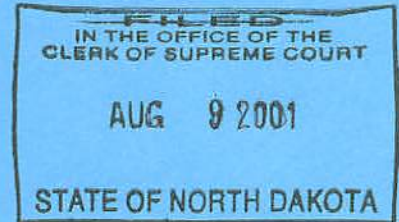


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**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**



Kyle Kenneth Bell,)
)
)
Petitioner/Appellant,)
)
-vs-)
)
State of North Dakota,)
)
Respondent/Appellee.)

SUPREME COURT NO. 20010139

DISTRICT COURT NO. 01-C-0818

**BRIEF OF PETITIONER/APPELLANT
KYLE KENNETH BELL**

APPEAL FROM JUDGMENT
ENTERED ON MAY 21, 2001
IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA
THE HONORABLE NORMAN J. BACKES

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STATEMENT OF THE CASE

This is an appeal from a Judgment which dismissed an application for post-conviction relief, and was entered on the 21st day of May, 2001, by the Court, the Honorable Norman J. Backes, Judge of the District Court, presiding. The Defendant, Kyle Kenneth Bell, filed his Petition for Post-Conviction Relief on March 19, 2001. (App. at 3 through 74).¹ (Docket No. 1). The State responded with a Motion to Dismiss on April 18, 2001. No evidentiary hearing was held. On May 17, 2001, the Court entered its Memorandum Opinion and Order granting Motion to Dismiss, in which the Court ordered the dismissal of Mr. Bell's claim for post-conviction relief. (App. at 92)(Docket No. 13). A Notice of Appeal was filed on May 31, 2001 (Docket No. 18 & App. 97).

¹The Appendix to Appellant's brief will be abbreviated "App."

STATEMENT OF THE ISSUES

1. Whether the trial court's summary dismissal of Mr. Bell's application was procedurally erroneous?

2. Whether the trial court's summary dismissal of three of Mr. Bell's allegations as res judicata was erroneous?

3. Whether the Trial Court's summary dismissal of five of Mr. Bell's allegations as a misuse of process was erroneous?

4. Whether the Trial Court's summary dismissal of Mr. Bell's motions to be present at the hearing and to bar the media was erroneous?

`STATEMENT OF FACTS

There was no evidentiary hearing on Mr. Bell's Application for Post-Conviction Relief. Mr. Bell does, however, provide a factual basis for the allegations in his Application, which consists of forty-five (45) hand-written pages and a number of attachments.

The trial court characterized Mr. Bell's allegations in its order as follows:

The Petitioner makes the following allegations in his application for post-conviction relief:

1. The State unconstitutionally proceeded by way of an Information instead of by Grand Jury Indictment.

2. He was denied his alleged sixth amendment right to the assistance of counsel during an interrogation.

3. His conviction was obtained through an allegedly unconstitutional coerced confession.

4. His conviction was wrongfully obtained by the use of the media.

5. His guilty plea was involuntary because he did not know the

consequences of his plea.

6. His conviction was obtained through the use of alleged unconstitutional evidence.

7. His sentence was cruel and unusual punishment.

8. The criminal judgment and conviction are allegedly unconstitutional.

Court's Order dated May 17, 2001, pages 1 through 2. (App. 92 - 93). The trial court did not address the factual basis for any of Mr. Bell's allegations. The trial court simply reviewed the issues themselves without delving into the factual basis for them. (App. 92 - 95).

Mr. Bell's first argument is that he had a constitutional right to be indicted by a grand jury. In the original prosecution, the State proceeded by Information as the charging mechanism. Therefore, Mr. Bell believes that his right to be charged by grand jury indictment was violated. That Mr. Bell was not indicted by a grand jury is not in dispute.

Mr. Bell's second argument is that his "Conviction obtained by a violation of the Sixth Amendment of the United States Constitution, Assistance of Counsel."

Mr. Bell provided the following factual basis for this argument:

On April 20th, 1994, the petitioner, Kyle K. Bell, was arrested on Monte Carlo drive in North Fargo, at approximately 10:00 a.m. Mr. Bell was taken to the child interview room at Social Services. Officer Stone proceeded to interrogate Mr. Bell, with Officer Lemke and two other officers in the room. Mr. Bell told Mr. Stone that he wanted to contact Donald Becker, his attorney. Mr. Bell placed a call to Mr. Becker and received a reply from the receptionist that Mr. Becker wasn't in. (see attachment 1, indicating message to Mr. Becker). Detective Stone #107, then once again began to interrogate Mr. Bell, even when he requested counsel.

