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Supreme Court Number 20050389  
Ramsey County Number 94-K-4356

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

Dana Causer,

Applicant/Appellant,

vs.

State of North Dakota,

Respondent/Appellee.

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APPEAL FROM ORDER DENYING POST-CONVICTION RELIEF,  
DISTRICT COURT OF RAMSEY COUNTY

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BRIEF OF APPELLANT

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Dana Causer  
James River Correctional Center  
2521 Circle Drive  
Jamestown, N.D. 58401

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STATEMENT OF THE CASE

Dana Causer was sentenced for a sex offense on May 16, 1995. R.A.#95. He was sentenced to six years imprisonment with four years of probation to do after getting out of prison. R.A.#95.

Causer did his time, and was released from prison. After being on probation for 3½ years, Causer was revoked on April 11, 2003, and sent back to prison. R.A.#165. He was given a second sentence of seven more years in prison with three years of probation after he gets out. R.A.#165. Causer appealed this probation revocation to the N.D. Supreme Court. The appeal was denied. State v. Causer, 2004 ND 75, 678 N.W.2d 552. This Court upheld five of the six grounds for revocation, R.A.#165, overturning ground number three.

On August 1, 2005, Causer filed his Application For Post-Conviction Relief. R.A.#187; App.P.5.

On August 30, 2005, the State responded with their "Opposition Of (sic) Motion For Post-Conviction Relief". R.A.#189; App.P.26.

On September 9, 2005, the District Court entered his "Order Denying Application For Post-Conviction Relief". R.A.#192; App.P.30.

On September 23, 2005, Causer filed two motions: "Causer's Motion For Judgment on the Pleadings/Summary Disposition", R.A.#193; and "Motion to Reconsider, or for New Trial, or to Alter or Amend the Judgement", R.A.#194.

On September 28, 2005, the State filed their response to these two motions. R.A.#196.

On October 11, 2005, the District Court entered his "Order Denying Motions". R.A.#198; App.P.33.

On November 10, 2005, Causer filed his Notice of Appeal. R.A.#199; App.P.35.

There was no hearing on the post-conviction case. Thus there is no transcript.

#### STATEMENT OF THE FACTS

For his probation revocation, Causer was not served with the Petition for Revocation of Probation. R.A.#136 and 149.

What occurred is that the State's Attorney or the District Court or somebody had appointed an attorney, Coral Mahler, for Causer without his knowledge or request. Then the District Court, the State's Attorney, the probation officer, Lila Thomas, or somebody gave Coral Mahler the Petition to Revoke Probation.

On February 11, 2003, a hearing was scheduled for March 24, 2003. R.A.#146. Causer was not aware this was occurring. On March 13, 2003, the hearing date was changed to March 21, 2003. R.A.#148. Causer was not aware of this.

On the morning of March 20, 2003, Coral Mahler telephoned Causer to show up for the revocation hearing for the next day. Causer told Coral Mahler he would not come because he had not been served with process, the

Petition To Revoke. Coral Mahler responded she would let the judge know, and I will get back to you later on.

On March 21, 2003, the hearing was changed to April 11, 2003. R.A.#150.

Coral Mahler convinced Causer that he should show up for the April 11, 2003 hearing, so he did.

Causer was not informed at his April 11, 2003 revocation hearing that he had a right to appeal, and to have court appointed counsel on appeal.

Causer had a search done on him. Lila Thomas, probation officer, and four law enforcement officers, entered Causer's residence without his permission. See the transcript of the probation revocation hearing, R.A.#170, page 9, lines 1-18, and page 28, lines 11-14, and pages 46-47, lines 15-25 and 1-19.

Before entering, Lila Thomas did not identify herself to Causer, that is, she did not give notice of herself to Causer and inform him she wanted to do a search and then wait for Causer to give her permission to enter or refuse permission to enter. Revocation hearing transcript, the above same pages as cited in the preceeding paragraph. Also see State v. Causer, 2004 ND 75, ¶506, 678 N.W.2d 552, 557 (Lila Thomas knocked and called Causer's name and asked him to step outside, then she and the officers entered.).

No reasonable ground for a probation search exists.

Causer was sentenced to probation after imprisonment

on his first sentence, and also in his revocation sentence.

In his original sentence, R.A.#95, Causer was not sentenced to supervised probation. His probation conditions were dependent on whether or not he was on probation, or supervised probation. R.A.#95.

In his April 11, 2003 probation revocation sentence, he was sentenced to supervised probation. R.A.#165.

Causer's revocation hearing attorney, Coral Mahler, did not raise any of the five issues raised in the post-conviction application.

No facts are in dispute. The State confessed to the facts in the post-conviction application.

