

SUPREME COURT NO.20130064  
BURLEIGH COUNTY DISTRICT COURT CASE NO.08-06-K-01275IN THE SUPREME COURT  
STATE OF NORTH DAKOTARobert A. Gray  
Petitioner and Appellant,

vs.

State of North Dakota  
Respondant and Appellee.

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STATEMENT OF ADDITIONAL GROUNDS  
under Rule 24 (Supplemental Brief of Indigent Defendant)

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## SUPPLEMENTAL BRIEF

Appeal from the Findings of Fact, Conclusions of Law, and  
Order from the District Court, Burleigh County, North Dakota,  
Denying Petitioner's Application for Post-Conviction Relief.Submitted this 20<sup>th</sup> day of May, 2013.Robert A. Gray  
JRCC-18464  
2521 Circle Drive  
Jamestown, ND 58401

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## STATEMENT OF ISSUES

A. Whether the District Court erred when it failed to correct a due process violation and obvious error, which was discovered when Bismarck Police Officer Timothy Krous ("Officer Krous") Offered new evidence by recanting his earlier false testimony, and whether the prosecution had a duty to promptly disclose or give notice that this new evidence by testimony of Officer Krous created a reasonable likelihood that Appellant is actually innocent of the offense of Escape (Count-2) in this matter.

B. Whether the District Court erred when it failed to allow Appellant to With-draw his plea of guilty on the offense of terrorizing (Count-1) and enter a plea of not guilty, as with the newly discovered evidence by the Private Investigator clearly shows ineffectiveness of counsel, a due-process claim and a Manifest Injustice. And whether the prosecution failed in its affirmative duty to learn of and disclose the prior criminal history of the alleged victim, whether requested or not by Appellant's counsel, and whether there is a reasonable likelihood, with this new evidence, that Appellant is actually innocent of the offense of terrorizing (Count-1).

## LAW AND ARGUMENT

¶1. The District Court's denial of Appellant's application for post-conviction relief was improper as Appellant presented a sufficient basis upon which relief could be granted. Post-conviction relief proceedings are civil in nature. Heckelsmiller v. State, 2004 ND 191, ¶5, 687 N.W.2d 454. A petitioner seeking post-conviction relief bears the burden of establishing grounds for that relief. Steen v. State, 2007 ND 123, ¶11, 736 N.W.2d 457. A trial court's finding of fact in a post-conviction relief proceeding will not be disturbed unless they are clearly erroneous. Greywind v. State, 2004 ND 213, ¶7, 689 N.W.2d 390; see N.D.R.Civ. P. 52(a). A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or, even if there is some evidence to support it, a reviewing court is left with a definite and firm conviction that a mistake has been made. Heckelsmiller, 2004 ND 191, ¶5, 687 N.W.2d 454

A. Whether the District Court erred when it failed to correct a due process violation and obvious error, which was discovered when Bismarck Police Officer Timothy Krous ("Officer Krous") offered new evidence by recanting his earlier false testimony, and whether the prosecution had a duty to promptly disclose or give notice that this new evidence by testimony of Officer Krous created a reasonable likelihood that Appellant is actually innocent of the offense of Escape (Count-2) in this matter.

¶2. The Honorable Bruce B. Haskell, Judge of the Burleigh County District Court, was the Judge during the original proceedings and the Revocation of Probation proceedings. On the 3rd day of January, 2013, Judge Haskell recused himself from this matter. see Docket Sheet/Register of Actions, Supplemental Appendix ("S.App.") Page ("P.") 007, Doc. ID #169. On the 5th day of January, 2013, the

Honorable Thomas J. Schneider, Judge of the Burleigh County District Court, was assigned as the Judge in this Post-Conviction Relief Proceeding. see Docket Sheet/Register of Actions, S.App.P. 007, Doc. ID #170.

