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IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

Mark Christian Palmer,)	Supreme Court No. 20140002
Petitioner/Appellant,)	2010126
vs.)	McHenry County No. 2013-CV-
State of North Dakota,)	00044
Respondent/Appellee.)	Rule 24, Indigent Brief
)	

RULE 24, INDIGENT BRIEF

APPEAL FROM MEMORANDUM OPINION AND JUDGMENT
DISMISSING POST-CONVICTION RELIEF PETITION
DATED DECEMBER 4, 2013
MCHENRY COUNTY DISTRICT COURT
NORTHEAST JUDICIAL DISTRICT
THE HONORABLE MICHAEL G. STURDEVANT, PRESIDING



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SUPPLEMENTAL ISSUE

[¶1] Whether Petitioner's Due Process rights, which are guaranteed under the Due Process Clause of the Fifth Amendment of the United States Constitution have been violated, when Petitioner has never been afforded an opportunity for a hearing to establish whether his trial attorney provided ineffective assistance of Counsel and whether Double Jeopardy bars the second, third and fourth counts, because his First Post-Conviction Counsel missed a deadline, which resulted in a dismissal of his initial petition for post-conviction relief.

[¶2] The Due Process Clause of the Fifth Amendment provides in pertinent part that "no person shall... be deprived of life, liberty, or property without due process of law." See, United States Constitution Amendment V. The Fourteenth Amendment imposes this same limitation on the States. See, United States Constitution Amendment XIV.

[¶3] Petitioner was entitled to all reasonable inferences at the preliminary stages of his first post-conviction proceedings and he was entitled to an evidentiary hearing if the evidence he presented raised a genuine issue of material fact. See, Henk v. State, 2009 ND 117, ¶9, 767 N.W.2d 881. First Post-Conviction Appointed Counsel failed to provide the district court any competent admissible evidence by affidavit of or other comparable means in support of Petitioner's allegations,

even as Petitioner had many papers prepared for just this demonstration, that trial counsel was ineffective, in fact Petitioner supplied such evidence upon request by Russell J. Myhre, during a Rule 60(b) proceeding. See, Affidavit of Supporting Grounds, submitted in a letter to Russell J. Myhre. See, Letter to Russell J. Myhre, filed with the Clerk of District Court on September 20, 2012 at 11:32 pm. First Post-Conviction Appointed Counsel never requested, spoke with, met with or wrote Petitioner concerning this evidentiary support, and in fact Petitioner never received a copy of the States' response and Petitioner was unaware that the State moved for summary dismissal. Had Petitioner known of the State's Response and request for summary dismissal, Petitioner would have at the least filed a pro se Affidavit of or other comparable means, as Petitioner did in the Letter to Russell J. Myhre, and was filed on September, 20, 2012.

[¶4] On March 1, 2011, the State responded to Petitioner's first application and moved for summary dismissal. See, Palmer v. State, 2013 ND 98, ¶2, 816 N.W.2d 807. Petitioner's First Post-Conviction Counsel failed to respond, inform Petitioner of this request or to act in any form, and on May 18, 2011, the district court denied Petitioner's first application. Id. Petitioner's First Post-Conviction Counsel was ineffective and Petitioner was denied his Due Process rights, by First Post-Conviction Counsel moving for relief from the summary dismissal under N.D.R.Crim.P. 60(b)(1),

arguing that Petitioner was entitled to relief because of first Post-Conviction Appointed Counsel's mistake or inadvertence. Id. at ¶3. Clearly First Post-Conviction Appointed Counsel should have filed a timely Notice of Appeal to the North Dakota Supreme Court to argue the summary dismissal under the proper proceeding.

[¶5] The failure of First Post-Conviction Appointed Counsel to file a Notice of Appeal under the proper proceeding has prejudiced Petitioner by denying his Due Process rights, as now Petitioner can not bring his Federal Claims to the United States District Court under a Section 2254 Petition, due to the one-year statute of limitations, which does not toll under a Rule 60(b) proceeding as it would have under the proper appeal proceeding before the North Dakota Supreme Court. Clearly Petitioner's Due Process rights have been violated.

[¶6] Petitioner has been denied any meaningful proceeding to fully and finally determine whether his trial counsel, first post-conviction appointed counsel were ineffective and whether Petitioner has a non-frivolous Double Jeopardy and Multiplicity claim.

[¶7] The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution states that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Fifth Amendment is enforced upon the State

of North Dakota by the Fourteenth Amendment of the United States Constitution. The Clause protects against multiple punishments for the same offense. In Ohio v. Johnson, 467 U.S. 493, 498 (1984) the United States Supreme Court articulated policy justifications for each protection conferred by the Double Jeopardy Clause. The protection against cumulative punishments confines courts sentencing discretion to the legislative limits. See, Id. at 499. The Double Jeopardy Clause also protects against multiple punishments for the same offense. See, United States v. Wilson, 420 U.S. 332, 342-43 (1975). In the present matter jeopardy attached in the original proceeding, when the jury was impaneled and sworn. See, Crist v. Bretz, 437 U.S. 28, 38 (1978); see also, U.S. v. Melius, 123 F.3d 1134, 1137 (8th Cir. 1997)(holding jeopardy attached when jury impaneled and sworn).

