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STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA
IN THE SUPREME COURT

Art Tibor	)
Petitioner – Appellant,	)
vs.	) Sup. Crt. No.: 20110313
State of North Dakota,	)
Respondent – Appellee.	) Dist. Crt. No.: 53-2005-K-1170

STATE OF NORTH DAKOTA APPELLEE'S AMENDED BRIEF

APPEAL FROM THE NORTHWEST JUDICIAL DISTRICT COURT'S DISMISSAL OF TIBOR'S POST-CONVICTION APPLICATION ON OCTOBER 18, 2011, THE HONORABLE WILLIAM MCLEES PRESIDING

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Statement of the Case/Statement of the Facts

[¶1] Because of the sparseness of Tibor's facts presentation, the State includes a more complete statement of the facts. Due to the nature of Tibor's frequent litigation and how the previous filings interact with the current filing, the State's statement of the facts will a hybrid of factual background and legal proceedings. This format is more efficient than repeating the same information, and the State requests that the sectioning and section heading requirement of N.D.R.App.P 28 be suspended under N.D.R.App.P. 2 for the sake of this efficiency.

[¶2] For ease of use, the State has broken the information down into sections which generally track Tibor's claims.

Pre-trial depositions.

[¶3] Attorney Chapman conducted many pre-trial depositions of individuals in this case. These include:

1. Ms. Paula Condol
2. Ms. Monique Goff
3. Ms. Debra Bensen
4. Dr. Alonna Norberg
5. Ms. Cheryl Knutson
6. John Doe I
7. Ms. Erica Skoglund
8. Dr. Beverly Tong
9. Ms. Deborah Wahus
10. Ms. Linda Tibor
11. Mr. Dave Steckler
12. Ms. Angele Grindeland
13. John Doe II
14. Jane Doe

Pre-trial motions and objections.

[¶4] Attorney Chapman engaged in extensive pre-trial motion practice, including:

1. Motion in limine to exclude N.D.R.Evid. 404(b) material
2. Motion in limine to exclude the testimony of Ms. Condol and information about the Child Sexual Abuse Accommodation Syndrome ("C.S.A.A.S.").
3. Motion to exclude information about Petitioner's suicide attempt.
4. Demand for change of judge.
5. Objection to notice of intent to offer hearsay testimony.
6. Objection to allow deposition testimony

Pre-trial deposition of Ms. Condol, pre-trial motions regarding Ms. Condol , post-conviction motions regarding Ms. Condol, and appeals regarding Ms. Condol.

[¶5] Attorney Chapman conducted numerous pre-trial depositions, and a full list of the deponents is included elsewhere in the brief. The record is full of references to the pre-trial deposition of Ms. Paula Condol regarding her status as an expert and with information about the Child Sexual Abuse Accommodation Syndrome ("C.S.A.A.S.").

[¶6] The original deposition of Ms. Condol occurred on May 11, 2006, which was well before Tibor's jury trial. (R.O.A. #211, attachment)

[¶7] A pre-trial motion in limine was filed by Tibor, through Attorney Kevin Chapman, on July 5, 2006, which sought to exclude the testimony of Ms. Condol. (R.O.A. #79).

[¶8] Tibor, through Attorney Chapman, filed a motion for judgment of acquittal or in the alternative for a new trial on August 14, 2066, which again attacked Ms. Condol's testimony. (R.O.A. #142).

[¶9] After Tibor's motion for acquittal was denied, he, through Attorney Chapman, filed a motion for stay of execution of sentence pending appeal. In this motion he once again attacked the testimony of Ms. Condol. (R.O.A. #158). This motion was denied.

[¶10] Tibor's next action through Attorney Chapman, was to file a direct appeal in what became State v. Tibor, 2007 ND 146, 738 N.W.2d 492 (Tibor I). In Tibor's brief, he mentioned the pre-trial deposition of Ms. Condol and the pre-trial motion(s) filed regarding her testimony. (Tibor I, Appellant's Brief).

[¶11] Following his loss in Tibor I, Tibor proceeded to file a post-conviction document on July 30, 2009 claiming he had newly discovered evidence that Ms. Condol lied. (R.O.A. #211). This document contained attachments consisting of a heavily marked-up copy of the C.S.A.A.S. article, and a heavily marked up copy of "The Abuse of the Child Sexual Abuse Accommodation Syndrome" ("A.C.S.A.A.S.'), along with a copy of the transcript from Ms. Condol's pre-trial deposition. Id.

[¶12] After his loss on that issue, Tibor filed an appeal that eventually became State v. Tibor, 2010 ND 71, 789 N.W.2d 731 (Tibor II), in which this Court issued a *per curiam* opinion affirming the results below.

[¶13] Tibor then filed his newest application for post-conviction relief on April 28, 2011, where he has applied a veneer of "ineffective assistance of counsel" to another attack on Ms. Condol. (R.O.A. #234). This motion included a fabricated "quote" from Stogner v. California in support of his ineffective assistance claim.

[¶14] Following his loss on the most recent post-conviction filing, Tibor has now filed what will become Tibor III in this matter.

Dr. Tong.

[¶15] Dr. Tong's testimony was attacked in Tibor I. However, Tibor never raised the issue of her improperly testifying from memory regarding Jane Doe or her participation in the examination of Jane Doe. The post-conviction motion filed July 30,

2009 is the first time this issue has ever been raised, despite Tibor I and other post-conviction filings.

Monique Goff.

[¶16] While Ms. Goff's testimony was attacked in Tibor I, there was no mention of the most recent time travel/time continuity argument that an event which happened many months after the forensic interview affected the events of the forensic interview. Despite Tibor's numerous prior filings, this is the first time a space-time continuity argument has been raised.

Tibor I language.

[¶17] In previous filings, Tibor has never raised the issue of this Court's choice of language between "probably more than" and "at least". This was raised for the first time in this filing, as was the bootstrapped ineffective assistance claim.

[¶18] Similarly, the claim regarding the accuracy of this Court's presentation of Dr. Norberg's testimony was not previously raised in prior proceedings, despite the numerous filings by Tibor.

[¶19] The actual testimony of Dr. Norberg was that the injuries seen on Doe could be caused by facial structures or digital contact or a combination of both. (Appeal Transcript "A.T." 428:20-25).

The "I couldn't have done it" timing argument.

[¶20] Tibor spent twenty (20) pages of transcript talking about his busy work schedule and how he was too busy to molest Doe. (A.T. 704-724).

