

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Nos. 20190178

District Court Nos. 30-2018-CV-00419 [30-2014-CR-01101]

Rodney Harold Friesz,	)
	)
Petitioner and Appellant,	)
	)
v.	)
	)
State of North Dakota,	)
	)
Respondent and Appellee.	)

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**BRIEF OF THE APPELLEE**

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APPEAL FROM THE MORTON COUNTY DISTRICT COURT ORDER  
[MAY 14, 2019] DENYING PETITIONER'S  
MOTION FOR POST-CONVICTION RELIEF

MORTON COUNTY, NORTH DAKOTA  
SOUTH CENTRAL JUDICIAL DISTRICT  
HONORABLE DAVID REICH, PRESIDING

**\*\*ORAL ARGUMENT IS NOT BEING REQUESTED\*\***

Gabrielle J. Goter, ID #06595  
Assistant Morton County State's Attorney  
Morton County Courthouse  
210 2<sup>nd</sup> Ave. NW  
Mandan, ND 58554  
Phone: 701.667.3350  
Fax: 701.667.3323  
E-serve: mortonsa@mortonnd.org

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**STATEMENT OF THE ISSUES**

**[¶1]** Whether the District Court clearly erred in denying the Petitioner's requested post-conviction relief?

## STATEMENT OF THE CASE AND FACTS

[¶2] Rodney Harold Friesz was charged by Criminal Complaint on October 10, 2014 and appeared in court on an initial appearance on that same day. Criminal Index #1, 2, and 5. The Defendant was charged with the offenses of Murder, a Class AA Felony and Arson, a Class B Felony. Criminal Index #1. The Defendant requested counsel and was assigned indigent defense counsel, Travis Finck, who was at that time the supervising attorney for the Bismarck-Mandan Public Defender's Office. Criminal Index#5-8.

[¶3] Discovery was requested by Finck and provided by the State prior to the contested preliminary hearing, held on November 10, 2014. Criminal Index #9, 14, 15, and 17. Probable cause was found for each of the offenses and the matter was set for trial in April 2015. Criminal Index #29. Finck filed a Motion for Psychological Evaluation on November 19, 2014. Criminal Index #23-25. The Court granted the Motion, ordering, in Index #27, a Psychological Evaluation of Friesz, to be conducted at the North Dakota State Hospital, in order to determine whether the Defendant:

- a. was oriented to time and place;
- b. Had some recollection of the events which formed the basis of the criminal charges pending against him in Morton County, North Dakota;
- c. Had sufficient present ability to consult with his attorney with a reasonable degree of rational understanding which would permit him to assist in his own defense. If not, the court asked the evaluator to address whether there was a substantial probability Friesz would attain fitness to proceed in the foreseeable future, and if so, at what projected point in time;
- d. Had a rational, as well as factual understanding of the criminal proceedings pending against him;
- e. Lacked substantial capacity to comprehend the harmful nature or consequences of his conduct;
- f. Acted as a result of a loss or serious distortion of his capacity to recognize reality;

- g. Lacked the capacity specified immediately above in questions e and f at the time the offense occurred which forms the basis of the charges against the Defendant?

**[¶4]** The Psychological Evaluation on Fitness to Proceed and Criminal Responsibility, a 31-page document, was performed by Dr. Jennifer Krance, a ND-licensed psychologist, at the North Dakota State Hospital. Criminal Index #39. Krance made findings on each of the issues in the court's order and provided a report detailing her findings, in light of the legal standards applicable, to the court. The results of the evaluation included the findings that Friesz was oriented, was able to form intent, was able to consult with his attorney and aid in his own defense, and was criminally responsible. Krance also indicated a lack of truthfulness on Friesz's part as well as his insistence that his actions were "self-defense." Criminal Index #39.

**[¶5]** Following the results of this examination, Finck requested a continuance of the trial, which was granted, resetting trial into July 2015. Criminal Index #41, 46, 47. Finck also filed Defendant's Disclosures, which included the Notice of Self-defense and Defense of Premises. Criminal Index #43. Finck additionally filed a Motion to Suppress Evidence, alleging an illegal search and seizure of evidence contained within the subject premises. Criminal Index #49-50. An Order Denying Motion to Suppress was entered by the trial court, after a contested hearing was held on the merits. Criminal Index #336, 96, 85.

