ORIGINAL

20030145

State of North Dakota	[	In Supreme Court
County of Burleigh	[	South Central Judic. Dist.
Jerry Lee Bay (Appellant)	[	Appeal in Post Conv. Releif.
vs.	[	
State of North Dakota	[	Case # 99-K-3138
(Appellee)	[	

Appeal from the Summary Judgement under: Chapt. 29-32.1-01(1)(e) Post Conviction Proceedure Act, Vacation of Conviction or Sentence in the Interest of Justice.

Brief Prepared By:

Jerry Lee Bay

Acting Pro Se

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STATUTES

N.D.R. EVIDENCE 803 (24) Criminal law 695.5

The Prosecuter, under **N.D.R. Evid. 924)** has failed to show that the time in this matter was NOT "in close proximity" to the Alleged Incident. And that the Child's Statements were NOT Credible, due to the fact, that the Mother was left alone with her child, while the questioning was still going on. So there was a Motive to Fabricate, and the Defendant was prejudiced.

U.S.C.A. const. AMMENDMENT 6, Crim. 622.8

The prosecuter never made ANY offer of PROOF that the Child's satements were reliable, and NO guarantees of Trustworthiness were made, That are Constitutionally Required, in the Sixth Ammendment.

U.S.C.A. CONSTITUTIONAL AMMENDMENT 14

The prosecuter Violated the defendant's Due process Rights by Failure to provide the Defense with a Videotape of Osowski, and the Minor Child, and the Bismarck Police Dept. Violated the Defendant's 14th Ammendment's Due Process Rights, by Allowing the Mother to remain alone while the Questioning was still Ongoing.

N.D.R. Criminal Proceedure 52 (B)

The Court Erred in Accepting Detective Malo's Statement to what the Child had Said into evidence, at the preliminary Hearing, Without first having an In-depth Evaluation done on the Proposed Testimony.

The Court also Erred, when it Accepted only an Oral Offer of Proof, Rather than the Witness testimony. The trial Court Committed Plain, in this case, without an adequate Foundation, From the: State, Victim's "Out of Court" Statements, Under the Child hearsay Rule. In the Child's Report, She was asked if anything had happened to her? And, She "Shook her head" INDICATING "No", and then She Said, "I don't remember".

N.D.R. Criminal proceedure 11 (c) Criminal Law 273.1 (2)
A Plea Agreement Includes Situations, in which the Defendant Agrees to Plead Guilty, in Exchange for Dimissal of Charges or the Nonbinding Recommendation of a particular Sentence.

N.D.R. Criminal proceedure 11 (d) (1).

State v. Farrell: 606, N.W. 2d. 524 (N.D. 2000).

JURISDICTION

Jurisdiction of the Supreme court is Invoked in this case, because the prosecution and the Lower Court failed to Follow the Laws of the State of North Dakota, as well as the Constitution of the United States. The Prosecution did not Inform the Court, that the reliability & Guarantees of Trustworthiness, in the Child's Answers, could NOT be Regarded as Factual. Due to the Time Content, and the presense of the Mother, being with Her, at the Time of Questioning. The Actual Time, that had passed, from this Alleged Incident, is Six Days SHORT of 10 Months. This Violates the Accused's U.S.C.A Constitutional Ammendment's

Rights, as well as N.D.R Evidence 803 924. By allowing the Mother to remain Alone, with her Child, while Questioning was still Ongoing. With NO Supervision between Mother and Daughter, while the Interviewer was taking her breaks. This would Obviosly Affect the defendant's Substantial Rights, Under, N.D.R. Crim. Proc. 52 (b), and Deprive the Defendant of having a fair Trial, under these Circumstances.
See State v. Hirschkorn 640 N.W. 2d 439 (N.D. 2002)

STATEMENT of ISSUES

In this Case, neither the prosecuter, or the Court, CARED, abot the Time, that had Passed, from When the Alleged Incident Happened?, To the Time that this Child gave her Report. I believe that the Time in this Case, does NOT Coincide, with the Close proximity, in N.D.R. Evid. 803 (24) Under N.D.R. Evidence 803 (24) (A): The Child Hearsay Statements, are NOT ADMISSABLE, unless the Trial Court finds that the: Time, Content, and the Circumstances, of the Statement, Provide Sufficiant Guarantees of Trustworthiness. Factors to Consider, Include: Spontinuity, and Consistant repitition, and the mental State of the Declarant. As well as the use of Terminology, unexpected by a Child, of a Similar Age. Also a lack of Motive to Fabricate. See: Messner, 1998 N.D. 151, 15, 583 N.W. 2nd. 109.

