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Supreme Court Number 20070176  
District Court Number 07-C-00110

IN THE SUPREME COURT  
FOR THE STATE OF NORTH DAKOTA

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CLERK OF SUPREME COURT

NOV 01 2007

Randy Bertram,

Applicant/Appellant,

STATE OF NORTH DAKOTA

vs.

State of North Dakota,

Respondent/Appellee.

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

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BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Randy Bertram (Bertram) was convicted of criminal trespass in violation of N.D.C.C. 12.1-22-03(1), a Class C felony. He was convicted of trespassing in his own house, in his marital residence, the residence he and his wife, Joan Bertram (Joan) owned together.

Bertram was also convicted of violating a Temporary Disorderly Conduct Restraining Order (TRO) filed by his wife (now ex-wife) Joan, in violation of N.D.C.C. 12.1-31.2-01, a Class A misdemeanor.

Both charges arose out of the same incident when Bertram entered his and Joan's house on Sunday morning, February 8, 2004.

These two charges were tried together in the same trial. Trial was by jury, held on September 29, 2004. Judgment was entered on December 20, 2004. Bertram was sentenced to one year on the TRO violation, and to four years plus one year of probation following the four years. The trespass sentence runs consecutive to the TRO violation sentence. This is for Williams County criminal cases of 04-K-0093 for the trespass, and 04-K-0092 for the TRO.

Joan obtained the Disorderly Conduct TRO on January 29, 2004. See Appendix page 68 (App.P.68). Bertram's violation occurred on February 8, 2004. The Register of Actions for this TRO case is at App.P.71.

Direct appeal from the convictions was had in the

case of State v. Bertram, 2006 ND 10, 708 N.W.2d 913.

On February 5, 2007, Bertram filed the first part of his post-conviction application. App.P.3; see App.P.1, Register of Actions #1 (R.A.#1).

On February 21, 2007, the State responded to this first part with their "State's Response". App.P.132.

On April 12, 2007, Bertram filed the second part of his post-conviction application, the continued application. App.P.34. Along with it he filed his motion to amend the application. App.P.1, R.A.#6.

On April 19, 2007, the State responded to this second part with their "State's Response to Continued Application". App.P.134.

On May 10, 2007, the District Court filed his Order denying relief, but sua sponte saying he is going to have an evidentiary hearing on ineffective assistance of counsel. App.P.137.

Bertram was put in the hole and in A.S. (Administrative SEgregation) in prison. From A.S., Bertram filed a handwritten notice of appeal and asks for an attorney to help him as he is now segregated. He filed this notice of appeal on June 27, 2007. R.A.#23; App.P.1. Kent Morrow, an attorney in Bismarck, becomes Bertram's attorney. On August 31, 2007, Morrow filed an amended application for post-conviction relief. R.A.#43; App.P.1. On September 17, 2007, Morrow filed a second amended application. R.A.#49; App.P.2. The State filed a Response to this on September 14, 2007. R.A.#47; App.P.2. Bertram fired

Morrow as his counsel and asked that these two amended applications be withdrawn or not considered as they did not support and defend the fundamental issues raised in the original post-conviction application, as they left Bertram 'hanging out to dry' on the TRO violation, and as they did not appear to give a reason why the same issue adjudicated on appeal should be adjudicated again. See R.A.#51; App.P.2. And see the letter from Judge Lee, dated September 7, 2007, a copy of which is at App.P.146; R.A.#46; App.P.2.

On September 20, 2007, Bertram filed his motion to reconsider the Order filed on May 10, 2007, and to cancel the hearing scheduled for September 21, 2007. R.A.#53; App.P.2.

The Court's sua sponte hearing was held on September 21, at which the Court reiterated that he would not allow a collateral attack on the TRO, nor on the default divorce judgment as it related to showing that the TRO was void. See a copy of the transcript of this hearing in the record. R.A.#61; App.P.2.

On September 26, 2007, the Court filed his final Order, denying all relief, and claiming that Bertram has waived his ineffective assistance of counsel issue, and that the claim of ineffective assistance of counsel is denied because no evidence was presented. App.P.147. The judge also, in this Order, recused himself after making his ruling.

On October 11, 2007, Bertram filed his notice of  
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appeal, or, in the alternative, an amended notice of appeal.  
App.P.152.

#### STATEMENT OF THE FACTS

Bertram filed his post-conviction application with exhibits attached to it. The exhibits are copies of documents for the TRO case, as well as the default divorce judgment. These exhibits are in the Appendix, App.P.68 through App.P.131. These show that the TRO Order is void, App.P.68-71; and that the default divorce judgment was void as a matter of law and also void for extrinsic fraud on Joan's part, App.P.72-131.

The post-conviction application, at pages 7-10, App.P.9-12, showed that the trespass judgment was insufficient because the State did not bear their burden to prove:

- (1) that Bertram had no privilege to enter; and
- (2) that Joan had the authority to exclude Bertram from their house, to withhold license to enter; and
- (3) that N.D.C.C. 14-07-04 says that Joan could not exclude Bertram because they were still married.

This claim is based on the fact the State said they were not relying on the default divorce judgment as evidence. That is, they were married as of the date of the trespass, February 8, 2004.

The State said they were not relying on the default divorce judgment as evidence. See pages 3-4 and 21-22

and 30 of the application, and also see the State's Response, App.P.5-6 and 23-24 and 32, and the Response at App.P.132.

However, (A) if the State were relying on the default divorce judgment as evidence to prove lack of license and lack of privilege, then the post-conviction application showed, at pages 14-15 of the application, App.P.16-17, that as a matter of fact and law, that a judgment does not transfer title and that Bertram still possessed his possessory rights to the house.

