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[¶1] SUPPLEMENTAL STATEMENT ISSUES

[¶2] 1. The district court violated Appellant's Due Process rights under both the United States Constitution and the North Dakota Constitution, when it dismissed Appellant's application for post-conviction relief with-out first holding an evidentiary hearing to allow the development of additional evidence not presented during the original proceeding.

[¶3] The district court violated Appellant's Due Process rights under both the United States Constitution and the North Dakota Constitution, when it dismissed Appellant's application for post-conviction relief on Appellant's claim of ineffective assistance of trial counsel, with-out first holding an evidentiary hearing to allow Appellant the development of the record, as most of the ineffectiveness happened on matter occurring outside the court record or transcripts.

[¶4] SUPPLEMENTAL STATEMENT OF THE CASE

[¶5] Appellant does state and agree with the STATEMENT OF THE CASE, WHICH APPEARS IN Appellant's Brief, which was filed and served by and through appointed counsel, Lee M. Grossman. But Appellant would add the following supplemental sattements of the case.

[¶6] On June 30, 2014, Coral J. Mahler, appointed counsel for Appellant filed and served a post-conviction brief (Appendix, 42-53), which only repurposed Appellant's pro se application for post-conviction relief (Appendix, 10-35). Ms. Mahler's post-conviction brief (Appendix, 42-53) is nothing more than Appellant's application for post-conviction relief (Appendix, 10-35).

[¶7] On July 7th, 2014, Appellant, pro se, filed and served a Reply To State's Motion For Summary Disposition And Affida-

vit (Appendix, 6, DOC. ##17, 18)("Reply and Affidavit"). This Reply and Affidavit stated:

[¶2] Petitioner and Affiant is entitled to all reasonable inferences at the preliminary stages of this Post-conviction proceeding and is entitled to an evidentiary hearing if the evidence he presents raises a genuine issue of material fact. See, Henke v. State, 2009 ND 117, ¶9, 767 N.W.2d 881. "A genuine issue of material fact exists if reasonable minds could draw different inferences and reach different conclusions from the undisputed facts." See, Id. at ¶12 (quoting Vandenberg v. State, 2003 ND 71, ¶5, 660 N.W.2d 568. Summary disposition is not appropriate when there are claims of ineffective assistance of counsel. See, Wong v. State, 2010 ND 219, ¶15, 790 N.W.2d 757. In the present case the claim of ineffective assistance of counsel was based on matters occurring outside the court record or transcripts, and therefore the record and transcripts are not adequate to decide the claim and an evidentiary hearing is required to consider other evidence beyond the record. See, Wong v. State.

[¶3] In the present matter had appointed counsel deposed or even interviewed Bismarck Police Officer, Scarlet Vetter; Bismarck Police Sargent, Jesse Hellman; Loretta Stroud (Petitioner's step daughter) and Joan Otto (petitioner's wife), appointed counsel would have shown the original court that Officer Vetter, Sargent Hellman and Bismarck Police Department K-9 units had each on their own conducted a search of Petitioner's 5th Wheel Trailer Home, by walking around the home ("Curtilage"), while looking in the windows of the home, and later together conducted another search around the home, while again looking in the windows. These warrantless searches all prior to the warrantless "Security Sweep", which was performed over thirty (30) minutes after Petitioner was arrested on an unrelated bench warrant.

[¶4] Appointed counsel failed to show the original court that the Bismarck Police Department's K-9 unit's had conducted a free-air sniff of Petitioner's home prior to the "Security Sweep."

[¶5] Had appointed counsel shown that the afore-mentioned searches to the original court. It would have been clear that Law Enforcement was using canned language and tactics to conduct the warrantless "Security Sweep" and that there were no specific facts tailored to the individual situation, which would have required a "Security Sweep."

