

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Gene Carl Kirkpatrick,)	
)	Supreme Court no. 20150039
Petitioner/Appellant,)	
)	
-vs-)	District Court no. 2014-CV-03364
)	
State of North Dakota,)	
)	
Respondent/Appellee,)	
)	

Brief of Petitioner/Appellant Gene Carl Kirkpatrick

Appeal from Judgment Entered on February 12, 2015

In District Court, County of Cass, State of North Dakota
 The Honorable Steven L. Marquart

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¶ 3 Issues

¶ 4 Whether the district court erred in granting the state's motion for summary disposition, thereby dismissing Kirkpatrick's application for post-conviction relief on the basis that he misused the process by bringing his instant claim?

¶ 5 Whether the district court erred by failing to address whether the state met its burden of proof on its affirmative defense claim of abuse of process in light of Kirkpatrick's factual proof of excusable neglect?

¶ 6 Whether the district court erred in concluding Kirkpatrick's claim that he was not properly informed of the 85 percent rule and its application to his case was a claim he would have been well aware of at the time of his previous post-conviction hearing?

¶ 7 Whether Kirkpatrick is entitled to post-conviction relief on the merits of his claim of ineffective assistance of counsel in the plea-bargaining process?

¶ 8 Statement of the Case

¶ 9 Kirkpatrick was convicted by a jury in July 2011 of conspiracy to commit murder and conspiracy to commit burglary. He was denied all relief on direct appeal. ***State v. Kirkpatrick*, 2012 ND 229, 822 N.W.2d 851.**

¶ 10 Kirkpatrick then applied for post-conviction relief. **Cass County District Court no. 2013-CV-01740.** Kirkpatrick alleged ineffective assistance of counsel based upon his attorney's advice to not testify in his jury trial. After an evidentiary

hearing, the district court denied relief, and Kirkpatrick appealed. Relief was summarily denied. ***Kirkpatrick v. State*, 2015 ND 49, _____ N.W.2d _____.**

¶ 11 Kirkpatrick filed his second application for post-conviction relief on December 3, 2014. (Doc ID # 1; App. 3)(Entries in the Clerk's Register of Action will be Doc ID# and pages in the Appendix App.) The State filed a response and a motion to dismiss or for summary disposition. (Doc ID## 9, 10; App. 8, 18). Kirkpatrick filed a response to the State's motions, supported by affidavits. (Doc ID## 11, 12, 13; App. 21, 32, 37). The District Court granted the State's motion for summary disposition, via a Memorandum Opinion and Order entered on February 10, 2015. (Doc ID# 15, App. 31). Judgment was entered on February 12, 2015. (Doc ID# 19; App. 42). Notice of Appeal was filed on February 13, 2015. (Doc ID# 23; App. 43).

¶ 12 Statement of Facts

¶ 13 Kirkpatrick believes he was deprived of effective assistance of counsel because he was advised by his attorney not to plead guilty pursuant to plea negotiations with the state.

¶ 14 This Court described the background of the criminal case in the direct appeal:

On October 26, 2009, Kirkpatrick's son-in-law, Phillip Guttuso, was found bludgeoned to death in his Fargo home. Guttuso's car and various household items were stolen. Michael Nakvinda, a man Kirkpatrick had employed on miscellaneous projects, was convicted in December 2010 of murdering Guttuso. ***State v. Nakvinda*, 2011 ND 217, 807 N.W.2d 204.**

After Guttuso's death, law enforcement met with Kirkpatrick in his home state of Oklahoma on October 31, 2009, and obtained a statement from him. Based on Kirkpatrick's incriminating interview statements, Kirkpatrick was charged with conspiracy to commit murder and conspiracy to commit burglary.

A jury trial was held in July 2011. At trial, the State introduced Kirkpatrick's interview with law enforcement as evidence that after Guttuso's wife, who was Kirkpatrick's daughter, died in March 2009, Kirkpatrick wanted the Guttusos' child raised in Oklahoma, not in Fargo with Guttuso. Because Guttuso would not give up custody of the child, the State argued Kirkpatrick and Nakvinda conspired to murder Guttuso. Kirkpatrick's interview with law enforcement provided evidence Kirkpatrick and Nakvinda discussed killing Guttuso on multiple occasions; Kirkpatrick provided \$3,000 to Nakvinda for expenses a few days prior to Guttuso's death; and Kirkpatrick provided Nakvinda with Guttuso's schedule and a videotape of Guttuso's home "for [Nakvinda] to . . . be familiar with the place."