....

When Det. Stone started the interrogation again, Mr. Bell again requested to call his Attorney to see if by chance he returned to the office.

Once again being unable to speak to Mr. Becker, due to him not being in the office, Det. Stone once again started the interrogation. Making specific allegations to Mr. Bell's involvement in the disappearance of Jeanna North and how he could have done it. Specific allegations to Mr. Bell's alleged involvement in the molestation of his 8 year-old niece and 4 year-old daughter. Getting very graphic in detail as to what he believed Mr. Bell did to them.

Mr. Bell again requested to talk to Mr. Becker. Again, Mr. Becker wasn't in his office. Mr. Bell then requested to call his wife. Det. Stone said that Mr. Bell could not call his wife unless and until he agreed to confess to the alleged crimes.

(App. 7 - 9).

Mr. Bell stated his third allegation as follows: "Conviction obtained by use of coerced confession and a violation of the privilege against self-incrimination, a violation of the Fifth and Fourteenth Amendments to the United States Constitution."

Mr. Bell provided the following factual basis for this allegation:

During the interrogation, Det. Stone extracted an involuntary confession from Kyle Bell by promising him that he could call his wife, that he (Stone) would talk to the prosecutor and tell him to go light and that it would be in Mr. Bell's best interest to confess, he would feel better after confessing.

....

Not only did Det. Stone extract an involuntary confession from Kyle Bell, but Det. Stone hand wrote and composed the confession himself. When finished, he merely had Kyle Bell sign the sheets while he (Det. Stone) lifted only the bottom of the sheets to expose the signature line.

....

I am not a handwriting expert, nor have I had any experience in handwriting analysis, but with close examination, it is clear that Det. Stone wrote the Voluntary Statement - Confession with his own hand and in his own words.

Comparing page 3 of the Voluntary Statement - Supplement and Authority

to Search Premises, Attachments 2 and 3, 22 matches were made by superimposing one sheet over the other and by comparing similar characteristics. Five matches were made through superimposing: Attachment 2 line , letter A by itself (second A) is a perfect match with letter A from Fargo, Attachment 3 printed line 5. Attachment 2 letter O in Problem line 1 is perfect match with others, Attachment 2 line 4. Letter P in Promised, line 8 Attachment 2 with letter P in PD Attachment 2 line 5. Letter H in Hurt, line 7 Attachment 2 with Home, line 7 Attachment 3 and letter H in Have, Attachment 2 with letter H in Home, Attachment 3, line 8.

Seventeen other matches were made by comparing similar characteristics like the rocking of the leg on the R, crown of the Ms and four matches were made with just the As.

This statement is not Kyle Bell's. What is Det. Stone trying to say when he states that Kyle Bell has a problem, that he will cooperate with any treatment. These are things that would be discussed or said in court. Remorse would be stated in court.

It is clear by this page alone that Det. Stone was speaking for Kyle Bell. This page was disclosed to me by Kyle Bell's former Attorney. Where the other pages to this supplement maybe, who knows, but it is the only one that was attached to a police report. What did Det. Stone say in the other pages.

(App. 10 - 16).

Mr. Bell stated his fourth allegation as follows: "Conviction obtained by mass publicity of vital parts of the case, violating the Fifth and Fourteenth Amendments to the United States Constitution's right to a fair trial and due process." He provided the factual basis for this allegation as follows:

Because Kyle Bell was suspected to have been involved in the disappearance of Jeanna North, this case was widely publicized. This case together with case no. 98-03403 there must be at least 200 news accounts and newspaper articles. Probably the most in Cass County history.

The Cass Country States Attorney's Office released information to the press and had media interviews disclosing that Kyle Bell confessed to this case, and what charges would be brought against him. It was released and publicized to the public, not only the confession, but its contents and what evidence was being presented against Mr. Bell.

This completely jeopardizes any chance of Mr. Bell having a fair trial or due process. The States Attorney's office knew this and purposely jeopardized his rights.

