

IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

Mitchell David Holbach,)	
)	
Petitioner- Appellant,)	Supreme Court No.: 20110026
)	
vs.)	
)	District Court No.: 51-06-K-0110
State of North Dakota,)	
)	
Respondent- Appellee.)	

APPELLANT'S PETITION FOR REHEARING

**APPEAL FROM NORTH DAKOTA SUPREME COURT OPINION DATED
 SEPTEMBER 15, 2011 AFFIRMING WARD COUNTY DISTRICT COURT'S
 MEMORANDUM OPINION DENYING APPLICATION FOR POST-
 CONVICTION RELIEF**

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Statutory Materials and Rules of Procedure

N.D.R.App.P. 35.1(a)(6)..... ¶3

N.D.C.C. ch. 29-32.1 ¶3

[¶1] Appellant, Mitchell Holbach, hereby makes petition for rehearing pursuant to Rule 40 of the North Dakota Rules of Appellant Procedure.

STATEMENT OF THE CASE

[¶2] The statement of the case is as it appears in the briefs of the Appellant and the Appellee on file with the Court.

[¶3] The Court held oral argument on this case on September 1, 2011 in Bismarck. On September 15, 2011, the Court issued its' opinion denying Mr. Holbach's appeal and summarily affirming under N.D.R.App.P. 35.1(a)(6) the district court's orders denying his application for post-conviction relief under N.D.C.C. ch. 29-32.1.

STATEMENT OF THE FACTS

[¶4] The facts are as they appear in the briefs of the Appellant and the Appellee on file with the Court.

STATEMENT OF THE ISSUE ON REHEARING

[¶5] It is the Appellant's opinion that the Supreme Court overlooked or misapprehended the extreme prejudice placed upon Mr. Holbach by both the State, and his prior assigned counsel, in failing to obtain potentially exculpatory evidence.

[¶6] The State had an affirmative duty to learn of and disclose exculpatory information. The State failed in its duty. The State failed to obtain a Target surveillance video which potentially contained evidence that would have contradicted the statements of the alleged victim. In failing to obtain this evidence, Mr. Holbach was unfairly and unduly prejudiced. Mr. Holbach's prior counsel contributed to this prejudice by negligently failing to obtain the tape as well. Had the tape been obtained, prejudice could have been shown. The State should not benefit from its own negligence.

CONCLUSION

[¶7] Mr. Holbach respectfully requests that this Court grant his petition for rehearing on the question of material fact stated above.

Dated this 27 day of September, 2011.

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

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