**[¶6]** On July 10, 2015, Finck requested a continuance of the July trial date. Criminal Index #86-87. The Court granted the continuance, despite objection from the State, after a hearing was held. Criminal Index 90, 91, 103. The requested continuance was a result of new information being discovered by Finck, which he need to follow

up on. Criminal Index #90-91. A new trial date was set in October 2015. Criminal Index #103. Finck moved to withdraw from his representation of Friesz on September 9, 2015. Criminal Index #107-109. The Court allowed Finck to withdraw due to the irreparable breakdown in attorney-client relations. New trial counsel, Monty Mertz, was assigned. Criminal Index #115.

[¶7] Mertz requested a continuance after his assignment on September 23, 2015, in order to receive and review discovery and prepare with Friesz for trial. Criminal Index #116-117. Trial was reset in order to allow Mertz the opportunity to prepare. Criminal Index #122.

[¶8] Mertz received and reviewed discovery, including meeting multiple times with Friesz in order to prepare a defense. Mertz knew of Krance's evaluation of Friesz at the North Dakota State Hospital. Tr. p. 24, lines 21-25, Tr. p. 25, lines 1-24. Mertz requested Dr. Troy Ertelt, a second forensic psychologist to review the findings of Krance. Tr. p. 25, lines 13-24. Mertz considered it his due diligence to have Ertelt evaluate Friesz, which Ertelt did, spending a day with Friesz. *Id.* Ertelt's findings were consistent with Krance's. *Id.* From Krance's and Ertelt's findings, Mertz saw that Friesz was found legally competent and able to assist in his own defense as well as able to form the requisite intent. *Id.* Based on the findings of two psychologists, Mertz did not see a possible defense of insanity. Tr. p. 26, lines 3-20. Mertz reviewed the multiple confessions for signs of coercion but found none. Tr. p. 28, lines 24-25, Tr. p. 29, lines 1-25, Tr. p. 30, lines 1-9. However, Mertz used the recorded confessions and evidence of Friesz's mental state to mitigate the evidence and confessions at trial. Mertz attributes this strategy to the result of Friesz being found guilty of

Manslaughter and not Murder. Tr. p. 27, lines 19-25, Tr. p. 28, lines 1-14, Tr. p. 28, lines 24-25, Tr. p. 29, lines 1-25, Tr. p. 30, lines 1-9.

**[¶9]** Mertz continued investigating defenses after taking the case over from Finck. Mertz received the case at a time when Friesz had confessed multiple times on recording and had informed Finck and the psychologists that he had killed Jassman as self-defense. Tr. p. 21, lines 6-24. Mertz recognized that his client's position changed and followed up on every statement made by Friesz, attempting to locate additional witnesses and suspects. Tr. p. 21, line 25, Tr. p. 22, lines 1-6, Tr. p. 22, lines 11-25, Tr. p. 23, lines 1-25, Tr. p. 24, lines 1-20, Tr. p. 35, lines 14-25, Tr. p. 36, lines 1-25, Tr. p. 37, lines 1-5. Mertz followed every "rabbit trail" to the end in order to ascertain facts beneficial to his client. Tr. p. 44, lines 1-15. Mertz found no evidence of any kind that anyone other than Friesz was in the residence at the time Gene Jassmann was murdered and the residence lit on fire. Tr. p. 39, lines 17-21. Mertz used Friesz's stated beliefs that Jassmann posed a threat and people were after Friesz as mitigation and defense during the jury trial. Tr. p. 26, lines 13-20, Tr. p. 27, lines 19-25, Tr. p. 28, lines 1-14.

**[¶10]** Jury Trial was held from February 2-5, 2016. Mertz defended Friesz at the trial. During the Jury Trial, Mertz had subpoenaed multiple witnesses, including Derek Wisham and Mike Bonogofsky. Tr. p. 23, lines 19-25, Tr. p. 24, lines 1-20. Bonogofsky testified, which did not allow Mertz the ability to have him declared unavailable and limited the ability of Mertz to call additional witnesses to testify to Bonogofsky's hearsay statements. *Id.* Mertz had prepared for the potentiality of Bonogofsky not testifying and presented offers of proof to the court by way of formal



depositions of Jeremy Ficklin and Robert Heck and the formal statement of Derek Wisham, all of which had been conducted and obtained prior to trial. *Id.*; Criminal Index #133, 304-306.