There were No Guarantees of Trustworthiness, because the Mother was sitting, Right along Side, Helping the Child to Fabricate, whatever hhe Mother, wanted her to.

The Prosecution Violated the Defendant's Rights, under **U.S.C.A. Const. Ammendments Six & Fourteen.**

The Court Violated the Defendant's Substantial Rights, under **N.D.R. Crim. Proceedure 52 (b).**

The Court Abuses it's Discression, under the Following: **N.D.R. Criminal Proc. 11 (c) and 11 (d) (1).**

NATURE of CASE

In December of 1999, a Law Enforcement Officer obtained a Warrent, for the Arrest of Jerry L. Bay. Mr Bay was arrested & Charged with GROSS SEXUAL IMPOSITION. In violation of: **N.D.C.C. 12.1-20-03 (1) (d) "Class A Felony". Having engaged in a Sexual act with a Minor Under the Age of 15 Years.**

Mr. Bay pleaded Not Guilty, to this Charge.

Then, on March 23, 2000, this Charge was Ammended, because the State had No Evidense, and Could Not offer any **PROOF**, that the Defendant had Engaged in a Sexual Act, with a minor. The Prosecution then Charged **Mr. Bay with , N.D.C.C. 12.1-20-03 (2) (a) Class B Felony, "Sexual Contact" with a Minor Under the Age of 15 Years of Age.** In which the **Pr** Prosecution had No Timely Evidense On August 31, 2000, at the Change of Plea Hearing, I had entered an "Alford Plea" to Gross Sexual Imposition, and I plead Guilty to the Other 4 Charges.

On this day, On: **Pages:** 7-10, of the **Court Transcripts,** the **Court says:** "with that information Mr. Bay, there is Enough, so i can Accept a plea of Guilty, to this Charge". "Do You still want me to do that?"

The Defendant: "Could i tell My part of it"?

After I told "My Side", I was Never Again given the Opportunity to "Answer" the Court's Question, as to Weither I wanted to Withdraw My Plea? I was NEVER INFORMED, by my Attorney, that I could withdraw my Plea, PRIOR, to the Sentencing.

On December 20, 2000, I was Convicted, and Sentenced in Violation of: **N.D.C.C. 12.1-20-03 (2) (a) "Sexual Contact"** with a **Minor, Under 15 Years of Age.** I was sentenced to Serve 10 years Imprisonment, with 5 years Suspended, for a period of 5 years.

PLEA NEGOTIATIONS

On Wednesday, August 16, 2000. Mr. Murry, Attorney for the Defendant, Informed the Defendant, that, He, "Mr. Murry", and the Prosecution, "Ms. Felend", had "Worked out a deal" (Between themselves). Beginning February 8, 2000,to: August 16, 2000, UNKNOWN to the Defendant. Mr. Murry had Informed His Client, that If he were to Plead Guilty, the Prosecution would the Reccomend Five Years Credit, for Time Served.

I had informed my attorney, that I wanted a Jury Trial, on the G.S.I. Charge, but he Insisted that i "Take the Deal", for I could get MORE than Two Years, on the Other Charges. I was under great Duress, and Anxiety, at the time, and Still am. Mr. Murry handed me a copy of the Recommendation. I Informed mr. Murry that if the Prosecuter would knock off One Year, I would "Take the Deal". Mr. Murry Infomed Mr. Bay, that he would get in touch with the Prosecuter and see if she would be willing to negotiate the "Terms" a Little More. The Prosecuter said that She Would Recommend that I would do: 4 1/2 years, with the credit of "Time Served". INSTEAD of the: Five years PREVIOUSLY offered. So I took this "Deal", leading me to Believe that I would only be serving 3 1/2 MORE Years.

