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STATE OF NORTH DAKOTA

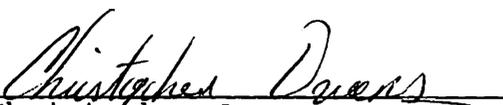
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SUPREME COURT
STATE OF NORTH DAKOTA
DEC 15 2014

CHRISTOPHER J. OWENS,)	
)	
Petitioner/Appellant,)	Supreme Court No. 20140282
)	
vs.)	District Court No.
)	08-2012-CV-01673
STATE OF NORTH DAKOTA,)	
)	
Respondent/Appellee.)	
)	

SUPPLEMENTAL RULE 24 STATEMENT

Appeal from Judgment Denying Petitioner's Application
For Post-Conviction Relief, Entered on July 23, 2014,
by the Burleigh County District Court, South Central
Judicial District, State of North Dakota, The Honorable
David E. Reich Presiding.


 Christopher Owens
 JRCC-36849
 2521 Circle Drive
 Jamestown, ND 58401

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[¶3] SUPPLEMENTAL RULE 24 ISSUE

[¶4] WHETHER APPELLANT'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION HAVE BEEN VIOLATED

[¶5] STATEMENT OF THE CASE

[¶6] Appellant does accept and agree that the STATEMENT OF THE CASE in APPELLANT'S AMENDED BRIEF, which was filed and served by and through appointed counsel Samuel A. Gereszek, is correct in it's statements.

[¶7] STATEMENT OF THE FACTS

[¶8] Appellant does accept and agree that the STATEMENT OF THE FACTS in APPELLANT'S AMENDED BRIEF, which was filed and served by and through appointed counsel Samuel A. Gereszek, is correct in it's statements.

[¶9] LAW AND ARGUMENT

[¶10] Appellant's argument falls under the catagory of ineffective assistance of counsel. Ineffective assistance of counsel at any phase of a criminal proceeding, if proven, violates a defendant's Sixth Amendment rights to a fair trial and adequate representation. That Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. VI.

[¶11] A claim of ineffective assistance of counsel essentially states that, even though Appellant had legal representation, that counsel was deficient to the point of negation Appellant's Federal Constitutional Rights to be represented by competent counsel, and that the actions of counsel prejudiced him. In scrutinizing an ineffective assistance of counsel claim, the primary concern is to confirm whether counsel's conduct so undermined the working of the adversary process that the findings at trial are unjust. See, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

[¶12] Strickland is the seminal case in determining claims of ineffective assistance of counsel, in which the United States Supreme Court set forth a two part test to determine such a claim. Id. To prevail on his claim, Appellant must meet both parts of the test; first, that his counsel's representation was defective, and second, that counsel's deficient performance affected the outcome of the case or that the defendant suffered prejudice as a result. See, Strickland at 687, see also, Siers v. Weber, F.3d 969, 974 (8th Cir. 2001).

[¶13] The first part of the test, defective performance, must be shown to a degree that Appellant was essentially denied his Sixth Amendment Right to Counsel. See, Strickland at 687.

Counsel's effectiveness is to be gauged by an "objective standard of reasonableness" considering "prevailing professional norms." See, Strickland at 688. To show prejudice under the second part of the test, Appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result... would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." See, Siers, 259 F.3d at 974, quoting Strickland, 466 U.S. at 694. The Court is directed to review the totality of the evidence in determining the probability of a different outcome at trial. Id. As to the standard for the Court to use in such a determination, the United States Supreme Court has stated that the reasonable probability standard is lower than the preponderance standard. See, Williams v. Taylor, 529 U.S. 362, 405-406 (2000).

[¶14] In the present matter, Appellant's Counsel's representation fell below an objective standard of reasonableness, when Counsel failed to:

- 1.) Prepare Appellant's defense competently. See, United States v. Tucker, 716 F.2d 576 (8th Cir. 1983). Applicable to this case Appointed Counsel failed to: A) obtain legally relevant facts from Appellant; B) pursue obvious leads provided by Appellant; C) interview or attempt to interview key witnesses. D) properly review the trial exhibits made available by the State; E) depose key wit-

nesses; F) develop or discuss a trial strategy with Appellant.

2.) Ask a qualified expert to investigate the statements made by the alleged victim, to see if these statements by the alleged victim could have been:

A.) Projection:

This being: "When the mother is under stress or is herself being abused physically or emotionally, and she "projects" things into her children, making them into victims."

B.) Displacement:

This being: "When a child has been abused by someone, but they are unable to accuse the actual abuser through fear or intimidation, so they accuse a "safe" person."

3.) Have a qualified investigator question everyone who had contact with the alleged victim, including the father, mother, and the neighbors, as the alleged victim was in a highly dysfunctional family situation.

4.) Ask the qualified expert to investigate the reports and statements made by Jeannie Delange, Medical Coordinator, who completed the forensic medical exams. The amount of investigation into expert opinions that may be required of a defense attorney is discussed in Davis v. Alabama, 596 F.2d 1214.

