

20120209

20120211

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA  
Supreme Court No. 20120209 & 20120211  
District Court No. 46-08-K-00041 & 46-08-K-00042

DARIN WAYNE DAHL )  
)  
APPELLANT, )  
)  
-VS- )  
)  
STATE OF NORTH DAKOTA, )  
)  
APPELLEE. )  
)

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

AUG 16 2012

STATE OF NORTH DAKOTA

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**SUPPLEMENTAL BRIEF OF INDIGENT DEFENDANT**

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APPEAL FROM POST CONVICTION HEARING  
HELD MARCH 29, 2012, AND ORDER DENYING POST  
CONVICTION RELIEF, ENTERED ON APRIL 25, 2012,  
HONORABLE STEVEN MARQUART, PRESIDING

Darin Wayne Dahl # 24574  
Box 5521  
Bismarck, ND 58506

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### **JURISDICTIONAL STATEMENT**

In East Central District Court Cases No. 46-08-K-00041 & 46-08-K-00042 were DENIED by the Honorable Steven Marquart on the 7<sup>th</sup> day of April 2012. The Defendant, Darin Wayne Dahl, filed a Notice of Appeal to the North Dakota Supreme Court in a timely matter on the 26<sup>th</sup> day of April 2012. The North Dakota Supreme Court has Jurisdiction.

### **ISSUES**

1. Did the court err when it did not have a Prima Facie Case?
2. Did the trial court commit reversible error when it denied Dahl's Application for Post Conviction Relief?

### **STATEMENT OF THE CASE**

3. On April 10, 2008, Darin Dahl allegedly committed the crime of Reckless Endangerment @ about 4 a.m. and allegedly committed the crime of Attempted Murder @ about 11 a.m. in Steele County North Dakota.
4. On April 21, 2008, Darin Dahl was charged in Steele County District Court with Reckless Endangerment and Attempted Murder.
5. Following pleas of not guilty, Dahl was convicted by a jury on both charges on June 5, 2009. He filed a Notice of Appeal to the North Dakota Supreme Court. On Appeal, the convictions were affirmed on June 10, 2010.
6. On August 26, 2011, Dahl filed an application for Post Conviction Relief alleging ineffective assistance of trial and appellate counsel, denial of fair trial because of the use of Hearsay Evidence and Prejudicial Influences to the Jury, and New Evidence.

A hearing on the application was held on March 29, 2012, before the Honorable Steven Marquart, District Judge.

7. On April 7, 2012, The Court entered its Memorandum Opinion, Findings of Facts, Conclusions of Law and Order for Judgment, denying the Application for Post Conviction Relief.
8. On April 26, 2012, Dahl filed a Notice of Appeal to the North Dakota Supreme Court.

#### **STATEMENT OF FACTS**

9. The pertinent and relevant facts surrounding the underlying conviction were addressed in *North Dakota v. Darin Wayne Dahl*, 2010 ND 108, 783 N.W.2d 41.
10. On April 9 and 10, 2008, Dahl was the suspect of a police standoff in a rural Steele County residence. During the standoff, Dahl allegedly shot at and missed a police officer deploying chemical munitions into the house, leading to the charge of reckless endangerment. Also during the standoff Dahl allegedly shot and hit an officer who had entered the residence in an attempt to arrest Dahl, leading to the charge of attempted murder. In the afternoon of April 10, 2008, Dahl voluntarily surrendered and was arrested for a Griggs County charge of reckless endangerment.
11. NDSP psychiatrist Dr. A.F. Samuelson testified on March 29, 2012 that Dahl was severely mentally ill on March 31, 2009.

#### **LAW AND ARGUMENT**

12. The court erred when it did not have a Prima Facie Case.
13. The trial court committed reversible error when it denied Dahl's application for Post Conviction Relief.

14. North Dakota Century Code § 29-32.1-01 provides the grounds or bases for seeking Post Conviction Relief. In his application, Dahl listed as grounds for relief, ineffective assistance of trial and appellate counsel, denial of fair trial because of the use of Hearsay Evidence and Prejudicial Influences to the Jury, and New Evidence.