#### APPLICABLE STANDARD OF REVIEW

Review of a summary denial of a post-conviction application is like a review of an appeal from a summary judgment under Rule 56, NDR CivP. Kaiser v. State, 2005 ND 49, ¶7, 693 N.W.2d 26, 28; State v. Bender, 1998 ND 72, ¶18, 576 N.W.2d 210, 213. Whether summary judgment was properly granted is a question of law which we review de novo on the entire record. Charles McCauley Partnership, L.L.P. v. Tyrone Tp., 2004 ND 410, ¶3, 689 N.W.2d 410, 412; MacKeefe v. City of Bismarck, 2005 ND 60, ¶12, 693 N.W.2d 639, 641-642.

#### ARGUMENT

Causer will discuss first the merits of his post-conviction case. Then he will discuss the procedural issue which arose in the post-conviction case.

I. THE PROBATION REVOCATION HEARING SHOULD NOT HAVE BEEN ALLOWED TO PROCEED FORWARD.

Causer was not served with the petition to revoke probation.

The law requires that Causer be served with a prior written notice of the petition to revoke. State v. Causer, 2004 ND 75, ¶16, 678 N.W.2d 552, 558. The Court should not have allowed a continuance on the hearing because Causer was not served.

Coral Mahler, Causer's attorney, should have made a motion to dismiss the hearing due to the fact that Causer was not served with the petition to revoke probation.

And the State would not be able to reschedule a new hearing. Thus, the petition to revoke would have been dismissed.

The State could not correct its own wrong of serving Causer's pre-appointed attorney and not serving Causer by starting over with the process; the State would have to provide good cause and excusable neglect to reschedule the hearing, and if no excusable neglect and no good cause, then the probation case would have to be dismissed. Cf. State v. Davis, 525 N.W.2d 837, 841 (Iowa 1994) (Good cause must be shown to file the information late or to have a late starting date.). Due process prohibits a new or second notice unless good cause and excusable neglect is shown for doing so. Rule 45(b), NDRCrImP; and see Walker v. Schneider, 447 N.W.2d 167, 172-176 (N.D. 1991) (The State

does not have an unbridled right or discretion or unfettered right to start over.). Due process of law does not mean that the State can disregard the law that the process be served on the defendant, not the lawyer, and later say "Never mind our wrong, we will just start over". State v. Davis, id., page 840-841.

By ignoring the rule that the State must serve the process on the defendant, the State would be free to obtain their revocation hearing without regard to the rule of law; and in practical effect, respond to any protest of the defendant by starting over; to allow this, the upshot would be a 'de facto' post-revocation notice for defendants who protest, this is not due process of law. Cf. Walters v. Grossheim, 554 N.W.2d 530, 531 (Iowa 1996) (This case related to 'de facto' post-deprivation hearings for person who protest when the prison takes money from an inmate without the required hearing being held first. The court held that due process does not provide for the state to violate due process and then if the prisoner protests to respond by granting the hearing due and again taking the money from the prisoner a second time.).

The rule is simple. It is defendant, not counsel, who must be served with the process. Faretta v. California, 422 U.S. 806, 819, 95 S.Ct. 2525, 2533 (1975).

On this fact that Causer was not served with the notice, a court's inquiry, by operation of the rule and of law, can go no further then whether Causer was properly

served with the petition to revoke probation. United States v. Davila, 573 F.2d 986, 987-988 (7th Cir. 1978) (The government argued that the probationer was given adequate notice, that he was not prejudiced. But the court held the government to strict compliance with the explicit language of due process of law.).

Any argument or reasoning other than that there should be strict compliance with the law of procedure and service of process makes the law and rule in to something that can be evaded.

If compliance with the law had been followed, the outcome of the case would have been different. The hearing would have been cancelled. And since the State would not be able to come up with good cause or excusable neglect to delay or reschedule the hearing, there would have been no revocation hearing, and thus no revocation of probation.

This is plain error, obvious error, prejudicial error. The District Court should not have allowed the hearing. It would then be up to the State to show cause for a right to serve Causer with the notice, to show cause to reschedule the hearing.

And, as an ineffective assistance of counsel issue, Coral Mahler, Causer's attorney, should have made a motion to dismiss the hearing due to lack of service on Causer. It would then be upon the State to show cause to reschedule the hearing.

II. CAUSER WAS NOT NOTIFIED HE HAD A RIGHT TO APPEAL,  
AND TO HAVE COUNSEL APPOINTED ON APPEAL.

At the revocation hearing, Causer was not informed he had a right to appeal the judgment. And he was not informed he could have counsel appointed on appeal.

Causer has a statutory right to appeal. State v. Causer, 2004 ND 75, ¶23, 678 N.W.2d 552, 560. And he has a right to counsel on appeal. Id., ¶26.

Due process mandates that Causer should have been notified of his right to appeal, and to have counsel appointed on appeal if one is indigent.

When a state opts to act in a discretionary field such as enacting a statute giving a statutory right of appeal, it must act in accord with the dictates of the Constitution and the due process clause of the Fourteenth Amendment. Evitts v. Lucey, 469 U.S. 387, 401, 105 S.Ct. 830, 838-839 (1985). State law may give rise to liberty interests protected by the 14th Amendment. Ballard v. Estelle, 937 F.2d 453, 456 (9th Cir. 1991). A statute granting a right creates a liberty interest protected by due process. Board of Pardons v. Allen, 482 U.S. 369, 381, 107 S.Ct. 2415, 2422 (1987).

