

TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF CASES AND AUTHORITES	i
STATEMENT OF CASE	1
STATEMENT OF FACTS	2
ISSUES PRESENTED FOR REVIEW	3
ARGUMENT.....	4
I. Whether Tweed’s 14 th Amendment Rights to due process and a fair hearing were violated when the lower court summarily dismissed his Application for Post Conviction Relief?	4
II. Whether Tweed’s 14 th Amendment Rights were violated by the lower court when they claimed that Tweed did not raise a substantial issue of fact or law?	8
III. Whether Tweed’s 5 th , 6 th and 14 th Amendment Rights were violated when the court erred, or abused it’s discretion by barring issues 1, 5, 6, 7, 8, 9, and 10 claiming res judicata applied to those issues?.....	12
IV. Whether Tweed’s 14 th Amendment Rights were violated when the court erred, or abused it’s discretion by claiming that issues 2, 3 and 4 were previously all issues that should have been raised in his first application for post conviction relief and that Tweed has inexcusably failed to show reason for not bringing the issues previously?	20
V. Whether Tweed’s 5 th , 6 th , and 14 th Amendment Rights were violated when the court erred, or abused it’s discretion by claiming that issues 11 and 12 were beyond purview, therefore, claims did not state a claim for post conviction relief?.....	22
VI. Whether Tweed’s 14 th Amendment Rights were violated when the court erred, or abused it’s discretion by claiming that Tweed made no showing that would negate his culpability in Dorff’s death?	24
VII. Whether Tweed’s 6 th and 14 th Amendment Rights were violated when he was denied effective assistance of counsel?.....	33
CONCLUSION.....	36

TABLE OF CASES AND AUTHORITES

Cases

<u>‘Material Fact’</u> , as defined by Black’s Law Dictionary.....	8
<u>Anderson v. Sirmons</u> , 476 F.3d 1131, 1148 (10 th Cir. 2007).....	28
<u>Berger v. U.S.</u> , 295 U.S. 78, 88 (1935).....	19
<u>Brady v. Maryland</u> , 373 U.S. at 87	5
<u>DeLuca v. Lord</u> , 77 F.3d 578, 590 (2d Cir. 1996).....	27, 34
<u>Dismone v. Phillips</u> , 461 F.3d 181, 196 (2 nd Cir. 2006).....	26

<u>Fisher v. Gibson</u> , 282 F.3d 1283, 1310-11 (10 th Cir. 2002).....	32
<u>Gall v. Parker</u> , 231 F3d. 265, 312 (6 th Cir. 2000)	16
<u>N.D. Code of Judicial Conduct Canon 2 A</u>	17
<u>N.D.C.C. 12.1-05-08, – Self Defense</u>	26, 30
<u>Naupe v. Ill.</u> , 360 U.S. 264, 269 (1959).....	11
<u>Sonnier v. Quarterman</u> , 476 F.3d 349, 357-358 (5 th Cir. 2007).....	31
<u>Strickler v. Greens</u> , 527 U.S. 263, 281-82 (1999)	6
<u>U.S. v. Conrad</u> , 320 F.3d 851, 856 (8 th Cir. 2003).....	10, 17
<u>U.S. v. Kojayan</u> , 8 F.3d 1315, 1321, 22 (9 th Cir. 1993).....	11, 14
<u>U.S. v. Morales</u> , 910 F.2d 467, 468 (7 th Cir)	30
<u>U.S. v. Pelullo</u> , 105 F. 3d 117, 124 (3 rd Cir. 1997).....	6
<u>U.S. v. Perlaza</u> , 439 F.3d 1149, 1172-73 (9 th Cir. 2006)	15
<u>U.S. v. Wade</u> , 388 U.S.....	31
<u>U.S. v. Watson</u> , 171 F.3d 695, 700 (D.C. Cir. 1999).....	10
<u>U.S. v. Young</u> , 470 U.S. at 9 & n.7	12
<u>Williams v. Cockhart</u> , 797 F.2d 344, 347 (8 th Cir. 1986)	11, 13
<u>Williams v. Taylor</u> , 529 U.S. 362, 396-399 (2000)	32
<u>Wilson v. State</u> , 1999 ND 222; 603 N.W.2d 47; 1999	20, 21, 23
<u>Winship</u> , 397 U.S. 358.....	6

STATEMENT OF CASE

This is an appeal from the Order of Summary Disposition on Second Application for Post Conviction Relief and Order for Judgment dated February 28th, 2011(see Appendix A-1-1).

Tweed was convicted of 'AA' murder in October, 1991 and sentenced to life imprisonment. He appealed and the conviction was affirmed in 1992. Tweed filed a post conviction in 2008 and it was denied by Judge Racek. Tweed appealed and the District court's decision was affirmed by the Supreme Court of North Dakota.

On December 17th, 2010 Tweed filed his Second Application for Post Conviction Relief along with request for counsel. The district court Summarily Dismissed the petition and request for counsel as well.

Tweed timely filed his Notice of Appeal on the 28th of March, 2011 (see Appendix A-3-1).

The petitioner Appeals the lower court's decision for the following reasons:

1. The petitioner claims that the court erred or abused it's discretion by ordering Tweed's second Application for Post Conviction Relief be summarily dismissed.
2. The petitioner believes the lower court has erred or abused it's discretion when they claimed that Tweed did not raise a substantial issue of fact or law.
3. The petitioner claims that the court erred, or abused it's discretion by claiming that issues 1, 5, 6, 7, 8, 9, and 10 were previously adjudicated and are barred by res judicata.
4. The petitioner claims that the court erred, or abused it's discretion by claiming that issues 2, 3 and 4 were previously all issues that should have been raised in his first

application for post conviction relief and that Tweed has inexcusably failed to show reason for not bringing the issues previously.

5. The petitioner claims that the court erred, or abused it's discretion by claiming that issues 11 and 12 were beyond purview, therefore, claims did not state a claim for post conviction relief.

6. The petitioner claims that the court erred, or abused it's discretion by claiming that Tweed made no showing that would negate his culpability in Dorff's death.

7. The petitioner claims that his 6th and 14th Amendment Rights were violated when he was denied effective assistance of counsel.

STATEMENT OF FACTS

Tweed was convicted of 'AA' murder in October, 1991 and sentenced to life imprisonment. He appealed and the conviction was affirmed in 1992. Tweed filed a post conviction in 2008 and it was denied by Judge Racek. Tweed appealed and the District court's decision was affirmed by the Supreme Court of North Dakota.

On December 17th, 2010 Tweed filed his Second Application for Post Conviction Relief along with request for counsel. The district court Summarily Dismissed the petition and request for counsel as well.

Tweed now appeal's the February 28th, 2011 order to the Supreme Court of North Dakota.

ISSUES PRESENTED FOR REVIEW

- I. Whether Tweed's 14th Amendment Rights to due process and a fair hearing were violated when the lower court summarily dismissed his Application for Post Conviction Relief?

- II. Whether Tweed's 14th Amendment Rights were violated by the lower court when they claimed that Tweed did not raise a substantial issue of fact or law?