[¶6] Petitioner and Affiant states that there is evidence of these warrantless searches prior to the warrantless "Security Sweep", but Petitioner and Affiant would need the full subpoena power of the court to depose witnesses, require the Bismarck Police Department to produce the K-9 unit's reports and daily logs, and then to investigate such, and then an evidentiary hearing to develop the record to reflect the new evidence, and other matters of ineffective assistance of counsel, due process violations and that officers misled the court that a "Security Sweep" was needed.

[¶7] Petitioner and Affiant states that he has prepared, filed and served this document/instrument pro se as differences have arisen between him and appointed counsel and it appears these differences have destroyed the legitimate objective of the representation, and made it impossible for him and appointed counsel to work together on this matter.

WHEREFORE, Petitioner and Affiant prays the Honorable Court set a date and time for an evidentiary hearing on the underlying post-conviction relief matter, and for such other and further relief as may be necessary and just.

See, Reply To State's Motion For Summary Disposition And Affidavit (pro se), (Appendix, 6, DOC. #17). This Reply and Affidavit was served upon Dawn M. Dietz, Assistant Burleigh County States Attorney ("State") and Coral J. Mahler, appointed counsel by United States Mail (Prison Mail Box System)(See, Appendix, 6, DOC. #18). This Reply and Affidavit was also filed with the Burleigh County Clerk of District Court on July 7th, 2014. (See, Appendix, 6, DOC. ##17, 18).

[¶8] On September 8th and 10th, 2014, Appellant, pro se, filed and served a Subpoena upon the Records Department, Bismarck Police Department which stated:

I would request and demand your agency to supply all NOTES, REPORTS, RECORDS, PAPERS, DOCUMENTS AND DAILY LOGS of the two (2) Bismarck Police Department K-9

units, whom were present at 2006 Frontier Avenue, Bismarck on the morning of July 26, 2012, at the residence of Wayne James Otto.

See, Subpoena (Appendix, 6, DOC. ##19-22). This Subpoena (Appendix, 6, DOC. ##19, 21), was served upon all parties by United States Mail (Prison Mail Box System)(See, Appendix, 6, DOC. ##20, 22). While the Records Department did supply all notes, reports, records, papers and documents of the Bismarck Police Officers at the scene, whom were not K-9 units, the Records Department failed to supply the requested evidence, by Subpoena, of the two (2) Bismarck Police Department K-9 units, whom were present at the scene and whom conducted a warrantless search of Appellant's residence. It must be noted, that prior to the filing and serving of the Subpoena, Appellant had on two (2) prior occasions requested this same evidence, which was requested by the Subpoena, and in fact Appellant served copies of the letter requests upon the Office of the Mayor of Bismarck, with a request for the Mayor's help in obtaining the requested evidence concerning the Bismarck Police K-9 units.

[¶9] On or about December 29th, 2014, Appellant requested Penny Miller, Secretary of the Disciplinary Board of the Supreme Court to "file a complaint against Ms. Mahler, and investigate my claims fully and have a hearing."

[¶10] SUPPLEMENTAL STATEMENT OF THE FACTS

[¶11] Appellant does state and agree with the STATEMENT OF

THE FACTS, which appears in Appellant's Brief, which was filed and served by and through appointed counsel, Lee M. Grossman.

[¶12] ARGUMENT

[¶13] ISSUE: 1. The district court violated Appellant's Due Process rights under both the United States Constitution and the North Dakota Constitution, when it dismissed Appellant's application for post-conviction relief with-out first holding an evidentiary hearing to allow the development of additional evidence not presented during the original proceeding.

[¶14] Appellant was entitled to all reasonable inferences at the preliminary stages of his post-conviction proceeding and was entitled to an evidentiary hearing because he presented evidence in his Reply To State's Motion For Summary Disposition And Affidavit (Appendix, 6, DOC. #17), which raised a genuine issue of material fact. See, Henke v. State, 2009 ND 117, ¶9, 767 N.W.2d 881. "'A genuine issue of material fact exists if reasonable minds could draw different inferences and reach different conclusions from the undisputed facts.'" See, Henke, at ¶12 (quoting Vandeberg v. State, 2003 ND 71, ¶5, 660 N.W.2d 568). Clearly reasonable minds could draw different inferences and reach different conclusions had Appellant been allowed to develop the fact that the Bismarck Police K-9 unit conducted an illegal search of Appellant's Home prior to the warrantless "Security Sweep", which would not have been needed, because of the K-9 free-air sniff and search. Had Appellant the power of the court to depose

