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SUPREME COURT OF NORTH DAKOTA

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CLERK OF SUPREME COURT

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STATE OF NORTH DAKOTA

LeRoy K. Wheeler,

Defendant / Appellant,

vs.

State of North Dakota,

Plaintiff / Appellee.

APPEAL FROM DISMISSAL OF POSTCONVICTION RELIEF

FROM NORTHEAST CENTRAL JUDICIAL DISTRICT

BRIEF FOR APPELLANT

LeRoy K. Wheeler

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STATEMENT OF THE ISSUES

Whether the District Court erred in refusing to consider Wheeler's challenge as an unconstitutional application of the amended Uniform Postconviction Procedure Act, to his case, as an Ex Post Facto violation, and violating due process?

Whether the District Court erred in entering Orders based on a false premise and noncompliant to N.D.R.Civ.P. 52(a), and violating due process, without reaching the merits?

Whether the District Court abused its discretion by placing a bar on Wheelers ability to file additional filings in this case punishing him for exercising his right to due process under N.D.R.Civ.P. 52(a)(5)?

STATEMENT OF THE CASE

The appellant, LeRoy K. Wheeler (Wheeler), was tried by jury on May 3-6, 2005, and convicted of 1 count of gross sexual imposition, 1 count of Encouraging the deprivation of a minor and 2 counts of contributing to the delinquency of a minor and sentenced to life in prison... and at the time of the judge reading the closing instructions to the jury, Wheeler observed the prosecutor read the back page of one of his briefs, which was an identifiable document. It was a News Release of information

to the media from the GrandForks Police Dept. (GFPD) disclosing Wheeler's initial arrest and the charges against him and also his criminal background information from the state of Florida. After the jury left to deliberate, the parties were asked to check the box of exibits to make sure their exibits were in there to be sent back to the jury. After the Clerk left with the box, the prosecutor declared to the trial judge that he accidentally slipped one of his briefs into the exibit box that went back to the jury. The trial judge stated we better get that. (the trascripts were altered and this part was slightly altered).

Once Wheeler was in prison he began attempting to write the jurors to seek information if they in fact seen this News Release in their deliberations. At the prison Wheeler had multiple problems with the prison staff not mailing his outgoing mail if they did not like the content. Wheeler could not prove they did not mail them, only that he was not getting any responses from many letters. See Wheeler v. Schmalenberger et al 1:11-cv-079 (Doc. 30 ¶2, + Doc. 31 ex. 5) + (Doc. 30 claim 6), in US. District Court.

Wheeler eventually was reunited with his Family members from Texas and requested some assistance to contact these jurors because he could not afford an attorney or investigator, and he knew the trial judge would not do anything to help him. The Family member agreed and Wheeler began sending the necessary documents to complete the communications with each juror. However, his Family member was not receiving all of his documents so he started sending notarized Certificates of Service by Mail to list all the contents. Even then she did not receive all of them. The Family member cut out some of them, such as a cover letter, from Wheeler, explaining what the communication was about, a prepared affidavit to fill out sign and notarize and a copy of the News Release, to see if each

juror actually seen the information in their deliberations. There was also a note from the Family member explaining her affiliation to Wheeler. This must have been successful because the GFPD sent Wheeler's Family member a threatening letter to stop contacting these jurors or it could result in a law violation, and she quit. Wheeler was given a copy of the letter from the GFPD and a letter that the Family member will not write to the jurors any more.

In the GFPD letter declared he was contacting the state attorney. Wheeler did not previously contact the court or the state on this issue because he knew they would only destroy any possibility of him obtaining these affidavits, so he wanted to get them first and then file for post-conviction relief. Once the GFPD notified the state attorney they were aware of Wheeler's activities. Wheeler then wrote a letter to the trial judge and asked for an official letter to let the jurors know it is okay for them to respond to Wheeler if they have received the extra-judicial information, on August 14, 2013. The trial court denied it on September 16, 2013, stating Wheeler failed to serve the state by Rule of Court 3.2. Wheeler filed an official motion Rule 3.2, Motion and Brief in Support of Motion and 6 exibits pursuant to NDCC 29-32.1-08. The state responded and resisted, but the trial court denied and falsely claimed Wheeler failed to include a Brief in Support of Motion or otherwise failed to support the motion with a legal justification for the request, on November 19, 2013. Wheeler assumed the prison extracted his documents before mailing as he has experienced in the past, so Wheeler requested court appointed counsel on December 4, 2013 and counsel was appointed on December 16, 2013.

Defense Counsel, Jessica Ahrendt (Ahrendt), refused to file the legal justification the trial court wanted and said that Wheeler will not dictate her job activities. Ahrendt wrote to each juror, as Wheeler did, and

after no response she called and left messages, with phone numbers Wheeler provided, and received no responses. After 4 months the District Court never heard from Ahrendt, so the trial court denied Wheeler's motion and in turn ended Ahrendts appointment as Wheeler's counsel on April 15, 2014. Ahrendt Filed a Motion to Reconsider on May 27, 2014, but the judge denied it saying that there was no law cited to support reconsidering the motion on June 10, 2014.