[¶21] Further, in his August 14, 2006 motion for new trial, Tibor stated: "Art, who testified truthfully, denied all five Counts lodged against him, and demonstrated to

the Jury that he was working late on Thursday, December 8, 2005, and would not have picked the children up from school…". (R.O.A. #142 page 3). He also referenced having presented employment records to show his unavailability to molest Doe. Id.

[¶22] Most specifically, Tibor contended: "Art also demonstrated, through his employment records the fact that there would have been no time or opportunity to inflict abuse on the child, as alleged by the child, taking into account the school schedules, work schedules, religion classes, visitation schedules, and bowling schedules." Id.

[¶23] In his April, 2011 filing Tibor stated:

> In fact, in regarding this particular abrasion that was cited, my argument has been the same all along. The fact that this abrasion was 1 to 2 days old at the time of the examination and with the rapid nature of the healing of an abrasion of this type, my argument has been that this abrasion could not have been caused by me. (R.O.A. #24 page 4)

[¶24] In his Tibor I Appellant's Brief, Tibor contended:

> Thus, there was a five day time separation between the time of the last alleged incident of abuse, allegedly tongue to vagina, and the photos taken on December 13, 2007[sic]. It is undisputed that this 4mm abrasion was healing, and that areas of the vagina heals[sic] very, very quickly, i.e. "within a day or two this type of injury is all healed up."

[¶25] In his motion for stay of execution of sentence, Tibor argued: Art, who testified truthfully, denied all five Counts lodged against him, and demonstrated to the Jury that he was working late on Thursday, December 8, 2005, and would not have picked the children up from school…" (R.O.A. #158 page 3). He also referenced employment records. Id.

Attorney Morrow.

[¶26] Nothing has been filed at any point regarding any improper conduct or performance by Attorney Morrow. The material at issue in Tibor's July, 2009 motion was decided in Tibor I, and other actions at the district court level.

Notice argument.

[¶27] The State filed a response to Tibor's April, 2011 application on June 1, 2011 along with a motion to dismiss. (R.O.A. ## 238 & 239). A notice of the motion to dismiss was also served on Tibor's counsel. (R.O.A. #240).

[¶28] The State's motion to dismiss included a statement in boldface capital letters putting Tibor on notice of the State's intent to put him to his proof. (R.O.A. #239).

[¶29] Tibor filed a response on June 20, 2011, which argued that the application should not be dismissed because: 1) it had been filed; 2) it contained ineffective assistance arguments; 3) ineffective assistance claims generally are not subject to dismissal; and 4) Tibor had alleged various things which were repackaged in a condensed form. (R.O.A. #241). No affidavit was filed. No competent admissible evidence was filed. (R.O.A. #241).

[¶30] More than sixty (60) days passed between the State's filing and the day oral argument was heard by telephone on August 10, 2011. After oral argument, the District Court dismissed Tibor's most recent post-conviction filing. (R.O.A. #249).

Standard of Review

[¶31] The appropriate standard of review for waived matters, or newly raised matters, is the obvious error standard. E.g. State v. Henes, 2009 ND 42, 763 N.W.2d 502.

[¶32] Questions of *res judicata* are fully reviewable on appeal as questions of law. Steen v. State, 2007 ND 123, 736 N.W.2d 457.

[¶33] Review of the summary dismissal of a post-conviction application is that applied to N.D.R.Civ.P. 56 proceedings. Steinbach v. State, 2003 ND 46, 658 N.W.2d 355.

Law and Argument

[¶34] "There must always be a time when litigation is at an end." Territory v. Christensen, 4 Dakota 410 (1887). This statement is just as applicable now, some 125 years later, as it was back then.

[¶35] "Post-conviction proceedings are not intended to allow defendants multiple opportunities to raise the same or similar issues, and defendants who inexcusably fail to raise all of their claims in a single post-conviction proceeding misuse the post-conviction process by initiating a subsequent application raising issues that could have been raised in an earlier proceeding." Jensen v. State, 2004 ND 200, ¶9, 688 N.W.2d 374.

I. THE DISTRICT COURT CORRECTLY DISMISSED TIBOR'S APPLICATION WITHOUT AN EVIDENTIARY HEARING.

[¶36] After his most recent application was dismissed, Tibor elected to file the instant appeal. This appeal contains several issues raised for the first time on appeal, along with some arguments supported by inapplicable case law, and some arguments which are simply false. What is omitted, is that Tibor never filed any competent admissible evidence after the State's motion to dismiss to support his claims. Such a failure allows a district court to dismiss a post-conviction application without a full evidentiary hearing.

Tibor's *pro se* filing status does not confer additional rights.

[¶37] It appears that Tibor is raising a new argument on appeal, that because he filed the most recent post-conviction application *pro se*, he is entitled to rights which exceed those of represented litigants. Tibor essentially claims that he should have been granted a hearing, despite his utter failure to provide any evidentiary support due to his *pro se* status.

[¶38] North Dakota case law states that *pro se* litigants play by the same rules as represented litigants, and do not receive a reduction in requirements for simply being *pro se*. E.g. State v. Gasser, 306 N.W.2d 205 (N.D. 1981). A *pro se* post-conviction applicant must still present evidence to avoid dismissal.

[¶39] Tibor's argument regarding *pro se* status was not made before the District Court, and is therefore barred as a newly raised argument. Further, Tibor's claim is also barred by the requirement that *pro se* litigants must comply with the same procedural requirements as every other type of litigant.

Tibor's multiple prior attorney status does not confer additional rights.

[¶40] As with the *pro se* filing argument, this claim was never presented to the District Court, and consequently, the District Court had no opportunity to address it.

[¶41] According to Tibor, riding the attorney carousel confers additional rights that do not attach to those who have had fewer attorneys. This is contrary to case law. Mitchell Holbach, one of North Dakota's most frequent abusers of the post-conviction process still has filings summarily dismissed, despite his having been on the attorney carousel for years. E.g. Holbach v. State, 2011 ND 181, 803 N.W.2d 834.

[¶42] This argument was not raised below, and is thus barred as a newly raised argument. This claim should also be rejected as case law demonstrates no additional rights are conferred by virtue of burning through multiple attorneys.

Tibor's N.D.R.Ct. 3.2(b) argument is newly raised and is therefore barred or was waived in the District Court.

