

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Mitchell David Holbach,

Supreme Court Case No. 20110276

Petitioner - Appellant,

Ward County Case No. 51-06-K-2309

-VS-

City of Minot, State of North Dakota,

Respondent - Appellee.

APPELLANT'S BRIEF

Mr. Mitchell David Holbach

John Van Grinsven III

P.O. Box 907

P.O. Box 5005

Minot, ND 58702-0907

Minot, ND 58701-5005

Appellant. (Involuntary pro se.)

Attorney for Appellee

TABLE OF CONTENTS

Page I

TABLE OF AUTHORITIES

Page II.

THE ISSUES

Page i.

THE CASE

Page ii.

THE FACTS

Page iv.

THE ARGUMENT

Page 1-17

THE RELIEF REQUESTED

Page 19

JURISDICTION

Page 18

CERTIFICATE OF SERVICE

Page 19.

TABLE OF AUTHORITIES

The United States Constitution

The Constitution of North Dakota

The Uniform Post Conviction Procedure Act

N.D.C.C. § 27-23-01 (6) Pg 13, 14

State v. Gleason, 619 NW 858, 419 NW 169 Pg 2, 13

Giglio v. United States, 405 U.S. 150, 151-55, 92 S.Ct. 763, 766, 31 L.Ed.2d Pg 2

United States v. White, 724 F.2d 711 (8th Cir. 1984), Pg 2

Alford v. Texas, 355 U.S. 28, 78 S.Ct. 163, 2 L.Ed.2d 9 (1957) Pg 2

Mooney v. Halahan, 299 U.S. 107, 55 S.Ct. 340, 79 L.Ed.2d 217, 710 F.d. 793 Pg 2

Parizet v. State, 2006 ND 61, 711 NW 2d 178 2006 LEXIS ND 55 Pg 4

Hoffarth v. State, 515 NW 2d 146 (1994) Pg 4

Sambrock v. State, 2006 ND 223, 13, 723 NW 2d 524 Pg 4, 5

Rumore v. State, 2006 ND 216, 10, 722 NW 2d 528 Pg 5

Matthews v. State, 2005 ND 202, 10, 706 NW 2d 741 Pg 5

Lara v. State, 2006 ND 187, 9, 705 NW 2d 74 Pg 5, 6

Klose v. State, 2005 ND 192, 10, 705 NW 2d 809 Pg 5

Roth v. State, 2006 N.D. 106, 10, 713 NW 2d Pg 5

Strickland v. Washington, 446 U.S. 668, 104 S.Ct. 674, 104 S.Ct. 2057 (1984) Pg 6

U.S. v. Cronk, 466 U.S. 648, 104 S.Ct. 2034, 80 L.Ed.2d 657 (1984) Pg 6

Brady v. Maryland, 373 U.S. 83, 101 L.Ed.2d 215, 83 S.Ct. 1194 (1963) Pg 10

N.D.C.C. § 28-21-01 Pg 18

Kaiser v. State, 417 NW 2d, 175 (ND 1987) Pg 18

N.D.C.C. § 29-01-25 and N.D.C.C. § 29-01-26 Pg 7-8

THE ISSUES

1. DID THE DISTRICT COURT ERR BY SUMMARILY DISMISSING THE PETITIONER'S APPLICATION FOR POST CONVICTION RELIEF WHERE IT REVIEWED THE RECORD TO DETERMINE WHETHER THERE WAS EVIDENCE SUPPORTING HIS CLAIMS WITHOUT GIVING HIM AN OPPURTUNITY TO DEMONSTRATE THAT THERE WAS A GENUINE ISSUE OF MATERIAL FACT?
2. DID THE DISTRICT COURT ERR BY REFUSING TO DETERMINE PETITIONER'S INDIGENT ELIGIBILITY STATUS FOR COUNSEL TO BE PROVIDED AT PUBLIC EXPENSE?
3. DID THE DISTRICT COURT ERR BY REFUSING TO APPROVE THE ASSIGNMENT OF COUNSEL FOR A PERSON UNABLE TO OBTAIN COUNSEL?
4. DOES AN OBVIOUS ERROR OR ERROR SO FUNDAMENTAL EXIST THAT A NEW TRIAL OR OTHER RELIEF MUST BE GRANTED?

THE CASE

1. Defendant was charged with the offense of trespassing in violation of City of Minot municipal ordinance on October 13, 2006.
2. A jury convicted Defendant on January 5, 2007. Defendant appealed.
3. The North Dakota Supreme Court denied the appeal, entered mandate on July 27, 2007.
4. Defendant filed application for post conviction relief on April 21, 2008.
6. The District Court denied Defendant's application for post conviction relief on January 6, 2009. Defendant appealed.
7. The North Dakota Supreme Court issued an ORDER OF DISMISSAL of Defendant's appeal on May 5, 2010.
8. Defendant filed second application for post conviction relief on December 13, 2010.
9. The District Court summarily denied Defendant's second application on September 16, 2011. Defendant appealed.
10. Hence, Defendant's appeal to the North Dakota Supreme Court.

