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STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

Freeman P. Koropatnicki,)
)
 Petitioner/Appellant,)
)
 vs.)
)
 State of North Dakota,)
)
 Respondent/Appellee.)
 _____)

Supreme Court No. 20080235
Crim. Case No. 05-K-0186

BRIEF OF APPELLANT KOROPATNICKI

APPEAL OF ORDER DENYING POST-CONVICTION RELIEF

APPEAL FROM THE DISTRICT COURT
STUTSMAN COUNTY, NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT
THE HONORABLE JOHN E. GREENWOOD, PRESIDING

Freeman P. Koropatnicki, pro se
Petitioner/Appellant
N.D. State Penitentiary
P.O. Box 5521
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58506-5521

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STATEMENT OF THE CASE

Appellant, Freeman P. Koropatnicki, appeals the ORDER DENYING AMENDED APPLICATION FOR POST-CONVICTION RELIEF entered by judge John E. Greenwood on August 4, 2008, in Stutsman County District Court. See (Appendix "hereinafter A" p. 89).

Koropatnicki was charged by CRIMINAL COMPLAINT (A 7) stating: "That on or about between January 30th and February 14th, 2005, in Stutsman County, the above named Defendant committed the offense of: Terrorizing, in violation of North Dakota Century Code section 12.1-17-04(1). . . . and a WARRANT OF ARREST was issued that day of February 23, 2005 (A 3).

Koropatnicki had a trial by jury and was found guilty on October 12, 2005. See (Trial Transcripts "hereinafter TT").

Koropatnicki appeared before judge Greenwood on December 15, 2005, for Sentencing and a CRIMINAL JUDGMENT was entered and signed by judge Greenwood on December 19, 2005 (A 18).

Koropatnicki filed an APPLICATION FOR POST-CONVICTION RELIEF on May 23, 2007 (A 35).

Upon meeting a Jailhouse Lawyer that appeared to know a little more about post-conviction applications, Koropatnicki shortly thereafter filed a subsequent AMENDED APPLICATION FOR POST-CONVICTION RELIEF on June 24, 2007 (A 41).

An evidentiary hearing was held on May 2, 2008. See (Evidentiary Hearing Transcript "hereinafter ET").

Consequently, as a result of judge Greenwood's ORDER DENYING AMENDED APPLICATION FOR POST-CONVICTION RELIEF, a NOTICE OF APPEAL was filed on September 14, 2008 (A 97).

STATEMENT OF THE FACTS

On February 23, 2005, Detective Jason Falk with the Stutsman County Sheriff's Office came before judge John E. Greenwood with an AFFIDAVIT IN SUPPORT OF PROBABLE CAUSE (A 3) and a CRIMINAL COMPLAINT (A 7) asking for a WARRANT OF ARREST (A 8) which the judge granted.

On April 18, 2005, the prosecuting attorney (Jodi L. Colling), issued the CRIMINAL INFORMATION (A 9).

On May 3, 2005, judge John T. Paulson filed a notice for RECUSAL (A 10).

On July 15, 2005, the State's attorney filed a document called NOTICE OF MOTION, MOTION FOR CONSOLIDATION FOR TRIAL OF COMPLAINTS AND INFORMATIONS, AND BRIEF IN SUPPORT OF MOTION (A 11).

On August 4, 2005, judge John E. Greenwood issued an ORDER CONSOLIDATION CASES INTO ONE TRIAL (A 17).

On October 12, 2005, a trial by jury was held in the case of "State of North Dakota vs. Freeman Koropatnicki." Koropatnicki was acquitted in criminal case No. 05-K-0182 and was found guilty in criminal case No. 05-K-0181 & 05-K-0186. See (TT).

On December 19, 2005, judge John E. Greenwood signed the JUDGMENT OF CONVICTION (A 18) and sentenced Koropatnicki to the custody of the North Dakota Department of Corrections and Rehabilitation for a term of five (5) years with credit of time served of two (2) days.

On January 20, 2006, Koropatnicki's trial attorney (Robert

C. Fleming) filed a NOTICE OF APPEAL (A 20) and an ORDER FOR TRANSCRIPT (A 21).

On March 20, 2006, Penny Miller, Clerk of the Supreme Court of North Dakota issued an ORDER OF DISMISSAL (A 24).

On April 5, 2006, court appointed attorney (William A. Mackenzie) filed a MOTION FOR REDUCTION OF SENTENCE (RULE 35) (b) for Koropatnicki (A 25).

On April 7, 2006, the State filed a motion titled RESPONSE TO MOTION FOR REDUCTION OF SENTENCE [R.Crim.Proc. 35] (A 32).

On May 10, 2006, judge John E. Greenwood issued an ORDER (A 34) denying the motion for sentence reduction.

On May 23, 2007, Koropatnicki filed an APPLICATION FOR POST-CONVICTION RELIEF (A 35) along with an AFFIDAVIT OF FREEMAN P. KOROPATNICKI (A 38) and an affidavit from Josh Lee (A 40).

On June 24, 2007, Koropatnicki filed an AMENDED APPLICATION FOR POST-CONVICTION RELIEF UNDER N.D.C.C. 29-32.1 (A 41).

On May 2, 2008, an evidentiary hearing was held on the application for post-conviction relief (ET). Attorney Mark A. Beauchene submitted 3 separate Defendant's Exhibits. A partial phone list is located at (A 47) and a copy of Josh Lee statement is located at (A 65).

On May 23, 2008, the State filed a document titled STATE'S BRIEF RE: PETITION FOR POST-CONVICTION RELIEF (A 66).

On May 23, 2008, Koropatnicki's attorney (Mark A. Beauchene) filed a document titled BRIEF IN SUPPORT OF AMENDED

APPLICATION FOR POST-CONVICTION RELIEF (A 80).