....

This case against Kyle Bell was made into a media circus from the first day Kyle Bell was in court. The media should have been banned from any of the proceedings to protect Mr. Bell's right to due process and a fair trial.

....

Another bearing factor on this case involving Kyle Bell, is that this was an election year. It is very apparent that the Assistant States Attorney's were performing before the camera to make their office look good and the Judge was performing for the camera with comments that were unrelated to this case. His comments towards the murder or potential murder of the victims in a case where there was no threat or action of physical or bodily assault.

This Court knew that it's only course of action was to allow mass publicity to make a conviction in a case that was not sound or triable beyond a reasonable doubt.

(App. 17 - 21).

Mr. Bell stated his fifth argument as follows: "Conviction obtained by plea of Nolo-Contendere which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea, A violation of the Fifth and Fourteenth Amendment to the United States Constitution."

He stated the factual basis for this argument as follows:

In 1994, Kyle Bell entered a plea of Nolo-Contendere to two counts of Gross Sexual Imposition and two counts of Use of Minor in Sexual Performance. This plea was entered under the understanding that the maximum penalty allowable by law is 10 years on each count.

At that time, Kyle Bell was unaware of the fact that, by law, the Judge was required to inform Kyle Bell that upon a plea, he could be sentenced to

consecutive sentences, and by law, he could be ordered to register as a sex offender.

Judge Backes accepted the plea as a plea of guilty which is incorrect. Kyle Bell pleaded to the fact that he would not contest the case. It was believed that there was sufficient enough evidence.

Now that there is proof that there is not enough factual evidence, that some of the evidence is fabricated and that Kyle Bell was not fully informed of the range of penalties, by law, Kyle Bell can withdraw his plea of Nolo-Contendere and is exercising that right at this time. The plea of Nolo-contendere should be withdrawn and replaced with a plea of not guilty. Due to Constitutional Violations.

....

To further establish the fact that the court failed to fully inform Kyle Bell of the consequences of his plea of Nolo Contendere, Mr. Bell was not aware of the fact that he had to register as a sex offender until January 24, 1995, the day of sentencing. Judge Backes had no intention of informing Mr. Bell of this until Constance L. Cleveland, Assistant State's Attorney, informed Judge Backes of his duty to do so. Constance L. Cleveland wasn't even an attorney active in this case. Steven R. Dawson was assigned to case # 94-1353. See transcripts, case number 94-1353, for January 24, 1995, Gail E. Wells, Reporter:

Id. 94-1353 at page 31, lines 12 through 18, attachment 4:

12 Ms. Cleveland: In addition, Your Honor, the State
13 is wondering if, in the sentence of the Court it is also a
14 condition of his probation that he register as a sex offender.
15 THE COURT: I apologize. Yes. You will be subject
16 to all the terms and conditions that are set forth in the
17 sexual offender statute, which will require registration by
18 the defendant as a sexual offender.

Attachment 4

(App. 22 - 25).

Mr. Bell states his sixth argument as follows: "Conviction was obtained through presumption and use of inadmissible evidence, a violation of the Fifth and Fourteenth Amendment to the United States Constitution, right to due process." He

provides the factual basis for this argument as follows:

In the case against Kyle Bell, the state used evidence against Mr. Bell that had no direct bearing on the charges against him.

See Attachment 5, where Mr. Dawson enters a photograph as evidence. Id. Page 13, line 22: ...clothed in a black miniskirt, a pink fishnet-type top,... he then indicated that a black miniskirt was recovered from a search warrant and that it is the miniskirt M.G. was wearing.

See Attachment 6, Id. Page 14, lines 1 - 3: ...also recovered during the execution of the search warrant, the black miniskirt worn by 8 year-old M.G. during these photographs.

A closer examination of this evidence reveals a very disturbing fact. The black miniskirt in the photograph is a child size miniskirt with pleats and elastic band. We know it has an elastic band because of looking at later photos, M.G. has a mark on her waist from wearing something elastic. The black miniskirt entered as evidence is an adult size miniskirt. If a child were to wear this, it would wear with the bottom past the knees. Furthermore, the miniskirt does not have pleats, is faded in color, and ties with strings. These facts are severely inconsistent with the black miniskirt in the photograph. Making this miniskirt not the one in the photos, as Mr. Dawson presumes, and thus inadmissible and fabricated. Kyle Bell nor Kim Bell were at the residence during the search to witness, therefore this miniskirt could have come from anywhere. There is no forensic evidence linking this miniskirt to M.G.