Where one has a liberty interest in appealing and to counsel on appeal, then one must be informed of one's right to appeal and to have counsel appointed on appeal. Ennis v. Schuetzle, 486 N.W.2d 867, 869 (N.D. 1992); Ennis v. Dasovick, 506 N.W.2d 386, 393 (N.D. 1993).

A probationer has a due process right, a liberty interest, a constitutional right to appeal and to counsel on appeal. And thus a probationer has a right to be informed he has a right to appeal and to have counsel appointed on appeal if he is indigent. State v. Orr, 375 N.W.2d 171, 174 (N.D. 1985) (Court must inform the defendant of his rights.).

### III. THE ENTRY IN TO CAUSER'S HOUSE WAS ILLEGAL.

Lila Thomas, probation officer, and the four law enforcement officers entered Causer's residence without his permission and thus they entered illegally. The search and seizure was illegal.

The first count of the revocation petition, R.A.#149, charged that Causer did not give permission to Lila Thomas to enter to visit, and thus Causer violated his probation condition that he give permission. If Thomas did not need permission to enter, then this count would be superfluous, not needed. This count shows that the entry was illegal.

Since Thomas and the officers entered Causer's house without his permission, their entry in to his house was illegal.

The fruit of the search and seizure should have been suppressed and excluded. All the counts except the methamphetamine count must be and should have been dismissed for lack of evidence. Causer's attorney was ineffective for not raising this as an issue.

Second:

Causer's probation condition Number 11, says that Causer "shall: 11. if on supervised probation submit to search of your person, vehicle, or place of residence by any probation officer at any time of the day or night, with or without a search warrant."

Causer did not submit.

There must first be submission before there can be a search. Their entry was illegal.

Third:

Lila Thomas did not identify herself to Causer, did not give notice of herself to Causer and inform him she wanted to do a search and then wait for Causer to give her permission to enter. She must have done this to make the entry and search reasonable and in accord with the common law and due process of law.

The common law says that for an officer to enter on a search, the officer must first give notice and that the homeowner either give permission to enter or refuse permission to enter. N.D.C.C. 29-29-08; State v. Sakelson, 379 N.W.2d 779, 781-782 (N.D. 1985).

The probation search must still conform to the rules of law, that the officer not commit trespass or breach of the peace, not violate the reasonableness requirement.

The probation condition itself states that the probationer must submit to the search. If the probation officer has the power to enter a probationer's home at will, without permission, then the requirement to submit

would be superfluous, a not necessary provision.

Thus the entry was illegal, unreasonable.

Fourth:

Probation is not strictly criminal, but is civil or quasi-civil in nature.

There is no right to break in on civil process, even with a refusal from the probationer. Miller v. U.S., 357 U.S. 301, 307, 78 S.Ct. 1190, 1194 (1958) (Arrest on civil process does not authorize a breaking in to one's home.).

This is furthered by the fact that the probation condition requires the probationer to submit to the search.

Thus, even a refusal to enter does not authorize the probation officer to enter with force. That is, the common law discussed in Part Three above can not be taken advantage of by a probation officer. If the probationer does not submit to the search, the probation officer can only recommend the probation be revoked for not submitting.

The entry was illegal.

Fifth:

The probation search was illegal as there are no reasonable grounds for a probation search. State v. Smith, 1999 ND 9, ¶14-19, 589 N.W.2d 546, 549-550 (For a probation search to be legal, it must be reasonable. Reasonable ground for doing the search must exist.).

The fruit of the entry and search and seizure must be and should have been suppressed. Causer's attorney was ineffective for not raising this. The first five counts

should have been dismissed for lack of evidence.

IV. A COURT CAN NOT IMPOSE PROBATION  
AFTER IMPRISONMENT.

Sentencing a person to probation after being punished with imprisonment violates due process of law.

Causer was sentenced to do probation after being punished with imprisonment. This was done on his original sentence, R.A.#95, and his revocation second sentence, R.A.#165.

After finishing his first prison sentence, Causer got out of prison on July 3, 1999. He did over 3½ years on probation, then was revoked on April 11, 2003. He was sentenced on revocation to seven years in prison with three years of supervised probation to do after he does the seven years. R.A.#165. Causer is currently in prison doing this second prison sentence of seven years.

The case of U.S. v. DiFrancesco, 449 U.S. 117, 139, 101 S.Ct. 426, 438 (1980), says that even though it is multiple punishment to impose both a fine and imprisonment, that this multiple punishment does not violate the double jeopardy clause if a statute authorized the infliction of both fine and imprisonment, but if a statute does not authorize it it, then it violates the double jeopardy prohibition to inflict both imprisonment and fine.