Ahrendt Filed a Motion to Withdraw as Counsel of Record on July 3, 2014 because she thought Wheeler's claim would be time barred due to the new amendment to NDCC 29-32.1-01(2). Wheeler opposed, but the trial court allowed Ahrendt to Withdraw and Ahrendt Filed a notice of appeal but it was ruled the Order was not appealable. Wheeler then requested the appointment of counsel on August , 2014, but was denied by the trial court on August 29, 2014, stating Wheeler's claims were time barred. Wheeler Filed a Motion to Reconsider on September 5, 2014, arguing the amendment could not be applied retroactively to his case. The trial court denied it on September 29, 2014, refering to her earlier order.

Wheeler attempted to appeal on this issue and this Court refused to look beyond the Rule 7(a) designation that a denial of counsel was not appealable. On December 9, 2014, Wheeler Filed an Motion For Leave of Court to Investigate the Validity of the Verdict and incorporated by reference the September 5, 2014 argument that the 29-32.1-01(2) amendment could not be retroactively applied. The trial court denied it on January 5, 2015, referencing the Orders dated September 16, 2013, November 19, 2013. Wheeler again Filed a Motion to Reconsider because the trial court refused to comply with N.D.R.Civil. 52(a), on January 13, 2015. the trial court denied it on February 5, 2015 refering to the earlier Order.

Because the trial court repeatedly refused to rule on the merits of Wheelers claims he was forced to file his Application for Postconviction Relief without his supporting evidence on February 13, 2015. The state responded briefly and the trial court denied Wheeler application and applied the amended statute as amended retroactively without consideration on Wheeler's challenge on Ex Post Facto grounds, falsified the prior rulings and placed a bar on Wheelers ability to file any additional documents in this case on future relief and refusing to comply with Rule 52(a) on March 25, 2015. this appeal follows.

STATEMENT OF THE FACTS

The amendment of N.D.C.C. 29-32.1-01 is an Ex Post Facto violation if applied retroactively.

It is an ex post facto violation because before the amendment there was no statute of limitation and there was no notice that a statute of limitation would come into effect until August 1, 2013. (App. p. 44) + (App. p. 17), thus violating due process. The language of the amendment did not announce any retroactive application as required by law.

All relevant Orders entered by the District Court violated Rule 52(a).

The District Court in denying Wheelers postconviction claims entered multiple Orders containing only vague and general language without facts or conclusions of law to support its decision. This process denies Wheeler's ability to properly object and the appeals court's ability to discern its legality in its review, denying due process. See (App. 17, 18) referencing previously ruled Orders. (App. p. 15)(App. p. 7) + (App. p. 8).

The District Court abused its discretion in placing a bar on Wheeler's ability to seek relief on his claims.

The District Court abused its discretion when it placed a bar on Wheeler's ability to seek justice by repeatedly refusing to adequately respond to Wheeler's pleadings, foreclose his ability to collect necessary evidentiary support, and then blocking him from any additional remedies in this case simply because Wheeler was exercising his due process right to challenge the validity of the District Court Orders under N.D.R. Civ. P. 52 (a)(5). See (Doc. 15) & (App. p. 17).

LAW AND ARGUMENT

THE DISTRICT COURT ERRED IN REFUSING TO CONSIDER WHEELER'S CHALLENGE AS AN UNCONSTITUTIONAL APPLICATION OF THE AMENDED NDCC 29-32.1-01 (2), to his case, AS AN EX POST FACTO VIOLATION AND VIOLATING DUE PROCESS.

Standard of Review: Holkesvig v. Dakota Spas 2014 ND 9, P8-P9, 841 NW2d 755 (Because the District Court decision rests on a legal interpretation rather than upon the merits of Holkesvig's petition, we review its decision under our standard for statutory interpretations. Statutor interpretation is a question of law, which is fully reviewable on appeal. Nelson v. Johnson 2010 ND 23, ¶12, 778 NW2d 773). See also, The determination whether a statute is constitutional is a question of law, which is fully reviewable on appeal. State v. Holbach 2009 ND 37, ¶23, 763 NW2d 761.

[P1] The N.D. Legislature amended the Uniform Postconviction Procedure Act imputting a two year statute of limitations in 29-32.1-01 (2) that became effective August 1, 2013. There was no language in the amended statute that indicated the legislative intent was to be a retroactive application to existing cases prior to the amendment. The wording is ambiguous on retroactivity. See MKB Mgmt. Corp. v. Burdick 2014 ND 197,

P44, 2014 ND LEXIS 202 (In enacting a statute it is presumed the legislation is intended to comply with the state and Federal Constitutions,.. words in a statute are given their plain, ordinary, and commonly understood meaning unless defined by statute or unless a contrary intention plainly appears. 1-02-02. A statute is ambiguous if it is susceptible to different rational meanings. 1-02-39). See also Lindh v. Murphy 521 US 320, 325-27 (1997) (the presumption against retroactivity was reaffirmed in the traditional rule requiring retroactive application to be supported by a clear statement,.. other constructive rules may apply to remove even the possibility of retroactivity,..). The statutes NDCC 1-02-10 & 29-32.1-03 applies to remove even the possibility of retroactivity by stating the application may be filed at any time, and 1-02-10 "Code not retroactive unless so declared." Under due process principles there was no prior notice provided to alert Wheeler to the amendment and for these reasons Wheeler is entitled to relief. (App p. 44).