....

As we proceed further in the case against Kyle Bell, some very serious allegations, inquiries, and presumptions are made with no evidence to prove these allegations. It also describes the states idea of the defendant's character, going so far as to call him a predator searching prey. See attachment 7, lines 22 and 23, page 15:

22 out victims, he grooms victims, he is a predator. His prey
23 are children, our community's children.

Attachment 8, line 25, page 16

25 We are going to have another victim who looks like

Attachment 9, lines 11-16, page 17

11 The State offers Exhibits 15, 16, and 17, items

12 seized from the defendant's home; two pair of girl's panties,

13 size 10, and a girl's training bra.

14 These are the most worrisome pieces of evidence
15 because they don't fit either of those victims. Makes one
16 wonder, who do they fit? The defendant's next victim?
Attachment 9, line 20, page 17
20 The defendant has extensive priors, not all of them

These are all presumptions stated by Mr. Dawson, Cass County Assistant State's Attorney. Allegations that he has no proof of. A pre-sentence investigation was conducted and a psychologist diagnosed Mr. Bell as not being a pedophile or predator. Mr. Dawson is not a psychologist and cannot make that assumption.

To further establish the violation of due process in this case and show that there was extreme prejudice by the State one must look at the statements that Stephen R. Dawson made under oath in both deposition and testimony on the stand in a suppression hearing for case no. 98-03403. Where Mr. Dawson refers to a plan. The State's Attorney's office had put together a plan to get Mr. Bell to illegally confess to a murder he did not commit. Mr. Dawson said that this plan was in effect since November of 1994. A time two months prior to the sentencing.

For a long time Kyle Bell was disturbed as to why Judge Backes would make reference to a murder in a case where there was no physical harm nor any threats of physical harm.

The plan was to offer Mr. Bell a deal of 30 years in prison concurrent to the 30 years he received for case no. 94-1353. How would Mr. Dawson know what to offer unless he knew what sentence Mr. Bell would receive. That is when it was made fully aware that Judge Norman J. Backes was involved in that plan. Thus proving his prejudice to Mr. Bell as indicated by the following statement:

Attachment 10, page 27, lines 10-13:

10 If Mr. Bell had murdered this child, killed her,
11 committed sexual acts upon the child and then murdered the
12 child, the maximum penalty that this Court could impose under
13 North Dakota law would be 30 years. That is for murder.

There are some very disturbing factors in this statement. One, there were two children involved in this case. Judge Backes refers four times to a single child, (this child, killed her, the child, and the child), where as the murder investigation involved one child. Second, Judge Backes uses the word murder three times, like he is trying to send some sort of message.

This proves beyond a doubt Judge Backes' involvement in the State's Attorney's plan. A Judge must remain neutral. Our symbol of Justice is Lady Justice, she is blindfolded with a sword in her left hand and a set of scales in her right hand, or vice versa. The scales are level indicating equality and she is blindfolded indicating neutrality, not seeing who is involved, but the issues at hand. These proceedings undermine the very foundation that justice was built on.

"The Court cannot allow this prejudice to continue." Judge Backes could be looked upon as convicting and sentencing Kyle Bell to a murder he wasn't on trial for. Just as a conviction upon a charge not made would be sheer denial of due process, so is it a violation of due process to convict and punish a man without evidence of his guilt.

(App. 27 - 31).

Mr. Bell stated his seventh argument as follows: "Unusual Punishment. Sentence is in violation of the Eighth Amendment to the United States Constitution, Cruel and Unusual Punishments." He provided his factual basis as follows:

The case against Kyle Bell was severely overblown. And what happens when you overrate something? You must have a big finish. The prosecution used personal vengeance, suspicion, presumption and lies to make this case sound worse than it actually was. Then the Judge shows his prejudice by graphically explaining the murder. In a case where there was no physical injury nor even a single threat of ever committing physical injury upon the victims.