witnesses and require the Bismarck Police Department to produce the K-9 unit's reports and daily logs, and then to investigate such and then an evidentiary hearing to develop the record to reflect the new evidence, reasonable minds would have determined that the "Security Sweep" was not needed and the prior free-air sniff and illegal search by Bismarck Police K-9 units was in illegal search under the Fourth Amendment and the North Dakota Constitution.

[¶15] Clearly Appellant's Due Process Rights under both the United States Constitution and the North Dakota Constitution have been violated by not holding an evidentiary hearing to allow the development of additional evidence not presented during the original proceeding.

[¶16] ISSUE: The district court violated Appellant's Due Process rights under both the United States Constitution and the North Dakota Constitution, when it dismissed Appellant's application for post-conviction relief on Appellant's claim of ineffective assistance of trial counsel, without first holding an evidentiary hearing to allow Appellant the development of the record, as most of the ineffectiveness happened on matters occurring outside the court record or transcripts.

[¶17] The Sixth Amendment to the United States Constitution guaranteeing to criminal defendants the effective assistance of counsel, applied to the states through the Fourteenth Amendment, and the North Dakota Constitution Article I, §12. See, DeCoteau v. State, 2000 ND 44, ¶10, 608 N.W.2d 240. In accordance with the two prong test established by the United

States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a defendant must satisfy both a 'performance prong' and a 'prejudiced' prong. Stopplesworth v. State, 501 N.W.2d 325, 327 (N.D. 1993).

[¶18] Generally, summary disposition is not appropriate when there are claims of ineffective assistance of counsel. Wong v. State, 2010 ND 219, ¶15, 790 N.W.2d 757. This Court has determined that in most cases of ineffective assistance of counsel are based on matters occurring outside the court record or transcripts, and therefore the record and transcripts are not adequate to decide the claims and an evidentiary hearing may be required to consider other evidence beyond the record. See, Coppage v. State, Supreme Court No. 20110076 (quoting Wong v. State, 2010 ND 219).

[¶19] Clearly Appellant's Due Process Rights under both the United States Constitution and the North Dakota Constitution have been violated by not holding an evidentiary hearing to allow Appellant the development of the record, as most of the ineffectiveness happened on matters occurring outside the court record or transcripts.

[¶20] CONCLUSION

[¶21] The district court's finding to summarily dismiss Appellant's application for post-conviction relief was clearly erroneous. Appellant is entitled to all reasonable inferences

in his application. The district court did not give Appellant's claim all reasonable inferences, instead relying on the record of the underlying criminal case to support its ruling. Appellant requests the Supreme Court reverse the district court's order summarily dismissing with prejudice the application for post-conviction relief, and remand with instructions that Appellant is entitled to an evidentiary hearing on his application considering Appellant's Due Process Rights.

[¶22] That Appellant respectfully prays that the Court grant the relief requested.

Dated this 6 day of January, 2015.



Wayne James Otto
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[¶23] CERTIFICATE OF SERVICE

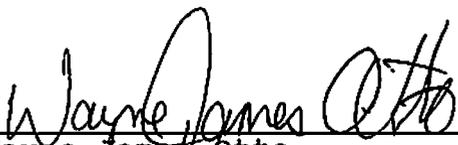
[¶24] I hereby certify that I served, by United States Mail (Prison Mail Box System) the foregoing Supplemental Rule 24 Statement, upon the following parties:

Lee M. Grossman
Myhre Law Office
P.O. Box 475
Valley City, ND 58072

Dawn Deitz
Assistant States Attorney

Burleigh County Courthouse
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Bismarck, ND 58501

Dated this 6 day of January, 2015.


Wayne James Otto