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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORHT DAKOTA

REGINALD E. TWEED,

Appellate/Petitioner,

V.

STATE OF NORTH DAKOTA,

Appellee/Respondent.

Supreme Court No. 20130246

Cass County No. 2010-CV-4415

APPELLATE'S BRIEF

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGEMENT FOR APPLICATION FOR POST CONVICTION RELIEF ENTERED IN THE DISTRICT COURT OF THE EAST CENTRAL JUDICIAL DISTRICT, THE HONORABLE FRANK L. RACEK, PRESIDING ON AUGUST 2, 2013.

Reginald E. Tweed, Pro Se
Petitioner-Appellant
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STATEMENT OF CASE

This is an appeal from Findings of Fact, Conclusions of Law, and Order for Judgment dated August 2, 2013.(see Appendix #1).

Reginald Tweed(from here on referred to as Tweed) was convicted of 'AA' murder in 1991. Appeal and conviction was affirmed in 1992. Tweed, through his attorney Brian Nelson(from here on referred to as Nelson), filed a post-conviction in 2008, it was denied by judge Racek. It was affirmed by Supreme Court.

On December 17th, 2010 Tweed, pro se, filed his Second Application for Post-conviction Relief(here on referred to as PCR) along with request for counsel. District court summarily dismissed petition.

In May, 2011 Tweed, pro se appealed lower court's decision to Supreme Court. On December 13th, 2011 Tweed's Second Application for PCR was affirmed in part and reversed in part by Supreme Court, in order to hold a hearing on whether or not Tweed received effective post-conviction counsel.

On July 15th, 2013 a hearing was held on the sole remaining issue of ineffective assistance of post-conviction counsel. An order denying Tweed was issued on August 2nd, 2013 by Judge Frank Racek.

Tweed, pro se, timely filed his Notice of Appeal in August, 2013.(see Appendix #2).

Petitioner Appeals lower court's decision for the following reasons:

1. Petitioner claims court erred or abused it's discretion by arbitrarily ordering Tweed's second Application for PCR be dismissed.

2. Petitioner believes lower court has erred or abused its discretion when they claimed Tweed did not prove his case of ineffective counsel against Nelson.

3. Petitioner claims court erred, or abused it's discretion by arbitrarily disregarding relevant, reliable testimonies including expert testimony.

4. Petitioner claims court erred, or abused its discretion when it and the state has shown bias toward Tweed and has prejudiced Tweed's case.

5. Petitioner claims court erred, or abused it's discretion by claiming Tweed made no showing of evidence or witnesses that would negate or reduce his culpability in Terry Dorff's(from here on referred to as Dorff) death.

6. Petitioner claims court erred or abused its discretion when it based its decision on maters and issues not properly before the court.

7. Petitioner claims that his 6th and 14th Amendment Rights were violated when he was denied effective assistance of counsel and due process.

STATEMENT OF FACTS

Tweed was convicted of 'AA' murder in October, 1991. The conviction was affirmed in 1992. Tweed filed a post-conviction in 2008 and it was denied by Judge Racek. It was affirmed by Supreme Court.

On December 17th, 2010 Tweed filed his Second Application for PCR. District court Summarily Dismissed petition.

Tweed now, in good faith, appeal's the courts August 2nd, 2013 order to the Supreme Court.

ISSUES PRESENTED FOR REVIEW

I. Whether Tweed's 6th and 14th Amendment Rights to due process, effective counsel, and a fair hearing were violated when the court erred or arbitrarily and unreasonably dismissed his Application for Post-conviction Relief in absence of clear and convincing evidence and by arbitrarily disregarding relevant and reliable testimony, including an expert?

II. Whether Tweed's 6th and 14th Amendment Rights were violated when the State has shown bias toward Tweed and prejudiced his case?

III. Whether Tweed's 6th, and 14th Amendment Rights were violated when the court erred, or abused it's discretion by claiming that Tweed made no showing of evidence or witnesses that would negate his culpability in Terry Dorff's death?

IV. Whether Tweed's 14th Amendment Rights were violated when court erred, or abused its discretion when it based its decision on matters and issues not properly before the court?

V. Whether Tweed's 6th and 14th Amendment Rights were violated by court when they claimed that Tweed did not prove his case of ineffective post-conviction counsel?

ARGUMENT

I. Whether Tweed's 6th and 14th Amendment Rights to due process, effective counsel, and a fair hearing were violated when the lower court erred or arbitrarily

and unreasonably dismissed his Application for Post-conviction Relief in absence of clear and convincing evidence and by arbitrarily disregarding relevant and reliable testimony, including an expert?

Judge Racek's decision was not the product of a rational mental process leading to a reasoned determination, nor was it based on the weight of evidence; therefore he has abused the court's discretion. Any person capable of reasonable thought viewing evidence would reasonably determine that the findings of fact are in Tweed's favor.

For example:

On page 3 – item 6 of judge Racek's order dated August 2, 2013. The judge says: "Mr. Nelson did not believe that there would be a medical expert available to offer any opinions concerning the cause of Dorff's death."

This is in direct opposition of what Brian Nelson(here on referred to as Nelson) said at the July 15th hearing,(7/15/13 hearing TR. Page 97 line 1-22) Tom Jackson(Tweed's attorney) questioned Nelson:

Q: "So at your deposition, at that time, you thought the issue of the medical examiner should have been raised at the original trial, correct?"

A: "Yes."

The court's findings are clearly arbitrary and erroneous. Nelson's testimony is an admission to a material fact, and in direct opposition to what judge Racek says.

In further support of Tweed's claim that judge arbitrarily and unreasonably denied Tweed's application, Tweed brings this Court's attention to the following ND Rules and subsequent case cites:

N.D.R.Ev - Rule701. Admissibility. – Discretion of Court. "Because N.D.R. Ev. 403 always allows a trial court discretion to exclude relevant evidence if its probative value is substantially outweighed by other considerations, the admissibility of lay opinion testimony is within the sound discretion of the trial court and will not be overturned on appeal absent an abuse of discretion. State v. McNair, 491 N.W. 2d 397(ND 1992)."

