**ORIGINAL**

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20060349

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| Randal R. Steen, | ) | |
| | ) | |
| Applicant/Appellant, | ) | Supreme Court No. 20060349 |
| | ) | |
| vs. | ) | Crim. Case No. 02-K-01113 |
| | ) | |
| State of North Dakota, | ) | Post-Con. No. 03-C-02185 |
| | ) | |
| Respondent/Appellee, | ) | |
| | ) | |

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JAN 11 2007

STATE OF NORTH DAKOTA

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**BRIEF OF APPELLANT STEEN**

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APPEAL OF ORDER DENYING POST-CONVICTION

APPEAL FROM THE DISTRICT COURT
BURLEIGH COUNTY, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE DONALD L. JORGENSEN, PRESIDING

Randal R. Steen, pro se
Applicant/Appellant
N.D. State Penitentiary
P.O. Box 5521
Bismarck, North Dakota
58506-5521

TABLE OF CONTENTS

page

TABLE OF AUTHORITIES . . . . . ii

STATEMENT OF ISSUES PRESENTED FOR REVIEW . . . . . vi

STATEMENT OF THE CASE . . . . . 1

STANDARD OF REVIEW . . . . . 4

ARGUMENT . . . . . 5

I. When the criminal judgment is void, then the judgment is no judgment and thus res judicata is not applicable. . . . . 5

II. A fair trial, effective assistance of counsel, is an element which must be shown in order to claim res judicata, or it is a defense to a claim of res judicata. . . . . 15

III. The District Court's ruling is insufficient with respect to the res judicata ruling. . . . 16

IV. The District Court has jurisdiction to consider the motion for injunction against the State. 19

CONCLUSION . . . . . 21

TABLE OF AUTHORITIES

page

Americana Healthcare Center v. North Dakota Dept. of Human Services, 513 N.W.2d 889 (N.D. 1994) . . 10

Bell v. State, 2001 ND 171, 639 N.W.2d 706 . . . . . 15

Benjamin v. Malcolm, 803 F.2d 46 (2nd Cir. 1983) . . . 21

Berumen v. Casaday, 515 N.W.2d 816 (Neb. 1994) . . . . 11

Borsheim v. O & J Properties, 481 N.W.2d 590 (N.D. 1992) 10

Burnham v. Superior Court of California, County of Marin, 495 U.S. 604, 110 S.Ct. 2105 (1990) 7

Carruth v. Taylor, 8 N.D. 166, 77 N.W. 617 (1898) . . 11

Clark v. Glazer, 609 P.2d 1177 (Kan.App. 1980) . . . . 9

Coenen v. Van Handel, 68 N.W.2d 435 (Wis. 1955) . . . 9

Enderlin State Bank v. Jennings, 4 N.D. 228, 59 N.W. 1058 (1894) . . . . . 16

Ex Parte Reed, 100 U.S. 13, 25 L.Ed. 538 (1879) . . . 6

Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822 (1963) . . . 8, 11

Fischer v. North Dakota Workers Compensation Bureau, 530 N.W.2d 344 (N.D. 1995) . . . . . 10

Flasza v TNT Holland Motor Exp., Inc., 155 F.R.D. 612 (N.D.Ill. 1994) . . . . . 18

Ford v. Willits, 688 P.2d 1230 (Kan.App. 1984) . . . 7, 9

Goodman v. Mevorah, 59 N.W.2d 193 (N.D. 1953) . . . . 15

Hamilton v. Hamilton, 410 N.W.2d 508 (N.D. 1987) . . . 13

Hanson v. Woolston, 701 N.W.2d 257 (Minn.App. 2005) 8

Heflin v. U.S., 358 U.S. 415, 79 S.Ct. 451 (1959) . . 10

Heller Financial, Inc. v. Midwhey Poweder Co., Inc., 883 F.2d 1286 (7th Cir. 1980) . . . . . 19

Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380 (N.D. 1992) . . . . . 10

page

Hollingsworth v. Barbour, 29 U.S. 466, 7 L.Ed. 922 (1830) 8

In re Devin W., 693 N.W.2d 901 (Neb.App. 2005) . . . . 4

In re Director of Insurance, 3 N.W.2d 922 (Neb. 1942) 9

In re Disciplinary Action Against Larson,
512 N.W.2d 454 (N.D. 1994) . . . . . 20

In re Tutu Wells Contamination Litigation,
157 F.R.D. 367 (D.Virgin Islands 1994) . . . . . 21

Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979) 5

Jensen v. State, 2004 ND 200, 688 N.W.2d 374 . . . . . 4

Johnson v. Ranum, 62 N.D. 607, 244 N.W. 642 (1932) . . 8

Johnson v. State, 2004 ND 130, 681 N.W.2d 769 . . . . 4

Johnson v. State, 2006 ND 122, 714 N.W.2d 832 . . . . 12

Jones v. Lilly, 37 F.3d 969 (3rd Cir. 1994) . . . . . 20

Jones v. State, 545 N.W.2d 313 (Iowa 1996) . . . . . 15

Knutson v. Ekren, 5 N.W.2d 74 (N.D. 1942) . . . . 17, 18

Long v. Brooks, 636 P.2d 242 (Kan.App. 1981) . . . . . 9

Lyon Financial SErvices, Inc. v. Waddill,
625 N.W.2d 155 (Minn.App. 2001) . . . . . 7

Matrix Properties Corp. v. TAG Investments,
2002 ND 86, 644 N.W.2d 601 . . . . . 20

Moen v. Moen, 519 N.W.2d 10 (N.D. 1994) . . . . . 20

National Accept. v. Regal Products,
155 F.R.D. 631 (E.D.Wis. 1994) . . . . . 18

Nicholson v. Red Willow County School District No. 0170,
699 N.W.2d 25 (Neb. 2005) . . . . . 4

Nind v. Meyers, 15 N.D. 400, 109 N.W. 335 (1906) . . . 9

Northern Pac. R. Co. v. McGinnis,
4 N.D. 494, 61 N.W. 1032 (1894) . . . . . 9

Ohio Cas. Ins. Co. v. Clark,
1998 ND 153, 583 N.W.2d 377 . . . . . 10, 15

page

Parizek v. State, 2006 ND 61, 711 N.W.2d 178 . . . . . 4

Peacock v. Sundre Tp., 372 N.W.2d 877 (N.D. 1985) . . 10

Reddington v. Beefeaters Tables, Inc.,
240 N.W.2d 363 (Wis. 1976) . . . . . 8

Riley v. State, 506 N.W.2d 45 (Neb. 1993) . . . . . 6

Roth v. Hoffer, 2006 ND 119, 715 N.W.2d 149 . . . . . 20

Rummel v. Rummel, 265 N.W.2d 230 (N.D. 1978) . . . . . 20

Sanders v. U.S., 373 U.S. 1, 83 S.Ct. 1068 (1963) . . 11

Schillerstrom v. Schillerstrom, 32 N.W.2d 106 (N.D. 1948) 6

Schlesinger v. Councilman,
420 U.S. 738, 95 S.Ct. 1300 (1975) . . . . . 11

Schlup v. Delo, 513 U.S. 298, 115 S.Ct. 851 (1995) . . 11

Scott v. Reed, 820 P.2d 445 (Okla. 1991) . . . . . 6

Simpson v. Chicago Pneumatic Tool Co.,
2005 ND 55, 693 N.W.2d 612 . . . . . 4

Smith v. Woodley, 164 N.W.2d 594 (N.D. 1969) . . . . . 15

Sprint Spectrum L.P. v. Mills.,
124 F.Supp.2d 211 (S.D.N.Y. 2000) . . . . . 21

Sramek v. Sramek, 840 P.2d 553 (Kan.App. 1992) . . . 7, 8

Stammeyer v. Division of Narcotic Enforcement of Iowa
Dept. of Public Safety, 2006 WL 2382011 (Iowa 2006) 4

State v. Board of Com'rs of City of Fargo,
63 N.D. 33, 245 N.W. 887 (1932) . . . . . 6

State v. Carmody, 243 N.W.2d 348 (N.D. 1976) . . . . . 14

State v. Gutsche, 405 N.W.2d 295 (N.D. 1987) . . . . . 15

State v. Steen, 2004 ND 228, 690 N.W.2d 239 . . . . . 1

State ex rel. Ness v. Board of Com'rs of City of Fargo,
63 ND 85, 246 N.W. 243 (1932) . . . . . 8

State ex rel. Styles v. Baeverstad,
12 N.D. 527, 97 N.W. 548 (1903) . . . . . 11, 12

page

Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2042 (1984) . . . . . 15

Taylor v. Oulie, 55 N.D. 253, 212 N.W. 931 (1927) . . 6

U.S. v. New York Tel. Co.,
434 U.S. 159, 98 S.Ct. 364 (1977) . . . . . 21

U.S. v. State of Washington,
459 F.Supp. 1020 (W.D.Wash. 1978) . . . . . 21

Vanover v. Cook, 260 F.3d 1182 (10th Cir. 2001) . . . 9

Wetch v. Wetch, 539 N.W.2d 309 (N.D. 1995) . . . . . 10

Zenker v. Zenker, 72 N.W.2d 809 (Neb. 1955) . . . . . 8

49 C.J.S. Judgments . . . . . 6

50 C.J.S. Judgments . . . . . 13, 14

N.D.C.C. 19-03.1-23 . . . . . 1

N.D.C.C. 19-03.4-03 . . . . . 1

N.D.C.C. 29-32.1 . . . . . 14, 16, 17, 19, 20

## STATEMENT OF ISSUES PRESENTED FOR REVIEW


| | | page |
|---|---|---|
| I. | When the criminal judgment is void, when there is no judgment, is res judicata applicable? | 5 |
| II. | When one has pleaded ineffective assistance of counsel based on facts of record, is res judicata applicable? | 15 |
| III. | In order for a court's ruling to be sufficient, must there be a finding of fact that the issue was actually and necessarily involved and decided, in order for the issue to be res judicata? | 16 |
| IV. | Does a court have jurisdiction to issue a writ in aid of or ancillary to its jurisdiction? | 19 |