¶3. On the 25th day of January, 2013, before the Honorable Thomas J. Schneider a Hearing was held on Appellant's Application for Post-Conviction Relief ("Application Hearing") at the Burleigh County Courthouse. see Transcripts of Post-Conviction Hearing ("Tr. Post-Conviction") S.App.P. 049-130.

¶4. The Honorable Thomas J. Schneider, had less than twenty (20) Days to read over 800 pages of evidence, 190 documents and multiple transcripts, in order to be prepared for the Application Hearing. The fact is Judge Schneider state's multiple times during the Application Hearing that he had not been able to read all the Papers, and states that he would read the pertinent and relevant papers at a later-time. see Tr. Post-Conviction, S.App.P. 90, Line ("ln.") 19-20; P. 94, ln. 10-18; P. 128, ln. 6-10.

¶5. During the Preliminary Hearing, which was held on the 28th day of August, 2006, before the Honorable Bruce B. Haskell, Officer Krous, after having been first duly sworn, was examined by Lloyd Suhr, Assistant Burleigh County State's Attorney, and testified that:

Q. "At any point in time after he was taken into physical custody was he place under arrest?" see Transcripts of Preliminary Hearing ("Tr.Prelim."), S.App.P. 150,ln. 25; P. 151, ln. 1.

A. "He was. After gathering the reports, I went down to the hospital and met with Officer Hughes, informed him that we were going to be charging Mr. Gray with terrorizing and

disorderly conduct. I asked Officer Hughes if he had been told if he was placed under arrest and he stated he did not. I went in and spoke to Robert--or Mr. Gray, and initially Robert asked me right away--he said "Am I being charged with anything" and I said "Yes. You're being charged with and you're under arrest for terrorizing and disorderly conduct." He asked me if any of them were a felony, at which point I told him that terrorizing was a felony." see Tr. Prelim., S. App. P. 151, ln. 2-10.

during the Cross-Examination by Wayne Goter, Appellant's Court Appointed Counsel, Officer Krous testified that:

Q. "Your department, or one of your officers, filed an emergency petition for committal, right?" see Tr. Prelim., S.App. P. 154, ln. 7, 8.

A. "I believe so." see Tr. Prelim. S.App. P. 154, ln. 9.

Q. "And that was the reason why Robert was in the hospital originally?" see Tr. Prelim. S.App. P. 154, ln. 10, 11.

A. "Originally he was taken there for the medical and for the psych evaluatin for stabbing himself in the neck." see Tr. Prelim. S. App. P. 154, ln. 12,13.

Q. "And there were no papers indicating an arrest had been issued--or no warrants? You had just said what you're saying here, you had told him there was going to be a charge?" see Tr. Prelim. S. App. P. 154, ln. 14-16.

A. "Correct. Correct. He was informed that he was placed under arrest for terrorizing." see Tr. Prelim. S. App 154, ln. 17, 18.

¶6. During the Post-Conviction Relief Hearing, which was held on the 25th day of January, 2013, before the Honorable Thomas J. Schneider, Officer Krous, again, after first being sworn, testified on his oath during Cross-Examination by Adam Fleischman, Appellant's Counsel for the Post-Conviction Relief Proceeding, testified that:

Q. "Officer, did you place Mr. Gray under arrest at the scene?" see Tr. Post-Conviction S.App P. 091, ln. 1, 2.

A. "No I did not." see Tr. Post-Conviction S. App. P. 091, ln. 3.

Q. "But you weren't the one to actually initiate the arrest,

or place him--say he was arrested?" TR. Post-Conviction S. App. P. 092, ln. 2, 3.