**[¶11]** Mertz had prepared and filed a Notice of N.D.R.Evid. 804(b)(3) Testimony and N.D.R.Evid. 807 Residual Hearsay Exception, detailing his intentions and, essentially, the theory of Friesz's defense(s) along with the relevant jury instructions and transport orders. Criminal Index #133, 129-130, 139-142.

**[¶12]** The jury returned verdicts of guilty to the lesser included offense of Manslaughter and Arson, as alleged. Criminal Index #311. Mertz appealed the issues of the trial court's Order Denying the Motion to Suppress and the sufficiency of the evidence for the convictions of Manslaughter and Arson. Criminal Index #324, 326. *See State v. Friesz*, 2017 ND 177, 930 N.W.2d 609. The North Dakota Supreme Court concluded that the trial court had not erred in denying the motion to suppress and that there was sufficient evidence to sustain convictions of arson and manslaughter. Criminal Index #330-331. *See State v. Friesz*, 2017 ND 177, 930 N.W.2d 609.

**[¶13]** On May 2, 2018, Friesz filed an application for Post-Conviction Relief. App. 14-18. On appointment of his post-conviction counsel, Russell Myhre, and at the opening of the post-conviction hearing on February 4, 2019, Myhre refined the grounds on which Friesz was seeking post-conviction relief to include ground 1) conviction obtained by coerced confession; ground 4) conviction obtained by unconstitutional failure of the prosecution to disclose to the defendant evidence favorable; and ground 6) denial of effective assistance of counsel Travis Finck and Monty Mertz; and ground 8) conviction obtained through the denial of right to call witnesses favorable to

Friesz's behalf. The Court sought clarification of the remaining issues, which counsel agreed amounted to an overall claim of ineffective assistance of trial counsel. Tr. p. 4, line 20-Tr. p. 6, line 19.

**[¶14]** After a hearing, during which Travis Finck and Monty Mertz were called as witnesses and were subject to direct and cross-examination, as well as post-hearing briefing, the District Court [the same as the trial court], issued an Order on Application for Post-conviction Relief. App. p. 31-35. The District Court, citing to *Heckelsmiller v. State*, 2004 ND 191, ¶3, 687 N.W.2d 454 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)), outlined the standard for ineffective assistance of counsel: "1) counsel's representation fell below an objective standard of reasonableness, and 2) the defendant was prejudiced by counsel's deficient performance." App. p. 33 at ¶6.

**[¶15]** The District Court determined that Friesz had not carried his burden and satisfied the *Strickland* test in that Friesz had both failed to establish an objective standard of reasonableness [of representation] or that his trial counsel's representation fell below the acceptable standard. App. p. 34 at ¶10. The District Court, also found that Friesz failed to show, in line with *Laib v. State*, 2005 ND 187, ¶10, 705 N.W.2d 845, how and where his trial counsel was incompetent and the probable different result. App. p. 34 at ¶¶9, 11. The District Court stated that Friesz's speculation that a second evaluation would have produced a different result and changed the outcome of the trial did not create a reasonable probability of a different result. App. p. 34 at ¶11. The District Court denied Friesz's Application for Post-conviction Relief in its entirety. App. p. 34 at ¶12.

**[¶16]** Friesz appealed the Order on Application for Post-conviction Relief on the basis that the “trial court erred in denying the Petitioner’s Petition for Post-Conviction Relief” on both *Strickland* bases: 1) Friesz’s trial counsel’s conduct fell below the standard of reasonableness that is expected and constitutionally ensured and 2) Friesz was prejudiced by his trial counsel’s lack of diligence and poor preparation.

## **STANDARD OF REVIEW**

[¶17] The Standard of Review regarding post-conviction relief, alleging ineffective assistance of counsel is defined by this Court in *Kalmio v. State*, 2018 ND182, ¶13, 915 N.W.2d 655 (quoting *Roe v. State*, 2017 ND 65, ¶¶4-5, 891 N.W.2d 745):

“A Person may apply for post-conviction relief on the ground that the conviction was obtained in violation of the United States Constitution. The Sixth Amendment guarantees that a person charged with a crime is entitled to effective assistance of counsel at critical stages of criminal proceedings. An applicant for post-conviction relief who claims ineffective assistance of counsel must demonstrate: (1) his counsel’s representation fell below an objective standard of reasonableness; and (2) he was prejudiced by his counsel’s representation. A district court should dispose of an ineffective assistance of counsel claim without reaching the merits of the first prong if the applicant fails to establish prejudice.