[P2] As defined by the amendment in 29-32.1-01 (2) states, "Except as provided in section 3, an application for relief under this chapter must be filed within 2 years of the date the conviction became final.." For cases filed after August 1, 2015 would be beyond the statute of limitations when the effective date of this statute was August 1, 2013, however, before this effective date there was no statute of limitations. So to apply this new amendment retroactively to prior cases would violate the due process of law of the N.D. Constitution, Art I sec. 12 + the 14th Amendment, USC. See Schwab v. Zajac 2012 ND 239, P22, 823 NW2d 737 (Generally, procedural due process requires fundamental fairness, which, at a minimum, necessitates notice and a meaningful opportunity for a hearing appropriate to the nature of the case.. Within the context of a due

process challenge," a court abuses its discretion only when the court employs a procedure which fails to afford a party a meaningful and reasonable opportunity to present evidence on the relevant issues).

When Legislature amended this statute there was no notice to active litigators, like Wheeler, so when it became effective, if applied retroactively, it would eliminate all prior existing cases, including Wheeler's, in which he was actively pursuing this present claim, see the exibits filed in his 10-18-13 & 12-9-14 documents (Doc. 443-444, App.p.26,51). This violates due process and should be applied in fundamental fairness to actually start the statute of limitations on 8-1-13 to begin the 2 years limit, for preexisting cases. Wheeler is being denied a reasonable opportunity to present evidence on his claims because of the retroactive application of this statute.

[P3] Considering this lack of notice that eliminates pre-existing cases, if applied retroactively, would be an ex post facto law violating the U.S. Constitution, Art. 1 sec. 10 cl. 1. See Carmel v. Texas 529 US 513, 529-n.19-530 (2000) (Held... the amended provision could not be applied in a trial for offenses that were committed before the amendments effective date without violating the federal Constitution, Art 1 sec. 10 cl. 1, prohibition against ex post facto laws ... altered the Rules of evidence so as to receive less or different testimony than the law required at the time of the commission of the offense in order to convict the offender... cut off extra-judicially by an Act made on purpose, Ex Post Facto, id at 529, n19).

But in Wheeler's case it is a postconviction statute and to apply the rule of law retroactive would be on purpose to cut him off for relief and no prior warning and would be applied to punish the offender. See State v. Norman 2003 ND 66, P21, 660 NW2d 549 (We have stated the Legislature may

apply statutes retroactively unless doing so would result in Ex Post Facto application. A law which imposes a collateral consequence of a conviction may be applied retroactively if the purpose is to protect some other legitimate interest, rather than to punish the offender). Wheeler would be the one punished because he was pursuing this claim through many hurtles and cannot get judicial assistance on this issue. Although Wheeler was appointed an attorney, at one point, Jessica Ahrendt refused to argue this ex post facto law and simply abandoned Wheeler's cause. Prior to the amendment there was no statute of limitations and Wheeler was actively pursuing this claim and was a lawful act, but this amendment made his cause unlawful. Glaspie v. Little 1997 ND 108, P5, 564 NW2d 651 (A statute is applied retroactively if it operates on transactions which have already occurred, or on rights and obligations which existed before its enactment). Prior to the amendment Wheeler had a 14th Amendment due process right to file this postconviction claim and be heard on the merits. In fact when Wheeler did file this claim, the state and the trial court never mentioned this amendment to 29-32.1-01 (2), and it was unknown to Wheeler until his counsel, Ahrendt, filed a Motion to Withdraw as Counsel of Record (Doc. 469-470). Even allowing counsel to withdraw, the trial court did not rule that Wheeler's claim was time barred. See (Doc. 492)(App.p. 12). Ahrendt filed a notice of appeal before she was discharged which was dismissed by appellate counsel because there was no appealable order. See (App.p 22).

[P4] Wheeler again requested appointed counsel from the trial court (Doc.), and the trial court denied it based on Wheeler's claim was time barred. ( )(App.p. 13). Wheeler filed a Motion to Reconsider and argued that the amendment to 29-32.1-01 (2) was an Ex

Post Facto and due process violation and could not be applied to his case. (App. p 44). Based on the laws Wheeler provided, even if imperfect, should have been sufficient in raising a Constitutional claim and due process violation with the ex post Facto challenge to the amended statute to warrant the appointment of an attorney to pursue the claim. The trial court denied without compliance to N.D.R.Civ.P. 52(a), and simply refered back to the previous Order (Doc.)(App. p. 14). After an appeal on this issue was denied Wheeler Filed a Motion For Leave of Court to Investigate the Validity of the Verdict on 12-9-14, (App. p. 51), and also Filed a Supplemental Authorities to the amended 29-32.1-01(2) on 12-15-14.* (App. p. 62) The trial court without consideration denied and refered to 2 prior Orders dated 9-16-13 (App. p. 7) + 11-19-13 (App. p. 8). The 9-16-13 Order was denied because W did not File Rule 3.2 Rule of Court, and the 11-19-13 Order was denied based on a False premise because the trial court claimed Wheeler did not File his brief in support of his motion, but the docket sheet and Ahrendt's motion declared it was received. (Doc. 462)(App. p. 67).