- III. Whether Tweed's 14th Amendment Rights were violated when the court erred, or abused it's discretion by barring issues 1, 5, 6, 7, 8, 9, and 10 claiming res judicata applied to those issues?

- IV. Whether Tweed's 5th, 6th, and 14th Amendment Rights were violated when the court erred, or abused it's discretion by claiming that issues 2, 3 and 4 were previously all issues that should have been raised in his first application for post conviction relief and that Tweed has inexcusably failed to show reason for not bringing the issues previously?

- V. Whether Tweed's 5th, 6th, and 14th Amendment Rights were violated when the court erred, or abused it's discretion by claiming that issues 11 and 12 were beyond purview, therefore, claims did not state a claim for post conviction relief?

VI. Whether Tweed's 14th Amendment Rights were violated when the court erred, or abused it's discretion by claiming that Tweed made no showing that would negate his culpability in Dorff's death?

VII. Whether Tweed's 6th and 14th Amendment Rights were violated when he was denied effective assistance of counsel?

ARGUMENT

I. Whether Tweed's 14th Amendment Rights to due process and a fair hearing were violated when the lower court summarily dismissed his Application for Post Conviction Relief?

The petitioner claims that the court erred by ordering Tweed's second Application for Post Conviction Relief be summarily dismissed, ultimately denying Tweed his right to due process. Tweed has supplied the lower court with ample genuine issues of material fact in his Application for Post Conviction Relief. For example:

A) Exhibit 1 in the Appellant's Application for Post Conviction Relief Docketed 12/17/10, refers to a 'shirt spattered with blood' is new evidence which exists now and was not available at Tweed's original trial in October of 1991, because the lab report did not exist until February of 1992. The lower court claimed that this issue was raised at Tweed's 2009 Post Conviction but it was not. Tweed was not aware of the existence of the document until 5-7-10, therefore, the court erred by claiming that the issue was barred by res judicata since it was not fully and finally determined by any court or appeal. It is

important to note that the state claimed that they were to use the said evidence to corroborate Tweed's testimony in order to convict David Sumner of the murder Tweed has been convicted of.

Brady v. Maryland, 373 U.S. at 87 "Some circuits have stated, however, that government suppression in bad faith may suggest that evidence is material."

At the time the of Tweed's trial the results were not known, however, the State was under the impression that it would have aided them in corroborating Tweed's 1991 trial testimony and the evidence would then aid them in convicting Sumner of murdering Terry Dorff, as evident by Mark Boening's statement in "State's return to Defendant's Motion to Suppress and Motion for Discovery" Dated 12/27/91 Case No. Cr. #91-148 State v. Sumner (see Appendix A-5-1) where he stated "Although sufficient corroborating evidence already exists, to submit this case to a jury, the State does have real evidence, a shirt containing apparent blood spatters, which may further tend to connect Sumner with the murder. **Since that evidence should be available before trial (emphasis added)**, defendant's suppression motion is clearly premature at this time. If the State fails to present evidence corroborating Tweed's testimony at trial, certainly Sumner would then have grounds for a North Dakota Rule 29 Motion for Judgment of Acquittal at the close of the State's case."

It is not fair to Tweed that the State was willing to have Tweed testify as a credible, reliable, and truthful witness at David Sumner's trial, despite knowing that Tweed was called untruthful at his trial, and the lab report did not include the victim's blood. After Sumner was acquitted, the state continued to treat Tweed as though he was lying during his trial in an attempt to minimize his complicity.

By the state not knowing the results of the lab report demonstrates that withholding the evidence was made in bad faith in an attempt to prejudice Tweed's case and making it more difficult if not impossible for him to obtain a new trial. Tweed's attorney certainly would have demanded a continuance to await the lab results before continuing with the trial, had he been effective.

Strickler v. Greens, 527 U.S. 263, 281-82 (1999) "Brady violation occurs when: 1) Evidence is favorable to accused because it is exculpatory or impeaching; 2) evidence was suppressed by the State either willfully or inadvertently; and 3) prejudice ensued."

The said evidence clearly falls in the three prong standard of *Strickler*. The evidence can be tested by Tweed for DNA and it will prove Tweed's case and the State's case that Sumner was in fact present, had opportunity, and killed Dorff, especially when viewed as a whole, in tandem with Sumner's admissions to witnesses and Tweed's statement and testimony, along with the new lab report regarding the 'shirt spattered with blood'.

Tweed is entitled to an evidentiary hearing to present this evidence.

U.S. v. Pelullo, 105 F. 3d 117, 124 (3rd Cir. 1997) "New trial granted because prosecution withheld evidence both favorable and material to defense, in violation of *Brady Rule*"

The *Pelullo* case applies to Tweed's because if the shirt was that important to the state at the time, then it will certainly be important to a jury. Especially with the new lab reports with all the advanced technology in DNA testing.

Winship, 397 U.S. 358 "Justice Harlan stated, '1) although the phrases, "preponderance of evidence" and "proof beyond a reasonable doubt" were quantitatively imprecise, nevertheless they communicated to the finder of fact different notions concerning the degree of confidence that he was expected to have in the correctness of his factual

conclusions; and 2) The reasonable-doubt standard in a criminal case has bottomed on the fundamental value determination that it was far worse to convict an innocent man than to let a guilty man go free.”

The *Winship* case applies to Tweed’s because Tweed is innocent and a lot of changes and evidence have come to light since Tweed’s 1991 conviction, and he is surely in need of relief. This court cannot allow the lower court to find some loop hole to uphold a wrongful conviction. Tweed’s case must be re-examined and viewed as a whole, and in it’s entirety. Tweed has genuine issues of material fact and the District Court erred in summarily dismissing his application for not providing any genuine issues of material fact. Like the *Winship* case, Justice Harlan’s statement must be adhered to and in view of the whole case with all the new evidence that was uncovered after Tweed was convicted leaves strong doubt as to Tweed’s actual guilt. Tweed is entitled to have a new jury hear his case where he will surely be acquitted at a new trial.

By denying Tweed’s Application, the lower court erred, or abused it’s discretion by denying Tweed fundamental fairness, therefore, denying Tweed an opportunity to set the record straight at an evidentiary hearing where Tweed surely would have prevailed on the grounds of new evidence, new witnesses, prosecutorial misconducts and ineffective assistance of counsel. Tweed would like this case remanded back to District Court with instruction and an order for an evidentiary hearing. Alternatively, this Court can vacate Tweed’s conviction and order a new trial, in the interest of justice.

II. Whether Tweed's 14th Amendment Rights were violated by the lower court when they claimed that Tweed did not raise a substantial issue of fact or law?

'Material Fact', as defined by Black's Law Dictionary – A fact that is significant or essential to the issue or matter at hand.”

A) As a matter of fact, Tweed has filed a sworn 'Affidavit in Support of Post Conviction Relief' dated and notarized on February 10th, 2011 (see Appendix A-6-1) #11 states "I received ineffective pre-trial, trial, appellate, post conviction, and post conviction appellate counsel."

B) The 'shirt spattered with blood' was withheld from Tweed by the State is also a fact that is significant or essential to the issue at hand, and a substantial issue of fact or law.