“The standard of review for a claim of ineffective assistance of counsel in a post-conviction proceeding is well-established: Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure. Whether a petitioner received ineffective assistance of counsel is a mixed question of law and fact and is fully reviewable on appeal. Under N.D.R.Civ.P. 52(a), the district court’s findings of fact will not be disturbed on appeal unless clearly erroneous. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made.”

## ARGUMENT

### **I. The District Court Did Not Err in Denying the Defendant's Application for Post-Conviction Relief.**

[¶18] This Court has previously stated, “While summary dismissal generally is not appropriate for post-conviction claims of ineffective assistance of counsel, it is appropriate if the petitioner does not raise a genuine issue of material fact.” *Atkins v. State*, 2017 ND 290, ¶9, 904 N.W.2d 738 (citing *Klose v. State*, 2008 ND 143, ¶9, 752 N.W.2d 192). The *Klose* Court simply stated:

“To avoid summary dismissal of an ineffective assistance of counsel claim, the post-conviction applicant must present some evidence that his counsel’s performance fell below an objective standard of reasonableness, and he must overcome the presumption that his counsel’s performance was within the broad range of reasonableness.” *Klose v. State*, 2008 ND 143, ¶13, 752 N.W.2d 192.

[¶19] The Court has stated that once a petitioner is put to his proof (the respondent has answered and moved for summary judgment), the petitioner “must specify how and where counsel was incompetent and the probable different result.” *Id.* A petitioner who “fails to ‘show how, but for the attorneys’ errors, the results of the proceedings would have been different’ justifies a district court’s decision to summarily dismiss the ineffective assistance of counsel claims.” *Atkins v. State*, 2017 ND 290, ¶9, 904 N.W.2d 738 (citing *Hughes v. State*, 2002 ND 28, ¶7, 639 N.W.2d 696).

[¶20] *State v. Bender* outlined the requirements of N.D.C.C. § 29-32.1-04, in which it was recognized that it was the petitioner’s duty to “set forth a concise statement of each ground for relief, and specify the relief requested,” refer to the pertinent portions of the record of prior proceedings, and if those portions are not in the record, the petitioner must attach those portions to the application. *State v. Bender*, 1998 ND

72, ¶19, 576 N.W.2d 210. A petitioner is required to provide evidentiary support for his petition when he has been given notice he is being put on his proof. *Id.* at ¶20. Once the petitioner has been put on his proof, he may not “merely rely on the pleadings or on unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact.” *Wheeler v. State*, 2008 ND 109, ¶5, 750 N.W.2d 446. If the petitioner presents competent evidence, he is then entitled to an evidentiary hearing to fully present that evidence. *Steinbach v. State*, 2003 ND 46, ¶17, 658 N.W.2d 355.

**[¶21]** In the instant case, the Defendant made a number of claims in his application for post-conviction relief. However, at the evidentiary hearing, where the Defendant was represented by attorney Russell Myhre, the Defendant withdrew all but one allegation, leaving the sole claim for post-conviction relief on the basis of ineffective assistance of counsel. (Tr. 4, line 20-Tr. 6, line 19).

**[¶22]** In the instant case, there was no motion for summary judgment. However, the State as Respondent filed an Answer, and an evidentiary hearing was held, putting the Defendant on his proof. The evidentiary hearing, supplemented by the post-hearing briefs, were the Defendant’s opportunity to offer evidence that his trial counsel’s (Mr. Finck and subsequently Mr. Mertz) representation fell below an objective standard of reasonableness. Both Mr. Finck’s and Mr. Mertz’s performance were presumed to fall within the range of reasonableness entering the evidentiary hearing.

**[¶23]** The District Court acknowledged this presumption in his Order on Application for Post-conviction Relief: “The defendant must first overcome the strong presumption that counsel’s conduct falls within the wide range of reasonable

professional assistance.” App. p. 33 at ¶7 (citing *Heckelsmiller*, 2004 ND at ¶3, 687 N.W.2d 454). The District Court cited this court’s finding in *Lange v. State*, 522 N.W.2d 179, 181 (N.D. 1994) in stating: “The effectiveness of counsel is measured by an objective standard of reasonableness considering prevailing professional norms.” App. p. 34 at ¶9.