[P5] Wheeler then Filed a Motion to Reconsider (Doc.), because the trial court was refusing to comply with N.D.R.Civ.P. 52(a), and the trial court never ruled on the merits of his claims, nor has it ruled on Wheeler's challenge to the retroactive application of 29-32.1-01(2). The trial court again simply denied based on the earlier Orders dated 9-16-13, 11-19-13 + 1-5-15 and again violating Rule 52(a). (Doc.)(App. p. 16).

[P6] The above mentioned motions Filed in the trial court were based on 29-32.1-08, to collect discovery. Wheeler needed the discovery of those affidavits from these jurors to support his application For postconviction relief before he could File the motion. Even the trial court on 6-10-14 in

its Order (App. p. 10)(Doc.) [92] ruled that, "If defense Counsel wishes to pursue its investigation as to whether Mr. Wheeler has a valid claim, she can still do so and File the appropriate motion after the investigation has been completed." This Order is post dated of the earlier denials and trumps those denials. Wheeler was attempting to continue these investigations and the trial court was resisting to assist Wheeler in seeking justice. Even in defense Counsel's motions Filed was asserting intentions that she needed Funding to continue these investigations, to no avail. (Doc. 462 + 470) (App p. 67). Ahrendt also stated that in the court File had Wheeler's prior motions to satisfy the legal justification for Wheeler's request to contact the jurors, but was ignored, because the trial court refused to allow Wheeler an opportunity to produce evidence on his claim to obtain a reversal of his conviction.

[P7] After the 2-5-15 Order denying Wheeler's request to collect discovery, Wheeler's only option left was to File his application for postconviction relief without the supporting evidence hoping for another chance to request it from the court. Wheeler also incorporated by reference, pursuant to N.D.R.Civ.P. 10 (c), his prior documents to reach the merits of his arguments of 10-18-13, 9-5-14, + 12-9-14. The state briefly responded (Doc. 8-12). Wheeler Filed a Reply Brief (Doc. 15). The trial court appeared to adopt the states position and applied the amended statute 29-32.1-01 (2) as amended. See (Doc. 17)(App. p. 17 96+7). Here, the trial court erred in not considering Wheeler's Constitutional challenge not to be applied retroactively to his case, and did not comply with N.D.R.Civ.P. 52(a)(1). See also Lehman v. State 2014 ND 103, P12, 847 N.W.2d 119 (citing NDCC 1-02-10), so the trial court erred by applying the amendment retroactive without the wording it was intended to be retroactive by legislature.

THE DISTRICT COURT ERRED IN ENTERING ORDERS BASED ON A FALSE PREMISE AND NONCOMPLIANT TO RULE 52(a), VIOLATING DUE PROCESS AND FAILING TO REACH THE MERITS.

Standard of Review: State v. J.A.H. 2014 ND 196, ¶, 2014 ND LEXIS 201 (A Finding of Fact is clearly erroneous under N.D.R.Civ.P. 52(a), if there is no evidence to support it, if it is clear to the reviewing court a mistake has been made, or if the Finding is induced by an erroneous view of the law. Akerlind v. Buck 2003 ND 169, ¶7, 671 NW2d 256. On appeal we review the files, records, and minutes or the transcripts of the evidence, and we give appropriate weight to the Findings of the juvenile court).

[¶8] Wheeler officially originated this claim in the District Court on August 14, 2013, by writing a letter to the trial judge ex parte (Doc 433), because he had been writing the jurors for years through various ways attempting to get a signed affidavit if they did in fact receive extra-judicial information on Wheeler's criminal history in jury deliberations that may have been attached to the state attorney's brief that he claimed was sent back to the jury on accident in the box of exibits, without a response. Finally, at least one juror had contacted the GFPD and a Sgt. Wyatt Jr. contacted Wheeler's Family member with a threatening letter to stop her from contacting these jurors or it could be a violation of law, and was successful. See (Doc. 443 + 444)

[¶9] With this letter from the GFPD Wheeler was compelled to request through the court for assistance, though he knew she would not help him. The trial court declined saying, "Wheeler failed to include a Brief in support of motion and failed to serve on the state... without supporting law or other supporting papers, this court finds the motion to be

without merit." (Doc. 436) (App. p. 7). However, there was law provided and was served on the state, but this letter was not a motion, it was simply a letter. (Doc. 433). Then on 10-18-13, Wheeler Filed an official motion Rule 3.2, Motion, Brief in Support of Motion and several exibits to support his cause. (Doc. 437- 445). The state responded. (Doc. 447). the trial court denied Wheeler's motion based on a False premise stating, "Defendant Failed to include a Brief in Support of Motion and otherwise Failed to support the motion with any legal justification for the request." The docket entries show that Wheeler documents were in Fact received and Filed. (App. p). (Doc. 449).

[p.10] Wheeler then Filed a Motion to Reconsider or in the Alternative to Appoint Counsel. (Doc. 453). And the trial court appointed Counsel, Jessica Ahrendt, on 12-16-13. Ahrendt told Wheeler that she would work his defense her way and not be dictated by the defendant. He requested Ahrendt File the legal justification for the request to contact the jurors, that the court said she didn't get. Ahrendt wrote letters to the jurors, as Wheeler has previously done, and after 2 months and no responses, Ahrendt made phone calls and left messages to all 12 jurors, because she did not make contact with any of them. After 2 months and no responses were returned Ahrendt said she would ask for Funding to hire a private investigator to seek out and make contact with the jurors. On 4-15-14, the trial court entered an Order denying Wheelers motion because Ahrendt made no contact with the court. (Doc. 459). Ahrendt Filed a Motion to Reconsider and mentioned that in the court File were Wheeler's documents that was the legal justification for the request, and to what extent was her appointment and that she needed funding to complete the investigation. (Doc. 462 App 67). The trial court denied

stating," the motion is not supported with any legal authority ... There is no legal reason provided that will justify reconsidering the motion." (Doc. 465, ¶2), (App. p. 10).