On August 4, 2008, judge John E. Greenwood issued an ORDER DENYING AMENDED APPLICAITON FOR POST-CONVICTION RELIEF (A 89).

On September 14, 2008, Koropatnicki filed a NOTICE OF APPEAL FROM ORDER DENYING AMENDED APPLICATION FOR POST-CONVICTION RELIEF (A 97).

STATEMENT OF JURISDICTION

The district court had jurisdiction under N.D. Const. art. VI, § 8 and N.D.C.C. §§ 27-05-06 and 29-32.1-03. Koropatnicki's appeal was timely under N.D.C.C. § 29-32.1-14 and N.D.R.App.P. 4(d). This Court has jurisdiction under N.D. Const. art. VI, §§ 2 and 6, and N.D.C.C. § 29-32.1-14.

LAW & ARGUMENT

I. Whether Koropatnicki Is Entitled To Relief Because He Received Ineffective Assistance Of Counsel At His Trial.

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const., Amend. VI. That same guarantee can also be found in the Constitution of North Dakota which provides that "In criminal prosecutions in any court whatever, the party accused shall have right . . . to appear and defend in person and with counsel." N.D. Const., Art. I, §12. It has been held that this right to the assistance of counsel means the right to the effective assistance of counsel. Powell v. Alabama, 287 U.S. 45, 63 (1932); McMann v. Richardson, 397 U.S. 759, 771, n. 14 (1970). "That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland v. Washington, 466 U.S. 688 (1984).

The effective assistance of counsel guaranteed to a defendant under the Sixth Amendment to the United States Constitution has been applied to the states through the Fourteenth Amendment.

Constitutional right of criminal defendant to counsel includes right to effective counsel and ineffective, incompetent, or inadequate representation is equivalent to have no counsel at all. State v. Micko, 393 N.W.2d 741 (N.D. 1986).

The burden of proving that a criminal defendant's counsel's assistance at trial was ineffective rests with the petitioner. See Roth v. State, 2006 ND 106, 713 N.W.2d 513. "In carrying that burden, the defendant must prove that the counsel's performance was deficient. Second, the defendant must prove that the deficient performance prejudiced the defendant." Roth, at ¶10, citing Klose v. State, 2005 ND 192, ¶9, 705 N.W.2d 809 (citing Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2054, 80 L.Ed.2d 674 (1984)).

"In attempting to prove the first element, 'the defendant must overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Roth, at ¶10 (quoting Strickland v. Washington, 466 U.S. at 689). The United States Supreme Court has declined to articulate specific guidelines for appropriate attorney conduct, instead holding that "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." Strickland, 466 U.S. at 688.

The second element requires the defendant to prove that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." Roth, at ¶10 (quoting Strickland v. Washington, 466 U.S. at 694).

An ineffective assistance of counsel claim should be made in an application for post-conviction relief so that an evidentiary record can be made that will allow scrutiny of the reasons underlying counsel's conduct. Roth, at ¶12 (citing State v. Causer, 2004 ND 75, ¶19, 678 N.W.2d 552). Assistance of counsel is plainly defective when the record affirmatively shows ineffectiveness of a constitutional dimension or the defendant points to some evidence in the record to support the claim. Id. Koropatnicki has met this two fold burden required by the Strickland standards after partially developing the record at the evidentiary hearing.

Counsel has a duty to know the law and to assert the rules of law so as to "render the trial a reliable adversarial testing process," citing to "Powell v. Alabama." Strickland v. Washington, 466 U.S. at 688. "Of all the rights that an accused person has, the right to be represented by (competent) counsel is by far the most pervasive for it affects his ability to assert any other rights he may have." United States v. Cronin, 466 U.S. 648 (1984).

Where counsel fails to assert the rules of law and thus fails to test the State's case, fails to make the State bear its full burden of proof beyond reasonable doubt, then it is the same as if the defendant had no counsel and thus defendant has been denied counsel. U.S. v. Cronin, id., at 655, n. 11.

Specific errors or omissions may be ineffective assistance of counsel. Cronin, id., at 657, n. 20; Strickland, id., at 693-696.

Koropatnicki's trial counsel failed to interview or to call any witnesses in his behalf. Koropatnicki's mother just happened to be there, so trial counsel put her on the stand. If his mother had not showed up, there would not have been anybody to testify in his behalf. Koropatnicki's mother's testimony was not needed and did nothing for his case. Koropatnicki needed the witnesses he had asked his attorney to interview and secure by subpoena.

The Sixth Amendment to the United States Constitution guarantees to a defendant "compulsory process for obtaining witnesses in his favor." That clause is violated when a defendant is arbitrarily deprived of testimony that would have been relevant, material, and vital to defense. See State v. Rayes, 357 N.W.2d 222, 223 (Neb. 1984) (citing United States v. Valenzuela-Bernal, 458 U.S. 858, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982)).

Counsel denied the defendant his right to present a defense, this in violation of the Sixth and Fourteenth Amendments to the United States Constitution, by not interviewing and securing the presence of the witnesses that Koropatnicki demanded be subpoenaed. Thus, violating the defendant's substantial rights, denial of the compulsory process.

Few rights are more fundamental than that of an accused to present witnesses in his own defense. Chambers v. Mississippi, 410 U.S. 284 (1973); See e.g., Washington v. Texas, 388 U.S. 14, 19 (1967). Defendants have the right

to put before the jury evidence that might influence the determination of guilt or innocence.