A. "No." Tr. Post-Conviction S. App. P 092, ln. 4.

¶7. Clearly Officer Krous never placed Appellant under arrest for the offense of terrorizing (Count-1). And when looking to the Bismarck Police Department Reports, see S. App. 135-144, it is also clear that no Officer placed Appellant under arrest at the scene prior to transport to St. Alexius Medical Center. The only Officer who was of the opinion that Appellant was placed under arrest at the Medical Center was Officer Dan Hudhes. see S. App. P. 139, Paragraph-5, ln. 5, 6: see also Supplemental Affidavit to Affidavit of Robert Gray in Support of Amended Application for Post-Conviction Relief. S. App. P. 040, (6). But Officer Krous while under sworn oath of the Court, during the Preliminary Hearing testified that:

"I asked Officer Hughes if he had been told he was placed under arrest and he stated he did not." see Tr.Prelim. S. App. P. 151, ln. 4, 5; see also Supplemental Affidavit to Affidavit of Robert Gray in Support of Amended Application for Post-Conviction Relief. S. App. P. 040, (7).

¶8. Appellant's claim that he was not arrested on the terrorizing charge (Count-1) is supported by the Amended Application for Post-Conviction Relief. see S. App. P. 018-026; Affidavit of Robert Gray, in Support of Amended Application for Post-Conviction Relief-Escape (Count-2), see S. App. P. 028-034; Affidavit of Robert Gray, of Additional Grounds, see S. App. P. 035-038; Supplemental Affidavit to Affidavit of Robert Gray in Support of Amended Application for Post-Conviction Relief, see S. App. P. 039-041; 2nd Affidavit of Robert Gray of Additional Grounds, see S. App. P. 042-044, and; the Defense Exhibits-1 thru 16, 19 and 2nd Affidavit Exhibit-1, see S. App. P. 131-217.

¶9. But for the earlier false testimony, that Appellant was placed under arrest at the Medical Center, by Officer Krous, no reasonable District Court Judge would have found probable cause of an offense of Escape from the offense of terrorizing, which had no papers produced indicating an arrest was made.

¶10. Clearly Appellant's due-process rights have been violated by Officer Krous's use of false testimony. see Mesaeosh v. U.S., 352 U.S. 1 Led 20, 77 S.Ct. 1 (1959)("the dignity of the U.S. Government will not permit the conviction on tainted evidence") see also; U.S. v. Haese, 162 F.3d, 5th Cir. (1999)("Defendants conviction must be reversed on due-process grounds where Government knowingly elicits or fails to correct materialy false statements from its witnesses"); Phillips v. Woodford, 1267 F.3d 966, 6th Cir. (2001)("If officers use false evidence including false testimony to secure a conviction, the defendants due-process rights are violated").

¶11. The Due Process Clause of the Fifth Amendment provides in pertinent part that "no person shall...be deprived of life, liberty, or property with out due process of law" United States Constitution Amendment V. The Fourteenth Amendment imposes this same limitation on the State of North Dakota. see Constitution Amendment XIV.

¶12. With this new, credible, and material evidence, the recanting of the earlier testimony of Officer Krous, there is reasonable likelihood that Appellant did not commit the offense of Escape, which Appellant was convicted of by a plea of guilty, on advise of Appointed Counsel. This new, credible, and material evidence creates a due process challenge to the sufficiency of the evidence. Clearly with this new evidence no jury could draw an inference

reasonably tending to prove guilt and fairly warranting conviction on the offense of Escape.

"A conviction rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt after reviewing the evidence in a light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor." State v. Charette, 2004 ND 187, ¶7, 687 N.W.2d 484 (quoting State v. Knowels, 2003 ND 180, ¶6, 67, N.W.2d 816).

¶13. Appellant asserts that his due-process right on the offense of Escape has been violated because the State's Key Witness, Officer Krous, has provided new, credible, and material evidence, which is contradictory to his original testimony at the Preliminary Hearing, and that without his original testimony at the Preliminary Hearing, the evidence would have been insufficient to sustain a finding of probable cause on the offense of Escape, let alone a conviction by plea of guilty on advise of Counsel.

