

IN THE SUPREME COURT OF NORTH DAKOTA

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Ashley Kenneth Hunter,	)	<b>Supreme Court File No.</b>
	)	<b>20200160</b>
	)	
Petitioner and Appellant,	)	<b>Cass County No.</b>
	)	<b>09-2019-CV-2260</b>
v.	)	
	)	
State of North Dakota,	)	<b>Appellant's Brief</b>
	)	
Respondent and Appellee.	)	

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**Appeal from the judgment entered May 18, 2020 in Cass  
County district court, east central judicial district, North  
Dakota, the Honorable Stephannie N. Stiel presiding.**

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**APPELLANT'S BRIEF**  
**ORAL ARGUMENT REQUESTED**

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Oral Argument:

Oral argument has been requested to emphasize and clarify the Appellant's written arguments on their merits.

Transcript References:

The post-conviction hearing for this matter was conducted on January 14, 2020. The transcript of the jury trial is referred to as [PCR Tr.] in this brief.

## **JURISDICTION**

[¶ 1] Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

“An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party.”

N.D.C.C. § 29-28-06.

## **STATEMENT OF THE ISSUES**

- [¶ 2] Whether Mr. Hunter is entitled to Post-Conviction Relief.
- a. Whether Mr. Hunter was provided ineffective assistance of counsel.
  - b. Whether there was judicial bias and ineffective assistance of counsel.
  - c. Whether Mr. Hunter’s confession was unconstitutionally acquired and there was ineffective assistance of counsel.

## **STATEMENT OF CASE**

[¶ 3] This is an appeal from the Cass County final judgment made May 18, 2020 and the underlying Order denying Ashley Hunter's application for post-conviction relief entered by the Honorable Stephanie Stiel.

[¶ 4] The district court held an evidentiary hearing on January 8, 2020. Mr. Hunter through his attorney filed a closing brief on February 5, 2020. The State filed an Amended Closing Brief February 20, 2020. On May 12, 2020, the court issued an Order denying Mr. Hunter's petition for post-conviction relief. Mr. Hunter now timely appeals that Order.

### STATEMENT OF FACTS

[¶ 5] The evidentiary hearing on this matter was originally scheduled for November 22, 2019 the matter was continued to January 8, 2020. On January 6, 2020, the State asserted the affirmative defenses of res judicata and misuse of process pursuant to N.D.C.C. § 29-32.1-12. Tr. p. 7, Index # 20. During the January 8, 2020 hearing, Mr. Hunter argued he was entitled to additional time in order to respond to the affirmative defenses raised by the State. Tr. p. 7. The Court ultimately found that Mr. Hunter's claim of false confession, *Miranda* violation, and judicial bias were barred based on the affirmative defense of res judicata.

[¶ 6] Mr. Hunter was charged in case No. 09-2015-CR-2085 with: Count 1- Murder, a Class AA Felony, Count 2- Murder, a Class AA Felony, and Count 3- Arson, a Class B Felony. He received a sentence of life without parole on Counts 1 and 2, to be served concurrently, and a sentence of 10

years, also served concurrently on Count 3.

[¶ 7] On the afternoon of June 22, 2015, Fargo police officers responded to a call about a death at a north Fargo location and found the body of Clarence Flowers. Trial Tr. at pp. 326; 333; 352; 387. Mr. Flowers had been stabbed numerous times. Late that evening, firefighters responded to a call about a fire at a north Fargo location and found the body of Samuel Traut. Mr. Traut had been killed by blunt force trauma to the head. *Id.* at p. 688.

[¶ 8] The next morning, 6:34 a.m., Fargo police officers were dispatched to an address near Mr. Traut's murder scene in response to a call about a suspicious male. Mr. Hunter was at an adjacent home to the second murder (Mr. Traut) scene and approached officers. He was then arrested on an unrelated warrant. *Id.* at 795. He was subsequently interrogated by Detectives Matthew Ysteboe and Nick Kjonaas. He was questioned at length while suffering from extreme exhaustion and serious mental impairment caused by the intoxication of methamphetamine. *Id.* at 1352. Mr. Hunter made several incriminating statements related to the Flowers and Traut murders. After the interview was complete, Mr. Hunter attempted suicide and was taken to the hospital.