Koropatnicki argues ineffective assistance of counsel due to his attorney's failure to investigate, interview and subpoena alibi witnesses and telephone records. The North Dakota Supreme Court has held that "a defendant must offer evidence that any additional witnesses would have aided the defense's claim." Damron v. State, 2003 ND 102, ¶16, 663 N.W.2d 650, 656 (citing State v. Wolf, 347 N.W.2d 573, 575 (N.D. 1984)).

In determining whether or not the attorney rendered reasonably effective assistance the court must consider all of the circumstances. State v. McLain, 403 N.W.2d 16, 17 (N.D. 1987) (emphasis added).

The court in McLain stated in a footnote that defendant's claim of ineffective assistance of counsel arguably met the first element of the Strickland test when said attorney failed to seek out witnesses. McLain, at 18, n. 1. The court went on to say that it is not ineffective assistance of counsel to fail to discover a witness who is not beneficial to the defense. Id.

Koropatnicki's witness (Josh Lee) could have testified that he was with Koropatnicki the last time Koropatnicki ever called Aaron Nogosek and that nothing threatening was said. In fact, the conversation was one of a very friendly nature. Also, subpoenaed telephone records (with tower 'locations') would have shown that it was not possible that Koropatnicki

called Nogosek some of the times Nogosek said he did. These records would have shown that Koropatnicki was not anywhere in the vicinity of Nogosek's home when Nogosek alleged that Koropatnicki said he knew that Nogosek's daughter was wearing yellow pajamas.

The North Dakota Supreme Court stated that "the decision to present testimony of a specific witness instead of the testimony of another related to trial strategy and as such will not support a claim of ineffective assistance of counsel." State v. Wolf, 347 N.W.2d 573, 576 (N.D. 1984) (denying claim of ineffective assistance of counsel when trial counsel did not subpoena two additional witnesses and Wolf's telephone records). In Wolf, the defendnat did not offer affidavits or demonstrate in any way that the testimony of these additional witnesses or his telephone records would have aided his defense. Id. Wolf is distinguishable from the instant case because Koropatnicki demanded that his attorney investigate, interview, and secure by subpoena the witnesses. Trial attorney gave Koropatnicki the impression that he planned to investigate, interview, secure by subpoena, and call these witnesses for trial. The testimony and evidence that was presented at the evidentiary hearing indicated Koropatnicki's witnesses would have been beneficial, a great benefit to the defense, and therefore meets the first prong of the Strickland test. Damron, at ¶16; McLain, at 18, n. 1.

Furthermore, strategy means making a choice which is reasonable. Strickland, 466 U.S. 668, 680-681 (1984).

The purpose of a strategy is that the path chosen will obtain the greatest benefit or advantage for the defendant. "Webster's New World Dictionary," defining strategy. To be strategy, one would have to state the advantage or benefit one felt could be derived from making the choice between two paths.

Koropatnicki's trial attorney couldn't possibly state a benefit to be gained from not investigating, interviewing, and/or securing the presence by subpoena, witnesses in his favor. Failure to get the telephone records couldn't possibly benefit Koropatnicki either.

Koropatnicki's attorney had no trial strategy.

The second prong of the Strickland test is that a defendant must be prejudiced by the deficiencies of counsel. Strickland, at 687; State v. Robertson, 502 N.W.2d 249, 251 (N.D. 1993). The court in Damron stated a defendant must show "actual, not possible prejudice" for an ineffective assistance of counsel claim at a suppression hearing. Damron, at ¶18. Actual prejudice in a criminal case is whether the factfinder would have had a reasonable doubt respecting the accused's guilt, absent the errors. McLain, at 18. Reasonable probability is defined as a probability sufficient to undermine confidence in the outcome. Strickland, at 694.

Koropatnicki never gave a plea, but instead took his case to a jury trial. In McLain, the defendant asserted that he was prejudiced because his attorney failed to locate additional witnesses. McLain, at 19. The North Dakota Supreme

Court stated that his claim lacked merit because the defendant failed to "identify who the additional witnesses were, nor how their testimony would have aided his case." Id. Koropatnicki provided his counsel with the witnesses' names and information on how to reach them. Koropatnicki specifically told his attorney that these witnesses could verify his alibi and that phone records would corroborate and/or confirm this information. It is attorney's responsibility to investigate and interview witnesses and to prepare the witnesses for trial. See DeCoteau v. State, 2000 ND 44, ¶12, 608 N.W.2d 240, 244 (quoting State v. Motsko, 261 N.W.2d 860, 863 (N.D. 1977) (stating that an attorney investigates the facts and talks to witnesses)). The testimony and evidence that was presented at the evidentiary hearing indicated that Koropatnicki was prejudiced because the alibi witnesses' testimony would have aided the defense; therefore, Koropatnicki's claims have met the second prong of the Strickland test. McLain, at 19.

The record before the Court paints a picture of an attorney completely unprepared. During some of the pretrial proceedings, Koropatnicki's attorney's representation plainly demonstrated errors so blatant and obviously prejudicial, the ultimate result of the case would likely have been far different had he had effective representation. See Wright v. State, 2005 ND 217, ¶10, 707 N.W.2d 242 (discussing the second prong of the Strickland test).

At trial, the inadequacies of Koropatnicki's counsel

became even more apparent. After the State's opening statement, Mr. Fleming reserved making an opening statement until the start of the defense's case. See (TT pp.14, 1.25 & p.15, 1.1). However, when it came time for the State to rest their case, Mr. Fleming made a Rule 29(a) Motion for Acquittal, prserving the record for appeal. See (TT pp.108, 1.18 through p.112, 1.10). It must be noted: The State points out that Mr. Fleming's argument really should have been brought up in a pretrial motion rather than now. See (TT p.112, 1.5-6). And, the judge seemed to agree. The motion was denied. The trial court correctly noted that the opening statement could be given at this time if Mr. Fleming wanted or was going to give one. Hence, Mr. Fleming then elected to make one on behalf of Koropatnicki. However, the record does not show the opening statement as being recorded. Koropatnicki does not know why this very important part of the record would not be recorded and/or if the court reporter, Arnold Strand, made the decision not to record it, or who decided it would not be recorded. It's a complete surprise to Koropatnicki that this is not recorded.