## STATEMENT OF THE CASE

Randy Steen was convicted of (I) Manufacturing methamphetamine in violation of N.D.C.C. 19-03.1-23(1), a Class A felony; (II) Possession of methamphetamine in violation of §19-03.1-23(6), a Class C felony; (III) Possession of Drug Paraphernalia with Intent to Inhale or Ingest methamphetamine in violation of §19-03.4-03, a Class C felony; and (IV) Possession of Drug Paraphernalia with Intent to Manufacture methamphetamine in violation of §19-03.4-03, a Class C felony. The criminal Information is at R.A.#21(K); App.P.1 (there are two Register of Actions for this case, #02-K-01113, which is the criminal case, the post-conviction application for this appeal was filed at R.A.#123 in this file, with other documents filed after it, this Register of Actions will be identified with the letter (K) put on the citation).

Steen was convicted by jury verdict on all four counts. Judgment was entered on October 2, 2002. He was sentenced to 15 years on Count I, and 5 years each on the other three counts, running concurrent with Count I.

Steen combined his first post-conviction case and his direct appeal as one appeal. State v. Steen, 2004 ND 228, 690 N.W.2d 239. Steen then did this second post-conviction, the subject of this appeal. His first post-conviction is filed at R.A.#3(C); App.P.5 (this is the other Register of Action for civil case #03-C-02185, documents for his second application were also filed in

this file, starting at R.A.#45 with other documents filed after it, this Register of Actions will be identified with the letter (C) put on the citation).

Steen filed this second post-conviction application on July 24, 2006. R.A.#123(K); App.P.3.

On August 2, 2006, Steen filed his Motion To Enjoin The State. R.A.#128(K); App.P.3. What occurred is that an inmate, Reuben Larson, wrote Steen's post-conviction application. Shortly before he was done, on June 21, 2006, the prison seized some of Larson's legal files so as to hinder, delay, obstruct and prevent Larson from helping Steen and others on their cases. The prison also put Larson in the hole for ten days, plus put him on 30 days of cell confinement for having legal files. Thus Steen filed the motion to enjoin the State in an attempt to get an injunction to enjoin the State, her officers and employees, from further obstructing Steen by obstructing Larson.[1]

In response to the post-conviction application, on July 31, 2006, the State filed their "Second Response" sic. R.A.#126(K); App.P.53. The State made a cursory, sweeping, all encompassing and generic claim of res judicata and misuse of process. App.P.53-54. Their response was

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1. Although not on the record, it is noted that the prison again seized Larson's legal files on November 14, 2006, and put him in the hole for 20 days. He got out of the hole on December 14, 2006.

neither an answer nor a motion.

On August 17, 2006, the State filed their "Response" to the motion to enjoin the State. R.A.#130(K); App.P.4. The State said that the post-conviction statute, N.D.C.C. 29-32.1-01(2) does not provide for a challenge of custodial treatment, a correct statement. But this fact is irrelevant as Steen was not relying on the post-conviction statute as authority for the Court's jurisdiction to grant an injunction to enjoin the obstruction of justice by the State, her officers and employees.

On August 30, 2006, Steen filed his "Reply" to the State's Response to his motion to enjoin the State. R.A.#132(K); App.P.4.

On September 19, 2006, Steen filed his Motion for Judgment on the Pleading/Summary Disposition. R.A.#45(C); App.P.5.

On September 29, 2006, the State filed their "Response" to the motion for judgment on the pleading. R.A.#47(C); App.P.6.

On October 3, 2006, the District Court filed his Order Denying Post-Conviction Relief. R.A.#48(C); App.P.55.

The Court held that the post-conviction issues have been previously addressed and adjudicated; and that the post-conviciton statute does not give the court jurisdiction to litigate prison disciplinary issues and thus the motion for injunction is denied.

Steen filed his notice of appeal on November 24, 2006.

R.A.#49(C); App.P.57.

No evidentiary hearing was had, thus there is no post-conviction transcript.

The State raised no quetions of fact, thus there are no facts in dispute.

The statement of facts are as stated above. See Rule 28(b)(6), NDRAppP.

STANDARD OF REVIEW

Summary denial of post-conviction relief is reviewed as an appeal from a summary judgment; if there is no genuine issue of material fact the party is entitled to judgment as a matter of law. Parizek v. State, 2006 ND 61, ¶4, 711 N.W.2d 178, 181; Jensen v. State, 2004 ND 200, ¶8, 688 N.W.2d 374, 377; Johnson v. State, 2004 ND 130, ¶5, 681 N.W.2d 769, 772. The applicability of res judicata is a question of law fully reviewable on appeal. Simpson v. Chicago Pneumatic Tool Co., 2005 ND 55, ¶8, 693 N.W.2d 612, 616.