Rule 701 applies because Tweed is claiming court abused its discretion when it excluded relevant testimony of Chad McCabe, Mark Beauchene, Michelle Tweed, Brain Nelson, Reginald Tweed, and Tom Tuntland(here on referred to as Tuntland). All who testified to material facts regarding Nelson's ineffectiveness as Tweed's first post-conviction counsel, and how his deficient performance prejudiced Tweed's case. The court offered no reason for ignoring relevant testimonies, whose probative value is not offset or outweighed by any other considerations. Therefore, court arbitrarily disregarded relevant and material testimony and abused its discretion. The weight of testimonies are clearly in Tweed's favor.

N.D.R.Ev. - Rule 702. Testimony by experts.

*TEST FOR ADMISSION. Test for admission of expert testimony under this rule, is to determine a fact in issue and whether or not witness is qualified as an expert. South v. National R. R. Passenger Corp., 290 N.W. 2d 819(N.D. 1980); Butz v. Werner, 438 N.W. 2d 509, 77 A.L.R. 4th 1093(ND 1989)"

Rule 702 applies to Tweed's case because court abused its discretion when it arbitrarily disregarded testimony of a clearly qualified and credible expert witness, Tom Tuntland, whose testimony was needed to determine and prove a fact in issue. The test

for admission clearly allows expert testimony of Tom Tuntland. There was no evidence or testimony to refute or discredit Tuntland, whose testimony was unequivocally, that Nelson's performance fell below the objective standard of reasonableness, and that his deficient performance prejudiced Tweed's case.

Tuntland testifies(July 15th, 2013 TR page 142 lines 13-15):

Q: "Okay. And have you ever been called as an expert witness before?"

A: "Yes, I have."

Tuntland testifies(July 15th, 2013 TR page 152 lines 3-8):

Q: "Now, your expert testimony is that Mr. Nelson's representation fell below the objective standard of reasonableness. Now, when you are giving that opinion, are you basing that on the prevailing norms, as it were?"

A: "Yes, I am."

Tuntland testifies(July 15th, 2013 TR page 146 lines 13-20):

Q: "Have you been able to formulate an opinion as to the effectiveness of Nelson in handling Mr. Tweed's case?"

A: "Yes. In my opinion, Mr. Nelson did not handle the post-conviction effectively, and his ineffectiveness was prejudicial to Reginald Tweed."

Tuntland testifies(July 15th, 2013 TR page 152 line 22 - page 154 line 10):

Q: "...So why, in your opinion, was Mr. Tweed prejudiced by Mr. Nelson's performance in that first post-conviction action?"

A: "...Tweed's theory of defense was... Dorff was alive when Tweed left... It was likely David Sumner (hereon referred to as Sumner) who did it...The jury didn't buy that. But certainly if we had the testimony from Suedel and Wegner that Sumner admitted to murdering somebody, all of a sudden you have a credible defense testimony, and it tips the scales enough to raise reasonable doubt, and most likely would have. So yeah, I think it would have made a huge difference and Tweed, most likely, would have been acquitted... Even if we didn't have the testimony of Sumner. The jury is going to say, Gosh, is Tweed telling the truth and was Terry Dorff still alive when he left... and do I have reasonable doubt, based upon reason? And I think they would have said yes... it would likely have affected the outcome of the trial. And I believe, faced with that, on application for post-conviction relief, the court, most likely would have said, yeah, we're going to grant a new trial because we have new exculpatory evidence that a jury should have considered, and due process requires me to grant a new trial."

Tuntland testifies(July 15th, 2013 TR page 154 lines 11-21):

Q: "So based on your years of experience, and in your expert opinion, then, you believe that there was a reasonable probability that but for Mr. Nelson's errors, the result of the post-conviction proceeding would have been different?"

A: "Yeah.

The Expert, at this point testified that all the prongs of ineffectiveness have been met.

Tuntland testifies(July 15th, 2013 TR page 144 line19 – page 145 line6):

Q: "And you've been sitting in the courtroom today listening to the testimony?"

A: "Yes, I have."

Q: "And what else have you reviewed in preparation for your testimony today?"

A: "I reviewed the transcripts of the depositions that you have taken. Of course, the ND Supreme Court case. The better part of Mr. Tweed's very lengthy post-conviction application. I reviewed, in connection with that, the news paper articles. I also reviewed relevant pleadings. I downloaded them from the website. Jury instructions. That's pretty much it.

Tuntland is an expert who made an informed opinion, and determined Tweed did not receive effective counsel and he was prejudiced by Nelson's deficient performance. But Judge Racek arbitrarily denied Tweed's application. There was no proof offered in opposition to Tweed's claims, or Tuntland's testimony.

N.D.R.Ev. - Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible. *TEST FO RELEVANCY. The test as to whether evidence is relevant or irrelevant is whether or not it would reasonably and actually tend to prove or disprove any matter of fact in issue. State v. Haugen, 448 N.W. 2d 191(ND 1989), rev'd on other grounds, 449 N.W. 2d 784(ND 1989)."

Rule 402 applies to this case because testimony of Chad McCabe, Mark Beauchene, Michelle Tweed, Brain Nelson, Reginald Tweed, and Tom Tuntland are all relevant evidence presented at July 15th hearing. The testimonies are relevant and actually tend to prove Nelson's performance fell below the objective standard of reasonableness and how the deficient performance prejudiced Tweed's case. Therefore,

the court abused its discretion when it arbitrarily disregarded relevant evidence that is clearly admissible and should have been given their proper weight.