On Page 20, Of the August 31 2000 Hearing. Mr Murry made an Attempt to get this RECOMMENDATION on record, but the Court DID NOT allow mr. Murry to do this. At this Point, the Court should have Allowed Mr. Bay, the opportunity to then Withdraw his Plea.

On December 18, 2002. I made a Motion to Withdraw my Plea, and was Denied. The Trial Court Failed to Substantially Comply, with the Requirements of N.D.R. Crim. Proc. 11 (c), which provides that the Insuring Plea, is Voluntary.

The court Shall NOT Accept a Plea without First: Addressing the Defendant Presonally, except as provided in: Rule 43 In open Court, determining that the plea Is Voluntary, and Not a result of: Force or Threats, or the Promises apart from the Plea Agreement. The Court shall also Inquire as to weither the Defendant's willingness to Plead Guilty, Results from Previous Discussions between the Prosecuter and the Defendant, or the Defendant's Attorney.

I have, in Writing, a Copy of the Prosecuter's August 14, 2000 Recommendations, and with Her Signature, leading me to Believe, that i would receive this particular Sentence. I should have been allowed to Withdraw my Alford Plea. Because the Trial Court, DID NOT ask Me weither my Alford Plea, had resulted from previous discussions with the Prosecuting Atty. And because I was NOT advised, that the Court could REJECT the Prosecuter's Recommended Sentence.

The Purpose for a **Rule 11 (c) Inquiry**, as to weither the Defendant's willingness to Plead Guilty, results from the Previous Discussions between the Prosecuting Attorney and the Defendant. It is for the Trial Court to Assertain weither the Plea of Guilty, is the Result of Plea Negotiations.

In State v. Farrell 606 N.W. 2d. 524 (N.D. 2000): The Trial Court did NOT substantially comply with the Requirements of N.D.R. Crim. Proceedure 11 (c), resulting in a Manifest Injustice, and the Trial Court Abused it's Discression in not Allowing Farrell to withdraw his guilty Plea. I feel that the Trial Court in my case, has caused a Manifest Injustice also, by not giving the Defendant the Opportunity to put the Prosecuter's recommendation on the Record, or Allow the Defendant to Withdraw his Guilty Plea. Therefore the Trial Court, has abused it's Discression.

COURSE of PROCEEDINGS

On August 31, 2000, a Change of plea Hearing was held, in which the defendant, Mr. Bay, in Exchange for his Alford Plea, that the Prosecution would recommend that Mr. Bay would serve a Total of: 4 1/2 Years, with the Credit for Time Served., and the Rest was to be Suspended.

Durring the course of thes Proceedings, it became apparantly obvious that Neither the court, or the Prosecution, knew any of the Basic or Fundamental facts in this Case. Like: "Who the alleged Victim Was?", or "Other incidents", the Time that had Elapsed before the reports were taken. It can be seen that the Defendant was Unfairly Prejudiced, and that there were alot of obvious, or Plian errors, in this Case.

It can be seen in the **Transcript** on **Page 5**, The Court: : I Think it's M.B. (Referring to the Alleged Victim's Innitials). Then the **Prosecution** Affirmed this, by Answering "Yes". This is NOT the Alleged Victim, She is B.P.

Then, on **Page 6**, **The Prosecution** goes on to say that Mr. Bay was at the Minor Child's Residense. This is ALSO incorrect, because the Minor Child Lives in Morton County. This Alleged Incident took place at the Aunt's Residense. The Mother was NOT THERE, and neither was her Boyfriend, Lane.

Now, on **Page 6** of the **Transcripts**, You will see that the Prosecution informed the Court to basically What? had Transpired. She say's basically What happened, is the Mother had Thought she saw Mr. Bay putting the Child's hand, on his Private Areas. I would like to point out again that, This would be the Aunt (Brenda), saying this. NOT, the Mother (Wanda). Now, at the preliminary Hearing, Detective Malo says something Similar to this. He said that Brenda, THOUGHT she saw B.P.'s Hand, on Jerry Bay's Crotch Area, with Jerry holding B.P.'s Hand.