C) It is also quite a substantial fact that the Cass County State's Attorney's Office is currently in possession of a letter received by police on February 11th, 2010 (see Appendix A-7-1) which names two new witnesses whom David Sumner has been bragging to for the past five or six years that he killed a guy. Mr. Boening has told Tweed's wife Michelle Tweed that the letter is **significant** (emphasis added). In Michelle Tweed's affidavit dated December 1st, 2010 (see Appendix A-8-1) on page two she states "We hoped that with past evidence, my husband's willingness to testify against Sumner, and the new witnesses named in the letter, that a conviction against Sumner could be obtained. After my husband was off the phone, Mr. Boening told me that the new letter was significant and he would be in contact with Det. Voigtchild about it." Therefore, if the State believes that the letter and witnesses are significant, Tweed can

certainly use them to prove Tweed's innocence, by using Sumner's admissions of 'killing a guy'.

Mark Boening wrote a letter to Mrs. Tweed on March 4th, 2010 (see Appendix A-9-1) where he stated at the bottom of page one, "The state appreciates that your husband would now be willing to cooperate and testify against David Sumner. Unfortunately, it is too late." Mr. Boening up to that point was willing to work with Tweed to ensure Sumner would be convicted, however, he discovered that Sumner could not be charged again, then he felt obligated to try and uphold the only conviction he had in the Terry Dorff case. It is unfair to Tweed that he should continue to do prison time for a crime he did not commit, simply because the state cannot find anyone else to do the time when they know that Sumner was really responsible for Dorff's death.

Mr. Boening's admission that the letter is significant, is a fact that is substantial, significant or essential to the issue or matter at hand, and worthy of investigation to correct the horrible injustice of Tweed's conviction.

D) Another substantial fact is that two new witnesses that became known in 2010 are Jason Johnson and Sheri Johnson, who Tweed swore in his Affidavit in Support of Post Conviction Relief, were to be subpoenaed to be present and questioned at Tweed's evidentiary hearing. The witnesses were not available at Tweed's 1991 trial, nor were they available for Tweed's 2009 Post Conviction. They are new evidence that is exculpatory and/or exonerating to Tweed.

E) It is a violation of law and also substantial fact supported by the record that John Goff lied to the jury more than 17 times in his closing arguments at Tweed's 1991 trial.

U.S. v. Watson, 171 F.3d 695, 700 (D.C. Cir. 1999) “Conviction reversed because prosecutor’s misstatement of defense witness’s testimony substantially prejudiced defendant despite curative instructions.” Watson case went on to state, “It is error for counsel to make statements in closing argument unsupported by evidence, to misstate admitted evidence, or to misquote a witness’ testimony”

The *Watson* case applies to Tweed’s case because John Goff the prosecutor in Tweed’s case misquoted witnesses and lied to the jury, and Tweed’s conviction should be reversed as well. There is no excuse or legal argument to condone lying, misstating evidence or misquoting witnesses as John Goff has in Tweed’s case.

U.S. v. Conrad, 320 F.3d 851, 856 (8th Cir. 2003) “Conviction reversed because prosecutor’s improper remarks during trial had cumulative effect that ‘substantially impaired the defendant’s right to a fair trial’, evidence against defendant was not overwhelming, and curative instructions were insufficient to protect defendant from substantial prejudice.”

The *Conrad* case applies to Tweed because so many lies were told by the prosecutor that Tweed’s trial was no longer fair, and the cumulative effect was staggering and prejudiced the jury, and because the improper remarks were not objected to by Tweed’s attorney left no choice for the jury to believe anything else but whatever Goff was telling them. Tweed was thought to be untruthful at his trial and the forensics were not accurately portrayed by the prosecution during closing arguments. The case against Tweed was not overwhelming, but he was convicted because Goff repeatedly lied to the jury.

U.S. v. Kojayan, 8 F.3d 1315, 1321, 22 (9th Cir. 1993) “Prosecutor’s untruthful statement regarding existence of plea bargain agreement with witness improper because there can be no invitation to lie to the jury.”

The *Kojayan* case applies to Tweed’s because Goff has lied on the record and there is absolutely no reason or invitation to lie to the jury. Tweed is entitled to a new trial. His conviction should be vacated and a new trial should be granted where he will surely be acquitted.

Naupe v. Ill., 360 U.S. 264, 269 (1959) “A prosecutor may not knowingly present false testimony and has a duty to correct testimony that he or she knows to be false.”

The *Naupe* case applies to Tweed’s case because the prosecution has lied to the jury, as Tweed has pointed out by the record in his application. Goff’s false testimonies have gone uncorrected by the State even though they are obligated to correct it.

Williams v. Cockhart, 797 F.2d 344, 347 (8th Cir. 1986) “A federal court reviews any improper inference to determine if it had a substantial and injurious effect or influence in determining a jury’s verdict.”

The *Williams* case applies to Tweed’s because the prosecution improperly derived at the wrong conclusion from witnesses’ testimonies on several occasions, as pointed out in Tweed’s Application, and presented the improper inferences to the jury. The improper inferences injured Tweed by destroying his credibility and maximized his culpability. Some of the improper inferences were taken from investigating officer’s testimony, Tweed’s testimony, and the medical examiner’s testimony regarding how Terry Dorff died, which directly resulted in prejudicing Tweed’s trial. The Appellant has supplied ample issues of fact and law to support grounds for an evidentiary hearing. In the interest

of justice the Supreme Court should order the District Court to have an evidentiary hearing, or alternatively vacate Tweed's conviction and issue a new trial.

U.S. v. Carter, 236 F.3d 777, 784-85 (6th Cir. 2001) "The law is clear that, while counsel has the freedom at trial to argue reasonable inferences from the evidence, counsel cannot misstate evidence...See U.S. v. Young, 470 U.S. at 9 & n.7"

The *Carter* case applies to Tweed's because the law is clear, the State cannot misstate evidence as Tweed has shown in his application. The court has erred, or abused it's discretion by stating that Tweed did not raise a substantial issue of fact or law.

Throughout Tweed's 76 page Application he has raised substantial issues of fact and law, and the lower court erred by stating that he did not. In the interest of justice, this case needs to be remanded back to District Court and an Evidentiary Hearing must be ordered.

III. Whether Tweed's 5th, 6th and 14th Amendment Rights were violated when the court erred, or abused it's discretion by barring issues 1, 5, 6, 7, 8, 9, and 10 claiming res judicata applied to those issues?

Issue 1 A) "A shirt spattered with blood" was not brought before any court and can not be barred by res judicata, therefore, the lower court erred due to the fact that this issue was not fully and finally determined by any court or appeal. The 'shirt spattered with blood' was not discovered by Tweed until 05-05-2010, as sworn to in Tweed's affidavit. (see Appendix A-6-1)

Issue 1 B) "Helmuth Wegner" is a new witness that exists now and was not brought before any court and can not be barred by res judicata, therefore, the lower court

erred due to the fact that this issue was not fully and finally determined by any court or appeal.

Issue 1 C) “John Goff’s belief that Tweed was truthful at his trial” is new exonerating and exculpatory evidence that now exists and was not brought before any court and can not be barred by res judicata, therefore, the lower court erred due to the fact that this issue was not fully and finally determined by any court or appeal.