[¶43] Tibor never made a claim to the District Court under N.D.R.Ct. 3.2(b) that testimony was required. Yet, here on appeal, he claims that his rights were violated, and argues that a hearing should have been had under N.D.R.Ct. 3.2(b). Once again, this is an argument that was never made to the District Court, and no objection was made.

[¶44] Under either analysis, this argument is barred as either a newly raised matter or was waived before the district court.

[¶45] Under a waiver analysis, the question becomes one of obvious error. E.g. State v. Carpenter, 2011 ND 20, ¶16, 793 N.W.2d 765 (waiver of issue by failing to object to jury instructions); N.D.R.Crim.P. 52(b). Obvious error requires: 1) error; 2) that the error is plain; and 3) that the error affects substantial rights. E.g. State v. Fickert, 2010 ND 61, ¶7, 780 N.W.2d 670.

[¶46] Here, the record contains ample information showing Tibor's utter failure to file an adequate response to the State's motion to dismiss. After two months, Tibor provided nothing more than a response stating the application should not be dismissed. Under existing case law, based on his failure to adequately respond to the State's motion to dismiss, Tibor had no right to an evidentiary hearing. Therefore, the matter does not make it past the first prong which is error. Since there was no error, there is no error to be plain. Similarly, Tibor's complete failure to provide an adequate response removed

his right to an evidentiary hearing, which causes the matter to fail the third prong regarding substantial rights.

Tibor's due process arguments were not raised below, and are without merit.

[¶47] There are numerous reasons why Tibor's newly raised due process claims should be denied. Tibor's standard of review is incorrect on this issue; he waived any due process arguments below, having never previously raised the issue. Further, it is interesting to note that Tibor has completely failed to provide any support for his claim that he has an absolute right to appear in a **civil matter**, which includes post-conviction proceedings, which are not part of any criminal proceeding.

[¶48] The one area that Tibor consistently forgets is that he was given full notice of the State's motion to dismiss, including boldface capital letters about the nature of the motion. Compare. Wilson v. State, 1999 ND 222, ¶ 17, 603 N.W.2d 47 (one paragraph motion). He had more than sixty (60) between the State's filing and the telephone conference to file appropriate material; he failed completely, and his application was therefore ripe for dismissal. Compare. Parizek v. State, 2006 ND 61, 711 N.W.2d 178 (no motion to dismiss). Tibor has presented no case law which states that a party's utter failure to provide factual support in a response to a motion to dismiss equates to due process notice violation. It is unclear how much additional notice Tibor believes he is entitled to before his application could be dismissed without even holding an oral argument hearing.

These claims were never presented to the District Court.

[¶49] Tibor's standard of review is incorrect on this issue; he waived any due process arguments below, having never previously raised the issue.

Once again, Tibor is attempting to argue in this Court what he seems to have wished he argued below. Tibor never once claimed due process violation s below. As with Tibor's N.D.R.Ct. 3.2(b) argument, this is a newly fashioned claim , and should be rejected as such.

[¶50] Even if this Court wishes to examine the matter under the obvious error analysis, this argument fails to make its way past the first prong. As noted repeatedly, Tibor utterly failed to provide any of the required support following a motion to dismiss his post-conviction application. Therefore, his application was ripe for dismissal without a hearing. E.g. Owens v. State, 1998 ND 106, ¶¶13-14, 578 N.W.2d 542. Consequently, there was no error in not having Tibor appear at the *ad hoc* motion to dismiss hearing.

[¶51] As there was no right to a hearing in the first place, this claim also fails to make it past the third prong. Since Tibor had no right to a hearing on the matter, not holding a full evidentiary hearing with him present did not violate his rights.

Ehli is irrelevant to this matter.

[¶52] Ehli involved the granting of a motion filed by the State before expiration of the response period under N.D.R.Ct. 3.2. State v. Ehli, 2003 ND 133, ¶10, 667 N.W.2d 635. In Ehli, the appellant had actually filed a timely response. Id. at ¶9. However, the district court had filed its order before the time for response had run. Id. at ¶9.

[¶53] This case is not an Ehli scenario. Here, Tibor had more than two months, or roughly twice the time period to respond to the State's motion to dismiss if considered under N.D.R.Civ.P. 56. Here, the District Court did not prematurely rule on a motion. As such, Tibor was not denied the opportunity to be heard on the matter. Compare. Id. at ¶¶9-10.

Westereng is irrelevant to the instant matter.

[¶54] Westereng is an unemployment compensation case. This case appears to be about access to information regarding employment and other matters by North Dakota Job Services in an action regarding unemployment compensation. Stutsman County v. Westerung, 2001 ND 114, 628 N.W.2d 305.

[¶55] Here, the Court is not faced with a question of access to information under a statutory framework. Id. at ¶21. Instead, the Court is faced with a litigious appellant who failed to make the appropriate showing to survive a motion to dismiss.

Hoffman has no bearing on this case.

[¶56] Hoffman involved a worker's compensation matter, in which, among other things, a training program he attended was declared invalid, causing him to attempt a due process argument. Hoffman v. North Dakota Workers Compensation Bureau, 1999 ND 66, 592 N.W.2d 533.

[¶57] Here, this Court is faced with a different scenario. Tibor had been put to his proof, and he completely failed to make any valid response, and his application was subsequently dismissed.

Rowley supports the State's position.

[¶58] The main issue in Rowley was whether proper notice of child support proceedings was given to the obligor. Rowley v. Cleaver, 1999 ND 158, 598 N.W.2d 125. The Court ultimately found that service was proper from the mailed notices. Id.

[¶59] Here, the State served Tibor's counsel with its motion to dismiss and notice of motion.in compliance with N.D.R.Civ.P. 5. There was never a claim that Tibor's counsel did not receive the information. Consequently, Rowley supports the State's

position that Tibor was given proper notice and an opportunity to respond to its motion to dismiss. The fact that Tibor utterly failed to do so does not render the notice ineffective.

D.C.S.H.C. is irrelevant to this matter.

[¶60] This case involved a termination of parental rights where one parent was incarcerated. In the Interest of D.C.S.H.C., 2007 ND 102, 733 N.W.2d 902. The Court noted that an inmate has no constitutional right to be present in person at a termination of parental rights hearing. Id. at ¶9.

[¶61] If anything, D.C.S.H.C. tends to support the State's position. Post-conviction matters are civil and not criminal in nature. E.g. Wong v. State, 2011 ND 201, ¶4, 804 N.W.2d 382. Tibor has presented nothing which shows that a represented inmate has the right to appear in a civil matter as he claims.