5.) Ask the qualified expert to investigate the reports and statements made by Shannon Hilfer, forensic interviewer. The amount of investigation into expert opinions that may be required of a defense attorney is discussed in Davis v. Alabama, 596 F.2d 1214.

6.) Call Angela Jares (A.App. 22); Arlet Becker (A.App. 23); Jennifer Heinz (A.App. 24); Karrissa Marzolf (A. App. 25 and 26); and, Lady Yvonne Bayman (A.App. 27) to give mitigating testimony and evidence as to Petitioner's character, temperament and Petitioner's involvement in his wife's daycare.

7.) Call Petitioner's wife, Dee Dee Owens to give mitigating testimony as to Petitioner's involvement in the daycare and on where and what type of movies Petitioner owned or rented.

8.) Hire an private investigator. "Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing certain lines of investigation when he has not yet obtained the facts on which a decision could be made." See, Strickland, 466 U.S. at 690. See also, U.S. v. Gray, 878 F.2d 702 (CA 3 1989). In this present case counsel hired no private investigator and conducted no investigation.

9.) Make a tactical trial strategy. Strategy of Appointed Counsel requires an actual existence of a strategy. See, Berryman v. Morton, 100 F.3d 1089 (CA 3 1996). Just pointing to holes in the State's case does not equal strategy. See, Fisher v. Gibson, 282 F.3d 1283 (CA 10 2002). A tactical decision required first an investigation. See, Reynosa v. Girbino, 462 F.3d 1099 (CA 9 2006). In this present case Appointed Counsel failed to have a

trial strategy and clearly lacked a "Game Plan."

10.) Move the Court for a TAIN T HEARING. Federal Rule of Evidence 602 and the corresponding state rules require that a witness must testify from personal knowledge. If witnesses are unable to testify from personal knowledge because memories have been altered or manipulated, they are said to be tainted. See, Lorandos & Campbell, Benchbook in the Behavioral Sciences p. 143-146 (2005). In this present case there should have been an understanding of whether the questioning, interviews, interrrogations or counseling of the child witness was unduly suggestive, and required an highly nuanced inquiry into the atmosphere and demeanor surrounding verbal interactions between the child and adults. See, Holden v. State, 202 Ga. App. 558, 562, 414 S.E.2d 910, 914 (1992). The broad question of whether children as a class are more susceptible to suggestion than adults is one that has been definitely answered in psychologicasl research. But this inquiry-vis-a-vis a taint hearing-would have been more focused. The issue that would have been before the trial court is whether the interviewing, questioning and counseling techniques used with the child witnss was so suggestive that they had the capacity to substantially alter the childs recollections of events and thus compromise the reliability of the child's personal knowledge. See, Goodman Helgeson, Child Sexual Assult: Children's memory and the Law, 40 V. MIAMI L. REV. 181

(1985); Myers, the Child Witness: Techniques for Direct Examination, Gross-Examination, and Impeachment, 18 PAC. L.J. 801, 889 (1987); Yourts, Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions, 41 DUKE L.J. 691 (1991).

11.) Represent Petitioner with his skill, thoroughness, legal knowledge, preparation (competence), diligence and with proper communication as is required of a reasonable attorney as is required pursuant to N.D.R.Prof.Conduct-Rule (1.1), (1.3) and (1.4). Counsel failed in each of his afore-mentioned duties in the original proceeding. Had Counsel even done a perfunctory job, there is a reasonable probability the outcome would have been different, but for these unprofessional errors of Counsel. See, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); see also, North Dakota Rules of Professional Conduct.

[¶15] The North Dakota Rules of Professional Conduct set the foundation principles and basic duties which are required of a reasonable attorney considering the prevailing professional norms. It is clear from the Record, Testimony and evidence in the present matter Appellant's Appointed Trial Counsel failed in these "prenciples" and "basic duties" during the original proceeding.

[¶16] The question under the first test in Strickland is

whether or not the failure to investigate any relevant matter; failure to hire an expert to investigate statements made by the alleged victim or have the alleged victim's interview reviewed by a qualified expert; failure to obtain legally relevant facts from Appellant; failure to pursue obvious leads provided by Appellant; failure to interview or attempt to interview Key Witnesses; failure to properly review the trial exhibits made available by the state; failure to depose any Key Witnesses; failure to develop or discuss a trial strategy with Appellant; and, failure to represent Appellant with his skill, thoroughness, legal knowledge, preparation, diligence as required by a reasonable attorney is deficient conduct. See, Strickland, at 687. Appellant argues that it is. Counsel is presumed to have prepared and investigated and then communicated all options with Appellant.

[¶17] Investigation all known facts is simply a basic part of practicing law. By failing to do any investigation or any relevant research and failing to properly prepare for trial, and its effect on Appellant, was deficient below the standard in the community, pursuant to the North Dakota Rules of Professional Conduct.