Issue 1 D) “Mark Boening’s belief that Tweed was truthful at his trial” is new exonerating and exculpatory evidence that now exists and was not brought before any court and can not be barred by res judicata, therefore, the lower court erred due to the fact that this issue was not fully and finally determined by any court or appeal.

Issue 1 E) “A letter” received on February 8th, 2010 by Chad McCabe indicating two new witnesses, Jason Johnson and Sheri Johnson who may have information that David Sumner has been bragging that he killed a guy. This is new evidence that never even existed at the time to Tweed’s February 4th 2009 evidentiary hearing which exists now and was not brought before any court and can not be barred by res judicata, therefore, the lower court erred due to the fact that this issue was not fully and finally determined by any court or appeal.

Issue 5 A) “John Goff told the jury what there only duty was.”

Williams v. Cockhart, 797 F.2d 344, 347 (8th Cir. 1986) “A federal court reviews any improper comment or injurious effect or influence in determining jury’s verdict.”

The *Williams* case applies to Tweed’s because a prosecutor cannot tell a jury what there only duty is, and without an objection from the defense, the jury will believe that

they were obligated to believe that whatever the prosecutor says their only duty is, then that would be their only duty.

Issue 5 B-1) “John Goff lied to the jury”

U.S. v. Kojayan, 8 F.3d 1315, 1321, 22 (9th Cir. 1993) “There can be no invitation to lie to the jury.”

The *Kojayan* case applies to Tweed’s case because the prosecution cannot lie to the jury.

Issue 5 B-2) “John Goff lied to the jury, by misquoting Tweed’s testimony, unfairly changing the meaning.”

Issue 5 B-3) “John Goff lied to the jury, by misquoting Tweed’s testimony, unfairly changing the meaning.”

Issue 5 B-4) “John Goff lied to the jury, by misquoting Tweed’s testimony, unfairly changing the meaning.

Issue 5 B-5) “John Goff lied to the jury, by misquoting Tweed’s testimony, unfairly changing the meaning.”

Issue 5 B-6) “John Goff lied to the jury, by misquoting Tweed’s testimony, unfairly changing the meaning.”

Issue 5 B-7) “John Goff lied to the jury, by misquoting Tweed’s testimony, unfairly changing the meaning.”

Issue 5 B-8) “John Goff lied to the jury, by misquoting Tweed’s testimony, unfairly changing the meaning.”

Issue 5 C) “John Goff lied by misquoting Dr. Frikke’s testimony, unfairly changing the meaning.”

Issue 5 D) “John Goff lied to the jury, by misquoting Tweed’s testimony, unfairly changing the meaning.”

Issue 5 E) “John Goff lied by misquoting the testimonies of Fargo Police Officers Wayne Johnson, Mike McCarthy, Paul Lies, and Dean Wawers, unfairly changing the meaning.”

Issue 5 F) “John Goff lied to the jury, by misquoting Tweed’s testimony, unfairly changing the meaning.”

Issue 5 G) “John Goff lied to the jury, by misquoting Tweed’s testimony, unfairly changing the meaning.”

Issue 5 H) “John Goff lied when he led the jury to believe that Tweed was not truthful.”

Issue 6 A) “John Goff expressed reasonable doubts as to Tweed’s guilt.”

Issue 6 B) “John Goff expressed reasonable doubts as to Tweed’s guilt.”

Issue 6 C) “John Goff expressed reasonable doubts as to Tweed’s guilt.”

Issue 6 D) “John Goff expressed reasonable doubts as to Tweed’s guilt.”

Issue 6 E) “John Goff expressed reasonable doubts as to Tweed’s guilt.”

Issue 6 F) “John Goff expressed reasonable doubts as to Tweed’s guilt.”

Issue 6 G) “John Goff expressed reasonable doubts as to Tweed’s guilt.”

Issue 6 H) “Mr. Boening expressed reasonable doubts as to Tweed’s guilt.”

Issue 7 A) “John Goff expressed reasonable doubts as to Tweed’s guilt.”

U.S. v. Perlaza, 439 F.3d 1149, 1172-73 (9th Cir. 2006) “Conviction reversed because of improper burden shifting comment.”

The *Perlaza* case applies to Tweed because the reasonable doubts by John Goff were expressed intentionally to improperly shift the burden of proving 100% innocence, to Tweed. Tweed's trial attorney never took advantage of the prosecutor's reasonable doubts which demonstrates how Mr. Beauchene's performance fell below the acceptable level of a professional. If Tweed's attorney had exploited the prosecutor's reasonable doubts the outcome of the trial would have been different.

Issue 8 A) "The prosecutor John Goff unfairly and improperly, psychologically assessed Tweed."

Gall v. Parker, 231 F3d. 265, 312 (6th Cir. 2000) "Prosecutor's suggestion to jury to heed his expertise as government prosecutor and dismiss defendant's insanity defense improper."

The *Gall* case applies to Tweed because Mr. Goff is not a licensed psychologist and should not have expressed his personal opinion to the jury regarding matters requiring personal knowledge or expert knowledge. Tweed's attorney never objected to the misconduct which prejudiced Tweed's case because the jury was left to believe the prosecution, and directly resulted in Tweed losing his Extreme Emotional Disturbance defense. Had Tweed been a woman, the sexual assault would have minimized Tweed's culpability, and would have been a major factor in the defense, had Tweed received effective counsel.

Issue 9A) "Mr. Beauchene has prejudiced his client's case by failing to object to all the prosecutorial misconducts."

Issue 9 B) "Mr. Beauchene has prejudiced his client's case by not bringing all the prosecutorial misconducts on direct appeal."

Issue 9 C) “Mr. Beauchene acted unprofessionally due to his blatant bias toward Tweed.”

Issue 10 A) “Mr. Nelson did not follow his client’s instructions, which directly resulted in prejudicing his clients case.”

U.S. v. Conrad, 320 F.3d 851, 856 (8th Cir. 2003) “Conviction reversed because prosecutor’s improper remarks during trial had cumulative effect that ‘substantially impaired the defendant’s right to a fair trial’, evidence against defendant was not overwhelming, and curative instructions were insufficient to protect defendant from substantial prejudice.”

The *Conrad* case applies to Tweed’s case because all the lies the prosecutor told the jury were not only wrong, and prosecutorial misconduct in it’s worst form but the numerous occasions also had a cumulative effect that can’t be ignored and surely biased the jury and prejudiced Tweed’s case, especially when the defense made no objection to the misconducts. It was as though the defense put it’s imprimatur on the prosecution’s misconducts.

Tweed knows that this is not the time or the place to argue these issues, Tweed is merely pointing out how these issues are new and have never been fully and finally determined by any court or on appeal. The prosecutorial misconduct was so egregious that it fatally infected the proceedings and rendered Tweed’s entire trial fundamentally unfair.

N.D. Code of Judicial Conduct Canon 2 A, “Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. The test for appearance of impropriety is whether the conduct

would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

N.D. Code of Judicial Conduct Canon 3, "A judge shall perform the duties of judicial office impartially and diligently."

Canon 3, B 2 states, "A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism."