THE FACTS

1. This case has been extensively litigated. Only the facts pertinent to the issues on appeal will be discussed.

2. On November 16, 2010, Attorney Travis Finck of the Bismarck-Mandan Public Defenders Office, in Criminal Case State v. Holbach, Case No. ST-06-K-0110 issued a Subpoena Duces Tecum upon Minot State University on behalf of this Defendant.

3. Minot State University gave to Defendant documents in response to the subpoena. Among these documents was a version of STATE'S EXHIBIT ONE displaying a memorandum on the lower right-hand corner with signature of the state's witness, Lisa Eriksmoen. This version of STATE'S EXHIBIT ONE had not ever been provided to the Defendant by the Prosecution.

4. Comparing this 'newly discovered evidence' to STATE'S EXHIBIT ONE, the testimony of Lisa Eriksmoen, and the Jury Trial Transcript, Defendant and Defendant's Counsel discovered that the conviction had been obtained by use of fraud, deceit, and perjury committed by Lisa Eriksmoen and the Ward County State's Attorney.

5. Defendant had not been arrested on March 1, 2006.

6. Defendant was never in the Ward County Jail on March 1, 2006.

(EMPHASIS ADDED UNDERLINED)

7. On December 13, 2010, Defendant filed an application for Post Conviction Relief. The state was named as respondent. Applicant requested appointment of counsel.

8. On January 19, 2011, the City Attorney for the City of Minot filed an answer.

9. Hitherto, Defendant filed repeated requests for the assignment of counsel, summary judgment, motion to vacate, complaints and affidavits, requests for transcripts, subpoenas, return of seized property, seized property inventory receipts, petitions for writ of mandamus et. . . et. . . all to no avail. The court ignored all, or failed to properly address the assigned judicial officials negligence, or the assignment of counsel and indigent status review and assignment process mandated by statute.

10. The clerk of court was dilatory in performing her statutory duty.

11. The court was dilatory in executing self-disqualification or recusal, and the reassignment.

12. Defendant was statutorily entitled to counsel and constitutionally entitled to assistance of counsel at public expense, and the assignment thereof, as a qualifying indigent applicant.

13. On September 16, 2011, the Court issued an ORDER denying Defendant's application.

14. Defendant filed this appeal.

ARGUMENT

I. THE DISTRICT COURT ERRED BY SUMMARILY DISMISSING THE PETITIONER'S APPLICATION FOR POST CONVICTION RELIEF WHERE IT REVIEWED THE RECORD TO DETERMINE WHETHER THERE WAS EVIDENCE SUPPORTING HIS CLAIMS WITHOUT GIVING HIM AN OPPORTUNITY TO DEMONSTRATE THAT THERE WAS A GENUINE ISSUE OF MATERIAL FACT.

A. The Defendant invoked the UNIFORM POST CONVICTION PROCEDURE ACT on December 13, 2010. A person who has been convicted of and sentenced for a crime may institute a proceeding applying for relief under this chapter upon the ground that:

(a.) The conviction was obtained or the sentence was imposed in violation of the laws or the Constitution of the United States or of the laws or of the Constitution of North Dakota;

(c.) Evidence, not previously presented and heard, exists requiring vacation of the conviction or sentence in the interest of justice.

Defendant, when put to his proof, presented the following evidence; among other:

1. The AFFIDAVIT OF MICHELE CHRISTIE, Id.
2. The 'newly discovered' version of STATE'S EXHIBIT ONE, displaying the memorandum of Lisa Eriksmoen. Id.
3. Seized Property Inventory Receipt - dated September 15, 2006. Id.
4. Probation and Parole Subject History Report. Id.
5. Saunders Detective Agency Report. Id.
6. Ward County Correctional Center correspondence. In Re: Video records of jail. Id.

The Supreme Court will notice error if it is obvious and affects substantial rights.

SEE: State v. Gleason, 619 NW 858, 419 NW 169

Defendant was not arrested on March 1, 2006. The prosecution's witness testified she had been informed defendant had been arrested on campus on March 1, 2006.

SEE: Jury Trial - City of Minot v. Holbach, Case No. 51-06-k-2309 Tr. pg. 35.

SEE: Affidavit of Michelle Christie - Bismarck - Mandan Public Defenders Office

Defendant was not in the Ward County Jail on March 1, 2006. The prosecution's witness testified she delivered a letter of no trespass, (STATE'S EXHIBIT ONE), to the Ward County Jail where she confirmed that Defendant was indeed in the Ward County Jail.