With respect to the motion to enjoin the State, the standard of review for a jurisdictional question is for correction of errors of law where no facts are in dispute. Stammeyer v. Division of Narcotis Enforcement of Iowa Dept. of Public Safety, 2006 WL 2382011 (Iowa August 18, 2006); Nicholson v. Red Willow County School District No. 0170, 699 N.W.2d 25, 28 (Neb. 2005); In re Devin W., 693 N.W.2d 901, 907 (Neb.App. 2005).

## ARGUMENT

The District Court summarily ruled that the issues raised in Steen's second post-conviction application, the subject of this appeal, "have previously been addressed and adjudicated by this Court" and affirmed on appeal by the Supreme Court of North Dakota. App.P.55-56. The Court made no ruling on the State's generalized claim of misuse of process, putting all the issues in to res judicata.

### I. WHEN THE CRIMINAL JUDGMENT IS VOID, THEN THE JUDGMENT IS NO JUDGMENT AND THUS RES JUDICATA IS NOT APPLICABLE.

Steen's post-conviction application raised nine (IX) grounds. App.P.7.

The application raised insufficiency of the evidence, failure to bear the burden of proof, in Grounds I, page 9 of the application; II, p.13; III, p.14; IV, p.16; V, p.26; VI, p.31 of the application; and in Ground VII, page 32 of the application. In Grounds VIII, p.38 and IX, p.43, Steen raised procedural due process grounds. It is noted that Grounds I through VII, insufficiency of the evidence is a substantive due process issue, and the State's failure to bear the burden of proof is a procedural due process issue. Jackson v. Virginia, 443 U.S. 307, 316, 321-324, 99 S.Ct. 2781, 2787, 2790-2792 (1979).

Grounds I through VII show that the judgment is void. And Grounds VIII and IX are also based on facts of record and thus the judgment is void. The fact material to the

ineffective assistance of counsel issue is either no or insufficient objection or motion on the record or not following through with the objection raising the issues raised by Grounds I through VIII, and since raising or fully and compeletely raising and following through on these issues would have prevented or overturned the judgments rendered, prejudice exists. Thus Grounds VIII and IX also show that the judgment is void. Also, Ground VIII, p.38 of the application, the claim is that Steen was compelled to be a witness against himself, and the material fact on the record is that there is no waiver, no affirmative, explicit waiver on the record of his right to not be compelled to be a witness against himself, for a waiver will not be presumed for this fundamental right of the sort at issue in the case of "Johnson v. Zerbst", and because prejudice is presumed from the violation of this right. Thus Ground VIII shows that the judgment is void.

A judgment is void if the court did not have subject matter jurisdiction, personal jurisdiction, or jurisdiction to render the judgment rendered. 49 C.J.S. Judgments, §18(d); Scott v. Reed, 820 P.2d 445, 447 (Okl. 1991); Riley v. State, 506 N.W.2d 45, 51 (Neb. 1993); Ex Parte Reed, 100 U.S. 13, 23, 25 L.Ed. 538 (1879); Schillerstrom v. Schillerstrom, 32 N.W.2d 106, 122 (N.D. 1948); Taylor v. Oulie, 55 N.D. 253, 212 N.W. 931, 932 (1927); State v. Board of Com'rs of City of Fargo, 63 N.D. 33, 245 N.W.

887, 892 (1932) (The administrative judgment in this case was void because there was no evidence in the record connecting the defendant with the wrongful act, the tribunal acted without any evidence and thereby exceeded its jurisdiction. page 891 & 892.).

And a judgment is void if due process of law was denied or violated, or the court acted in a manner inconsistent with due process of law. Sramek v. Sramek, 840 P.2d 553, 555 (Kan.App. 1992); Ford v. Willits, 688 P.2d 1230, 1237 (Kan.App. 1984); Lyon Financial Services, Inc. v. Waddill, 625 N.W.2d 155, 158 note 3 (Minn.App. 2001).

A void judgment is no judgment because a court lacking a jurisdictional element is 'coram non judice'--"before a person not a judge", meaning that a proceeding was not a judicial proceeding because lawful judicial authority was not present, and could therefore not yield a judgment. Burnham v. Superior Court of California, County of Marin, 495 U.S. 604, 608-609, 110 S.Ct. 2105, 2109 (1990).

The facts of record raised by the Grounds in the post-conviction application show that the judgment is void. Where the judgment is void, then misuse of process and res judicata is not applicable, can not be applied because there is no judgment to which they can be applied because there is no judgment to which they can be applied or from which the State can derive or claim a right, benefit or defense, or which would bar Steen.

