

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Antoine Marquis Murray,)
Plaintiff-Appellant,) SUPREME COURT NO..20150124
vs.)
State of North Dakota,) Case No. 06-2015-CV-00002
Defendant-Appellee.)

ON APPEAL FROM THE ORDER DISMISSING PETITION
FOR POST-CONVICTION RELIEF DATED MARCH 30, 2015
AND THE JUDGMENT DATED APRIL 23, 2015
BOWMAN COUNTY DISTRICT COURT
SOUTHWEST JUDICIAL DISTRICT
STATE OF NORTH DAKOTA
THE HONORABLE ZANE ANDERSON, PRESIDING

SUPPLEMENTAL RULE 24 BRIEF



Antoine Marquis Murray
James River Correctional Center-#40325
2521 Circle Drive
Jamestown, ND 58401

[¶1] TABLE OF CONTENTS

Paragraph

TABLE OF AUTHORITIES.....¶2

SUPPLEMENTAL ISSUE:
The district court erred by denying Plaintiff-Appellant's petition for post-conviction relief without first determining, whether Plaintiff-Appellant's appointed trial counsel was ineffective for failing to properly preserve Plaintiff-Appellant's claim that the single-photograph display was suggestive and unnecessary and, therefore, violating Plaintiff-Appellant's due process rights.....¶¶3,4,18

STATEMENT OF THE CASE.....¶5

STATEMENT OF THE FACTS.....¶7

LAW AND ARGUMENT.....¶14

CONCLUSION.....¶32

CERTIFICATE OF SERVICE.....¶36

[¶2] TABLE OF AUTHORITIES

<u>North Dakota Cases:</u>	<u>Paragraph</u>
<u>DeCouteau v. State,</u> 586 N.W.2d 156 (N.D. 1998).....	¶29
<u>State v. Herrick,</u> 1999 ND 1, 588 N.W.2d 847.....	¶29
<u>State v. Klodt,</u> 298 N.W.2d 783 (N.D. 1980).....	¶27
<u>State v. Matthews,</u> 216 N.W.2d 90, 99 (N.D. 1974).....	¶29
<u>State v. Norquist,</u> 309 N.W.2d 109, 113 (N.D. 1981).....	¶29
<u>State v. Orr,</u> 375 N.W.2d 171 (N.D. 1985).....	¶28
<u>State v. Packineau,</u> 423 N.W.2d 148, 150 (N.D. 1988).....	¶22
<u>State v. Stockert,</u> 245 N.W.2d 266, 271 (N.D. 1976).....	¶29
<u>State v. Syvertson,</u> 1999 ND 137, ¶¶26-27, 587 N.W.2d 644 Cert. denied, 120 S.Ct. 282 (1999).....	¶22
 <u>Washington Case:</u>	
<u>State v. Lampman,</u> 724 P.2d 1092 (Wash. App. 1986).....	¶29
 <u>Federal Cases:</u>	
<u>Biggers,</u> 409 U.S. at 198-99.....	¶22
<u>Chambers v. Mississippi,</u> 410 U.S. at 295, 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).....	¶31
<u>Mason v. Brathwaite,</u> 432 U.S. 98, 109-14 (1977).....	¶22
<u>Simmons v. United States,</u> 390 U.S., at 383-385.....	¶¶22, 23, 25
<u>Stovall v. Denno,</u> 388 U.S. 293, 302 (1967).....	¶¶21, 22, 25

TABLE OF AUTHORITIES, cont.

<u>North Dakota Constitution:</u>	<u>Paragraph</u>
N.D. Const. art. VI §6.....	¶15
N.D. Const. art. I, §12.....	¶¶27, 28, 29
<u>North Dakota Rules of Appellant Procedure:</u>	
N.D.R.App.P. Rule 24.....	¶¶15, 37
<u>North Dakota Century Code:</u>	
N.D.C.C. §29-32.1-14.....	¶15
<u>United States Constitution:</u>	
Fifth Amendment.....	¶¶27, 29, 31
Sixth Amendment.....	¶¶27, 29, 31
Fourteenth Amendment.....	¶¶27, 29

[¶3] SUPPLEMENTAL ISSUE:

[¶4] ISSUE: THE DISTRICT COURT ERRED BY DENYING PLAINTIFF-APPELLANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT FIRST DETERMINING WHETHER PLAINTIFF-APPELLANT'S APPOINTED COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY PRESERVE PLAINTIFF-APPELLANT'S CLAIM THAT THE SINGLE-PHOTOGRAPH DISPLAY WAS SUGGESTIVE AND UNNECESSARY AND, THEREFORE, VIOLATING PLAINTIFF-APPELLANT'S DUE PROCESS RIGHTS.

[¶5] STATEMENT OF THE CASE

[¶6] Plaintiff-Appellant ("Appellant") does agree and state that the **STATEMENT OF THE CASE** in **APPELLANT'S BRIEF**, which was filed and served by and through appointed counsel, Scott O. Diamond is correct.

