20100141-20100143,
20100145 & 20100146

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20100143, 20100145, 20100146

STATE OF NORTH DAKOTA,
Planitiff/Appellee,

v.

MITCHELL HOLBACH,
Defendant/Appellant.

Supreme Court No. 20100141, 20100142

MITCHELL HOLBACH,
Petitioner/Appellant,

v.

STATE OF NORTH DAKOTA,
Respondent/Appellee.

ON APPEAL FROM THE ORDER DENYING POST-CONVICTION; ORDER DENYING PETITION, COMPLAINTS, OBJECTIONS, AND MOTION TO AMEND CRIMINAL JUDGMENT-PROBATION CONDITIONS; AND ORDER ON REQUEST FOR RETURN OF PERSONAL PROPERTY
FROM THE DISTRICT COURT OF NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT

BRIEF FOR PLAINTIFF/APPELLEE

Travis W. Finck
Bismarck/Mandan Public
Defender Office
314 E Thayer Avenue, Suite 200
Bismarck, ND 58501
(701)328-7190
Bar ID# 06183
ATTORNEY FOR DEFENDANT/
APPELLANT

Rozanna Larson
Ward County State's Attorney
PO Box 5005
Minot, ND 58702
(701)857-6480
Bar ID# 05294
ATTORNEY FOR PLAINTIFF/
APPELLEE

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STATEMENT OF THE CASE

The State has reviewed Holbach's Statement of the Case starting at page one of Appellant's Brief and has no objections.

STATEMENT OF FACTS

The petitioner was convicted by jury of Stalking, a class C felony, and two charges of Disobedience of a Judicial Order, both class A misdemeanors. The defendant appealed the convictions and the convictions were affirmed. State v. Holbach, 2009 ND 37, 763 NW2d 761. The defendant has had at least 15 court appointed attorneys and there has been at least three different District Judges presiding over these matters. In addition to motions, notices, applications, etc., being filed by the defendant's court appointed legal counsel, the defendant has filed countless pro se motions, complaints, appeals, correspondence, etc. Often times the pro se filings have been repeatedly filed, without time for responses, decisions, or actions to be taken. The defendant has created a *hybrid* representation which he has no constitutional right. Johnson v. State, 2004 ND 130, ¶ 20, 681 NW2d 769, 778. This hybrid representation has created chaos to the record, impossible for State, let alone newly appointed defense counsel, or the District Court to keep facts, Motions or Orders straight. Such abuse of the process and the legal system should not be allowed.

The defendant applied for post conviction relief. The State responded, giving the defendant notice it was putting him on his proof. Ude v. State, 2009 ND 71, ¶ 8, 764 NW2d 419, 422. The Court granted a hearing on the matter, however specifically stated that any subpoenas requested by the defendant must come through his legal counsel and be reviewed and approved by the Court. The defendant, without the approval of his legal counsel, obtained subpoenas for several witnesses without Court approval. The Court quashed a number of the subpoenas. The State did not see, nor did it participate in, the quashing of the subpoenas, therefore the State does

not specifically know who the proposed witnesses were or what testimony would have been sought.

The Post-Conviction hearing was held on March 4, 2010. The Court advised counsel and the defendant that if there were additional issues raised at the hearing, he would consider any requests for a continuance or second hearing. (Post-Conviction Procedure Act Transcript p. 2). At the close of the evidentiary hearing, the Court ordered the State to inquire into and provide copies of three tapes to the Court and defense counsel. The State provided copies of the tapes to the Court and the defendant's counsel. At the close of the hearing, the Court gave counsel an opportunity to file a letter brief in this matter. The State provided copies of the video tapes to the Court and the defendant's counsel on April 13, 2010. There were no further requests for additional hearings or offers of proof made after submission of the tapes, by either the defendant or his counsel. On May 7, 2010, the Court issued an Order Denying the defendant's Post Conviction Petition, Order on Request for Return of Personal Property, and Order Denying Petition, Complaint, Objection and Motion to Amend criminal judgment/probation conditions.

STANDARD OF REVIEW

In the Order denying the petitioner's petition for post-conviction relief, the Court made findings of fact. Findings of fact made in a post-conviction relief proceeding will not be disturbed unless they are clearly erroneous. Syvertson v. State, 2005 ND 128, ¶ 4, 699 NW2d 855, 856. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by the evidence, or if although there is some evidence to support it, a reviewing court is left with a definite and firm conviction that a mistake has been made. Id. (quoting Greywind v.