In his law enforcement interview, Kirkpatrick stated that while he did want the child to come to Oklahoma, his statements to Nakvinda about killing Guttuso were not to be taken seriously because, "I said [to Nakvinda] we're just talking about this stuff . . . I don't know that I want to do this." Kirkpatrick asserted Nakvinda misinterpreted his intentions and unilaterally decided to kill Guttuso.

***State v. Kirkpatrick*, 2012 ND 229, ¶¶ 2 – 5, 822 N.W.2d 851.**

¶ 15 Kirkpatrick relies herein upon the entire record of the two companion files, and upon the Affidavit of Mack Kelly Martin, dated January 29, 2015, and the Affidavit of Gene Carl Kirkpatrick, dated January 23, 2015, which have been filed and served herewith. (Doc ID# 12; App. 37 & Doc ID# 13; App. 32).

¶ 16 In June of 2010, Birch Burdick conveyed a plea offer to Mack Martin. That offer was in return for a plea of guilty by Kirkpatrick to the charge of conspiracy to commit murder, the prosecution would dismiss the charge of conspiracy to commit burglary and recommend a sentence of 30 years, 5 years suspended, with 5 years of supervised probation. (App. 38, ¶ 6). Mr. Martin recalls that Mr. Burdick stated at that time that the "85% rule" would not apply, with the result that Mr. Kirkpatrick **would** be eligible for parole. Burdick told Martin he had talked to

someone in the North Dakota penal system to render this opinion of the application of the "85% rule." (App. 38, ¶ 7).

¶ 17 On a 25-year sentence, Martin calculated that Kirkpatrick could receive good time credit which could result in a net sentence of 21 years, without considering parole. (App. 38, ¶ 8).

¶ 18 Martin conferred with Steve Light, the attorney retained to serve as North Dakota counsel for Kirkpatrick. Light told Martin that he was not convinced that the "85% rule" would not apply to conspiracy to commit murder. (App. 38, ¶ 8).

¶ 19 Martin recalls discussing the plea offer with Kirkpatrick, along with the conflicting opinions as to the application of the "85% rule" to the proposed sentence. Martin recalls advising Kirkpatrick that, if even he were to be eligible for parole, given the surrounding circumstances, it would be unlikely he would actually be paroled. Martin states that based upon this discussion, Kirkpatrick rejected the plea offer and proceeded to trial. (App. 39, ¶ 12).

¶ 20 Kirkpatrick remembers this exchange somewhat but significantly differently than does Martin. First and foremost, his North Dakota attorney, Steve Light, gave the opinion that the sentence offered would be subject to the "85% rule" and Kirkpatrick would not be eligible for parole. Given that reality, the sentence offered would be tantamount to a life sentence. (Kirkpatrick was born in 1946, so in 2010 he would have turned 64; a net 21-year sentence would render him 85 at the time of release, an age well past his actuarial life expectancy).

¶ 21 Martin admits that he advised Kirkpatrick that, if even he would be parole eligible, actually being paroled would be highly unlikely. (App. 39, ¶ 12).

¶ 22 Kirkpatrick asserts that, had he been assured that the “85% rule” did not apply to Burdick’s offer, he definitely would have accepted the offer and pleaded guilty. (App. 34, ¶ 10).

¶ 23 In summary, he asserts that his constitutional rights were violated. He asserts that in the plea bargaining process, he received ineffective assistance of counsel from both Steve Light and Mack Martin, because it was upon their objectively unreasonable advice that he rejected the plea offer. (App. 34, 35, ¶ 12 & 13).

¶ 24 Burdick filed a sentencing memorandum in the criminal case. See File #09-2009-CR-03845, docket entry #476 at page 3. Mr. Burdick states: “The State has reviewed N.D.C.C. §12.1-32-09.1 and believes that the 85% rule does not apply to either conspiracy count for which the jury found the Defendant guilty.” So, if Burdick is correct, then Kirkpatrick got bad advice from Mr. Light. (Mr. Light was suffering from chemical dependency and mental health issues and committed suicide on February 8, 2012). If Burdick is wrong, then he, as the chief law enforcement officer in Cass County, North Dakota, misstated the law. (App. 34, ¶ 11).