"A void judgment is no judgment. Only final legal

judgments can be res adjudicata." State ex rel. Ness v. Board of Com'rs of City of Fargo, 63 N.D. 85, 246 N.W. 243, 243 (1932); Zenker v. Zenker, 72 N.W.2d 809, 817 (Neb. 1955); Reddington v. Beefeaters Tables, Inc., 240 N.W.2d 363, 367 (Wis. 1976).

"A void judgment is an absolute nullity and may be ignored or disregarded, vacated on motion, or attacked on habeas corpus." Sramek v. Sramek, 840 P.2d 553, 556 (Kan.App. 1992).

A void judgment constitutes no hinderance to the prosecution of any rights, and it gives no protection to any one acting under it, it may be attacked in either direct or collateral proceedings. Johnson v. Ranum, 62 N.D. 607, 244 NW. 642, 643-644 (1932); Hanson v. Woolston, 701 N.W.2d 257, 262 (Minn.App. 2005); Fay v. Noia, 372 U.S. 391, 423, 83 S.Ct. 822, 840-841 (1963) (overruled on other grounds, on the procedural default issue. "Keeney v. Tamayo-Reyes", 504 U.S. 1, 5, 112 S.Ct. 1715, 1717 (1992)).

A void judgment passes no title, right or benefit to the person who purports to obtain a benefit, title or right from it. Johnson v. Ranum, id., page 644; Hollingsworth v. Barbour, 29 U.S. 466, 471, 7 L.Ed. 922 (1830).

"A void judgment is, in legal effect, no judgment. By it no rights are devested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds

nor bars any one. All acts performed under it and all claims flowing out of it are void. ... A void judgment is in reality no judgment at all. It does not bind the person against whom it is rendered. It may be impeached in any action, direct or collateral." In re Director of Insurance, 3 N.W.2d 922, 926-927 (Neb. 1942).

With a void judgment there is absolutely nothing left of the judgment to which even equitable principles could be applied. Long v. Brooks, 636 P.2d 242, 245 (Kan.App. 1981); Clark v. Glazer, 609 P.2d 1177, 1180 (Kan.App. 1980); Vanover v. Cook, 260 F.3d 1182, 1187 (10th Cir. 2001).

The theory underlying the concept of a void judgment is that it is legally ineffective, a legal nullity, and a defense "cannot infuse the judgment with life". Ford v.. Willits, 688 P.2d 1230, 1238 (Kan.App. 1984). A court has no power to inject life in to a void judgment. Coenen v. Van Handel, 68 N.W.2d 435, 437 (Wis. 1955) (The judgment in this case was void because it was a conditional judgment.).

A void judgment is no judgment and a defense such as, for example, the statute of limitations will not apply, for there is nothing for it to operate upon. Nind v. Meyers, 15 N.D. 400, 109 N.W. 335, 345 (1906) (dissenting opinion). Life can not be infused in to that which is dead. Id., page 345, 347 (The Legislature can not infuse life into that which is dead.); Northern Pac. R. Co. v. McGinnis, 4 N.D. 494, 61 N.W. 1032, 1032 (1894) (Government

officials cannot, by the receipt of money, or by agreement, or in any other way, infuse life in to a void statute.).

The doctrine of res judicata is limited to a valid judgment from a court of competent jurisdiction. Fischer v. North Dakota Workers Compensation Bureau, 530 N.W.2d 344, 347 (N.D. 1995); Americana Healthcare Center v. North Dakota Dept. of Human Services, 513 N.W.2d 889, 891 (N.D. 1994); Peacock v. Sundre Tp., 372 N.W.2d 877, 878 (N.D. 1985); Ohio Cas. Ins. Co. v. Clark, 1998 ND 153, ¶23, 583 N.W.2d 377, 382-383.

Res judicata should not be applied if it would defeat the ends of justice or work an injustice. Wetch v. Wetch, 539 N.W.2d 309, 312 (N.D. 1995); Hofsommer v. Hofsommer Excavating, Inc., 488 N.W.2d 380, 383 (N.D. 1992). The reason for this is because res judicata is a rule of justice and thus is not to be applied it it would defeat the ends of justice or work an injustice. Borsheim v. O & J Properties, 481 N.W.2d 590, 597 (N.D. 1992).

Res judicata does not apply because it is a rule of justice; and it does not apply where there is no judgment, when the judgment is void.

