

IN THE SUPREME COURT
OF NORTH DAKOTA

Supreme Court Case No.: 20190408
Ward County Case No.: 51-2018-cv-01305

James Richard Kremer,
Petitioner and Appellant,
vs.
State of North Dakota,
Respondent and Appellee.

Appellant's Supplemental Brief

Appeal from the Order Denying Post-Conviction Relief in Ward County District Court,
North Central Judicial District, North Dakota
December 4, 2019, the Honorable Douglas L. Mattson presiding

Benjamin C. Pulkrabek
ND Bar No. 02908
Pulkrabek Law Office
402 First Street NW
Mandan, ND 58554
Office: 701-663-1929
pulkrabek@lawyer.com
Attorney for the Appellant

TABLE OF CONTENTS

<u>Document:</u>	<u>Paragraph No.:</u>
Table of Authorities	Page (ii)
Statement of Issue	¶1
Law and Argument.....	¶2-¶7
Issue 1: Whether or not Defendant/Appellant James Richard Kremer’s counsel’s performance in this case was inadequate and a violation of his sixth amendment rights?	
Conclusion	¶8

TABLE OF AUTHORITIES

Cases/Statutes:

Paragraph No.:

United States Supreme Court Case:

<i>Henderson v. Morgan</i> , 426 U.S. 637 (1976)	¶12
<i>Bousley v. US</i> , 118 S.Ct. 1604 (1998)	¶12
<i>Powell v Alabama</i> , 287 US 45, 77 L Ed 158, 53 S Ct 55, 84 ALR 527 (1932)	¶13
<i>Lee v. US</i> , 137 S.Ct. 1958 (2017)	¶16
<i>Flores-Ortega</i> , 528 U.S. at 483, 120 S.Ct. 1029, 145 L.Ed.2d 985	¶16
<i>Hill v. Lockhart</i> , 474 U.S. at 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985)	¶16
<i>INS v. St. Cyr</i> , 533 U.S. 289, 322-323, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001)	¶16

STATEMENT OF ISSUES

[¶1] **Issue 1:** Whether or not Defendant/Appellant James Richard Kremer's counsel's performance in this case was inadequate and a violation of his sixth amendment rights?

LAW AND ARGUMENT

[¶2] Mr. Kremer's counsel's performance on this case was inadequate in many ways. Mr. Kremer was never informed of any details of any of the charges against him including the essential elements prior to being presented with the information document at his Change of Plea hearing. He was also only given a few minutes to review the document and his counsel never explained or discussed the document with him. The essential element in particular Mr. Kremer was never informed of is that of knowledge. Mr. Kremer states he had no knowledge of the files' presence on any of his devices. In Henderson v. Morgan (426 U.S. 637 (1976)) the US Supreme Court held that advice on the intent element of an offense is constitutionally required. Mr. Kremer believes that advice on the culpability requirement and essential element of knowledge and knowingly should also be required. In Bousley v. U.S. (118 S.Ct. 1604 (1998)), the US Supreme Court strongly indicated that accurate advice regarding the elements of the crime is necessary to a valid plea.

[¶3] The Honorable Judge Mattson in his Order Denying Post-Conviction Relief (See Appellant's Appendix pp. 39) states in ¶27 that since the information sheet presented to Mr. Kremer at his Change of Plea hearing listed all the charges with the elements this

was sufficient to inform Mr. Kremer of the nature of each charge and the concept of essential elements. This is a fundamentally flawed belief. This is analogous to saying if someone is presented with a sheet full of logarithms, then that person has all the information needed to perform calculus. The Supreme Court has recognized that even an intelligent and educated layman has small and sometimes no skill in the science of law. Indeed he frequently lacks both the skill and knowledge adequate to prepare a defense even though he may have a perfect one. "He requires the guiding hand of counsel at every step of the proceedings against him." (See Powell v. Alabama, 287 U.S. 45, 69, 53 S. Ct. 55, 64, 77 L. Ed. 158 (1932)). Mr. Kremer states that when he read the words "knowing" and "knowingly" in the information presented to him at the Change of Plea hearing, he believed that those terms were simply added by the prosecutor to make the charges seem worse.