[¶ 9] On June 24, 2015 Mr. Hunter was appointed Attorney Mertz. *Case No. cr2085*, Index 15. On June 29, 2015 the case was reassigned to special case contractor Attorney Mottinger. *Id.* at Index 16. A stipulated

motion to have Mr. Hunter committed to the State Hospital for mental health evaluations on July 9, 2015 was filed, but no request to stay proceedings was made. *Id.* at 17. On July 10, 2015 Mr. Mottinger filed a written waiver of Mr. Hunter's right to a preliminary hearing and entered a not guilty plea. *Id.* at Index 19. On February 26, 2016 Mr. Mottinger filed a motion to request a hearing regarding his continued appointment as Mr. Hunter's counsel. *Id.* at 32. A hearing was held on March 1, 2016 to address Mr. Hunter's concerns with his representation. *See* SC transcript *Case No. cr2085*, Index 54.

[¶ 10] At the hearing held on March 1, 2016, Mr. Hunter explained to the Court that Mr. Mottinger had not given him all of his discovery, had not filed motions that they had agreed he would file, and that there had been a break down in communication. *Id.* at p. 3. The Court advised Mr. Hunter that he may not be assigned a new attorney, he had a right to self-representation, but the Court would most-likely keep Mr. Mottinger as standby counsel regardless of Mr. Hunter's wishes. *Id.* Mr. Hunter stated he would rather waive his right to counsel than proceed with Mr. Mottinger. The Court then denied Mr. Hunter's right for self-representation explaining trial was scheduled in June and Mr. Hunter could renew his motion before April 1, 2016. *Id.* pp. 4, 5. On March 3, 2016, a letter from Mr. Hunter was filed with the Court asking Mr. Mottinger to withdraw. *Case No. cr2085*, Index 36. Mr. Mottinger moved to withdraw as Mr. Hunter's counsel on March 4, 2016. *Id.* at Index 37. The Court allowed his withdrawal on March 9, 2016. *Id.* at Index



42.

[¶ 11] On March 14, 2016 Attorney Thornton was assigned to represent Mr. Hunter. *Id.* at Index 43. On August 29, 2016, Mr. Thornton filed a motion to suppress Mr. Hunter's involuntary statements. *Id.* at 79.

**Whether Miranda warnings were given to Mr. Hunter was not addressed in Mr. Thornton's motion.** *Id.* at Index 79. At the post-conviction hearing Mr. Gereszek testified that he kept the contents of that motion to suppress based on a coerced confession theory and filed it materially unchanged. PCR Tr. p.32. On August 30, 2016, Mr. Thornton motioned to change venue and attached 50 separate exhibits of Mr. Hunter's case appearing in the local news. *Id.* at 79-154.

[¶ 12] New witnesses in the case were disclosed to Mr. Hunter and Mr. Thornton on September 29, 2016. Mr. Thornton discovered a material conflict of interest and moved to withdraw as Mr. Hunter's counsel on October 7, 2016. *Id.* at 159. A conference in chambers was conducted on October 7, 2016 to determine if Mr. Thornton had a true conflict of interest. *See* CC transcript *Case No. cr2085*, Index 620. At the chambers conference the Court asked the State about the nature of the late disclosed *Brady* evidence. Mr. Burdick explained to the Court that a report prepared by Clay County Sheriff's Department was made last January (2016) which indicated someone besides Mr. Hunter was involved in the case before the Court. *Id.* at p. 4. Mr. Thornton went on to explain, "A former client of mine who I recently

represented was in the Clay County Jail with another person [identified as Mr. Christopher Doss]. That person confessed to my former client that he was, in fact, the person who caused the death of these two individuals.” *Id.* at p. 5, ln. 13-16. “And in the confession, there were quite a few self-verifying details that weren’t disclosed to the media.” *Id.* at p. 6, ln. 5-7. “Why this is important is where all the bloody clothes were found that link my client, supposedly, to the crime, that’s Christopher Doss’s apartment. And so, really, there’s a lot of details there that should have been followed up with in January.” *Id.* at p. 6, ln. 9-14. Mr. Thornton went on to explain to the Court, “My concern is, Judge, flat-out, this is the problem. Doss is suspected to be a prospect for the Sons of Silence. I can’t guarantee [my former client]’s safety.” *Id.* at p. 22, ln 22-25. “And it is so crucial to Hunter’ defense to be able to say it’s this other guy, it’s not me.” *Id.* at p. 28, ln 8-10.