[¶7] STATEMENT OF THE FACTS

[¶8] Appellant does agree and state that the **STATEMENT OF THE FACTS** in **APPELLANT'S BRIEF**, which was filed and served by and through appointed counsel Scott O. Diamond is correct, but Appellant would add that:

[¶9] Appellant's pro se petition for post-conviction relief ("petition") alleged ineffective assistance of trial counsel and that the conviction was wrongfully obtained through the use of an impermissibly suggestive and unnecessary single photograph display. (Appellant's App. at 3).

[¶10] On June 2, 2014, Appointed Trial Counsel ("Counsel") filed a motion in limine requesting the trial court to exclude any testimony regarding the identification made by

Adams County Deputy Travis Bergerson. In the brief supporting the motion, Counsel argued that testimony concerning the stop and subsequent identification of Appellant by Deputy Bergerson should be excluded because it was a single-photograph display instead of a line-up. Counsel argued to irreparable misidentification and such constituted a denial of due process. (See, Bowman County Case No. 06-2014-CR-00019, DOC. ID #34,#36). This motion was supported by three exhibits. (See, Bowman County Case No. 06-2014-CR-00019; Exhibit-A, E-mail from Deputy Bergerson to Deputy Eberle (DOC. ID #37); Exhibit-B, Incident Report (DOC. ID #38); and Exhibit-C, Report (DOC. ID #39).

[¶11] On June 17, 2014, a hearing on the motion in limine was held and on this same day the trial court issued its Order denying Appellant's motion in limine. (See, Bowman County Case No. 06-2014-CR-00019, DOC. ID #59).

[¶12] During the jury trial, Counsel failed to properly preserve the single-photograph issue for direct appeal from the criminal conviction.

[¶13] Shortly after filing of the pro se petition, Appellant was Appointed Post-Conviction Counsel. (Appellant's App. at 1). In response to the pro se petition, the State of North Dakota contemporaneously filed an Answer and a Motion for Summary Disposition. (Appellant's App. at 24,26). Appellant's appointed post-conviction counsel failed to respond to the

State's motion. Appointed Post-Conviction Counsel also failed to notify or send Appellant a copy of the State's Answer and Summary Disposition request.

[¶14] LAW AND ARGUMENT

[¶15] The North Dakota Supreme Court has jurisdiction over this appeal under N.D.Const.art. VI §6 and N.D.C.C. §29-32.1-14. Appellant files and serves this Supplemental Rule 24 Brief, by and through Appointed Counsel Scott O. Diamond, pursuant to N.D.R.App.P. Rule 24. Appellant has requested Mr. Diamond to file and serve this Rule 24 Brief, as Appellant has no funds for photocopies or United States Legal Postage.

[¶16] STANDARD OF REVIEW

[¶17] Appellant does state and agree with the STANDARD OF REVIEW in Appellant's Brief, filed and served by and through Appointed Counsel Scott O. Diamond, is correct.

[¶18] **ISSUE: THE DISTRICT COURT ERRED BY DENYING PLAINTIFF-APPELLANT'S PETITION FOR POST-CONVICTION RELIEF WITHOUT FIRST DETERMINING WHETHER PLAINTIFF-APPELLANT'S APPOINTED COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY PERSERVE PLAINTIFF-APPELLANT'S CLAIM THAT THE SINGLE-PHOTOGRAPH DISPLAY WAS SUGGESTIVE AND UNNECESSARY AND, THEREFORE, VIOLATING PLAINTIFF-APPELLANT'S DUE PROCESS RIGHTS.**

[¶19] At the CONCLUSION in Appellant's pro se petition, Appellant argues that Appellant, "was not accorded the counsel guaranteed by the Sixth Amendment", because Counsel's performance was below the "objective standard of reasonableness" considering "prevailing professional norms". (See,

Appellant's App. at 19, ¶32).

[¶20] This CONCLUSION was for both grounds listed in the pro se petition. (Ineffective Assistance Of Counsel and The Identification Procedure By Deputy Bergerson And Deputy Eberle Was A Impermissibly Suggestive Single-Photograph Display). It is clear from this pro se CONCLUSION that Appellant was bringing the single-photograph issue to the post-conviction court as a stand alone issue and a claim under ineffective assistance of counsel and a due process violation claim.

[¶21] In Stovall v. Denno 388 U.S. 293, 302 (1967), the United States Supreme Court held identification testimony must be suppressed if, under the totality of the circumstances, the procedure for identification "was so unnecessarily suggestive and conducive to irreparable mistaken identification to constitute a denial of due process." "The Court condemned "[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup," but concluded, under the totality of the circumstances, the immediate hospital identification was imperative. Id. at 302. The Court said the victim was the only person who could exonerate the defendant; the hospital was not far from the jail; no one knew how long the victim might live; and, faced with the responsibility of identifying the attacker, the need for immediate action, and the knowledge the victim could not visit the jail, the police followed the only feasible proce-

dure and took the defendant to the hospital room."