[¶18] The second test in Strickland, is essentially, was Appellant prejudiced by Counsel's lack of knowledge, investigation or advice, and would the prejudice have made a difference in the outcome. See, Strickland at 694. Appellant

argues that he was prejudiced, and that Counsel's errors and advice did make a difference in the outcome. When representing a defendant, counsel must be competent in the basic part(s) of practicing law, such as investigating all known facts; impeaching the alleged victim and to put up a defense. Appointed Counsel called no witnesses and put up no defense.

[¶19] At the conclusion of the State's case in chief against Appellant, the defense called no witnesses and put up no defense. (Tr. Post-Conviction Hr'g pg. 64.) By presenting an expert like Dr. Ertelt to the jury and displaying how the alleged victim's statement was likely tainted along with showing the improbability to accomplish the crime due to the layout of the house the jury would have been left with reasonable doubt. Again, this lack of attempting to impeach the alleged victim falls short of "strategy" due to the trial attorney's admitted lack of knowledge of the ability to even do so, and falls into the category of an "unprofessional error."

[¶20] The "reasonable probability of unprofessional errors" in the case at bar is the pure lack of any defense witnesses at all, versus an expert witness who could have directly attacked the validity of the alleged victim's statement. The defense of "the State did not meet their burden" that was put forth by Appellant's trial attorney provided the finder of fact, the jury, with no alternative than to believe the alleged victim verbatim. Given the probable testimony of an

expert who would have pointed out five of sixteen factors where the alleged victim was "coached" or "led" to give her particular statement we can be left with sufficient reason to undermine the outcome of the case at trial.

[¶21] The prejudice prong of the Strickland test governing a claim of ineffective assistance of counsel is satisfied if the Appellant shows that there is a reasonable probability that, but for counsel's errors, the outcome of the original proceeding may have been different.

[¶22] The prejudice occurred as Appellant would have more thoughtfully considered requesting the Court, or asking his family for the funds to hire, a different attorney, had Appellant known about Counsel's lack of investigation, failure to request for an expert to investigate statements made by the alleged victim or have the alleged victim's interview reviewed by a qualified expert; failure to pursue obvious leads provided by Appellant; failure to interview or attempt to interview key witnesses; failure to review the trial exhibits made available by the state; failure to depose any key witnesses; failure to develop or discuss a trial strategy with Appellant; and failure to represent Appellant pursuant to the "prevailing professional norms", which were outlined by the North Dakota Rules of Professional Conduct.

[¶23] Appellant listened to the ineffective advice of Counsel.

Therefore, the adversarial process itself was presumptively unreliable during the original proceeding. See, U.S. v. Cronin, 466 U.S. at 659 (1984). It is clear in the present matter that prejudice occurred and an inquiry is necessary, to determine if Appellant's Federal Rights have been violated, in the interest of justice.

[¶24] The Sixth Amendment provides in pertinent part that "In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense." In the present matter Counsel failed in almost every aspect of his duties to represent Appellant in the Original Proceeding. See, United States Constitution Amendment VI.

[¶25] Ineffectiveness is clear here in the context of complete failure to investigate. "Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing certain lines of investigation when he has not yet obtained the facts on which a decision could be made. See, Strickland, 466 U.S. at 680. Appellant was prejudiced by Counsel's lack of any relevant research and the subsequent factless strategic choice during the original proceeding. This failure of Counsel to locate and bring highly relevant evidence and testimony before the Court was ineffective assistance and prejudiced Appellant, as Counsel had yet to obtain all the facts necessary to represent Appellant.

[¶26] Each claim of ineffective assistance of counsel here support ineffective assistance of counsel on their own, as each error is sufficiently egregious and prejudicial. See, United States v. Cronin, 466 U.S. 648; see also, Murray v. Carrier, 477 U.S. 496, 91 L.Ed.2d 397, 106 S.Ct. 2639 (1980). Cleraly there were multiple errors here, which each prejudiced Appellant, and made Counsel's performance constitutionally defective.

[¶27] CONCLUSION

[¶28] Appellant was not accorded the counsel guaranteed by the Sixth Amendment, and clearly below the "objective standard of reasonableness" considering "prevailing professional norms." See, Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Clark v. State, 2008 ND 234, ¶12, 758 N.W.2d 900; see also, North Dakota Rules of Professional Conduct.

[¶29] CERTIFICATE OF SERVICE

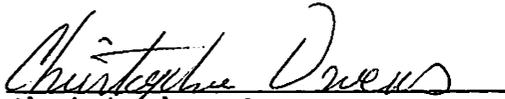
[¶30] I hereby certify that I served a copy of the foregoing Supplemental Rule 24 Statement, by United States Mail, upon the following parties:

Pamela Ann Nesvig, Assistant State Attorney
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Dated this 10 day of December, 2014.

A handwritten signature in cursive script, appearing to read "Christopher Owens", written over a horizontal line.

Christopher Owens
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