[¶ 13] The hearing, held October 10, 2016, originally set to address the motions to suppress and change of venue was used to address the motion to withdraw. *See* MH transcript *Case No. cr2085*, Index 625. And the Court ultimately allowed Mr. Thornton to withdraw as representation, continued the trial date, and allowed the withdrawal of all of Mr. Thornton’s previous motions. *See Generally Id.* Mr. Hunter’s case was reassigned to Attorney Kevin McCabe out of Dickenson, ND on October 19, 2016. *Case No. cr2085*, Index 167. On November 21, 2016 Mr. McCabe filed a motion to withdraw as counsel. Mr. Hunter had raised concerns regarding Mr. McCabe’s availability.

Mr. McCabe ultimately stayed on the case until March of 2017.

[¶ 14] On March 1, 2017, more than three months after his first motion to withdraw, Mr. McCabe filed a subsequent motion to withdraw along with a supporting affidavit. In his affidavit Mr. McCabe stated he had not been able to communicate with Mr. Hunter in a beneficial way because he could not call him. He had not been able to question witness and investigate matters necessary to his defense because of the distance between his office and Fargo, ND. And he was not able to spend adequate time on the case because he had time conflicts with other major trials he was assigned to. See *McCabe Affidavit* Index 217. At the motion hearing on the matter, held March 8, 2017, Mr. McCabe explained to the Court that the commission on legal counsel for indigent clients “Commission” wanted him to simply conflict out and they would substitute Mr. Gereszek. See MH transcript Index 622. The trial court questioned Mr. McCabe about the delay in the motion and the delay that would result in the case as a result of the motion. *Id.* Mr. McCabe indicated that the Commission had great difficulty in finding an attorney that could represent Mr. Hunter. However, Attorney Gereszek was able to take on the case. *Id.* On March 9, 2017, Mr. McCabe was allowed to withdraw from Mr. Hunter’s representation. Mr. Gereszek continued as Mr. Hunter counsel. *Case No. cr2085*, Index 223.

[¶ 15] On April 10, 2017, Mr. Gereszek made motions for a *Franks* hearing, to suppress Mr. Hunter’s statements, and also for a change of judge

pursuant to N.D.C.C. § 29-15-21 and not under Judicial Canons 2 and 3. In the motion for a change of judge Mr. Hunter, through his counsel, alleged that preconceived notions may be forming regarding the defendant, although he did not allege impropriety. *Id.* at 253. This Court in its opinion from Mr. Hunter's direct appeal noted, "Hunter's demand cited only N.D.C.C. § 29-15-21, under which the demand was untimely and did not comply with other requirements." *State v. Hunter*, 2018 ND 173, ¶ 51. At the in chambers conference with Mr. Thornton held on October 7, 2016, the Court admitted to reading news reports about the pending case before it. *See* CC transcript *Case No. cr2085* Index 620 p. 22 ln. 10-18. The Court ultimately denied the demand on April 12, 2017 for failing to comply with statutory requirements. *Case No. cr2085*, Index 276.