The prohibition against double jeopardy is a rule of the common law. U.S. v. DeFrancesco, id., page 128, 432 (Double jeopardy is a rule of the common law.).

For the State to enact a statute and thus 'authorize' putting a person in jeopardy more than once for the same crime or to punish him more than once for the same crime, is a taking of life, liberty and property without due process of law.

By enacting a statute to authorize that which is illegal, the State is "working the wrong", that is, is enacting a statute so as to 'authorize' a taking of life, liberty and property without due process of law, is 'authorizing' that which is contrary to the Constitution. Webster v. Reid, 52 U.S. 437, 455, 13 L.Ed. 761 (1850) (The words "by the law of the land", do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory, and turn this part of the Constitution into mere nonsense. Due process of law does not mean a mere act of the legislature, for if it did it would remove all limitation on legislative authority and destroy the restrictive power of the constitution. Brief of plaintiff.). Same, In re Winship, 397 U.S. 358, 372 note 5, 90 S.Ct. 1068, 1077 note 5 (1970) (Concurring opinion.).

The due process clause restricts the power of the State or legislature to prescribe the punishment which can be imposed. People v. Hughes, 272 N.W.2d 567, 571 note 5 (Mich.App. 1978); Whalen v. U.S., 445 U.S. 684, 689 note 3, 100 S.Ct. 1432, 1436 note 3 (1980) (There are constitutional limitations on the power to legislate

punishment, citing cases declaring statutes as being in violation of the due process clause.).

Article I, §12, N.D. Constitution, says that "No person shall ... be deprived of life, liberty or property without due process of law." The Fourteenth Amendment of the U.S. Constitution says that "... nor shall any state deprive any person of life, liberty or property, without due process of law."

The statutes which authorize probation after imprisonment, which authorize a court to impose more than one punishment for the same crime, or to put one in jeopardy of being punished more than once for the same crime, violate due process of law.

N.D.C.C. 12.1-32-02(1 & 3) and 12.1-32-06.1 and 12.1-23-07(4 & 5), which authorize or recognize probation after imprisonment, are unconstitutional, contrary to due process of law.

Second:

As a second way of looking at the issue:

The due process of law states: "That what cannot be done directly cannot be done indirectly." Cummings v. Missouri, 71 U.S. 277, 288, 325, 329, 19 L.Ed. 356 (1866); Carmell v. Texas, 529 U.S. 513, 541, 120 S.Ct. 1620, 1637 (2000); Paluck v. Board of County Com'rs, Stark County, 307 N.W.2d 852, 857 (N.D. 1981); Langenes v. Bullinger, 328 N.W.2d 241, 246 (N.D. 1982).

If the imposing of more than one punishment for the

same crime is held to be constitutional, or if being put in jeopardy more than once for the same crime is held to be constitutional because it is not done directly, but indirectly under the form of probation and the probation statute, then the prohibition against double jeopardy may be evaded at pleasure. Paraphrasing from Cummings v. Missouri, id., page 289, 325, 329 (The constitutional prohibition against bills of attainder and ex post facto laws can not be evaded by doing it by the form of the enactment.).

If a court sentences a man to prison, and the man finishes his punishment, finishes his prison sentence, and later the man is brought back in to court and given another punishment of more time for the same crime, it would be a violation of the prohibition against double jeopardy.

But if a court sentences a man to prison with probation to do after he gets out of prison, and the man finishes his punishment and is now doing probation, and later the man is brought back in to court for violating probation, and is given another punishment of more time, it is said that this does not violate double jeopardy because the statute authorized it.

The probation and sentencing statutes authorize a court to do indirectly via probation that which the court could not do if there were no statute authorizing probation after punishment.

Using the rationale of Cummings v. Missouri, id., the statutes and the sentence of the court which imposed probation after imprisonment violate the double jeopardy clause.

The rule that what can not be done directly can not be done indirectly is a maxim to aid in the just application of the double jeopardy law. N.D.C.C. 31-11-05 (The maxims of jurisprudence are to aid in the just application of the law.).

The statutes, and the sentence of the trial court and the sentence of the probation revocation court violate due process of law, and/or they violate the double jeopardy prohibition clause of the N.D. and U.S. Constitutions.

The trial Court and the probation revocation Court were without jurisdiction to render the judgment rendered because a court can not sentence a defendant to probation after imprisonment. Or the trial and probation Courts were without jurisdiction to proceed forward towards judgment in the manner they proceeded, because they proceeded forward contrary to due process of law, and/or contrary to the double jeopardy prohibition clause.

Causer should be immediately released from incarceration. Causer respectfully prays this N.D. Supreme Court consider the points raised here, points not considered before.

**V. CAUSER WAS NOT ON SUPERVISED PROBATION.**

Causer's probation conditions from his sentence from

the trial Court, R.A.#95, Appendix A, contain two different types of conditions, depending on whether one is on probation, or if one is on supervised probation.

