

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

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| Sean Michael Kovalevich, |) | Supreme Court Nos. 20190024 |
| |) | 20190025 |
| |) | |
| |) | |
| Petitioner/Appellant, |) | |
| |) | District Court Nos. 18-2017-CV-00957 |
| vs. |) | 18-2018-CV-02728 |
| |) | |
| |) | |
| State of North Dakota, |) | |
| |) | |
| Respondent/Appellee. |) | |

ON APPEAL FROM DENIAL OF POST-CONVICTION RELIEF
FROM THE DISTRICT COURT
FOR THE NORTHEAST CENTRAL JUDICIAL DISTRICT
GRAND FORKS COUNTY, NORTH DAKOTA
THE HONORABLE JUDGE THELEN, PRESIDING

BRIEF OF APPELLEE

Meredith H. Larson
ND Bar ID #06206
Assistant State's Attorney
Grand Forks County
124 South 4th Street
P.O. Box 5607
Grand Forks, ND 58206-5607
(701) 780-8281
E-Service Address: sasupportstaff@gfcounty.org

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STATEMENT OF THE ISSUE

- I. Whether the district court properly denied Kovalevich's Rule 60(b) Motion in 18-2017-CV-00957?**
- II. Whether the district court properly denied Kovalevich's Application for Post-Conviction Relief in 18-2018-CV-02728?**
- III. Whether the district court properly denied Kovalevich's Application for Court-Appointed Counsel in 18-2018-CV-2728?**

STATEMENT OF THE FACTS

[¶1] On October 31, 2013, Kovalevich was found guilty of two counts of Gross Sexual Imposition and one count of Corruption of a Minor in 18-2012-CR-3069. The underlying facts of the criminal case were outlined for this Court in detail in State v. Kovalevich, 2015 ND 11. On February 24, 2014, Kovalevich was sentenced to 30 years with the North Dakota Department of Corrections and 10 years of supervised probation. Kovalevich filed a Notice of Appeal on March 13, 2014. His appeal was denied and the conviction and sentence were affirmed by this Court in State v. Kovalevich, 2015 ND 11, 858 N.W.2d 625.

[¶2] On November 18, 2015, Kovalevich filed his first Petition and Application for Post-Conviction Relief alleging prosecutorial misconduct and ineffective assistance of counsel. Petition and Application for Post-Conviction Relief, November 18, 2015, 18-2015-CV-2064. The State filed a Motion for Summary Disposition as to the allegation of prosecutorial misconduct on December 18, 2015. The State denied the allegations of ineffective assistance of counsel and put Kovalevich to his proof. Answer, Motion for Summary Disposition and Brief in Support of Motion for Summary Disposition and in Opposition to Petition and Application for Post-Conviction Relief, December 18, 2015, 18-2015-CV-2064. The district court granted the State's Motion for Summary Disposition as to the allegation of prosecutorial misconduct based on the grounds of misuse of process and res judicata. Order Granting Summary Disposition, in Part, and Denying, in Part, Respondent's Motion for Summary Judgment, January 11, 2016, 18-2015-CV-2064. An evidentiary hearing was held limited to the issue of ineffective assistance of counsel. Kovalevich alleged counsel was ineffective for multiple reasons

including failing to file pre-trial motions, filing procedurally deficient motions, failing to request a continuance, and failing to depose the victim. Subsequent to the evidentiary hearing, the district court filed an order denying post-conviction relief. Order Denying Post-Conviction Relief, April 15, 2016, 18-2015-CV-2064.

[¶3] On May 25, 2016, Kovalevich filed a Notice of Appeal of the district court's denial of Post-Conviction Relief in 18-2015-CV-2064. However, before filing a brief with the North Dakota Supreme Court, Kovalevich filed a Motion for a New Trial in 18-2015-CV-2064, as well as in the underlying criminal case, 18-2012-CR-3069. The matter was remanded to the district court to address the motions. Kovalevich alleged in 18-2015-CV-2064 Motion for New Trial that he was entitled to a new trial due to newly discovered evidence and ineffective assistance of counsel. Prior to the evidentiary hearing in 18-2015-CV-2064, Kovalevich served case Agent Zachmeier with a subpoena duces tecum. The result of that subpoena was Agent Zachmeier locating and providing to Kovalevich two pages of handwritten field notes not previously discovered or disclosed prior to trial. Kovalevich argued these two pages of handwritten field notes were newly discovered evidence. The allegation of ineffective assistance of counsel was a reassertion of previously litigated complaints regarding a procedurally improper Motion to Dismiss. In 18-2012-CR-3069, Kovalevich filed a pro se Motion for New Trial alleging newly discovered evidence which led him to believe the Bureau of Criminal Investigations (BCI) did not have jurisdiction to investigate his case and thus he was entitled to a new trial. The State resisted both motions. A hearing was held on September 1, 2016. The district court denied both motions and specifically ruled that ineffective assistance of counsel claims had been previously fully and finally determined. Order Denying Motion