[P11] Then Ahrendt Filed a Motion to Withdraw as Counsel of Record (Doc. 469 ¶3), primarily relying on the amended 29-32.1-01(2) that she thought Wheeler's claims were time barred. Ahrendt made no effort to challenge the retroactive application of this statute on Wheeler's behalf. She told Wheeler, "we don't do anything Federal." The trial court granted Ahrendt's withdrawal (Doc. 492)(App. p. 12) but did not comply with N.D.R.Civ.P. 52(a), just a vague and general ruling. Rule 52(a)(1) states, "In an action tried on the Facts ... the court must find the facts specially and state its conclusions of law separately."

[P12] Ahrendt Filed a notice of appeal on Wheeler's case that was dismissed voluntarily because there was no appealable Order, but Wheeler did file to the N.D. Supreme Court for a Supervisory Writ that was denied. S.Ct. No's 20140249, 250 + 251. Wheeler again requested for a court appointed Counsel to complete the investigation (Doc.). The trial court quickly denied it and then ruled his claims were time barred for the first time. (Doc.)(App. p. 13). Wheeler Filed a Motion to Reconsider because he needed counsel to complete the investigation and that the amended statute of 29-32.1-01(2) could not be applied retroactively to his case. (App. p. 44), because it would be a due process and ex post facto violation, U.S.C. 14 Amendment. This argument should have been adequate for appointed counsel. The trial court denied this motion only vaguely and generally + relying on the earlier Order. (Doc.) (App. p. 14). An appeal was attempted unsuccessfully on this Order. (App. p.).

[P13] Wheeler then Filed a Motion for Leave of Court to Challenge the

Validity of the Verdict pursuant to 29-32.1-08 to obtain subpoena's to collect affidavits from the jurors because the District Court was avoiding making a proper ruling pursuant to N.D.R.Civ.P. 52(a). See (App. p. 51 ¶.2) and showing 3 exibits of Wheeler's previous activities on his claims attempting to make contact with the jurors that predated the new amendment to the statute 29-32.1-01(2). Again, the trial court simply denied basing solely on the First 2 Orders of denial on these claims. See (Doc.)(App. p. 15). These Orders are based on a False premise because the motions the trial court said it did not receive were in Fact in the court File. See (App. p.) and Ahrendt's motion declared the same. (Doc. 462 p.1-2) + (Doc. 462 p.2). Wheeler Filed a Motion to Reconsider and gave a complete rundown of all the above documents with laws and Constitutional amendments that Wheeler's case is properly before it and that the court was denying its obligation under N.D.R.Civ.P. 52(a). (Doc.). The trial court ignore the motion, denied it and only refered to its earlier Order. (Doc.)(App. p. 16).

[¶14] After the above denials Wheeler was compelled to File his Application for Postconviction Relief even without the required discovery to obtain the relief in hopes of better cooperation. (Doc. 1). Pursuant to N.D.R.Civ.P. 10(c), Wheeler incorporated by reference 3 prior documents such as the ones dated 10-18-13 (App. Doc. 26 439), 9-5-14 (App. p. 44) + 12-9-14 (App. p. 51), to support his application and Reply Brief (Doc. 15). Wheeler requested the arguments in these documents be considered in the application for postconviction relief because the trial court has not ruled on any of the merits of his claims. See State v. J.A.H. 2014 ND 196, ¶, 2014 ND LEXIS 201 (Rule 52(a) N.D.R.Civ.P. requires a court to Find Facts specially and state its conclusions of law separately when an action is tried without a jury. A court must make Findings of Fact and conclusions

of law which provide sufficient specificity to enable a reviewing court to understand the factual determinations made by the trial court and the basis for its conclusions of law and decision ... We cannot properly review a decision if the trial court does not provide an explanation for the basis of its decision because we would be left to speculate whether the court properly applied the law. Findings that are conclusory and general do not comply with Rule 52 (a)).

Not only the appeal court would be left to speculate if the District Court properly applied the law, but the defendant has no real basis to base his challenge to the District Courts determination, this would violate due process of the 14th Amendment, USC. See Mullane v. Central Hanover B.+T. Co. 339 US 306, 314 (1950) (the fundamental requisite of the due process of law is the opportunity to be heard ... An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections ... But when notice is a persons due, process which is a mere gesture is not due process).

Here, the trial courts Orders, above, are only a mere gesture and provide Wheeler no basis to proceed to present his objections to the trial courts mental processes that brought on its decision in its Orders.