¶ 25 Kirkpatrick believes Burdick wanted to convince the Court not to give him a term of years, and misstated the law to intentionally mislead the Court into thinking that if it gave a sentence to a term of years, Kirkpatrick would be eligible for parole. Mr. Martin prepared and filed a sentencing memorandum on September 30, 2011, in which he then agreed with Burdick that the “85% rule” would not apply to Kirkpatrick’s convictions. Docket entry #666. In either case,

Kirkpatrick is entitled to relief because the process resulting in his sentence was patently unfair. The interpretation of the "85% rule" in **N.D.C.C. §12.1-32-09.1** was critical to any meaningful consideration of any plea offer in this case, and proper sentencing considerations. Kirkpatrick asserts that, had he known he would be eligible for parole on the murder count, he would have accepted Burdick's offer and pleaded guilty for a sentence to a term of years. (App. 35 ¶ 12).

¶ 26 Kirkpatrick asserts his current (second) petition for post-conviction relief should not be barred by res judicata or abuse of process. He points out that he is not an attorney, and he has no legal training and am unfamiliar with any aspect of criminal law. The legal basis for this second petition for post-conviction relief was brought to his attention only recently, and not in time to include it in his first application for post-conviction relief. (App. 32, 33, ¶ 5).

¶ 27 In his response, Burdick makes much of the fact that he asked Kirkpatrick repeatedly what his claims were in his first post-conviction hearing. Kirkpatrick agrees his sole claim was ineffective assistance of counsel due to Mr. Martin's advice that he not testify at his jury trial. Kirkpatrick asserts that his was an honest answer. When he said that, he was unaware of the **Lafley** decision and how it might impact his case. That decision by the United States Supreme Court came **after** he was convicted and sentenced to life without the possibility of parole. Kirkpatrick is claiming excusable neglect, because he is not an attorney, and if his attorneys do not ask the questions which would trigger a response which would give rise to a claim for relief, he is helpless and at their mercy. His

claim in the first petition was ineffective assistance by Mr. Martin; his claim now is that Mr. Light gave Mr. Martin and him bad advice prior to the trial which caused them to reject Mr. Burdick's plea offer. He is also claiming that Martin gave him bad advice when he claimed Kirkpatrick would not be paroled in any case. Kirkpatrick is not raising the same claim again in some other form. (App. 33, ¶ 6).

¶ 28 Kirkpatrick has no intention to abuse the court process or bring claims piecemeal. Holding a hearing on this second petition will not be burdensome nor difficult for the state or the court. There is a statute of limitations for post-conviction claims, and he must assert his claims within that time frame. (App. 33, ¶ 7).

¶ 29 Argument

¶ 30 **The judgment denying Kirkpatrick post-conviction relief should be reversed.**

¶ 31 Kirkpatrick was deprived of a fair trial and due process through ineffective assistance of counsel.

¶ 32 Under the holding in **Lafler v. Cooper, 566 U.S. ___, 132 S.Ct. 176 (2012)** Kirkpatrick was denied effective assistance of counsel during plea negotiations and he was prejudiced as a result of that ineffective assistance. The appropriate remedy would be to "neutralize the taint" which would be to require the prosecution to re-offer the plea. (App. 33, ¶ 8).

¶ 33 The State claims that Kirkpatrick abused process by failing to raise his present arguments in earlier proceedings. Summary dismissal is appropriate only when there is no genuine issue of material fact. **Steinbach v. State, 2003 ND 46,**

¶ 12, 658 N.W.2d 355. As the moving party, the state may support its motion by merely pointing out the fact that there is no evidence to support the non-moving party's claim. *Id.* The burden has then shifted to the non-moving party to show that there is a dispute of fact, essentially requiring the non-moving party to show his cards before trial. *Id.* ¶ 17. The non-moving party, however, "is entitled to all reasonable inferences at the preliminary stages and is entitled to an evidentiary hearing if an inference raises a genuine issue of material fact." *Bell v. State*, 2001 ND 188, ¶ 6, 636 N.W.2d 438. "A genuine issue of material fact exists if reasonable minds could draw different inferences and reach different conclusions from the undisputed facts." *Everett v. State*, 2008 ND 199, ¶ 20, 757 N.W.2d 530.