¶14. The due-process clause prohibits the conviction of an accused "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). In this appeal setting, this Court must consider whether, after viewing this new, credible and material evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. see Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed. 560 (1979); see also; Evans v. Luebbers, 371 F.3d 438, 441 (8th Cir. 2004).

¶15. Appellant's argument that he was not arrested on the underlying offense of terrorizing (Count-1) was improperly denied. Clearly

the offense of Escape (Count-2) is no longer supported by any evidence, and therefore the District Court ruling in this matter was clearly erroneous. And with this new evidence, the recanting by Officer Krous of his earlier false testimony, there is now a definite and firm conviction that a mistake has been made.

Heckelsmiller, 2004 ND 191, ¶5, 687 N.W.2d 454.

¶16. With this new, credible, and material evidence, that Appellant was not placed under arrest on the offense of terrorizing, Appellant's claim of Actual Innocence warrants special attention.

"Protection of due-process against conviction except upon proof beyond a reasonable doubt is not limited to those facts which, if not proved, would wholly exonerate the defendant." Mullany v. Wilber, 421 U.S. 684 n.3 (1975).

"The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless. Under our system of criminal justice, even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar. Jackson v. Virginia, 443 U.S. 307, 323-24 (1978).

Every single element of a crime must be proved beyond a reasonable doubt for conviction to satisfy due-process. Id. at U.S. 316.

¶17. The State's argument, that Appellant was placed under arrest for the offense of terrorizing (Count-1) is clearly not supported by the new, credible, and material evidence. And Appellant has demonstrated that the earlier false testimony by Officer Krous resulted in a conviction of one who is actually innocent of the offense of Escape (Count-2). Therefore Appellant has interest in relief, as he is innocent of the charge for which he is incarcerated. see Jones v. Delo, 56 F.3d 878, 883 (8th Cir. 1995). No Reasonable juror would have found Appellant guilty beyond a reasonable doubt with this "new evidence." see House v. Bell, 126 S.Ct.

2064, 2077 (2006); Schlup v. Delo, 513 U.S. at 327 (1995) (Schlup "standard").

"It must be presumed that a reasonable juror would consider fairly all the evidence presented. It must also be presumed that such a juror would conscientiously obey the instructions of the trial court requiring proof beyond a reasonable doubt. Schlup, 513 U.S. at 329.

this standard requires this Court to make a probabilistic determination about what reasonable properly instructed jurors would do. Id. at U.S. at 328.

"Under Jackson, the use of the word 'could' focuses the inquiry on the power of the trier of fact to reach its conclusion. Under Carrier, the use of the word 'would' focuses the inquiry on the likely behavior of the trier of fact." Id. at U.S. at 330.

¶18. Here no reasonable juror would have found Appellant guilty beyond a reasonable doubt on the offense of Escape (Count-2), with the new, credible, and material evidence. With Officer Krous recanting his earlier false testimony the evidence is now insufficient to establish guilt on each and every element of the crime of Escape (Count-2), and Appellant would be deemed factually innocent of the offense of Escape (Count-2). see Jackson, *supra*, 443 U.S. at 323-324.

¶19. Appellant's claim of actual innocence here on the offense of Escape (Count-2) is both procedural and substantive in nature, as Appellant's claim is based on actual innocence, the District Court at the Post-Conviction Relief Hearing not being fully prepared, and Appellant's contention that the ineffectiveness of his Counsel [Strickland]...denied Appellant the full parity of protections afforded to criminal defendants by the North Dakota and United States Constitution.

¶20. It is clear that there is a Miscarraige of Justice here and the imposition of the sentence on the offense of Escape (Count-2) is unreasonably harsh and shocking to the conscience of a reasonable person, with due consideration of the totality of the circumstances. This clearly is a Manifest Injustice and in the Interest of Justice, this Court must notice this plain error, and that it affected Appellant's substantial rights. This plain error clearly affected the fairness, integrity and public reputation of the judicial proceeding on the offense of Escape (Count-2) here, and is a serious injustice and must be reversed in the Interest of Justice. see Rule 52(b), N.D.R.Crim.P.; see also State v. Rindy, 229 N.W.2d 783, 785 (N.D. 1980); State v. Olander, 1998 ND 50, 575 N.W.2d 658.