And, (B) if the State were relying on the default divorce judgment as evidence, the application at page 4 (¶15-16) and page 5 (¶20), and pages 19-20, App.P.6-7 and 21-22, that Joan testified that there was no default divorce judgment or that it had been or may have been vacated before February 8, 2004, the date of the trespass.

And, (C) if the State were relying on the default divorce judgment, the application showed that a civil judgment can not be used to prove an element in a criminal case, and that it is insufficient to prove an element beyond a reasonable doubt, this as a rule of law, at pages 10-22 of the application, App.P.12-24.

And fourth, (D) if the default divorce judgment were to be relied on as evidence to prove trespass, the application, at pages 22-30, App.P.24-32, showed that the default divorce judgment was void as a matter of law, and was void due to extrinsic fraud on Joan's part.

The post-conviction application noted that the default

divorce judgment was vacated on the ground of mistake, but that it could have been vacated on the ground it was void as a matter of law or void due to extrinsic fraud, at page 27; App.P.29.

The post-conviction application showed five reasons why the TRO violation conviction is void, because there was no TRO Order to violate because it is void as a matter of law, and void due to extrinsic fraud on Joan's part:

1. The facts pleaded in the Petition for the TRO failed to state a claim for disorderly conduct. Pages 37-43 of the application; App.P.42-48.

2. The no contact provision in the TRO is overbroad, is a prior restraint. Pages 43-46 of the application; App.P.48-51.

3. The facts pleaded in the Petition for the TRO failed to state a claim for granting a no contact order. Pages 46-49 of the applicaton; App.P.51-54.

4. The Petition for the TRO failed to plead that Joan did nothing to consent to the conduct, failed to plead that Bertram's conduct was intrusive and unwanted conduct, and thus failed to state a claim for a TRO. Pages 49-54 of the applicaton; App.P.54-59. And

5. The facts pleaded in the Petition for TRO show that Joan had an adequate remedy at law, that her detriment was not irreparable; and the facts pled in the Petition did not show an imminency of imminent disorderly conduct as there was no claim of threat or no prior history of

domestic abuse or domestic verbal abuse. Pages 54-55 of the application; App.P.59-60.

The application showed the facts for the two elements of ineffective assistance of counsel: (1) that counsel was ineffective for not raising, arguing and presenting to the trial and appeal courts the above issues showing that there was no trespass and no violation of the TRO because it was void; and (2) that Bertram was prejudiced because if these issues had been presented and pursued the charges would have been dismissed, or no conviction would have been obtained, or the convictions would have been overturned on appeal. Pages 55-59 of the application; App.P.60-64.

On direct appeal, Bertram claimed (a) that the State failed to prove that he was not in fact both licensed and privileged to enter the house because the default divorce judgment was illegal due to the later proceeding which vacated it; and second, (b) that he actually knew he was not licensed or privileged because three attorneys gave him legal advice the judgment was illegal, and thus he could enter. State v. Bertram, 2006 ND 10, ¶8, 708 N.W.2d 913, 918.

#### STANDARD OF REVIEW

Summary disposition is a question of law reviewable

de novo on the entire record. Johnson v. State, 2005 ND 188, ¶21, 705 N.W.2d 830, 835. Questions of law are reviewable de novo. State v. Loughead, 2007 ND 16, ¶7, 726 N.W.2d 859, 864. Questions of law are fully reviewable on appeal, and whether findings of fact meet a legal standard is a question of law. State v. Goebel, 2007 ND 4, ¶11, 725 N.W.2d 578, 582.

#### ARGUMENT

#### I. THE TRESPASS CLAIMS RAISED IN THE POST-CONVICTION APPLICATION WERE NOT FULLY AND FINALLY DECIDED ON DIRECT APPEAL AND THUS ARE NOT RES JUDICATA.

N.D.C.C. 29-32.1-06(3)(a) says the State may raise a defense by answer or motion that "The claim has been fully and finally deatermined in a previous proceeding ...". And N.D.C.C. 29-32.1-12(1) says that the affirmative defense of res judicata may be used to deny a post-conviction application "on the ground that the same claim or claims were fully and finally determined in a previous proceeding."

The State's Response, App.P.132, says that the claim that the State did not meet its burden of proof on the trespass charge was fully and finally determined in the direct appeal.

The District Court's May 10 Order, App.P.140, says that the argument on post-conviction is a reassertion of

the same argument made on direct appeal.

The post-conviction application showed that the State did not prove trespass because they were still married, no divorce existed, it was not shown Bertram had no license and no privilege to enter. See page 4 above; pages 7-10 of the application.

The default divorce judgment is not applicable, relevant nor material as an issue as the State said they are not relying on it as a fact to prove trespass. See pages 4-5 above.

Two claims were made on direct appeal, see page 7 above: (a) that the default divorce judgment which did give possession of the house to Joan was later determined to be invalid and thus the State did not prove lack of license and privilege to enter; and (b) that Bertram had been told by three attorneys that the default divorce judgment was illegal and thus Bertram did not know that he had no license and no privilege to enter.

The North Dakota Supreme Court determined that as it relates to the mens rea, other facts may be looked at to show a guilty mens rea and the other facts were determined to show that he did know he had no license and no privilege to enter, the other facts being the evidence of guilty knowledge, Bertram's running when the police came. State v. Bertram, 2006 ND 10, ¶11, 708 N.W.2d 913, 919. (The extreme prejudice to Bertram of combining a violation of an injunction or TRO with a trespass charge is that the

apparent or obvious knowledge of the existence of the TRO and the running from it is being used and translated and interpreted in to knowledge that he had no license and no privilege to enter.)

And second, the claim that since the default divorce judgment was later reopened, was later determined to be invalid, is not a defense because an invalid order must be obeyed until stayed or reversed by the court which issued the invalid order because "the later proceedings on that judgment do not, as a matter of law, relieve him from criminal liability." State v. Bertram, id., ¶11, page 919. The Court cited to State v. Zahn, 1997 ND 65, ¶14, 562 N.W.2d 737, 741, which said that a court order must be followed "absent a showing of transparent invalidity or patent frivolity surrounding the order."--(Meaning unless the order was void.)

