

**IN THE SUPREME COURT**  
**STATE OF NORTH DAKOTA**

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<b>JENNIFER LYNN ROBINSON,</b>	)	
	)	
<b>Petitioner / Appellant,</b>	)	<b>Supreme Court No.</b>
	)	<b>20180066; 20180067;</b>
	)	<b>20180068</b>
<b>vs.</b>	)	
	)	<b>District Court No.</b>
<b>STATE OF NORTH DAKOTA,</b>	)	<b>36-2017-CV-00265</b>
	)	<b>36-2017-CV-00266</b>
<b>Respondent / Appellee.</b>	)	<b>36-2017-CR-00267</b>

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**APPELLANT’S BRIEF**

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**Consolidated Appeal from Court’s Order Denying Appellant’s  
Application for Post-Conviction Relief Entered on February 7,  
2018 by Ramsey County District Court, Northeast Judicial  
District, State of North Dakota, The Honorable Donovan  
Foughty Presiding.**

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**[¶ 3] STATEMENT OF THE ISSUE**

[¶ 4] Whether the District Court erred in finding that Jennifer Robinson (hereinafter “Robinson”) failed to establish ineffective assistance of counsel.

**[¶ 5] STATEMENT OF THE CASE**

[¶ 6] On July 28, 2017 Robinson filed a timely Application for Post-Conviction Relief alleging ineffective assistance of counsel for being forced into pleading guilty, and failure to advise Robinson on the appellate process. (A.A. at 30.) After the State’s response, an evidentiary hearing was held on January 23, 2018, where the district court heard from Robinson’s trial counsel and Robinson herself. (A.A. at 30.)

[¶ 7] Following the hearing, on February 7, 2018 the district court issued its Order denying Robinson’s application. (A.A. at 30-31.) Robinson, by and through counsel, timely filed a notice of appeal on February 14, 2018, citing preliminary statement of the issues pursuant to N.D.R. App. P. 3 & 4. (A.A. at 32.)

[¶ 8] The District Court had jurisdiction under N.D.C.C. § 29-32.1-03 and N.D. Const. art. VI, § 8. The Supreme Court has jurisdiction under N.D.C.C. § 29-32.1-14 and N.D. Const. art. VI, § 2.

**[¶ 9] STATEMENT OF THE FACTS**

[¶ 10] This consolidated post-conviction appeal stems from three separate underlying criminal cases. Case 36-2016-CR-214 arises out of a situation occurring on April 22, 2016, wherein Robinson, while under the influence of controlled substances, was placed under arrest for being in possession of a controlled substance, then subsequently escaped from her handcuffs and attacked a police officer. (A.A. at 7-10.) Case 36-2016-CR-215 arises out of Robinson, once again escaping from her handcuffs while at a medical

clinic, but still in police custody for the previous case. (A.A. at 15-16.) Robinson escaped from her handcuffs and attempted to escape recapture but was unsuccessful. (A.A. at 15-16.) Finally, case 36-2016-CR-334 comes from Robinson being released from custody on a short furlough in order to obtain bond money from her bank, from which Robinson did not return. (A.A. at 22.)

**[¶ 11]** On June 30, 2016 Robinson plead guilty on an open plea basis in cases 36-2016-CR-214 & 215 (four C Felonies in total). The district court ordered a Pre-Sentence Investigation Report on July 1, 2016 (A.A. at 5, Index # 16, & 14, Index # 12.) Subsequent to her open pleas of guilty, on July 8, 2016, Robinson failed to return to the jail after her short furlough.

**[¶ 12]** As a result, Robinson was apprehended on July 15, 2016 by the Ramsey County Sheriff's Office. Then on August 19, 2016 Robinson entered a guilty plea, also on an open basis, to this new charge. (Sentencing Trans. Aug. 19, 2016, at 6, ln. 21.) On August 19, 2016 the district court sentenced Robinson on all three files to a combination of incarceration time, time served, suspended sentences, and supervised probation. Id. at 23-24.

**[¶ 13]** In total, Robinson received, 5 years with credit for 115 days served in case 214, 5 years with credit for 112 days served in case 215, and 1 year and 1 day, with credit for 38 days served in case 334, all time consecutive to each other. Id. at 23-24.

**[¶ 14]** Robinson asserted that her trial attorney urged her to enter into the open pleas of guilty, wherein Robinson was left with no choice but to plead. Additionally, Robinson was never informed by her trial counsel of her right to appeal the decisions of

the district court. As such, Robinson filed this post-conviction relief in all three of her underlying criminal cases.

[¶ 15] The district court found that Robinson failed to meet the first prong of the Strickland analysis. (A.A. 31, ¶6.) Therefore, not meeting prong one, the district court denied Robinson's application with no further findings.