15. North Dakota Century Code § 12.1-04.1-01 states:

**§ 12.1-04.1-01 Standard for Lack of Criminal Responsibility**

1. An individual is not criminally responsible for criminal conduct if, as a result of mental disease or defect existing at the time the conduct occurs:

A. The individual lacks substantial capacity to comprehend the harmful nature or consequences of the conduct, or the conduct is the result of a loss or serious distortion of the individual's capacity to recognize reality; and

B. It is an essential element of the crime charged that the individual act willfully.

2. For purposes of this chapter, repeated criminal or similar antisocial conduct, or impairment of mental condition caused primarily by voluntary use of alcohol beverages or controlled substances immediately before or contemporaneously with the alleged offense, does not constitute in itself mental illness or defect at the time of the alleged offense. Evidence of the conduct or impairment may be probative in conjunction with other evidence to establish mental illness or defect.

16. The defense proffered by trial counsel was Dahl's Lack of Criminal Responsibility to commit the crime, as evidence by the Notice of Defendant's Intent to Raise an Affirmative Defense on June 18, 2008. A hearing was held on the notice of May 29, 2009.

17. The state's evaluator, Dr. Robert Lisota, failed to testify. The independent evaluator, Dr. Stacey Benson, did testify at the hearing that Dahl Lacked Criminal Responsibility. Dahl's right to confront the witness was violated at a crucial point of the proceedings. Dahl's right to cross-examine the witness to determine the validity of the report was violated. This violated Dahl's Fifth, Sixth & Fourteenth Amendment Confrontation Clause and Due Process Rights. *Pointer v. Texas* 380 U.S. 400, 13L Ed 2d 923, 85 S. Ct. 1065 (5<sup>th</sup> Cir.1965); *Delaware v. Van Arsdall* 475 U.S. 673, 89L. Ed. 2d 674,106 S. Ct. 1431 (3<sup>rd</sup> Cir.1986).
18. The Fifth, Sixth & Fourteenth Amendment of the United States Constitution and Article I, § 12 of the North Dakota Constitution guarantee a criminal defendant effective assistance of counsel.
19. North Dakota Century Code § 12.1-04.1-10 states:

**§ 12.1-04.1-10 Reports by mental health professionals and expert witnesses.**

A mental health professional retained by the prosecuting attorney and a mental health professional whom the defendant intends to call to testify at trial shall prepare a written report concerning any examination of the defendant and other pretrial inquiry by or under the supervision of the mental health professional. Any other individual whom either party intends to call at trial as an expert witness on any aspect of the defendant's mental condition shall prepare a written report. A report under this section must contain:

1. The specific issues addressed.
2. The identity of individuals interviewed and records or other information used.

3. The procedures, tests, and techniques used.
4. The date and time of examination of the defendant, the explanation concerning the examination given to the defendant, and the identity of each individual present during the examination.
5. The relevant information obtained and findings made.
6. Matters concerning which the mental health professional was unable to obtain relevant information and the reasons therefore.
7. The conclusions reached and the reasoning on which the conclusions were based.

20. Court appointed attorney Blake Hankey failed to object to Dr. Robert Lisota's statement at the May 29, 2009 competency hearing where Dr. Lisota was absent and was required to testify. This violated Dahl's Fifth, Sixth & Fourteenth Amendment Confrontation Clause and a violation of Due Process. Dr. Lisota's statement is Hearsay Evidence. The State did not have a Prima Facie Case. *Pointer v. Texas* 380 U.S. 400, 13L Ed 2d 923, 85 S. Ct. 1065 (5<sup>th</sup> Cir.1965); *Delaware v. Van Arsdall* 475 U.S. 673, 89L. Ed. 2d 674,106 S. Ct. 1431 (3<sup>rd</sup> Cir.1986); *U.S. v. Gold*, 790 F.2d 235, 238 (2d. Cir. 1986); *U.S. v. Ewing*, 494 F.3d 607,622-23 (7<sup>th</sup> Cir. 2007); *U.S. v. Martinez*, 446 F.3d 878, 881-82 (8<sup>th</sup> Cir. 2006); *U.S. v. Hemsli*, 901 F.2d 293, 295-96 (2d Cir. 1990); *U.S. v. Ghane*, 490 F.3d 1036, 1040-41 (8<sup>th</sup> Cir. 2007); *U.S. v. Friedman*, 366 F.3d 975, 980-81 (9<sup>th</sup> Cir. 2004); *Interest of T.E., Daisy Van Valkenburg M.D., Petitioner and Appellee v. T.E.*, 2008 ND 86; 748 N.W. 2d 677; 2008 N.D. Lexis 88 (2008).