Then the judge goes against the very rules, laws and amendments that this country was built on. Rules that can be traced back to Europe. He sentences Kyle Bell to three ten year consecutive sentences and an additional five years probation, consecutive. A sentence that shocked Mr. Bell's attorney, Mr. Bell, and society itself. A sentence that can be compared to no other case of the same nature. Murderers convicted of crimes twice as heinous and brutal as this case could ever have been . You can read case after case from the past and open the newspaper every day and find some sort of sexual case where the accused has received a far lesser sentence than Mr. Bell's, and the greatest majority of these cases, when multiple counts are involved, the accused received concurrent sentences. Two cases come to mind that were being tried at the same time Mr. Bell's case was being tried, and both of these cases were far more heinous, one involved an individual convicted three times for the same offense. The same offense as Mr. Bell,

only far worse things were done to these victims. Their sentences were concurrent and far lesser in years.

The exact number 30 years, has played a part in this case since November of 1994. Why didn't Judge Backes sentence Mr. Bell to four ten year sentences consecutive for 40 years? He couldn't. Thirty years was the bargaining chip needed for the State's Attorney's office in the illegal dealings of the investigation of Mr. Bell in the North disappearance. As were once again referred to Judge Backes' statement in Attachment 10, page 27, lines 10-13. By law he couldn't sentence me to more than 30 years. I need go no further, the record in case No. 94-1353 and the deposition hearing of Steven Dawson speak for themselves when they show as plain as day Judge Backes pretrial prejudice and implication in the Cass County States Attorneys offices plan. This sentence is not proportionate to other crimes of the like in or around North Dakota, and is a clear violation of the rules of law, court procedure, ethics, and the Eighth Amendment to the United State's Constitution, and must be reversed. This new evidence was brought to light in case no. 98-03403.

(App. 32 - 38).

Mr. Bell stated his eight argument as follows: "Conviction and Sentences are in violation of the Rules and laws of the Criminal Procedures and are a violation of the Fifth and Fourteenth Amendments to the United States Constitution, the right to due process and equal protection." He provided the factual basis for his argument as follows:

In 1994 Kyle Bell pleaded Nolo-Contendere to one count of Gross Sexual Imposition and one count of Use of Minor in Sexual Performance against his 8 year-old niece M.G. and one count of Gross Sexual Imposition and one count of Use of Minor in Sexual Performance against his 3 year-old daughter J. M. Criminal Judgment and Commitment, attachment 11, the State pronounced judgment upon plea of guilty. Kyle Bell did not plead guilty, he pleaded Nolo-Contendere, this is a considerable difference.

Furthermore, Kyle Bell was charged with crimes against his 8 year-old niece and 3 year-old daughter. On count 6 of the Amended Complaint Mr. Bell is indicated as J.M.'s parent. Other paperwork shows M.G. as Mr. Bell's niece and J.M. as Mr. Bell's daughter.

Therefore, the Court's 1994 Judgment against Mr. Bell is illegal. In this judgment, as is recognized by the North Dakota State Supreme Court, 540 NW 2d 599, State v. Bell, (ND 1995), Attachments 12a and b, Mr. Bell is convicted of crimes against M.G., Mr. Bell's 8 year-old daughter and J.M. Mr. Bell's 3 year-old neighbor. These two minors do not exist, nor did they ever. In 1994 Mr. Bell did not have an 8 year-old daughter or even a daughter named M.G., nor was there a 3 year-old neighbor by the name J.M. Kyle Bell cannot be found guilty of a crime against two people to which he wasn't charged, nor is there evidence to a crime. Mr. Bell cannot be found guilty of crimes he did not commit.

....

In addition to being convicted of a crime for which he didn't commit, Kyle Bell is being forced to comply to an illegal sentence. In the Criminal Judgment and Commitment filed February 13, 1995 at 3:30 p.m. (Attachments 13 and 14) the Court sentenced Kyle Bell to three ten year sentences to commence on January 24, 1995.

Kyle Bell was transported to the North Dakota State Pen. in March of 1995. During Mr. Bell's intake process into the State Penitentiary, the sentences were questioned by Officer Charles Schumacher. Mr. Schumacher contacted Cass County and asked them about it.