State, 2004 ND 213, ¶ 5, 689 NW2d 390). The defendant, in his brief, does not specify any clearly erroneous findings made by the Court in this matter.

LAW AND ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN QUAUSHING SUBPOENAS ISSUED BY HOLBACH

The defendant asserts the Court erred by quashing subpoenas issued by Holbach. The defendant does not specifically identify which subpoenas the court erred in quashing, nor provide an offer of proof as to what the witnesses' testimony would have been. Prior to the post conviction hearing, the court issued an order quashing subpoenas issued by the defendant pro se. (ROA 484, Appellant Appendix p. 25). Prior to testimony being provided at the post conviction hearing, the court gave counsel AND THE DEFENDANT an opportunity to make a record of any unfinished business or issues. Neither counsel nor the defendant made any objection to the subpoenas being quashed or provided an offer of proof of what the testimony would have been.

A. COURT'S DISCRETION IN QUASHING SUBPOENA

As stated previously, the State is not privy to which subpoenas were quashed. The defendant asserts that in a claim of ineffectiveness of counsel, an opportunity to examine all former attorneys is necessary. The State disagrees. The two-prong test for meeting the burden of ineffectiveness of counsel requires a showing that 1) the representation fell below an objective standard of reasonableness, and 2) the defendant was prejudiced by the deficient performance. Strickland v. Washington, 466 U.S. 668. Post-conviction proceedings are not fishing expeditions, but are designed to resolve genuine factual disputes which might affect the validity of the

convictions. Hopfauf v. State, 1998 ND 30, ¶ 3, 575 NW2d 646, 647. Nor is it the purpose of an appointment of counsel under NDCC § 29-32.1-05 to attempt to dredge up an issue for appeal. Id.

We review the district court's decision to quash a subpoena for an abuse of discretion. Nesvig v. Nesvig, 2006 ND 66, ¶ 12, 712 NW2d 299, 303 (citing Moore v. State, 2006 ND 8, ¶ 5; State v. Jensen, 333 NW2d 686, 692 (ND 1983)(The discovery procedures and subpoenas were directed toward various state, county, and city officials, law enforcement officers, judges and court staff, and Jensen's trial counsel requesting items and responses too numerous to mention here. In denying Jensen's requests, the district court basically determined that various procedures utilized by Jensen sought materials which were irrelevant to his post-conviction proceedings)). The Court in this matter determined that the majority of subpoenas issued by the defendant served no purpose other than vindictiveness.

The District Court and the Supreme Court in this matter can take judicial notice of all of the pro se filings made by the defendant and make that determination from the record before it. Nearly all the defendant's filings include complaints against judges, attorneys, law enforcement officers, and other government officials. Most of the complaints and issues raised in these filings are irrelevant to the defendant's conviction or the effectiveness of counsel at the trial. A trial court abuses its discretion when it acts arbitrarily, capriciously, or unreasonably or if it misinterprets or misapplies the law. State v. Muhle, 2007 ND 132, ¶ 7, 737 NW2d 647, 651. The court in this matter did not act arbitrarily, capriciously or unreasonably when it quashed the mystery subpoenas.

The defendant asserts that Rule 45(c)(4) of the NDRCiv.Pro. does not provide for the court to quash subpoenas. The State disagrees. Rule 45(c)(4) specifically provides that a Court may quash a subpoena if such subpoena subjects a person to an undue burden. An abuse of discretion standard is used when a court quashes a subpoena. Martin v. Trinity Hospital, 2008 ND 176, ¶ 17, 755 NW2d 900, 906. The party seeking relief must show more than the district court made a "poor" decision, but that it positively abused the discretion it has under the rule. Id. The defendant has failed to show the district court made a poor decision, let alone an abuse of discretion. The district court made a reasonable decision.