[P15] The state vaguely responded to Wheeler's postconviction relief (Doc. 12), citing 2 reasons: (1) due to the amended 29-32.1-01 (2) (see claim 1 in this appeal); + (2) that Wheeler failed to raise this claim in his prior postconviction application in 2008. The state should have been denied

because (1) the state was provided with service of (App. p 44) arguing the ex post facto challenge and the other documents which ignored; + (2) that Wheeler showed in his Reply Brief (Doc 15) that in the trial transcripts shown that when this incident occurred, after the jurors went to deliberate, the state told the judge he accidentally sent one of his briefs back with the exibits to the jury. The trial court said we better get that. Here, Wheeler is denied his fair opportunity to be heard because he is being denied his right to present his evidence to support these claims, both the affidavits from the jurors and the corrected transcripts that have been altered. (Doc. 15). Also, the trial court has an obligation to control closing arguments of attorney's to the jury, and a brief slipped into the exibit box is uncontrolled closing argument that cannot be objected to or effectively rebutted. The back page of this states brief contained inadmissible prior criminal history of the Defendant, denying fundamental fairness. This is clearly credible information to the judge coming straight from the prosecutors mouth or his own actions. See addendum (p. 27) Rule 2:15. This inadmissible evidence would constitute extra-judicial information, provided by the prosecutor to the jury, see (addendum p. 27) see Rule 3.8, 3.6 + 8.4.

[P16] Wheeler did not raise this claim in his earlier postconviction action because he has the right to have relied on the judges comment that she did go and get that brief before the jurors saw it. (App. p. transc. p. 665 l. 1-17). See Banks v. Dretke 540 US 668 (2004) (Held: As Strickler instructs at 289, three inquiries underly the "cause" determination (1) whether the prosecutor withheld exculpatory evidence; (2) whether the petitioner reasonably relied on the prosecutor's open file policy as fullfilling the prosecutor's duty

to disclose such evidence; and (3) whether the state confirmed the petitioners reliance on that policy by asserting during the state habeas proceeding that the petitioner had already received everything known to the Government).

Here, Wheeler needs the affidavits from the jurors to prove that the brief was not retrieved as stated, therefore withheld exculpatory evidence, + (2) Wheeler reasonably relied on the judges statement; + (3) in the states response (Doc. 12 ¶ 2) "the applications are all premised upon an allegation that transcripts were altered." The state acknowledged Wheeler's reliance on the altered transcripts, doesn't deny their altered, and the transcripts show, as written, a reasonable showing Wheeler's claim is correct.

[P17] Wheeler also has shown on page 2 of his Reply Brief (Doc. 15), 8 reasons why he was unable to raise this claim in his prior postconviction application, and also cited on page 3, State v. Wilson 466 N.W.2d 101, 103-04 (ND 1991) (Without confinement to the transcripts, postconviction procedures allow developement of additional evidence to evaluate the claims. NDCC 29-32.1-10... When necessary evidentiary materials are not available to resist a motion for summary judgment, "the court ... may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other Order as is just. N.D.R.Civ.P. 56 (F)." Without an independent test, Wilson was in no position to resist summary disposition. The trial court foreclosed development of evidence and then, not surprisingly, granted summary disposition for lack of evidence. This was inconsistent with the Uniform Postconviction Relief Act).

Here, all Wheeler's requests to obtain discovery on his claims, the affidavits,

were completely ignored, foreclosed by the trial court, so Wheeler is also in no position to resist summary disposition, as in his first post-conviction application, and is inconsistent with postconviction procedure Act & violates the due process of law. 14th Amendment, USC and the N.D. Constitution Art. I sec. 12. (Doc. 17 ¶8).

[P18] Also pursuant to 29-32.1-12, it is the states burden to prove the principles of res judicata and misuse of process apply and he has not done that. In the trial courts ruling it adopted the states position and ruled in vague and general terms violating Rule 52 (a) N.D.R.Civ.P. stating in [¶8] "this court has previously found this claim to be lacking in factual support and frivolous," and denied Wheeler's petition. This ruling is based on a false premise because the trial court has never made that finding in any decision on this matter. See Orders in (App. p.). She primarily relied on 2 original decisions on 9-16-13 (Doc 436)(App. p 7) & 11-19-13 (Doc. 449)(App. p 8). Like Wheeler mentioned above the 9-16-13 Order was a decision on a letter, ex parte to the court, but was served on the state, but was only a letter. And the 11-19-13 Order was a complete false ruling that the court never received Wheeler's Brief in Support of motion or legal justification. (Doc 449)(App. p. 8). See Docket entries (App. p) and defense counsels motions (Doc. 462 p 1-2)(App. p. 67) & (Doc. 469 p. 2). The trial court makes no mention of any facts found or conclusions of law based on those facts, but simply ignores Wheelers presentation completely, due to bias, violating Rule 52 (a)(1). supra.

[P19] If the trial court is now claiming that Wheeler's claims are lacking in factual support, it is not due to any fault of his own as is shown in his Reply Brief (Doc. 15 p. 4), and if anything it is attributable to the trial court and the state for foreclosing Wheeler's

ability to collect discovery or affidavits to support his claims and is inconsistent with the Uniform Postconviction Procedure Act, Wilson supra. The trial court refused to issue subpoena's and to make a finding on the retroactive application of 29-32.1-01(2) as an ex post facto violation. Refused counsel and allow Wheeler to continue this investigation on these underlying claims as the trial court declared he could in 6-10-14 (Doc. 465 ¶2). 6th Amendment, USC. These affidavits from the jurors would prove these claims are not Frivolous. See Davis v. State 2013 ND 34, P14, 827 NW2d 8 (To obtain discovery under 29-32.1-08 good cause standard: (1) the evidence sought to be discovered, if established, must allow the applicant to obtain relief under 29-32.1-01, + (2) contain specific and particularized allegations).