Condition number 3 says that the probation officer has a right to visit Causer's residence, if he is on supervised probation. R.A.#95.

Condition number 10 says that the probation officer can take a drug test, if he is on supervised probation. R.A.#95.

Condition number 11 says the probation officer can search Causer, if he is on supervised probation. R.A.#95.

The other conditions of probation, 1 through 18, except for number 3, 4, 10 and 11, apply if Causer is on probation, are not conditioned that he be on supervised probation. R.A.#95.

Causer's "Criminal Judgment and Commitment", R.A.#95, says only that: "2) Four years of the ten year sentence is hereby suspended for the balance of ten years subject to the following terms and conditions: ... b) Defendant shall comply with the terms of probation outlined in the attached Appendix A, incorporated herein and made part hereof."

Causer was not sentenced to supervised probation. The word supervised is not used.

The April 11, 2003 "Order Revoking Probation", R.A.#165, states on page 3 that: "He shall be on supervised probation for three (3) years upon his release. Previous

Appendix A conditions are imposed." Here, the word supervised is used.

On appeal to the N.D. Supreme Court, Causer claimed that the drug test for methamphetamine did not prove that Causer used methamphetamine because the probation revocation Court found orally at the hearing that the lab did test for amphetamine, but no finding was made that it tested for methamphetamine. But this Court held that what was said or found on the record orally at <sup>the</sup> ~~teh~~ hearing is superseded by the later written order. The written order found that the lab test tested for and found methamphetamine as well as amphetamine. State v. Causer, 2004 ND 75, ¶44-46, 678 N.W.2d 552, 563-564.

The point here is that what is stated in the written order or judgment governs.

But also, at his original sentencing hearing, the trial Court did not <sup>orally</sup> ~~say~~ that Causer was sentenced to supervised probation. The oral sentence governs, over the written sentence. Davidson v. Nygaard, 58 N.W.2d 578, 583 (N.D. 1951); State ex rel. Perry v. Garecht, 70 N.D. 599, 279 N.W. 132, 134-135 (1940); State v. Trieb, 516 N.W.2d 287, 292 (N.D. 1994); Sampson v. State, 506 N.W.2d 722, 726-727 (N.D. 1993).

Causer was not sentenced to supervised probation, whether one looks at the oral or written sentence. He was not on supervised probation.

Because the State had no right to search, the fruit

of the search must be suppressed and the first five counts dismissed. And because the State had no right to take a drug test and do a home visit, those counts must be dismissed, counts one and six. All the counts must be dismissed and overturned.

The State and the probation revocation Court exceeded their jurisdiction when they violated Causer's probation based on the search, the drug test, and the home visit.

#### VI. CAUSER HAD INEFFECTIVE ASSISTANCE OF COUNSEL.

Causer was given an attorney for his probation revocation hearing. See the transcript of the revocation hearing, page 3, lines 7-9; R.A.#170.

Incorporating herein the preceeding five issues, Coral Mahler, the attorney, did not raise these issues before the revocation hearing Court.

If these issues had been raised, there would have been no revocation, and the probation itself would have been declared illegal, contrary to the due process of law or the double jeopardy clause. And Causer would have been informed of his right to appeal, and to have appointed counsel on appeal. Causer was prejudiced by his ineffective counsel.

Because Causer's attorney did not raise the above five issues, and because he was prejudiced by it, he had ineffective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 687, 694, 104 S.Ct. 2052, 2064, 2068 (1984); State v. Causer, id., ¶19, page 559.

The revocation Court was without jurisdiction to proceed forward towards judgment in the manner he proceeded, because he proceeded with ineffective counsel for Causer.

VII. THE STATE CONFESSED TO THE MERITS OF THE  
POST-CONVICTION APPLICATION.

The State responded to the post-conviction application with an "Opposition Of (sic) Motion For Post-Conviction Relief", dated August 30, 2005. R.A.#189; App.P.26.

With this type of response, the State confessed to the facts and the issues of law of the post-conviction application.

N.D.C.C. 29-32.1-06 mandates that the State "shall respond by answer or motion". This statute says the defense of res judicata may be raised by either answer or motion.

The State's response is neither an answer or motion.

It is not an answer. It does not deny any facts in the post-conviction application. (Of course, all material facts are facts on the record.) It does not raise any new facts.

On page 3, App.P.28, the State 'appears' to say that Causer was placed on supervised probation.

The State only asks that the Court review Causer's prior revocations and sentencings, then concludes that "Clearly, the defendant was placed on supervised probation." But the State cited no transcript, page and line, and no judgment stating this. The State could not because no mention was made orally at sentencing or put in writing

about being on supervised probation. The State only asks the Court to search the record, and, by implication, unfoundedly and arbitrarily conclude that Causer was sentenced to supervised probation. The Court then did such.

