

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

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<b>JEFFREY KROGSTAD,</b>	)	
	)	
	)	
<b>Petitioner / Appellant,</b>	)	<b>Supreme Court No.</b>
	)	<b>20220264</b>
<b>vs.</b>	)	
	)	<b>District Court No.</b>
<b>STATE OF NORTH DAKOTA,</b>	)	<b>18-2021-CV-01778</b>
	)	
<b>Respondent / Appellee.</b>	)	
	)	

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**APPELLANT’S BRIEF**

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**Appeal from Order Dismissing Application for Post-Conviction Relief Entered on August 16, 2022, by Grand Forks County District Court, Northeast Central Judicial District, State of North Dakota, The Honorable John Thelen Presiding.**

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**ORAL ARGUMENTS REQUESTED**

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**[¶ 3] JURISDICTION**

[¶ 4] Krogstad appeals for the district court’s final order dated August 16, 2022. Final orders entered under the Uniform Post-Conviction Procedure Act may be reviewed by this Court on appeal. N.D.C.C. § 29-32.1-14 & N.D. Const. art. VI, § 2.

**[¶ 5] STATEMENT OF THE ISSUE**

[¶ 6] The district court failed to properly address the speedy trial argument.

[¶ 7] The district court failed to analyze the prejudice prong of the *Strickland* test based on conclusory findings that trial counsels’ performance was reasonable professional.

**[¶ 8] ORAL ARGUMENT JUSTIFICATION**

[¶ 9] This case touches on the long held ineffective assistance of counsel argument, and counsel is requesting this Court create a *per se* below “prevailing professional norms” standard based on advising defendants of certain Constitutional rights that are held by defendants.

**[¶ 10] STATEMENT OF THE CASE**

[¶ 11] This is an appeal from the order dismissing application for post-conviction relief entered on August 16, 2022. (R103). On September 3, 2021, Krogstad filed an application for post-conviction relief along with eleven exhibits. (R1, 4-15). Krogstad alleged ineffective assistance of counsel in six specific areas; 1) counsel failed to file a N.D.R.Ev. 412 notice; 2) counsel failed to object to witness credibility vouching; 3) counsel failed to request a speedy trial; 4) counsel did not seek independent testing of DNA samples; 5) counsel did not call defense expert witnesses; & 6) counsel did not seek suppression of evidence obtained from Krogstad’s phone.

[¶ 12] The State answered the application on September 22, 2021. (R32). Following various continuance, a post-conviction hearing was held on May 6, 2022 before the Honorable John Thelen. (R97). Following the hearing, both parties submitted closing argument briefs. (R100, 101). On August 16, 2022, the district court issued the order dismissing Krogstad's application for post-conviction relief. (R103). Krogstad then filed a timely notice of appeal on September 9, 2022, pursuant to N.D.R.App.P. 4. (R104).

### [¶ 13] STATEMENT OF THE FACTS

[¶ 14] Krogstad was charge with gross sexual imposition in July 2018. *State v. Krogstad*, 2020 ND 78, ¶2, 941 N.W.2d 574. The preliminary hearing and arraignment in the matter was held on September 7, 2018. (R32 *underlying criminal case* 18-2018-CR-01581). Subsequently, 228 days later on April 23, 2019, commenced the three-day jury trial wherein Krogstad was convicted. *Krogstad*, 2020 ND 78, ¶4. Krogstad alleges that trial counsel was ineffective for failing to demand a speedy trial under N.D. Const. art. I, § 12 and N.D.C.C. § 29-19-02; wherein the trial should have commenced, at the very latest, December 20, 2018, within 90-days of the election of the right, but the right must be elected within 14-days following the arraignment. (R103:¶5).

[¶ 15] Krogstad alleges this failure to demand for a speedy trial, permitted the DNA results to be concluded and introduced at trial. (R103:¶23). Trial counsel testified that not demanding a speedy trial and waiting for the DNA results could have been to Krogstad's benefit. (R103:¶24).

[¶ 16] The district court reasoned this allegation to did not overcome the presumption that trial counsel's representation fell below a reasonable professional

standard. (R103:¶24). The district court made no finding regarding any prejudice that the Krogstad may have suffered.