Now in **Brenda's handwritten Report # 99-5-18204**, on Dec. 28, 1999, She writes out of the Corner of my Eye, I thought I witnessed him removing his hand from his crotch. So Both the prosecution & Detective Malo, were wrong, in saying that Mr. bay was putting B.P.'s hand on his Crotch, or Private area.

The Prosecution contends that She had an eyewitness to this Particular Incident, the Same One that witnessed the Sexual Act, that i was Charged with, that being: lane Weber. Mr. Weber's Credibility, does not lie too well, with Officer valley, of the Bismarck police Department. As well as Brenda, the Aunt. (She was Convicted of Fraud by Social Services), which makes Her a Felon.

On Page 9 of the **August 31 Transcript**, You will see that the Prosecution made the statement that Mr. Bay made Allegations concerning Other Sexual Acts, or other Incidents. She said that all those were Completely Investigated by Law Enforcement Officials, and they were found to have NO Merit.

If the Court could now look at **Page 10** of the **Preliminary Transcripts**, You will see what Detective malo had said.

She, meaning (The mother), had told me that B.P. was showing some signs of Behavior problems, that this Incident was bothering Her, also Other Incidents.

FACTS

Osowski asked B.P. if anything had happened to her? Then She shook her head (NO), and said "I don't Remember".

Osowski asked B.P., If a part of Jerry's Body ever Touched her body? "He touched my stomach, with his hand".

When asked if Jerry ever had her touch his privates in the Bathroom, B.P. Indicated (No), by shaking her head.

When asked if Jerry ever had her touch his Privates in the Living Room, B.P. again, shook her haed (NO).

B.P. Made the Statement that her Dad's boy's, Nick & Robbie, were trying to hump her, at their House.

The Mother says that Her Son, makes her Daughter play with other Boy's Private Parts.

B.P. also said that her Brother makes her do it.

B.P. also said, (Jaydeen), a friend of her Mother's Sister's kid, was touching her crotch area with his tongue.

The Aunt said, out of the Corner of my eye, "I thought I seen him, Removing his hand from his crotch".

At one point, B.P. said that Nick & Robbie were her Dad's boys, and the next time, She referred to them as her cousins.

FACTS RELEVENT to the ISSUE

First of all, the reliability & trustworthiness of a 5 year old Minor child, is a Crucial Issue Here, and that the Questioning should have been done by a Licensed Psychoanalist, one that deals with the Concepts of Infantile Sexuality, and <u>NOT</u> a Forensic Interviewer.

Second, Osowski allowed the Mother of this Child to Sit In, and View the Interview, after the Mother had Insisted that, "She had to do this". I will also Point Out that Osowski says: "No Social Worker was Present at the Time".

On Page 7, the Follow Up Report, B.P. was asked How many times she saw Jerry without his clothes on? B.P. Held up (ONE FINGER). On D-8: Deb took a break, (Leaving the Mother alone with B.P.). B.P. was asked if she ever saw Jerry's Privates, in any other room? B.P. Said: "She saw his Privates this many times, and she held up 10 Fingers." In the Same Paragraph, on Top of Page D-8, you will see when osowski asked B.P. if jerry ever had her touch his Privates, in the bathroom? B.P. Indicated (NO)! By shaking her head. When asked if it ever happened in the Living Room? B.P. Shook her head again (NO)! After the next Paragraph, Osowski took another break,(leaving the Mother alone Again with B.P.). When Osowski returned, she asked B.P. if the Touching had happened at Anyone elses house? This is when B.P.'s Story Changed Again! This just happened to be her "ALLEGED EVIDENSE" from which the prosecuter said, was to be SIMILAR to Mr. Weber's.

ARGUMENT

The Prosecution in this Case KNOWINGLY failed to INFORM the Court, that the Mother & Child (Were Allowed to Remain Together in the Interview Room), by themselves, while osowski took Two Breaks, on two Separate ocassions, and this is while the questioning was still going on.