Judges are not to be asked to search the record to aid or argue and prove the party's position for him; the party is to set out the page and line in the transcript, producing the fact claimed to exist. Earnest v. Garcia, 1999 ND 196, ¶10, 601 N.W.2d 260, 263; State v. Vandenberg, 2003 ND 71, ¶7, 660 N.W.2d 568, 572.

The State bears the burden to prove their affirmative claim. Sorum v. Schwartz, 411 N.W.2d 652, 654 (N.D. 1987); Midland Oil & Royalty Co. v. Schuler, 126 N.W.2d 149, 152 (N.D. 1964); Helbling v. Helbling, 541 N.W.2d 443, 445-446 (N.D. 1995).

To say that the State can delegate this burden to the court is to say that the court is now acting as the State, is the party, is no longer an unbiased court or judge. It relieves the State of its burden, contrary to due process of law.

As a claim or defense, it is illegal. A claim must set forth facts, not a request to the court. Rule 8, NDRCivP.

The response does not deny a fact, nor does it raise a fact. It is not an answer.

There was no joinder of issue of fact before the

District Court. The Court was without jurisdiction to decide a fact. A court only has jurisdiction to decide disputes, a case or controversy.

The State's response is not a motion. It does not 'move' or 'motion' the Court. It does not have a notice of motion, an order to show cause summoning Causer or putting him on notice that the State is asking the Court for relief on a question of law, giving the Court 'in personam' jurisdiction over Causer for the relief to be granted, and bringing the subject matter properly before the Court to give it jurisdiction of the subject matter--(distinguishing from subject matter jurisdiction).

The response, since it is not a motion, does not give the District Court jurisdiction to render summary disposition because the statute, N.D.C.C. 29-32.1-09(1), says that a court may grant summary disposition only if a motion for such is before the court.

There was no joinder of issue of law before the District Court.

Since there was no joinder of issue of both fact and law before the Court, the Court's only jurisdiction was to look at the post-conviction application, on Causer's motion for summary disposition/judgment on the pleading.

The State's pretended claim of res judicata is waived or forfeited. Fetch v. Quam, 530 N.W.2d 337, 337 (N.D. 1995) (If not raised by answer, an affirmative defense is waived. Rule 8(c), NDR CivP.). The State is enjoined

by statute and due process of law, to respond by answer or motion. N.D.C.C. 29-32.1-06; Robertson Lumber Co. v. Progressive Contractors, Inc., 160 N.W.2d 61, 74 (N.D. 1968) (The affirmative defense of res judicata is required to be raised in the answer as required by Rule 12(b), NDRCivP.). The State's intentional conduct of not abiding by the statute, and their knowledge of the claim or issue, waives or forfeits the claim. See Black's Law Dictionary, Eighth Edition, defining forfeiture and waiver.

Since there is no joinder, the State confessed to the merits of the post-conviction application. 71 C.J.S. Pleading, §571(a) notes 87-93 (The allegations are taken as confessed where there is no joinder.).

Default may be had on a post-conviction application. Owens v. State, 1998 ND 106, ¶20 & 22, 578 N.W.2d 542, 547; Bell v. State, 1998 ND 35, ¶9-14 & 21, 575 N.W.2d 211, 214-215, 216; Gamboa v. State, 2005 ND 48, ¶4-7, 693 N.W.2d 21, 22-23.

Alternatively, achieving the same end result, the State's Opposition may be struck if not timely and properly done. 39A C.J.S. Habeas Corpus, §180(b) note 9, citing to "Beavers v. Smith".

Or a motion for judgment on the pleading may be had where the State has failed to join an issue of fact and law because they filed neither an answer nor a motion to dismiss. 71 C.J.S. Pleading, §572 (If a party does not

move for judgment on the pleading or for default, then that party waives the failure to join.).

Reading the above case of Bell v. State, id., a motion for summary disposition/judgment on the pleading is the proper procedure because it satisfies the default requirements of Bell v. State, id., and of Rule 55, NDR CivP, while staying within the bounds of the post-conviction statutes and §29-32.1-09(1).

The State's Opposition is an intent that the District Court rule sua sponte or ex parte, rule without giving Causer notice and an opportunity to defend, the basic requirement of due process of law. Black's Law Dictionary, Fourth Edition, defining due process of law (The essential elements of due process are notice and opportunity to defend.).

A party's intent may be determined from his conduct in court and the Court's conduct. Production Credit Ass'n of Minot v. Schlak, 383 N.W.2d 826, 827 (N.D. 1986) (The motion did not include a notice of hearing, and the movant did not provide the opposing party with sufficient time to present a defense, and the court made its decision without notice to the opposing party, and therefore the movant's intent was to be heard ex parte and to keep the opposing party from being able to defend.).

Causer is entitled to rely upon the designation of the State's Opposition, that it is an abuse of process by denying notice and an opportunity to defend, and thus

a default, and thereby plan his trial tactic accordingly. In Interest of M.L., 239 N.W.2d 289, 295 (N.D. 1976) (A party is entitled to plan his trial tactics according to the designation of the case presented and noticed to him.).