B. FAILURE TO OBJECT TO QUASHED SUBPEONAS

It a is well-established tenet of appellate procedure that objections to introduction of evidence must be raised at the very time the evidence is introduced, or the objections will be waived. State v. Wishnatsky, 491 NW2d 733, 734 (ND 1992). This rule is especially important in maintaining the constitutional and legislative divisions among the different courts of the state. Id. at 735. "These touchstones are not procedural technicalities nor arbitrary rules; they provide a basis for our jurisdiction and serve as a reminder that we are primarily a court of review, not a court which determines facts and considers legal issues anew." Id. (citing State v. Kopp, 419 NW2d 169, 172 (ND 1988)(other citations omitted)). New counsel on appeal inherits the strategies of prior counsel. Clark v. State, 2008 ND 234, ¶ 8, 758 NW2d 900, 904. In this matter before the Court, not only does present counsel inherit post conviction counsel's strategy, but also the strategy of the defendant himself, as he was allowed *hybrid* representation at the hearing as the court specifically ruled against the State's request that only counsel, not the defendant, be allowed to question

the witnesses or raise issues. (Post-Conviction Procedure Act transcript p. 5). Neither the defendant nor his counsel objected to the quashed subpoenas.

C. FAILURE TO MAKE AN OFFER OF PROOF

The defendant and his counsel failed to make an offer of proof regarding the persons subject to the quashed subpoenas at the post-conviction hearing. See N.D.R.Ev. 103(a)(2) (providing an error may not be predicated upon a ruling which excludes evidence unless the party offering the evidence makes an offer of proof, or the substance of the evidence is apparent from the context in which the question was asked); Ude v. State, 2009 ND 71, ¶ 14, 764 NW2d 419, 424 (citing Heckelsmiller v. State, 2004 ND 191, ¶ 12, 687 NW2d 454) (concluding failure to make an offer of proof at trial prevented a meaningful appeal on the issue of whether witnesses should have been allowed to testify). In this matter, the defendant and his counsel failed to make an offer of proof. There is nothing apparent from the context of the record.

D. OBVIOUS ERROR REVIEW

Notwithstanding the position or standard of review, the defendant and his counsel failed to object, the Court's inquiry is limited under N.D.R.Crim.P. 52(b) to whether the District Court's action was obvious err. See generally State v. Flanagan, 2004 ND 112, ¶ 5, 680 NW2d 241, 243. We exercise our authority to notice obvious error cautiously and only in exceptional circumstances in which the defendant suffered a serious injustice. Id. at ¶ 6. In determining whether there has been obvious error, the Court examines the entire record and the probable effect of the alleged error in light of all the evidence, and the burden is upon the defendant to show the alleged error was prejudicial. State v. Desjarlias, 2008 ND 13, ¶ 6, 744 NW2d 529, 530 (citing State v. Frohlich, 2007 ND 45, ¶ 31, 729 NW2d 148). An alleged error does

not constitute obvious error unless there is a clear deviation from an applicable legal rule under current law. Id. The Court will notice obvious error only in exceptional circumstances when the defendant suffered a serious injustice. Id. The defendant in this matter fails to meet his burden to establish a serious injustice.

II. THE DISTRICT COURT WAS NOT IN CLEAR ERROR IN DENYING MR. HOLBACH'S APPLICATION FOR POST-CONVICTION RELIEF.

As discussed above, the Court uses a clearly erroneous standard when reviewing post-conviction proceedings. The findings of fact are clearly erroneous if they are induced by an erroneous view of the law. Clark v. State, 2008 ND 234, ¶ 11, 758 NW2D 900. The court, in its order denying the defendant's petition, cited the standard and burden of proof the defendant has in a post-conviction proceeding as set out in Strickland v. Washington, 466 US 668 (1984). (Appellant Appendix p. 78-79). The Court summarily dismissed Grounds 1 and 4 of the defendant's petition. The defendant does not assert the court's dismissal of those grounds were clearly erroneous. The court then heard evidence regarding grounds 2 and 3.

A. THE DISTRICT COURT DID NOT ERR IN DENYING MR. HOLBACH'S CONTENTION THE JUDGMENT OF CONVICTION WAS OBTAINED BY THE UNCONSTITUTIONAL FAILURE OF THE PROSECUTION TO OBTAIN AND DISCOLSE EXCULPATORY EVIDENCE.