¶ 34 In order for the state to succeed on the affirmative defense of abuse of process, the state must show that (1) the defendant failed to raise the issue in a previous proceeding and (2) failure to raise the issue was inexcusable. N.D.C.C. §29-32.1-12(2)(a). In the present case, it is undisputed that the issues of ineffective assistance of counsel and prosecutor misconduct as to the plea bargain were not raised in Kirkpatrick's first post-conviction proceeding. The State must base the summary disposition motion on the contention that Kirkpatrick has no evidence to show that his failure to raise these issues was excusable.

¶ 35 The State's argument fails for two reasons. First, because abuse of process is an affirmative defense, it is the State's obligation to show that failure to raise the issue was inexcusable, not Kirkpatrick's obligation to show that it was

excusable. The State's sole contention in its Motion for Summary Dismissal for why the failure to raise the issue was inexcusable is that Kirkpatrick "offers no explanation for his failure to do so." This assumes that Kirkpatrick must anticipate an affirmative defense in the application for post-conviction relief, and offer evidence against the affirmative defense before it is ever raised by the State. This is illogical, and flies in the face of the idea of an "affirmative defense." The State must first raise the defense and provide evidence for why the failure to previously raise the issue was inexcusable, then Kirkpatrick can respond to the defense by showing how the failure to previously raise the issue was excusable.

¶ 36 Additionally, the State cannot succeed on summary dismissal on an affirmative defense by simply saying Kirkpatrick has no evidence to rebut it. The State has the burden to prove its affirmative defense. Instead, the State seems to suggest that Kirkpatrick must show that he has not abused process, even though the State provided no evidence that his failure to raise the prior conviction issue was inexcusable. Consider if this logic were used in any other civil suit, like a car accident. The plaintiff could simply state the fact that the car accident happened, assert that the defendant was negligent with no facts to show the defendant was negligent, and force the defendant to prove that he or she was not negligent or lose on summary judgment. This is an absurd result, and is contrary to concepts governing burdens of proof, which are the foundation of our adversarial system.

¶ 37 Kirkpatrick's current (second) petition for post-conviction relief should not be barred by res judicata or abuse of process. He is not an attorney. He has no legal training and is unfamiliar with any aspect of criminal law. The legal basis for

this second petition for post-conviction relief was brought to his attention only recently, and not in time to include it in his first application for post-conviction relief.

¶ 38 In his response, Burdick makes much of the fact that he asked Kirkpatrick repeatedly what his claims were in his first post-conviction hearing. Kirkpatrick agrees his sole claim was ineffective assistance of counsel due to Mr. Martin's advice that he not testify at the jury trial. That was an honest answer. When he said that, Kirkpatrick was unaware of the *Lafleur* decision and how it might impact his case. That decision by the United States Supreme Court came *after* he was convicted and sentenced to life without the possibility of parole. Kirkpatrick is claiming excusable neglect, because he is not an attorney and if his attorneys do not ask him questions which would trigger a response which would give rise to a claim for relief, he is helpless and at their mercy. His claim in the first petition was ineffective assistance by Mr. Martin; his claim now is that both Mr. Light and Mr. Martin gave him bad advice prior to the trial which caused him to reject Mr. Burdick's plea offer. And, in the alternative, that Mr. Burdick may have misled the Court. Kirkpatrick is not raising the same claim again in some other form.

¶ 39 The State also raised the affirmative defense of Res Judicata. According to N.D.C.C. §29-32.1-12, part of the Uniform Postconviction Procedure Act, "[a]n application for postconviction relief may be denied on the ground that the same claim or claims were fully and finally determined in a previous proceeding." N.D.C.C. §29-32.1-12. In *Wilson v. State*, the defendant raised a claim of ineffective assistance of counsel on direct appeal regarding counsel's failure to

move for a mistrial when it was discovered that a jury member was sleeping during the trial. **1999 ND 222, ¶ 3, 603 N.W.2d 47.** In a later post-conviction proceeding, the defendant raised another ineffective assistance of counsel claim on the grounds that his attorney failed to adequately investigate his case, and failed to raise the issues necessary to defend him. *Id.* ¶ 3. The court decided that the defendant's second ineffective assistance claim had not been fully and fairly determined. *Id.* ¶ 12. In other words, ineffective assistance claims cannot be lumped together into one claim for res judicata purposes. Claims based on separate conduct are separate claims.