21. North Dakota Century Code § 12.1-04.1-12 states:

**§ 12.1-04.1-12 Use of Reports at Trial.**

Use at trial of a report prepared by a mental health professional or other expert governed by the North Dakota Rules of Evidence. A report of a mental health professional or other expert furnished by the defendant pursuant to section 12.1-04.1-10 may not be used at trial unless the mental health professional or other expert who prepared the report has been called to testify by the defendant.

22. Dr. Robert Lisota failed to testify at the May 29, 2009 competency hearing therefore giving total credit to Dr. Stacey Benson's testimony. The State did not have a Prima Facie Case.

23. NDSH psychiatrist Dr. Robert Lisota's statement was hearsay evidence under North Dakota Court Rules Rule 801, Rule 802, Rule 803 overrides sub.(3), (4), Rule 804 A(5), and is a violation of the Fifth, Sixth & Fourteenth Amendment Confrontation Clause and a violation of Due Process. Rule 803 (6), Rule 403; *Patterson v. Hutchens*, 529 N.W. 2d 561 (1995); *Air Land Founders, Inc. v. U.S.* 172 F.3d 1338; 1999 U.S. App. Lexis 5632; 51 Fed. R. Evid. Serv. (Callaghan) 419 (Fed.Cir.1999).

24. Court appointed attorney Blake Hankey failed to raise the issue that Dahl was not competent to stand trial. *U.S. v. Frank*, 956 F.2d 872, cert. denied, 113 S.Ct. 363 (1992); *U.S. v. Blohm*, 579 F.Supp. 495 (1983).

25. Court appointed attorney Blake Hankey failed to present evidence of Dahl's diminished mental capacity due to fact that Dahl was being held in the Special Assistance Unit during Trial.

26. Court appointed attorney Blake Hankey failed to object that Dahl was fitted with a standard prison uniform during June 2-4, 2009 trial, which violated Dahl's right to a fair and impartial trial. This prejudiced the jury until the final day June 5, 2009 where Dahl was fitted with an orange jumpsuit and spit mask; *Roche v. Davis*, 291 F. 3d 473, 483 (7<sup>th</sup> Cir. 2002).
27. Court appointed attorney Blake Hankey failed to object to Dahl not being physically present in the court room during cross-examination of Dr. Robert Lisota. Dahl was not able to confront Dr. Lisota as a witness on June 5<sup>th</sup> at the June 2-5, 2009 trial due to the fact that the State feared Dahl's orange jumpsuit and spit mask would prejudice the jury. This is a violation of Dahl's Fifth, Fifth, Sixth & Fourteenth Amendment Confrontation Clause and is a violation of Due Process in order to assist his attorney, Blake Hankey, in cross-examination to sustain grounds for impeachment. The defendant shall exercise the right to confront the witness face to face. *Pointer v. Texas* 380 U.S. 400, 13L Ed 2d 923, 85 S. Ct. 1065 (5<sup>th</sup> Cir.1965); *Delaware v. Van Arsdall* 475 U.S. 673, 89L. Ed. 2d 674,106 S. Ct. 1431 (3<sup>rd</sup> Cir.1986); *Plaintiff and Appellee v. Eldin Nino Komad*, 2006 N.D. 177, 720 N.W. 2d 619, 2006 N.D. Lexis 184 (2006); *Becker v. Cain*, 8 N.D. 615, 80 N.W. 805 (1899); *State v. Haynes*, 7 N.D. 70, 72 N.W. 923 (1897); *McMillan v. Aitchison*, 3 N.D. 183, 54 N.W.1030 (1893) .
28. Court appointed attorney Joel Lyle Larson failed to raise meritorious issues on Direct Appeal including Hearsay on the May 29, 2009 competency hearing and that Dahl's Fifth, Sixth & Fourteenth Amendment Confrontation Clause was violated, this is a violation of Due Process in order to sustain grounds for impeachment. *Pointer v. Texas* 380 U.S. 400, 13L Ed 2d 923, 85 S. Ct. 1065 (5<sup>th</sup> Cir.1965); *Delaware v. Van*