As one treatise suggested, the opening statement is "perhaps the most important phase of the trial because the jury's impression regarding the innocence or guilt of the accused is often formed at this time." Cipes, Bernstein & Hall, Criminal defense Techniques, § 1A.08. As a result of this importance, the defenses' reserving an opening statement until after the State has rested is a strategy that is

cautioned against "because it leaves the prosecutor's opening in mind without a rebuttal." Id. In addition, without a defense opening statement, the jury will not have the defense theory to consider while it hears the government's case. Id.

In this case, defense counsel's decision to reserve the opening statement was completely inappropriate and demonstrative of ineffective counsel. As noted previously, the strategy of reserving the opening statement itself is questionable, but there appeared to be absolutely not strategic logic in reserving the defense's opening statement in Koropatnicki's case. Prior to the start of trial, Mr. Fleming knew that he had no witnesses (except possibly Koropatnicki and his mother, whom neither one should have been put on the stand), who he intended to call/recall to the stand. Koropatnicki submits that any reasonable competent counsel would know that, under these circumstances at the start of trial, it would be entirely possible that the defense may end up not calling any witnesses. A fact which would mandate that the defense must make an opening statement at the start of the trial. The loss of opening statement not only resulted in one less opportunity for Koropatnicki to present his theory to the jury, but also left the State's opening un rebutted, basically until closing arguments.

Koropatnicki's counsel also demonstrated deficient performance in failing to know basic procedure, such as when to make a motion for a directed verdict of acquittal. Likewise, Koropatnicki's counsel's failure to poll the jury after the

verdict was read was a further demonstration of deficient performance. As a result of this failure, there is no way of knowing for certain that the jury's verdict was indeed unanimous.

Koropatnicki's trial attorney failed to represent him at the preliminary hearing; had Koropatnicki go there on his own, not knowing what to do or expect. Trial attorney failed to investigate, interview, and secure by subpoena the witnesses (Josh Lee & Kasey Koropatnick) that Koropatnicki demanded of him. Note: Koropatnicki's mother just happened to be in town visiting and so she came up to the courthouse for the trial. It was not ever planned for her to testify and her testimony did not help. The point is, she was just an afterthought for Fleming. Basically like saying, "Oh well, beings I do not have any witnesses, I'll use her." Trial attorney also failed to investigate and secure telephone records Koropatnicki had demanded be secured.

Taken together, Koropatnicki's trial counsel's performance prior to and during trial was wholly deficient and below the objective standard of reasonableness. This deficient performance clearly prejudiced Koropatnicki. His attorney's unpreparedness and inabilities prior to trial and during trial led to Koropatnicki's conviction. At trial, Koropatnicki did not receive an opening statement because of his attorney. Koropatnicki's counsel failed to object properly, poll the jury, and even made an untimely motion for a directed verdict. It's not so much that the motion was untimely, it was the

type of motion that should have been asked for at an earlier stage in the proceedings.

The rule of law says that violating a fundamental right is presumed prejudicial. See United States v. Cronin, 466 U.S. 648, 658, n. 24 (1984); also Strickland v. Washington, 466 U.S. 668, 692 (1984) (In certain Sixth Amendment contexts, prejudice is presumed).

Since fundamental rights of constitutional dimension were violated in Koropatnicki's case, no showing of prejudice need be shown. See Flanagan v. United States, 465 U.S. 259, 268 (1984), cited in Cronin, *id.*, n. 24 ("Obtaining reversal for violation of such a right does not require showing of prejudice to the defense, since the right reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding. . . . No showing of prejudice need be made to obtain reversal in these circumstances because prejudice to the defense is presumed."); Cf. State v. Dvorak, 2000 ND 6, ¶9, 604 N.W.2d 445, 448 (The denial of a right guaranteed by the Constitution can not be subjected to harmless error analysis. The right is either respected or denied. State v. Harmon, 1997 ND 233, ¶16, 575 N.W.2d 635, 640).

In determining whether criminal defendant has been provided effective assistance of counsel, burden is on defendant to demonstrate that counsel's conduct fell below objective standard of reasonableness and that defendant was actually prejudiced in that but for counsel's unprofessional

errors, result of proceeding would have been different; however, ultimate focus of judicial inquiry is on fundamental fairness of proceeding. State v. Micko, 393 N.W.2d 741 (N.D. 1986) (emphasis added).

Koropatnicki's trial counsel failed to file a timely notice of appeal. (A 20).

Ineffective assistance of counsel denies to one a fair trial or a fair hearing. Strickland v. Washington, 466 U.S. 668, 684 (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., at 686.

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., at 597.

Koropatnicki received ineffective assistance of trial counsel and the conviction must be overturned or a new trial ordered.

II. Whether Koropatnicki Is Entitled To Relief Because He Received Ineffective Assistance Of Appellate Counsel.

Appellate counsel hoodwinked Koropatnicki into thinking that if he voluntarily signed a waiver or dismissal of appeal that he would then get a favorable Rule 35(b) Sentence

Reduction. This attorney (William A. Mackenzie) promised Koropatnicki he was sure to get the reduction in sentence. Appellate counsel coerced Koropatnicki into forfeiting his appeal. Koropatnicki would never have knowingly, willingly, and intelligently waived his direct appeal had he not been convinced by counsel that he was going to be granted a sentence reduction. In fact, counsel told Koropatnicki that he could not have an appeal and a Rule 35 at the same time. He did not tell him that he could file a motion to have the appeal held in abeyance and remand the case back to district court to hear the Rule 35.