SEE: Jury Trial - City of Minot v. Holbach, Case No. 51-06-k-2309 Tr. pg. 35-36.

The use of perjury to obtain a criminal conviction violates the Constitution.

Not only is the deliberate deception of the court and jury by the presentation of testimony known to be perjured improper, the prosecution may not allow testimony known to him or her to be false to stand uncorrected.

SEE: Giglio v. United States, 405 U.S. 150, 154-55, 92 S.Ct. 763, 766 31 L.Ed.2d.; United States v. White, 724 F.2d 714 (8th Cir. 1984); Alcorn v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957)

Conviction obtained through use of perjured testimony

SEE: Mooney v. Holohan, 299 US 103, 55 S.Ct. 340, 79 L.Ed.2d. 791 (1935) Id. at 110 55 S.Ct. at 341, 79 L.Ed.2d at 793.

To establish a due process violation set forth in Mooney, Giglio, and their progeny, the witness in question: ① gave testimony, and, ② the prosecutor knew or should have known of its falsity.

In opposition to Defendants Rule 29 Motion For Judgement of acquittal, the prosecution told the court the letter of no trespass (STATE'S EXHIBIT ONE), was written on March 1 and delivered to the jail on March 1 . . . it was addressed to him at the Wood County Jail and it was given the jailer to give to him on that date . . . That's where Miss Eriksmaen had brought it and that's where the defendant was.

SEE: Jury Trial, City of Minot v. Holbach, Case No. 51-06-k-2309, Tr. Pg 49.

The prosecution told the court and jury: "The evidence before you that the state or the city presented is that on March 1 of 2006 Lisa Eriksmaen did deliver a letter of no trespass to the Defendant that is States number 1."

SEE: Jury Trial, City of Minot v. Holbach, Case No. 51-06-k-2309, Tr. pg 60-61.

The prosecution's Final argument brought forth this claim stated to the court and jury: "You have before that the Defendant was in jail on March 1. Miss Eriksmaen personally took this letter to the jail and said, "Give it to Mr. Holbach. I know that this is where he is at."

SEE: Jury Trial, City of Minot v. Holbach, Case No. 51-06-k-2309, Tr. pg. 67

A reckless disregard for the truth, deceit, fraud, and perjury has occurred. Conduct prejudicial to the administration of justice is evident.

Judicial abuse of discretion is that reason or rulings of trial court which are clearly untenable (indefensible) unfairly depriving a litigant of substantial right and denying a just result in matters submitted to the court for litigation.

Actual innocence of Defendant is present, clear, and obvious. IF a Petitioner presents competent evidence, he is entitled to an evidentiary hearing to fully present his evidence.

Trial counsel and prior post conviction counsel were clearly ineffective and inadequate by not obtaining and producing the evidence Defendant was not arrested or in the Ward County Jail on March 1, 2006, rendering all prosecutions claims and allegations impossibilities. The interests of justice must prevail. Defendant raised a genuine issue of material fact, i.e. his whereabouts which puts into dispute the testimony of the witness, and the honesty, truthfulness, and integrity of the witness, the prosecutor, defense counsel, and the court itself. Defendant established a basis for post conviction relief.

The trial court erred in summarily dismissing petitioners application for post conviction relief where it reviewed the record to determine whether there was evidence supporting his claims without giving him an opportunity to demonstrate that there was a genuine issue of material fact.

SEE: Parizek v. State, 2006 ND 61, 711 N.W.2d. 178, 2006 N.D. LEXIS 55 (Mar. 29, 2006)

All reasonable inferences favor the defendant at a preliminary stage of a post conviction proceeding; if a reasonable inference raises a genuine issue of material fact, the defendant is entitled to an evidentiary hearing.

SEE: Hoffarth v. State, 515 N.W.2d 146 (N.D. 1999)

B. The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel.

SEE: Samburst v. State, 2006 ND 223, 13, 723 N.W.2d 524

Defendant claims that trial counsel, post conviction counsel, and all counsel in this case provided to assist Defendant have been ineffective (i.e. not knowing and presenting Defendants date, time, place of arrest and incarceration) prejudicial him. Defendants whereabouts is essential, relevant, material, and admissible. Counsel has been clearly incompetent and grossly negligent. Counsel for Defendant inadequately or deliberately failed to raise issue of Defendants whereabouts on March 1, 2006.

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to effective assistance of counsel.

SEE: *Sambrusk v. State*, 2006 ND 223, 13, 723 N.W.2d 524.

In order to prevail on a post-conviction claim of ineffective assistance of counsel, the petitioner bears a heavy burden.

SEE: *Rummer v. State*, 2006 ND 216, 10, 722 N.W.2d 528.

The petitioner must prove that: ① counsel's representation fell below an objective standard of reasonableness, and, ② the petitioner was prejudiced by counsel's deficient performance.