Canon 3, B 7(e) states "A judge may initiate or consider ex parte communication when expressly authorized by law."

Canon 3, E (1) "A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (A) The judge has personal bias or prejudice concerning a party or a party's lawyer, personal knowledge of disputed evidentiary facts concerning the proceedings."

The above Canons apply to Tweed's case because Tweed is inclined to believe by the judge's order of Summary Disposition, that the judge is afraid to issue an order in Tweed's favor due to the past attention the media has had in this case, and that a reversal of a conviction in this case may cause public clamor, and he may be criticized.

In the 'Background' section of Judge Racek's 'Order to Summarily Dismiss'. The judge makes it a point to mention that Tweed did not testify at Sumner's trial. Why would he mention it? What direct bearing does 'not testifying' at Sumner's 1992 trial have on Tweed's 1991 trial? Tweed believes that the Judge's intentions were to inflame the passions of the Supreme Court Judges, and instill anger or rage that 'David Sumner got away with murder', and therefore be inclined to rule against Tweed, and not base

their decision on the merits of the issues. This would further punish Tweed for not testifying. This shows further bias by Judge Racek.

Tweed asked Judge Racek a specific question, as to whether or not he and Mark Boening were involved in some type of Ex Parte communication, but the Judge has opted not to answer for some reason. Tweed would like this court to order him to answer that question. Any conversations that Judge Racek had with Mr. Boening about Tweed's post conviction either ex parte, or in camera discussions, is an abuse of the judge's discretion and violates Tweed's right to confrontation.

Berger v. U.S., 295 U.S. 78, 88 (1935) "And whose interest, therefore, in a criminal prosecution is not that it shall win, but that justice shall be done. A prosecuting attorney is to refrain from improper methods calculated to bring about a wrongful conviction."

The above Canons and *Berger* case apply because, instead of focusing on ways to deny Tweed's Application, Judge Racek and the prosecutor's office should have focused on the importance and legitimacy of the issues. It's as though they want Tweed to fail, so that no one will ever know that Tweed was wrongfully convicted of 'AA' murder, nor do they want anyone to know the depth at which they sank to in order to keep their malfeasance from coming into light.

Tweed has enclosed these concerns in his "Request for Reconsideration" (see Appendix A-10-1). None of the concerns were addressed by Judge Racek. The judge literally 'rubber stamped' his denial on the back of Tweed's reconsideration request. Tweed asked the judge "At what court was the issue of the 'shirt spattered with blood' brought up?" By Judge Racek refusing to even bother investigating Tweed's claims in the reconsideration shows a total disregard and complete indifference to the value and

integrity of the judicial system, and is an attempt to directly prejudice Tweed's post conviction.

Tweed has listed several issues that clearly should not be barred by res judicata. This shows actual bias by Judge Racek, who unfairly generalized the issues in Tweed's Application, and arbitrarily dismissed them. Tweed is entitled to an evidentiary hearing. The Supreme Court should issue instructions to the lower court and remand this case to District Court, where Tweed shall certainly prevail in an evidentiary hearing, and ultimately be acquitted in a new trial.

IV. Whether Tweed's 14th Amendment Rights were violated when the court erred, or abused it's discretion by claiming that issues 2, 3 and 4 were previously all issues that should have been raised in his first application for post conviction relief and that Tweed has inexcusably failed to show reason for not bringing the issues previously?

Wilson v. State, 1999 ND 222; 603 N.W.2d 47; 1999 "Petitioner was entitled to Raise ineffective assistance of counsel claims in Application for Post Conviction Relief when those claims had not been fully and finally determined on appeal."

The *Wilson* case applies to Tweed's case because Tweed instructed his first Post Conviction (from hear on referred to as 2009 Post Conviction) and subsequent appeal attorneys Brian Nelson and Chad McCabe to include the issues in his 2009 Post Conviction but they failed to follow there client's instruction which prejudiced Tweed's case. Had they included the issues in Tweed's 2009 Post Conviction the results of the first one would have been different, and Tweed's conviction would have been vacated

and he would have been acquitted in a new trial. By the court's denial of an evidentiary hearing in this case, Tweed was unfairly denied an opportunity to provide excuse as to why issues were not raised previously.

The State agrees with Tweed on page 2 section 8 of "Answer to Application for Post Conviction Relief" (see Appendix A-11-2) Mr. Boening stated "As for Ground for relief 10 and ground for relief 11 Respondent acknowledges that Petitioner must be permitted a reasonable opportunity to present relevant materials regarding claims of ineffective assistance of counsel pursuant to Wilson v. State, 1999 ND 222; 603 N.W.2d 47; 1999 and that summary disposition would be error."

The legislative intent is in Tweed's favor in this instance and the court erred by denying Tweed the opportunity that the State conceded, to allow Tweed an opportunity to show how he was denied effective counsel.

Another example of ineffective assistance is that Brian Nelson raised an issue of DNA in Tweed's 2009 post conviction but never even argued the issue (see Appendix A-12-6). In Judge Racek's "Findings of fact, conclusions of law and order for judgment" dated April 13th, 2009 he stated "Finally, Tweed raised in his petition, although he did not argue it at the post-conviction hearing, that advancements in DNA technology would warrant post-conviction relief."

Mr. Nelson's performance fell below the accepted level of a professional and Tweed's case was prejudiced due to the fact no argument was made by counsel, so there was no legal basis to side with Tweed. Chad McCabe also failed to raise this instance on direct appeal and therefore, his performance fell below the acceptable level of a

professional, and Tweed's case was prejudiced due to the fact that the valid issue would have resulted in a new hearing.

One of Tweed's issues of ineffective assistance of counsel was that Mr. Nelson's co-counsel was a disbarred attorney (see Appendix A-13-4).

Tweed is entitled to an evidentiary hearing and will prove that he in fact had ineffective assistance of post conviction counsel, and provide excuse why issues were not raised.

V. Whether Tweed's 5th, 6th, and 14th Amendment Rights were violated when the court erred, or abused it's discretion by claiming that issues 11 and 12 were beyond purview, therefore, claims did not state a claim for post conviction relief?

A) The district court judge was mistaken or misinformed by thinking Tweed was making specific issues of the Ineffective Post Conviction Counsel. Tweed specifically says on pages 73 of Application (see Appendix A-15-1) "Tweed is entitled to re-argue the issues of the 02/04/09 hearing, with adequate counsel." And on page 74 (see Appendix A-15-2) "Tweed is entitled to re-argue issues that were not adequately and fairly considered by the Supreme Court." Tweed is merely trying to attempt overcoming a procedural bar by demonstrating how the ineffectiveness of Brian Nelson and Chad McCabe prejudiced Tweed's case. Tweed's post conviction counsel's refused to raise issues that Tweed believed were important. They were obligated to follow their client's instructions, but they did not and Tweed's case was prejudiced as a result. Tweed is a pro se applicant and cannot be expected to word things right in every instance, and

Tweed should have been given the option to correct or amend the Application if the judge found fault with it.

Wilson v. State, 1999 ND 222; 603 N.W.2d 47; 1999 “Petitioner was entitled to Raise ineffective assistance of counsel claims in Application for Post Conviction Relief when those claims had not been fully and finally determined on appeal.”