Appellate counsel told Koropatnicki that he did not have any appealable issues, when in fact he had a lot of good appeal issues due to insufficient evidence. And, the trial attorney did put in a Rule 29 motion for acquittal preserving the entire record for appeal. It is absolutely ludicrous for any decent attorney to do what this attorney did to Koropatnicki. In fact, it is unconscionable.

The legal argument for issue II. is incorporated into the argument in issue I.

It is unconscionable what our system of court appointed attorneys are doing to people who cannot afford to retain or hire an attorney who will actually do something for them. The court appointed lawyers help the prosecutors gain and sustain convictions and do it without a conscience. And, the district court judges condone and basically promote this.

Furthermore, it is completely unconscionable for our

district courts and our N.D. Supreme Court to uphold or affirm these convictions that the State gains due to the assistance, or lack thereof (ineffective assistance), from court appointed attorneys. The current system in North Dakota is basically unconstitutional. For details, See REVIEW OF INDIGENT DEFENSE SERVICES IN NORTH DAKOTA, by "The Spangenberg Group" (N.D. 2004).^{*} This study tells the true horrors of how bad it really is here in North Dakota. The study tells how the district court judges control court appointed contracts and they promote ineffective assistance. The district court judges tell these lawyers not to file too many motions and if they do, it seems that the judges retaliate. Therefore, the attorneys on these contracts haven't much choice but to provide their clients with ineffective assistance of counsel.

It is actually shameful how Koropatnicki's appellate counsel coerced him into forfeiting his direct appeal.

Nobody in their right mind can honestly say Koropatnicki received effective assistance of appellate counsel.

III. Whether Koropatnicki Is Entitled To Relief Because He Received Ineffective Assistance Of Post-Conviction Counsel.

Koropatnicki hates to have to bring a claim of ineffective assistance against yet another attorney. However, this lawyer fell well short of the expectations of Koropatnicki.

The legal argument for issue III. is incorporated into the argument in issue I.

^{*} , A copy of above cited REVIEW OF INDIGENT DEFENSE SERVICES IN NORTH DAKOTA, by "The Spangenberg Group" (January 30, 2004), is available at the COMMISSION ON LEGAL COUNSEL FOR INDIGENTS, 2517 West Main, P.O. Box 149, Valley City, N.D. 58072.

Koropatnicki first wants to say, post-conviction counsel (Mark A. Beauchene) did more for him than all the other lawyers put together. However, as stated above, he fell short of the mark on what Koropatnicki demanded be done.

Counsel failed to subpoena Kasey Koropatnicki and Lee Allen as Koropatnicki demanded for necessary witnesses.

Counsel failed to keep in contact with Koropatnicki; it was a non stop chase trying to contact this attorney and trying to get him to call or write back.

Counsel failed to submit into evidence a letter from Koropatnicki's mother stating that she had heard Freeman ask trial counsel, on more than one occasion, to get phone records and to subpoena Josh Lee. Koropatnicki now feels that this letter should have been part of the developed record during the post-conviction evidentiary hearing and that this Court would now consider it as supplementing the record at appellate level. It is beyond Koropatnicki's imagination why counsel would not have submitted this letter.

Koropatnicki's counsel agreed with counsel for the State that grounds for relief would be limited to ineffective assistance without Koropatnicki's approval. See page 2 of STATE'S BRIEF RE: PETITION FOR POST-CONVICTION RELIEF. The point is, Koropatnicki never agreed to forfeit any of his grounds for relief or issues (A 66).

Counsel should have redacted parts of the phone records, i.e., any phone calls that did not fall within the parameters of the four corners of the CRIMINAL COMPLAINT (January 30,

2005 through February 14, 2005). In essence, counsel gave the judge the rope to hang Koropatnicki. Koropatnicki thought he only needed to defend himself within the four corners of the CRIMINAL COMPLAINT and that anything else was not relevant. Koropatnicki spoke to Nogosek one time for 46 minutes on the 14th of February. He called on February 6, 2005, but was told by whom ever answered the phone that Nogosek wasn't home. The only good thing about more of the phone records being submitted is that it shows that none of Nokosek's dates and times were correct and that none of the calls were short and threatening. See Defendant's BRIEF IN SUPPORT OF AMENDED APPLICATION FOR POST-CONVICTION RELIEF (A 80).

IV. Whether Koropatnicki Is Entitled To Relief Because Of Insufficient Evidence. The State Failed To Bear Their Burden Of Proof Beyond A Reasonable Doubt.

The rule of law here is that the State bears the burden of proof. That is, the State must produce facts which show beyond a reasonable doubt that it occurred in a certain County, and that it occurred on a certain date. The State has not borne its burden simply because there are unexplained circumstances as to proving the elements; to prove terrorizing, venue, time, and the actor who did it, and thus the jury can just assume it all occurred as the State claims it did.

A conviction cannot be based upon suspicion, speculation, the weakness of the status of the defendant, the embarrassing position of the defendant, or the fact that some unfavorable circumstances are not explained. State v. Garza, 592 N.W.2d 485, 494-495 (Neb. 1999); State v. Miller, 357 N.W.2d 225, 227 (N.D. 1984).

The State bears the burden to produce facts which overcome the presumption of innocence.

The presumption of innocence continues to operate until overcome by facts and proof of guilt beyond a reasonable doubt. United States v. Fleischman, 339 U.S. 349, 363 (1950); State v. Anderson, 116 N.W.2d 623, 624 (N.D. 1962).