N.D.R.Ev. - Rule 403.Exclusion of relevant evidence on grounds of prejudice confusion, or waste of time. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by danger or unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Rule 403 applies to Tweed's case because relevant testimonies of Chad McCabe, Mark Beauchene, Michelle Tweed, Brain Nelson, Reginald Tweed, and Tom Tuntland are evidence with probative value. As they tend to prove Nelson was ineffective as Tweed's attorney and how his deficient performance prejudiced Tweed's case. There probative value is not substantially outweighed by danger of unfair prejudice, confusion of issues, they are not misleading, did not cause undue delay, they are not a waste of time, and are not a needless presentation of cumulative evidence. Therefore, court abused its discretion when it arbitrarily excluded relevant evidence.

Crawford v. Crawford, 524 N.W. 2d. 833(1994). "...courts should vacate judgments that are unconscionable. N.D.R. Civ. P. 60(b)(6) is available for just such a rare occasion and exceptional circumstances."

The Crawford case applies because Judge Racek's decision was unconscionable. Tweed has proven judge Racek has not based his decision based on evidence from the hearing.

Tweed has supplied court with ample genuine issues of material fact and ample evidence to show Tweed's first post-conviction counsel's performance fell below the objective acceptable level of a professional, and has further shown how the deficient performance prejudiced Tweed, and if Tweed had received adequate counsel in his first post-conviction he would have won and a new trial would have been granted.

A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination. The Supreme Court can and should reverse the lower courts arbitrary and unconscionable order, and issue a new trial.

N.D. Code of Judicial Conduct Canon 3-E-1) – Disqualification. "A judge shall disqualify himself in a proceeding in which judge's impartiality might reasonably be questioned." Commentary: "A judge should disclose on record information that the judge believes parties or their lawyers might consider relevant to the question of disqualification, even if judge believes there is no real basis for disqualification."

The Canon applies to Tweed's case because judge Racek should have disqualified himself when Tweed asked him to. Through his attorney, Tom Jackson(hereon referred to as Jackson), Tweed filed a motion for judge Racek to 'step down' or 'disqualified' as judge in this case(see Appendix #3 'Notice for Disqualification') The judge did not because he was attempting to hide something from Tweed. His history with and personal knowledge of, Nelson's criminal history relating to money. See following case:

U.S. v. Brian Nelson (Frank Racek, as Counsel), 735 F. 2d. 1070 (1984),

"Mr. Nelson was tried, convicted and sentenced for two counts of failing to file income taxes. His defense attorney was none other than attorney Frank Racek."

This shows impropriety. Tweed asked judge to 'step down', or 'disqualified'. The judge refused to, and unfairly answered the motion himself('Order Denying Plaintiff's Motion to Disqualify dated March 1st, 2013(see Appendix #4). By answering the motion against him, judge Racek put himself in a position of conflict of interest and in a position to show bias toward Tweed and prejudice his case. Also, in the order, judge Racek on page 2 he says: "The basis of Plaintiff's request for PCR is that counsel representing him in his first post-conviction was ineffective. ...The court has no knowledge of this case other than what is already on record." **Mr. Nelson, himself is this case**, therefore judge Racek has knowledge of it. Due to the fact that he has history with Nelson reaching back at least 29 years, he felt obligated to protect him from an ineffective claim, regardless of facts. Justice was the farthest thing from judge Racek's mind. He wanted to keep himself on the case, to be in a position to help his friend and ex-client.

Judge Racek did not disclose, at any time to Tweed, that he had defended Brian Nelson against criminal charges in the past. As an attorney, Mr. Racek was unsuccessful, and Nelson's criminal conviction and sentence was affirmed in 8th Circuit.

Judge Racek has first hand, personal knowledge that Nelson has a criminal history when dealing with money. Nelson has lied in this case. He has lied in his deposition(Nelson's Deposition pg. 24 lines 20-23 Appendix #5) Jackson asked him: Q: "Did you and he(Tweed) talk about obtaining a trial expert to talk about Mr. Beauchene's performance at..." A: "**No**." Which is in opposition to what he said later(see Nelson's

Deposition pg. 240 lines 2-6) Jackson asked him: Q: "Brian, in looking back over that letter, you would agree that Reggie did in fact, ask you about a trial expert, correct?" A: "He asked me about it **yes**." He also lied when he was on the stand at Tweed's July 15th hearing(July 15th, 2013 TR page 97 lines 6-10): Jackson asked Nelson: Q: "My question is, was one of the issues that Mr. Tweed had concerns about was hiring a medical expert examiner to re-look at his case?" A: "**I didn't think that was the way to go.**"
(July 15th, 2013 TR page 97 lines 18-22): Jackson asked Nelson: Q: "So at your deposition, at that time, you thought that the issue of the medical examiner should have been raised at the original trial, correct?"
A: "**Yes**."

Nelson is trying to lie his way out of trouble and Judge Racek only cares about making sure Tweed does not win his case. Even if the judge has to lie and bestow credibility on someone he knows has a criminal history of lying about finances.

Tweed has complained to this court before, about Judge Racek being unfair and being bias('Appellate's Brief' dated May 1st, 2011 pages 17-20). Please note, in judge Racek's denial of the motion to disqualify him, he never once offers to assure Tweed that he will be treated fair in his court room. A judge can't answer a motion against him, because it deprives the moving party due process.

N.D. Code of Judicial Conduct Canon 2 A – Judge will avoid impropriety and the appearance of impropriety. Commentary: "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. The test for appearance of impropriety is whether the conduct

would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

Judge Racek has not acted with impartiality or integrity. Any person viewing this case will see that judge Racek's ability to carry out his judicial responsibilities has been impaired, due to his bias against Tweed and his preferential treatment and protection of his friend and ex-client Nelson. The impropriety is obvious, and Tweed did not receive a fair hearing or order regarding the hearing, especially in light of the fact, that the weight of evidence is in Tweed's favor. Answering a motion against him, shows desperation to stay on a case, to accomplish an improper agenda.