**[¶24]** The District Court considered the matter carefully, after hearing testimony of both trial counsel, Mr. Travis Finck and Mr. Monty Mertz, and reviewing both post-hearing briefs (App. p. 31 at ¶2.) before issuing his Order Denying Post-Conviction Relief. Specifically, he looked at what such competent evidence would need to demonstrate in the case of post-conviction on the basis of ineffective assistance of counsel.

**[¶25]** The District Court cited to *Heckelsmiller v. State*, 2004 ND 191, ¶3, 687 N.W.2d 454 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). Specifically, the District Court found that “the standard for ineffective assistance of counsel is well established. A defendant claiming ineffective assistance of counsel must show (1) counsel’s representation fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel’s deficient performance.” App. p. 33 at ¶6.

**[¶26]** The District Court’s findings of the appropriate standard to apply to a claim of ineffective assistance of counsel was consistent with this Court’s interpretation of *Strickland v. Washington*, 466 U.S. 668 (1984), as it was interpreted by this court in *Stoppeworth v. State*, 501 N.W.2d 325 (N.D. 1993):

“A defendant is guaranteed effective assistance of counsel by both the Federal and North Dakota Constitutions. U.S. Const. amend. VI and XIV; N.D. Const. art. I, 12. When a defendant raises an ineffective-assistance-of-counsel argument, it is the defendant’s burden to prove that

counsel's assistance was ineffective at trial. *State v. Skaro*, 474 N.W.2d 711, 714 (N.D. 1991). In carrying that burden, the defendant must establish two elements. 'First, the defendant must prove that the counsel's performance was deficient. Second, the defendant must prove that the deficient performance prejudiced the defendant.' *State v. Wilson*, 488 N.W.2d 618, 622 (N.D. 1992) [citing *Strickland v. Washington*, 466 U.S. 668 (1984)]. In attempting to prove the first element, 'the defendant must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."' *State v. Skaro*, 474 N.W.2d at 715 (quoting *Strickland v. Washington*, 466 U.S. at 689). The second element requires the defendant to prove that, 'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. at 694). See also *State v. Bowers*, 426 N.W.2d 293, 295 (N.D. 1988); *State v. Thompson*, 359 N.W.2d 374, 377 (N.D. 1985).

**[¶27]** Further, as noted by the District Court in the instant case, the Defendant must prove not only that counsel's assistance was ineffective, but must specify how and where trial counsel was incompetent and the probable different result. App. p. 34, ¶¶9, 11. *Laib v. State*, 2005 ND 187, ¶10, 705 N.W.2d 845.

**[¶28]** From the arguments presented at hearing and in the post-hearing briefs, the Court summarized the Defendant's argument that trial counsel was ineffective was based on three factors: 1) the Defendant's contentions that his attorneys were ineffective because they failed to suppress his multiple confessions; 2) the Defendant's contention that his confessions were not freely and voluntarily given, but were a reflection of his drug-induced mental state and diminished capacity; and 3) the Defendant's contention that Mr. Mertz misinterpreted the statute regarding voluntary intoxication, N.D.C.C. §12.1-04-02 and failed to request a second psychological evaluation. Order on Application for Post-conviction Relief, App. pgs. 31-32 at ¶3.



[¶29] The District Court considered the testimony and arguments and found that the Defendant “has not satisfied the *Strickland* test. Friesz did not present evidence to establish an objective standard of reasonableness or to show that his attorneys’ assistance fell below such a standard.” App. p. 4, ¶ 10. The District Court found that the Defendant’s arguments essentially amounted to a wish that his trial counsel had pursued a different strategy or trial tactic rather than evidence of ineffective assistance. Lacking evidence of the first prong of the *Strickland* test, the Defendant failed to overcome the presumption that his counsels’ conduct fell below the wide range of reasonable professional assistance.

[¶30] Although a claim of ineffective assistance of counsel is fully reviewable on appeal, this Court has found that it still recognizes the factual findings of the District Court, who is in a better position to judge the credibility and demeanor of the witnesses. *Kalmio v. State*, 2018 ND182, ¶13, 915 N.W.2d 655 (quoting *Roe v. State*, 2017 ND 65, ¶¶4-5, 891 N.W.2d 745). Here, the Court did not err in deciding that the Defendant’s contentions that his attorneys were ineffective because they failed to suppress his multiple confessions or pursue mental health investigations regarding the defense of insanity failed the *Strickland* test.