[¶ 16] A motion hearing was held on April 26, 2017. Mr. Gereszek's testimony at the post-conviction relief hearing stated it was at this hearing that he discovered Mr. Hunter had never been mirandized stating, "It was at that motion hearing that I realized that we had completely missed something. We had missed that he wasn't even Mirandized." PCR Tr. p. 32 ln 8-10. Mr. Gereszek stated that based on the testimony at the hearing, the distance between the crime scenes and the log of officers coming and going from the scene it would not have been possible for Mr. Hunter to have been Mirandized. At the motion hearing, Detective Kjonaas testified that he, although not having included it in his standard report, issued *Miranda*

warnings to Mr. Hunter at the scene of his arrest, while Mr. Hunter was seated in Officer Wes Libner's squad car. MH transcript *Case No. cr2085* Index 308 at p. 41 Ln. 10-19. Detective Kjonaas specifically stated that he had no further conversation with Mr. Hunter on the scene. *Id.* at p. 41 ln. 23-25. When asked by the Court at the motion hearing to detail his recitation of *Miranda* to Mr. Hunter, Detective Kjonaas insisted that he opened the door, stated the warnings from memory, and closed the door with no response from Mr. Hunter and no further communication. *Id.* at p. 70. He specifically did not ask Mr. Hunter if he understood his rights and did not inform him of the reason for his arrest. *Id.* at pp. 72 - 73.

[¶ 17] When Mr. Hunter was arrested at 6:34 a.m. on the morning of June 23, 2015, Detective Kjonaas was not logged into the scene. *Case No. cr2085*, Index 308; 321 p. 6. According to the Fargo Police Department Crime Scene Entry Roster for the location of the fire, 1122 12th Street North in Fargo, ND, Detective Kjonaas was signed in as the lead investigator on the scene starting at 1:15 a.m. He was signed in at that scene at the time he alleged to have been present on the scene at 1119 University Drive North issuing a *Miranda* warning to Mr. Hunter. *Case No. cr2085*, Index 321. His name is absent on the Crime Scene Entry Roster for the location of Mr. Hunter's arrest at 1119 University Drive North. *Case No. cr2085*, Index 297. Mr. Gereszek did not further investigate or depose any other officers or witnesses at either scene to establish Detective Kjonaas location. The district

court ultimately denied the motion to suppress based on a lack of Miranda warnings.

[¶ 18] At the pretrial conference held on May 17, 2017, Mr. Gereszek indicated that he was requesting money and attempting to finalized hiring an expert to discuss false confessions for the trial that started May 22, 2017. The State indicated to the district court that the expert would not have reviewed the specific information in the case before it but would just generally discuss false confessions. The district court indicated that it believed the Commission should pay for the expert. At the post-conviction hearing Mr. Gereszek testified that he felt the trial court was saying they would work with Mr. Gereszek regarding the issue of calling an expert to discuss false confessions. PCR tr. p. 112, ln 15. Mr. Gereszek specifically testified that he should have requested a continuance, but he was a newer lawyer at the time of this case and did not feel comfortable asking the Court to continue the case on the eve of trial. PCR tr. p. 37-38, 112, He testified that he was not effective because he did not request the continuance and Mr. hunter was prejudiced because of that inaction. PCR tr. pp. 38, 43, 44.

[¶ 19] On June 1, 2017, day eight of Mr. Hunter's jury trial, Mr. Gereszek attempted to call the only expert he could acquire on such short notice, Mr. Hirsch. The trial court went on to explain that, "Although he is, I'm sure, an intelligent man and he's a lawyer, he just doesn't have any science background where he could be a value to the jury in determining

whether the defendant in this case has a mental condition that would make him more susceptible to coercion.” Jury Trial Vol 8 transcript Index 636 p. 1895. The trial court also stated, “I question whether there’s anything – a science of false confessions in the first place. Only rarely can a confession be determined to be false....the Court questions whether [false confessions are] ever actually proven, except in the case of impossibility...There’s no identifiable personality disorder that Mr. Hunter has that would make him more amenable to suggestion by law enforcement.” *Id.* at pp. 1899-1900.

[¶ 20] At the post-conviction hearing on this matter Dr. Jessica Mugge proffered testimony that explained to assess the voluntary nature of a confession she would first perform a clinical interview on the defendant, perform psychological testing, assess an individuals IQ, assess their reading comprehension, review the interview that was conducted, and then she would write a report based upon her findings. PCR p. 131. She further testified that this process would most likely take two months. *Id.* The trial court allowed Mr. Gereszek to generally discuss that false confessions exist, but otherwise denied his expert to testify to more detailed information.