The later proceedings vacated the default divorce judgment on the ground of mistake, which made the judgment only voidable, but not void as a matter of law. And thus the fact it was an illegal judgment did not, as a matter of law, relieve Bertram from his duty to obey it until it was vacated.

Mistake makes a judgment voidable, but not void. Wilson v. Wilson, 364 N.W.2d 113, 116 (N.D. 1985); Federal Land Bank of St. Paul v. Lillehaugen, 370 N.W.2d 517, 519 (N.D. 1985).

The May 10 Order, App.P.140, says the argument on

direct appeal was "that there was insufficient evidence in the record to establish his ex-spouses ownership and possession of the home, and that he was not privileged to remain in the home." And that this is the same argument in the post-conviction application.

This identifies the general subject area raised.

But this ignores that the particular facts and the particular questions of law and issues to show insufficiency of evidence are different between that raised in the application, and that raised and determined on direct appeal.

That the general subject area that there was insufficient evidence to show lack of license and lack of privilege to enter was raised on direct appeal and also in the post-conviction application does not mean that every claim showing insufficiency of evidence was "fully and finally determined in a previous proceeding", and thus is res judicata.

N.D.C.C. 29-32.1-06(3) and 29-32.1-12(1).

Res judicata does not mean that all issues or claims involved and included in the general subject area are res judicata because a particular question involved in the general subject may not have been necessarily involved in the determination of the general subject, and thus the judgment is not final on the point. Knutson v. Ekren, 5 N.W.2d 74, 77 (N.D. 1942); Gepner v. Fujicolor Processing, Inc. of Sioux Falls, South Dakota, 2001 ND 207, ¶20, 637 N.W.2d 681, 686; First State Bank of New Rockford v. Anderson, 452 N.W.2d 90, 93 (N.D. 1990); Dolajak v. State Auto. and

Cas. Underwriters, 252 N.W.2d 180, 184 (N.D. 1977) ("In determining whether or not the matter is res judicata it is not sufficient to merely find that it could have been included or could have been determined, but it is necessary to find that it was actually decided and determined.").

"In order for a matter to be res judicata it must have been actually decided and determined and merely to find that it could have been included or could have been determined is not sufficient." Nodland v. Nokota Co., 314 N.W.2d 89, 92 (N.D. 1981); In re Nelson's Estate, 281 N.W.2d 245, 251 (N.D. 1979).

If the same and identical question was not decided, then it is not res judicata. Knutson v. Ekren, id., page 77 and 77-78. An issue must have been "necessarily involved" in the determination to make it res judicata. Id., page 78. "It is not enough even that it appears that the issue presented in the later suit was presented and ought to have been litigated in the former, but it must appear further that it was litigated and decided, as well as involved." Id., page 78. "A judgment is not res judicata, unless the identical matter in issue in the subsequent proceeding was determined by the former adjudication." Id., page 78-79.

As the post-conviction statute states, in order for the State to show res judicata, the State must show that the same claim was "fully and finally determined" in the previous proceeding. N.D.C.C. 29-32.1-06(3) & 29-32.1-12(1).

What was determined on direct appeal did not decide all the reasons for insufficiency of evidence, did not decide all the issues showing lack of license and lack of privilege, and thus, insufficiency of evidence was not "fully and finally" decided.

And, further, the claims in the application, at pages 7-10, are not the same as that raised and decided on direct appeal. They contain different facts and rely upon different facts. Thus they are not even the "same claims", and thus are not res judicata. The State must show that they are the same claims. N.D.C.C. 29-32.1-12(1).

The claims are not res judicata as a matter of fact. The State's claim and the Court's ruling are insufficient.

However, suppose the claims were the same claims, were based on the same facts:

II. A VOID JUDGMENT IS NO JUDGMENT AND CAN NOT BE RES JUDICATA. IT DOES NOT EXIST.

The issues in Ground I, pages 7-10 of the post-conviction application make the criminal judgment void. The district Court was without jurisdiction to render the judgment rendered. See pages 23-24 of the application, App.P.25-26, and the court cases cited therein.

Even though a court has jurisdiction of the subject matter and of the person, a judgment is void if the court was without jurisdiction to render the judgment rendered. Scott v. Reed, 820 P.2d 445, 447 (Okla. 1991); Shcillerstrom

v. Schillerstrom, 32 N.W.2d 106, 122 (N.D. 1946); Waltman v. Austin, 142 N.W.2d 517, 521 (N.D. 1966).

A void judgment, being no judgment, can never be res judicata, only final legal judgments can be res judicata. State v. Board of Com'rs of City of Fargo, 63 ND 85, 246 N.W. 243, 243 (1932); Matter of Camp, 59 F.3d 548, 550-551 (5th Cir. 1995); Reddington v. Beafeaters Tables, Inc., 240 N.W.2d 363, 367 (Wis. 1976); Zenker v. Zenker, 72 N.W.2d 809, 817 (Neb. 1955); and see Hollingsworth v. Barbour, 29 U.S. 466, 471, 7 L.Ed. 922 (1830) (Judgments which are void are not binding, and those which are only voidable are binding until reversed.).

The rule of res judicata is that "A valid, existing final judgment from a court of competent jurisdiction is conclusive, ..." Lamplighter Lounge, Inc. v. State ex rel. Heitkamp, 510 N.W.2d 585, 591 (N.D. 1994); Ohio Cas. Ins. Co. v. Clark, 1998 ND 153, ¶23, 583 N.W.2d 377, 382-383.