[¶8] The test to determine whether there are multiple offenses is whether each provision requires proof of a fact the other does not. See, Blockburger v. United States, 284 U.S. 299, 301 (1932); see also, Rutledge v. U.S., 517 U.S. 292, 297 (1996); Texas v. Cobb, 532 U.S. 162, 172-73 (2001). In the present matter Petitioner was charged with four (4) Gross Sexual Imposition offenses, which were all based on sole specific alleged act of sexual abuse, therefore, Double Jeopardy bars the second, third and fourth counts. See, U.S. v. Robertson, 606 F.3d 943, 950-52 (8th Cir. 2010). All four (4) counts here happened in the same time period and location,

and each include the same elements and facts. Clearly the prosecution here charged Petitioner with four (4) separate offenses of the same transaction, this is clearly a Double Jeopardy violation. See, U.S. v. Muhlenbruch, 634 F.3d 987, 1002-03 (8th Cir. 2011). Further, there was no continuing criminal enterprise after the alleged predicate offense, here.

[¶9] Clearly the legislative intent, was not to allow the prosecution here to charge Petitioner with multiple violations of the same statute from a single act and occurrence, and if legislative intent is ambiguous, the Blockburger test determines whether multiple charges constitute the same offense, and are therefore barred by Double Jeopardy. See, Mo. v. Hunter, 459 U.S. 359, 368 (1983). The rule of lenity requires only one punishment absent a showing of legislative intent to impose multiple punishments.

[¶10] But for ineffectiveness of Counsel during the original proceeding, Petitioner would have raised and asserted a Double Jeopardy and Multiplicity claim/issue at the start of the trial. However, even though Petitioner failed to raise and assert a Double Jeopardy claim at the start of the trial, the claim is reviewable under plain error standard. See, U.S. v. Robertson, 606 F.3d 943, 949-50 (8th Cir. 2010)(holding standard of review on appeal when not previously raised is plain error).

[¶11] But for ineffectiveness of Counsel during the Direct Appeal process before the North Dakota Supreme Court, Petitioner would have properly raised and framed the Double Jeopardy and Multiplicity issues regarding the multiple convictions and consecutive sentences for a sole alleged act. See, State v. Palmer, 2002 ND 5, 638 N.W.2d 18. Further the North Dakota Supreme Court allowed Petitioner to raise the issue of ineffective performance of his trial lawyer in post-conviction proceedings. See, State v. Palmer, 2002 ND at ¶13. In the present case Petitioner is allowed to raise Double Jeopardy and Multiplicity issues for review for plain error. See, U.S. v. Chief, 561 F.3d 846, 851 (8th Cir. 2009)(holding defendant permitted to raise claim for review for plain error despite failure to assert double jeopardy claim for multiplicitous sexual charges).

[¶12] Petitioner's Counsel's mistake of failing to raise and/or frame the Double Jeopardy and Multiplicity issues and its effect on Petitioner's sentence fell below the objective standard of reasonableness. The prevailing professional norm with regard to an direct appeal or post-conviction relief proceeding would have been to raise and/or frame all applicable defenses or issues so that each may be heard by the court. Further, Petitioner was prejudiced by Counsel's deficient performance in this matter. Had Thomas K. Schoppert, Petitioner's trial Counsel, understood the applicability of the Double Jeopardy and Multiplicity issues prior to trial, he would

have raised these issues and therefore, the court could have made a ruling, also, had William Hartl, Petitioner's Court Appointed Direct Appeal Counsel, understood the applicability of the Double Jeopardy and Multiplicity issues during the Direct Appeal before the North Dakota Supreme Court, he would have raised these issues and therefore, the Supreme Court could have made a ruling, further, had Coral Mahler, Petitioner's Court Appointed First Application Counsel, replied to the State's request for summary dismissal, she would have properly framed these issues and therefore, the court could have made a ruling. But for Counsel's errors, the applicability of these issues would have come into play and Petitioner would not have received four consecutive three (3) year sentences for the four B Felonies, which arose out of the same alleged course of conduct and had the same alleged criminal objective, further, Petitioner would not have been resentenced, on a probation violation, and received two concurrent five (5) year sentences for two of these B Felonies.

[¶13] The district court dismissed Petitioner's Second Application For Post-Conviction Relief Stating:

The Petitioner was given notice that he was being "put on his proof" on July 8, 2013, by the filing of the State's Answer and Motion to Application for Post-Conviction Relief requesting that this court summarily dismiss his Motion for Post-Conviction Relief. However, Petitioner has failed to present competent admissible evidence by affidavit or other comparable means demonstrating that post-conviction relief counsel was

fatally ineffective and that there would have been a different result if he had been provided more effective representation. Thus, Petitioner has failed to raise an issue of material fact.

[¶14] It is clear the district court abused its discretion as Petitioner presented competent admissible evidence in his Second Application For Post-Conviction Relief. See, ¶¶17-19 (Appellant's Appendix pages 14-17). Further, Petitioner's Second Post-Conviction Appointed Counsel filed and served a Reply to the respondent's answer and motion to Application For Post-Conviction Relief on September 25, 2013, which also contained competent admissible evidence.

[¶15] Petitioner's Due Process rights, which are guaranteed under the United States Constitution and which are imposed on the State of North Dakota by the Fourteenth Amendment have been violated.

CONCLUSION

[¶25] The Memorandum Opinion and Judgment, denying Petitioner's petition for post-conviction relief should be reversed and remanded.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Rule 24, Indigent Brief, by United States Mail upon:

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Dated this 13 day of March, 2014.



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Subscribed and sworn to before me this 13th day of March, 2014,
in Stutsman County, North Dakota.



Notary Public