¶21. The prosecutor at the Post-conviction Relief Hearing, Lloyd Suhr, Assistant Burleigh County State's Attorney, was also the prosecutor during the Preliminary Hearing. Mr. Suhr was made aware at the Post-Conviction Relief Hearing that Officer Krous recanted his earlier false testimony. Mr. Suhr has a duty to promptly inform and disclose the existence of this new, credible, and material evidence to the Court, as this new, Credible, and material evidence clearly proves Appellant did not commit the offense of Escape (Count-2). see North Dakota Rules of Professional Conduct-Rule 3.8, which states:

"(g) when a prosecutor knows of new, credible, and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted:

(2) if the conviction was obtained in the prosecutor's jurisdiction.

(i) promptly disclose the existence of that evidence to

the defendant unless a court authorized delay, and  
(ii) undertake further investigation or cause an investigation to determine whether the defendant was convicted of an offense that the defendant did not commit.  
(h) when a prosecutor knows of or receives clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, seek to undo the conviction.

#### COMMENTARY

Once the prosecutor knows of clear and convincing evidence that the defendant was convicted of an offense that the defendant did not commit, the prosecutor must seek to undo the conviction. Necessary steps may include disclosure of the evidence to the defendant, requesting that the court appoint counsel for an unrepresented indigent defendant, and where appropriate, notifying the court that the prosecutor has knowledge that the defendant did not commit the offense of which the defendant was convicted."

¶22. The failure here of Lloyd Suhr to inform and disclose this new, credible, and material evidence, which is clear and convincing that Appellant did not commit the offense of Escape (Count-2) is prosecutorial misconduct, as a "lawyer holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional rule of lawyer." North Dakota Rules of Professional Conduct-8.4, commentary. This improper conduct by Lloyd Suhr violated the Appellant's due-process rights, and once Lloyd Suhr knew of this new evidence a misconduct occurred and Lloyd Suhr operated under an actual conflict of interest in any further prosecuting or arguing of the offense of Escape (Count-2). This failure clearly shows Lloyd Suhr was highly motivated to obtain a conviction. Lloyd Suhr has a duty in a prosecution to seek **JUSTICE**. see Berger v. U.S., 295 U.S. 78, 88 (1935).

¶23. "Prosecutorial Misconduct implicates due-process concerns."

see Foy v. Donnelly, 959 F.2d 1307, 1316 (5th Cir. 1992). Actions by a prosecutor may violate due process in two ways: "They may abridge a specific right conferred by the Bill of Rights, or may constitute a denial of due process generally, thus constituting a 'generic substantive due process violation.'" Id. (quoting Rogers v. Lynaugh, 848 F.2d 606, 608 (5th Cir. 1988)).

¶24. The record on appeal here does not support, with this new, credible, and material evidence, that Appellant committed the offense of Escape (Count-2). Therefore the prosecution here can no longer prove the elements of this offense. see State v. Bohl, 317 N.W.2d 790 (N.D. 1982), and it is now the duty of the prosecution to correct and dismiss the offense of Escape (Count-2), and the failure to do so denies Appellant due process of law in violation of both the North Dakota and United States Constitution.

B. Whether the District Court erred when it failed to allow Appellant to with-draw his plea of guilty on the offense of terrorizing (Count-1) and enter a plea of not guilty, as with the newly discovered evidence by the Private Investigator clearly shows ineffectiveness of counsel, a due-process claim and a Manifest Injustice. And whether the prosecution failed in its affirmative duty to learn of and disclose the prior criminal history of the alleged victim, whether requested or not by Appellant's counsel, and whether there is a reasonable likelihood, with this new evidence, that Appellant is actually innocent of the offense of terrorizing (Count-1).