#### [¶ 16] ARGUMENT

[¶ 17] This Court has outlined the criteria of North Dakota law on ineffective assistance of counsel very succinctly:

The Sixth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, and Article I, § 12 of the North Dakota Constitution guarantee a criminal defendant effective assistance of counsel. In accord with the test established by the United States Supreme Court . . . a defendant claiming ineffective assistance of counsel has the 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. Effectiveness of counsel is measured by an objective standard of reasonableness considering the prevailing norms. The defendant must first overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Trial counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the distorting effect of hindsight. The prejudice element requires a defendant to establish a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Not only does a criminal defendant have the heavy, demanding burden of proving counsel's assistance was ineffective, a defendant claiming ineffective assistance of counsel must specify how and where trial counsel was incompetent and the probably different result. A reasonable probability is probability sufficient to undermine the confidence in the outcome.

Tweed v. State, 2010 ND 38, ¶ 26, 779 N.W.2d 667 (internal citations and quotations omitted).

[¶ 18] In order to prevail on a post-conviction claim for ineffective assistance of counsel, an applicant must show his counsel's representation fell below an objective

standard of reasonableness and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Everett v. State, 2015 ND 149, ¶7, 864 N.W.2d 450 (internal quotations and citations omitted). This two-part test is affectionately called the Strickland test, and the "heavy burden" of the Strickland test rests solely with the applicant/petitioner. Flanagan v. State, 2006 ND 76, ¶10, 712 N.W.2d 602.

[¶ 19] The first part of the Strickland test uses the "prevailing professional norms," and is satisfied, specifically *without* the distorting effects of hindsight, if the petitioner shows his counsel erred "enough to result in a denial of counsel guaranteed by the Sixth Amendment." Sambursky v. State, 2006 ND 223, ¶13, 723 N.W.2d 524. Secondly, the petitioner must show "there is a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different." Everett, 2015 ND 149, at ¶8 (citing Flanagan, 2006 ND 76, at ¶10).

[¶ 20] In the present case, Robinson argues that her counsel pressured her into entering into guilty pleas on an open basis and that she was never informed of her right to appeal the decisions of the district court, thereby, effectively usurping Robinson's appeal by right. (A.A. at 25.)

[¶ 21] This Court's Standard of Review for post-conviction relief proceedings has been clearly established:

A trial court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless clearly erroneous under N.D.R.Civ.P 52(a). A finding is clearly erroneous if it induced by an erroneous view of law, if it is not supported by any evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made. Questions of



law are fully reviewable on appeal of post-conviction proceeding.

Broadwell v. State, 2014 ND 6, ¶ 5, 841 N.W.2d 750 (internal citations omitted).

[¶ 22] “Effectiveness of counsel is measured by an ‘objective standard of reasonableness’ considered ‘prevailing professional norms.’” Garcia v. State, 2004 ND 81, ¶ 5, 678 N.W.2d 568 (quoting DeCoteau v. State, 2000 ND 44, ¶ 8, 608 N.W.2d 240).

[¶ 23] The first allegation of coerced or pressured guilty pleas is addressed by the district court in a rather dismissive format, by stating, “the only evidence...was Petitioner’s hearing testimony.” (A.A. at 30, ¶3.) The district court goes onto explain that this allegation was effectively moot because “a transcript indicates counsel discussed on two occasions the ‘amount that is attached to each C felony.’” (A.A. at 30, ¶3.)

[¶ 24] This logic utilized by the district court is flawed insomuch that merely explaining the penalties associated with a charge does not negate the possibility that a counsel did in fact pressure a client into a plea. The district court is required to inform a defendant of the exact same information. See N.D.R. Crim. P. 11(b)(1)(G)-(H). This requirement of “informing” does not place a district court in a position of legal representation of the defendant. Merely informing a client is but one small aspect of competent legal counsel.

[¶ 25] Moreover, the act of pleading guilty on an “open basis” is a risky situation in an of itself. Open pleas effectively strip the defendant of any prior knowledge or control of the sentence a court may impose. At least with a plea agreement, the defendant has a definite and firm knowledge of the outcome before entering the plea. Moreover, should the court reject the agreement, the defendant still possesses the ability to withdraw the guilty plea. N.D.R. Crim. P. 11(c)(5).

[¶ 26] Therefore, the district court’s logic is fundamentally flawed in that merely informing a defendant of potential sentences is not dispositive of not coercing a defendant to plead guilty. Therefore, the district court’s own reference, “[t]he only evidence...was Petitioner’s hearing testimony that she was ‘pushed to take a plea,’” now stands uncontested and uncontroverted by trial counsel or the State of North Dakota. Thus, under This Court’s standard of review, the district court’s finding, per the order, is not supported by any evidence, making the district court’s order, clearly erroneous.