[¶31] On review, this Court, as the District Court did, has before it the whole of the record in the criminal matter as well as the testimony of Travis Finck and Monty Mertz at the Post-conviction hearing. The record and the testimony of Friesz’s two defense counsel bear out the District Court’s findings.

[¶32] First, Defendant’s original trial counsel was Travis Finck, who during his representation pursued a theory of self-defense, as Friesz had confessed multiple

times and continued to state to Finck that he had killed Gene Jassmann because he believed he posed a threat. Finck's memory of his representation of Friesz was imperfect at the post-conviction hearing due to the passage of time. However, facts, as a matter of court record included that Finck filed a motion to suppress evidence, which was denied, a decision this court affirmed on appeal. Finck requested a competency evaluation, which was ordered by the District Court. Criminal Index #23-24, 27.

**[¶33]** During that evaluation, Friesz maintained that he had killed Jassmann and started the residential fire. Criminal Index # 39. Friesz was found competent to stand trial, not lacking in criminal responsibility, and able to aid in his own defense as a result of this evaluation. Criminal Index # 39. Mr. Finck continued preparing a self-defense, as that was the only information afforded him by the evidence and his client at the time of his representation. All of these facts are a matter of court record in the underlying criminal case as well as Finck's testimony at the post-conviction hearing.

**[¶34]** Additionally, Mr. Finck requested and was granted multiple continuances of the trial date in order to pursue additional and changing information and perform his due diligence. Depositions were held at Finck's request of Jeremy Ficklin and Robert Heck when those individuals presented information inconsistent with that previously known to the parties. Criminal Index #304-305. It was at this point that the attorney-client relationship broke down. Mr. Finck sought and was allowed to withdraw from his representation, and Mr. Mertz was appointed as trial counsel. This is also a matter of court record in the underlying criminal case, including the depositions undertaken by Finck on Friesz's behalf. *See* Criminal Index #304-306.

[¶35] Friesz fails to show how Mr. Finck’s representation falls below “prevailing professional norms.” Finck, until the end of his representation of Friesz, filed the motions he believed to be meritorious, requested a mental health examination, and pursued additional statements and witnesses, which were later used at trial. As the District Court noted in his Order, “[Friesz] asserts that his attorneys could have pursued a different trial strategy or trial tactic. This assertion is not evidence of ineffective assistance.” App. at p. 34, ¶10. This is especially true in light of the presumption that Finck’s conduct fell within the wide range of reasonable professional assistance. *See Heckelsmiller v. State*, 2004 ND 191, ¶3, 687 N.W.2d 454.

[¶36] Additionally, the State argues that the Defendant fails to show that any deficiencies on the part of Finck could not and were not cured by Friesz’s trial counsel Monty Mertz. Mertz undertook representation of Friesz, and, per his testimony at the post-conviction hearing, pursued the “rabbit trails” being presented by Friesz throughout his representation. Tr. p. 44, lines3-10.

[¶37] Friesz contends on this appeal that not filing a motion to suppress confessions or statements and not pursuing mental health investigations regarding the defense of insanity are the bases on which Friesz is now arguing his trial counsel was ineffective. Finck’s representation ended with his withdrawal from the case. New counsel, Mertz, was assigned and given continuances in order to conduct proper discovery and prepare for trial.

[¶38] During the post-conviction hearing, Mertz outlined his strategy to the district court, which is borne out in the criminal record, particularly as included in his Notice of N.D.R.Evid. 804(b)(3) Testimony and N.D.R.Evid. 807 Residual Hearsay Exception,

detailing his intentions and, essentially, the theory of Friesz's defense(s) along with the relevant jury instructions and transport orders. Tr. p. 22, lines 20-25, Tr. p. 23, lines 1-25, Tr. p. 24, lines 1-20; Criminal Index #133, 129-130, 139-142. Mertz testified that he followed Friesz's new concern that there was some other murderer as far as its viability would take him. Tr. p. 38, lines 14-25, p. 39, lines 1-25, p. 40, lines 1-5, p. 44, lines 7-15. Mertz also agreed he took the self-defense as far as that could go as well, including making a distinction between specific and general intent and successfully seeking the legal instructions in that regard. Tr. p. 44, lines 16-24, Tr. p. 26, lines 13-25, Tr. p. 27, lines 1-13. Mertz testified that his defense of Friesz was successful in that a lesser included offense of manslaughter was found based on his defense regarding intent. Tr. p. 44, line 25, Tr. p. 45, lines 1-16.