¶25. The Sixth Amendment to the United States Constitution guaranteeing to criminal defendant the effective assistance of counsel, applied to the states through the Fourteenth Amendment, and the North Dakota Constitution Article I, §12. see DeCoteau v. state, 2000 ND 44, ¶10, 608 N.W.2d 240. In accordance with the two prong test established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct.2052, 80 L.Ed.2d 674 (1984),

"a defendant must satisfy both a 'performance prong' and a 'prejudiced prong.'" Stoppeworth v. State, 501 N.W.2d 325, 327 (N.D. 1993).

¶26. This Court has indicated that on a claim of ineffective assistance of counsel, the following must be proven:

1. [C]ounsel' representation fell below an objective standard of reasonableness, and
2. The defendant was prejudiced by counsel's deficient performance.

Clark v. State, 2008 ND 234, ¶12 758 N.W.2d 900 (citations omitted).

"Effectiveness of counsel is measured by an 'objective standard of reasonableness' considering 'prevailing professional norms.'" Id. at ¶12 (citing Lange v. State, 522 N.W.2d 179, 181 (N.D. 1994), (quoting Strickland, at 688)).

¶27. The prejudice element requires a showing of "reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Flanagan v. State, 2006 ND 76, P7, ¶17, 712, N.W.2d 602 (citing Heckelsmiller v. State, 2004 ND 191, ¶4, 687 N.W.2d 454. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.)

¶28. In the original proceeding on the offense of terrorizing (Count-1), Appellant's Appointed Counsel's representation fell below an objective standard. Appellant's Counsel failed to do what a reasonable attorney representing Appellant would do. Appellant's Counsel at the original proceeding failed to:

\*Prepare Appellant's defense competently, with the needed legal knowledge, skill, thoroughness and preparation reasonably necessary for effective representation. see North Dakota Rules of Professional Conduct-Rule 1.1. Here Appellant's Counsel failed to:

- 1.) Interview, attempt to interview or depose key witnesses, Linda Gibbons, Eric Neff and Adam Gibbons. Wayne Goter,

Appellant's Counsel during the original proceeding, testified upon sworn oath at the Post-Conviction Hearing, when questioned during cross-examination by Adam Fleischman, Appellant's Post-Conviction Counsel that:

Q. "...Did you at any time interview or attempt to interview Mr. Neff or any of the witnesses?" Tr.Prelim.S.App. P.078, ln. 23, 24.

A. "Not Mr. Neff. And, you know, when I was talking to Mr. Suhr yesterday, something clicked that I had talked to Linda Gibbons." Tr.Prelim.S.App. P078, ln. 25; S.App. P.079, ln. 1, 2.

After testifying at the Post-Conviction Hearing Mr. Goter left the courtroom and returned a few moments later and informed both the Prosecution and Mr. Fleischman that he had just spoke to Linda Gibbons and that he had testified incorrectly, as he had never spoke to Linda Gibbons before.

2.) Obtain legally relevant facts from Appellant. Here Mr. Goter failed to pursue the fact that Eric Neff, the alleged victim, had punched Appellant twice prior to the incident.

see Testimony under sworn oath by officer Krous at the Preliminary Hearing:

Q. "And Eric says he tried to throw-he threw punches at Robert?" Tr.Prelim.S.App. P. 154, ln. 2.

A. "...That he had threw punches at him-In fact, I believe he stated that he did land a punch or two." Tr.Prelim.S.App. P. 154, ln. 4, 5.