Wheeler unquestionably should be granted discovery or subpoena the jurors affidavits if in fact they saw this News Release with his prior criminal history in deliberations. Wheeler did not testify in his jury trial so his criminal history was inadmissible extra judicial information and was unjustifiably prejudiced by this action by the prosecutor. See the incorporated documents and exibits attached in Doc. #'s 437 - 445 and App. p. 26, 51) with supporting case laws and Constitutional amendments to support Wheeler's justification for his request to contact these jurors. There is no physical evidence or even circumstantial evidence that any crime occurred only untrustworthy testimony that could have been impeached if Wheeler's evidence would have been allowed, but was suppressed by the state. So these requested affidavits should be subpoena'd. in the interests of justice, and are critical to his cause.

THE DISTRICT COURT ABUSED ITS DISCRETION BY PLACING A BAR ON WHEELER'S ABILITY TO FILE ADDITIONAL FILINGS IN THIS CASE PUNISHING HIM FOR EXERCISING HIS RIGHT TO DUE PROCESS UNDER N.D.R.Civ.P. 52(a)(5).

Standard of Review: Holkesvig v. Grove 2014 ND 57, P7, 844 NW2d 557. (Generally, this Court reviews Orders enjoining certain future litigation under the abuse of discretion standard. See Holkesvig v. Wette 2012 ND 142, ¶6, 818 NW2d 760.).

[P20] As Wheeler has shown in the first 2 claims that he was requesting of the trial court since August 18, 2013 (Doc. 439) for leave of court to collect discovery of his underlying claims of prosecutorial misconduct and jury misconduct because the prosecutor slipped one of his briefs into the box of exibits to go back to the jury during deliberations. On the back page of his brief Wheeler observed a copy of a GFPD News Release to the media upon Wheeler's initial arrest and on this document disclosed Wheeler's criminal history from the state of FL. See (Doc. 442). After the jury went to deliberate, the state told the Judge he accidentally slipped the brief into the exibit box. The trial court stated, we better get that. (App p. 25, transc. p. 665 L 1-17, though they are altered). Wheeler did not object because he depended on the judges words to be fullfilled.

The trial court through all these motions Wheeler filed was resisting Wheeler's attempt to obtain these affidavits from the jurors. Then upon Wheeler's filing his application for postconviction relief the court denied and applied res judicata and collateral estoppel to Wheeler's case and also placed a bar on Wheeler's ability to file any further filings with the trial court in this case. (Doc. 17 ¶ 9 & 10). The trial court

failed to follow N.D.R. Civ.P. Rule 52 (a)(1), which requires a court to find the facts specially and its conclusions of law separately to support its conclusion. The N.D. Supreme Court says there is a 4 part test to find if res judicata and collerial estoppel even apply which was also not done. See Northstar Founders LLC v. Hayden Capital USA LLC 2014 ND 200, P61, 2014 ND LEXIS 204 (Collateral estoppel, or issue preclusion, forecloses relitigation of issues of either fact or law in a second action based on a different claim, which were necessarily litigated, or by logical and necessary implication must have been litigated, and decided in the prior action. We have said a 4 part test should be applied to determine whether collateral estoppel bars relitigation of a fact or issue in an earlier lawsuit: (1) Was the issue decided in the prior adjudication identicle to the one presented in the action in question?; (2) Was there a final judgment on the merits?; (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?; and (4) Was the party against whom the plea is asserted given a fair opportunity to be heard on the issue? Silbernagel v. Silbernagel 2011 ND 149, 918, 800 NW2d 320). These claims of Wheelers have never been raised before in any other action so collateral estoppel cannot apply to his claims

[P21] the trial court in its Order (Doc. 17 98) makes the claim of previously determined based on its prior Orders on 9-16-13 (Doc 436) and 11-19-13 (Doc. 449) and those denials are based on a false premise. the Order on 9-16-13, was denied only because Wheeler failed to serve the state on Rule 3.2, but the state was served and Wheeler provided law to support his claim. (Doc. 433). The Order on 11-19-13 was a false claim based on Wheeler failed to include a Brief in support of motion and other-

wise failed to support the motion with any legal justification for the request. However, Wheeler's Brief and exibits were in fact received, see defense counsel's motions (Doc. 462 p.1-2) + (Doc. 469 p.2) and also the docket entries in (App. p. 67)

[P22] Wheeler also shows further support that his claims are not barred because the trial courts own Order (Doc. 465 ¶2) stated, "If defense Counsel wishes to pursue its investigation as to whether Mr. Wheeler has a valid claim, she can still do so and file the appropriate motion after the investigation has been completed." The trial court here declares that its earlier Orders were not finally determined as to Wheeler's claims, and in none of its Orders was it ever said that W's claims were lacking in factual support or frivolous, violating Rule 52(a). Shows bias against pro-se prisoners. This also includes the trial courts claim of res judicata.