Throughout all the proceedings, the defendant has asserted the State has unconstitutionally failed to obtain and disclose exculpatory evidence, i.e. Brady material. To establish a Brady violation, the defendant must prove (1) the government possessed evidence favorable to the defendant; (2) the defendant did not possess the evidence and could not have obtained it with reasonable diligence; (3) the prosecution suppressed the evidence; and (4) a reasonable probability exists that the

outcome of the proceeding would have been different if the evidence had been disclosed. Rummer v. State, 2006 ND 216, ¶ 21, 722 NW2d 528, 534. In this matter, the defendant asserts the State suppressed and/or failed to obtain security videos from numerous businesses in town. The defendant failed to provide any competent evidence by way of affidavit or witness that such surveillance/security videos existed for nearly all of his "video security" assertions. The defendant also failed to provide any competent evidence that such videos would have been favorable to the defendant. The defendant also failed to prove that a reasonable probability existed that the outcome of the proceeding would have been different if the evidence had been disclosed.

The Court in its Order specifically found that at trial, the defendant's issue was not his presence at the places of contact, but rather the lack of "intentional" contact. (Appellant Appendix p. 85). The Court went on to find that several witnesses established his presence at these locations, including the defendant himself. (Appellant Appendix p. 85). The Court then found, as this court should affirm, "4. The evidence presented by the prosecution was overwhelming and gigantic in support of the intentional actions of the defendant. 5. Law enforcement and, thus, the prosecution did not fail to obtain exculpatory evidence, if any there was from video surveillance tapes of area businesses." (Appellant Appendix p. 85). The District Court did not err in denying the defendant's contention that the conviction was obtained by unconstitutional failure of the prosecution to obtain and disclose exculpatory evidence.

The court did find that the defendant had not received copies of three tapes. However the Court went on to find, after viewing the tapes, that the tapes did not

contain exculpatory evidence which would have changed the decision of the jury. (Appellant Appendix p. 85). Specifically with regard to VHS tape #2, the court describes what was shown in the video. (Appellant Appendix p. 81). Furthermore, the defendant himself admitted to that particular contact at trial. (Trial Transcript Vol. 3 p. 40). The Court found the video was neither incriminating nor harmful. (Appellant Appendix p. 81). The defendant asserts the court was in clear error by making such a finding, asserting that only the jury can make that finding. The defendant's position is incorrect. This matter is a post-conviction proceeding, wherein the defendant was put on his proof. It is not only appropriate, but the Court's duty, to make such findings as asserted by the defendant put on his proof by the state.

In regard to VHS #1, the reenactment video by law enforcement, the court found the video to be demonstrative in nature. (Appellant Appendix p. 82). The Court further found the video offered nothing that was exculpatory; nor could it prove or disprove intentional behavior. (Appellant Appendix p. 82). It should also be pointed out that the defendant himself testified at trial to his version of the events contained in this particular tape. (Trial Transcript Vol. 3 p. 40-43). At the post conviction hearing, Lt. Strandberg testified he believed the tape strengthened the State's case in showing the defendant's intentional actions. (Post-conviction Procedure Act Transcript p. 34). The Court, after hearing the evidence and reviewing the tape, found the tape did not prove or disprove anything. The Court also found the jury heard the testimony of the victim, and witnesses, including the defendant, to find the defendant's driving near the victim on numerous occasions (as many as 40) as not incidental or accidental. (Appellant Appendix p. 82).

In regard to the security video (CD dated 8/4/10), the Court found that while the defendant had not been provided a copy of the actual video, a "still" picture had been provided. Furthermore the court found that the victim's mistaken identity of the defendant regarding that reported incident had been fully developed at trial. (Appellant Appendix p. 81).

The defendant asserted the court erred in its view of the law when it made the determination the above videos were not exculpatory nor would have changed the outcome of the trial. Again, it is the defendant with the erroneous view of the law. In a post conviction hearing, it the court's duty to conduct an evidentiary hearing, and then make findings on the allegations of the defendant. The petitioner may not merely rely on the pleadings or on unsupported conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact. Ude v. State, 2009 ND 71,¶ 8, 764 NW2d 419, 422. Findings of fact made in a post-conviction relief proceeding will not be disturbed unless they are clearly erroneous. Syvertson v. State, 2005 ND 128, ¶ 4, 699 NW2d 855, 856. A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by the evidence, or if although there is some evidence to support it, a reviewing court is left with a definite and firm conviction that a mistake has been made. Id. (quoting Greywind v. State, 2004 ND 213, ¶ 5, 689 NW2d 390). The defendant, in his brief, does not specify any clearly erroneous findings made by the Court in this matter.