"In a judicial setting, the doctrine of res judicata is limited to a valid, existing, and final judgment from a court of competent jurisdiction." Fischer v. North Dakota Workers Compensation Bureau, 530 N.W.2d 344, 347 (N.D. 1995).

Where the judgment is void, a judgment can not be final because there is no judgment. To be res judicata, the claim must have been "fully and finally" determined. N.D.C.C. 29-32.1-06(3)(a) and 29-32.1-12(1).

The doctrine of res judicata should apply as fairness

and justice require and should not be applied so rigidly as to defeat the ends of justice or to work an injustice. Riverwood Commercial Park, L.L.C. v. Standard Oil Co., Inc., 2007 ND 36, ¶14, 729 N.W.2d 101, 107; Wech v. Wetch, 539 N.W.2d 309, 312 (N.D. 1995).

Where the judgment is void, then res judicata is not applicable. Fay v. Noia, 372 U.S. 391, 423, 83 S.Ct. 822, 840 (1963) (A habeas corpus case. Overturned on different grounds by "Keeney v. Tamayo-Reyes", 504 U.S. 1, 5-6 (1992)).

Denial of an application for habeas corpus is not res judicata, it does not bar another habeas petition upon the same state of facts. Carruth v. Taylor, 8 ND. 166, 77 NW. 617, 620 (1898); Sanders v. U.S., 373 U.S. 1, 7, 83 S.Ct. 1068, 1072-1073 (1963).

Two other reasons res judicata is not applicable when the judgment is void is because void judgments may be collaterally impeached, and conventional notions of finality of litigation cannot be permitted to defeat liberty. Fay v. Noia, *id.*, page 423-424, 840-841; Sanders v. U.S., *id.*, page 8, 1073.

Where a judgment is void, "a void judgment is no judgment. Only final legal judgments can be res adjudicata." State v. Board of Com'rs of City of Fargo, *id.* "A void judgment, being no judgment, cannot be res judicata." *Id.* (Quoting from the heading.). "A void judgment is no judgment and can never be res adjudicata." *Id.* (Quoting from the syllabus.).

When a judgment is void, defenses of limitations, res judicata, laches and waiver can not be applied. See Heflin v. U.S., 358 U.S. 415, 420, 79 S.Ct. 451, 454 (1959). And a reason is because a court has no discretion to protect a void judgment. Cf. First Nat. Bank of Crosby v. Bjorgen, 389 N.W.2d 789, 793 (N.D. 1986); Bender v. Beverly Anne, Inc., 2002 ND 146, ¶18, 651 N.W.2d 642, 648; ~~State~~ v. Red Arrow Towbar Sales Co., 298 N.W.2d 514, 516 (N.D. 1980).

III. EVEN IF THE CLAIM IS IDENTICAL OR IS CLOSELY IDENTICAL, RES JUDICATA DOES NOT NECESSARILY OR AUTOMATICALLY APPLY.

This Court held at ¶10-11 of ~~State~~ v. Bertram, id., that other evidence showed that Bertram had knowledge that he was trespassing. See page 9 above. The other evidence was evidence of Bertram's guilt, that he ran from the police. Id., ¶10.

It was an extreme prejudice to combine a trespass charge with a violation of the TRO because the question of did Bertram run because he had knowledge he was violating the TRO, or did he run because he had knowledge he was trespassing, may be confused or used to prove the other.

The fatal flaw in ¶11, Id., of the reasoning that the conduct, the running, the apparent guilt, showed that Bertram had knowledge he was trespassing, is that it assumes he ran due to knowledge he had no license and no privilege

to enter, as opposed to due to knowledge of the TRO.

The State introduced no facts that Bertram ran due to knowledge of the trespass law, as opposed to knowledge he was violating the TRO. The State bears the burden to prove, beyond reasonable doubt, every fact necessary to constitute the crime with which they charge a person. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970).

The conclusion in ¶11 of State v. Bertram, id., is insufficient. It did not consider all the issues.

This point was not raised in the post-conviction application due to the incompetency of this writer. This point just 'hit' this writer on October 22, 2007, while writing this appeal brief. This is obvious error. The judgment is void. Bertram's trial and appeal attorneys did raise lack of knowledge as a reason to overturn the trespass charge. They did right. (But, of course, this fine point apparently did not 'hit' them.)

Even though this is the same claim or appears to be the same as already raised and decided, res judicata will not apply to it because the issue was not fully and finally decided, and, of course, because the prior ruling is void, is insufficient. As noted on page 15 above, even a claim made on the same facts is not necessarily res judicata. Carruth v. Taylor, id.

IV. A DEFENDANT IN A CRIMINAL CASE AND IN A POST-  
CONVICTION APPLICATION CAN MAKE A COLLATERAL  
ATTACK ON A JUDGMENT BEING USED AS EVIDENCE  
AGAINST HIM.

In his post-conviction application, at pages 22-23, App.P.24-25, Bertram cited case law showing that one can make a collateral attack on a judgment being used as evidence against him.

Other cases showing this:

A void proceeding may be attacked and set aside in a collateral proceeding where the jurisdictional defect is on the record. Renner v. J. Gruman Steel Co., 147 N.W.2d 663, 669 (N.D. 1966); Union Storage & Transfer Co. v. Smith, 58 N.W.2d 782, 786-787 (N.D. 1953); State v. Keen, 718 N.W.2d 494, 500 (Neb. 2006); State v. Pawling, 621 N.W.2d 821, 827 (Neb.App. 2000); State v. Dye, 572 N.W.2d 524, 529 (Wis.App. 1997); State v. Madison, 353 N.W.2d 835, 839 (Wis. App. 1984); State v. Simants, 236 N.W.2d 794, 802 (Neb. 1975).