Causer is entitled to summary disposition in his favor because the facts warrant it, because the State confessed to the merits of the case, and because Causer moved for judgment on the post-conviction application/summary disposition--R.A.#193.

A standard should be set. The rule of law should govern. The State misused and abused process. The State should be held to the rule of law.

The District Court was without jurisdiction to render the judgment rendered because the facts of the case did not warrant the decision made, the State confessing to the merits of the post-conviction application.

**VIII. THE JUDGMENT IS VOID, THERE WAS AN  
IRREGULARITY IN THE PROCEEDINGS OF THE COURT  
AND OF THE STATE, DENYING CAUSER A FAIR TRIAL.**

Causer filed his post-conviction application. The State did not respond according to the mandate of the statute, §29-32.1-06 with an answer or motion. The State instead served and filed an "Opposition". App.P.26. This is not an authorized pleading. The District Court then ex parte summarily denied Causer's application.

The State and the District Court did not conform to the rule of law of notice, and to the rule of the post-

conviction statute, §29-32.1-06.

It is noted that even if the State's response were a motion and had a notice of motion, Causer was still denied timely, full and complete notice. He was not allowed the ten days plus three days for mail time to respond. And, considering it as a summary disposition/summary judgment motion, Causer should have been given 30 days to respond. The District Court ruled 10 days after the State served their response.

Not only did the State and District Court not conform to the statutes and rules of procedure, there was no conformance to the common law or due process of law of notice. Johnson v. State, 2004 ND 130, ¶6, 681 N.W.2d 769, 773 (Full and complete notice was not provided because 30 days was not allowed for "Johnson" to respond.); Hernandez v. State, 682 N.W.2d 81 (Iowa App. 2004) (The state filed a motion to dismiss, not a motion for summary judgment. The state's document did not authorize the court to take the action it took. Therefore the defendant did not receive adequate notice of trial court's intention to summarily dispose of his application. The trial court's denial was overturned. Unpublished opinion.); Wilson v. State, 1999 ND 222, ¶17, 603 N.W.2d 47, 52 (The State's motion to dismiss and supporting brief, little more than a paragraph in length, was not adequate to put Wilson on notice he needed to put on proof, and so the order of denial was reversed.).

Notice and opportunity to defend or to be heard, and that there be no arbitrariness, is the foundation of due process. Black's Law Dictionary, Fourth Edition, defining due process of law.

Due process of law and the purpose of the rules of pleading are to allow for proper notice of issues, to eliminate surprise, to eliminate ambush. Tormaschy v. Tormaschy, 1997 ND 2, ¶13, 559 N.W.2d 813, 816.

Summary denials and no answer or argument from the other party is not an administration of justice and fair trial, but is a means of keeping one from having his day in court. Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 373, 86 S.Ct. 845, 851 (1966). Equity takes in to consideration and forbids manipulation of the legal process. Nelson v. Campbell, 541 U.S. 637, 649, 124 S.Ct. 2117, 2126 (2004). Pleading is not to be a game of skill. Foman v. Davis, 371 U.S. 178, 181-182, 83 S.Ct. 227, 229 (1962). Due process forbids a case from becoming a "game", a "matching of wits". Kotteakos v. U.S., 328 U.S. 750, 759, 66 S.Ct. 1239, 1245 (1946). Due process of law is to bring the matter of litigation to a point, "simple and unambiguous". McFaul v. Ramsey, 61 U.S. 523, 524, 15 L.Ed. 1010 (1857).

The purpose of the rules of procedure is to give notice, and that notice must be explicit. N.D.C.C. 1-01-23. It is explicit that the "Opposition" is not an answer nor a motion.

A judicial decision without notice and opportunity to be heard is contrary to due process of law. McWethy v. McWethy, 366 N.W.2d 796, 798 (N.D. 1985). No principle is more vital to the administration of justice, than that no man shall be condemned in his person or property without notice, and an opportunity to make his defense. Hull v. Rolfsrud, 65 N.W.2d 94, 98 (N.D. 1954).

It is a fundamental duty of a trial court to assure that basic rules of procedure are followed; and rules cannot be applied differently merely because of who the party is. McWethy v. McWethy, id.

"Judges, more than most, should understand the value of adherence to settled procedures. By adopting a set of fair procedures, and then adhering to them, courts of law ensure that justice is administered with an even hand. 'These are subtle matters, for they concern the ingredients of what constitutes justice.'" McWethy v. McWethy, id., page 799.

Since the order was made without following settled procedures requiring notice and opportunity to be heard, it is reversed. McWethy v. McWethy, id., page 799.

Since no answer or motion to dismiss or no motion for summary disposition was submitted, the District Court was without jurisdiction to take cognizance of the case because issue was not joined on fact nor on law. There was nothing calling the Court to take jurisdiction of the subject matter.