[¶4] Mr. Kremer states that even though his case was transferred from the federal court into the state court, he counsel still had the duty to make sure the client was made aware of the charges against him and the essential elements the state has to prove. His counsel should have also made sure he had seen the contents of the discovery and went over it with him when his counsel would have found out that he had not seen the contents.

[¶5] For these reasons and those presented in the Appellant's Brief, Mr. Kremer has shown his counsel's performance fell below an objective standard of reasonableness therefore satisfying the first test of Strickland.

[¶6] As far as the second test in Strickland goes, there have been many cases ruled on by the US Supreme Court dealing with ineffective assistance of counsel and guilty pleas.

In Lee v. US (137 S.Ct. 1958), the US Supreme Court stated the following:

"But in this case counsel's 'deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself.' Flores-Ortega, 528 U.S. at 483, 120 S.Ct. 1029, 145 L.Ed.2d 985. When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial 'would have been different' than the result of the plea bargain. That is because, while we ordinarily 'apply a strong presumption of reliability to judicial proceedings,' 'we cannot accord' any such presumption 'to judicial proceedings that never took place.' Id., at 482-483, 120 S.Ct. 1029, 145 L.Ed.2d 985 (internal quotation marks omitted).

We instead consider whether the defendant was prejudiced by the 'denial of the entire judicial proceeding...to which he had a right.' Id., at 483, 120 S.Ct. 1029, 145 L.Ed.2d 985. As we held in Hill v. Lockhart, when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a 'reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' 474 U.S. at 59, 106 S.Ct. 366, 88 L.Ed.2d 203."

Furthermore, the US Supreme Court goes on to state:

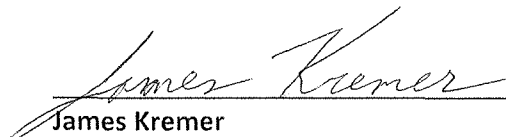
"But common sense (not to mention our precedent) recognizes that there is more to consider than simply the likelihood of success at trial. The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. See INS v. St. Cyr, 533 U.S. 289, 322-323, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001). When those consequences are, from the defendant's perspective, similarly dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years." (Emphasis added).

[¶17] Mr. Kremer was sentenced effectively to 13 years instead of the 15 years he was facing in the federal court. According to him, these are both equally dire sentences. Mr. Kremer has demonstrated a reasonable probability that, if it had not been for his counsel's errors, he would have chosen not to plead guilty and instead go to trial. Mr. Kremer has shown prejudice and therefore satisfies the second test of Strickland.

CONCLUSION

[¶18] Mr. Kremer prays that this court reverses the Order Denying Post-Conviction Relief made by the Honorable Judge Mattson and grants the relief requested.

[¶19] Dated this 7th day of February, 2020.



James Kremer
James River Correctional Center, Inmate #44998
2521 Circle Drive
Jamestown, ND 58401

IN THE SUPREME COURT OF NORTH DAKOTA

James Richard Kremer,)	Supreme Court File No.
Plaintiff and Appellee,)	20190408
)	
v.)	Ward County No.
)	51-2018-CV-01305
)	
State of North Dakota,)	CERTIFICATE OF SERVICE
Defendant and Appellant.)	

[¶1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Supplemental Brief

By email at the below address upon:

Rozanna Larson
Ward County States Attorney
51wardsa@wardnd.com

By efilng at the below address upon:

North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

And by placing a true and correct copy of said items in a sealed envelope with USPS mail to:

James Richard Kremer
C/O James River Correctional Center
2521 Circle Drive
Jamestown, ND 58401

Dated this 12th day of February, 2020

/S/ Cassy Larson
Cassy Larson
Legal Assistant to Benjamin C. Pulkrabek
Pulkrabek Law Office
402 First Street NW
Mandan, ND 58554
(701) 663-1929
pulkrabek@lawyer.com