A judgment may be collaterally attacked if the court lacked jurisdiction to enter the judgment and the lack of jurisdiction is obvious from the record. Texaro Oil Co. v. Mosser, 299 N.W.2d 191, 195 (N.D. 1980); Gruebele v. Gruebele, 338 N.W.2d 805, 810 (N.D. 1983); Lende v. Wiedmeier, 179 N.W.2d 736, 738 (N.D. 1970); Oakes Farming Ass'n v. Martinson Bros., 318 N.W.2d 897, 905 (N.D. 1982).

A judgment can be collaterally attacked if it was

procured with (extrinsic) fraud. State v. Stockland, 668 N.W.2d 810, 812 note 2 (Wis.App. 2003); People v. Hawkins, 404 N.W.2d 662, 664-665 (Mich.App. 1987).

Specifically, as it relates to a defendant's right to make a collateral attack for violation of the TRO:

The failure of a party to obey an order that is void for want of authority in the court to issue it is not punishable as a contempt of court or as a violation of the order. Hodus v. Hodus, 36 N.W.2d 554, 559 (N.D. 1949); State v. Zahn, 1997 ND 65, ¶14, 562 N.W.2d 737, 741 (Cited in ¶11 of "State v. Bertram", id.); Dahlen v. Dahlen, 393 N.W.2d 769, 770 (N.D. 1986); State ex rel. Register v. McGahey, 12 N.D. 535, 97 N.W. 865, 869 (1903); Forman v. Healey, 11 N.D. 563, 93 N.W. 866, 868 (1903); In re Camp, 7 N.D. 69, 72 N.W. 912, 912-913 (1897).

A void judgment can be collaterally attacked at anytime by any person in any proceeding, is entitled to no authority or respect. 50 C.J.S. Judgment, §499 notes 3-4; Schmidt v. First Nat. Bank, 60 N.D. 19, 232 N.W. 314, 317 (1930); State v. Campbell, 718 N.W.2d 649, 659 (Wis. 2006); Berumen v. Casady, 515 N.W.2d 816, 818 (Neb. 1994); Larson v. Dunn, 474 N.W.2d 34, 39 (N.D. 1991); Wells v. Wells, 689 N.W.2d 504, 507 (S.D. 2005) (A judgment which is void is subject to collateral attack both in the state in which it is rendered and in other states.)-(See N.D.C.C. 28-20.1).

A judgment is void and subject to collateral attack where, although the court had jurisdiction of the parties

and the subject matter, the judgment is void for want of power to render the judgment rendered. 50 C.J.S. Judgment, §516 notes 17-21; Steph v. Scott, 840 F.2d 267, 270 (5th Cir. 1988); Matter of Camp, 59 F.3d 548, 550-551 (5th Cir. 1995).

"Where a judgment is void, ... because the court exceeded its jurisdiction and rendered a particular judgment which it was wholly unauthorized to render under any circumstances, as considered supra, §18, the rule against collateral attack does not apply." 50 C.J.S. Judgment, §526 note 92.

A party relying on a void judgment obtains no title from it. Hollingsworth v. Barbour, 29 U.S. 466, 471, 7 L.Ed. 922 (1830).

"A void judgment cannot create a right or obligation, as it is not binding on anyone." Kett v. Community Credit Plan, Inc., 586 N.W.2d 68, 73 (Wis.App. 1998); State v. Campbell, 718 N.W.2d 649, 659 ¶42 (Wis. 2006).

"A void judgment, as we all know, grounds no rights, forms no defense to actions taken thereunder, and is vulnerable to any manner of collateral attack (thus here, by habeas corpus). ... the matters thought to be settled thereby are not res judicata." Fitts v. Krugh, 92 N.W.2d 604, 626 (Mich. 1958) (Dissenting opinion).

"A void judgment is a mere nullity which neither affects, impairs, or creates rights, and that as to the person against whom it professes to be rendered it binds

him in no degree whatever. It has no effect as a lien upon his property and it does not raise an estoppel against him." Sedlak v. Duda, 13 N.W.2d 892, 898 (Neb. 1944).

Where a default judgment is void, "subsequent transfers based on the judgment conveyed no rights." Hanson v. Woolston, 701 N.W.2d 257, 266 (Minn.App. 2005).

"A void judgment is no judgment at all, and no rights are acquired by virtue of its entry of record." Johnson v. Mitchell, 489 N.W.2d 411, 414 (IowaApp. 1992).

"A void judgment means one which has no legal force or effect, the invalidity of which may be asserted by any person whose rights are affected at any time and at any place directly or collaterally." State v. McCright, 569 N.W.2d 605, 608 (Iowa 1997).

A void judgment "is open to attack ..., even by a person not a party to the action, but who is affected by the judgment in his property rights." Pilney v. Funk, 3 N.W.2d 792, 795 (Minn. 1942); Hanson v. Woolston, *id.*, page 263 (Void judgment may even be attacked by a nonparty whose property rights are affected by the void judgment.).

"A motion may be made at any time, in any court, to vacate a void judgment." Miller v. Benecke, 55 N.D. 231, 212 N.W. 925, 927 (1927) (Quoting the syllabus.).

Where a court "finds that a clearly void judgment affects the rights of parties properly before us, it is within our power to so state and hold such judgment void ab initio." Reddington v. Beefeaters Tables, Inc., 240 N.W.2d 363, 367 (Wis. 1976).

The District Court's May 10 Order, App.P.141-144, says he will not and can not make a collateral attack on the TRO (and the default divorce judgment as it relates to the TRO), for the following reasons:

The District Court says a collateral attack can not be made because the void judgment does not affect the subject matter or personal jurisdiction of the criminal court which tried the case. This is correct. But, this is not the issue. Bertram did not say or claim this. On pages 23-25 of his application, App.P.25-27, Bertram says, and cites cases, that the TRO Order, and the criminal judgment, is void for lack of jurisdiction to render the judgment rendered, and for lack of jurisdiction to proceed forward towards judgment in the manner the Court proceeded. This is what insufficiency of evidence does to the TRO Order, as well as to the criminal judgment. It does not divest a court of personal or subject matter jurisdiction. The May 10 Order raises and makes an issue out of something which is not an issue.