[¶ 27] In addition to the uncontested testimony that Robinson was coerced into pleading guilty, the failure of trial counsel to inform Robinson of her right to appeal, also stands largely uncontroverted. The district court dismisses this allegation pursuant to trial counsel’s testimony that appeals were “discussed with Petitioner in the course of her representation and is contained in a pamphlet given to indigent defendants.” (A.A. at 31, ¶5.) To replace defense counsel with “pamphlets” (despite some prosecutor’s desire to do so) would render the Sixth Amendment to the United States Constitution and Article I, Section 12, of the North Dakota Constitution moot.

[¶ 28] Moreover, a vague discussion of a right over the “course of representation” falls far short of direct, specific advice, narrowly tailored to the individual defendant’s unique specific case and circumstances. Therefore, once again, Robinson’s allegations stand largely uncontested, yet the district court dismissed the application for post-conviction in less than two pages of text. (A.A. at 30-31.)

[¶ 29] As a result of the district court’s failure to take the next step in its analysis under the Strickland test, This Court is left with the inability to review such things for the first time on appeal. See, e.g., Myers v. State, 2015 ND 54, ¶ 1, 861 N.W.2d 172; State v.

Hammer, 2010 ND 152, ¶ 21, 787 N.W.2d 716; State v. Kurtenbach, 2009 ND 93, ¶ 2, 767 N.W.2d 529 (per curiam); State v. Kieper, 2008 ND 65, ¶ 16, 747 N.W.2d 497; State v. Gill, 2008 ND 152, ¶ 21, 755 N.W.2d 454.

[¶ 30] This Court has outlined factors to be considered when determining if a defendant's claims of a desire to persist in a non-guilty plea are beyond that of a subjective-self-serving statement. Factors such as, strength of the state's case, whether pleading guilty gained a defendant a benefit, whether prosecution may have been brought on counts in addition to those which were plead guilty. *See, e.g., Bahtiraj v. State*, 2013 ND 240, ¶ 17, 840 N.W.2d 605. It is abundantly clear Robinson received no benefit from her guilty pleas, inasmuch as she was sentenced to consecutive sentences in all files and maxed out in two of the three cases. Moreover, the prosecution brought forth every single count that could be sought and did not dismiss a single count. In fact, included the second hand-cuff slip by Robinson while still in custody for the first as a new and independent case and charge, constituting yet another C felony.

[¶ 31] However, as previously noted, these particular factors are un-addressable by This Court for the district court's failure to even address the second prong of Strickland analysis.

**[¶ 32] CONCLUSION**

[¶ 33] For the foregoing reasons, Robinson's trial counsel's representation did fall below an objective standard of reasonableness of the prevailing norms of the profession. This warranted, at the very least an analysis by the district court into the second prong of the Strickland analysis.

[¶ 34] By the district court's failure to do so, has yet again usurped, not only Robinson of her right to have her case be "fully reviewed" by a reviewing court, but has usurped This Court's ability to review such factors.

[¶ 35] These failures have robbed Robinson of her North Dakota Constitutional, Article VI, Section 6 right to appeal, not only once of direct appeal for a failure to even be advised of such a right. But have robbed her of this Constitutional Right yet again, by the district court not addressing an issue, thus effectively commandeering her appellate rights through inaction.

[¶ 36] Therefore, Robinson respectfully requests This Court reverse the district court's denial of her Post-Conviction Relief Application on the basis her trial counsel was ineffective, and remand to the district court to properly and thoroughly address the second prong of the Strickland analysis.

Respectfully submitted this Monday, July 2, 2018.

*/s/ Samuel A. Gereszek*  
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	)	<b>Supreme Court No.:</b>
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	)	<b>36-2017-CV-00266; 36-2017-CV-00267</b>
<b>Appellee.</b>	)	
	)	

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**CERTIFICATE OF SERVICE**

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I, Samuel A. Gereszek, attorney for the Petitioner / Appellant, and officer of the court, hereby certify that I served a true and correct copy of the following:

1. *Appellant's Brief (.pdf and word format);*
2. *Appellant's Appendix*

On the following:

<b>Clerk of the Supreme Court</b>	<b>Kari M. Agotness</b>	Ms. Jennifer Robinson, #38028
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All done by Electronic Filing pursuant to N.D. Sup. Ct. Admin. Order 14.

Dated this Monday, July 2, 2018.

**HAMMARBACK & SCHEVING, P.L.C.**

/s/ Samuel A. Gereszek  
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