

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

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Jason Travis O’Neal,  Petitioner-Appellant,  vs.  State of North Dakota,  Respondent-Appellee,	Supreme Court No. 20220353  Case No. 09-2022-CV-00770
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On appeal from the Order denying post-conviction relief  
entered on December 1, 2022  
Cass County District Court  
East Central Judicial District  
State of North Dakota  
The Honorable Stephannie N. Stiel, Presiding

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**APPELLANT’S BRIEF**

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[¶1]

**Statement of the Issue**

- I. Whether the district court erred by denying Mr. O’Neal’s application for post-conviction relief.

### **Statement of the Case**

[¶2] This is an appeal from an order denying post-conviction relief regarding Jason Travis O’Neal (hereinafter referred to as “Mr. O’Neal”). On March 25, 2022, Mr. O’Neal filed a pro se Application for Post-Conviction Relief. (R1:1-7). Mr. O’Neal was appointed an attorney. (R7:1). The district court conducted an evidentiary hearing on Mr. O’Neal’s application. (R31:3:1-12). On December 1, 2022, the district court issued an order denying Mr. O’Neal any post-conviction relief. (R20:1-9). Mr. O’Neal now appeals the December 1 order. (R21:1).

### **Statement of the Facts**

[¶3] Mr. O’Neal was charged with Attempted Murder. (R20:2:¶4).

[¶4] Mr. O’Neal was appointed an attorney. (R31:7:23-8:1). During the course of the representation, Mr. O’Neal wanted to pursue a theory of an alternate perpetrator of the crime. (R31:19:20-24). To that end, he wanted forensic testing to be done on the knife that was believed to be the chief implement of the crime. (R20:1:¶1). Mr. O’Neal discussed the possibility of forensic testing on the knife with his attorney. (R20:3:¶6). Testing could have revealed the DNA of an alternate individual, which would have permitted Mr. O’Neal to pursue a theory of an alternate perpetrator at trial. To the extent that Mr. O’Neal’s DNA might have been found through forensic testing, that could have been explained by the fact that Mr. O’Neal “was living at the victim’s apartment and his DNA would have inevitably been found at the scene.” Id. Despite his requests for forensic testing, no testing was ever

done on the knife. See id.

[¶5] The week before the scheduled trial, Mr. O’Neal felt that his attorney began to “push” him toward pleading guilty, rather than going to trial. (R31:22:14-15). Mr. O’Neal explained his impression of his attorney’s intentions:

I was under the impress at the time that we got it to the point of, like, the last week or so of going to trial and then all of suddenly out of nowhere (inaudible) come at me with plea bargains so --

[...]

It seemed like that she wanted to start talking about plea bargains and I’m like, we only got a week, week-and-a-half left before trial and it just felt like she was trying to duck out of going to trial.

(R31:21:5-15). As a result of his discussions with his attorney, Mr. O’Neal pled guilty, in April 2021. (R20:2:¶4). Mr. O’Neal was sentenced to a term of imprisonment. See id.

[¶6] Mr. O’Neal filed a pro se Application for Post-Conviction Relief. (R1:1-7). The district court conducted an evidentiary hearing on Mr. O’Neal’s application. (R31:3:1-12). At the evidentiary hearing, Mr. O’Neal and his previous attorney testified. (R31:7:15-16:19:4-6). On December 1, 2022, the district court issued an order denying Mr. O’Neal any post-conviction relief. (R20:1-9). Mr. O’Neal now appeals the December 1 order. (R21:1).

### **Law and Argument**

[¶7] This is an appeal of an order denying post-conviction relief. (R21:1). This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6 and N.D.C.C. § 29-32.1-14. See id. North Dakota Century Code Section 29-32.1-14 provides, “A final judgment entered under this chapter may be reviewed by the supreme court of this state upon appeal as

provided by rule of the supreme court.” Id.

### **Standard of Review**

[¶8] Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Broadwell v. State, 2014 ND 6, ¶ 5, 841 N.W.2d 750. On appeal, findings of fact are reviewed under the “clearly erroneous” standard set forth in N.D.R.Civ.P. 52(a). See id. A finding of fact is clearly erroneous, “if it is not supported by any evidence or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made.” Id. Questions of law are fully reviewable on appeal of a post-conviction relief proceeding. See id. Additionally, the issue of ineffective assistance of counsel is a “mixed question of law and fact which is fully reviewable by this court.” Id. at ¶ 7.

#### **I. The district court erred by denying Mr. O’Neal’s application for post-conviction relief.**

[¶9] In his initial petition, Mr. O’Neal described his claim as one of newly discovered evidence. (R1:1-7). His petition was filed pro se. See id. After being appointed an attorney, his post-conviction relief attorney later explained that this claim was intended to be a claim of newly discovered evidence as well as a claim of ineffective assistance of counsel. (R19:1-4). The district court interpreted Mr. O’Neal’s claim as both a claim of newly discovered evidence and as a claim of ineffective assistance of counsel. (R20:1-9). As will be explained, Mr. O’Neal’s claim is more properly considered a claim of ineffective assistance

of counsel, in failing to pursue the forensic testing of certain evidence. The newly discovered evidence would be the results of the testing, had the testing been done. Although this is more properly a claim of ineffective assistance of counsel, the claim will be analyzed under both legal frameworks to illustrate and explain the claim.

**A. Newly discovered evidence.**

[¶10] A district court may grant post-conviction relief in response to newly discovered evidence. N.D.C.C. § 29-32.1-01(1)(e). See Tweed v. State, 2010 ND 38, ¶ 16, 779 N.W.2d 667. When newly discovered evidence is alleged, the statutory basis for granting post-conviction relief is similar to a request for a new trial based on newly discovered evidence under N.D.R.Crim.P. 33. Tweed, at ¶ 16. To prevail, the petitioner must show: (1) the evidence was discovered after trial, (2) the failure to learn about the evidence at the time of trial was not the result of the petitioner's lack of diligence, (3) the newly discovered evidence is material to the issues at trial, and (4) the weight and quality of the newly discovered evidence would likely result in an acquittal. See id.