[P23] See Ungar v. N.D.S.U. 2006 ND 185, ¶11, 721 NW2d 16 (Res judicata, or claim preclusion, prevents relitigation of claims that were raised, or could have been raised, in prior actions between the same parties or their privies). As Wheeler has shown in his Reply Brief (Doc. 15) that failure to develope this claim is not his fault. He has been trying and cannot file the application for postconviction relief unless and until he obtains the evidence to support the claim, but after all his efforts the only way he can appeal the trial courts denials is to file the application without the evidence hoping a reversal with directions from this Court.

[P24] Wheeler has been persistently pursuing this claim but unable to get any assistance, and it appears that the jurors were actually told not to respond concerning the verdict (App. p. 23 transc. p. 667-68). The state and the trial court are intestionally foreclosing Wheeler's ability to collect the needed evidence to support his claims. See State v. Wilson supra

in [P17]. Wheeler cannot present newly discovered evidence until the evidence is actually obtained. Even court appointed counsel, Jessica Ahrendt, also declared an inability to obtain any response from any juror as Wheeler also experienced. See (Doc. 462, p.2) (App. p. 67). Wheeler did not request assistance from the court before he did because as shown in this case the trial court will not allow Wheeler to succeed under any circumstances, as was in his first postconviction claim. Wheeler v. State 2008 ND 109, 750 NW2d 446. Wheeler was attempting to secure this evidence on his own because he has no money for an investigator. The main reason Wheeler did not raise this claim in the first action was it was unclear if the judge actually retrieved the states brief like she said in (App. p. 25), if she did not, then thats the reason why she don't want Wheeler to obtain any affidavits to the contrary. Wheeler relied on the trial court doing what she said as in Banks supra Ante at 17.

[P25] As for the due process violation, Wheeler's multiple filings in this case were caused by the trial court due to refusing to adequately rule on Wheeler's requests. N.D.R.Civ.P. 52(a)(1) supra, see also Schwab v. Tajac supra, Ante at 7, and Mullane supra, Ante at 16. See also N.D.R.Civ.P. 52(a)(5), "Questioning the Evidentiary Support. A party may later question the sufficiency of the evidence supporting the findings, whether or not the party requested findings, objected to them, moved to amend them, or moved for partial findings." All Wheeler's Filings and Motions to Reconsider were in fact challenges to the evidence the trial court relied on to deny, because it did not follow Rule 52(a)(1). Then the trial court placed a bar on Wheeler's ability to file additional filings in this case to seek a ruling on the merits of these underlying claim or future activity, because if any of Wheeler's postconviction evidence, in prior or present claims were subpoena'd then Wheeler's conviction would be vacated, something the

trial court does not want. This is a showing Wheeler is being prejudiced by the denial of his requested disovery in both ~~post~~ postconviction actions, and a denial of the due process of law to have his evidence heard. 14th Amendment, USC, Art. I sec. 12 of the N.D. Constitution and N.D.C.C. 29-32.1-01 (1)(e).

CONCLUSION

The appellant, LeRoy K. Wheeler, humbly requests of this Honorable Court to reverse the judgment of the District Court and remand the case. Hold the amended statute 29-32.1-01(2) cannot be applied retroactively to this case, that the Orders appealed from are invalid, remove the bar placed on Wheeler's ability to access the courts, and allow Wheeler to effectively pursue these claims he presses, either by Counsel or subpoena under NDCC 29-32.1-08.

LeRoy K. Wheeler

CERTIFICATE OF SERVICE

I, the undersigned, DO HEREBY CERTIFY that a true and correct copy of the Foregoing BRIEF FOR APPELLANT and APPENDIX has been furnished by mail on Mark J. M'Carthy assistant State Attorney P.O. Box 5607, GrandForks, N.D 58206-5607, on this day of ~~May~~ June, 2015. First class postage has been pre-paid and has been placed into the institutional mail box for mailing on this date.

Appellant Pro-se
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58506

ADDENDUM

Code of Judicial Conduct. Canon 2, Rule 2.15, states:
(D). A Judge who receives credible information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.

Rules of Professional Conduct For Prosecutors: Rule 3.4, Fairness to opposing party and Counsel. A lawyer shall not:
(a). unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value;
(b) Falsify evidence, counsel or assist a witness to testify falsely...;
(c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
(e) In trial, allude to any matter that a lawyer does not reasonably believes is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;

Rule 3.8 (F). ... refrain from making extra-judicial comments that have a substantial likelihood of heightening public condemnation of the accused ... from making an extrajudicial statement that the prosecutor would be prohibited from making under N.O.R. of Prof. Conduct Rule 3.6 or this Rule.

Rule 3.6 (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extra-

judicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of material prejudicing an adjudicative proceeding in the matter.

Rule 8.4 Misconduct: It is professional misconduct for a lawyer to:

(a) violate or attempt to violate these Rules, knowing assist or induce another to do so, or do so through the acts of another;

(b). commit a criminal act that reflects adversely on the lawyers honesty, trustworthiness, or fitness as a lawyer in other respects;

(c). engage in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on a lawyers fitness as a lawyer;

(d). knowingly assist a judge or judicial officer in conduct that is a violation of applicable cannons of judicial conduct or other law;

(e). state or imply an ability to influence improperly a government agency or official; or to achieve results by means that violate these Rules or other law.