In the Tweed case the two prong test of *Wilson* has been satisfied. 1) Tweed’s post conviction attorney’s were deficient by not following their clients instructions, which they were obligated to do, and 2) prejudiced ensued by the district court dismissing the claims that Tweed wanted to raise in his first post conviction due to misuse of process, in the order by Judge Racek dated February 28th, 2011. Had Tweed received effective counsel during his first post conviction, Tweed would have raised the issues the first time and the results would have been a vacation of conviction, and a new trial would have been ordered.

As stated earlier the State’s Attorney’s agreed with the petitioner that summary disposition would be error. Therefore, the court erred in summarily dismissing Tweed’s Application due to misuse of process, and Tweed is entitled to an evidentiary hearing.

Tweed respectfully requests that this court order the district court to grant an evidentiary hearing where Tweed will prove that he was deprived of effective counsel regarding pre-trial, trial, appellate, and post conviction counsel, and post conviction appellate counsel.

VI. Whether Tweed's 14th Amendment Rights were violated when the court erred, or abused its discretion by claiming that Tweed made no showing that would negate his culpability in Dorff's death?

A) Judge Racek on page 6 of his Order dated February 28th, 2011 stated "Tweed makes no showing that would negate his culpability in Dorff's death."

The "Background" section of the judge's order has been inundated with Judge Racek's assumptions and opinions. This is not fair because the appellant knows how much the Higher Court Judges relies on the Lower Court's version of the facts of the case. But to be fair, in this instance the Appellant would like to bring it to the Supreme Court's attention that a significant amount of information in Judge Racek's 'Background' portion of his order, were actually issues in Tweed's application, they are not 'Facts of the Case' because much of it is being disputed by Tweed. For the Supreme Court to assume as accurate, what Judge Racek portrays as facts in his order, will surely prejudice Tweed due to the fact that much is heavily disputed in Tweed's 'Application for Post Conviction Relief'.

In Tweed's 'Request for Reconsideration' Judge Racek assumes the theory of Tweed's 1991 trial was that 'Tweed was remorseful and admits to have been involved to events in his statement'. This is an issue in Tweed's application that during Tweed's 2009 Evidentiary Hearing Transcript, where Beauchene under oath, testified that even he did not know the theory of Tweed's 1991 trial. (see Appendix A-16-1)

Judge Racek made it a point to mention that "Tweed's statement was inconsistent with the forensics." Another issue Tweed has been explained away in his Application.

Judge Racek also stated that "Judge LeClerc indicated that he did not find Tweed's testimony believable." Tweed is painfully aware that he was not believed at his 1991 trial, he has explained throughout his Application why he was not believed at his trial.

The appellant's issues in his Application are actually given weight by Judge Racek's assumptions that his 'Background' statements were factual, because if a District Court Judge can be 'led to believe inaccuracies' or 'swayed' by the prosecutor's misconducts, lies, Brady violations, and misquoting witnesses, then how easily is a Jury going to be 'led to believe' or 'swayed'? This seriously questions the confidence of Tweed's conviction.

In Tweed's application he stated that there are now at least 4 witnesses who will testify that David Sumner admitted that he killed Terry Dorff, and that he will subpoena the 4 witnesses and David Sumner as well to testify at the evidentiary hearing. They are Helmuth Wegner, Todd Suedel, Jason Johnson, and Sheri Johnson. But the evidentiary hearing was denied by the lower court; therefore Tweed is appealing that decision to this court. The new witnesses and their actual presence at an evidentiary hearing are genuine issues of material fact. If this court does not think that it is, than perhaps it can order the lower court to hold an evidentiary hearing on the condition that Tweed supplies the court with sworn affidavits and/or statements as to what they will testify to. Tweed is a pro se litigant and is doing the best he can, but admits he is in over his head, he also feels that the lower court should have granted him an attorney or allowed him the opportunity to amend his application if they seen fault with it. After all, he did enclose that statement in his Application for Post Conviction Relief Docketed December 17th, 2010, on page 3

“Tweed should be granted an attorney, and reserves the right to have himself or his attorney amend this application.”

In Tweed’s Application he pointed out in great detail how the prosecution, at his 1991 trial used improper methods to convict him. The State would only implore such improper methods if they did not have a strong case and desperately wanted a conviction. Dismone v. Phillips, 461 F.3d 181, 196 (2nd Cir. 2006) “The state withheld affidavit of testimony that someone else admitted to the killing was material, because no witness testified that the defendant killed the victim and defendant’s conviction was not supported by overwhelming evidence of guilt.”

The *Dismone* case goes on to state “Statement exculpatory because it would have allowed defense to investigate another party’s involvement.”

The *Dismone* case applies to Tweed because no one ever testified that Tweed killed anyone, however, two witnesses have already testified at David Sumner’s trial that he killed Dorff. The state has withheld the witnesses from Tweed and the statements are material and exculpatory along with the witnesses that surfaced in February 2010. A jury must hear the testimonies of these witnesses and Tweed will be acquitted.

The fore mentioned arguments are in Tweed’s Application and are material. The lower court has erred, or abused it’s discretion in stating “Tweed makes no showing that would negate his culpability in Dorff’s death.”

B) On page 24 of Tweed’s Application for Post Conviction Relief it says “Tweed was in real danger of imminent harm – rape equals harm... A.I.D.S. equals harm. Tweed had no idea if Dorff would produce a weapon to force him into submission, or produce a

weapon to force Tweed into compliance, or shoot or stab Tweed as he was escaping.

Tweed had no time to think about it. At the moment Tweed realized Dorff was naked, he was already being sexually assaulted. Tweed could only act instinctively to stop the assault as quick as he could. This is information the jury should have heard, but Tweed's attorney's devastating error of failing to disclose mitigating circumstances and evidence, undermined Tweed's credibility. Had Tweed's attorney informed the jury of such circumstances and evidence, the outcome of the trial would have been different, as prosecutor's case was not overwhelming."

DeLuca v. Lord, 77 F.3d 578, 590 (2d Cir. 1996) "Determining that counsel's failure to pursue 'Extreme Emotional Disturbance' constituted ineffective assistance when a reasonable probability existed that a jury would have found this defense persuasive and would reduce defendant's liability from second degree murder to first degree manslaughter."

The *DeLuca* case applies to Tweed's case because it is similar to Tweed's in so many ways, from sexual assault to ineffective assistance of counsel. The end result of the *DeLuca* case was that counsel's failure resulted in an unfair trial. Had Tweed's attorney put forth any effort other than mentioning the EED defense in passing, Tweed's liability would have been diminished if not excused completely. The State pulled out all the stops to impeach, discredit, and paint the picture that Tweed was a liar. The evidence against Tweed was not overwhelming so the State had to try and make the jury believe that Tweed was lying, which by itself was not an element of 'AA' murder, but lying would make it appear that Tweed was attempting to 'conceal something' such as his possible guilt or culpability. The State needed the jury to believe Tweed was lying because his

truthful testimony actually diminished his culpability. Even Judge Racek's 'Background' section of his order said that Tweed was not believed because his testimony was not credible. The sad and unfair truth is, Tweed's testimony was only made to **appear** (emphasis added) as not credible, by the prosecution. Everything Tweed testified to was the truth and his statement has never changed. The State went as far as saying Tweed was truthful, but only saying it after they had already tricked the jury and the judge that he was not, and then getting the conviction they wanted.