The defendant in this matter does not provide any competent evidence that the tapes were suppressed by the State, that the State failed to obtain exculpatory

evidence, or the court erred in its findings that the videos provided post-hearing were exculpatory. The defendant fails to meet his burden as outline in Strickland or Brady.

B. MR HOLBACH WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

In an assertion for ineffective assistance of counsel, the defendant must show 1) the representation fell below an objective standard of reasonableness, and 2) the defendant was prejudiced by counsel's deficient performance. Clark v. State, 2008 ND 234, ¶ 12, 758 NW2d 900 (citing Lange v. State, 522 NW2d 179, 181 (ND 1994) (quoting Strickland v. Washington, 466 US 668).

1. Mr. Holbach was not denied effective assistance of counsel when the trial counsel failed to effectively prepare for the case and impeach a key witness.
2. Mr. Holbach was not denied effective assistance of counsel when an appropriate remedy was not sought upon admission of victim's to prior false statement under oath.

The defendant makes the assumption that the jury found him guilty solely on the testimony of the victim in this matter. The defendant fails to recognize the jury heard testimony from the victim, law enforcement, and himself regarding the contacts (nearly 40) made between the defendant and the victim. The defendant, in his brief, asserts that the conflicting (i.e. impeaching) testimony of the victim did not come to light until sentencing. This conflicting testimony, according to the defendant, is that in a previous restraining order hearing the victim had asserted that the defendant had struck her, yet at sentencing, when asked if the defendant ever struck her, she stated "no." The defendant asserts, because trial counsel never questioned the victim regarding her prior statement at the restraining order hearing, and only at the sentencing did she "contradict" herself that this somehow rises to the level of ineffective assistance of counsel such that it falls below an objective standard of

representation. It is the State's position the defendant is taking the victim's testimony at sentencing completely and wholly out of context, thereby attempting to mislead the court with facts that are not accurate. At sentencing, the defendant continually attempted to question the victim on trial matters, and the prior relationship history between herself and the defendant. The State objected. The Court sustained the objection and advised the defendant and counsel that the questions must pertain to only the time frame charged. Finally, the Court took over the questioning of the victim, and after prefacing the questioning to the time frame of the offense charged, the court stated "Mr. Holbach has been convicted of stalking and disobeying the court orders. And there has been ample evidence of contacts. Has he ever physically struck you? If so—I—my memory is that he has not. And if that's incorrect I need you to correct it at this point. Has he ever physically struck you, ever? Victim: no." (Appellee Appendix p. 1-11). The defendant ignores the cross examination of the victim and conflicting testimony she gave at trial. (Trial transcript Vol 1 pp. 90-95, 107, 110-111) (presenting evidence contrary to earlier testimony that she had not written the defendant after 1991, defendant presented 3 postcards dated 1995, and testimony during cross examination indicating victim and defendant had contact in 1999 and insinuation there was a sexual relationship).

In addition, the defendant is entirely ignoring the testimony of law enforcement relating to the August 1 (Dakota Mall video tape) incident wherein the victim reported seeing the defendant the mall, and law enforcement determined the person was not the defendant. In its Order denying post-conviction relief the Court made a specific finding relating to that misidentification, and that fact was fully developed at trial. (Appellant Appendix p. 81). The existence of conflicting

testimony or other explanations of the evidence does not prevent the jury from reaching a conclusion the evidence is clear beyond a reasonable doubt. State v. Grant, 2009 ND 210, ¶ 13, 776 NW2d 209, 216; Clark v. State, 2008 ND 234, ¶ 19, 758 NW2d 900, 907. In this matter, trial counsel presented plenty of inconsistencies of the victim's testimony by direct evidence (the postcards) and other witnesses (the misidentified incident) and the jury still found him guilty. Even presuming the victim made a false statement in a previous proceeding, the defendant fails to explain how this one additional inconsistency would have changed the outcome of the jury verdict, given the "overwhelming and gigantic" evidence presented to support the contacts were intentional. (Appellant Appendix p. 85).