Where the judgment is void, defenses can not be raised or had against a challenge to the judgment. This is why, in habeas corpus, where the only issue which can be is that the judgment is void, there is no statute of limitations, no res judicata, and laches is inapplicable. Heflin v. U.S., 358 U.S. 415, 420, 79 S.Ct. 451, 454 (1959);

Sanders v. U.S., 373 U.S. 1, 7, 83 S.Ct. 1068, 1072 (1963) ("At common law, the denial by a court or judge of an application for habeas corpus was not res judicata."); Carruth v. Taylor, 8 N.D. 166, 77 N.W. 617, 620 (1898) ("At common law, as has been seen, an order in habeas corpus proceedings remanding the petitioner to custody is not res judicata. The first adjudication at common law was not a bar to another inquiry upon the same state of facts."); Schlup v. Delo, 513 U.S. 298, 317, 115 S.Ct. 851, 862 (1995). The reason res judicata is not applicable to habeas corpus is because of the universal or larger rule that void judgments may be collaterally impeached or collaterally attacked. Fay v. Noia, id., page 423, 840-841. Since habeas is a collateral attack on the judgment, it can be applied for only if the criminal judgment is void, making defenses such as res judicata not applicable. Thus, instead of trying to raise res judicata as a defense, the only question on habeas is whether the criminal judgment is void and thus habeas relief must be granted, or whether it is merely voidable and thus relief is not warranted. State ex rel. Styles v. Baeverstad, 12 N.D. 527, 97 N.W. 548, 549 (1903) (Under habeas the court's investigation or inquiry is "confined to jurisdictional matters".); Berumen v. Casaday, 515 N.W.2d 816, 818 (Neb. 1994) (On habeas a court is limited to a "question of law, namely, is the judgment in question void?"); and see Schlesinger v. Councilman, 420 U.S. 738, 753, 95 S.Ct. 1300, 1310 (1975)

(Where a judgment is void or is being claimed to be or is being deemed void, it automatically means it is "without res judicata effect for purposes of the matter at hand".).

Whereas on post-conviction, which is different from habeas in that it allows claims of both a void and a voidable criminal judgment, the State, to show that their defense of res judicata is applicable, has to first show that the criminal judgment is not void, but is voidable only, based on the particular issue raised by the applicant. For example, in the case of Johnson v. State, 2006 ND 122, ¶15, 714 N.W.2d 832, 839, it was held that the defense of laches did apply to that particular post-conviction issue, this because the claim did not make the criminal judgment void, but merely voidable. "Johnson's" claim was and would have to be based on facts 'de hors' the record because, as a matter of law a second mental evaluation is not automatically mandated--Id., ¶22, page 840. Other facts would have to be introduced to show that a second mental evaluation was required. Id., ¶20-21, page 840.

Res judicata is not applicable to the grounds raised by Steen's second post-conviction application. The facts of record show that the criminal judgment is void. The District Court was without jurisdiction to render the judgment rendered. State ex rel. Styles v. Baeverstad, id., page 549 (Judgment is void if the court was without "jurisdiction to render the particular judgment rendered". quoting from the syllabus on page 548.); and see the cases

cited on page 6-7 of this brief. Or the District Court was without jurisdiction to proceed forward towards judgment in the manner he proceeded, contrary to the rules of due process of law. Refer to the cases cited on page 7 of this brief.

There is no judgment as a matter of law to be res judicata or which exists to bar Steen's attack or which gives the State a right or benefit.

* * *

Relating to the discussion of the difference between habeas and post-conviction in the middle paragraph on page 12 above, it is noted that post-conviction is a direct attack on the criminal judgment. It was designed to provide for an attack on the criminal judgment. It is provided for by law or statute for the express purpose of obtaining relief from the criminal judgment, and relief can be obtained even with matters 'de hors' the record of the criminal case. Thus it provides for a direct attack on the criminal judgment. 50 C.J.S. Judgment, §505(b) note 98; Hamilton v. Hamilton, 410 N.W.2d 508, 520 (N.D. 1987) (This case defines the criteria for a direct and collateral attack. In this case the wife sued via an independent action in equity to attack the divorce judgment entered against her, and it was held that her attack was a direct attack, not a collateral attack even though it was a separate action, independent of the divorce suit.).

If post-conviction were not a direct attack, then

one would not be able to raise facts 'de hors' the record to challenge the criminal judgment. Post-conviction provides for a direct attack on the criminal judgment. State v. Carmody, 243 N.W.2d 348 (N.D. 1976), the annotation of this case under N.D.C.C 29-32.1-01, page 771 of Title 29 of Volume 5 of the Code Book.

A collateral attack on a judgment is an attempt to re-try the case, and thus res judicata applies, whereas a direct attack involves no retrial but rather is a means to correct the judgment. Quoting: "In a direct, as distinguished from a collateral, attack on a judgment, the judgment does not, of course, operate as res judicata precluding relief, since the validity and binding effect of the judgment is the very matter in issue on such direct attack." 50 C.J.S. Judgment, §697 note 12.

Thus Steen wonders how, why or when res judicata can or should be a defense on post-conviction.

The application of res judicata on post-conviction denies to one the right to make a direct attack on the criminal judgment. It is contrary to the rules of law relating to direct attacks on a judgment. The Legislature provides for a direct attack, but in the same breath takes away the right. N.D.C.C. 29-32.1-06(3) and 29-32.1-12(1 & 3) should be declared contrary to due process of law. Or an explanation is warranted as to how or when res judicata is applicable, restricting it to its proper scope if due process allows its application.