¶ 40 Similarly, in this case, Kirkpatrick's claim is based on a separate instance of conduct from the ineffective assistance claims his counsel raised in his first post-conviction petition. In his first petition, Kirkpatrick claimed that his trial attorney was ineffective because he advised Kirkpatrick not to testify in his own defense. Kirkpatrick now claims both Light and Martin were ineffective in their advice concerning the plea offer made by Burdick. This a starkly different ground for his claim of ineffective assistance of counsel, and therefore res judicata is not an appropriate ground for summary dismissal.

¶ 41 It is not Kirkpatrick's intention to abuse the court process or bring claims piecemeal. Holding a hearing on this second petition will not be burdensome nor difficult for the state or the court. There is a statute of limitations for post-conviction claims, and he must assert all claims within that time frame. Mr. Burdick has failed to respond to Kirkpatrick's factual assertions in his second petition for post-conviction relief. This apparently means he concedes that

Kirkpatrick's factual assertions are true, and that there are no issues of disputed fact. Thus, the court should accept as fact that Light and Martin gave him bad advice, or that Mr. Burdick misstated the law. Either way, Kirkpatrick's right to a fair proceeding was violated.

¶ 42 Mr. Burdick has raised "affirmative defenses" for which he has the burden of proof; Kirkpatrick is not required to negate an affirmative defense. In its opinion, the trial court cited ***Steen v. State*, 2007 ND 123, ¶ 13, 736 N.W.2d 457**. (App. 41). That case has little application to this case. The procedural history, factual background, and legal issues are all distinguishable. Kirkpatrick could not have raised the issue of ineffective assistance of counsel concerning plea bargaining in his direct appeal, because he necessarily is relying upon matters not contained in the trial record. Kirkpatrick has shown excusable neglect for not raising the issue in his first application for post-conviction relief. The state merely reiterates its questioning of Kirkpatrick in the evidentiary hearing about his claims in that proceeding. The trial court stated: "Here, the claim that Kirkpatrick was not properly informed of the 85 percent rule and its application to the conspiracy cases, is a claim that Kirkpatrick would have been well aware of at the time of his previous post-conviction proceeding." (App. 41, ¶ 6). That is a conclusory statement with no factual basis and no basis in the record. The trial court held the state to no standard of proof. The trial court's summary dismissal of Kirkpatrick's second application for post-conviction relief based upon res judicata or abuse of process is fully reviewable on appeal. See ***State v. Clark*, 1999 ND 78, ¶¶ 5 & 6, 593 N.W.2d 329**. Kirkpatrick has shown excusable neglect for not previously

raising the issue of ineffective assistance of counsel in the plea bargaining process. Kirkpatrick was unaware of the **Laflier** decision and how it might impact his case. That decision by the United States Supreme Court came **after** he was convicted and sentenced to life without the possibility of parole. Kirkpatrick is claiming excusable neglect, because he is not an attorney and if his attorneys do not ask him questions which would trigger a response which would give rise to a claim for relief, he is helpless and at their mercy. His claim in the first petition was ineffective assistance by Mr. Martin; his claim now is that both Mr. Light and Mr. Martin gave him bad advice prior to the trial which caused him to reject Mr. Burdick's plea offer. And, in the alternative, that Mr. Burdick may have misled the Court. Kirkpatrick is not raising the same claim again in some other form. Summary dismissal was not appropriate. **See Coppage v. State, 2011 ND 227, ¶ 19, 807 N.W.2d 585.**

¶ 43 Based upon the facts, the record, and documents on file, Kirkpatrick is entitled to post-conviction relief, due to ineffective assistance of counsel.

¶ 44 Standard of Review

¶ 45 The standard of review for ineffective assistance of counsel was stated by this Court in **Sambursky v. State, 2008 ND 133, ¶ 7, 751 N.W.2d 247:**

Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure. **Flanagan v. State, 2006 ND 76, ¶ 9, 712 N.W.2d 602.** Whether a petitioner received ineffective assistance of counsel is a mixed question of law and fact and is fully reviewable on appeal. **Klose v. State, 2005 ND 192, ¶ 10, 705 N.W.2d 809.** Under **N.D.R.Civ.P. 52(a)**, the district court's findings of fact will not be disturbed on appeal unless clearly erroneous. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the finding, a

reviewing court is left with a definite and firm conviction a mistake has been made." **Heckelsmiller v. State, 2004 ND 191, ¶ 5, 687 N.W.2d 454.**