[¶ 17] Krogstad's next allegation was that trial counsel was ineffective for failing to submit the DNA results to an independent laboratory. (R103:¶25). Trial counsel testified that he had no reason to believe that the results were defective thus warranted an independent laboratory test. (R103:¶27). Trial counsel further testified that in cases where independent laboratory testing was conducted, he finds that the results are not inconsistent with the North Dakota State Crime Laboratory. (R103:¶27).

[¶ 18] Again, the district court here made a finding that Krogstad failed to overcome the presumption that trial counsel's performance fell below any reasonable professional standard. (R103:¶28). Also again, the district court made no finding regarding any prejudice that Krogstad may have suffered.

[¶ 19] The other four allegations regarding the suppression of evidence, Rule 412 notice, credibility vouching, and failure to call expert witnesses will not be discussed in this appellate brief.

#### [¶ 20] **STANDARD OF REVIEW**

[¶ 21] This Court has outlined the standard of review for post-conviction matters as follows:

Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Although the issue of ineffective assistance of counsel is a mixed question of law and fact that is fully reviewable by this Court, the trial court's findings of fact in a post-conviction relief proceeding will not be disturbed on appeal unless clearly erroneous under N.D.R.Civ.P. 52(a).

*Laib v. State*, 2005 ND 187, ¶11, 705 N.W.2d 845 (internal citations omitted)

## **[¶ 22] LAW AND ARGUMENT**

[¶ 23] To prevail on a claim for ineffective assistance of counsel, a petitioner must show 1) his counsel's representation fell below an objective stand of reasonableness and 2) there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. *Everett v. State*, 2015 ND 149, ¶7, 864 N.W.2d 450. This two-part test is affectionately referred to as the '*Strickland Test*' and the heavy burden of the *Strickland Test* rests solely on the petitioner. *Flanagan v. State*, 2006 ND 76, ¶10, 712 N.W.2d 602.

[¶ 24] The district court here failed to address the second prong of the *Strickland Test* in all of the allegations set forth by Krogstad. (R103). Beyond that failure, the district court decided that Krogstad failed to meet the burden on the first prong by making conclusory findings of its own, some that defy logic. These conclusory findings are the fundamental error in the district court's order.

### **[¶ 25] A. The Speedy Trial Allegation.**

[¶ 26] The district court concludes that "[a]t the time when this case was continued while the parties waited for DNA results, nobody knew what the DNA results would be." (R103:¶24). This is a conclusory statement that defies logic because Krogstad arguably knew what the results were going to show. The district court even outlined the conflicting testimony between trial counsel and Krogstad at the hearing. "Krogstad further testified that [trial counsel] never explained his right to a speedy trial nor that he had to make that request within a specific time frame." (R103:¶13). "[Trial counsel] testified that he advised Krogstad of his right to a speedy trial, but Krogstad did not want to invoke that right." (R103:¶5). Despite this acknowledgement of the conflict in testimony regarding the speedy

trial issue, the district court rests its finding on the lack of the speedy trial request being about the DNA results alone. (R103:¶¶23-24).

[¶ 27] The district court even acknowledges that it cannot view the case through the benefit of hindsight, “[i]nstead, [the district court] must put itself in trial counsel’s shoes prior to the DNA results being known.” (R103:¶24); *Citing Brewer v. State*, 2019 ND 69, ¶6, 924 N.W.2d 87. Thus, at the time the speedy trial request would have been required to have been made, between the date of the arraignment on September 7, 2018 and the 14-day window that followed until September 21, 2018, one person logically knew what the DNA results were going to show, Krogstad.

[¶ 28] Therefore, it is more logical to presume that Krogstad was not informed of the importance of speedy trial demand and its limited time frame to invoke. The conclusory leap the district court made goes beyond a mere credibility determination between trial counsel and Krogstad but must also leap the gap of logic.

[¶ 29] **B. DNA And Independent Testing.**

[¶ 30] Here the district court rests its finding on trial counsel’s testimony that independent DNA testing rarely results in finding inconsistencies in the state crime laboratory’s result. (R103:¶27). However, what the district court fails to understand is that there is no contest from trial counsel that independent DNA testing was a major point of concern for Krogstad. This should have been a red flag to the district court. Because it further corroborates Krogstad’s earlier assertion, had he known about the speedy trial timeline and proceeding to trial before DNA results were returned, he would have opted for that procedure. But once the DNA results were returned, Krogstad was adamant with trial counsel to find some way to discount their results.