[¶ 21] Mr. Hunter was ultimately convicted at the jury trial held between May 22, 2017 through June 2, 2017. Mr. Hunter appealed his case to the North Dakota Supreme Court. He raised the issue of not being properly mirandized, not voluntarily waiving his right to remain silent, and the trial court was biased against Mr. Hunter. The North Dakota Supreme Court

denied Mr. Hunter's appeal on all three issues. *See State v. Hunter*, 2018 ND 173. Mr. Hunter subsequently filed the application for post-conviction relief before the court. That application was denied, and Mr. Hunter timely appealed the district court's Order.

## LAW AND ARGUMENT

### I. **Whether the district court erred in denying Mr. Hunter's application for post-conviction relief.**

#### Standard of Review

[¶ 22] This Court applies a 'clearly erroneous' standard found in N.D.R.Civ.P. Rule 52(a) when reviewing a district court's findings of fact on an appeal under the Uniform Post-Conviction Procedure Act. 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. *Roe v. State*, 2017 ND 65, ¶ 5,891 N.W.2d 745.

[¶ 23] The district court has jurisdiction under the Uniform Post-Conviction Procedure Act, N.D.C.C. § 29-32.1-01. Res Judicata was improperly found by the district court. A court may deny an application for post-conviction relief on the ground of res judicata if the claim has been fully and finally determined in a previous proceeding. N.D.C.C. § 29-32.1-12(1). *Klose v. State*, 2008 ND 143, ¶ 10, 752 N.W.2d 192 held that a misuse of process defense precludes claims when the defendant inexcusably failed to pursue an issue on appeal and now seeks review in a post-conviction



application. However, some issues are better suited to the post-conviction process, such as ineffective assistance of counsel. This Court has often said an ineffective assistance of counsel claim should not be brought on direct appeal. *State v. Keener*, 2008 ND 156, ¶ 13, 755 N.W.2d 462. Appellate records from original trials are often inadequate for defendants to satisfy their evidentiary burdens regarding counsel's performance and the prejudicial effects resulting therefrom. *Id.* Post-conviction proceedings provide a better opportunity for such claims by giving defendants a further opportunity to develop the record necessary for their claim. *Id.* Therefore, not all claims can be brought on direct appeal. Mr. Hunter asserts his claims for judicial bias resulting in his inability to present an effective defense and his confession were not fully developed on appeal. Additional information was necessary to develop the record, specifically Mr. Hunter, Mr. Gereszek, and Dr. Mugge's testimony. Neither misuse of process nor res judicata apply to these claims.

[¶ 24] Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure. *Delvo v. State*, 2010 ND 78, ¶ 10, 782 N.W.2d 72. Misuse of process and res judicata are affirmative defenses which the state must raise. Mr. Hunter filed his application for post-conviction relief on June 28, 2019. The original motion hearing was set for November 22, 2019. Due to an error in requesting Mr. Hunter's transportation the hearing was not conducted. At the hearing the

court raised with the petitioner their concerns with misuse of process and res judicata. However, the State had an obligation to raise the affirmative defenses prior to the motion hearing. The State had 21 days from Mr. Hunter's initial application to answer it and assert any affirmative defenses. They did not do so and therefore waived them.

[¶ 25] Additionally, If the district court had restarted the 21 days to respond from when the amended application was filed by the petitioner the State still failed to respond and assert their affirmative defenses until January 6, 2020. That was well after their deadline had expired. Therefore, the affirmative defenses of misuse of process and res judicata were waived by the State. The trial court in its Order said there was no prejudice to Mr. Hunter by the late filing from the State because Mr. Hunter's evidence was largely the same. *See* Order denying pp. 5-6. This completely ignores the issue that the defenses were raised after the time for raising them had expired. Mr. Hunter was prejudiced because the Court found that his issue of false confession, improper Miranda advisory, and bias of the trial judge were barred based on res judicate. The decision to allow untimely defenses is an abuse of discretion by the district court and should be reversed by this Court.