N.D. Code of Judicial Conduct Canon 3(B)(5), (B)(6) – Judge shall perform with impartiality and diligence. B-5) "A judge shall perform judicial duties without bias or prejudice. B-6) A judge shall perform duties of judicial office impartially and diligently." Commentary: "A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute."

Judge Racek did not perform his duties without bias or prejudice, and has impaired the fairness of the courts and disgraced Cass County's judiciary process. The judge made his arbitrary decision in absence of the weight of the evidence.

Berger v. U.S., 295 U.S. 78, 88 (1935) "And whose interest, therefore, in a criminal prosecution is not that it shall win, but that justice shall be done. A prosecuting attorney is to refrain from improper methods calculated to bring about a wrongful conviction."

Berger case applies because, instead of focusing on ways to deny Tweed's Application, Judge Racek and the prosecutor's office should have focused on the importance and legitimacy of the issues.

Reid Brady filed "Response to Motion to Disqualify judge Racek" dated March 1st, 2013. In the response, there was never any offer or indication Tweed would receive a fair hearing in judge Racek's courtroom. They are obviously not interested in seeking justice, only in keeping a judge in this case that has sided with them at every turn.

It's as though the prosecution and judge Racek are in collusion and want Tweed to fail, so no one will ever know Tweed was wrongfully convicted of 'AA' murder, nor do they want anyone to know the depth at which they sank to in order to keep their malfeasance from coming into light.

This court cannot set precedence by allowing a judge to lie on an order without consequences.

II. Whether Tweed's 6th and 14th Amendment Rights were violated when the State has shown bias toward Tweed and prejudiced his case?

Naupe v. Ill., 360 U.S. 264, 269 (1959) "A prosecutor may not knowingly present false testimony and has a duty to correct testimony he or she knows to be false."

Naupe case applies because Cheri Clark(from here on referred to as Clark) lied to the court, with the intention of tricking court to side with the state.(July 15th, 2013 TR pg. 171 lines 21-25) Clark lied to the court when she said; "Wegner, as well, your honor. It wasn't in the initial appellate petition - - or, post-conviction petition."

The exact opposite is true, in Tweed's Application for Post-Conviction Relief dated December 15th, 2011 page 5 section B. Tweed says: "Helmuth Wegner testified under oath at Sumner's trial in February, 1992. Wegner testified that David Sumner killed a guy and he was in there(jail) for murder."

In further opposition to Clark's statement to the court, in Tweed's May 11th, 2011 Appellate's Brief page 12, Issue 1 B) "Wegner is a new witness that exists now and was not brought before any court and can not be barred by res judicata, therefore, court erred due to the fact that this issue was not fully and finally determined by any court or appeal."

Therefore, Clark showed bias and prejudiced Tweed's case by arguing to the court things that were not true.

U.S. v. Watson, 171 F.3d 695 (D.C. Cir. 1999)

"It is error for counsel to make statements in closing argument unsupported by evidence, to misstate admitted evidence, or to misquote a witness' testimony"

The *Watson* cases apply because Clark's arguments to the judge were not based on the facts of the case, and were done so in hopes of discrediting Tweed and tricking the judge to side with the state, to deny Tweed's application, in clear violation of Tweed's right to due process and fair hearing.

In Boening's Deposition(Pg 33 ln. 25 – pg. 34 ln. 4) when questioned by Clark (Appendix #6) Boening lied:

Q: "That's the theory the state went on?"

A: "Right. **We weren't trying to prove Tweed was a liar**, because we thought that - -."

Q: "**We don't believe he(Tweed) is a liar, correct**?"

A: "**Correct**."

This is important because it shows the depth the state is willing to sink in order to uphold Tweed's conviction. In the eyes of the jury, they absolutely wanted Tweed to be a liar at his original trial. Boening along with Goff prosecuted Tweed in 1991 and actually convinced the jury and judge LeClerc that Tweed was a liar.(Oct. 1991 TR pg. 426 lines 23-25) Goff tells jury: "He(Tweed) told you on his direct he wanted to tell the truth, he was scared, confused, and he didn't. But keep that in mind: **He didn't tell the truth**."

The judge and jury did not believe Tweed, (see Oct. 1991 TR pg. 460 lines 7-12) Judge LeClerc stated, "After listening to the evidence and the Defendant's version of the facts here, I sill don't know, I don't think, what truly precipitated this encounter and the initial assault, **it's just not credible**."

Judge also said; (Oct. 1991 TR pg. 460 lines 22-23) "Mr. Dorff was in a lot more serious condition than Mr. Tweed is admitting to now."

This shows if Tweed had new witnesses at his 1991 trial that could have corroborated his testimony, he would have been acquitted. But the witnesses did not exist until 1992; therefore, Tweed must have a new trial to show jury that someone other than him killed Terry Dorff, after Tweed left.

It is also important to note, in the past, Boening put a 'spin' on the new witnesses, as soon as Tweed discovered them, by saying testimonies of new witnesses 'merely corroborated' Tweed's testimony. This is very significant, because in 1991 Tweed actually needed corroborating testimony in order to be believed by the jury, and

corroborating evidence was not available at his original trial. Expert now testified as follows(see July 15th, 2013 TR page 152 line 22 - page 154 line 10):

A: "...Tweed's theory of defense was... Dorff was alive when Tweed left... It was likely Sumner who did it...**The jury didn't buy that. But certainly if we had the testimony from Todd Suedel and Mr. Wegner that Mr. Sumner admitted to murdering somebody, all of a sudden you have a credible defense testimony, and it tips the scales enough to raise reasonable doubt, and most likely would have. So yeah, I think it would have made a huge difference and Mr. Tweed, most likely, would have been acquitted."**

Nelson, himself has admitted on record that he should have called at least Suedel to Tweed's post-conviction hearing, and Tuntland testified to the same.