Cass County then rewrote the Criminal Judgment and Commitment and thus violating Rule 35 of the North Dakota Century Code and illegally resentencing Mr. Bell three times to the original sentence. This rewritten sentence was filed June 20th 1995 at 3:40 p.m. (Attachments 15 -16). Rule 35 clearly states that Court must act in 120 days. This was done after the 120 days had passed.

The plain language of subdivision (b) of this rule, emphasized in its explanatory note, means that failure of a sentencing Court to act within 120 days forecloses its power to reduce a criminal sentence....

Mr. Bell's release date is incorrect, but the State Penitentiary still recognizes that Mr. Bell's sentence on all counts begins on January 24, 1995, (attachments 14-15). Mr. Bell's sentence is concurrent and must be recognized and obeyed as such.

....

The Amended Criminal Judgment and Commitment against Kyle Bell was illegally filed and cannot be recognized. Due to the first un-understandably

sentence; the executing authority by law must recognize the sentence most favorable to Mr. Bell. Thus, Mr. Bell, by law, is serving a concurrent sentence.

(App. 39 - 46).

Mr. Bell wrote his application in the form of the argument portion of a brief, with legal citations and arguments interspersed with his factual assertions.

Argument

I. The Trial Court's Summary Dismissal of Mr. Bell's Application was Procedurally Erroneous.

Mr. Bell filed his application for post-conviction relief on March 19, 2001. The State responded with a Motion to Dismiss on April 18, 2001. No evidentiary hearing was held. On May 17, 2001, the Court entered its Memorandum Opinion and Order granting Motion to Dismiss, in which the Court ordered the dismissal of Mr. Bell's claim for post-conviction relief. The trial court was, of course, bound by **N.D.C.C. Chapter 29-32.1**, the Uniform Post-Conviction Procedure Act as enacted in North Dakota. The State couched its Motion to Dismiss in the terms set forth in **N.D.C.C. Section 29-32.1-06**, and raised the affirmative defenses set forth in **N.D.C.C. Section 29-32.1-12**. The trial court dismissed some of the claims as being res judicata, and the balance of the claims as being a misuse of process. This Court examined the procedures established by **N.D.C.C. Chapter 29-32.1** in *Clark v. State*, 1999 ND 78, 593 N.W.2d 329. *Clark* involved the summary dismissal of an application for post-conviction relief. This Court pointed out that its review of the summary denial of an application for post-conviction relief is like its review of an

appeal from a summary judgment. *Id.* at ¶ 5; 593 N.W.2d at 331. As such, “[t]he party opposing the motion is entitled to all reasonable inferences at the preliminary stages and is entitled to an evidentiary hearing if an inference raises a genuine issue of fact. Once the moving party has established there is no genuine issue of fact, the burden shifts to the nonmoving party to show a genuine issue of fact exists. The party resisting the motion may not merely rely on the pleadings or unsupported conclusory allegations; rather the party must present competent evidence by affidavit or other comparable means.” (Citations omitted). The trial court did not follow this analysis at all. Mr. Bell’s application contained extensive factual assertions and a number of attachments, which consisted of exhibits, court records, and portions of transcripts. On the other hand, the State’s Motion to Dismiss did not seek to discuss any of the facts, nor did the State argue that there was no issue of material fact. The State relied upon only conclusory statements that Mr. Bell’s allegations were barred by either res judicata, or were a misuse of process. It is interesting to note that this Court found Mr. Bell’s first application for post-conviction relief lacking because it was not supported by facts, but only upon conclusory statements. ***Bell v. State*, 1998 ND 35, ¶ 37, 575 N.W.2d 211, 218.** In the present case, the roles are reversed. Mr. Bell has documented his claims with facts and evidence, while the state has provided no factual response at all. The Court denied Mr. Bell’s request to be present for an evidentiary hearing. The Court did not hold an evidentiary hearing. Nor did the Court schedule a hearing for oral arguments. In fact, Mr. Bell and his attorney were left in limbo at the mercy of the court. By summarily