**a. Whether Mr. Hunter was provided ineffective assistance of counsel.**

[¶ 26] Mr. Hunter's application alleges ineffective assistance of counsel. The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy

and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI. Mr. Hunter asserted to the district court that the trial court denied him his Sixth Amendment right to present a defense by denying him the opportunity to present his expert witness, Mr. Hirsch, to give the jury evidence regarding false confessions. Additionally, Mr. Hunter was denied his expert witness at trial because Mr. Hirsch could not provide the trial court, or a jury, with specific information, as to Mr. Hunter’s state of mind. Mr. Hunter was not appropriately evaluated by a medical expert, and was therefore denied expert testimony of false confessions, because his attorney, Mr. Gereszek did not attempt to hire an expert until a week before the jury trial was to take place.

[¶ 27] “To succeed on a claim for ineffective assistance of counsel, a petitioner must prove counsel’s performance fell below an objective standard of reasonableness and the deficient performance prejudiced him.” *Garcia v. State*, 2004 ND 81, ¶ 5, 678 N.W.2d 568, (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The first prong of the *Strickland* test requires that an attorney’s performance be measured by an objective standard of reasonableness, considering the prevailing professional norms. *Garcia* at ¶ 5.

The second prong of the *Strickland* test requires a showing of “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* Mr. Gereszek testified that his representation fell below an objective standard of reasonableness because he did not request a continuance of the jury trial, even though he knew he needed one. Mr. Gereszek testified that he would have done more investigation regarding who was actually present at the scene of Mr. Hunter’s arrest and who was not. He also would have had the opportunity to have Mr. Hunter evaluated by an expert who could determine if Mr. Hunter’s confession was false. The district court’s finding that the issue of whether Mr. Hunter’s confession was not constitutionally obtained was barred on the basis of res judicata ignores the limitation of direct appeal. This Court may only review the record before it on appeal. The issue of Mr. Gereszek failing to request a continuance would not be available for review at the appellate level. By not raising the issue to the lower court Mr. Gereszek could not then bring the issue before this Court. If Mr. Gereszek was ineffective because he failed to ask for a continuance preserving it for this court to review was not considered by the district court, however that issue was developed during Mr. Gereszek’s testimony. PCR pp. 110-111. The district court conflates the issue of ineffective assistance of counsel with an unconstitutionally acquired confession. However, there was repeated testimony that Mr. Gereszek was ineffective by not requesting a continuance of the jury trial. He testified,

“But at the time, at that moment in time, I clearly had made a mistake in not identifying who gave Miranda. So at the moment in time, I had clearly not investigated enough and I had not had my investigator track down enough. And so at that moment in time, I wanted -- I was -- I had realized I had made that mistake.”

PCR Tr. p. 119 ln 9-14. Therefore, prong one of the *Strickland* test is met.

[¶ 28] Prong two of the Strickland test is also met because Dr. Mugge’s proffered testimony was in order to evaluate Mr. Hunter a number of tests would need to be conducted as well as reviewing his three-hour long interrogation. Her testimony was that approximately two (2) months would be necessary to complete the evaluation and report. The specific reason the trial court gave for denying Mr. Hirsch’s testimony was because he could not speak to any underlying medical or psychological problem with Mr. Hunter that would make him susceptible to giving a false confession. Although given the time frame in which Mr. Hirsch was operating in that information would have been impossible to obtain. Therefore, but for Mr. Gereszek’s failure to get a continuance and failure to have Mr. Hunter evaluated months prior to trial the expert testimony would not have been excluded. Additionally, by not preserving the issue he could not raise it to this Court on direct appeal. This prejudiced Mr. Hunter’s case and the second prong of Strickland has been met. With expert testimony to explain false confessions as it relates to Mr. Hunter, Mr. Hunter’s confession would have been suppressed. Alternatively, the jury would have been able to determine that Mr. Hunter’s confession was false, rather than simple be told that false confessions exist and not

specifically why Mr. Hunter's confession was false. Finally, if the trial court had denied the continuance, as the district court suggests in its Order denying Mr. Hunter's application, it would have been properly preserved for this Court to review on appeal. Therefore, prong two of the Strickland test has been met and the district court erred in its Order denying post-conviction relief.