Had Mr. Goter pursued any of the facts Appellant informed Mr. Goter of, Mr. Goter would have discovered that the alleged victim was twenty (20) years younger, six (6) or seven (7) inches taller, and almost one-hundred (100) pounds heavier than Appellant. Also, Mr. Goter would have discovered that the angry, younger, and stronger alleged victim had started the altercation by hitting Appellant twice, and Appellant

acted in self-defense. Further, Mr. Goter would have discovered that the alleged victim had left the scene of the altercation once and returned to start the altercation again. In fact the time the alleged victim returned, he returned with his wife and child. Mr. Goter would have discovered that the alleged victim was the aggressor and the alleged victim, Mr. Neff was not at any time placed in fear of his life or his safety during the altercation.

3.) Properly review the exhibits made available by the State, and try to locate the criminal history reports of all Key State Witnesses. Here Mr. Goter failed to request, discover or locate the criminal history of Mr. Neff, the alleged victim.

4.) Ask a qualified expert to investigate or to investigate on his own, any possible defense, including but not limited to:

\* Self-defense

\* Justification

Here Mr. Goter failed to hire an investigator, or to ever investigate on his own any possible defense. see Strickland v. Wahsington, 466 U.S. at 690; see e.g., Dugas v. Coplan, 428 F.3d 317, 332 (1st Cir. 2005)(counsel's failure to investigate possible defense was ineffective assistance).

¶29. Appellant asserts that his due-process right on the offense of terrorizing (Count-1) has been violated because with the new, credible, and material evidence, which is contradictory that Eric Neff was the victim here.see Investigative Report, S.App. P 207-217. Had Mr. Goter discovered this criminal history report or had the Prosecution supplied the defense with this criminal history report, no rational trier of fact could have found the essential

elements of the crime of terrorizing beyond a reasonable doubt.  
see Jackson, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.560 (1979);  
see also evans, 371 F.3d 438, 441 (8th Cir. 2004).

¶30. Mr. Goter's lack of reasonable diligence to produce exculpatory evidence, and the lack of a strategy, resulting from this lack of diligence in preparation and investigation is not protected by the presumption in favor of counsel. see Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir. 1991), and Appellant was prejudiced by pleading guilty to a crime he did not commit in ineffective advice of Mr. Goter.

¶31. Appellant was DENIED his right to effective assistance of counsel, under the Sixth Amendment to the Constitution of the United States. Mr. Goter failed Appellant in almost every aspect of his duty, and the record before this Court bears out that, with these issues Appellant has established a reasonable probability that, but for the unprofessional errors of Counsel, the result of the proceeding would have been different. Also Appellant has demonstrated with specificity how and where trial counsel was incompetent. see State v. Burke, 2000 ND 24, ¶36, 606 N.W.2d 108. Had Mr. Goter done even a perfunctory job there is a very good chance Appellant would not have been convicted.

¶32. Appellant's claim of ineffectiveness of Mr. Goter is supported by the following:

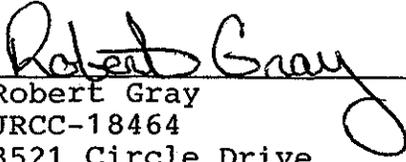
- \*Amended Application for Post-Conviction Relief. S.App.P. 009-027.
- \*Affidavit of Robert Gray, of Additional Grounds. S.App.P.035-038.
- \*Affidavit of Robert Gray in Support of Amended Application for Post-Conviction Relief. S.App. P. 045-048.
- \*Defense Exhibit-1, through 2nd Affidavit Exhibit-1, S.App. P. 131-217.

¶33. Burleigh County Assistant States Attorney, Lloyd Suhr did

engage in Prosecutorial Misconduct, by failing to disclose the alleged victim's prior criminal history. This is a clear Brady violation, and whether it was willfully or inadvertently suppressed matters not. see U.S. v. Bagley, 473 U.S. 667, 68 (1985). The Fifth and Fourteenth Amendments required the Prosecution to disclose evidence to Appellant. see Brady, 373 U.S. 83, 87 (1963). There is a reasonable probability that the outcome of Appellant's original proceeding would have been different had the Prosecution disclosed the alleged victim's prior criminal history, which show a pattern of assaults see S.App. P. 207-217. And because of this misconduct Appellant was Prejudiced. see Stickler v. Greene, 527 U.S. 263, 281-82 (1999). Appellant's claim of the Prosecution's Brady violation is Supported by 2nd Affidavit of Robert Gray of Additional Grounds. see S.App. P. 042-044.