Boening's office has pulled out all stops to trick the lower court and this Court into believing Tweed is not entitled to relief, but Tweed is confident this Court will view this case as a whole and see the injustices and unfair rulings, and see that Tweed gets a new trial in the interest of justice and due process.

State v. Hernandez, 2005 ND 214 (2005) "Unless a defendant can show bad faith by police, failure to preserve evidence does not constitute a denial or due process. Bad faith, as used in cases involving destroyed evidence, means that evidence was deliberately destroyed by or at the direction of a State agent who intended to thwart and to deprive defense of information."

Hernandez case applies because Boening ordered the destruction of "a letter"(Appendix #7). By destroying the letter, he destroyed evidence that could have

identified a potential new witness who could have testified that Sumner has information exonerating to Tweed. But Boening did not bother to investigate letter, and ordered police not to investigate it. He lied about how he came into possession of letter, and claimed he never even thought of exculpatory evidence.(see Boening Deposition page 35 – page 38). Boening's lies can be proven by a police report of who and how it actually came into Boening's possession(see Appendix #8), and how Tweed asked him to investigate letter(Appendix #9) and Boening's response to Tweed's letter(Appendix #10). This all shows Boening's attempt at 'damage control'. He knew that new witnesses Jason and Sheri Johnson may have benefited Tweed but chose to do nothing and ignore his prosecutorial obligations with intent to prejudice Tweed.

Fines v. Ressler Enters, 2012 ND 175 August 21, 2012. "Sanctions for spoliation of evidence serve two purposes: First, sanctions exist to penalize those whose conduct is deemed to warrant a sanction; second, they exist to deter others who may be tempted to behave in such a way as to warrant the imposition of a sanction. Sanctions have an additional goal of protecting the integrity of the legal process by evening the playing field. Dismissal of entire case with prejudice is perhaps the most restrictive sanction which exists."

Fines case applies to Tweed because prosecutor's office in Cass County has destroyed evidence in Tweed's case, in effort to give themselves an unfair advantage in this case. They do not want to play on a level playing field. Now it is time for this Court to step in and sanction them to discourage anyone from behaving like this in the future.

In the past, the state and court have made it a point to mention, Sumner has been acquitted and could not be recharged. As though it was evidence against Tweed, this is unfair, now Tuntland points out how Sumner can be recharged.

Expert, Tuntland testified(7/15/13 hearing TR. Page 163 line 17 – Page 164 line 24):

Q: "Okay. Now, Mr. Brady asked you a question about double jeopardy and Mr. Sumner pleading the Fifth again. Now, you began to answer that that's a question for somebody in Washington, D.C. And, I guess, what is your understanding of how - - of whether or not somebody can plead the Fifth - - whether or not somebody can be prosecuted, then, in federal court after they've been found not guilty?"

A: "Well, under the basis of dual sovereignty, the federal government can prosecute. In practice, a deputy attorney general has to give approval to the prosecution. ...the prosecution, and presumably the defense, can go to the attorney general and ask for immunity. The attorney general would have no reason to deny immunity for somebody that's already been acquitted in state court. The attorney general gives immunity. That immunity extends to a federal prosecution. ... you go to Wayne Stenehjem and say, I would like immunity for a man who's already been acquitted. If he refuses to sign, you go to the court, and although they're few and far between, there are cases where judges have ordered prosecutors to give immunity, and I believe this would be one of them."

As of this date, no one has again tried to prosecute Sumner.

III. Whether Tweed's 6th, and 14th Amendment Rights were violated when the court erred, or abused it's discretion by claiming that Tweed made no showing of evidence or witnesses that would negate his culpability in Terry Dorff's death?

The issue of Tweed's culpability was not within the scope of the Supreme Court's order. And the court unfairly used it in the decision. This is unfair because Tweed had no opportunity to prepare and present evidence at the hearing, as it was barred. The only issue remaining before the court was ineffective counsel.

However, Tweed's lack of knowledge of the crime scene is exculpatory. Tweed's testimony was as follows (Oct. 1991 TR pg. 363 ln.1- pg. 364 ln. 5) John Goff(here on referred to as Goff) questioned Tweed about crime scene:

Q: "Okay, showing you State's exhibit No.1, is that familiar to you at all?"

A: "Yes."

Q: "What is it?"

A: "Terry Dorff's bedroom."

Q: "And is that Terry Dorff, to the best of your knowledge, on the bed?"

A: "Yes."

Q: "Have you seen him in a similar condition to that before?"

A: "No."

Q: "Have you seen him in a similar condition to that before? Even close to that?"

A: "Yes."

Q: "Okay, what about the photograph have you not seen before?"

A: "The pillow on his head."

Q: "You've never seen the pillow on top of his head before?"

A: "No."

Tweed's lack of knowledge regarding the crime scene is supported by Suedel's testimony at David Sumner's February 1992 trial(Appendix #11 TR pg. 164 lines 15-18). Boening questioned Todd Suedel as follows:

Q: "Did he(Sumner) make any statements to you with regard to hitting Terry Dorff with a rock?"

A: "The only thing he ever said 'Between the four walls myself and a **dead man**, they're the only ones that know how many times I hit him. **There's no witnesses because Tweed had left the room."**

This is significant for two reasons: #1.Tweed always testified that Dorff was alive when he left. Now **Sumner admits that Dorff was dead**, which means Sumner killed him. And #2. After **Tweed rendered Dorff aid** by taking out gag, making sure he was breathing, and turning Dorff's head to the side in case he vomited from alcohol, Sumner for the first time admitted he was left alone with Dorff because Tweed had left the scene. At that point, **Tweed was no longer in a position to protect Dorff from Sumner, nor was he in a position to prevent Sumner from killing Dorff.** Tweed was no longer in a position to describe crime scene, as evident by the pillow on Dorff's head, gag in Dorff's mouth, and three additional and fatal blows to Dorff's head. This is exonerating to Tweed, and Tweed asked Nelson to get the Sumner transcript, but Nelson did not, and Tweed lost his chance to discover this exculpatory evidence

Also, in Tweed's July of 2012 Affidavit in support of Post-conviction, Tweed specifically mentioned someone other than him or Sumner who could describe the crime scene(Appendix #12) Tweed states on pages 2-3 section #5.: "Mr. Tweed told Mr.