for New Trial, September 7, 2016, 18-2015-CV-2064. The court also denied Kovalevich's pro-se motion in the criminal case substantively ruling that BCI did have jurisdiction. Order Denying Motion for New Trial, September 7, 2016, 18-2012-CR-3069.

[¶4] A notice of appeal was again filed in 18-2012-CR-3069 and 18-2015-CV-2064. On appeal, Kovalevich alleged he was entitled to a new trial because the State failed to disclose evidence to him during discovery, he was deprived the opportunity to effectively cross-examine a witness about prior inconsistent statements, and he received ineffective assistance of counsel. Kovalevich also alleged BCI lacked jurisdiction to investigate him. On March 1, 2017, this Court entered an opinion affirming the district court's orders denying post-conviction relief and the motions for new trial. Kovalevich v. State, 2017 ND 40, 891 N.W.2d 778.

[¶5] On April 17, 2017, Kovalevich filed a second application for post-conviction relief in 18-2017-CV-00957. His petition alleged: 1) The victim's due process rights were violated, 2) Selective and vindictive prosecution, 3) Newly discovered evidence, and 4) Unlawful Conviction (BCI's jurisdiction). Post-Conviction Relief Application, April 17, 2017, 18-2017-CV-00957. The State filed an Answer, Motion for Summary Dismissal, and Brief in Support of Motion for Summary Dismissal on May 15, 2017. On June 2, 2017, Kovalevich filed a response. Petitioner's Response to State's Motion for Summary Disposition, June 2, 2017, 18-2017-CV-00957. On June 6, 2017, the district court filed an Order Reserving Ruling on Motion for Summary Judgment. Order Reserving Ruling on Motion for Summary Judgment, June 6, 2017, 18-2017-CV-00957. On July 19, 2017, Kovalevich filed a Supplemental Application for Post-Conviction Relief and Brief in

Support along with six exhibits. The State filed Respondent's Brief in Response to Plaintiff's Supplemental Application on August 16, 2017. Two exhibits were filed in support of the State's brief which were two transcripts of interviews of the victim. Brief in Response to Plaintiff's Supplemental Application, August 16, 2017, 18-2017-CV-00957.

[¶6] An evidentiary hearing was held on October 30, 2017. Kovalevich was represented by counsel. Summary disposition was granted as to Issue I (Due process violation), Issue II (Selective and vindictive prosecution), and Issue IV (Unlawful Conviction-BCI's Jurisdiction), based on the doctrines of res judicata and misuse of process. Order Granting Respondent's Motion for Summary Disposition in Part and Denying in Part, November 9, 2017, 18-2017-CV-00957. The remaining issue was Issue III, newly discovered evidence. The alleged newly discovered evidence was a new hotel receipt Kovalevich provided. Closing arguments were filed by both parties and on February 12, 2018, the district court issued an order denying post-conviction relief. Order Denying Second Application for Post-Conviction Relief, February 12, 2018, 18-2017-CV-00957,

[¶7] A notice of appeal was filed on March 16, 2018 only with respect to the February 12, 2018 Order denying post-conviction relief with respect to newly discovered evidence. This Court affirmed the district court's order in Kovalevich v. State, 2018 ND 184, 915 N.W.2d 644. Specifically, this Court found that Kovalevich could not meet the four prong test that is required to establish newly discovered evidence because the new receipt he obtained post-trial would not likely result in an acquittal. Id. at ¶ 6-7. Further,

this Court found that the additional receipt was not inconsistent with the victim's testimony. Id. at ¶ 6-7.