*Arsdall* 475 U.S. 673, 89L.Ed. 2d 674,106 S. Ct. 1431 (3<sup>rd</sup> Cir.1986) ; *Plaintiff and Appellee v. Eldin Nino Komad*, 2006 N.D. 177, 720 N.W. 2d 619, 2006 N.D. Lexis 184 (2006); *Becker v. Cain*, 8 N.D. 615, 80 N.W. 805 (1899) ; *State v. Haynes*, 7 N.D. 70, 72 N.W. 923 (1897); *McMillan v. Aitchison*, 3 N.D. 183, 54 N.W.1030 (1893).

29. Dahl was prejudiced by the jury due to the fact that he was hand-cuffed and shackled throughout his trial, Dahl's hand-cuffs and shackles were visible to the jury pool in which the jurors were picked, this is a violation of Dahl's Fifth & Fourteenth Amendment of Due Process. Dahl had an unfair advantage where he couldn't take written notes of the witnesses testimony. *Deck v. Mo.*, 544 U.S.622, 628 (8<sup>th</sup> Cir. 2005); *DeLeon v. Strack*, 234 F. 3d 84, 88 (2d Cir. 2000); *U.S. v. Waldon*, 206 F. 3d 597, 607 (6<sup>th</sup> Cir. 2000); *Davidson v. Riley*, 44 F. 3d 1118, 1119 (2d Cir. 1995).
30. North Dakota State Penitentiary psychiatrist Dr. Albert F. Samuelson testified on March 29, 2012 that Dahl was suffering from an acute form of Paranoid Schizophrenia on March 31, 2009 which is a chronic mental illness prior to trial. This diagnosis was between the times that NDSH Dr. Robert Lisota and independent psychiatrist Dr. Stacey Benson reached their conflicting conclusions. Dr. A.F. Samuelson testified that Dahl was not feigning a mental illness and that Samuelson has over 50 years of experience in the psychiatry field. This gives more credit to the accuracy of Dr. Benson's conclusions and less credit to the accuracy of Dr. Lisota's conclusions.

Q. What was that diagnosis?

A. Paranoid – Schizophrenia, Paranoid Type, Yes

Q. I'm assuming under DSM-IV that qualifies as mental illness?

A. Yes

Q. Did it appear in your opinion that he was feigning that?

A. Oh, No, No. I did not believe that. None of us at the prison believed that he was feigning. We were dealing with a real live very, very disturbed young man. And we see those types of cases very, very frequently in the prison setting.

Q. So just to clarify for the record now with that exhibit having refreshed your memory, you've probably saw Mr. Dahl around March 31 of 2009, not the fall of 2009.

A. Yes

Q. Did it appear to you that this Paranoid Schizophrenia was longstanding?

A. Well, it certainly appeared to be an acute, severe form of the illness.

SEE: Exhibit 1

31. Tr. p.14 ¶1-2; 6-8; 17-23, p.16 ¶ 15-18, p.16 ¶ 15-18, p.17 ¶ 13-16

32. Dahl was in a waxed stage of Paranoid Schizophrenia until after trial when he was prescribed with anti-psychotic medications, **Risperidone** and **Benztropine**, by JRCC psychiatrist Dr. Daisy Van Valkenberg on June 11, 2009 until when he was deemed to be released from the Special Assistance Unit in August of 2009 in Jamestown, ND where Dahl was under observation by a team of Doctors including psychiatrist Dr. David Johnson.