And the May 10 Order says he can not make a collateral attack because proceedings in post-conviction are not a substitute for a motion for relief from the divorce judgment or the TRO Order under Rule 60, NDR CivP, nor is it a substitute for an appeal, nor is post-conviction a chance to undo the decisions made in the default divorce or TRO. This is all correct. But Bertram did not say or claim this. The May 10 Order says that Bertram is asking the

post-conviction court to strike down the TRO Order, to act as a mini court of appeals, which a collateral attack can not do. This is correct. But Bertram did not ask for this. The District Court makes an issue out of something which is not an issue. The Court 'sidetracks' or derails what is at issue.

A collateral attack seeks, as a necessary incident to relief otherwise within the (post-conviction) court's power to grant, only "a declaration that a judgment is void." Schlesinger v. Councilman, 420 U.S. 738, 746-747, 95 S.Ct. 1300, 1307 (1975).

A collateral attack declaring a judgment void means that for purposes of the matter at hand the judgment is without res judicata effect, the judgment neither justifies nor bars relief from its consequences. Schlesinger v. Councilman, *id.*, page 747, 1307.

A collateral attack is only "an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective. A petition for a <sup>writ</sup>~~writ~~ of habeas corpus is one type of collateral attack." "Black's Law Dictionary", Eighth Edition, defining collateral attack.

"A direct attack on a judgment or decree is an attempt, ..., to have it annuled, reversed, vacated, corrected, declared void, or enjoined, in a proceeding instituted for that specific purpose, such as an appeal, writ of error, bill of review, or injunction to restrain its execution;

distinguished from a collateral attack, which is an attempt to impeach the validity or binding force of the judgment or decree as a side issue or in a proceeding instituted for some other purpose." "Black's Law Dictionary", Fourth Edition, defining direct attack.

A collateral attack is only "an attempt to avoid, defeat, or evade it, or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking it." "Black's Law Dictionary", Fourth Edition, defining collateral attack. It is "any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying such decree, ...". Black's, id., Fourth Edition, defining collateral attack. That is, it does not act as an appeal or as a motion to vacate, etc. It will not overturn, reverse, vacate, undo, or strike down the judgment.

Of course, as already discussed above, a collateral attack can be made only if the judgment is void.

Bertram has the ability and right to make a collateral attack.

**ATTACK**

V. NOT ALLOWING A COLLATERAL ATTACK ON A JUDGMENT USED AS EVIDENCE AGAINST HIM, DENIES TO THE DEFENDANT HIS RIGHT TO DEFEND.

The District Court's May 10 Order, App.P.137, says he will not allow or consider any collateral attack on the TRO (or the default divorce judgment as it relates

to the TRO, and to the trespass conviction if it were to be used as evidence in the trespass case).

This violates due process of law. It denies to a defendant his right to defend, to show that a fact is not true. (A judgment is not a fact. Rather, it is only a saying of what the facts were.)

It relieves the State of its burden to prove true all the facts it introduces in to evidence. The State bears the burden to prove true all the facts for each element of the offense. N.D.C.C. 12.1-01-03(1); City of Mandan v. Sperle, 2004 ND 114, ¶6, 680 N.W.2d 275, 277; Bunkley v. Florida, 538 U.S. 835, 840, 123 S.Ct. 2020, 2023 (2003); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073 (1970).

It is contrary to due process of law to have a rule or to create a rule or presumption which deprives a party from interposing a valid claim or defense. Serafin v. Serafin, 241 N.W.2d 272, 275 (Mich.App. 1976); Western & R.R. v. Henderson, 279 U.S. 639, 642, 49 S.Ct. 445, 447 (1929); Bandini Petroleum Co. v. Superior Court of State of Cal., 284 U.S. 8, 19, 52 S.Ct. 103, 107 (1931); Hunt v. Methodist Hosp., 485 N.W.2d 737, 744 (Neb. 1992) (Due process means law which hears before it condemns.); Trustees of Dartmouth College v. Woodward, 17 U.S. 518, 581, 4 L.Ed. 629 (1819) (Due process of law means a law which hears before it condemns.); State v. Taylor, 27 N.D. 77, 145 N.W. 425, 429 (1913) (Same, citing "Dartmouth", id.).

A rule or ruling by a court that a defendant can not

defend against a void judgment being used as evidence against him violates due process for being arbitrary and capricious, for it would allow a non-existent judgment to be used to convict a person.

The due process of law "constitutional gauranty demands only that law shall not be unreasonable, arbitrary, or capricious." "Black's Law Dictionary", Fourth Edition, defining due process of law; Nebbia v. People of New York, 291 U.S. 502, 525, 54 S.Ct. 505, 510-511 (1934); Hoff v. Berg, 1999 ND 115, ¶14, 595 N.W.2d 285, 290 (A statute which created a presumption of fact which is or may be contrary to the actual facts of ~~the~~ case is void. Id., ¶17-18.); State v. Cromwell, 9 N.W.2d 914, 920 (N.D. 1943); Truax v. Corrigan, 257 U.S. 312, 332, 42 S.Ct. 124, 129 (1921).

And a rule or ruling that a judgment is to be conclusively presumed to be valid and true and thus can not be attacked is likewise contrary to due process for being arbitrary and capricious. "The court would not endure that a mere form or fiction of law, introduced for the sake of justice, should work a wrong, contrary to the real truth or substance of the thing." McIntosh v. Dakota Trust Co., 52 N.D. 752, 204 N.W. 818, 825 (1925) (A ruling by Lord Mansfield that a fiction of law or presumption can not work contrary to the real truth or the facts of the case.).