¶34. The record on appeal here does not support, with this new, credible, and material evidence, coupled with ineffectiveness of counsel, that Appellant committed the offense of terrorizing (Count-1). Therefore there is a clear Manifest Injustice as Appellant is Actually Innocent of terrorizing, and the failure to correct and dismiss the offense of terrorizing denies Appellant due-process of law in violation of both the North Dakota and United States Constitution.

Dated this 20<sup>th</sup> day of May, 2013.

  
Robert Gray  
JRCC-18464  
3521 Circle Drive  
Jamestown, ND 58401

Blake Hankey

MAY 24 2013

RECEIVED

CERTIFICATE OF SERVICE BY U.S. MAIL

I DO HEREBY CERTIFY THAT on the 21<sup>st</sup> day of May, 2013, I placed the following in the United States Mail at Jamestown, North Dakota, 58401.

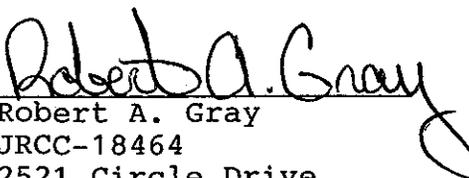
Statement fo Additional Groundsd, under Rule 24 (Supplemental Brief of Indigent Defendant)

Addressed as follows:

Blake D. Hankey  
Hankey Law Office  
Attorney for Petitioner and Appellant  
405 Bruce Ave., Suite-100  
Grand Forks, ND 58201

Lloyd Suhr  
Assistant State's Attorney  
514 E. Thayer Ave.  
Bismarck, ND 58501

Dated this 21<sup>st</sup> day of May, 2013.

  
Robert A. Gray  
JRCC-18464  
2521 Circle Drive  
Jamestown, ND 58401

Subscribed and sworn to before me this 21 day of May, 2013, in Stutsman County, North Dakota.



JULIE MUNKEBY  
Notary Public  
State of North Dakota  
My Commission Expires June 11, 2015

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

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ROBERT A. GRAY,	)	
	)	Supreme Court No. 20130064
Petitioner and Appellant,	)	
	)	Burleigh County District Court
v.	)	South Central Judicial District
	)	Case No. 08-06-K-01275
STATE OF NORTH DAKOTA,	)	
	)	
Respondent and Appellee.	)	

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**CERTIFICATE OF SERVICE  
BY E-MAIL**

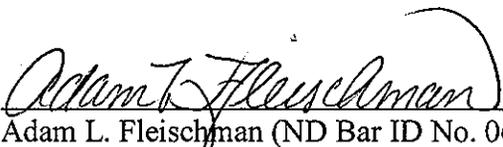
The undersigned, being of legal age and an officer of the court says that on May 24, 2013, he served true and correct copies of the Petitioner and Appellant's Rule 24 Supplemental Brief (Statement of Additional Grounds) dated May 20, 2013, electronically through e-mail from [bhankeylaw@gmail.com](mailto:bhankeylaw@gmail.com) to:

**Lloyd C. Suhr, Esq. (Attorney for Appellee)**

Burleigh County State's Attorney's Office  
Burleigh County Courthouse  
514 E. Thayer Ave.  
Bismarck, ND 58501

E-mail: [bc08@nd.gov](mailto:bc08@nd.gov)

Dated this 24<sup>th</sup> day of May, 2013.

  
Adam L. Fleischman (ND Bar ID No. 06145)  
HANKEY LAW  
405 Bruce Avenue, Suite 100  
Grand Forks, ND 58201  
Ph. (701) 746-4529 / Fax (701) 746-4729