33. Affidavit in support of Motion for Reconsideration. See: appendix

34. Affidavit in support of the North Dakota Supreme Court's decision ¶ 18.

SEE: appendix

## CONCLUSION

35. The court erred when it did not have a Prima Facie Case.

36. The trial court erred when it denied Dahl's application for Post Conviction Relief

### **Statement for Additional Grounds for Review**

The Appellant / Petitioner, Darin W. Dahl, hereby submits this Supplement Brief of Indigent Defendant pursuant to NDR App. P Rule 24 (a) (1) and shows to the court the following additional grounds that he believes should be considered in this appeal which are not addressed in his attorney Kent M. Morrow's brief submitted to this court on July 27, 2012 and August 6, 2012.

#### **A. Ineffective assistance of Trial Council.**

1. Court appointed attorney Blake Hankey failed to object to Dr. Lisota's statement at May 29, 2009 competency hearing where Dr. Lisota was absent and was required to testify thereof under N.D.C.C §12.1-04.1-10 and §12.1-04.1-12.; See *U.S. v. Gold*, 790 F.2d 235, 238 (2d. Cir. 1986); *U.S. v. Ewing*, 494 F.3d 607,622-23 (7<sup>th</sup> Cir. 2007); *U.S. v. Martinez*, 446 F.3d 878, 881-82 (8<sup>th</sup> Cir. 2006); *U.S. v. Hems*, 901 F.2d 293, 295-96 (2d Cir. 1990); *U.S. v. Ghane*, 490 F.3d 1036, 1040-41 (8<sup>th</sup> Cir. 2007); *U.S. v. Friedman*, 366 F.3d 975, 980-81 (9<sup>th</sup> Cir. 2004); *Interest of T.E., Daisy Van Valkenburg M.D., Petitioner and Appellee v. T.E.*, 2008 ND 86; 748 N.W. 2d 677; 2008 N.D. Lexis 88 (2008).
2. Court appointed attorney Blake Hankey failed to present evidence of Dahl's diminished mental capacity due to fact that Dahl was being held in the Special Assistance Unit during trial.
3. Court appointed attorney Blake Hankey failed to object that Dahl was fitted with a standard prison uniform during trial, which violated Dahl's right to a fair and impartial trial; *Roche v. Davis*, 291 F. 3d 473, 483 (7<sup>th</sup> Cir. 2002).
4. Court appointed attorney Blake Hankey failed to object to Dahl not being physically present in the court room during cross-examination of Dr. Robert Lisota. Dahl was not able to Confront Dr. Lisota as a witness at the June 2-5, 2009 trial. This is a violation of Dahl's Fifth, Sixth & Fourteenth Amendment Confrontation Clause, this is a

violation of Due Process in order to assist his attorney, Blake Hankey, in cross-examination to sustain grounds for impeachment. *Pointer v. Texas* 380 U.S. 400, 13L Ed 2d 923, 85 S. Ct. 1065 (5<sup>th</sup> Cir.1965); *Delaware v. Van Arsdall* 475 U.S. 673, 89L. Ed. 2d 674,106 S. Ct. 1431 (3<sup>rd</sup> Cir.1986); *Plaintiff and Appellee v. Eldin Nino Komad*, 2006 N.D. 177, 720 N.W. 2d 619, 2006 N.D. Lexis 184 (2006); *Becker v. Cain*, 8 N.D. 615, 80 N.W. 805 (1899); *State v. Haynes*, 7 N.D. 70, 72 N.W. 923 (1897); *McMillan v. Aitchison*, 3 N.D. 183, 54 N.W.1030 (1893).

5. Court appointed attorney Blake Hankey failed to raise issue that Dahl was not competent to stand trial. *U.S. v. Frank*, 956 F.2d 872, cert. denied, 113 S.Ct. 363 (1992); *U.S. v. Blohm*, 579 F.Supp. 495 (1983).