[¶ 31] The district court’s analysis focused solely on whether there was evidence to show the state crime laboratory’s results were inaccurate. It completely missed the broader picture, that by viewing these two allegations as a whole, it is clear that Krogstad was not advised by his trial counsel about his Constitutional right to a speedy trial.

[¶ 32] **C. Strickland’s Second Prong.**

[¶ 33] The district court did not address whether Krogstad suffered any prejudice at the hands of his trial counsel. The district court did not do so because of its own conclusory findings that trial counsel’s performance did not fall below any objective standard of reasonableness.

[¶ 34] Herein lies the problem, if a district court chooses to view the evidence in favor of a finding of reasonable performance, rather than objectively viewing evidence and letting the evidence logically lead to reasonableness or unreasonableness, than no petitioner will ever prove performance below an *objective* standard of reasonableness.

[¶ 35] This district court’s ruling here epitomizes one of Justice Thurgood Marshall’s fears. *See Strickland v. Washington*, 466 U.S. 668, 706 (1984) (*J. Marshall dissenting*). Justice Marshall feared that the majority’s use of the adjectives “strong” and “heavy” in describing presumptions and deference will proscribe a malleable and subjective burden on any petitioner. *Id.* at 712-713 (*J. Marshall dissenting*). He further argued that the concept of “prevailing professional norms” is “sufficiently broad to allow defense counsel the flexibility they need in responding to novel problems of trial strategy.” *Id.* A trial court’s subjective application of “strong” presumptions and “heavy” burdens combined with trial counsel’s fallback on ‘trial strategy’ equates to an insurmountable burden for any defendant.

**[¶ 36] CONCLUSION**

[¶ 37] Logic here dictates that Krogstad was not advised of his Constitutional right to a speedy trial. This Constitutional right is owned by the defendant and not trial counsel. This Constitutional right cannot be waived by trial counsel under the pretense of ‘trial strategy’ especially when the defendant is unaware of such a Constitutional right.

[¶ 38] The failure of trial counsel here to properly advise Krogstad of his Constitutional right to a speedy trial, including, how and when to invoke his Constitutional right is per se below any standard of reasonableness or prevailing professional norms.

[¶ 39] Therefore, Krogstad respectfully requests this Court vacate the district court’s order dismissing the post-conviction application and remand this case with instructions to hold an evidentiary hearing regarding the prejudice Krogstad suffered by not being properly advised of his Constitutional right to a speedy trial.

Respectfully submitted this Tuesday, December 13, 2022.

/s/ Samuel A. Gereszek  
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**IN THE SUPREME COURT  
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<b>Petitioner / Appellant,</b>	)	
	)	<b>Supreme Court No.: 20220264</b>
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	)	<b>District Court No.:</b>
<b>STATE OF NORTH DAKOTA,</b>	)	<b>18-2021-CV-01778</b>
<b>Respondent / Appellee.</b>	)	

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**N.D.R.App.P. 32(d)  
CERTIFICATE OF COMPLIANCE**

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[¶1] COMES NOW Samuel A. Gereszek, attorney for the Appellant, **Jeffrey Krogstad**, and preparer of documents filed in association with the above captioned case on this day.

[¶2] Pursuant to N.D.R.App.P. 32(d) the documents filed on this day comply with the North Dakota Rules of Appellate Procedure as follows:

a. Appellant’s Brief – Word count = **2149**; Page Count = **10** (N.D.R.App.P 32(a)(8))

[¶3] This Certificate of Compliance is drafted to ensure the filings on this day are in compliance with the rules and specifically pursuant to N.D.R.App.P. 32(d).

Dated this Tuesday, December 13, 2022.

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IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

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JEFFREY KROGSTAD,	)	
	)	
	)	Supreme Court No.: 20220264
Petitioner / Appellant,	)	
	)	District Court No.: 18-2021-CV-01778
vs.	)	
	)	
STATE OF NORTH DAKOTA,	)	CERTIFICATE OF SERVICE
	)	
Respondent / Appellee.	)	
	)	

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

1. *Appellant’s Brief*
2. *Certificate of Compliance*

was filed via **electronically through the Court Electronic Filing System** on Tuesday, December 13, 2022, and served upon:

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Dated this Tuesday, December 13, 2022

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