attorney or to remain silent." The district court apparently determined that Chisholm's instruction to the interviewing officer: "Put the bad guy back in the cell," nor his statements of "If we're just going to keep going on Donald and stuff, I'm done. Because we've chased on it" for three hours" or "I think we're done for today though" were an unequivocal invocation of his Miranda rights. (App. at 58). Based on its previous memorandum, it appears court ruled because Chisholm kept answering questions, there was "evidence that [Chisholm] did not unequivocally invoke his rights." (App. at 41). The district court then ruled, "He did not say that he wanted to remain silent or that he did not want to talk with the police." The district court ruled had Chisholm made either of those two statements, he would have adequately invoked his rights. (App. at 32).

[¶ 47] The district court's reasoning, however, is flawed for three reasons. First, the district court requires ritualistic incantations of the right to remain silent or to cut off questioning. Davis, 512 U.S. at

459 and Berghuis v. Thompkins, 130 S. Ct. 2260 (2010) do not require a suspect to use any specific language to invoke his or her rights. Instead, the statement must only be "reasonably construed as to be an expression of a desire for the assistance of an attorney or to remain silent." Davis, at 459. Chisholm's assertion: "Put the bad guy back in the cell," could have reasonably be construed as an expression of the desire to remain silent.

[¶ 48] Second, the district court's reasoning that Chisholm continuing to answer questions proves that his invocation of his rights was not unequivocal is a fallacy. Had the officers stopped questioning when he asked to be put back in his cell, there would not have been an incriminating statement to suppress. Under the district court's rationale, it would be virtually impossible to ever suppress a statement if the suspect kept answering questions after invoking his or her rights. Chisholm's continued response to questioning in this case merely indicates law enforcement did not honor his request to end the questioning. Any responses after his assertion to be put back in his cell should have been suppressed.

[¶ 49] Most importantly, the district court's reasoning fails because it is distorted by hindsight. See Garcia, 2004 ND 81, ¶ 5, 678

N.W.2d 568. At the time when it mattered for Chisholm—before trial—Light could not know that the Court would rule that Chisholm's statement was not definitive enough to terminate the questioning because Light did not file the suppression motion. Keep in mind, the confession following Chisholm's assertion led officers to the discovery of Don Chisholm's body, Chisholm's admission to hitting his brother until he was unconscious, tightening a hose clamp around his brother's neck with a screwdriver until he died, and then burying his brother. Undoubtedly, whether Chisholm's confession was admissible was crucial for the State's case and Chisholm's trial strategy. Now, in hindsight, the district court ruled that it would have ruled for the State on the suppression issue. (App. at 30). The district court's retrospective ruling does not change the fact that Light could not have known whether those statements would have been unequivocal without contesting the confession, and the fact that the evidence obtained from the confession was the State's entire case against Chisholm.

[¶ 50] The district court's decision then turns to effective assistance of counsel on appeal. (App. at 58). The district court determines that Light's failure to raise more than one issue on appeal was not ineffective for the same reasons it denied Chisholm's first

Miranda claim. The district court's reasoning fails for the same reasons as outlined above.

[¶ 51] At the district court level, Chisholm's confession should have likely been suppressed based on the similarity of the facts of the Taillon case. Trial counsel's failure to make the motion to suppress was below the objective standard of reasonableness for a trial attorney, and had the evidence been suppressed, the results without question would have led to a reasonable probability of a different result. This error is especially important in light of the Taillon and other confession coercion cases in North Dakota.

[¶ 52] Light was ineffective with respect to failing to challenge the confession, and the district court erred in concluding otherwise. Chisholm respectfully requests this Court reverse the trial court's denial of post-conviction relief.

[¶ 53] THE DISTRICT COURT ERRED WHEN IT FAILED TO RULE ON OR CONSIDER ALL OF CHISHOLM'S ISSUES

[¶ 54] Chisholm argues the district court erred in not addressing all of the instances of Light's ineffectiveness in its order denying post-conviction relief.