A jury certainly will weigh the evidence, as only they can, and determine Tweed's level of culpability and his defense, especially when they must consider Sumner's admissions as well as new witnesses. Tweed is certain a new trial will end with different results.

Had the jury believed Tweed's testimony, they would have acquitted him or found him guilty of Manslaughter or Class 'A' Murder. But due to the ineffectiveness of his attorney in combination with the State's maliciously improper tactics, Tweed was found guilty, despite the fact that the state's case was not overwhelming. Tweed is pro se and is trying to paint as clear of a picture as he can.

Anderson v. Sirmons, 476 F.3d 1131, 1148 (10th Cir. 2007) "Counsel's failure to present mitigating evidence at sentencing phase of death penalty trial was ineffective assistance because failure allowed prosecution to successfully argue there was nothing to diminish defendant's culpability even though such evidence was readily available."

The *Anderson* case is like Tweed's because Tweed's original trial attorney failed to present or even investigate mitigating evidence that surely would have diminished Tweed's culpability if he had killed Dorff. The evidence was readily available, but it was

simply and prejudicially not looked for. Tweed still maintains that Sumner murdered Dorff after he left the scene.

Had Tweed been a woman, the sexual assault would have been the focus of the trial and the key to Tweed's defense. Tweed deserves a new hearing with fairness and equal rights with the protection of the 14th Amendment of the U.S. Constitution.

C) At Tweed's 1991 trial his truthfulness was very much an issue. The prosecutor in the case John T. Goff stated to the jury in closing arguments (TR. 426, lines 23-25) "He (Tweed) told you on his direct he wanted to tell the truth. He was scared, confused, and he didn't. But keep that in mind, he didn't tell the truth."

Judge LeClerc, the judge at Tweed's 1991 trial stated (TR. Pg. 460 lines 11-12) "But the defendant's version of what led up to this assault, it's just not credible."

Tweed never had a chance at his original trial because nobody believed him. Neither the prosecutors, nor the judge believed Tweed at his trial, so it is a fair assessment that the jury did not believe him either. No one believed Tweed until a lot of new evidence surfaced **after** (emphasis added) his trial was over.

On February 25th, 1992 John T. Goff said in an interview with Jane Serbus (see Appendix DVD A-17-1) Mr. Goff said, "It would have made a lot of difference if Mr. Tweed had decided to provide truthful testimony, which we believe to be consistent with the way he testified at his own trial."

It's obvious that the two new witnesses Helmuth Wegner, and Todd Suedel in tandem with the "shirt spattered with blood" as new evidence changed the minds of the State and made Tweed believable. Tweed now wants and is entitled to have a jury at a

new trial hear and weigh, as only they can, the same evidence that changed the mind of the state. The lower court has erred in stating “Tweed makes no showing that would negate his culpability in Dorff’s death.” Tweed has obviously shown to have diminished or negated his culpability in Dorff’s death.

D) The statements made by Mark Boening and John Goff after Tweed was convicted, that Tweed is now believable is significant, and raises serious doubt as to the validity of Tweed’s conviction.

U.S. v. Morales, 910 F.2d 467, 468 (7th Cir) “New trial granted because jury convicted defendant of crime carrying long mandatory minimum penalty and complete record left strong doubt as to defendant’s guilt.”

Like the *Morales* case there is strong doubt to Tweed’s guilt and a new trial should be granted. It’s not fair to Tweed for Boening and Goff to convict him by impeaching or discrediting him, and then when they find out he was telling the truth, they still cling on to the conviction anyways. The conviction itself is more important to the prosecution than **who** (emphasis added) is convicted.

E) Tweed was sexually assaulted and self defense is a legal excuse that use of force was necessary.

N.D.C.C. 12.1-05-08, – Self Defense ‘Excuse that use of force necessary’. “Finder of fact is required to use a subjective standard and view circumstances attending an accuser’s use of force from standpoint of accused, and not from standpoint of what a reasonably cautious person might or might not do under like circumstances, to determine if

circumstances are sufficient to create in the accused mind an honest and reasonable belief that use of force was necessary to protect himself from imminent harm.”

Even John Goff at Tweed’s trial admitted that Tweed hitting Dorff was okay. (Original 1991 TR. Pg. 412 lines 16-18) Goff says “Okay, okay fine, and even maybe, if we give him the benefit of he doubt, that punching the guy in the face a couple of times is okay. Fine.” Goff says that self defense was appropriate in Tweed’s case and use of force was excused. The legislature’s intent was to minimize or excuse the level of culpability when use of force is necessary, however, due to Tweed’s attorney’s ineffectiveness, the key to Tweed’s defense disappeared without any meaningful adversarial testing of the prosecutor’s arguments. Had Tweed’s attorney investigated for mitigating, exonerating, exculpatory, or extenuating circumstances prior to the 1991 murder trial, the outcome surely would have been different.

U.S. v. Wade, 388 U.S “The Supreme Court held that the 6th Amendment right to Counsel attaches to “Critical Stages” of pre-trial proceedings.”

The *Wade* case applies to Tweed’s because Tweed did not receive adequate pre-trial counsel, the most critical stages of a case.

Sonnier v. Quarterman, 476 F.3d 349, 357-358 (5th Cir. 2007) “Counsel’s failure to investigate for mitigating evidence was unreasonable strategy because it made it unlikely that effective evidence would be uncovered.”

Sonnier’s case is like Tweed’s because his attorney’s lack of investigating for mitigating evidence made it unlikely if not impossible that effective evidence would be discovered to be applied to Tweed’s defense.

Williams v. Taylor, 529 U.S. 362, 396-399 (2000) “Counsel’s failure to investigate substantial mitigating evidence during sentencing phase of capital murder trial was prejudicial.”

William’s case applies to Tweed’s because Tweed’s attorney did not investigate substantial mitigating evidence which prejudiced Tweed’s case due to the fact that the evidence that would have helped Tweed went unfound and unused; evidence such as self defense, Tweed’s mental state after being sexually assaulted, character witnesses, extenuating circumstances, and exculpatory / exonerating evidence were not investigated, and prejudiced ensued due to the fact that Tweed’s culpability was not negated or minimized with any meaningful argument or investigations from his counsel.

Fisher v. Gibson, 282 F.3d 1283, 1310-11 (10th Cir. 2002) “But for counsel’s devastating errors that undermined defendant’s credibility. There was reasonable probability that outcome would have been different, as prosecutor’s case was not over whelming.”

Fisher’s case applies to Tweed’s because Tweed’s attorney never investigated why his client’s statement upon arrest never matched the forensic report. If he had, the outcome of Tweed’s 1991 trial would have been different because the jury would have believed Tweed. If Mr. Beauchene would have investigated mitigating evidence Tweed’s credibility would have remained intact, and Tweed’s culpability would have been diminished if not negated completely in Dorff’s death. Diminished by showing excused actions had he killed Dorff, and negated by proving by new witnesses and Sumner’s admissions that someone other than Tweed killed Dorff. Only a jury can determine Tweed’s level of culpability and his applicable defense. Tweed is entitled to have a new jury properly weigh these issues, as only they can.