[¶11] In this case, Mr. O'Neal's claim is that his prior counsel failed have forensic testing done of the alleged weapon, which would have provided more evidence about how the alleged crime occurred and would have supported an alternate perpetrator defense. (R1:1-7). The first two prongs of the newly discovered evidence test relate to the timing of the discovery of the evidence: the evidence must have been discovered after trial and the failure to discover it prior to trial must not have been as a result the petitioner's lack of diligence. Tweed, at ¶ 16. Although it may illustrate why this claim may be better analyzed as a claim



of ineffective assistance of counsel, Mr. O’Neal can meet both of these prongs. The forensic testing was not performed because of the actions (or lack thereof) of Mr. O’Neal’s attorney. As a result, it was not discovered prior to trial. In addition, the failure to learn of the evidence is not a result of Mr. O’Neal’s lack of diligence, but rather, his attorney’s lack of diligence. The final two prongs relate to the weight of the newly discovered evidence: it must be material to the issue at trial and the weight and quality of the evidence would likely result in an acquittal. Tweed, at ¶ 16. Mr. O’Neal meets both of these prongs as well. The evidence relates to the knife which was alleged to be the chief implement of the crime. To the extent that forensic testing of the knife could have revealed an alternate perpetrator, that would have been material to the issue of the identity of the perpetrator of the crime. This is a critical issue in any criminal case. Had that evidence pointed to an alternate perpetrator, such evidence would be strong enough to result in an acquittal. As a result, Mr. O’Neal can meet all four prongs of the newly discovered evidence test. Under the circumstances, the district court committed reversible error in its legal determination that he was not entitled to post-conviction relief.

**B. Ineffective assistance of counsel.**

[¶12] Mr. O’Neal’s claim may be better characterized as a claim of ineffective assistance of counsel. “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. The two pronged Strickland test applies to challenges to guilty pleas that were entered as a result of ineffective assistance of counsel. Hill v. Lockart, 474 U.S. 52, 58 (1985). When the claim of ineffective assistance of counsel relates to a guilty plea, this Court has held that the application is treated as one made under Rule 11(d) of the North Dakota Rules of Criminal Procedure. Moore v. State, 2013 ND 214, ¶ 10, 839 N.W.2d 834. Withdrawal of the guilty plea is allowed when necessary to correct a manifest injustice. See id.

[¶13] In this case, Mr. O’Neal’s attorney provided ineffective assistance of counsel by failing to pursue the requested forensic testing. Mr. O’Neal wanted to pursue forensic testing of the knife, and other items, to bolster a defense theory of an alternate perpetrator. (R31:19:20-24). Mr. O’Neal advised his attorney that he wanted the knife to be forensically tested. (R20:1:¶6). Had the weapon been tested, it could have revealed the DNA of an alternate individual, which would have permitted Mr. O’Neal to pursue a theory of an alternate perpetrator at trial. Mr. O’Neal’s attorney did not do it because she feared that Mr. O’Neal’s DNA could have been discovered on items from the victim’s home. (R20:5:¶10). However, to the extent that Mr. O’Neal’s DNA might have been found, that could have been explained by the fact that Mr. O’Neal “was living at the victim’s apartment and his DNA would have inevitably been found at the scene.” (R20:3:¶6). Under the circumstances, there was essentially no risk in pursuing forensic testing. The testing could only have improved

his case. Fear that testing could have revealed the presence of Mr. O'Neal's DNA should not have stopped Mr. O'Neal's counsel from pursuing the potentially favorable evidence. Combined with Mr. O'Neal's clear desire to pursue the testing, the failure to have the knife tested fell below an objective standard of reasonableness.

[¶14] Without the requested forensic testing, Mr. O'Neal could not develop and pursue his theory of an alternate perpetrator of the crime. There is a reasonable probability that had Mr. O'Neal's attorney pursued that testing that the result of his case would have been different. Mr. O'Neal's attorney also provided ineffective assistance of counsel, by "pushing" him toward a plea. For most of the representation, Mr. O'Neal and his attorney were preparing for trial. (R31:21:5-15). Suddenly, right before trial, his attorney wanted to discuss a possible plea. See id. Mr. O'Neal felt as if his attorney was trying to "duck out of going to trial." Id. Mr. O'Neal felt pressured into pleading guilty as a result of his attorney's conduct. With the pressure applied by his attorney and the lack of forensic evidence to support an alternate theory of the crime, Mr. O'Neal felt he had to plead guilty. But for the ineffective assistance of his counsel, he would not have pled guilty. Mr. O'Neal can show that he was prejudiced as a result of his attorney's deficient performance. The facts of this case satisfy the two-part Strickland test. A manifest injustice exists and Mr. O'Neal should be permitted to withdraw his guilty plea as a result.

[¶15] Under the circumstances, Mr. O'Neal should be granted post-conviction relief. That relief includes the withdrawal of his guilty plea, the appointment of a new attorney and setting the matter for a trial.

**Conclusion**

[¶16] For the foregoing reasons, Mr. O’Neal respectfully requests that the district court’s order denying post-conviction relief be reversed and remanded for further proceedings.

Dated this 21<sup>st</sup> day of February, 2023.

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**Certificate of Compliance**

[¶17] Pursuant to N.D.R.App.P. 32(e), the undersigned attorney certifies that this Brief consists of 12 pages and complies with 38 page limitation.

Dated this 21<sup>st</sup> day of February, 2023.

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