dismissing the application, the trial court used the procedure which this Court has said is like the procedure for a Summary Judgment. However, the procedure used by the trial court seems backwards. With a motion for summary judgment, the party seeking a summary judgment files a motion supported by affidavits, depositions, or other forms of evidence. The responding party must respond with affidavits, depositions, or other forms of evidence in order to resist the motion. **Rule 56, N.D.R.Civ.P.** Here, Mr. Bell commenced his action with his pleading, the application, which was extensively supported with factual allegations and exhibits, which is not required under **N.D.C.C. Chapter 29-32.1**. The State responded with a motion to dismiss, which really amounted to more of a motion for judgment on the pleadings under **Rule 12(c), N.D.R.Civ.P.** One really cannot claim the procedure used here followed **Rule 56** or anything resembling it. The trial court should have allowed a hearing with the presence of Mr. Bell, along with testimony and oral argument. **N.D.C.C. Section 29-32.1-09**. Mr. Bell has never been allowed to appear before the Court to assert his claims. This Court should reverse the Judgment and remand this case to the trial court for an evidentiary hearing.

II. The Trial Court's Summary Dismissal of Three of Mr. Bell's Allegations as Res Judicata was Erroneous.

The trial court dismissed "allegations four, five, and seven because they are res judicata." (App. 94). Again, This Court examined the procedures established by **N.D.C.C. Chapter 29-32.1** in *Clark v. State*, 1999 ND 78, 593 N.W.2d 329, and specifically whether the application fell within the "penumbra of the affirmative

defenses delineated in N.D.C.C. ch. 29-32.1.” *Id. at* ¶ 6, 593 N.W.2d 331. In *Clark*, this Court decided that none of the issues raised by Clark were barred by res judicata. It is not clear that any of the three of Mr. Bell’s arguments dismissed as res judicata were “fully and finally determined in a previous proceeding.” *Id. at* ¶ 8, 593 N.W.2d at 332. Mr. Bell stated his fourth allegation as follows: “Conviction obtained by mass publicity of vital parts of the case, violating the Fifth and Fourteenth Amendments to the United States Constitution’s right to a fair trial and due process.” Mr. Bell stated his fifth argument as follows: “Conviction obtained by plea of Nolo-Contendere which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea, A violation of the Fifth and Fourteenth Amendment to the United States Constitution.” Mr. Bell stated his seventh argument as follows: “Unusual Punishment. Sentence is in violation of the Eighth Amendment to the United States Constitution, Cruel and Unusual Punishments.” These are new arguments which may sound similar to those raised in the past, but they are substantively different. When the trial court failed to hold an evidentiary hearing, it failed to properly analyze the factual claims made by Mr. Bell, and was unable to make a proper determination of whether these issues had been fairly raised and disposed of in the prior proceedings. Again, this Court should reverse the judgment and remand for a proper hearing on Mr. Bell’s application.

III. The Trial Court’s Summary Dismissal of Five of Mr. Bell’s Allegations as a Misuse of Process was Erroneous.

The trial court decided that “allegations one, two, three, six, and eight are

dismissed because they are a misuse of process.” (App. 94). Mr. Bell’s first argument is that he had a constitutional right to be indicted by a grand jury. In the original prosecution, the State proceeded by Information as the charging mechanism. Therefore, Mr. Bell believes that his right to be charged by grand jury indictment was violated. That Mr. Bell was not indicted by a grand jury is not in dispute. Mr. Bell’s second argument is that his “Conviction obtained by a violation of the Sixth Amendment of the United States Constitution, Assistance of Counsel.” Mr. Bell stated his third allegation as follows: “Conviction obtained by use of coerced confession and a violation of the privilege against self-incrimination, a violation of the Fifth and Fourteenth Amendments to the United States Constitution.” Mr. Bell states his sixth argument as follows: “Conviction was obtained through presumption and use of inadmissible evidence, a violation of the Fifth and Fourteenth Amendment to the United States Constitution, right to due process.” Mr. Bell stated his eighth argument as follows: “Conviction and Sentences are in violation of the Rules and laws of the Criminal Procedures and are a violation of the Fifth and Fourteenth Amendments to the United States Constitution, the right to due process and equal protection.” The trial court found that all of these claims had to be raised at the trial court level, on direct appeal of his conviction, or in his first application for post-conviction relief, citing **Clark at ¶ 19, 593 N.W.2d at 334**. (App. 94). However, this Court also recognized that “Post-conviction proceedings necessarily present a balancing act between the constitutional rights of defendants and the notion of finality in our criminal justice system.” **Clark at ¶ 21, 593 N.W.2d at 334**. This