SEE: *Matthews v. State*, 2005 ND 202, 10, 706 N.W.2d 74.

As to the first prong, the petitioner must overcome the strong presumption that counsel's representation fell within the wide range of reasonable professional assistance.

SEE: *Laird v. State*, 2005 ND 187, 9, 705 N.W.2d 74.

An attorney's performance is measured considering the prevailing professional norms.

SEE: *Sambrusk v. State*, 2006 ND 223, 13, 723 N.W.2d 524.

In assessing the reasonableness of counsel's performance, courts must consciously attempt to limit the distorting effect of hindsight. *Id.* Courts must consider all the circumstances, and decide whether there were errors so serious that defendant was not accorded the "counsel" guaranteed by the Sixth Amendment.

SEE: *Klose v. State*, 2005 ND 192, 10, 705 N.W.2d 809.

In order to meet the second prong, the petitioner must show there is a reasonable probability, but for counsel's unprofessional errors, the results of the proceedings would have been different.

SEE: *ROTH II*, 2006 N.D. 106, 10, 713 N.W.2d 513.

The petitioner must prove not only that counsel's representation was ineffective, but must specify how and where counsel was incompetent and the probable different result.

SEE: *Laib v. State*, 2005 ND 187, 9 705 NW 2d 845

Ineffective assistance of counsel claims must meet the two (2) prong test of: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding. Both parts of the test must be met.

SEE: *Strickland v. Washington*, 446 US 668, 104 S.Ct. 2052 (1984)

The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of the trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversarial process itself presumptively unreliable.

SEE: *U.S. v. Cronk*, 466 US 448, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)

An attorney clearly has a duty to familiarize himself with the discovery materials provided by the state. Counsel's lack of familiarity with the case, combined with his failure to investigate, provided defendant with a trial significantly different than the trial he might have received if represented by competent counsel. There exists, in short, a reasonable probability that the outcome would have been different. Defendant's counsel had a duty to know the date, time, and place of Defendant's arrest. Defendant's counsel clearly had a duty to know the date, time, and place, and duration of Defendant's incarceration. Counsel failed to impeach Lisa Eriksen and to confront the prosecutor's claims, to correct those claims, and to bring to the Court's attention Defendant was not arrested on March 1, 2006, and that Defendant was not in the Ward County Jail on March 1, 2006. As well, post conviction Counsel also failed in this aspect.

Both prongs of the 'Strickland' test are present here.

C. Defendant raised a genuine issue of material fact when he presented the Seized Property Inventory Report, dated September 15, 2006. The evidence contradicts the sworn testimony of the prosecution's witness Kristen Plessas, (Tr. pg 20), who alleged she found the letter of no trespass (i.e. STATES EXHIBIT ONE) in Defendant's vehicle during a probation search. (Tr. pg. 20).

There is no way to determine which letter of no trespass is the original, nor which is a copy.

The Seized Property Inventory Report, dated September 15, 2006 does not list the letter of no trespass (i.e. STATE'S EXHIBIT ONE).

North Dakota Century Code 29-01-25. Receipt to accused and clerk or magistrate. When money or property is taken from a defendant arrested upon a charge of a public offense, the officer taken it at the time shall give duplicate receipts therefor, specifying particularly the amount of the money, or the kind of property taken, one of which receipts the officer shall deliver to the defendant, and the other which the officer shall file at once with the clerk of the court to which the complaint and other papers in the case by law are required to be sent. When such property is taken by a police officer of an incorporated city, the officer shall deliver one of the receipts to the defendant and one with the property, at once to the clerk or other person in charge of the police office in such city, or, if there is no such clerk or other person, then to the magistrate before whom such defendant may be taken for examination and

Non-compliance occurred by the prosecution agent. No docket entry exists in 06K2309 or 06K0110 of the seized property inventory receipt. The seized property was not properly 'in custody' of the proper authority. There was no specific or particular itemization of the seized property.

North Dakota Century Code 29-01-26. Duty of Clerk or Magistrate. The clerk, magistrate, or other person to whom property is delivered, as provided in section 29-01-25, shall record every amount of money and a description of every article of property taken from each person arrested, attach a number to every amount of money and every article of property, and make a corresponding entry thereof. Sufficient compliance with this section is met if the entries are made in the docket of the magistrate after the receipt and property are delivered to a magistrate, as provided in section 29-01-25.

Again, non-compliance with the statutory requirements occurred. Mishandling of the seized property occurred.

Defendant made repeated petitions for the return of his seized property. District Judge Gary Lee issued an ORDER on October 19, 2006, directing the return to the defendant his seized property. District Judge Doug Mattson issued an ORDER, on December 6, 2006, directing the State to prepare an itemized inventory receipt of defendant's seized property and to present receipts to the court and defendant by no later than December 28, 2006.