[¶8] On September 19, 2018, Kovalevich filed a Motion under Rule 60(b) for relief from judgment in 18-2017-CV-00957. A brief was filed in support of the motion. Motion Under Rule 60(b) for Relief from Judgment, Brief in Support of Motion Under Rule 60(b) for Relief from Judgment, September 19, 2018, 18-2017-CV-00957. The State filed a brief in response on September 27, 2018 objecting to Kovalevich's motion as well as a request for finding of vexatious litigant. State's Brief in Response to Defendant's Motion and Request for Finding of Vexatious Litigant and Prefiling Order Pursuant to North Dakota Administrative Order 58, September 27, 2018, 18-2017-CV-00957. On October 11, 2018, Kovalevich filed a response to the State's brief. Plaintiff's Reply to State's Brief in Response to Defendant's Motion and Request for Finding of Vexatious Litigant and Prefiling Order Pursuant to North Dakota Administrative Rule 58. The district court denied Kovalevich's Rule 60(b) motion and filed an order entitled, Order Denying Third Application for Post-Conviction Relief on January 8, 2019. A notice of appeal was filed on January 22, 2019.

[¶9] Simultaneous to engaging in litigation in 18-2017-CV-00957, Kovalevich filed a 28 page Application for Post-Conviction Relief in 18-2018-CV-02728. Application for Post-Conviction Relief, December 5, 2018, 18-2018-CV-02728. This petition/application would be either the third or fourth Petition for Post-Conviction Relief, depending on how this Court views the Rule 60(b) Motion in 18-2017-CV-00957. The issues raised in Kovalevich's petition were: 1) Newly discovered evidence with respect to the Canad Inns receipt, 2) Search warrant affidavit was false, 3) BCI lacked jurisdiction. Application for

Post-Conviction Relief, December 5, 2018, 18-2018-CV-02728. The State responded on December 21, 2018. Answer to Plaintiff's Application for Post-Conviction Relief, Motion for Summary Disposition, Brief in Support of Motion for Summary Disposition and in Opposition to Petitioner's Petition and Application for Post-Conviction Relief, December 21, 2018, 18-2018-CV-02728. The State asserted that the Application for Post-Conviction Relief must be summarily dismissed based on the grounds of res judicata and misuse of process. On January 8, 2019, Kovalevich filed a response, Plaintiff's Objection to State's Motion for Summary Disposition and Brief in Support of Plaintiff's Objection to State's Motion for Summary Disposition. These documents were filed on January 8 and entered as Index #18 and 19 respectively. The same day the district court entered an Order Denying Fourth Application for Post-Conviction Relief. Order Denying Fourth Application for Post-Conviction Relief, January 8, 2019, 18-2018-CV-2728. This order was entered as Index # 22. The district court also entered an order on January 9, 2019, finding Kovalevich a vexatious litigant. Findings and Pre-Filing Order Pursuant to N.D.Sup.Ct.Admin.R. 58, January 9, 2019, 18-2018-CV-2728. Kovalevich filed a notice of appeal of the district court's January 8, 2019 Order Denying Fourth Application for Post-Conviction Relief on January 22, 2019.

[¶10] The appeals in 18-2017-CV-00957 and 18-2018-CV-2728 have been consolidated.

LAW AND ARGUMENT

I. The district court properly denied Kovalevich's Rule 60(b) Motion.

[¶11] Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Patten v. State, 2008 ND 29 ¶ 8, 745 N.W.2d 626. Relief under Rule 60(b) of the Rules of Civil Procedure is extraordinary relief to be granted only in exceptional circumstances. Gajewski v. Bratcher, 240 N.W.2d 871, 889 (N.D. 1976). The moving party has the burden to establish, by clear and convincing evidence, that the adverse party obtained the judgment through fraud, misrepresentation, or misconduct. Id. Where allegations of fraud are unsubstantiated and merely an effort to relitigate the case, relief under rule 60(b) must be denied. Dvorak v. Dvorak, 2001 ND 178, ¶ 12, 635 N.W.2d 135.

[¶12] Kovalevich filed a Rule 60(b) motion within six days of this Court's decision in Kovalevich v. State, 2018 ND 184, 915 N.W.2d 644. Kovalevich claims the State obtained a favorable opinion in Kovalevich v. State, 2018 ND 184, via fraud. Essentially, Kovalevich's Rule 60(b) Motion alleges that the State elicited testimony at the evidentiary hearing in 18-2017-CV-00957 on the Post-Conviction Relief Application that misrepresented Kovalevich's version of the facts and led to this Court, the North Dakota Supreme Court, issuing a judgment based on fraud.