**[¶39]** Mertz testified he would not have done anything differently on reviewing the case after the fact. Tr. p. 45, lines 1-16. Mertz testified that he did not file a motion to suppress statements in the criminal case because any such motion would not have been meritorious on his review of the case. Additionally, Mertz testified that he used the confessions and statements made by Friesz to pursue the self-defense theory and theory regarding intent. Tr. p. 27, lines 14-25, Tr. p. 28, lines 1-25, Tr. p. 29, lines 1-25, Tr. p. 30, lines 1-25, Tr. p. 31, lines 1-15, Tr. p. 41, lines 11-25, Tr. p. 42, lines 1-4.

**[¶40]** The second issue of failing to follow up on a defense regarding a defense of insanity is arguably disingenuous. In this case, Friesz's original counsel requested a competency evaluation to assess criminal responsibility as well as fitness to proceed to trial and aid in Friesz's own defense. That evaluation was conducted at the North Dakota State Hospital, and the findings are part of the criminal record. Criminal Index

#39. They were adverse to any insanity defense Friesz would wish to claim. Mertz acknowledged this on testimony during the post-conviction hearing. Tr. p. 24, lines 24-25, Tr. p. 25, lines 1-12.

[¶41] Friesz at the post-conviction hearing and seemingly again on appeal, argues that trial counsel should have sought a second opinion or followed up on the first. However, the testimony of Mertz during the post-conviction hearing was that he had done just that, believing it to be his due diligence. Tr. p. 25, lines 13-24. Dr. Troy Ertelt reviewed Dr. Krance's report as well as spending a day with Friesz. *Id.* Dr. Ertelt agreed with Dr. Krance's findings. *Id.*

[¶42] Mertz testified that although he couldn't use the insanity defense, he did defend the case on a *mens rea* premise, arguing that Friesz believed Jassmann was going to kill him and was acting in self-defense. Tr. p. 26, lines 13-20. Mertz testified that he had made the argument to the jury to find him not guilty on grounds of self-defense, but that in seeking the self-defense instruction and defense, he triggered the District Court to give instructions on lesser included offenses, which is how Friesz was ultimately convicted. Tr. p. 27, lines 1-13. Mertz testified that this was a very good result for Friesz in that he was found guilty of a crime two offense levels below that with which he was charged. *Id.*, Tr. p. 45, lines 9-16.

[¶43] Friesz fails to show how Mr. Mertz's representation falls below "prevailing professional norms." Mertz, until the end of his representation of Friesz, filed the motions he believed to be meritorious, requested a second mental health examination, pursued additional statements and witnesses that were later used at trial, and formulated and executed a multi-faceted self-defense, which resulted in

Friesz being convicted of manslaughter and not murder. As the District Court noted in his Order, “[Friesz] asserts that his attorneys could have pursued a different trial strategy or trial tactic. This assertion is not evidence of ineffective assistance.” App. p. 34 at ¶10. This is especially true in light of the presumption that Mertz’s conduct fell within the wide range of reasonable professional assistance. *See Heckelsmiller v. State*, 2004 ND 191, ¶3, 687 N.W.2d 454.

¶44 Although he would not have needed to proceed further in his analysis, the District Court did look at the second prong of the *Strickland* test in that he also found that the Defendant failed to establish that he was prejudiced by his attorneys’ performance in his case. The Court stated that mere speculation as to a different result does not create the probability of a different result. App. 33, ¶8-App. 34, ¶9, ¶11

¶45 Here, there is speculation that filing a motion to suppress statements would have resulted in all of Friesz’s multiple recorded confessions and statements to third parties being suppressed. That is contradictory to the record and to the testimony of Mertz, who is an experienced defense attorney. Mertz testified that any such motion to suppress would have lacked merit based on his review of the evidence, the facts and the circumstances of Friesz’s statements, and the statements themselves. Tr. p. 28, lines 15-25, Tr. p. 29, lines 1-25, Tr. p. 30, lines 1-25, Tr. p. 31, lines 1-15.