The State introduced no real facts.

Or, if the State claims they did introduce some evidence that it was Koropatnicki, it was insufficient to prove beyond a reasonable doubt that it was Koropatnicki.

There must be more facts than just a couple of people (whom are all friends and whom all are friends of with Koropatnicki's ex-wife) saying that Koropatnicki said these awful things.

The judgment must be overturned because the State failed to bear any burden of proof, or if some evidence was introduced, the State failed to bear their burden of proof beyond a reasonable doubt, not proving terrorizing, venue, time, and that Koropatnicki did it.

Koropatnicki did not terrorize Aaron Nogosek or any of these people. He was merely a concerned parent saying things that should have been taken as nothing more than trifling remarks. These people (whom are all Koropatnicki's ex-wife's friend) took what Koropatnicki said and embellished it to sound like he was some crazy mad man going to possibly hurt or kill somebody.

The law disregards trifles. "De minimis non curat lex."

"The law does not care for, or take notice of, very small or trifling matters." Black's Law Dictionary, translating "De minimis . . ." Thus the law will not, for example, notice the fraction of a day. Black's, id.

The rule of de minimis, or that the law disregards trifles, is a maxim which can be applied to criminal prosecutions.

Bowman v. Preferred Risk Mutual Ins. Co., 83 N.W.2d 434, 435-436 (Mich. 1957).

In order for a crime to exist there must be proof of injury, and where the proof of injury is non-existent or is de minimis, then the criminal charge can be dismissed. State v. Kern, 140 N.W.2d 920, 921 (Iowa 1966).

These maxims can and should be applied to this case. This is because the rules of law are designed for the purpose of administering justice, the rules of law and justice go hand in hand. Perkins v. City National Bank of Clinton, 114 N.W.2d 45, 50 (Iowa 1962).

The State failed to prove actus reus and mens rea.

The difference between actus and actus reus is the act and the bad act, and mens and mens rea is the mind and the guilty mind or evil mind or that the will, the intent, was evil and known to be evil or wrong.

Terrorizing, all the elements, must be proven, the actus and the mens.

Koropatnicki's amended post-conviction application raised insufficiency of the evidence or lack of evidence, failure to bear the burden of proof, in Ground C.), issues 1.), 2.),

3.), 4.), and 5.), page 4 of the application. It is noted that this Ground and these issues, 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 (1979).

Ground C.), of the amended application, insufficient evidence, shows that the judgment is void. And, Grounds A.), B.), D.), and E.) of the amended application are also based on facts of record and thus 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 (Okla. 1991); Riley v. State, 506 N.W.2d 45, 51 (Neb. 1993); Ex Parte Reed, 100 U.S. 13, 23 (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).

"A void judgment is, in legal effect, no judgment. By it no rights are divested. From it no rights can be obtained. Being worthless in itself, all proceedings founded upon it are equally worthless. It neither binds nor bars anyone. 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 not power to inject life in to a void judgment. Coenen v. Ban Handel, 68 N.W.2d 435, 437 (Wis. 1955) (The judgment in this case was void because it was a conditional judgment).

A party attacking a judgment as void need show or plead no equity on his behalf, he is entitled to have the judgment treated for what it is, a legal nullity. Neylan v. Vorwald, 368 N.W.2d 648, 656 (Wis. 1985).

Post-conviction is a direct 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) n. 98;

Hamilton v. Hamilton, 410 N.W.2d 508, 520 (N.D. 1987) (This case defines the criteria for a direct and collateral attack).

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), see annotation of this case under N.D.C.C. 29-32.1-01.

FACTS NOT ON TRIAL RECORD

Josh Lee testified, in an affidavit submitted with the original application for post-conviction relief, dated May 23, 2007, that he was with Koropatnicki on February 14, 2005, when Koropatnicki called Aaron Nogosek. Lee stated that nothing threatening was said. Lee was to be subpoenaed for the trial but wasn't due to ineffective assistance. Lee was available to testify at the evidentiary hearing dated May 2, 2008.

Koropatnicki's son Kasey was to be subpoenaed as a witness for the trial but wasn't due to ineffective assistance. Kasey would have been able to testify about how often Aaron Nogosek comes over to his mother's house, how long they have known each other (i.e., his mother, Koropatnicki's ex-wife and Nogosek), how Kasey didn't like Nogosek, how Kasey used to have to screen the phone calls because his mother did not want to talk to this guy and he just kept calling the house, etc., etc. Kasey should've been subpoenaed for post-conviction evidentiary hearing but wasn't due to ineffective counsel.

Kasey would have testified that his dad was calling the house and when he would try to answer his mother would not let him. She wanted Koropatnicki to leave messages. Kasey would have testified that his mother very well knew that his dad Koropatnicki was calling to talk to the kids and that she was playing some kind of mind games with Koropatnicki. Kasey would have testified that his mother never put chairs up against the door and that they all slept together, that this was not true. Kasey would have testified that his mother never ever said that she did not want Koropatnicki calling; she never said "Do not call."

Kasey would have testified that Nogosek comes over to his mothers house all the time. And, that Schumacher had the kids screening calls from Nogosek because she was sick of him calling and coming over so much. Kasey did not like Nogosek and had told Koropatnicki that this guy was coming over all the time and that sometimes he would sit on Kasey's bed and talk to him. This made Kasey uncomfortable and, as well, made Koropatnicki uncomfortable.

Telephone records that should have been subpoenaed for the trial would have proved that everybody's story is different than was said. These records not only should have been available for the defense, but should have been subpoenaed by the State to prove their case. There's no good excuse why these records were not subpoenaed by either party, the defense or the State. Not only should have Koropatnicki's phone records been subpoenaed, but Nogosek's should have been also. Some

phone records (Koropatnicki's) were supplied at the evidentiary hearing by post-conviction counsel. (A 47).