N.D.C.C. 29-32.1-(09, 10 & 11) authorize a court to take jurisdiction only after a party asks or moves the court to take jurisdiction or only <sup>if</sup> ~~is~~ issue is joined and an evidentiary hearing is requested and held. A court can grant summary disposition only if a motion for such is before the court. §29-32.1-09(1); State v. Bender, 1998 ND 72, ¶24, 576 N.W.2d 210, 215 (Court erred in ruling where no answer or motion was filed by the State.).

Although Causer was served with an "Opposition", he was not notified of the particular procedure the State intended the Court to employ, or that jurisdiction of the subject matter was being brought to the Court, asking the Court to act or when to act. First Western Bank of Minot v. Wickman, 464 N.W.2d 195, 196 (N.D. 1990) (While the Wickmans were served with the motion for summary judgment, they were not notified of the particular procedure First Western intended the trial court to employ in considering the motion. The Wickmans were not served with the notice of motion. The judgment was reversed for lack of proper, full and complete notice. "A judgment entered on motion of one party without proper notice and the opportunity to be heard by the other party is contrary to fundamental principles of justice.").

In order for a court to obtain jurisdiction of the subject matter, the party must have brought the issue properly before the court. King v. Menz, 75 N.W.2d 516, 521 (N.D. 1956); Reliable, Inc. v. Stutsman County Com'n.,

409 N.W.2d 632, 634 (N.D. 1987).

It is a general principle of law that a court can not set itself in motion, nor has it power to decide questions except as presented by the parties in their pleadings; anything that is decided pursuant to such initiation is 'coram non judice' and is void for want of jurisdiction, and is open to collateral attack. I.P. Homeowners, Inc. v. Morrow, 668 N.W.2d 515, 524 (Neb.App. 2003). A trial court lacks competence, jurisdiction, to proceed forward to enter a default judgment in absence of a pleading required by statute, thus the default judgment is void. Tridle ex rel. Shannon v. Horn, 652 N.W.2d 418, 422-423 (Wis.App. 2002). "A court can give no judgment in a thing not depending, or that does not come in a judicial way before the court;" where the court deviates from the rules of procedure, the proceeding is rendered 'coram non judice'; the law is, the court and the officer executing the process are both trespassers, it being better for the peace of society, and its interests of every kind, than that a void writ should be executed. Dynes v. Hoover, 61 U.S. 65, 71, 80-81, 15 L.Ed. 838 (1857).

In this case, the State should have filed a motion for summary disposition, including, of course, a notice of motion.

The conduct of the State and of the District Court is irregular. This prevented Causer from having a fair trial/hearing.

An irregular judgment is one given contrary to the method of procedure allowed by law. Felix v. Lehman, 20 N.W.2d 82, 84-85 (N.D. 1945); Bohn v. Eichhorst, 181 N.W.2d 771, 775-776 (N.D. 1970); Lang v. Cusey, 379 N.W.2d 775, 777 (N.D. 1985). Irregularity denies to one a fair trial. Felix v. Lehman, *id.*, page 86.

"A void judgment is one that, from its inception, is a complete nullity and without legal effect. ... A judgment is void when the court lacks jurisdiction of the parties or of the subject matter, lacks the inherent power to make or enter the particular order involved, or acts in a manner inconsistent with due process of law." Opat v. Ludeking, 666 N.W.2d 597, 606 (Iowa 2003). Where a proper method of notification is not employed, the judgment is void, and not merely subject to reversal; the rendition of such a judgment is a denial of due process of law, and even though the court has jurisdiction over the defendant, and even though he is given notice of the action, a judgment against him is void if he was denied all opportunity to be heard. Board of Trustees of York College v. Cheney, 71 N.W.2d 195, 198 (Neb. 1955). Judgments entered contrary to due process are void; it is not within the province or power of a court to enter orders or decrees without notice; and thus the orders entered without notice dismissing the actions are void. Neylan v. Vorwald, 360 N.W.2d 537, 540, 543 (Wis.App. 1984).

The District Court was without jurisdiction to proceed

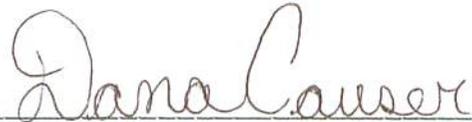
forward towards judgment in the manner he proceeded. The Court's conduct and Order is 'coram non judice', beyond and outside the due process of law, outside the requirement of the statutes, in excess of his jurisdiction, void.

The post-conviction judgment must be vacated and overturned.

#### CONCLUSION

Wherefore, the post-conviction judgment must be overturned, and the criminal judgment overturned. Or alternatively, the post-conviction judgment must be vacated and remand had to the District Court to properly rule on the issues which were presented to him, the motion for summary disposition/judgment on the pleading.

Dated this 7th day of December, 2005.



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#### CERTIFICATE OF NON-COMPLIANCE

I declare that this Brief was typed on a typewriter, not on a word processor or computer. Thus I can send you no diskette of my brief.

Dated this 13th day of December, 2005.



Dana Causer