Self Defense does diminish or negate Tweed's culpability in Dorff's death; therefore, the lower court has erred, or abused its discretion in stating "Tweed makes no showing that would negate his culpability in Dorff's death."

At the very least Tweed deserves to have an evidentiary hearing to present evidence and new witnesses that became known after Tweed's trial was over, including two witnesses that became known as recently as February 2010. In the interest of Justice, this Court should remand this case back to the District Court with instructions.

VII. Whether Tweed's 6th and 14th Amendment Rights were violated when he was denied effective assistance of counsel?

A) Mark Beauchene withdrew a 'Motion to Suppress' at hearing on September 10th, 1991 transcript excerpts (see Appendix A-18-1). There was no strategic reason to withdraw that motion. The motion was to suppress Tweed's statement, and would have prevented the State from using any of Tweed's pretrial un-mirandized statements as impeaching evidence. This issue was brought up in Tweed's Application. This decision proved to have severely prejudiced Tweed's case as the State ultimately used Tweed's un-mirandized, pretrial statements against him at his 1991 trial (TR page 426 lines 13-25) John Goff tells the jury "He gave several statements initially when he turned himself in here at the Cass County Sheriff's office. He talked to Budd Warren of the Sheriff's office. He talked to Greg Stone that evening, more or less together, at least initially, and told them he didn't have anything to do with this case, lost his car keys, and that he spent the night, 7th and 8th, early morning of the 8th, at a girl's house, Tammy Berg's, in West Fargo. That's the first statement. And – and – and he told you. He told you on his direct

he wanted to tell the truth, he was scared, confused and he didn't. But keep that in mind: He didn't tell the truth." If Mr. Beauchene never withdrew that motion, the state would not have been able to convince the jury that Tweed was not telling the truth, Tweed was cooperative and honest after he was mirandized, the State has conceded that Tweed's 1991 testimony at his trial was truthful, but unfairly only after Tweed was already convicted.

45 days before Tweed's trial, Mr. Beauchene withdrew the 'Motion to Suppress', that is a decision that demonstrates that Beauchene's actions fell below an acceptable level of a professional as it severely prejudiced Tweed's case by allowing the State to unfairly lead the jury into believing Tweed is a liar who's testimony was merely an attempt to minimize his culpability in Dorff's death. Mr. Beauchene then forced Tweed to take the witness stand for the sole purpose of 'locking him into', or 'solidifying' his statements. Which is an inappropriate tactic by Beauchene, it seems, to aid the prosecution in convicting his client. This is not an acceptable level of a professional and Tweed deserves a new trial.

DeLuca v. Lord, 77 F.3d 578, 590 (2d Cir. 1996) "First, Judge Ward found that, had the EED (Extreme Emotional Disturbance) been adequately explained to her, she would have taken the stand, as had been her intention all along. Second, the judge found that her taking the stand and asserting the EED defense would have been likely to change the result of the trial"

The *DeLuca* case applies to Tweed's case. Because if Mr. Beauchene met with Tweed more than 3 times prior to the 1991 'AA' murder trial, Mr. Beauchene should have explained the EED defense to his client, so Tweed could have taken the stand with

confidence instead of as a scared, confused, and uninformed witness. Tweed had no idea what to expect on the witness stand, he did not even want to take the stand but Mr. Beauchene told him that he had no choice. Had Tweed been explained the defense of EED he would have willingly went to the witness stand and convinced the jury that the sexual assault was an extreme emotional disturbance to him, and the results would have been that the jury would have, at a minimum, minimized his culpability. But Tweed had no idea of the value or the importance of the EED defense, this effectively prejudiced Tweed's case.

The *DeLuca* case also found "There was unquestionably a disadvantage to *DeLuca* taking the stand." Like the *DeLuca* case, there was a strong disadvantage to having Tweed take the stand, especially not knowing what to expect, or even what kind of questions his lawyer would ask.

Had the jury believed Tweed's testimony, they would have acquitted him or found him guilty of Manslaughter or Class 'A' Murder. But due to the ineffectiveness of his attorney in combination with the State's maliciously improper tactics, Tweed was found guilty, despite the fact that the state's case was not overwhelming. Tweed is now pro se and trying to explain things as best as he can. Tweed did not get a fair hearing and is certain that he will be acquitted in a new trial. There is no evidence or witnesses that can prove Tweed committed "AA" Murder. There is ample evidence and witnesses in Tweed's favor, and a new trial with adequate counsel will result in an acquittal.

In Tweed's Application docketed on December 17th, 2010 he supplied many examples of ineffective assistance of counsel. Tweed deserves, at minimum, an evidentiary hearing where he can prove his claims.

The court has further prejudiced Tweed's case by denying him counsel for his post conviction and subsequent appeal to this court (see Appendix A-19-1). By denying Tweed an attorney has compounded the prejudices Tweed has experienced from Cass County. Tweed cannot afford an attorney and feels at a disadvantage. The judge did not say Tweed did not qualify for an attorney, only that he would not give him one. Tweed does not need an attorney to 'drudge up issues' Tweed obviously found several.

On February 10th, 2011 Tweed filed a 'Brief in Support of Request for Counsel'(see Appendix A-2-1), Tweed specifically asked for an attorney to help amend his application. If the lower court judge found it was lacking in some way, he should have allowed Tweed an opportunity to fix it.

Tweed cannot afford an attorney, he called the Lawyer Referral Service at 701-255-1406 but said they could not help him.

CONCLUSION

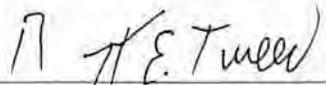
Tweed would like oral arguments scheduled, to support his claims that the court erred or abused it's discretion when it summarily dismissed Tweed's Application.

When viewing this case as a whole, it is apparent that the State seems to be insisting that some, even higher standard then clearly established law should be applied when dealing with Tweed. Certainly there can be no standard in which the State is allowed to lie to the jury and misquote or withhold witnesses, discrediting and/or impeaching Tweed, then bestow him with credibility to convict someone else.

Tweed has clearly demonstrated how the record reflects an unfair trial fraught with prosecutorial misconduct in many forms, in tandem with a grossly ineffective assistance of counsel who never prepared for this case, and never investigated for mitigating, exculpatory, exonerating evidence or extenuating circumstances.

Tweed has shown a reasonable likelihood of a different outcome of a new trial, or how the results of his original trial would have been different if none of the issues Tweed has claimed in his Application were to have happened, and had he received adequate counsel. Tweed's conviction was made against the evidence. Based on the facts of the case and the law Tweed is entitled to have his conviction vacated and granted a new trial, or alternatively remand this case back to district court with instructions and order an evidentiary hearing. Tweed is innocent of murdering Terry Dorff and after 20 years in prison, he deserves an opportunity to prove it. The state will certainly not be able to convict Tweed a second time, because there is no evidence or witnesses that a jury could see or use to convict Tweed of 'AA' murder.

Dated this 1 day of May, 2011.



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