¶ 46 In **Wong v. State, 2011 ND 201, ¶ 15, 804 N.W.2d 382** this Court described the petitioner's burden:

This Court has described the "heavy burden" a petitioner bears to succeed on an ineffective assistance of counsel claim:

[A] defendant claiming ineffective assistance of counsel has a heavy burden of proving (1) counsel's representation fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel's deficient performance. "Effectiveness of counsel is measured by an 'objective standard of reasonableness' considering 'prevailing professional norms.'" The defendant must first overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." "Trial counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the distorting effect of hindsight."

Citations Omitted.

¶ 47 To succeed with a claim for ineffective assistance of counsel, a petitioner must prove counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced him. **Strickland v. Washington, 466 U.S. 668 (1984); State v. Robertson, 502 N.W.2d 249, 251 (N.D. 1993).** The prejudice element requires the petitioner to establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, and the petitioner must point out with specificity how and where trial counsel was incompetent and the probable different result. **Decoteau v. State, 1998 ND 199, ¶ 6, 586 N.W.2d 156.**

¶ 48 Regarding the first prong of the **Strickland** test, Kirkpatrick believes he has proven that Light's and Martin's performance fell below acceptable standards. Specifically, Martin convinced Kirkpatrick not to accept the state's plea offer and plead guilty.

¶ 49 Kirkpatrick's claim in this action is based upon the holding in **Lafler v. Cooper**, 566 U.S. ___, 132 S.Ct. 176 (2012). In that case, the United States Supreme Court ruled that criminal defendants are entitled to effective assistance of counsel during plea negotiations and to an appropriate remedy if they are prejudiced as a result of ineffective assistance. The appropriate remedy would be to "neutralize the taint" which would be to require the prosecution to re-offer the plea.

¶ 50 The issue in this case is the application of North Dakota's so-called "85% rule," in **N.D.C.C. §12.1-32-09.1**. That rule clearly applies to a conviction for murder under **N.D.C.C. §12.1-16-01**. The question then is whether the "85% rule" applies to **conspiracy** to commit murder.

¶ 51 Attorney Steve Light was hired as Kirkpatrick's local North Dakota attorney. Mr. Martin and Kirkpatrick relied upon Mr. Light to advise them as to North Dakota law. Before the trial, the prosecutor, Birch Burdick, offered a sentence to serve of twenty-five (25) years for a guilty plea to the Conspiracy to Commit Murder Charge. Mr. Light advised Mr. Martin that he thought the "85% rule" would apply. Due to his age, their calculations was that a sentence of 25 years subject to the "85% rule" would be the functional equivalent of a life sentence. Martin asserts he also advised Kirkpatrick that parole was unlikely regardless of

whether he was eligible for parole. Therefore, based upon that analysis, Kirkpatrick rejected the plea offer and went to trial. (App. 33, 34, ¶¶ 6 -12).

¶ 52 If Kirkpatrick had known that the 85% rule did not apply to Conspiracy to Commit Murder, he would have pleaded guilty for a 25-year term, because he would have been eligible for parole within a reasonable time considering his age. (He was born in 1946). (App. 33, 34, ¶ 12). If Light and Martin were wrong, they rendered ineffective assistance of counsel, and Kirkpatrick is entitled to relief under *Lafler v. Cooper*, 566 U.S. ___, 132 S.Ct. 176.

¶ 53 Burdick told Martin and the Court the “85% rule” does not apply to either conspiracy count. So, if Burdick is correct, then Kirkpatrick got bad advice from Mr. Light. (Mr. Light was suffering from chemical dependency and mental health issues and committed suicide on February 8, 2012). If Burdick is wrong, then he, as the chief law enforcement officer in Cass County, North Dakota, misstated the law. Kirkpatrick believes Burdick wanted to convince the Court not to give him a term of years, and mislead the Court into thinking that if it gave Kirkpatrick a sentence to a term of years, he would be eligible for parole. Mr. Martin prepared and filed a sentencing memorandum on September 30, 2011, in which he then agreed with Burdick that the “85% rule” would not apply. Docket entry #666. In either case, Kirkpatrick is entitled to relief because the process resulting in his sentence was patently unfair. The interpretation of the “85% rule” in **N.D.C.C. §12.1-32-09.1** was critical to any meaningful consideration of any plea offer in the case, and proper sentencing considerations. (App. 34, 35, ¶¶ 12 -13).