Schmalle actually supports the State's position.

[¶62] In Schmalle, there was a claim that the ex-wife's request for modification of spousal support was not mentioned in a variety of pleadings. Schmalle v. Schmalle, 1998 ND 201, 586 N.W.2d 677. The Court noted that the ex-wife's responsive brief provided adequate notice in the form of an alternative argument. Id. at ¶10. From there, the Court determined that the ex-husband had adequate notice. Id. at ¶10.

[¶63] Here, the State not only provided a notice of motion, it placed its intent to put Tibor to his proof in boldface capital letters. The State submits that if an alternative argument in a responsive pleading is sufficient to place a party on notice, boldface capital letters stating the intention of the State plus a notice of motion should more than suffice.

Mathews has no bearing on this case.

[¶64] Mathews involved the termination of social security payments, and ultimately, the Court determined that the administrative procedures which were in place complied with due process. Mathews v. Eldridge, 424 U.S. 319, 349 (1976).

[¶65] Here, this Court is not faced with the complexities of an administrative decision. And, as noted above, Tibor had ample opportunity to provide evidentiary support to survive the motion to dismiss. The fact that he utterly failed to do so does not make notice improper, or result in due process violations.

Armstrong supports the State's position.

[¶66] The short story behind Armstrong is that a biological mother and a step-father failed to notify the biological father of the step-father's adoption filing as required by Texas law, despite knowing his whereabouts. Armstrong v. Manzo, 380 U.S. 545 (1965).

[¶67] Here, Tibor received more than adequate notice of the State's motion to dismiss, yet chose to provide no evidentiary support in response. Tibor has presented nothing which says he was entitled to a full-fledged hearing after failing to fully respond to the State's motion, or that he did not have adequate notice.

Tibor was given a fair opportunity to be heard on the motion to dismiss.

[¶68] Tibor had notice of the State's motion. Tibor did not properly respond, which left his motion ripe for dismissal without a hearing. Throughout his Brief, Tibor consistently leaves out his more than two-month opportunity to submit affidavits, take depositions and present the information in support, serve subpoenas *duces tecum* for attorney records and present the information to the court, or gather and present other such

evidence in support of his application. This two-month plus opportunity is in addition to the time Tibor had while drafting his latest application to collect such information.

[¶69] Tibor's utter failure to provide proper support meant that his application could be dismissed without any hearing at all. E.g. Klose v. State, 2008 ND 143, ¶13, 752 N.W.2d 192. Tibor had his chance and he squandered it. E.g. Wheeler v. State, 2008 ND 109, 750 N.W.2d 446 (dismissal without hearing appropriate where petitioner failed to present any evidence to show genuine issue of material fact).

[¶70] Now, he is attempting to take additional bites at the apple to do an end run around his failure. The **only** filing Tibor did in response to the State's motion was to regurgitate the same conclusory statements from the original filings; that is insufficient. Tibor, as the resisting party could not "simply rely upon the pelading or upon unsupported, conclusory allegations." Hopfauf v. State, 1998 ND 30, ¶4, 575 N.W.2d 646 (internal citations omitted).

[¶71] He has presented nothing showing that his failure to respond as required should result in him receiving additional rights. Compare. Syvertson v. State, 2000 ND 185, ¶12, 620 N.W.2d 362 (resisting party must present some competent admissible evidence to survive summary dismissal motion).

Tibor's request for evidentiary hearing does not allow his application to survive summary dismissal.

[¶72] While the request for evidentiary hearing is more fully addressed below, the State notes that a request for an evidentiary hearing is insufficient to survive a motion to dismiss where a petitioner utterly fails to provide any factual support in response. E.g. State v. Bender, 1998 ND 72, 576 N.W.2d 210. Or, as the St. Claire Court stated: "An

applicant for post-conviction relief is only 'entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact.'" St. Claire v. State, 2002 ND 10, ¶19, 638 N.W.2d 39.

[¶73] Here, Tibor, like St. Claire, failed to present any competent admissible evidence raising a genuine issue of material fact. Id. at ¶¶19-20. Therefore, Tibor was not entitled to an evidentiary hearing.

Tibor's failure to respond with competent admissible evidence resulted in proper dismissal without a full evidentiary hearing.

[¶74] There are numerous reasons why the District Court's decision was and is correct in this matter. These include:

The State's motion clearly stated the intent of the motion.

[¶75] The State filed a motion to dismiss in this matter. Compare. Henke v. State, 2009 ND 117, 767 N.W.2d 881 (State did not move for dismissal). The first page of the State's motion stated: "**TO THE PETITIONER, AND HIS ATTORNEY MARK BLUMER, THE STATE OF NORTH DAKOTA IS PUTTING PETITIONER TO HIS PROOF TO SHOW THE PRESENCE OF A GENUINE ISSUE OF MATERIAL FACT**." (R.O.A. #239, page 1). The motion was also accompanied by notice under N.D.R.Ct. 3.2. (R.O.A. #240). Tibor had more than sixty (60) days between service of the motion and the telephonic oral argument.

[¶76] The State's motion was not hidden, or buried in the document without extensive notice. Compare. Delvo v. State, 2010 ND 78, ¶¶19-35, 783 N.W.2d 72 (Crothers, J dissenting). Instead, it was accompanied by a notice of hearing, and even stated in boldface capital letters that the State was putting Tibor to his proof. The State

submits that there is little chance either Tibor or his counsel were unaware of the nature of the State's motion. Compare. Wilson, 1999 ND 222, ¶17, 603 N.W.2d 47.

[¶77] During the more than sixty (60) days between service of the motion and the telephonic oral arguments, the following was the sum total of Tibor's three (3) page response:

> 1) Tibor filed a post-conviction application.
> 2) Tibor claimed ineffective assistance of counsel.
> 3) Ineffective assistance claims generally should not be dismissed.
> 4) Recitation of the conclusory statements from application, essentially in compressed form. (R.O.A. ##234 and 241)

[¶78] More than two months passed between the State's filing and the telephonic oral arguments; providing Tibor with more than double the time provided for response under N.D.R.Civ.P. 56. Compare. Overlie v. State, 2011 ND 191, 804 N.W.2d 50.