SEE: State v. Holbach, 51-06-K-0110, Docket # 90; and; Docket # 152. Id.

Again, non-compliance by the prosecution occurred.

Magically, the prosecution claimed to discover the letter of trespass (i.e. STATES EXHIBIT ONE) amongst the seized property, two days prior to trial. Kristen Plessas, alleged she discovered it. At the time she originally searched and seized Defendant's property, she was aware of the 'trespass' allegation made by co-worker Tynia Lluvellyn on August 29, 2006. Kristen Plessas directly accused Defendant of being at Minot State University on September 7, 2006. Defendant denied accusation and told Kristen Plessas he had not been on Minot State University, had no knowledge of such incident, and had been to Taco John's to purchase lunch at the alleged time. (SEE NDPP Subject History Report)

Kristen Plessa, later testified she made 'audio cassette tape recordings' of Defendant probation interviews. Defendant clearly gave an alibi, designating his whereabouts to be somewhere other than alleged the location, (i.e. Tara John's Restaurant - North Broadway,) by video surveillance security cameras, one which directly monitors the cash register and counter where orders are taken.

Defendant has raised an issue of genuine material fact here, several issues in fact. A Brady violation has and continues to occur. Counsel has been ineffective by failing to investigate or impeach Kristen Plessa.

D. The envelope containing the letter of no trespass does not display the STAMP OF RECEIPT of the Wood County Jail. It is the policy, rule, and procedure of the Wood County Jail that all mail must only enter the jail via U.S. Mail or the Wood County Sheriff's office. The general public can not drop off mail.

All mail entering the jail is opened and inspected for contraband by jail staff. The jail employee receiving the mail must enter the date and time received, and enter their name or identifying initials.

Defendant has provided examples to the court of these 'identifiers'

The envelope containing the letter of no trespass does not display any U.S. Postal Service identifiers, such as a stamp or postal tracking code, nor a cancellation of postage, zip code identifier, nothing. It is void of any such "mailing identifiers."

This is a genuine issue of material fact, and one which reflects ineffective assistance by counsel for the defendant.

E. The Sixth Amendment of the Constitution guarantees Defendant the right to confront the witnesses against him. The prosecution has and continues to suppress the identity of the jail employee or employees who received, handled, or delivered the letter (i.e. STATES EXHIBIT ONE.)

Defendant filed a Rule 16 - Discovery request with the prosecution. The Word County Jail has video surveillance security cameras and recording equipment. Video storage archives are maintained for approximately one year.

Video of Lisa Eriksen and the jail employee (S) "delivery" is relevant, material, and admissible evidence. The jail maintains "bookin" logs. ... Video Achieves

The suppression of evidence by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.

SEE: Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S.Ct. 1194 (1963)

F. The prosecution witness, Twyla Llewellyn gave testimony (Tr. pg. 40-45). Contradictions in her testimony exist. Specifically, Twyla Llewellyn alleges she was getting out of her car when she allegedly saw the defendant in her written statement. At trial, she testified differently, stating she had been coming out of a building to go get into her car when she allegedly saw defendant.

Twyla Llewellyn also gave contradictory testimony regarding an "ORDER" prohibiting defendant from being on Minot State University, claiming she knew defendant was 'banned'. No such ban existed.

Further, suppression of the letter of no trespass in 06K0110 occurred. Law enforcement had a copy of STATE'S EXHIBIT ONE, it was not provided by the prosecution to the defense (Brady Violation)

The prosecution knew of the letter of no trespass on July 17, 2006, the day of the sentencing hearing in 06K0110. The Court specifically addressed this matter on the record (Tr. pg. 4-5-6)

again at; (Tr. Pg. 14), (Tr. Pg. 16), (Tr. Pg. 27). The prosecution's silence can only be equated with fraud. Twyla Llewellyn engaged in fraud and made a false claim tantamount to perjury in her testimony at trial.

G. Attorney Travis Finck issued a subpoena duces tecum on Minot State University, on 16 November, 2010. Among the documents provided Defendant was: ① letter of H. Patrick Seaworth - attorney for MSU in response to a SUBPOENA DUCES TECUM, dated 19 December, 2006; ② SUBPOENA DUCES TECUM OF Defendant, issued by attorney Kent Morrow, on 22 December, 2006; and ③ Sheriff's Return = Service of Subpoena Duces Tecum on 12-27-06 at 9:35 a.m. dated 12-28-2006.

Can the government explain how attorney for MSU, H. Patrick Seaworth, responded to a SUBPOENA DUCES TECUM on 12-19-06, that was not prepared till 12-22-06, and was not served until 12-27-06? How could attorney Seaworth respond three (3) days before the SUBPOENA DUCES TECUM was dated, and eight days prior to service?