[¶ 55] Chisholm's application for post-conviction relief raised five ineffective assistance issues: (1) Light did not present evidence that

there were numerous, more recent incidents of his brother's prior bad acts involving threats and violent behavior; (2) that Light suffered from drug addiction and was distracted frequently during the trial, he was difficult to contact, that Light entered a drug rehabilitation program during the pendency of the appeal, and that he committed suicide; (3) that Light failed to challenge and preserve issues for appeal regarding his request for counsel during his videotaped confession; that Light failed to challenge and preserve a search and seizure suppression issue involving the search of his new property; and (5) that Light failed to object to several instances of prosecutorial misconduct and during the examination of certain witnesses. (App. at 12-13).

[¶ 56] In the court's post-remand order, the trial court stated:

> Consistent with the Supreme Court's directive, this court will review all issues raised in Chisholm's application for post-conviction relief *ab initio*. That review will be based upon matters he previously submitted as well as any amended brief he wishes to submit with whatever additional evidence in support of his ineffective assistance of counsel claim that he wishes this court to consider in determining the existence of a genuine issue of material fact.

(App. at 47). Consistent with that post-remand order, Chisholm's counsel filed an amended brief, where she wrote: "Mr. Chisholm renews these arguments and amends these arguments in support of his claims for ineffective assistance of counsel to include: (3) Trial counsel's failure to

employ and present expert witness testimony regarding the psychological condition of disassociation; (4) Trial counsel did not adequately advise Rodney Chisholm on the ramification of not allowing the jury to consider lesser included charges; (5) Failure of trial counsel to investigate and present evidence regarding Donald Chisholm's abuse of narcotics." (App. at 48-49). Later, in a subsequent "Affirmance of Pre-Hearing Orders on Petitioner's Motions for Release of Jury Identities and for a Continuance," the trial court stated that the "court will only be allowing and considering evidence deemed relevant to the five issues raised in Petitioner's Amended Brief in Support of Application for Post-Conviction Relief, filed November 3, 2014. (App. at 52).

[¶ 57] Evidence was presented at the evidentiary hearing consistent with Chisholm's original claim that Light failed to present evidence that there were numerous instances of more recent situations where Don Chisholm had threatened others with guns within two to three years before the shooting at instance here; not ten or twenty years in the past. Chisholm testified at the evidentiary hearing that there were far more recent incidents of Don Chisholm's violence that were not presented to the district court, despite being known by Light at the time. Post-Conviction Relief Tr. at 21:14-23:7. Specifically, Chisholm testified

that in 2009, Chisholm and Jason Bushaw were at his ranch when Don Chisholm came out and confronted Bushaw in a threatening way. Id. He also testified that "shortly before that," Don Chisholm had gone after Mike Sweeney with a shotgun after Sweeney had made a snide remark to him at a gas station. Id. Chisholm testified he was aware that since he could not find Sweeney, Don Chisholm shot up Sweeney's farm equipment. Id. Chisholm testified that Light confused and "garbled up" these incidents with incidents that had happened 10 to 20 years earlier, which is the basis for not allowing Chisholm to introduce evidence regarding those specific incidents of past conduct. See id.

[¶ 58] As this Court noted in Chisholm I, 2012 ND 147, ¶ 13, 818 N.W.2d 707, evidence of specific instances of a victim's conduct of violence, such as the incidents where Don Chisholm threatened and brandished firearms toward Jason Bushaw and Mike Sweeney were relevant to demonstrate that his actions were reasonable in defending himself. See also State v. Gagnon, 1999 ND 13, ¶¶ 13-14, 589 N.W.2d 560; N.D.R.Ev. 405. Evidence concerning state of mind and the reasonableness of a defendant's belief that his conduct was necessary, reasonable, and appropriate under the circumstances is crucial in a self-

defense case. Without the ability to introduce that evidence, Chisholm's case was extremely prejudiced.

[¶ 59] The district court, although originally ordering that it would review all of the issues raised in Chisholm's application for post-conviction relief *ab initio* and having received uncontested testimony at the evidentiary hearing supporting that claim, wholly failed to address that issue in its order denying relief, prohibiting this Court from adequately addressing this claim on appeal.