Nelson to get a copy of the Fargo Police Report regarding Dorff's death, he did not. Had Nelson followed Tweed's instructions he would have discovered many new issues to prove Tweed did not receive a fair trial due to prosecutor's Brady violations, police department Brady violations, and Beauchene's failure to bring up several facts such as: A.) Computer introduced as evidence at Tweed's 1991 trial did not exist. Only a picture of it did. It was released in bad faith to a civilian within a week after it was taken into evidence. Tweed was therefore deprived of any exonerating or exculpatory evidence it held. B.) Police report contained witnesses and evidence that Sumner, physically beat two men, on two separate occasions in February 1990 and April 1990, Steven Nelson and Steven Wayne Hopkins(see Appendix #13) for being homosexual and to punish them for telling people that Sumner had sex with them. Both were transported to hospital by ambulance. This evidence would have shown jurors that **Sumner had opportunity and motive to kill Dorff due to his past history and tendency of assaulting gay men.** C.) Aaron Anderson who was a State's witness at Tweed's 1991 trial made several statements to police, each statement was inconsistent, and changed even more at Tweed's trial. As it is part of Beauchene's professional duty to investigate and impeach witness with conflicting statements and testimony. D.) **Aaron Anderson went to police and made a statement describing the crime scene in detail before any information about it was released to the public**(Appendix #14). While Anderson was testifying, Beauchene should have confronted Anderson as to his personal knowledge of the crime scene and how he knew the body was bound with hands behind the back, feet bound, gag in Dorff's mouth, Dorff was naked, and that he was hit with a blunt instrument, unless he was there. This information is exculpatory to Tweed and is evidence someone other than

Tweed could have killed Terry Dorff, or at minimum it puts the question of causation into play and the jury would have had reasonable doubt and likely Tweed was truthful that someone other than Tweed killed Dorff at some point after Tweed left. Dorff's friend made statements indicating Anderson was 'obsessed' with Dorff(Appendix #15), and Dorff and Anderson had a 'falling out' over money. Beauchene should have asked Anderson why he testified he and Dorff were only friends but made prior statements that he and Dorff were sexually intimate. If the jury was made aware of Anderson's knowledge of the crime scene and inconstant versions of events, they would have known someone other than Tweed could have caused Dorff's death, and questioned Anderson's motive to testify, causation would be a factor, Tweed would certainly have been acquitted. Beauchene was clearly ineffective and Nelson was ineffective as well for not following Tweed's instructions and as a result, Tweed lost his post-conviction.

It is more probable David Sumner killed Terry Dorff after Tweed left, but it is now possible Aaron Anderson had opportunity and motive to kill Terry Dorff. DNA testing would have proved that, but the issue is now barred by a Supreme Court order due to Nelson's prejudicial failure as counsel.

None of the witnesses Suedel, Wegner, Sumner have ever said Tweed killed anyone. They all say Sumner did it. Sumner is silent because he is guilty. And Nelson's failure to investigate what witnesses would testify to has certainly prejudiced Tweed's case.

The issue of a new witness is barred by Supreme Court order.

Tweed told Nelson to hire an Expert Medical Witness. If he had, he would have discovered that the Hog-tie Position is no longer lethal(Michelle Affidavit Appendix

#16), and can no longer be cause of death, also that gag could not have been in Dorff's mouth when body was discovered due to the fact that tongue was in it's proper place, and unremarkable, Dr. Frikke testified that a lot of blood was found in body bag, which now questions blood loss as a cause of death, and pallor of nose is no longer considered to be evidence of asphyxiation. Dr. Maureen Frikke testified at Tweed's 1991 trial, she is basing her findings of 'cause of death' off a 1988 study from Dr. Reay regarding hog-tie and positional asphyxia. Had Nelson followed Tweed's instruction and hired an Expert Medical Witness, Tweed could have proven that Dr. Reay's study on hog-tie position is no longer(as of 1998) an accepted standard in medical community and that Dr. Reay recanted his study in 2005(Appendix #17).

A new cause of death must now be determined. This new evidence will surely lead to an acquittal at Tweed's new trial. Dr. Frikke's findings are no longer credible.

Michelle Tweed testified (July 15th, 2013 TR pg. 71 line 22 – pg. 72 line 7):
Q: "And at that time do you recall talking to Nelson about the grounds that you and Reggie felt were necessary to do a post-conviction?"
A: "When I spoke to him, I had a whole list of things that we felt were grounds. One of them was a 911 call that Reggie made from the Highway Host in West Fargo."

This is important, because **Tweed rendered Dorff aid before he left the residence**, and after he got to the Highway Host **he made a call to 911 to further get aid for Dorff**. But Nelson did not look for the recording, and he never used the issue at Tweed's post-conviction. Nor did he use the issue that Beauchene too, did not obtain or use the 911 call to reduce Tweed's culpability, and to put causation into play.

Tuntland testified(July 15th, 2013 TR page 155 lines 7-12):

Q: "How about with Suedel? You cannot point to anything specific he would say that would exonerate Tweed?"

A: "Yes, I can."

Tuntland testified(July 15th, 2013 TR page 157 lines 7-12):

Q: "Do you agree with the statement, Tweed admitted to committing several acts that directly caused Dorff's death?"