FACTS ON THE TRIAL RECORD

The State used nine witnesses, (1) Corporal James Scherbenske with the Jamestown Police; See (T pp.15-24); (2) Dale Stoltman, South Dakota police officer, formerly with the Jamestown Police Department. See (T pp.25-49); (3) Nicole Schumacher, Koropatnicki's ex-wife. See (T pp.50-67); (4) Damian Hoyt, Stutsman County Deputy Sheriff. See (T pp.68-74); (5) Aaron Nogosek. See (T pp.74-82); (6) Dan Beckley. See (T pp.83-90); Brittany Wenzel. See (T pp.90-91); (8) Todd Kinzler. See (T pp.92-95); and (9) Jason Falk, detective for the Stutsman County Sheriff's Department. See (T. pp.95-107).

The record is replete with so many inconsistent dates, times, and statements that it would be nearly impossible to document all of them.

First, Deputy Falk's interview with Koropatnicki was done on 02/15/05 at 0938, which is almost twelve and a half (12½) hours before Deputy Hoyt took the complainant's call and did a field report. See Hoyt's field incident report, dated 02/15/05, 2212 hrs. This is contrary to their sworn testimony.

On page two of Hoyt's incident report it is stated in the second paragraph that Koropatnicki said, "he was there right now and told Aaron that Aaron's daughter was wearing yellow pajamas, which she was." And again, on page three of this report (titled Supplement #1 [upper left]), dated 02/20/05,

in the third paragraph Hoyt writes that Nogosek asys Koropatnicki said, "You're (sic) daughters wearing yellow pajamas," and she was wearing yellow pajamas.

Notice: This was allegedly said on February 2, 2005.

If, in fact, Koropatnicki would have said something so creepy and outrageous about Nogosek's daughter, then it seems rather irresponsible to wait until thirteen (13) days later to report it. It seems a little careless for any father to wait to report something of this nature. Unless, of course, this was not true. Common sense and logic dictates that this quite possibly is not true. Koropatnicki did not do any such thing.

These kinds of allegations are a sure way to get someone locked up if you do not like them.

Furthermore, telephone records (with cell tower locations) would have shown that Koropatnicki was possibly several hundred miles away when it was alleged that he was watching Nogosek's house.

As stated above, there are so many inconsistencies, inaccurate statements, and actual 'factual errors' in this case that it would be nearly impossible to document them all. We will try to point out as many as possible.

Nogosek claimed in Officer Hoyt's report that he received calls from Koropatnicki on the following dates January 30, February 2, 10 or 11, and 14.

Nogosek claimed at trial that the calls were received on January 3, February 9, 10, and 14.

Based on Koropatnicki's phone records, calls were placed from Koropatnicki to Nogosek on the following dates: January 17, 24, 26, 27, February 6, and 14. However, it is Koropatnicki's contention that he only had to defend himself in regards to the phone calls on the dates stated within the four corners of the Criminal Complaint. It is for these reasons that Koropatnicki testified at trial and at the evidentiary hearing that he had only spoken to Nogosek once. Even though there was two phone calls made within the four corners of the Criminal Complaint, the phone call on February 6, was for 2 minutes and as for that call, Koropatnicki asserts that he did not speak to Nogosek. Leaving only the call made on the 14th of February that lasted for 46 minutes for which Josh Lee was present and has testified that the call was of a non-threatening nature.

When the State rested their case, the judge asks Fleming if he wants to give his opening statement. Fleming makes a Rule 29 Motion for Acquittal. (T p.108).

The judge denies the Motion for Acquittal. (T p.108, 1.10).

Defense counsel gives his opening statement. (T p.113, 1.6-7).

Note: See Ground I, Ineffective Assistance of Counsel, in this brief, which specifically discusses the failure to give an opening statement at the right time.

Koropatnicki's trial attorney puts him on the stand. (T p.113). Koropatnicki's testimony lasts for what is equivalent to almost 30 pages of transcript. (T p.113-140).

Note: This was one of the worst things defense attorney Fleming could have done. Koropatnicki's highly charged state of emotions and passions made him his own worst enemy and he should have never been put on the stand. However, Fleming probably did this because he did not have any witnesses to testify on Koropatnicki's behalf. Any competent trial attorney would have known not to put somebody like Koropatnicki on the stand with his emotions and passions out on his sleeve. This was a fatal error on Fleming's part.

Trial attorney Fleming puts Koropatnicki's mother Joanne on the stand to testify in Koropatnicki's behalf. (T p.140-143).

Note: As previously stated in the ineffective assistance of counsel argument, Koropatnicki's mother just happened to be in town visiting. It was not ever planned for her to testify, it was just convenient. Fleming needed somebody because he failed to call any of the witnesses that Koropatnicki demanded that he call.

Fleming renewed his Motion for Acquittal. The State opposed. The judge denied the motion. (T p.144, 1.17-22).

The court reads the closing instructions. The plaintiff and defendant give their closing arguments. (T p.149, 1.13-15). The jurors retire to deliberate. (T p.149, 1.19-20).

The jury reached a verdict. The clerk reads the verdicts in cases 05-K-0181, 05-K-0182, and 05-K-0186. (T p.152).

The defense and the State waive polling of the jury. (T p.152).

The trial is completed and Koropatnicki was found guilty of two charges, case No. 05-K-0181 & 05-K-0186, and not guilty of the charge in case No. 05-K-0182.

Sentencing was to be scheduled upon completion of a presentence investigation. (T p.154).