#### **B. Ineffective assistance of Appellant Council.**

1. Court appointed attorney Joel Lyle Larson failed to raise meritorious issues including hearsay on May 29, 2009 competency hearing and that Dahl's Fifth, Sixth & Fourteenth Amendment Confrontation Clause was violated, this is a violation of Due Process in order to sustain grounds for impeachment. *Pointer v. Texas* 380 U.S. 400, 13L Ed 2d 923, 85 S. Ct. 1065 (5<sup>th</sup> Cir. 1965); *Delaware v. Van Arsdall* 475 U.S. 673, 89L. Ed. 2d 674,106 S. Ct. 1431 (3<sup>rd</sup> Cir.1986); *Plaintiff and Appellee v. Eldin Nino Komad*, 2006 N.D. 177, 720 N.W. 2d 619, 2006 N.D. Lexis 184 (2006); *Becker v. Cain*, 8 N.D. 615, 80 N.W. 805 (1899); *State v. Haynes*, 7 N.D. 70, 72 N.W. 923 (1897); *McMillan v. Aitchison*, 3 N.D. 183, 54 N.W.1030 (1893).

#### **C. Dahl was denied a fair trial because of the use of Hearsay Evidence.**

1. NDSH psychiatrist Dr. Lisota's statement was hearsay evidence under Court Rules Rule 801, Rule 802, Rule 803 overrides sub.(3), (4), Rule 804 A(5), and is a violation of the Fifth, Sixth & Fourteenth Amendment Confrontation Clause and Due Process; Rule 803 (6), Rule 403; *Patterson v. Hutchens* 529 N.W. 2d 561 (1995); *Air Land Founders, Inc. v. U.S.* 172 F.3d 1338; 1999 U.S. App. Lexis 5632; 51 Fed. R. Evid. Serv. (Callaghan) 419 (Fed.Cir.1999).

#### **D. Dahl was denied a fair trial because of prejudicial influences to the Jury.**

1. Dahl was prejudiced by the jury due to the fact that he was handcuffed and shackled throughout his Trial, this is a violation Dahl's Fifth & Fourteenth Amendment Rights of Due Process; *Deck v. Mo.*, 544 U.S.622, 628 (8<sup>th</sup> Cir.2005); *DeLeon v. Strack*, 234 F. 3d 84, 88

(2d Cir. 2000); *U.S. v. Waldon*, 206 F. 3d 597, 607 (6<sup>th</sup> Cir. 2000);  
*Davidson v. Riley*, 44 F. 3d 1118, 1119 (2d Cir. 1995).

**E. New Evidence.**

1. NDSP psychiatrist Dr. A.F. Samuelson stated Dahl was severely mentally ill prior to Trial.
2. JRCC psychiatrist Dr. Daisy Van Valkenburg prescribed psychiatric medication on 6-11-2009.

Dated this 14 day of August, 2012.



Darin W. Dahl #24574  
Box 5521  
Bismarck, ND 58506



**CERTIFICATE OF SERVICE BY MAIL**  
 DEPARTMENT OF CORRECTIONS & REHABILITATION  
 PRISONS DIVISION  
 SFN 50247 (Rev. 04-2001)

STATE OF NORTH DAKOTA )  
 ) SS.  
 COUNTY OF BURLEIGH )

The undersigned, being duly sworn under penalty of perjury, deposes and says: I'm over the age of eighteen years and on the 16 Day of August, 2012, 3 PM, I mailed the following:

1- petition - Supplemental Brief of Indigent Defendant

1- petition - Appendix to Supplemental Brief of Indigent Defendant

by placing it/them in a prepaid envelope, and addressed as follows:

Kent M. Morrow  
 Attorney at Law  
 411 N. 4th Street #6  
 Bismarck, ND 58501

Charles Stock  
 Steele County States Attorney  
 P.O. Box 355  
 Finley, ND 58230-0355

and depositing said envelope in the Mail, at the NDSP, P.O. Box 5521, Bismarck, North Dakota 58506-5521.

AFFIANT

*R. D. H.*

P.O. Box 5521  
 Bismarck, North Dakota 58506-5521

Subscribed and sworn to before me this

16th

day of

August

, 2012.

Notary Public

*[Signature]*

My Commission Expires On

PATRICK SCHATZ  
 Notary Public  
 State of North Dakota  
 My Commission Expires Oct. 31, 2014