A: "I agree that Tweed admitted to striking Dorff. **As far as causation, that was a jury question. And I believe that when faced with all of the evidence, a jury would have, said at least, we have a doubt as to causation. We have reasonable doubt.**"

Tuntland testified(July 15th, 2013 TR page 160 lines 6-9):

Q: "And Mr. Sumner, you're not aware of any evidence that he has that would exonerate Mr. Tweed, correct?

A: "Yeah, I am."

Tuntland's testimony has shown how Sumner's silence(Deposition - Appendix #18) is an admission to guilt.(July 15th, 2013 TR page 161 lines 5-9): "...and they(jury) are told that he has taken the 5th, and we ask the judge for an instruction that they can draw and adverse inference from him taking the 5th when he does not have the right."

Star v. Morsette, 236 N.W. 2d 183 (1975) ND Sup. Crt. "We now hold that the silence of the codefendant Alfred Morsette, constituted conduct adopting the statement as his own in the absence of a denial of it, and that the trial court was within its discretion in admitting into evidence. We find no error."

Star case applies to this case because Sumner would not deny key questions in his deposition. He is admitting guilt, and a new jury can be instructed to draw an adverse inference to it.

Tuntland testified(July 15th, 2013 TR page 160 lines 3-5): "I am aware of evidence that would point the finger at Sumner, and then that puts the question of causation into play."

Dr. Frikke when questioned testified(Oct. 1991 TR pg. 317 lines 10-14):

Q: "So even to a reasonable degree of medical certainty, you **aren't** prepared to tell the jury today that two blows would have been sufficient to cause this gentleman to bleed to death, is that true?"

A: "I agree with that statement."

This is significant and is an admission to a material fact that two blows were not sufficient to cause death.

Tweed has negated or reduced his culpability in Dorff's death. However, this was not an issue before the court and judge should not have used that to determine his order. Tweed did not have opportunity to present evidence in his favor regarding this issue, because Nelson's deficient performance ensured it was barred by misuse of process. The only issue before the court was ineffective assistance of counsel.

IV. Whether Tweed's 14th Amendment Rights were violated when court erred, or abused its discretion when it based its decision on matters and issues not properly before the court?

Tweed was put at an unfair advantage during his July 15th, 2013 hearing because court ultimately based its decision on matters and issues not properly before the court. Issues and matters that were barred by Supreme Court, and therefore, Tweed had no opportunity to present argument and present evidence to court.

For example:

The issue of new information on Suedel, Wegner and Sumner, medical expert, and Nelson's money were either barred by Supreme Court or not before properly before the court. So Tweed was prevented from bring anything new regarding those issues. Therefore, judge violated Tweed's due process by holding it against him in his order, when the only issue was ineffective assistance of post-conviction counsel.

Nelson failed to get the information on witnesses in 2009 and Tweed was prejudiced because of it. Tweed asked Nelson to get the information on witnesses, but he didn't, now Nelson lied to the court by saying he was afraid to. But in his deposition he admitted he should have(Deposition pg. 36 line 19 – pg. 37 line 9) Nelson stated:

Q: "Do you think that it would have been important to call Suedel if he made that statement... Do you think it would have been important to call him to the witness stand?"

A: "Yeah, ... he should have been called by Beauchene... and if not... I think..."

Q: "And if not, you would say that's a failure by Mr. Beauchene?"

A: "Well, I would say so, **and perhaps it was my failure, maybe I should have called this guy.**"

Nelson is admitting to a material fact. That he should have called Suedel to Tweed's first post-conviction, but failed as a professional.

Nelson took it a step further in his deposition when questioned by Jackson(Deposition pg. 37 lines 20 – pg. 38 line 1)

Q: "And so you would agree that in post-conviction, presenting evidence to judge Racek could have changed his mind about whether or not Mr. Tweed was prejudiced at the original trail, correct?"

A: "I would say that probably."

Nelson is admitting to the second prong and admitting that, if not for his deficient performance, the outcome of Tweed's first post-conviction probably would have been different.

The judge's order also reflected that an expert medical witness would not have helped Tweed, but again this issue was not properly before the court and put Tweed in an unfair position that he was not allowed to present evidence in support of. However, Nelson admitted he should have got the expert.(July 15th, 2013 TR page 97 lines 18-22): Nelson testified:

Q: "So at your deposition, at that time, you thought that the issue of the medical examiner should have been raised at the original trial, correct?"

A: "Yes."

By Nelson's own testimony, he believed a medical expert was important. Therefore, judge Racek lied and did not base his decision on the facts of the case.

Judge's order also reflected Nelson was not paid and did not have funds. By Nelson's own admissions, he should have got the experts, and admitted he did not talk

about the money with Tweed(July 15th, 2013 TR page 98 lines 13-16): "Mr. Jackson asked Mr. Nelson:

Q: "Okay. But you never told him(Tweed) that you didn't have the funds for an expert medical examiner, did you?"

A: "We didn't discuss it."

Many issues in the order were clearly beyond the scope of the Supreme Court remand. It is unfair and a clear violation of Tweed's rights. The decision of court was clearly arbitrary, and must be reversed.

V. Whether Tweed's 6th and 14th Amendment Rights were violated by lower court when they claimed that Tweed did not prove his case of ineffective post-conviction counsel?

Nelson raised issue of conflict of interest at Tweed's 2008 hearing by stating that Tweed and Suedel both had Beauchene as an attorney at the same time, Nelson should have researched the issue, he would have discovered that Wegner was also Beauchene's client. And Beauchene worked plea agreements for Suedel and Wegner to testify at Sumner's 1992 trial but not Tweed. In addition to Dorff's case other witnesses were represented by Beauchene were Tammy Berg, and others.

Nelson, a professed 50 year veteran of criminal defense knew that burden of proof at an evidentiary hearing rested upon the plaintiff. He simply collected Tweed's money and showed up at the hearing date. He admittedly did not look for evidence, test anything, subpoena or depose anyone. His lack of preparation for the hearing, and full

knowledge that any issues Tweed would want to bring up in the future would be barred due to res judicata or misuse of process, prejudiced Tweed.