**b. Whether there was judicial bias and ineffective assistance of counsel.**

[¶ 29] North Dakota Code of Judicial Conduct Canon 2 requires judges to perform their duties impartially, competently, and diligently. Rule 2.2 requires that a judge shall uphold and apply the law, and shall perform all duties of judicial office, including administrative duties, fairly and impartially. Comment 1 further explains, "To ensure impartiality and fairness to all parties, a judge must be objective and open-minded." North Dakota Judicial Conduct Canon 3 prohibits judges from participating in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality" Mr. Gereszek representation fell below an objective standard of reasonableness when he failed to assert that the Trial Judge should be disqualified based upon Judicial Canons 2 and 3. Rather, Mr. Gereszek brought a demand for change of judge under N.D.C.C. § 29-15-21. However, Mr. Hunter was well past the 10-day time limit and did not meet the other restrictions for changing a judge under that statute. The trial court properly denied the motion under that statute. However, based

upon the Trial Judge's statements regarding reading news articles on the pending case the motion should have been brought for disqualification under Canons 2 and 3. Additionally, Mr. Gereszek should have renewed the appropriate disqualification motion at trial when the Court made statements indicating that false confessions do not actually occur. Mr. Gereszek failed to make the motion again and the North Dakota Supreme Court found that waived the question of judicial bias, which prejudiced Mr. Hunter's case. Therefore Mr. Gereszek was ineffective in the context of the two-prong Strickland test.

[¶ 30] The district court stated found that no new facts had been raised as to the trial court's bias. This was an improper finding. Mr. hunter through his counsel cited to the trial court's admission that they had been reading news articles about a pending case before it. That is a violation of Canons 2 and 3. These issues were not raised to the trial court and therefore could not be properly reviewed by this Court. Based on the district court's improper factual finding it determined there was no judicial bias present for Mr. Hunter's case. That conclusion is clearly erroneous and must be reversed.

[¶ 31] The district court found that the issue of bias was res judicated, but once again the issue had not been raised to the district court or properly preserved by Mr. Gereszek. This Court cannot fully review an issue that has not been made to the lower court. Therefore, res judicata does not apply and certainly not in the context of ineffective assistance of counsel.

[¶ 32] The district court in its Order denying Mr. Hunter’s application stated that Mr. Hunter pointing to the trial judge ruling against him on various issues including false confession was not sufficient to support the allegation of judicial bias. However, this analysis is incorrect. As recently as *State v. Hanson*, this Court has said,

“When a confession is challenged on due process grounds, the ultimate inquiry is whether the confession was voluntary... To assess voluntariness, we look at the totality of the circumstances. Our inquiry focuses on two elements: (1) the characteristics and conditions of the accused at the time of the confession, including age, sex, race, education level, physical and mental condition, and prior experience with police; and (2) the details of the setting in which the confession was obtained, including the duration and conditions of detention, police attitude toward the defendant, and the diverse pressures that sap the accused’s powers of resistance or self-control.”

*State v. Hansford*, 923 N.W.2d 113, 119 (N.D. 2019) The trial court did not review Mr. Hunter’s confession in accordance with this court’s repeated guidance, which was an abuse of discretion. Mr. Gereszek failed to properly preserve the issue for this Court review on direct appeal which was ineffective. The district court in its Order denying the application does not address the trial court’s apparent unwillingness to properly access a confession or Mr. Gereszek’s failure to preserve the issue for proper review.

**c. Whether Mr. Hunter’s confession was unconstitutionally acquired and there was ineffective assistance of counsel.**

[¶ 33] The Fifth Amendment of the United States Constitution, as well as Sec. 12, Article I of the North Dakota Constitution, provides that no “person...shall be compelled in any criminal case to be a witness against



himself.” In *Miranda v. Arizona*, the Supreme Court held that a person subjected to custodial interrogation is entitled to four specific warnings to “secure the privilege against self-incrimination.” *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Specifically, the Supreme Court in *Miranda* held:

1. He must be warned prior to any questioning that he has the right to remain silent,
2. that anything he says can be used against him in a court of law,
3. that he has the right to the presence of an attorney, and
4. that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