It is impossible ... unless the fix was in and collusion was occurring to "Frame" Defendant.

H. Further evidence of fraud. A letter dated 2-14-06 by Lisa Erickson, requesting Defendant "meeting" at 2:00 p.m. on 2-14-06 was allegedly mailed on February, 27, 2006 to the Defendant via certified mail. (SEE EXHIBITS OF DEFENDANT - Supplement Answer of Defendant) (Tr. Pg 34 line 1-10). (Tr. Pg 38-39).

It is completely ridiculous to mail a letter dated 2-14-06, requesting a meeting on 2-14-06 at 2:00 p.m., on February, 27, 2006. (i.e. nearly two weeks late!)

Defendant has claimed, and will continue, always and forever, to charge MSU sent him an entirely different letter, which Defendant received by certified mail on or about March 1, 2006.

The government is concealing and suppressing the true letter and the truth!!!

Holbach was incarcerated at the time the trespass was charged. Defendant could not access his papers and effects. After release, following conviction, Defendant drove to Bismarck and presented his "true" certified letter to attorney Kent Morrow on? (M, OT) SEE Kent Morrow - Billable Hours statement (Tr. Pg 11).

I Defendant has raised many new genuine issues of material fact and provided documentary support clearly demonstrating entitlement to an evidentiary hearing. Issues not previously raised are due to attorney's ineffective assistance, gross negligence, and incompetence.

II THE DISTRICT COURT ERRED BY REFUSING TO DETERMINE PETITIONERS INDIGENT ELIGIBILITY STATUS FOR COUNSEL TO BE PROVIDED AT PUBLIC EXPENSE.

A Defendant filed an application for post conviction relief. The state was named as a Respondent (N.D.C.C. 29-32.1-03(1)). Pursuant to N.D.C.C. 29-32.1-03 subsection 6 - "IF the applicant is not represented by counsel, the clerk shall notify the applicant that assistance may be available to persons unable to obtain counsel. The clerk shall also inform the applicant of the procedure for obtaining counsel. Id. (EMPHASIS ADDED UNDERLINED)

N.D.C.C. 29-32.1-05. Counsel at public expense - Applicant's inability to pay costs and litigation expenses.

1. IF an applicant requests counsel and the court is satisfied that the applicant is indigent, counsel shall be provided at public expense to represent the applicant.

SHALL IS MANDATORY (N.D.C.C. 27-23-01, subsection 6.) When the text uses "shall" it is intended to impose binding obligation. (i.e. command)

Here the record is that the clerk was dilatory in performing her statutory duty. Nearly six months elapsed after the application was filed. The applicant filed on December 13, 2010. The clerk filed on June 6, 2011 the "Eligibility of Counsel notice".

Defendant made repeated requests in writing for assistance and assignment of counsel. Defendant submitted applications clearly showing his indigent status. The Court ignored the statutory duty imposed upon it by law. No determination by the court of applicant's indigency status occurred. This is obvious error. No record has been provided to this Defendant of any indigent status determination.

The Supreme Court will notice error if it is obvious and affects substantial rights.

SEE: State v. Gleason, 619 NW 858 / 419 NW 16A

Judicial abuse of discretion is that reason or rulings of trial court which are clearly untenable, unfairly depriving a litigant of substantial right and denying a just result in matters submitted to the court for litigation.

The Court failed to perform its statutorily mandated duty.

Defendant was statutorily entitled to have a determination of indigency.

The Court committed obvious and reversible error by not complying with its statutory duty to determine "indigency."

Defendant is indigent and was entitled to a determination adjudicating indigency.

SEE: Application for Indigent Defense Services - Criminal Cases (pg 5, Id.) NDCC 29-32.1-05 Id.

III. THE DISTRICT COURT ERR BY REFUSING TO APPROVE THE ASSIGNMENT OF COUNSEL FOR A PERSON UNABLE TO OBTAIN COUNSEL

A. On December 13, 2010, filing of Defendant's application for post conviction relief was completed by the clerk of court in which the conviction and sentence took place. The state was named as a respondent. Pursuant to NDCC § 29-32.1-03 (6). IF the applicant is not represented by counsel, the clerk shall notify the applicant that assistance of counsel may be available to persons unable to obtain counsel. The clerk shall also inform the

applicant of the procedure for obtaining counsel.

Defendant repeatedly made requests for counsel assignment. The clerk did not fulfil the clerk's statutory duty until 6 June, a six month delay. This prejudiced Defendant who when put to his proof, was without counsel. Defendant submitted several applications for counsel, identifying this case further delay by the court occurred due to misconduct of District Judge John C. McClintock who failed to automatically and mandatorily disqualify or recuse himself.