Court in **Clark** quoted extensively from the **A.B.A . Standards** and commentary thereto, which recognize that virtually every matter that can be raised in a post-conviction proceeding could have been raised before, and that, “Postconviction remedies exist to try fundamental issues that have not been tried before.” **Id.** (**citations omitted**). The bottom line is that a criminal defendant should be given an “opportunity to have at least one substantive review of issues relating to a conviction.” **Id.**

A careful analysis of Mr. Bell’s present post-conviction application and the procedure used by the trial court in this matter reveal that he has raised several weighty constitutional issues which have a direct bearing on the foundation of the charges and his convictions of those charges, based upon his un-counseled confession and ultimately guilty pleas to the charges. There was no “litigation” of these matters. **State v. Bell, 540 N.W.2d 599 (N.D. 1995)**(Bell’s direct appeal). There was no evidentiary hearing in connection with the prior post-conviction relief applications, and Mr. Bell has never been brought personally before the Court to argue his case or to present testimony in support of his allegations. This Court recognized the really poor procedures used at the trial court level in the last post-conviction case in **Bell v. State, 1998 ND 35, ¶ 23, 575 N.W.2d 211, 216**. One could argue that the first case was a primer on how not to proceed with an orderly disposition of an application for post-conviction relief. As pointed out above herein, the procedure used in the instant case is also questionable. Can the State really make a good faith argument that M. Bell’s claims in his post-conviction applications

have been “fully and fairly litigated?” By seeking summary disposition each and every time, the State has left Mr. Bell with the understandable feeling that he has been, and continues to be, “railroaded” by the North Dakota criminal justice system. If the State is so confident that Mr. Bell’s rights were protected at every stage, then there should be no fear of a fair hearing. At this point one is left with a strong impression that the State is going to continue to hide behind procedural technicalities, and does not want to have a court reach the merits of any of his claims. At least Mr. Bell is convinced that this is exactly what has occurred and continues to occur. By remanding this case to the trial court for an evidentiary hearing, with Mr. Bell present, to allow testimony and oral argument in open Court, the State and this Court will ensure integrity of the process. And, if Mr. Bell pursues his remedies in Federal Court, which he very likely will, the integrity of the North Dakota courts will be in good stead. Remanding this case for a full and fair hearing will bolster the integrity of our criminal justice system, not undermine it. Then and only then will Mr. Bell be foreclosed from effectively attacking these convictions in future litigation. Furthermore, Mr. Bell may very be entitled to substantive relief on his convictions, and/or his sentences.

IV. The Trial Court’s Summary Dismissal of Mr. Bell’s Motions to be Present at the Hearing and to Bar the Media was Erroneous.

The State gave short shrift to Mr. Bell’s request to be present at the hearing and to bar the media from the proceedings. (App. 91). The trial court denied those requests. (App. 95). The trial court has the discretion to ensure the presence of the

petitioner at a hearing on an application for post-conviction relief. **N.D.C.C. Section 29-32.1-10** governs the conduct of an evidentiary hearing. It states in part that “[e]vidence must be presented in open court....” The petitioner himself is often the primary witness at such a hearing. A personal appearance is essential. In practice, the Cass County District Judges often order the personal presence of the petitioner. And, as set forth above, the fair resolution of Mr. Bell’s case requires that he be present and allowed to testify in support of his claims.

The issue of media access is governed by North Dakota law. **See N.D.R. Crim. P. 53; N.D.R.Ct. 10.1; N.D.Sup.Ct.Adm.R. 21.** The court has some discretion in determining the extent of media access. The trial court was well aware of these rules and the court’s discretion to limit media access.


A post-conviction relief application need not be supported by argument, citations or discussion of authorities. **N.D.C.C. Section 29-32.1-04.** The Court’s only reason given for denying these requests was the lack of citation of authority, which is not a proper basis for such a denial.

Again, this Court should remand this case for a full and fair hearing on the merits.

CONCLUSION

WHEREFORE, Petitioner prays that the court vacate the Judgment dated May 21, 2001, and that he be granted a full and fair hearing of his claims on remand.

Respectfully submitted this 9th day of August, 2001.



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