[¶79] No affidavit was filed. No competent admissible evidence was filed. No supporting facts were filed. The only thing filed was a rehash of Tibor's original application. Such a response is completely insufficient to survive a motion to dismiss. E.g. Bender, 1998 ND 72, ¶20, 576 N.W.2d 210; Delvo, 2010 ND 78, 782 N.W.2d 72.'

[¶80] Once a post-convictioning defendant is put to his proof, that defendant must supplement the original application with affidavits or other competent admissible evidence to even make it to a hearing stage. E.g. St. Claire, 2002 ND 10, ¶¶19-20, 638 N.W.2d 39.

[¶81] An many regards, Tibor was fortunate enough to even be in a situation where his counsel had the opportunity to make arguments to the District Court as to why his application should not be dismissed.

Tibor failed to show any genuine issue of material fact as to why certain claims were not barred by res judicata.

[¶82] *Res judicata* operates as a bar to the continuous litigation of previously decided matters and variations on the same. N.D.C.C. §29-32.1-12; e.g. Jensen, 2004 ND 200, 688 N.W.2d 374. As the Jensen Court noted: "Post-conviction proceedings are not intended to allow defendants multiple opportunities to raise the same or similar issues…". Jensen, 2004 ND 200, ¶9, 688 N.W.2d 374. Variations on the same thing that was previously finally and fully adjudicated are also barred. E.g. Garcia v. State, 2004 ND 81, ¶22, 678 N.W.2d 568.

[¶83] Ground 1 was based on an attack on the testimony of Ms. Paula Condol with an ineffective assistance claim attached. The State notes that the propriety of Ms. Condol's testimony and the propriety of evidence regarding the CSAAS was first attacked in Tibor I.

[¶84] Later, Tibor filed his 2009 post-conviction relief document once again attacking Ms. Condol's testimony and the CSAAS. This was unsuccessful, and Tibor subsequently appealed to this Court. In Tibor II, at least as regarding this case, Ms. Condol was once again attacked. This Court issued a *per curiam* opinion rejecting Tibor's attack.

[¶85] The State submits that the issue of whether Ms. Condol could have or should have testified at his original trial has been more than finally and fully litigated as required by N.D.C.C. §29-32.1-12. This issue has been presented to the Court **twice** before, and is now before this Court for a **third** time.

[¶86] The only difference is the brief ineffective assistance claim which was attached and the related misquote from the dissent of Justice Kennedy in Stogner v. California, 539 U.S. 607, 649 (2003). Everything else is nearly a carbon copy from the previous filings, including complaints of Ms. Condol lying about the CSAAS. To better illustrate this point:

> **2009 motion:** "There is no confusion when Ms. Condol cites CSAAS as researched and scietific[sic] data."
>
> **2011 application:** "Ms. Condol then testifies in court to the jury that this 'syndrome' was scientific evidence."
>
> **2009 motion:** "Regardless, Ms. Condol still misled Ms. Foster, Mr. Chapman, in [?] the deposition and the Court and Jury during the trial by testifying to the Scientific; Research; Data the CSAAS proposes to tell us. The 'Child Sexual Abuse Accommodation Syndrome Data as Ms. Condol led all to believe."
>
> **2011 application:** "Therefore CSAAS being claimed as scientific study or based on scientific research as Ms. Condol claimed repeatedly is misleading to the jury and to the court in general and should not have been allowed."

[¶87] The propriety of Ms. Condol's testimony has been litigated on post-conviction filings to the district court three times, and has been litigated before this Court twice. It is unclear how many times Tibor believes the matter must be litigated before further attacks become barred by *res judicata*. Regardless of Tibor's subjective beliefs, the issue of Ms. Condol's testimony has been fully and finally litigated on at least **two** previous occasions, and is therefore barred by *res judicata*.

[¶88] In its motion to dismiss and response, the State pled the defense of *res judicata*. (R.O.A. ##238 & 239) relating to the C.S.A.A.S. matter along with Ms. Condol's testimony. (R.O.A. #249 page 1).

[¶89] The entirety of Tibor's response can be found in his response. (R.O.A. #241). This three (3) page response contained no competent admissible evidence in support of the original application. His only other response was that he "needed" a hearing to provide evidence. Failure to provide competent admissible evidence in support of a post-conviction application is fatal to surviving a motion to dismiss.

[¶90] More than 60 days after the State's motion to dismiss, Tibor had still failed to provide any competent admissible evidence to support his claim. Based on the record in this case, there was simply no way that Tibor could present any evidence showing that the nature of the C.S.A.A.S. and Ms. Condol's testimony had not already been addressed at least twice before. E.g. Tibor I and Tibor II.

[¶91] As such, summary dismissal without an evidentiary hearing was appropriate with regard to Ground 1.

[¶92] With regard to Count 3, Tibor had attacked the propriety of Ms. Goff's testimony in Tibor I. He would have known about this space-time continuity "issue" at trial, yet failed to raise it in the direct appeal. Of course, now he is blaming Attorney Chapman for not raising this "issue" which Tibor apparently believes would make him a free man. As noted above, *res judicata* operates to bar the continuous litigation of issues previously decided and variants thereof.

[¶93] Tibor has already attacked Ms. Goff's testimony and lost. Now he seeks to renew the attack using something more suitable to the realm of science-fiction than a courtroom. As such, the State submits that this latest attack is barred by *res judicata*, and that dismissal without a full evidentiary hearing was proper.

[¶94] Concerning Ground 4, Tibor previously challenged whether it was proper to have Dr. Tong testify in Tibor I. He now claims that he should be allowed to renew the attack by alleging that Dr. Tong should have been prohibited from testifying from memory, or as he states: "Dr. Tong was yet allowed to cite questions and answers for Jane Doe from memory."

[¶95] This is little more than another bite at the apple by Tibor under the guise of "ineffective assistance." The propriety of Dr. Tong testifying was already determined in Tibor I. As such, the State submits that the District Court was correct in dismissing this application without a full evidentiary hearing.

Tibor failed to show any genuine issue of material fact as to why misuse of process does not bar many of these claims.

[¶96] While generally, the State agrees with the District Court's decision, it notes that misuse of process is also a proper ground for affirming the decision.

[¶97] Misuse of process comes in two flavors under N.D.C.C. §29-32.1-12. One version is the repetitive filing of frivolous claims. An example would be: 1) appealing for insufficiency of the evidence because the defendant testified that his doppleganger committed the offense(s); 2) filing a post-conviction application alleging ineffective representation on the original trial doppleganger claim; 3) filing an appeal from the post-conviction; and 4) then filing a post-conviction application alleging that the first post-conviction counsel did not effectively present the doppleganger issue.