N.D.C.C. § 29-32.1-05 Counsel at public expense - Applicants inability to pay costs and litigation expenses.

1. IF an applicant requests counsel and the court is satisfied that the applicant is indigent, counsel shall be provided at public expense to represent the applicant.

The statute imposes a mandatory duty upon the court if the applicant requests counsel. The Court is commanded by law to determine applicants indigency status. IF the applicant is indigent, counsel shall be provided at public expense to represent the applicant.

Shall is mandatory. When the text uses "shall" it is intended to impose binding obligation.

SEE: N.D.C.C. § 27-23-01 (6)

The Uniform Post Conviction Procedure Act sets forth specific steps of proceeding. The Court failed to perform a statutorily mandated step. Obvious and reversible error has occurred. The Court abused its discretion by excluding a statutory step of procedure sua sponte. The Court denied Defendant due process. Defendant was not arrested or in Ward County Jail on March 1, 2006. Defendant's whereabouts is a question of material fact.

IV. AN OBVIOUS ERROR OR ERROR SO FUNDAMENTAL EXIST THAT
A NEW TRIAL OR OTHER RELIEF MUST BE GRANTED.

A. Defendant was not arrested "on campus" on March 1, 2006. Defendant was not in the Ward County Jail on March 1, 2006. Defendant never received any letter of no trespass from any employee of the Ward County Jail on March 1, 2006, or at any time! The prosecution's claims and the testimony do not fit the facts. The true facts make the government's claims an impossibility and totally implausible. How could this be overlooked-ignored?

B. City ordinances are inapplicable and unenforceable to "State" property. Municipalities have no authority to regulate "State" property. Municipalities have no jurisdiction to regulate 'State property' its use or enjoyment by the general public.

Defendant was charged with trespassing on 'State' property (i.e. Miami State University) pursuant to a municipal ordinance.

IF such application is valid, then municipalities could regulate state highways, or any state property, within their jurisdiction, or Federal property, (EXAMPLES GIVEN), Air Buses, State Parks, National Parks, State Universities, ect.

The conviction and sentence imposed upon Defendant is null and void.

A jurisdictional defect exists constituting obvious error.

The City of Miami has no jurisdiction or standing to enforce its municipal ordinances upon state property, or to prosecute this case. It cannot be a party to this action.

A court reviews an appeal from a summary denial of post conviction relief as it reviews an appeal from a summary judgement.

N.D.C.C. § 29-32.1-04 provides the requirements for an application for post conviction relief under the Uniform Post Conviction Procedure Act. A petitioner must set forth a concise statement of each ground for relief, and specify the relief requested, refer to the pertinent portions of the record of prior proceedings, and if those portions are not in the record, the petitioner may attach affidavits or other supporting materials to the application, but they are unnecessary. A petitioner is not required to provide evidentiary support for his petition until he has been given notice he is being put to his proof. At that point, the petitioner may not merely rely on the pleadings or an unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raise an issue of material fact. If the petitioner presents competent evidence, he is entitled to an evidentiary hearing to fully present his evidence.

The party opposing a motion for summary judgement is entitled to all reasonable inferences at the preliminary stages of a post conviction proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact. Here it is Defendant, whereabouts on March 1, 2006 and the perjury, deceit, fraud, misrepresentation, and conduct prejudicial to the administration of justice committed by the prosecution and its witnesses.

A genuine issue of material fact exists if reasonable minds could draw different inferences and reach different conclusions from the undisputed facts.

Defendant was not arrested on March 1, 2006, a prosecution claimed

Defendant was not in jail on March 1, 2006, as prosecution claimed

A trial court may, on its own initiative, and the cautious exercise of its discretion, dismiss a complaint for failure to state a claim under N.D.R. Civ. Proc. 12(b). Such power must be exercised sparingly and with great care to protect the rights of the parties, and a trial court should dismiss under Rule 12(b) only when certain it is impossible for the plaintiff to prove a claim for which relief can be granted.

Here, Defendant produced an Affidavit of Nicole Christie, proving Defendant's whereabouts are other than what prosecution presented and claimed.

A summary dismissal of a post-conviction proceeding application is analogous to dismissal of a civil complaint under N.D.R. Civ. P. 12(b) for failure to state a claim upon which relief can be granted.

N.D.C.C. § 29-32.1-09 (1) provides summary judgment standard.

The State was not entitled to summary judgment as Defendant raised a genuine issue of material fact, (i.e. his whereabouts), and provided supporting affidavit, (i.e. evidence), putting into dispute the material facts and inferences put forth by the government at trial, (i.e. manifest injustice) and clearly demonstrating actual innocence of Defendant, and revealing government misconduct at all levels.

Defendant provided numerous documents, support (i.e. evidence) when put to his proof.