## II. A FAIR TRIAL, EFFECTIVE ASSISTANCE OF COUNSEL, IS AN ELEMENT WHICH MUST BE SHOWN IN ORDER TO CLAIM RES JUDICATA, OR IT IS A DEFENSE TO A CLAIM OF RES JUDICATA.

Steen pleaded ineffective assistance of counsel on his first post-conviction application, as well as trial and appellate counsel. App.P.49, page 43 of his post-conviction application.

Ineffective assistance of counsel denies to one a fair trial or a fair hearing. Strickland v. Washington, 466 U.S. 668, 684, 104 S.Ct. 2042, 2063 (1984); State v. Gutsche, 405 N.W.2d 295, 296, 297 (N.D. 1987); Jones v. State, 545 N.W.2d 313, 314 (Iowa 1996). And it denies to one the right to counsel. Strickland, id., page 686, 2063.

A judgment is void if one has been denied a fair trial or a fair hearing due to ineffective assistance of counsel. Smith v. Woodley, 164 N.W.2d 594, 596, 597 (N.D. 1969). Ineffective assistance of counsel is the same as no counsel at all and will equal a denial of due process of law, and will thus render the judgment void and hence a jurisdictional defect exists. Id., page 597.

One of the elements to be satisfied in order for a judgment to be res judicata is that one must have had a full and fair trial or hearing. Goodman v. Mevorah, 59 N.W.2d 193, 202 (N.D. 1953); Ohio Cas. Ins. Co. v. Clark, 1998 ND 153, ¶25 & 28, 583 N.W.2d 377, 383, 384; Bell v.

State, 2001 ND 171, ¶2, 639 N.W.2d 706; Enderlin State Bank v. Jennings, 4 N.D. 228, 59 N.W. 1058, 1059 (1894).

A claim of res judicata is insufficient, or it is a defense to res judicata, if one had ineffective assistance of counsel, that is, there is a denial of a fair trial or hearing, a denial of counsel, that is, the judgment is void.

When ineffective assistance of counsel is pleaded, the issue on post-conviction is whether or not there was ineffective assistance of counsel, res judicata not being applicable unless and until it is first determined that counsel was not ineffective.

The District Court should not have ruled res judicata because the issue was barred until the counsel issue is first decided.

**III. THE DISTRICT COURT'S RULING IS INSUFFICIENT WITH RESPECT TO THE RES JUDICATA FINDING.**

The District Court held that the grounds of this second post-conviction application have been previously addressed and adjudicated. App.P.56.

N.D.C.C. 29-32.1-12(1) limits res judicata to only where the "same claim was fully and finally determined in a previous proceeding".

A judgment in a former suit between the same parties is not conclusive in a subsequent suit where it does not appear that the identical question of law or fact sought to be concluded was necessarily tried and determined in

such prior litigation. Knutson v. Ekren, 5 N.W.2d 74, 77 (N.D. 1942).

An issue is not res judicata simply because it might have been, but was not, included in the prior adjudication, if in fact it was not presented by the prior pleading or necessarily involved therein. Knutson, id., page 78. A claim is not res judicata simply because it might have been adjudicated in the prior action. Id.

When the issue was not pleaded in the prior action, the record must show that it formed one of the premises upon which the prior judgment necessarily rested in order for it to have been necessarily involved in the prior judgment. Knutson, id., page 78.

It is not enough even that it appears that the issue presented in the current suit was presented and ought to have been litigated and decided in the prior suit, but it must appear further that it was litigated and decided, as well as involved. Knutson, id., page 78.

Knutson, id., at page 77, was based on the question or rule that the doctrine of res judicata covers those things which might have been litigated, as well as those that were actually litigated. But as held by the Court, this rule is very narrowly limited, is not a general, all inclusive rule.

The burden of showing former adjudication, of showing res judicata, is upon the one asserting it. N.D.C.C. 29-32.1-12(3); Knutson, id., page 77.

The State's defense did not identify nor even try to identify which count or counts of the application were res judicata and the reason why. The State simply claimed that all the grounds were either res judicata or misuse of process, if not this, then it must be that, not citing any fact to show that res judicata is applicable, only reciting the rules, principles and standards of the statute. App.P.53. The District Court simply stated that all the grounds have been previously addressed and adjudicted. App.P. 55. The Court made no finding or mention of misuse of process. The Court made no findings of fact as to why and where each ground had been previously addressed and adjudicated. No finding was made that any of the grounds had been actually decided. It is not enough that an issue was addressed and litigated, but it must further appear that it was decided. Knutson, id., page 78.