[¶98] The second version relates to the inexplicable failure of a defendant to raise the issue in previous filings. Here, one or both types of misuse of process operate to bar many of Tibor's claims.

[¶99] As noted above, Tibor has filed previous post-conviction documents and appeals. Nearly all of them have either been focused exclusively on, or included, the testimony of Ms. Condol. This dead horse has been beaten to the point it has been reduced to a pile of mush. As such, the State submits that Tibor's newest attack on Ms. Condol's testimony is barred under the doctrine of misuse of process.

[¶100] The State pleaded misuse of process in its response and motion to dismiss. Tibor filed no competent admissible evidence to show a genuine issue of material fact regarding matter, and thus dismissal without a full evidentiary hearing was appropriate.

[¶101] The State also notes that despite all of Tibor's previous post-conviction filings, Tibor never attacked the performance of Attorney Chapman. Instead, Tibor has attempted to file piecemeal applications, motions, and petitions. Then, when he loses on the issues, he attempts to continue the process by appending "new" claims to previously argued issues. Attorney Chapman's performance would have been known to Tibor at the time he was filing subsequent post-conviction documents either *pro se* or with the assistance of other counsel. He never once challenged Attorney Chapman's performance on anything until he lost on the "newly discovered evidence" claim.

[¶102] As such, the State submits that misuse of process bars Tibor's new attacks on Attorney Chapman's performance.

Tibor failed to show any genuine issue of material fact regarding ineffective assistance of counsel by either Attorney Chapman or Attorney Morrow.

[¶103] A defendant claiming ineffective assistance of counsel must first overcome the heavy burden of the presumption of attorneys providing appropriate performance. E.g. Heckelsmiller v. State, 2004 ND 191, ¶¶3-4, 687 N.W.2d 454. They must

specifically show how and where the attorney's performance was **objectively** unreasonable and that there would be a reasonably probable different outcome or result but for counsel's performance. E.g. Noorlun v. State, 2007 ND 118, ¶11, 736 N.W.2d 477

[¶104] A defendant's subjective belief is irrelevant. The mere fact that one approach "didn't work" or the claim that "I lost, and therefore my attorney was ineffective" is insufficient for valid ineffective assistance claim.

[¶105] As Justice Sandstrom noted in Coppage v. State, 2011 ND 227, ¶22, there are serious concerns about the ineffective assistance of counsel merry-go-round involving endless cycles of attorneys and countless hours of time. In many cases, including this one, the appointment of counsel for post-conviction or appellate work turns into another round of litigation after the inevitable failure of the previous filing. Examples such as Mitchell Holbach come to mind. In this case, Tibor has done the exact same thing that Justice Sandstrom was concerned about: he is perpetuating litigation by claiming that each successive attorney unfortunate enough to be associated with this case was ineffective.

[¶106] To take a step back and look at ineffective assistance at a basic level, the State notes first that there is the presumption of effectiveness which attaches to representation. Flanagan v. State, 2006 ND 76, ¶10, 712 N.W.2d 602. All attorneys licensed to practice in North Dakota, must either pass the North Dakota bar examination, or be subject to waiver based on prior legal performance and/or bar passage scores in other jurisdictions. N.D.R. Admission to Practice 1. In the instant case, Attorney

Chapman took and passed the North Dakota Bar Exam. This demonstrates his competency in North Dakota law.

[¶107] Next, there is the matter of objectively unreasonable conduct. A post-convictioning defendant must show that something an attorney did, or failed to do, was objectively unreasonable. In doing so, the State submits that the Court should look to whether a post-convictioning defendant has actually set forth any "specifics," and whether those specifics are actually real in terms of poor performance.

[¶108] By using the term real, the State means consideration of such things as: 1) did the claimed event actually take place or did the claimed omission actually happen; 2) is what the applicant is claiming possible or is it pure fiction/fantasy; 3) did the applicant himself cause the problem; 4) did the problem exist before the attorney came on board; and/or 5) is the defendant lying based on obvious information contained in the record, including transcripts.

[¶109] The State submits that patently false claims and allegations should be immediate grounds for summary dismissal without a hearing at least with regard to those issues. Examples of such patently false claims include statements which claim that witness "X" did not say subject "Y," yet the appeal, or other, transcript shows that witness "X" did, indeed say "Y." Similarly, patently false claims would include claims that certain arguments, motions, petitions, filings, etc. were never made, and the record shows the presence of that material.

-Ground 1

[¶110] In Tibor's case, the "specific" example for Ground 1 is a fake "quote" from Stogner, 593 U.S. 607 (2003). There is no lengthy definition of the words

"empirical study" to be found anywhere in Stogner, despite the Tibor's purported quotation. It is unclear from what source Tibor obtained his definition, but it is crystal clear that the definition did not come from Stogner.

[¶111] Further, the phrase "empirical study" is found in the dissent of Justice Kennedy, and therefore is not controlling law on any jurisidiction. However, Tibor attempts to mislead the Court by claiming it was an actual holding/label by the United States Supreme Court.

[¶112] Additionally, the phrase "empirical study" is used by Justice Kennedy to describe a collection of research studies that he feels supported the State of California's statute of limitations. Id. If anything, Justice Kennedy's statements when presented in proper context support the **State's** position and undermine Tibor's.

[¶113] Tibor presented nothing which shows it is objectively unreasonable to either: 1) not present a dissenting opinion as controlling law; or 2) not present information which is favorable to the State's side. As such, Tibor presented nothing showing a genuine issue of material fact

-Ground 2

[¶114] Here, Tibor pillories Attorney Morrow, claiming that Morrow was ineffective for not creating some new arguments to address his "newly discovered evidence claim." The State notes that under Schlickenmayer, and related cases, "newly discovered evidence" must be discovered after trial. E.g. State v. Schilickenmayer, 364 N.W.2d 108 (N.D. 1985).

[¶115] Tibor conducted a pre-trial deposition of Ms. Condol, where he learned of the C.S.A.A.S.. That in and of itself renders the C.S.A.A.S. not "newly discovered

evidence." Tibor also found out about the C.S.A.A.S. at trial, which also fails the first prong for newly discovered evidence.

[¶116] Tibor also received the name of the C.S.A.A.S.'s author, and therefore could with due diligence found out more about the author and his writings. His failure to do so runs afoul of the diligence prong set forth in Schlickenmayer.