The District Court would deny to Bertram his right

to interpose a defense that the TRO order is void and thus he did not violate any TRO, he did not commit a crime. (The default divorce judgment is not being used or considered as evidence in the trespass case. But if it were, since it is void, it proves nothing for the State. Also, of course, a civil judgment can not be used as evidence in a criminal case.)

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

Bertram raised ineffective assistance of counsel as an issue in his post-conviction application, at pages 55-59, App.P.60-64. His counsel was ineffective for not raising the issues as discussed in the application. See page 7 above.

However, the District Court would not consider the proof for this because he would not consider a collateral attack on the TRO Order (and the default divorce as it relates to the TRO). Since the default divorce judgment is not being used by the State as evidence to prove trespass, it is a non-issue with respect to the trespass case, but, if it is to be relied on, the Court would not consider a collateral attack on it. (Of course, regardless of a collateral attack, a civil judgment can not be used to prove a criminal case.)

But, as discussed above, a collateral attack can be had.

Bertram had ineffective assistance of counsel.

With respect to the trespass conviction, since the claim is not res judicata and can not be res judicata, Bertram had ineffective assistance of counsel on the trespass conviction.

VII. NO EVIDENTIARY HEARING WAS NEEDED TO PROVE  
INEFFECTIVE ASSISTANCE OF COUNSEL, IT COULD  
BE DECIDED ON SUMMARY DISPOSITION.

The proof for ineffective assistance of counsel are matters for summary disposition, for judgment on the pleading.

Bertram filed his post-conviction application along with the exhibits attached to it. See App.P.1 (R.A.#1); and App.P.3-131.

It was sworn to under oath that the facts stated in it were true and correct. App.P.67.

The State filed their two "Responses" to the application. App.P.132 and App.P.134.

These responses are not an answer, they did not deny any of the facts raised in the application nor did they raise an affirmative fact. Nor were they motions to dismiss.

N.D.C.C. 29-32.1-06(1), and due process of law of notice, only allows the State to respond by answer or motion to dismiss. Also, the rules of civil procedure only provide for an answer or a motion to dismiss. Rules 7 and 12, NDRCivP.

Since the two "Responses" are not an answer, the State put no facts in to dispute. There is no joinder of issue of fact. Likewise, since the State filed no motion to dismiss, there was no joinder of issue of law.

As such, this case was subject to a motion for judgment on the pleading by Bertram. Under the terms of the post-conviction statute, it was subject to a motion for summary disposition pursuant to N.D.C.C. 29-32.1-09(1).

This is because there was no 'contest', no controversy before the District Court, no dispute was put before the District Court, there was no joinder of issue of fact. The State admitted to the facts of the post-conviction application. The State did not show that there was a genuine issue as to any material fact. In fact, the State pleaded, by inference, that there was no genuine issue as to any material fact, and thus the State was entitled to judgment as a matter of law on its allegation in their "Responses". The State was, by inference, though not by procedure of law, making a motion for judgment on the pleading with their two "Responses". The two "Responses" were an implied message to the District Court to summarily dispose of the application.--Of course, this is an illegal procedure, but, this is what is done.

N.D.C.C. 29-32.1-09 states in full: "Summary disposition.

(1) The court may grant a motion by either party for summary disposition if the application, pleadings, any previous proceeding, discovery, or other matters

of record show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

(2) If an evidentiary hearing is necessary, the court may determine which issues of material fact are in controversy and appropriately restrict the hearing."

There was no genuine issue of material fact on the ineffective assistance of counsel issue, and thus Bertram was entitled to judgment as a matter of law.

Bertram did not need an evidentiary hearing to prove and to introduce any facts.

The Court's May 10 Order, App.P.143-144, did not determine which issues of material fact are in controversy. Nor did the Court identify any other fact which was not of record which needed to be introduced to prove ineffective assistance of counsel.

The May 10 Order stated that the ineffective assistance of counsel issue could not be proven without an evidentiary hearing, stating: "Neither inquiry can be answered summarily." App.P.144. The word "inquiry" refers to the two elements for ineffective assistance of counsel. App.P. 143-144; and see page 7 above.

But, as already noted above, the Order does not identify why it can not be answered summarily. The Order just makes an arbitrary, capricious claim.

Note that the State is entitled to make a motion for judgment on the pleadings when the facts allow it, pursuant

to N.D.C.C. 29-32.1-06(2). Johnson v. State, 2005 ND 188, ¶9, 705 N.W.2d 830, 833. Likewise, the applicant is entitled to make the same motion as a motion for summary disposition under §29-32.1-09(1).

Ineffective assistance of counsel can be summarily determined. An evidentiary hearing is not always needed, where the facts for it are a matter of record, when the record shows that counsel plainly was defective.

There is no need for an evidentiary hearing on a post-conviction application on a claim of ineffective assistance of counsel, when the record affirmatively shows ineffectiveness of a constitutional dimension or the defendant points to some evidence in the record to support the claim, for then the assistance of counsel is plainly defective. Roth v. State, 2006 ND 106, ¶12, 713 N.W.2d 513, 517.

An evidentiary hearing is not needed if ineffective assistance of counsel is plainly defective, that is, if the record shows it, and thus ineffectiveness can be determined on a direct appeal from a criminal conviction and it need not be determined with a post-conviction evidentiary hearing. State v. Causer, 2004 ND 552, ¶19, 678 N.W.2d 552, 559; State v. BELL, 2002 ND 130, ¶29, 649 N.W.2d 243, 251; State v. Palmer, 2002 ND 5, ¶12, 638 N.W.2d 18, 22; State v. Burke, 2000 ND 25, ¶35, 606 N.W.2d 108, 116; State v. Strutz, 2000 ND 22, ¶26, 606 N.W.2d 886, 895; State v. Saylor, 443 N.W.2d 915, 918 (N.D. 1989); State v. Bates, 2007 ND 15, ¶19, 726 N.W.2d 859, 869;

State v. McDonnell, 550 N.W.2d 62, 65 (N.D. 1996); Hoffarth v. State, 515 N.W.2d 146, 150 (N.D. 1994).