Coppage v. State, 2011 ND 227; December 13th, 2011 "We have said ineffective assistance of post-conviction counsel claims are governed by the standard set forth in Stickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Johnson v. State, 2004 ND 130, ¶ 17, 681 N.W. 2d 769. To succeed on a claim of ineffective assistance of counsel, applicant must show his counsel's performance fell below an objective standard of reasonableness and his deficient performance prejudiced him. Id."

Coppage case applies to this case, because Tweed has proven both prongs in this case. The testimony of all the witnesses, the expert, the evidence, and Nelson's own admissions indicate Tweed's right to effective counsel has been violated; he did not receive effective counsel at his 1991 trial, nor his 2009 post-conviction hearing. The evidence and witnesses at the July 15th hearing further proved it.

N.D.R.C.P – RULE 60(b)(2)3)(6) – Relief from Judgment. Grounds for relief from final judgment or order.. "On motion and just terms, court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (2)Newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b). Or, (3)Fraud, misrepresentation, or misconduct by opposing party. Or, (6)Any other reason that justifies relief."

Under Rule 60, this Court can relieve Tweed of the court's order based on fraud, newly discovered evidence, or any other reason that justifies relief.

CONCLUSION

Tweed has proven that judge Racek's order was made in clear error or arbitrarily and not based on the material facts of the case, unconscionable, and not on the preponderance of evidence from the hearing, and/or based on issues or pleadings not properly before the court. Tweed has proven through Nelson's own admissions, evidence, witness testimony, that Nelson's performance fell below the objective standard of reasonableness, and his deficient performance prejudiced Reginald Tweed, and if Tweed had effective counsel at his first post-conviction, he would have won and a new trial would have been issued. Tweed did not get a fair hearing or order. Tweed demands this court reverse the lower courts order and/or vacates his conviction and/or grant a new trial for Tweed where he will surely be acquitted.

Dated this 8 day of November 2013.

Reginald E. Tweed, pro se
Box 5521
Bismarck, ND
58506-5521

20130246

CERTIFICATE OF SERVICE BY MAIL

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

NOV - 8 2013

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA]
] SS
COUNTY OF BURLEIGH]

The undersigned, being duly sworn under penalty of perjury, deposes and says: I am over the age of 18 years old, and on the 8th day of November, 2013, I, Michelle Tweed, wife of Reginald Tweed, address of Box 524, Garrison, ND 58540, phone number of 701-333-8574, hand delivered 8 copies of the following to the Supreme Court, and mailed 1 copy to the Cass County State's Attorney's Office for / and or/ on behalf of Reginald Tweed, address of Box 5521, Bismarck, ND 58506-5521.

"APPELATE'S BRIEF"
"APPENDIX"
"CERTIFICATE OF NON-COMPLIANCE"

By hand delivering to: Clerk of Supreme Court
Penny Miller Clerk
1st Floor Judicial Wing
Bismarck, ND 58505-0530

By placing it in a prepaid envelope and addressed as follows to:
Reid Brady, State's Attorney's Office
Box 2806
Fargo, ND 58108
And depositing said envelope in the Mail at Cash Wise Foods, 1144 East Bismarck Expressway, Bismarck, ND 58504.

AFFIANT: Michelle Tweed
Michelle Tweed
Box 524
Garrison, ND 58540

Subscribed and sworn to before me this 8th th day of November, 2013.

Rikki Bacon

RIKKI BACON
Notary Public
State of North Dakota
My Commission Expires Sept. 1, 2017

IN THE SUPREME COURT OF NORHT DAKOTA

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
NOV - 8 2013
STATE OF NORTH DAKOTA

REGINALD E. TWEED,

Appellate/Petitioner,

V.

STATE OF NORTH DAKOTA,

Appellee/Respondent.

Supreme Court No. 20130246

Cass County No. 2010-CV-04415

CERTIFICATE OF NON-COMPLIANCE

The Appellant in the above entitled case requests the Supreme Court to waive Rule 31 (b)(1)(C) that requires him to file with this Court, an Electronic Copy of the Brief – Due on November 9th, 2013. The Appellant is an inmate at the prison and cannot make an electronic copy. The Brief was prepared on a word processor, but inmates at the prison are not allowed access to 'disks' to save onto, nor are inmates allowed access to the internet.

Dated this 8 day of November, 2013.

Reginald E. Tweed, pro se
Petitioner-Appellant
P.O. Box 5521
Bismarck, ND 58506-5521

20130246

CERTIFICATE OF SERVICE BY MAIL

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

NOV 21 2013

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF BURLEIGH)

The undersigned, being duly sworn under penalty of perjury, deposes and says: I am over the age of 18 yeas old, and on the 20 day of November, 2013, I Reginald E. Tweed Box 5521 Bismarck, ND 58506-5521mailed 8-copies of the following to the Supreme Court, and 1-copy to State's Attorney's Office:

"Appellate's Appendix"
"Certificate of Service by Mail"

By placing it/them in a prepaid envelope, and addressed as follows:

Clerk of Supreme Court
Sarah Erck, Deputy Clerk
1st Floor, Judicial Wing
600 E. Boulevard Ave
Bismarck, ND 58505-0530

Reid Brady
State's Attorney's Office
Box 2806
Fargo, ND 58108

And depositing said envelope in the Mail at the following address: Box 5521 Bismarck, ND 58506-5521

AFFIANT

R H E Tweed

Reginald E. Tweed, pro se
Box 5521
Bismarck, ND 58506-5521

Subscribed and sworn to before me this 20 day of November, 2013

Notary Public
In the County of Burleigh

My commission Expires On May 14, 2018

ERIC HASBY
Notary Public
State of North Dakota
My Commission Expires May 14, 2018