[¶117] Tibor's "newly discovered evidence" was merely something to attempt to impeach Ms. Condol with. Such information does not rise to the likely to generate acquittal level required under Schlickenmayer, and is therefore generally insufficient to warrant a new trial. E.g. State v. VanNatta, 506 N.W.2d 63, 70-71 (N.D. 1993); State v. Garcia, 462 N.W.2d 123, 125 (N.D. 1990).

[¶118] Tibor presented nothing showing that it was objectively unreasonable for Attorney Morrow to set forth additional arguments to try to convince the courts that this information was "newly discovered evidence," when it obviously fails to qualify under Schlickenmayer as related cases. Therefore, the matter was ripe for dismissal without a full evidentiary hearing.

-Ground 3

[¶119] Here, Tibor has created an argument based on some sort of time-space discontinuity or time travel claim. Apparently Tibor believes that because Ms. Goff picked up Jane Doe from school for the trial, many months after the forensic interview, she somehow altered what happened in the interview and her testimony based on the forensic interview should be set aside. Tibor further claims that this months-after-the-fact contact was "a violation of Ms. Goff's stated protocol for interviews."

[¶120] No support for this argument is ever given. The State submits that this is one of the types of "unreasonable performance" claims that falls into the pure fantasy class of arguments.

[¶121] The State submits that Tibor has submitted nothing showing a genuine issue of material fact that Attorney Chapman was objectively unreasonable for not arguing that Ms. Goff's picking up of Doe for trial opened a hole in the fabric of space and time, and allowed her to alter the forensic interview thus rendering the information unreliable.

-Ground 4

[¶122] This ground is based upon the claim that Attorney Chapman should not have allowed Dr. Tong to testify from memory. The State notes that having a witness testify from memory is the preferred method, as opposed to having the witness read a document or report into the record.

[¶123] Tibor presented nothing showing a genuine issue of material fact that it was objectively unreasonable for Attorney Chapman to not allow Dr. Tong to testify from memory, which is the preferred means of testifying. As such, Tibor's ineffective assistance claim was ripe for dismissal without an evidentiary hearing.

-Ground 5

[¶124] Ground 5 is actually a collection of several different claims, each relating to Tibor's disenchantment with this Court's decision in Tibor I, and blaming Attorney Chapman for the bad result.

[¶125] In Ground 5.1, Tibor alleges Attorney Chapman failed him because this Court used the term "probably more than" instead of "at least 1 to 2 days old." Tibor

then claims that Dr. Norberg never said "probably more than." This ground is little more than a fabrication created by Tibor.

[¶126] Dr. Norberg actually testified: "The edges - - the edges of the wound were filling in with what we call granulation tissue which indicates it had to have been at least probably more than 24 to 48 hours old." (A.T. 418:18-20).

[¶127] The appeal transcript was before this Court in Tibor I, and it clearly shows that Dr. Norberg did say "probably more than," despite Tibor's recent false claims. As such, the State submits that Attorney Chapman was not objectively unreasonable in arguing that Dr. Norberg never said "probably more than," when that language is plainly visible in the appeal transcript.

[¶128] In Ground 5.2, Tibor claims that Attorney Chapman failed him because this Court used "probably more than" instead of "at least." Ironically, the "probably more than" language is more favorable to Tibor than "at least." Using "at least" requires that the injury be more than 24-48 hours, as that amount of time could be the least possible amount of time. "Probably more than" allows for the injury to be younger than even 24 hours.

[¶129] Tibor presented nothing showing objectively unreasonable conduct in Attorney Chapman's performance relating to this Court's use of "probably more than" instead of "at least." Tibor has presented nothing showing ineffective assistance relating to the use of more language more favorable to his position in this Court's decision.

[¶130] In Ground 5.3, Tibor complains that Attorney Chapman failed him because this Court mentioned his failed "too busy to molest" defense, which he suddenly

distances himself from. In this most recent filing Tibor claims he has always had the same contention about how the injury came to be.

[¶131] As noted above, Tibor himself spent 20 pages of transcript talking about his work schedule, and other matters. He filed numerous post-conviction motions referencing his testimony about work schedules, and how with everything else going on he did not have time to molest Doe. Such information was also presented in his appeal brief for Tibor I.

[¶132] Tibor has presented nothing showing objectively unreasonable performance by Attorney Chapman in presenting the same defense on appeal that he himself was expounding upon at length in trial. As such, no genuine issue of material fact regarding performance was presented.

[¶133] In Ground 5.4, Tibor takes Attorney Chapman to task for failing to argue that Dr. Norberg said the injuries to Doe were inconsistent with the type of allegation he was facing. However, this claim is a complete fabrication by Tibor, as shown by the appeal transcript.

[¶134] Dr. Norberg testified that the injuries seen could be caused by facial structures and/or digital manipulation. (A.T. 428:20-25). Similarly, Dr. Norberg's testimony about the cause of the abrasion was referenced in Tibor's November 14, 2006 motion to stay execution of sentence. (R.O.A. #158 page 5). This was also referenced in Tibor's 2006 motion for new trial. (R.O.A. #143, page 5).

[¶135] Following the State's motion to dismiss, Tibor did nothing more than regurgitate the claims in the original application, and claim that he relied on his attorney's experience. He presented nothing showing that Attorney Chapman was

objective unreasonable in not violating the North Dakota Rules of Professional Conduct by arguing that Dr. Norberg said the injuries were inconsistent with the allegations when the appeal transcript plainly shows she stated the injuries could be caused by facial structures. Consequently, the State submits that this issue was ripe for summary dismissal without a full evidentiary hearing.

[¶136] Not only must a post-convictioning defendant show objectively unreasonable conduct, they must also show a reasonably probable different outcome. When it is easier to dispose of an ineffective assistance claim based on lack of prejudice, that path should be taken.

[¶137] In this case, even if one were, for the sake of argument only, plug-in everything that Tibor says should have happened, there is still one massive obstacle that Tibor cannot overcome. That obstacle is having to show a reasonably probable different outcome. For ease of analysis, the State will address the grounds relating to Attorney Chapman first, and then address the single one against Attorney Morrow.

[¶138] Ground 1- Assuming that Chapman did present Stogner to the District Court as Tibor claimed he should have, then what? Justice Kennedy's statement is not controlling law, and is, if anything supportive of the State's position. The end result would have been support for the State's position.