The defendant asserts that trial counsel did not properly bring the issue to the attention of the Court and failed to seek a remedy immediately upon learning of the prior false statement. The defendant fails to identify what remedy trial counsel could have sought, but asserts the outcome of the trial would have been different The State's somewhat perplexed by this assertion, given the alleged false statement came to light at sentencing, how did that statement change the outcome of the jury?

The only remedy that would have been available to the defendant at that point would have been a motion for new trial, based upon the "new evidence," impeachment testimony. N.D.R.Crim.P. 33(b)(1). To prevail in a motion for a new trial, the defendant must show, among other things, that 1) the new evidence is material to the issues at trial, and 2) the weight and quality of the newly discovered evidence would likely result in an acquittal. N.D.R.Crim.P. 33, Explanatory Note. A motion for a new trial is committed to the sound discretion of the trial court and its judgment is conclusive unless we can say that, in denying the motion, there was an

abuse of discretion. State v. Kraft, 413 NW2d 303, 308 (ND 1987) (citing State v. Kringstad, 353 NW2d 302, 307 (ND 1984)(other citations omitted)). It is the State's position that had a motion for new trial been made, the trial court would not have granted the motion. The defendant fails to provide any basis or argument to the contrary.

The "newly discovered" evidence is a statement made by the victim at sentencing, which is allegedly contradictory to a prior statement under oath. Purely impeaching affidavits are insufficient grounds to grant a new trial. State v. VanNatta, 507 NW2d 63, 70 (ND 1993) (citing State v. McLain, 312 NW2d 343 (ND 1981)). (Also given the evidence introduced at trial, and issues we will discuss later, we agree with the trial court that the newly discovered evidence would not likely have resulted in an acquittal. Id.) In this matter, trial counsel thoroughly brought out and provided impeachment evidence to the jury regarding the victim's testimony. The alleged contradictory statement of the victim involved physical violence. In this matter, the defendant was not charged with assaulting the victim. None of the contacts between the victim and defendant were alleged to be violent. The defendant had the opportunity through cross examination to test the credibility of the victim as discussed above. In this case, the defendant asserts the newly discovered evidence is a prior inconsistent statement of the victim. Generally, impeaching affidavits are insufficient grounds for granting a new trial. State v. Steinbach, 1998 ND 18, ¶ 23, 575 NW2d 193, 199 (citing VanNatta, *supra.*; State v. Garcia, 462 NW2d 123, 125 (ND 1990)). Impeachment evidence here concerns a minor peripheral issue, a collateral matter. Id. (Evidence that Aaron might have been less than candid about stealing some personal property would not, in any likelihood, result in an acquittal).

It is the State's position that the weight and quality of the "new evidence" would not likely result in an acquittal. The amount of evidence presented by witnesses other than the victim, including the defendant's own testimony, was overwhelming, an acquittal was not likely.

Additionally the defendant ignores the fact that the jury was given an "Impeachment" instruction. A jury is generally presumed to follow instructions. State v. Hidanovic, 2008 ND 66, ¶ 28, 747 NW2d 463, 476 (citing State v. Hernandez, 2005 ND 214, ¶ 24, 707 NW2d 449). The trial court advised the jury to consider all the evidence presented. As part of the Instructions, the jury was given "Weight and Credibility" and "Impeachment" instructions. (Trial Transcript Vol. 3, p. 219-221). When considered as a whole, the instructions correctly advised the jury of the law. State v. Skjonsby, 319 NW2d 764, 774 (ND 1982). The jury was also advised that if they could not reconcile the testimony of witnesses, or a witness, it could wholly disregard that testimony. (Trial Transcript Vol. 3, p. 221). The State in this case presented other evidence than just the victim's testimony. The defendant was given his opportunity to tell his version of the contacts. The defendant corroborated nearly all the victim's testimony regarding the contacts that had been made and alleged against him. Given all the evidence presented, it is the State's position that the jury could have disregarded all of the victim's testimony regarding any corroborated contacts and still found the defendant guilty.

III. THE DISTRICT COURT DID NOT ERR IN DENYING THE MOTION TO AMEND MR. HOLBACH'S CRIMINAL JUDGMENT AND PROBATION CONDITIONS.