¶ 54 To succeed with a claim for ineffective assistance of counsel, a petitioner must prove counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced him. ***Strickland v. Washington***, 466 U.S. 668 (1984); ***State v. Robertson***, 502 N.W.2d 249, 251 (N.D. 1993). The prejudice element requires the petitioner to establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, and the petitioner must point out with specificity how and where trial counsel was incompetent and the probable different result. ***Decoteau v. State***, 1998 ND 199, ¶ 6, 586 N.W.2d 156.

¶ 55 Regarding the first prong of the ***Strickland*** test, Kirkpatrick believes he has proven that both Light's and Martin's performance fell below acceptable standards of reasonableness as to the plea bargaining. Specifically, Light opined that the "85% rule" would apply to his sentence, so Kirkpatrick would not be eligible for parole. Martin relied upon that advice, but went further and opined that parole was unlikely in either case. Kirkpatrick was severely prejudiced, and the outcome would have been different, because had Kirkpatrick been correctly advised that parole was legally possible, he would have accepted the plea offer.


¶ 56 In the alternative, if Burdick was wrong, and the "85% rule" did apply, Burdick's advice to both the defense and the Court tainted the proceedings, either through calculation or negligence. The North Dakota Supreme Court has ruled that prosecutorial misconduct may "so infect the trial with unfairness as to make the resulting conviction a denial of due process." ***State v. Kruckenberg***, 2008 ND 212, ¶ 20, 758 N.W.2d 427 (citations omitted). The misconduct must be

so significant that it denies the defendant the right to a fair trial. *Id.* Kirkpatrick is asserting that if Burdick's legal opinion was wrong as to the application of the "85% rule" Kirkpatrick was denied due process, because his sentencing argument was based upon an incorrect interpretation of the law and likely misled the Court. This resulted in a violation of Kirkpatrick's right to due process.

¶ 57 Conclusion

¶ 58 Specifically, Kirkpatrick requests that the court vacate the criminal judgment and commitment in the above-captioned case which was entered on October 17, 2011, and that he be offered a plea in such a manner that he would receive a sentence not to exceed 25 years, for which he is eligible for parole, which may require a plea to an amended charge. In the alternative, Kirkpatrick asks that the judgment summarily dismissing his application for post-conviction relief be reversed and the case be remanded for an evidentiary hearing on his claims.

Respectfully submitted this 23rd day of March, 2015.



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IN RE

Kirkpatrick v. State
Supreme Court No. 20150039
District Court No. 09-2014-CV-03364**CERTIFICATE OF SERVICE
BY ELECTRONIC MEANS**

I, Monty G. Mertz, do hereby certify that, on the 23rd day of March, 2015, I served the Brief of Petitioner/Appellant Gene Carl Kirkpatrick and the Appendix in this case on the following:

Birch P. Burdick (ND #05026)
Cass County State's Attorney
Courthouse
P.O. Box 2806
Fargo, ND 58108-2806

Attorney for Appellee

by sending an E mail to Sa-defense-notices@casscountynd.gov with the documents attached in PDF format. To the best of my knowledge, this is the Eservice address for Mr. Burdick.

Dated this 23rd of March, 2014.



Monty G. Mertz, ND Bar ID#03778
Supervising Attorney
Fargo Public Defender Office
912 3rd Avenue South
Fargo, ND 58103-1707
Phone: 701-298-4640
Fax: 701-239-7110
Eservice: fargopublicdefender@nd.gov

IN RE

Kirkpatrick v. State
Supreme Court No. 20150039
Cass County No. 2014-CV-03364**CERTIFICATE OF SERVICE
N.D.R.App.P. 24**

I, Monty G. Mertz, do hereby certify that, on the 23rd day of March, 2015, true copies of the Brief of Petitioner/Appellant Gene Carl Kirkpatrick and the Appendix in this case were mailed to:

Gene C. Kirkpatrick (#3147)
South Dakota State Penitentiary
P.O. Box 5911
Sioux Falls, SD 57117-5911
Petitioner/Appellant

To the best of my knowledge, this is the mailing address for Mr. Kirkpatrick.

Dated this 30th day of March, 2015.



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