By Allowing this to happen. It gave the Mother a chance to "COACH the DAUGHTER", into what She wanted her to Say. The Bismarck Police Department, Deb osowski, and the Prosecution for the State, all have Violated the Defendant's Due process Rights, Under **U.S.C.A. Const. Ammendment 14.** This also Constitutes **"Plain Error"**, and has to be Corrected.
Also, osowski asked a Question, leading the Victim to Answer to "How they wanted her to", and as to What they wanted to Hear?" Again, Violating the Defendant's Rights. The Question that was asked by Osowski was: "If it Happened in the Living Room, at her Aunt's House"? This type of Question should have NEVER been asked, by a person who was Representing the prosecuter, or the Police department. This is a Question that Should have been asked in Front of a Jury in a Court Room. Osowski was Badgering the Child to Admit that This ACTUALLY happened. When in fact, She (The child) already indicated that it DIDN'T , that is Unfair Prejudice. Furthermore, I would like to add the prosecution made the Comment that the defendant was Lying, or Not telling the Truth, when he made the allegation to the Other Incidents, or sexual Act, when it was mentioned to Detective Malo, at the Preliminary hearing.

This was also Mentioned by the Mother, as well, in her Report and also by the Defense Council, at the Change of Plea hearing, on August 31, 2000.

I also want to mention that the Prosecution KNOWINGLY, Withheld the Videotape of osowski and the Child, as well as the 960 Report, For the Prosecution's own Personal Gain. In a Conviction, and by doing this, This also Violated the Defendant's Due Process Rights AGAIN!

This would fall under: U.S.C.A. Constitutional Ammendments Six & Fourteen, and also N.D. Rules of Evidense 803 (24).

I believe the Credibility and Trustworthiness was lost, when the Mother was allowed to remain with the Child. I, Personally don't know what is on this Videotape? But I feel that this Honorable Court should review this tape, and make Your Decision, based on that.

Indicia of reliability and Guarantees of Trustworthiness, are Constitutionally Required BEFORE the Admission of Hearsay Statements, to Preserve the sixth ammendment's basic Interest, in Requiring CONFRONTATION, even though an Accused Cannot Directly Confront, the hearsay Declarant. This is Found in: Idaho v. Wright 497 U.S. 805, 814-16, 110 S. CT. 3139, 111 Led. 2d 638 (1990): Messner 1998 N.D. 151, 12,583 N.W. 2d 109 Stevens 796 P2d at 952.

The Constitution requires that a Criminal Defendant be given the Opportunity to Present Evidense, that is Relevant, Material, and also Favorable, to his Defense. U.S. v. Begay 937 F2d 515 (10th Cir. 1991).

RELIEF

I am requesting that this Honorable Court allow the Defendant to WITHDRAW his "Alford Plea", to N.D.C.C. 12.1-20-30 (2)(a) that being having Sexual Contact with a Minor Under the Age of 15 Years, under N.D.R. Crim. Proceedure 11 (d) (1), Non Binding Recommendation, of a particular Sentense, in Exchange for his Guilty Plea, and Vacate the Judgement, Against the Defendant, for Prosecution Misconduct. That being that the Prosecution KNOWINGLY withheld Evidense from the Defendant's Due Process Rights.

If this Court Does NOT find, In MY Favor, i would like to make a Motion at this time, that an Inlimin Hearing, on the Sexualization of this minor Child be held. This would only be fair, since the Prosecutional Misconduct Exist in this case, Violating the Defendant's Rights. U.S.C.A. Const. Ammendment 14.

Sincerely:

Jerry L Bay

Jerry L. Bay

Dated this 5 Day of June 2003.

RECEIVED BY CLERK
SUPREME COURT JUN 30 '03

Proof of Service 20030145

In the matter of Terry L Bay vs. State of North Dakota in Burleigh Co. No 99-K-3138 - Supreme Court No 2003145 I acknowledge that a copy of the Appellants Brief and Appendix was mailed to States Attorney, Cynthia Feland as well as Penny Miller Clerk of Supreme Court on the 18th day of June 2003.

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUN 30 2003
STATE OF NORTH DAKOTA

Sincerely Jerry L Bay

dated 25 June 2003

Witnessed by: Denise Krenz 6/26/03
Commission Expires 7/5/2007

DENISE KRENZ
Notary Public, STATE OF NORTH DAKOTA
My Commission Expires JULY 5, 2007