JURISDICTION

N.D.C.C. § 29-32.1-14. Review. A Final judgement entered under this chapter may be reviewed by the supreme court of this state upon appeal as provided by rule of the supreme court.

N.D.C.C. § 28-21-01. Appeals to the supreme court. A judgement or order in a civil action or in a special proceeding in any of the district courts may be removed to the supreme court by appeal as provided in this chapter.

N.D. Constitution Article Six subsection six. Appeals shall be allowed from decisions of lower courts to the supreme court as may be provided by law.

In construing an appeal statute, the language and context thereof, the purpose to be obtained, and the relative interests and rights of the parties in the subject matter involved must be considered.

Statutes conferring the right to appeal must be liberally construed, and in determining appeal ability, it is not the label which controls but rather the effect.

SEE: Kaiser v. State, 417 N.W.2d, 175, (N.D., 1987.)

This is an appeal from the ND Dist. Court from a final order denying post conviction relief to the ND S.Ct.

WHEREFORE, Mitchell David Holback, requests the following relief

1. Vacation of the Judgement and Conviction.
2. Complete exoneration.
3. Apology by government, by publication.
4. Such other relief appropriate
5. New Trial.

Dated this 24th day of October, 2011

By: Mitchell D. Holback

Mitchell David Holback

P.O. Box 907

Mindel, ND 58702-0907

CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2011, a copy of Appellant's Brief was mailed by First-class U.S. Mail at Mindel ND, to:

John Van Griensven

P.O. Box 5005

Mindel, ND 58702-5005

Original to: N.D. Sup. Ct.

600 East Boulevard Ave

Bismarck, ND 58505-0500

OCT 26 2011

TO: North Dakota Supreme Court

600 East Boulevard Avenue

Bismarck, ND 58505-0530

FROM: Mr. Mitchell David Holbach

P.O. Box 907

Minot, ND 58702-0907

DATE: 26 October 2011

RE: Holbach v. Cal. of Minot, Ward County Cas. SI-06-E-2309 ; Supreme Court Case No. 20110276

Please find enclosed the Appellant's Brief.

I am unable to provide an appendix or eight copies due to conditions of my incarceration, my poverty, and the failure of the District Court and clerk.

I have made repeated requests for transcripts and documents. I submitted subpoenas. The District Court and clerk refuse to provide to me the documents and transcripts I requested.

I can only provide one copy of my Appellant's Brief, which is 26 pages long. I must pay .25¢ for each page to the jail per photocopy page. This amounts to \$5.50 for one copy. Eight (8) times (x) 5.50 = \$44.00

An Appendix would be far in excess of this cost due to the volume of the docket, and several additional documents, and affidavits, submitted in support of my appeal for post-conviction relief.

I am indigent and cannot afford these costs which exceed my annual (past year) inmate account deposit. I exist on \$20 per entry.

two months or \$10 a month given to me as gifts from my family so I can buy stamps to write them and phone card time to call them and my son.

I am outraged by the cruel, callous and indifferent conduct to treat me this way!!!

I am locked up in an institution that has no law library, provides no materials. I am destitute and passively stricken due to the wrongs committed against me.

I AM INNOCENT!!!

It is beyond my ability to provide the required \$800 plus appellate.

I am entitled to relief.

The Court is abusing the process & oppresses me due to my poverty.

First, I am being denied counsel. Then, told I must provide what is beyond my financial abilities.

I request my appeal be heard on the record without reproducing any part on my behalf.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Mitchell David Holbach, Petitioner-Appellant,	Supreme Court Case No. Ward County Case No. SI-06-k-2300
- VS -	EX PARTE
City of Minot, State of North Dakota, Respondent-Appellee,	NOTICE OF PROCEEDING IN FORMA PAUPERIS ON APPEAL DUE TO POVERTY INDIGENCY AND CONDITIONAL OF INCARCERATION

TO THE STATE OF NORTH DAKOTA PROSECUTING ATTORNEY

NOTICE IS HEREBY GIVEN, the Petitioner-Appellant is a indigent, imprisoned and destitute,

I have no income, assets, bank accounts, or own any property, of material value. Due to my poverty,

I can only provide the one original of my Appellants-Brief to the court. My poverty, complicate
my ability to comply with the Rule of Appellant-Procedure, the Rule of Court.

I cannot afford photocopies, paper envelopes, or postage costs without undue hardship.

I believe I am entitled to relief.

Dated: 21 October 2011 By: Mitchell D. Holbach

Mitchell David Holbach

P.O. Box 907

Minot, ND 58702-0907

The District Court and clerk refuse to provide me copies of transcripts, documents or the Etc. in case
of my requests. I am unable to comply with court rules due to insufficient availability
of legal law library, materials such as paper, calculators, writing tools, supplies, stamps, photocopies,
due to conditions of incarceration and poverty, I am unable to file an appendix.