[¶139] Ground 3- Assuming Chapman did argue that Ms. Goff's actions in pickup Doe of from school caused a break down in the fabric of space and time, resulting in alterations of what happened back during the forensic interview months before, then what? Tibor has presented nothing showing how something that happened months after

the forensic interview could have altered what happened during the interview, and changed Ms. Goff's ability to testify regarding the same.

[¶140] Ground 4-Let us assume that Chapman objected claiming that Dr. Tong was improperly testifying from memory and not testifying off of a document or other record, then what? Tibor has presented no authority, and the State has been unable to find any authority, that states witnesses should not be allowed to testify from memory. At best, the objection would have been overruled on the basis that from memory testimony is the preferred method. See. N.D.R.Evid 612 (use of writing or object to refresh memory).

[¶141] Ground 5-Even if Chapman had presented the complete list of arguments Tibor claims he should have, the end result would still have been the same. The full appeal transcript was before this Court, and it shows Dr. Norberg's testimony. When this Court is presented with a conflict between the record and unsupported assertions of a party, this Court is compelled to accept the record absent some independent proof. State v. Vogel, 325 N.W.2d 184, 186 (N.D. 1982); Sate v. Barlow, 193 N.W.2d 455, 460 (N.D. 1971).

[¶142] Indeed, the instant case is similar to Barlow in that Tibor's claims are directly disproved by an official transcript. The largest difference is that Tibor is not claiming the district court should have interpreted what was said differently, Tibor is claiming it was never said at all; something shown to be completely false by the record.

[¶143] In short, even if Chapman had made all the arguments Tibor says he should have, the result would still have been the same; this Court is compelled to accept the record.

[¶144] Regarding the wrong wording claim, Tibor still could not possibly show how the proposed wording change would have altered the outcome of the appeal, or that he would have had any different outcome if his less favorable language had been used.

[¶145] Ground 2-Even if Morrow had presented unspecified new arguments, he was still stuck with the basic underlying problem; material learned either at or before trial is not newly discovered evidence. You can put a dress on a pig and call it a date, but in the end it is still a pig. As noted above, courts are compelled to accept the record. And, in this situation, the record demonstrates pre-trial depositions, pre-trial motions, and questions at trial regarding the C.S.A.A.S. The record makes it obvious that Tibor was aware of the C.S.A.A.S. and its author either at or before trial, which is a complete bar to a newly discovered evidence claim.

[¶146] Further, Tibor presented nothing showing any type of diligence whatsoever in trying to find any other articles from the author of the C.S.A.A.S., which fails the diligence prong.

[¶147] Also, Tibor's claim was that this new evidence showed that Ms. Condol lied; i.e. that it was impeaching information, which as noted above, is not generally valid grounds for a new trial.

[¶148] In short Tibor failed to present anything showing that some other outcome would have happened if only Attorney Morrow had made unspecified additional arguments.

Tibor's generic listing of claims did not entitle him to post-conviction relief:

[¶149] Tibor listed several "bases" for post-conviction relief in his application as essentially a verbatim repeat of the classifications found in N.D.C.C. Chapter 29-32.1.

He provided no support for these claims at any stage, and they were thus properly subject to dismissal without an evidentiary hearing.

Summary

Due process claim:

[¶150] The due process arguments are newly minted on appeal, and were never raised below. No objection was made to having oral argument on the motion some two-months after Tibor received the motion and notice, and some forty-plus days after Tibor's failure to provide evidentiary support. As they were not presented below, the were effectively waived. At best for Tibor, this results in an obvious error analysis. The State submits that these issues should be disregarded is items raised for the first time on appeal.

[¶151] Should this Court choose to review these new claims, the obvious error standard applies. As Tibor failed to provide any competent admissible evidence to support his claims, Tibor failed to make it to the evidentiary hearing stage, and thus had no right to an evidentiary hearing.

[¶152] Consequently, Tibor fails the first prong of obvious error analysis, which requires an error. He also fails the second prong, in that there was no error to be plain. He then fails the third prong as based on his insufficient response, he did not have a right to a hearing.

Appropriateness of dismissal:

[¶153] As noted at length above, the State filed a motion to dismiss putting Tibor to his proof to show a genuine issue of material fact regarding several bars to his claims, and his inability to show ineffective assistance. Tibor's three (3) page response contained

no competent admissible evidence in support of his claims, but instead rested on conclusory statements.

[¶154] Therefore, summary dismissal was appropriate under *res judicata* for the claims regarding Ms. Condol, Ms Goff, Dr. Tong, and Dr. Norberg. Alternatively, summary dismissal for misuse of process including multiple filings regarding Ms. Condol, and failure to previously attack Attorney Chapman would have been proper.

[¶155] Summary dismissal was also appropriate based on Tibor's inability to show ineffective assistance of counsel. Support for Ground 1 was based entirely on numerous false claims and assertions by Tibor, as shown by reference to Stogner. Tibor never did provide any specifics for how Attorney Morrow was ineffective in Ground 2. Tibor never provided any specifics on how not arguing time travel in Ground 3 was ineffective. Tibor never provided any evidence showing that Attorney Chapman was ineffective for allowing Dr. Tong to testify from memory in Ground 4. Ground 5 was based entirely on false statements and claims by Tibor, which were easily disproved by references to Dr. Norberg's actual testimony at trial.

[¶156] Tibor never provided any evidence showing reasonably probable different outcomes. Justice Kennedy's statement supported the State's position. The C.S.A.A.S. and related materials were not newly discovered. Humanity lacks the ability to alter the past through actions in the present. Witnesses are supposed to testify from memory. Dr. Norberg actually said all those things Tibor claimed she did not, and actually said that the injuries to Doe could have come from facial structures and/or digital manipulation; things which Tibor was charged with.

Conclusion

[¶157] The District Court correctly dismissed Tibor's application without a full evidentiary hearing. Tibor received proper notice, and chose to file an insufficient response. In many respects, Tibor was fortunate that his attorney was given the opportunity to argue. The arguments presented to this Court are mostly newly created, and were not argued below. As such, the State respectfully requests this Court affirm the decision of the District Court.

Dated this 23rd day of February, 2012.

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Certificate of Service

I, Nathan Kirke Madden, hereby certify that on February 23, 2012, a true an accurate copy of the State of North Dakota, Appellee's Brief was served on Attorney Thomas Jackson at his last known email address of: tjacksonjtw@gmail.com.

Dated this 23rd day of February, 2012.

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