[¶ 34] The Officer testified that he specifically did not ask Mr. Hunter if he understood his rights and did not inform him of the reason for his arrest. *Id.* at pp. 72 - 73. This is significant because it goes to the voluntary nature of Mr. Hunter’s waiver. Mr. Hunter was questioned at length while suffering from extreme exhaustion and serious mental impairment caused by the intoxication of methamphetamine. He was suicidal and initially incoherently rambling when police made contact with him. There was not evidence presented to the jury or the trial court regarding characteristics and conditions of the accused at the time of the confession, including age education level, physical and mental condition, and prior experience with police. Nor were the details of the setting in which the confession was obtained, including the duration and conditions of detention, police attitude toward the defendant, and the diverse pressures that sap Mr. Hunter’s

powers of resistance or self-control. The trial court said that the jury could make a determination of voluntariness, but then refused to let in evidence required by the test to prove that voluntariness. Finally, the trial court stated it was the sole purview of the jury to determine if Mr. Hunter's confession was voluntary, and that was a significant basis of the denial of Mr. Hunter's expert at trial. It is also an inaccurate statement of the law. The district court failed to properly analyze this issue either under the failure of Mr. Gereszek to properly preserve it for review or as a violation of Mr. Hunter's constitutional right to due process.

[¶ 35] Mr. Gereszek's failure to get a continuance of Mr. Hunter's jury trial was also ineffective because he only learned of Mr. Hunter's lack of a *Miranda* warning at the motion hearing held on April 26, 2017, less than a month prior to Mr. Hunter's jury trial. Mr. Gereszek filed his supplementary motion to suppress, dealing with the *Miranda* issue, approximately one week after the motion hearing on May 4, 2017. Mr. Gereszek testified that he should have tasked his private investigator to interview the individuals listed on the crime scene rosters and he should have deposed witness prior to making his supplementary motion. He testified that it would not have been possible to *Mirandize* Mr. Hunter in the time allowed. By not delaying the jury trial Mr. Gereszek could not provide the Court with sufficient evidence to counter Detective Kjonaas assertion that he properly *Mirandized* Mr. Hunter. Mr. Gereszek specifically testified that he would have tasked his private

investigator to conduct interviews of individuals at the two scenes which could then be used to impeach the officer. This prejudiced Mr. Hunter because the trial court found Detective Kjonaas statements possible regardless of the timing and crime scene rosters. Additionally, the Supreme Court of North Dakota found that it was not an abuse of the trial court's discretion, **based upon the information provided to court** to deny the motion to suppress. The prejudice is built into this Court's holding. Without more information it was not an abuse of discretion. There reason there was not more information was because of Mr. Gereszek's failure. Therefore Mr. Gereszek representation was ineffective.

#### CONCLUSION

[¶ 36] WHEREFORE the district court's denial of Mr. Hunter's post-conviction relief application was clearly erroneous and Mr. Hunter's application for post-conviction relief should be granted.

Dated: July 20, 2020.

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IN THE SUPREME COURT OF NORTH DAKOTA

---

Ashley Kenneth Hunter,	)	<b>Supreme Court File No.</b>
	)	<b>20200160</b>
	)	
Petitioner and Appellant,	)	<b>Cass County No.</b>
	)	<b>09-2019-CV-2260</b>
	)	
v.	)	
	)	
State of North Dakota,	)	<b>CERTIFICATE OF</b>
	)	<b>COMPLIANCE</b>
	)	
Respondent and Appellee.	)	

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[¶ 1] This Appellant’s Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: July 20, 2020.

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v.	)	
	)	
State of North Dakota,	)	<b>CERTIFICATE OF</b>
	)	<b>SERVICE</b>
Respondent and Appellee.	)	

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[¶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 Brief  
Appellant's Appendix  
Certificate of Compliance

[¶2] And that said copies were served upon:

Birch Burdick, State's Attorney, sa-defense-notices@casscountynd.gov

by electronically filing said documents through the court's electronic filing system and upon:

Ashley Hunter, c/o ND DOCR, POB 5521, Bismarck, ND 58506

by placing a true and correct copy of said documents in a sealed envelope with USPS.

Dated: July 20, 2020.

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