The defendant asserts that all of the probation conditions placed upon him are unconstitutional and vague. Specifically, he states that Condition #21 requiring

psychological evaluation, domestic violence offender treatment and anger management is vague. N.D.C.C. §12.1-32-07 gives the court broad discretion to impose conditions when placing a defendant on probation. State v. Bender, 1998 ND 72, ¶ 9, 576 NW2d 210, 212. Although the statute does not explicitly list chemical dependency treatment or anger management counseling, the list is not exclusive and the imposition of conditions of probation is purely a matter of judicial discretion, allowing the trial court to tailor conditions to meet the particular facts and circumstances of each case. Id.

The defendant further states that Condition #32, the "no contact" order, is ripe for review and modification because it prevents him from pursuing civil litigation against the victim. In this case, the defendant was charged with Stalking and Disobedience of a Judicial Order; specifically violating the court's previous probation conditions of "no-contact with the victim." Violence is not necessitated for a stalking charge. However unwanted contact is. It is nonsensical for the defendant to assert that a "no-contact" order is an abuse of discretion in this matter. A condition of probation is valid if it is reasonable and is related to the defendant's reformation and rehabilitation in light of his offense charged. Id. at ¶ 10. The defendant's status as a probationer does effect his rights under the Fourth Amendment. State v. Schlosser, 202 NW2d 136, 139 (ND 1972). The defendant's conviction is for having unwanted contact, thus a condition of no-contact is reasonable and valid to assist the defendant in reformation and rehabilitation.

IV. THE DISTRICT COURT DID NOT ERR IN FINDING THE RETURN OF MR. HOLBACHS PROPERTY HAD BEEN ACHIEVED.

Property inventory lists were provided to the defendant. The defendant listed particular items that were taken from him by law enforcement. None of those items appear on the property inventory reports. Additionally, a list of exhibits was provided to the defendant listing what is in the custody of the court. The defendant provides no credible evidence to show that the State or law enforcement has any other property belonging to him. The defendant's former probation officer still has the camera and 2 receipts. The probation officer advised the defendant to send someone to her office to sign out that the property so it can be returned to him. (Post-Conviction Procedure Act transcript p. 155). This has not been accomplished since the defendant was convicted in December 2007. The property could now be determined to be abandoned as unclaimed property. N.D.C.C. § 47-30.1-13. The law helps the vigilant before those who sleep on their rights. N.D.C.C. § 31-11-05(18).

The defendant asserts that not all the property seized from him was properly inventoried. He further implies the State or other agencies are intentionally withholding his property. The defendant then suggests that he be allowed to inspect the Minot Police Department's evidence lockers to ensure all his property which was taken has been returned. Such a suggestion borders on the ridiculous. How can the State, or anyone for that matter, prove the non-existence of something. Furthermore, it is the State's position that allowing him to personally inspect the Minot Police Department's evidence lockers would not resolve the issue. Given the fact the defendant believes law enforcement is intentionally withholding his property, should he be allowed to "inspect the locker" personally, when he finds there is nothing, he would then simply accuse law enforcement of either hiding it someplace else or destroying it.

CONCLUSION

For the reasons stated above, the State respectfully requests the Court affirm the denial of the defendant's Post-Conviction Application, Affirm the courts denial of Petition, Complaints, Objections and Motion to Amend Judgment-Probation Conditions, and Affirm Order on Request for Return of Personal Property. The State further requests the Court Affirm/Dismiss with prejudice all additional filings renewing Motions to Return Property, Petitions, Complaints and Motions to Amend Judgment.

Date this 25 day of September, 2010.

Rozanna C. Larson ID# 05294
Ward County State's Attorney
Ward County Courthouse
Minot, ND 58701

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20100143, 20100145, 20100146

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AFFIDAVIT OF SERVICE BY MAIL

LeAnn Westereng, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 29 day of September, 2010, this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following document in the above entitled action:

BRIEF FOR PLAINTIFF/APPELLEE

That said envelope was addressed to the following person at his address as follows:

TRAVIS W FINK
BISMARCK/MANDAN PUBLIC
DEFENDERS OFFICE
314 E THAYER AVE SUITE 200
BISMARCK ND 58501

That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

LeAnn Westereng

Subscribed and sworn before me this 29 day of September, 2010 by LeAnn Westereng.

Notary Public

JULIE KROSBAKKEN
Notary Public
State of North Dakota
My Commission Expires Oct. 28, 2014