Defenses which amount to nothing more than mere conclusions of law or conclusory facts, and are not warranted by any claimed and asserted fact have no efficacy. National Accept. v. Regal Products, 155 F.R.D. 631, 634 (E.D.Wis. 1994) (The defendant simply claimed and listed various defenses, but did not cite facts as to why the defenses were applicable.). If a defense is simply a recitation of the standard for the defense, it is nothing more than a bare bones conclusory allegation of the defense, and thus fails to give notice of the specific infirmity, and thus is insufficient and may be stricken. Flasza v.

TNT Holland Motor Exp., Inc., 155 F.R.D. 612, 614 (N.D.Ill. 1994). A bare bones conclusory allegation with no statement of facts is insufficient to state a defense and therefore is meritless. Heller Financial, Inc. v. Midwhey Powder Co., Inc., 883 F.2d 1286, 1295 (7th Cir. 1980).

The State's 'defense' of res judicata is insufficient, it was a failure to state a claim upon which relief could be granted. It should have been struck or ignored and judgment on the pleading/summary disposition should have been granted in favor of Steen. R.A.#45(C); App.P.5.

The State's claim, and the District Court's ruling are meritless, unfounded, contrary to the rules of due process of law for being insufficient and for not giving notice to Steen. The State failed to bear their burden as required by the post-conviction statute, and by the common law and due process of law. And the Court's ruling is insufficient.

## IV. THE DISTRICT COURT HAS JURISDICTION TO CONSIDER THE MOTION FOR INJUNCTION AGAINST THE STATE.

Steen filed a motion to enjoin the State and her officers and employees from obstructing, hindering, delaying, chilling, burdening and interefering with his ability to appear and prosecute his post-conviction case by interfering with his jail house lawyer, Reuben Larson. R.A.#128K; App.P.3.

The State filed a Response to this motion, saying that the post-conviction statute, §29-32.1-01(2), does

not give a post-conviction court jurisdiction to hear and decide violations of civil rights or illegal custodial treatment. R.A.#130K; App.P.4. Of course, this is a correct statement of the law. But it is not relevant nor material because the jurisdiction of the District Court, in this case, is derived from another source of authority.

Steen filed a Reply to the State's Response, showing why the State's Response was irrelevant, not applicable. R.A.#132(K); App.P.4.

The District Court denied Steen's motion to enjoin the State on the bais of the prohibition or limitation on the court's jurisdiction in the post-conviction statute, §29-32.1-01(2). App.P.55-56.

The District Court has the authority, concurrent with its general subject matter jurisdiction, to issue a writ which is necessary to the proper and full exercise of its jurisdiction. North Dakota Constitution, Article VI, §8; N.D.C.C. 27-05-06(3); Rummel v. Rummel, 265 N.W.2d 230, 235-236 (N.D. 1978); In re Disciplinary Action Against Larson, 512 N.W.2d 454, 458 (N.D. 1994); Matrix Properties Corp. v. TAG Investments, 2002 ND 86, ¶19, 644 N.W.2d 601, 607; and see Roth v. Hoffer, 2006 ND 119, ¶13, 715 N.W.2d 149, 153; Moen v. Moen, 519 N.W.2d 10, 13 (N.D. 1994).

A writ is used to protect the rights of the parties and thus a writ auxillary to the underlying action may be issued. Jones v. Lilly, 37 F.3d 964, 968 (3rd Cir. 1994).

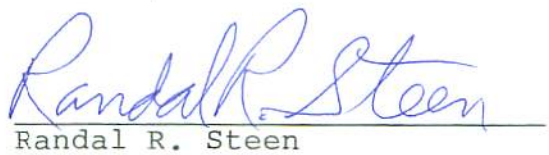
A writ may be issued against any who are frustrating the proper administration of justice. U.S. v. State of Washington, 459 F.Supp. 1020 (W.D.Wash. 1978), appeal dismissed 573 F.2d 117, affirmed 645 F.2d 749; Benjamin v. Malcom, 803 F.2d 46, 53 (2nd Cir. 1983); In re Tutu Wells Contamination Litigation, 157 F.R.D. 367, 374 (D.Virgin Islands 1994); Sprint Spectrum L.P. v. Mills, 124 F.Supp.2d 211, 215 (S.D.N.Y. 2000), affirmed on appeal 283 F.3d 404, 413 (2nd Cir. 2002); U.S. v. New York Tel. Co., 434 U.S. 159, 174, 98 S.Ct. 364, 373 (1977).

The District Court has subject matter jurisdiction to consider the motion to enjoin the State, and issue a writ in aid of his post-conviction jurisdiction, to enjoin the State, her officers and employees, from obstructing Steen's ability to appear and prosecute his post-conviction action.

## CONCLUSION

Wherefore, Steen prays this Court to grant him relief and remand back to the District Court to rule on the merits of his post-conviction application and grant him judgment on the pleading/summary disposition; and to rule on the merits of his motion for injunction and provide relief pending any further litigation or appeal.

Dated this 30th day of December, 2006.



Randal R. Steen
P.O. Box 5521
Bismarck, N.D. 58506-5521