[¶ 60] Moreover, the district court failed to make adequate findings of fact on not just this issue, but all of the specific instances Chisholm claims Light was ineffective. Rule 52(a), N.D.R.Civ.P., requires the court to make findings of fact and conclusions of law. "The court must specifically state the facts upon which its ultimate conclusion is based[.]" Kruckenberg v. State, 2012 ND 162, ¶ 7, 820 N.W.2d 314 (internal quotations omitted). The purpose of Rule 52(a) is to provide the appellate court with the understanding of the factual issues and the basis for the trial court's decisions. Clark v. Clark, 2005 ND 176, ¶ 8, 704 N.W.2d 847. "A court 'errs as a matter of law' when it fails to make sufficient findings." Kruckenberg, at ¶ 7.

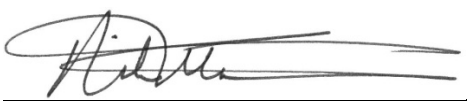
[¶ 61] Here, the trial court wholly failed to address issues it originally promised to address, even after uncontroverted evidence was presented supporting that claim. The remaining analysis of other issues raised can be described as nothing short of the conclusory, general findings that do not comply with N.D.R.Civ.P. 52(a). See Rothberg v. Rothberg, 2006 ND 65, ¶ 14, 711 N.W.2d 219. "[A] finding of fact that merely states a party has failed in its burden of proof is inadequate under the rule. Rather, the trial court must specifically state the subordinate facts upon which its ultimate factual conclusions rest." Id. (citations omitted).

[¶ 62] Chisholm respectfully requests this Court remand this case for adequate factual findings on these issues.

[¶ 63] CONCLUSION

[¶ 64] For the reasons set forth above, Chisholm respectfully requests that the district court's denial of Chisholm's application for post-conviction relief be reversed, or in the alternative, reversed and remanded.

[¶ 65] Dated: August 16, 2015.



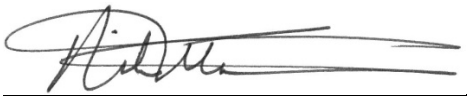
Nicholas Thornton (ND # 06210)
FREMSTAD LAW FIRM

PO Box 3143
Fargo, ND 58108-3143
Phone: (701) 478-7620
Fax: (701) 478-7621
nick@fremstadlaw.com
ATTORNEYS FOR APPELLANT

[¶ 66] CERTIFICATE OF COMPLIANCE

[¶ 67] The undersigned hereby certifies that said brief complies with N.D.R.App.P. 32 in that the brief was prepared with Franklin Gothic Book, size 14-point font, proportional typeface and that the total number of words does not exceed 8,000 from the portion of the brief entitled "Statement of Issues" through the signature block, including footnotes, if any. The word count was calculated using "Microsoft Word" word processing software, which also counts abbreviations as words.

[¶ 68] Dated August 16, 2015.



Nicholas Thornton (ND # 06210)

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

RODNEY RAY CHISHOLM, Appellant, vs. STATE OF NORTH DAKOTA, Appellee.	CERTIFICATE OF SERVICE Supreme Court No. 20150099 District Court No. 18-2013-CV-01281

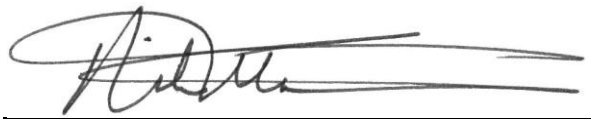
[¶ 1] I, Nicholas D. Thornton, an attorney licensed in the State of North Dakota, hereby certify that on **August 16, 2015**, the following documents were filed with the Clerk of the Supreme Court:

Appellant's Brief;
Appellant's Appendix; and
Certificate of Service.

Copies of these documents were served electronically on all parties at the e-mail addresses listed below:

Jason McCarthy
sasupportstaff@gfcounty.org; *Jason.mccarthy@gfcounty.org*

[¶ 2] Dated: August 16, 2015.



Nicholas D. Thornton (ND # 06210)
FREMSTAD LAW FIRM
P.O. Box 3143
Fargo, ND 58108-3143
Telephone: (701) 478-7620
Facsimile: (701) 478-7621
E-Service: nick@fremstadlaw.com
ATTORNEY FOR DEFENDANT