[¶13] Kovalevich's motion and brief in support of his Rule 60(b) motion detail the same allegations that he litigated in his Post-Conviction Relief pleadings in 18-2017-CV-00957 relating to the additional July receipt that he obtained post-sentencing. Kovalevich claimed the receipt was newly discovered evidence which was exculpatory and entitled him to a new trial. This Court disagreed and this issue was fully and finally determined in

Kovalevich v. State, 2018 ND 184, 915 N.W.2d 644. Subsequent to that opinion, in Kovalevich's Rule 60(b) Motion, he simply attempts to litigate the same issues, but framed it as the State committing fraud. Specifically, Kovalevich claimed the State fraudulently elicited testimony from Agent Zachmeier regarding the timeline in which the victim recalled being taken to hotels by Kovalevich. Kovalevich's "evidence" to establish his claim that the State committed fraud was the transcript from the evidentiary hearing on the post-conviction relief proceedings in 18-2017-CV-00957. However, this Court has already ruled, conclusively, that the additional receipt Kovalevich provided was not inconsistent with the timeline provided by the victim. See Kovalevich v. State, 2018 ND 184, ¶ 6-7. The position of this Court is the same position the State articulated and the testimony that was elicited at the evidentiary hearing, which Kovalevich claims led to a fraudulent judgment. Additionally, the evidentiary hearing transcript is not information that was unknown to this Court, concealed, or prevented Kovalevich from making his argument on appeal. Further, Kovalevich, represented by counsel, had an opportunity to cross-examine Agent Zachmeier at that evidentiary hearing. This Court had an opportunity to review the entire transcript prior to drafting an opinion. The arguments in his Post-Conviction Relief Application at the district court level in 18-2017-CV-00957, on appeal in Kovalevich v. State, 2017 ND 40, and in his Rule 60(b) Motion are identical. This is Kovalevich's attempt to merely relitigate his Post-Conviction Relief application in 18-2017-CV-00957 after this Court affirmed the district court's denial of his Post-Conviction Relief Application. The issue has been fully and finally determined and based upon the doctrines of res judicata and the case law set forth in Dvorak, the district court properly denied Kovalevich's Rule 60(b) motion.

II. The district court properly denied Kovalevich's Motion for Post-Conviction Relief in 18-2018-CV-02728.

[¶14] Pursuant to N.D.C.C. § 29-32.1-12(1), an application for post-conviction relief may be denied based on the principle of res judicata, that the same claim or claims were fully and finally determined in a previous proceeding. N.D.C.C. § 29-32.1-12(1). Further, a court may deny relief on the ground of misuse of process. *Id.* Specifically, an applicant misuses a process when he presents a claim for relief which the applicant inexcusably failed to raise the issue in a proceeding leading to judgment of conviction and sentence or in a prior post-conviction relief proceeding. N.D.C.C. § 29-32.1-12(2)(a). This Court has stated that post-conviction proceedings are not intended to allow defendants multiple opportunities to raise the same or similar issues, and defendants who inexcusably fail to raise all of their claims in a single post-conviction proceeding misuse the post-conviction process by initiating subsequent applications raising issues that could have been raised in earlier proceedings. *Steen v. State*, 2007 ND 123, ¶ 13, 736 N.W.2d 457. Defendants are not entitled to post-conviction relief when their claims are merely variations of previous claims that have been rejected. *Id.*

[¶15] Kovalevich is litigious. In his underlying criminal case, Kovalevich did not file any motions prior to the verdict. However, post-verdict, in 18-2012-CR-3069, Kovalevich filed a Rule 33 Motion for New Trial, Motion to Dismiss, a second Motion for New Trial, and a Rule 35(b) Motion for Sentence Reduction. A direct appeal was decided by this Court in *State v. Kovalevich*, 2015 ND 11. Kovalevich filed his first Post-Conviction Relief Application in 18-2015-CV-2064, which denied by the district court, and that order was affirmed in *Kovalevich v. State*, 2017 ND 40, 891 N.W.2d 778. Kovalevich filed a second Post-Conviction Relief Application in 18-2017-CV-00957,

which was denied by the district court, and that order was affirmed in Kovalevich v. State, 2018 ND 184, 915 N.W.2d 644. Kovalevich filed a Rule 60(b) Motion which was deemed a third application for Post-Conviction Relief due to its identical nature to the prior post-conviction relief pleading in 18-2017-CV-00957, and now a fourth Post-Conviction Relief Application in 18-2018-CV-2728.