¶46 Here, there is also mere speculation that seeking a second opinion or following up on an insanity defense would have resulted in a different outcome. However, Mertz did seek a second psychologist’s opinion. Dr. Ertelt agreed with Dr. Krance’s findings. Mertz testified at the post-conviction hearing that there was not a viable insanity defense at that time, but he used Friesz’s perceptions to argue self-defense

with effect. There is no indication and certainly no evidence that Friesz would have prevailed in asserting a defense of insanity. In fact, it's the opposite, both Finck and Mertz sought opinions of mental health experts, who made findings adverse to such a defense. There is no evidence of prejudice within the record or testimony that Friesz was prejudiced by a deficient performance in either trial counsel.

**[¶47]** Because the District Court correctly found that the Defendant failed meet its burden with regard to either prong of the *Strickland* test regarding efficacy of Friesz's trial counsel Travis Finck and Monty Mertz, the Court was correct in denying Friesz's application for post-conviction relief.

**CONCLUSION**

[¶48] The District Court did not err, in looking at the legal framework of post-conviction claims of ineffective assistance of trial counsel, in his decision deny Friesz's Application for Post-Conviction Relief in all things. For all of the foregoing facts and argument, the State of North Dakota respectfully requests this Court affirm and uphold the District Court's Order on Application for Post-Conviction Relief.

[¶49] Respectfully submitted this 2nd day of December, 2019.

**/s/ Gabrielle J. Goter**

GABRIELLE J. GOTER, Id No. 06595  
Morton County Assistant State's Attorney  
Morton County Courthouse  
210 2<sup>nd</sup> Ave NW  
Mandan, ND 58554  
701.667.3350  
701.667.3323 (fax)  
E-serve: mortonsa@mortonnd.org

**CERTIFICATE OF COMPLIANCE**

[¶50] The undersigned certifies that the Appellee's Brief contains twenty-four (24) pages consisting of the cover page through the conclusion and signature block, thereby complying with the page limits outlined in North Dakota Rules of Appellate Procedure Rule 32(a)(8)(A).

Dated this 2<sup>nd</sup> day of December, 2019.

**/s/ Gabrielle J. Goter**

GABRIELLE J. GOTER, Id No. 06595  
Morton County Assistant State's Attorney  
Morton County Courthouse  
210 2<sup>nd</sup> Ave NW  
Mandan, ND 58554  
701.667.3350  
701.667.3323 (fax)  
E-serve: mortonsa@mortonnd.org



IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Nos. 20190178

District Court Nos. 30-2018-CV-00419 [30-2014-CR-01101]

Rodney Harold Friesz, )  
 )  
 Petitioner and Appellant, )  
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 v. )  
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 State of North Dakota, )  
 )  
 Respondent and Appellee. )

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**CERTIFICATE OF SERVICE**

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[¶1] The undersigned hereby certifies that on the 2nd day of December, 2019, a true and correct copy of the **BRIEF OF THE APPELLEE** in PDF was filed with the Clerk of the North Dakota Supreme Court with a copy served upon the Petitioner/Defendant/Appellant by electronic mail to his counsel of record, Laura Ringsak to her email address: lringsak@midconetwork.com.

Dated the 2nd day of December, 2019.

/s/ Gabrielle J. Goter  
Gabrielle J. Goter, ID #06595  
Assistant Morton County State's Attorney  
210 2<sup>nd</sup> Ave. NW  
Mandan, ND 58554  
Phone: 701.667.3350  
E-serve: mortonsa@mortonnd.org

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[¶1] The undersigned hereby certifies that on the 2nd day of December, 2019, a true and correct copy of the **BRIEF OF THE APPELLEE (corrected)** in PDF was filed with the Clerk of the North Dakota Supreme Court with a copy served upon the Petitioner/Defendant/Appellant by electronic mail to his counsel of record, Laura Ringsak to her email address: lringsak@midconetwork.com.

Dated the 2nd day of December, 2019.

/s/ Gabrielle J. Goter  
Gabrielle J. Goter, ID #06595  
Assistant Morton County State's Attorney  
210 2<sup>nd</sup> Ave. NW  
Mandan, ND 58554  
Phone: 701.667.3350  
E-serve: mortonsa@mortonnd.org