The State went outside the box if you will, i.e., they went outside the four corners of the CRIMINAL COMPLAINT to prove their case. Koropatnciki was unfairly prejudiced by this and deserves to have this case overturned and/or a new trial ordered.

Finally, the State failed to bear their burden of proof beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1970).

The reasonable doubt standard plays a vital role in the American sceme of criminal procedure. It is the prime instrument for reducing the risk of convictions resting on factual error. One of the essential due process safeguards that attends the accused at his trial is "that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" In re Winship, 397 U.S. 358, 363 (1970) (quoting Coffin v. United States, 156 U.S. 432, 453 (1895)). See also, e.g., Deutch v. United States, 367 U.S. 456, 471 (1961); Sinclair v. United States, 279 U.S. 263, 296-297 (1929).

This presumption of innocence is given concrete substance by the due process requirement that imposes on the prosecution the burden of proving the guilt of the accused beyond a

reasonable doubt. "The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. Accordingly, a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt." In re Winship, 397 U.S. at 363-364.

Due process commands that no man shall lose his liberty unless the government has borne the burden of convincing a proper fact finder of his guilt. To this end, the reasonable doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue. Id.

V. Whether Koropatnicki Is Entitled To Relief Because He Was Denied Due Process Of Law And Fundamental Fairness.

Jurors, at the beginning of a trial are supposed to believe that the defendant is innocent, and it is the burden of the State to overcome that presumption of innocence by convincing the jury beyond a reasonable doubt that the defendant is guilty. By placing a witness in the jury box destroys that presumption because that witness cannot judge impartially the facts in issue because he is a witness.

During Koropatnicki's trial one of the jurors was friends with and was currently employed with Koropatnicki's ex-wife's boyfriend. This juror should have spoke up but didn't. Also, Koropatnicki had told his trial counsel about it and counsel

said that he would take care of it. Trial attorney Fleming should have filed a Rule 33 Motion for New Trial. This is just another example of how Koropatnicki's trial counsel failed to provide effective assistance of counsel.

"The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." Drope v. Missouri, 420 U.S. 162, 172 (1975).

"Due process requires that no person be made to suffer the onus of a criminal conviction except upon sufficient proof, defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307, 316 (1979).

Koropatnicki was denied due process and fundamental fairness from the beginning to the end.

The majority of the legal argument has been incorporated into all of the other grounds for relief.

VI. Whether Koropatnicki Is Entitled To Relief Because Of Judicial Bias/Misconduct.

Just as the Sixth Amendment requires an impartial jury, due process requires an impartial judge.

Although an unbiased judge is not mentioned in the specifics of the Bill of Rights (the Sixth Amendment refers only to an "impartial jury"), Tumey v. Ohio, 237 U.S. 510 (1927) held lack of judicial bias to be an essential element of fundamental fairness.

The right to an impartial judge is guaranteed under the Due Process Clause of the 14th Amendment to the United States Constitution, Ward v. Village of Monroeville, 409 U.S. 57

(1972), and under the due process clause of the North Dakota Constitution, art. I, §12. This right extends to both the trial and the sentencing hearing.

It is not necessary to establish that the judge is in fact prejudiced. The guiding standard on personal involvement, the Court has emphasized, must be the "likelihood or appearance of bias" rather than "proof of actual bias." Taylor v. Hayes, 418 U.S. 488 (1974).

See e.g., State v. Dailey, 2006 ND 184, 721 N.W.2d 29.

Disqualification decisions are governed by the North Dakota Code of Judicial Conduct. Farm Credit Bank v. Brakke, 512 N.W.2d 718, 720 (N.D. 1994). Cannon 3(A)(5), N.D.Code Jud. Conduct, states, "[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice. . . ." Cannon 3(E)(1), N.D.Code Jud. Conduct, states, "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. . . ." The "'primary concern is the preservation of public respect and confidence in the integrity of the judicial system,'" and even without intentional bias, disqualification may be necessary to satisfy the appearance of justice. Brakke, at 720 (quoting Sargent County Bank v. Wentworth, 500 N.W.2d 862, 877-878 (N.D. 1993)). In Brakke, at 720 (quoting Terry v. State, 602 N.E.2d 535, 540 (Ind.Ct.App. 1992)), this said, "'[t]he law presumes a judge is unbiased and not prejudiced.'" Dailey, at ¶7.

In Koropatnicki's case the judge should have recused

himself because he had sat on many cases involving Koropatnicki and/or his ex-wife.

It does not take a jurisprudence degree to review the record and determine that Koropatnicki was by the cumulative errors unfairly prejudiced and did not receive a fair trial.

There are so many errors, "factual errors," in this case that Ray Charles and Stevie Wonder would be able to see them. If a mere layperson (blind man), can see all of these errors then surely this North Dakota Supreme Court should be able to see them.

In conclusion, the Court may find that one of these items that have been identified and argued above may not, in the Court's eyes, be grounds for relief. The problem with analyzing simply as one and not together is that it misses the important issue of a fair trial. All the items placed together definitively points to ineffective assistance, insufficient evidence, and an unfair trial. Plain and simply, the combination of errors in Koropatnicki's case had a prejudicial impact. Had these errors not been committed, it would have given the jury reasonable doubt and therefore would have been highly likely to result in a different verdict.

Accordingly, in considering all the errors together the court must grant relief. If justice is to be served, in all fairness, Koropatnicki deserves to have the case overturned and/or deserves a new trial, a fair trial.

CONCLUSION

For all the foregoing reasons, Koropatnicki asks this Court to grant relief and issue an order vacating the judgment of conviction and/or granting a new trial. At the very least, Koropatnicki asks this Court to reverse and remand with instructions to further develop the record.

Dated this 15 day of November 2008.

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