[¶16] Applications for relief must be filed within two years of the date a conviction becomes final. N.D.C.C. § 29-32.1-01(2). An exception is a claim of newly discovered evidence. N.D.C.C. § 29-32.1-01(3)(1). Because of that, Kovalevich is barred, statutorily from raising any post-conviction relief claims that are not newly discovered evidence or fit into another exception. An application for post-conviction relief based on newly discovered evidence is reviewed under the same standard as a motion for new trial based on newly discovered evidence under N.D.R.Crim.P. 33. In order to prevail, a defendant must show: 1) the evidence was discovered after trial, 2) the failure to learn about the evidence at the time of the trial was not the result of the defendant's lack of diligence, 3) the newly discovered evidence is material to the issues at trial, and 4) the weight and quality of the newly discovered evidence would likely result in an acquittal. Everett v. State, 2016 ND 78, ¶ 17, 877 N.W.2d 796.

[¶17] In 18-2018-CV-2728 Kovalevich raised three issues claiming he was entitled to post-conviction relief. Because of the statutory limitation on filing post-conviction relief in this case, Kovalevich now frames each issue as "newly discovered evidence". Kovalevich claimed there was newly discovered evidence with respect to a receipt at the Canad Inns as Kovalevich "noticed" something new on a receipt, that there was newly discovered evidence that the search warrant affidavit in the case was false, and

that there was newly discovered supporting evidence that BCI lacked jurisdiction in the case.

[¶18] The district court reviewed Kovalevich's claims as well as the four pronged test required to prevail on a claim of newly discovered evidence. The district court found that with respect to Issue 1 (Canad Inns/Receipt) Kovalevich did not have newly discovered evidence, simply noticing additional information does not make newly discovered evidence, and that this was an issue that had been fully and finally determined in the district court's Order Denying Second Application for Post-Conviction Relief as well as in Kovalevich v. State, 2018 ND 184, 915 N.W.2d 644. The district court found that this was an issue previously litigated that was a variation on a previous argument. The district court found that this issue was barred by the doctrine of res judicata. With respect to Issue II (Search Warrant Affidavit), the district court found that Kovalevich failed to previously raise the issue in the underlying criminal case prior to verdict and that the information he claimed was "newly discovered" was, in fact, information that had been available to Kovalevich prior to trial. The district court found Kovalevich was barred from raising the issue due to misuse of process. The district court also reviewed Issue III (BCI Jurisdiction). The district court noted that Kovalevich had previously raised the issues in 18-2012-CR-3069 in his Motion for New Trial which was denied at the district court level and affirmed by this Court in Kovalevich v. State, 2017 ND 40, 891 N.W.2d 778. Further, the BCI jurisdictional issue was raised in Kovalevich's Second Post-Conviction Relief Application in 18-2017-CV-00957 and denied on the grounds of res judicata. Kovalevich did not appeal that portion of the district court's order in Kovalevich v. State, 2018 ND 184, 915 N.W.2d 644.

[¶19] Most importantly, though, on appeal in this case Kovalevich does not substantively raise or appeal the district court's denial of his Fourth Post-Conviction Relief Application. Kovalevich does not address the district court's findings on res judicata or misuse of process or newly discovered evidence. Issues not briefed by an appellant are deemed abandoned. Murchison v. State, 1998 ND 96, ¶ 13, 578 N.W.2d 514.

[¶20] In this appeal from the denial of his Fourth Post-Conviction Relief Application in 18-2018-CV-2728, Kovalevich claims the district court erred because the district court adopted the State's argument for the district court's order and because the district court did not consider his responsive pleading filed on January 8, 2019. Kovalevich fails to cite any supporting case law regarding his complaint that the district court adopted the State's argument. This Court has stated that the parties have the primary duty to bring the Court's attention to the proper rules of law applicable in the case. State v. Noack, 2007 ND 82, ¶ 8, 732 N.W.2d 389.