Of obvious pertinence, Bertram's own direct appeal of State v. Bertram, 2006 ND 10, ¶39, 708 N.W.2d 913, 925, says an evidentiary hearing is not needed when the ineffectiveness is plainly defective on the record.

The May 10 Order, App.P.143-144, is insufficient where it said that ineffective assistance of counsel could not be summarily determined. In fact, it is an arbitrary and capricious claim. It is a false claim. It is contrary to the rules of law. It is contrary to the case law. It is contrary to Bertram's own case law.

The District Court should have determined the ineffectiveness issue summarily, as requested by Bertram in his motion to reconsider. R.A.#53, App.P.2. Bertram's trial and appellate counsel was ineffective. The facts or record showed it.

A second point with respect to the Court's final Order denying post-conviction relief, App.P.147:

The Court's final order, at App.P.149, the Court determined that Bertram waived his right to present any evidence or to argue ineffective assistance of counsel.

However, the Court stated he would not consider the evidence showing ineffective assistance. Bertram had no need for the hearing. He did not waive any thing.

Rather, the Court <sup>forced</sup> forced an issue which was false, then uses his wrongdoing to claim Bertram has waived.

The Court says he will not consider the evidence presented by Bertram for summary disposition, and makes a false claim that it can not be decided summarily and that an evidentiary hearing is needed to raise facts unknown to Bertram to prove ineffectiveness, and when Bertram objects to this, the Court "determines that Bertram has waived his right to present any evidence on the issue of ineffective assistance of counsel." App.P.149.

There is no waiver here. There is only a false claim of it. There is only arbitrariness and capriciousness. There is a refusal to rule according to the rule of law.

**VIII. A FAIR HEARING ON THE POST-CONVICTION  
WAS DENIED.**

The procedure according to the law was not followed in this case. The State's two responses were not legal. The District Court, without cause, would not hear the issue regarding the validity of the TRO conviction, and falsely ruled that the trespass claim is res judicata. And the Court 'forced' an evidentiary hearing to hear facts which Bertram is unaware of, and would not consider Bertram's evidence for summary disposition.

Due process of law means law in its regular course of administration through courts of justice. "Black's Law Dictionary", Fourth Edition, defining due process of law. Due process is violated when the court acts arbitrarily

and capriciously. "Black's", id., defining due process of law.

Every ruling or decision the District Court made was wrong. In fact, his reasoning was ludicrous. The Court's findings were made without any evidence or they were made with ludicrous evidence.

Contemplated in a fair hearing is the right to have findings supported by evidence. "Black's Law Dictionary", Sixth Edition, defining fair hearing, copyright 1990.

A fair hearing was denied to Bertram.

#### SUMMARY COMMENT

There was insufficiency of evidence to show trespass. In fact, no evidence was introduced for lack of privilege to enter. And insufficient evidence was introduced to show lack of license to enter. No crime of trespass occurred. Bertram committed no trespass.

There was insufficient evidence to show a violation of the TRO. The State merely assumed the TRO was valid, but made no effort to show it was valid, they did not even claim it was valid. The TRO is void. Bertram did not violate a TRO because no TRO exists as a matter of law. No crime occurred. Bertram committed no violation.

Bertram is the victim here, not a perpetrator or actor.

The State initiated charges they knew should not have been filed, and they pursued charges even after being

explicitly informed the judgments were void, their conduct making their trespass void ab initio.

The District Court ignored the rules for res judicata, ignored the motion to reconsider.

The District Court put his hands over his eyes and plugged his ears to the truth so that he could say he could not make a collateral attack on the TRO.

For the Court to say that he can not make a collateral attack is to say that every time a court has overruled another opinion so that it is no longer stare decisis, that that court has violated the rule of law in doing so, that it is illegal to make a collateral attack on other judgments.

The District Court said he could not make a collateral attack because a collateral attack can not and does not do certain things,<sup>and</sup> that therefore he can not make a collateral attack. He is saying that because fish can not breathe air and do not live on land, that therefore he can not go fishing. He is using the fact that fish do exist to prove that therefore it is impossible for one to go fishing.

Bertram's trespass trial and direct appeal was a collateral attack on the default divorce judgment. It is just that counsel did not distinguish or comprehend the difference between a void and voidable judgment, or between what makes a judgment void, and what makes it voidable. And thus even though it was later vacated, it did not act as a defense that it was an illegal judgment.

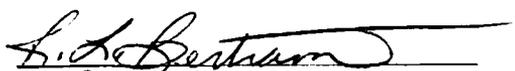
And the Court ignored the facts showing ineffective assistance of counsel and made up a rule that it can not be summarily ruled on, ignoring case law, even ignoring Bertram's own direct appeal. Then he uses his wrongdoing to say that Bertram has waived his rights.

Bertram has had his name and liberty horribly slandered.

#### CONCLUSION

Wherefore, Bertram prays this Court to overturn the denial of post-conviction relief and grant him relief from his criminal judgment, declaring that no trespass occurred and that he violated no TRO; or Bertram prays this Court to overturn the denial and remand back to the District Court and order the District Court to rule on the merits.

Dated this 29th day of October, 2007.

  
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#### CERTIFICATE OF NONCOMPLIANCE

I declare that this brief was typed on a typewriter. We have no computers in this prison. Thus, I can provide no diskette of this brief to this Court.

Dated this 29th day of October, 2007.

  
Randy Bertram