[¶21] With respect to his argument regarding the filing dates, Kovalevich claims the district court did not review his Objection to State's Motion for Summary Disposition. However, the record does not support his argument. The docket reflects that Kovalevich's objection was filed prior to the Court's Order Denying Fourth Application for Post-Conviction Relief. (Appellant's App. at 5.) Simply because the Court's order was signed prior to Kovalevich's objection being filed, does not mean the Court did not review it. The Court's order was filed subsequent to Kovalevich's objection being filed. (Appellant's App. at 5.)

[¶22] The district court properly reviewed Kovalevich's Fourth Application for

Post-Conviction Relief and the issues presented therein. Kovalevich has litigated and relitigated these exact same issues before the district court and this Court as well. As this Court has stated, the post-conviction relief process is not one designed to give litigants multiple opportunities to re-litigate issues previously addressed and fully and finally determined. The district court appropriately summarily dismissed this fourth Post-Conviction Relief application on the grounds of res judicata and misuse of process, subsequent to the State's Motion for Summary Disposition and Kovalevich's Objection being filed. Therefore the district court's order must be affirmed.

III. The district court properly denied Kovalevich's motion for court appointed counsel in 18-2018-CV-2827.

[¶23] It is not an abuse of discretion to refuse to appoint counsel for post-conviction proceedings that are completely without merit. Murchison v. State, 1998 ND 96, ¶ 19, 578 N.W.2d 514. In Murchison, the post-conviction relief applicant argued that a trial court erred in denying his request for court appointed counsel. Id. at ¶ 17. This Court held that the appointment of counsel under the Uniform Post-Conviction Procedure Act is discretionary with the trial court. Id. Further, this Court held that it would not reverse a trial court's decision not to appoint counsel, absent an abuse of discretion. Id. The Court found that even reading the application in the light most favorable to Murchinson, there was not a substantial issue of law or fact and it was not an abuse of discretion to deny court-appointed counsel.

[¶24] In 18-2018-CV-2728, Kovalevich applied for court-appointed counsel. Subsequent to that application, Kovalevich filed his pro se Objection to State's Motion for Summary Disposition. In the district court's Order Denying Fourth Application for

Post-Conviction Relief, the court specifically notes that it is not necessary to appoint counsel as the application was being summarily dismissed. Summary disposition is appropriate when there is no genuine issue of material fact. N.D.C.C. § 29-32.1-09. This is Kovalevich's fourth application for post-conviction relief where the same issues are being repeatedly litigated both at the district court and appellate levels. Consistent with this Court's decision in Murchinson, it was not an abuse of discretion to deny court-appointed counsel.

CONCLUSION

[¶25] For the above-stated reasons, Kovalevich's appeals should be denied.

DATED this 21 day of March, 2019.

A handwritten signature in black ink, appearing to read 'MHA', is written over a horizontal line.

Meredith H. Larson

ND Bar ID #06206

Assistant State's Attorney

Grand Forks County

124 South 4th Street

PO Box 5607

Grand Forks, ND 58206-5607

(701) 780-8281

E-Service Address: sasupportstaff@gfcounty.org

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

| | | |
|--------------------------|---|--------------------------------------|
| Sean Michael Kovalevich, |) | Supreme Court Nos. 20190024 |
| |) | 20190025 |
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| Petitioner/Appellant, |) | |
| |) | District Court Nos. 18-2017-CV-00957 |
| vs. |) | 18-2018-CV-02728 |
| |) | |
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| State of North Dakota, |) | |
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| |) | |
| Respondent/Appellee. |) | |

AFFIDAVIT OF SERVICE

BY MAIL

SA#124635

STATE OF NORTH DAKOTA)
) SS
COUNTY OF GRAND FORKS)


[¶1] The undersigned, being of legal age, being first duly sworn deposes and says that on the 21st day of March, 2019, she enclosed in envelopes true copies of the following documents:

BRIEF OF APPELLEE

and that she addressed and deposited said envelopes, with the contents therein, in the U.S. Mails at Grand Forks, North Dakota, mail postage prepaid to the following:

Sean Michael Kovalevich
#39835
ND State Penitentiary
P.O. Box 5521
Bismarck, ND 58506

At the office of the Grand Forks County States Attorney's Office.



States Attorney's Office

Subscribed and sworn to before me this 21 day of March, 2019.

Bobbi Jo Davidson
Notary Public

jlf