[¶22] Under the Stovall due process test, the determination of the admissibility of an identification involves a two-pronged analysis of (1) whether the identification procedure is impermissibly suggestive, and (2) if so, whether the identification nevertheless is reliable under the totality of the circumstances. (See, Manson v. Brathwaite, 432 U.S. 98, 109-14 (1977); Biggers, 409 U.S. at 198-99; Simmons, 390 U.S. at 384-85. See also, State v. Syvertson, 1999 ND 137, ¶¶26-27, 597 N.W.2d 644, cert. denied, 120 S.Ct. 282 (1999); State v. Packineau, 423 N.W.2d 148, 150 (N.D. 1988)."

"The "suggestive" prong considers whether the identification procedure is "unnecessarily or impermissibly suggestive." Professor LaFave explains the "unnecessarily or impermissibly suggestive" prong can be separated into two inquiries: (1) whether the identification is suggestive, and (2) whether there is a good reason for not using a less suggestive procedure. 2 LaFave at §7.4(b). Under the "suggestiveness" inquiry, the practice of showing suspects singly and not as part of a lineup is widely condemned."

[¶23] The United States Supreme Court determined that "identifications arising from single-photograph displays may be viewed with suspicion." (See, Simmons v. United States, 390 U.S., at 383).

[¶24] In the present case Bowman County Deputy Sheriff Frank Eberle contacted Adams County Deputy Sheriff Trevor Bergerson. On February 10, 2014, Deputy Eberle emailed Deputy Bergerson a photograph of Appellant. Deputy Bergerson called Deputy Eberle and confirmed that the photograph was the passenger in

the car with Melissa Anne Carlson.

[¶25] Clearly, this was a single-person photograph display (line-up) which was suggestive and unnecessary, as there were no other exigent circumstances or emergency situations, such as a victim facing imminent death, Stovall, 388 U.S., at 302, or other needs such as quickly apprehending and identifying a perpetrator, Simmons, 390 U.S. at 384-385.

[¶26] Appellant did not present this issue to the North Dakota Supreme Court on direct appeal, because Counsel failed to properly preserve the single-photograph issue for direct appeal.

[¶27] While Appellant believes that his Fifth, Sixth, and Fourteenth Amendment protections are enough, Appellant also believes that he should be afforded even greater constitutional protection under Article 1, Section 12 of the North Dakota Constitution, specially regarding his Due Process Rights and Right To Effective Assistance Of Counsel. In State v. Kloedt, 298 N.W.2d 783 (N.D. 1980), the North Dakota Supreme Court stated:

"It is within the power of this court to apply higher constitutional standards than are required of the States by the Federal Constitution."

[¶28] This Court has also referenced, "our judicial constitutional interpretation that (Article 1) §12 provides the key to a fair trial..." (See, State v. Orr, 375 N.W.2d 171 (N.D.

1985). Article 1, Section 12 of the North Dakota State Constitution provides:

"In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

[¶29] The Fifth and Fourteenth Amendments guarantee due process while the Sixth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, guarantees a defendant effective assistance of counsel. (See, DeCouteau v. State, 586 N.W.2d 156 (N.D. 1998)). By contrast, the emphasis of Article 1, Section 12 of the North Dakota State Constitution should be on protecting an individual's right to due process and effective assistance of counsel, rather than simply just guaranteeing it. (See, State v. Lampman, 724 P.2d 1092 (Wash. App. 1986)). Thus, the North Dakota Supreme Court has continuously stated that, "[t]he North Dakota Constitution may afford broader individual rights than those granted under the United States Constitution." (See, State v. Rydberg, 519 N.W.2d 306, 310 (N.D. 1994); See also, State v. Nordquist, 309 N.W.2d 109, 113 (N.D. 1981); State v. Stockert, 245 N.W.2d 266, 271 (N.D. 1976); State v. Matthews, 216 N.W.2d 90, 99 (N.D. 1974); State v. Herrick, 1999 ND 1, 588 N.W.2d 847).

[¶30] The State Constitution provides the citizens of this

State with a fully independent source of protection of fundamental rights and liberties. Appellant believes that it is the Court's role alone to say what those rights are, and that it is the Court's solemn obligation to enforce them.

[¶31] Appellant's constitutional right to confrontation was violated and the accuracy of the truth-determining process failed. (See, Chambers v. Mississippi, 410 U.S. at 295, 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). And calls into question the ultimate "integrity of the fact finding process. Appellant was guaranteed a fair trial. (See, United States Constitution Amendment V, VI). Clearly the original trial carries a tinge of falsification, deception, and misrepresentation.

[¶32] CONCLUSION

[¶33] Had Appellant been informed that the State had requested summary disposition, by Appointed Post-Conviction Counsel, Appellant would have filed and served a pro se Affidavit in support of petition along with exhibits in support of Affidavit along with a request for Trial Transcripts, to show the post-conviction court, Counsel had failed to preserve the single-photograph issue for direct appeal, and that because of ineffective assistance of counsel, Appellant would be unable to bring the single-photograph issue to direct appeal. But Appellant's petition was dismissed, before Appellant became aware of the State's request.

[¶34] THEREFORE, for the foregoing reasons, Appellant respectfully requests that the district court's order and judgment denying his petition for post-conviction relief be reversed and remanded.

[¶35] Respectfully submitted this 25 day of June, 2015.



Antoine Marquis Murray
James River Correctional Center-#40325
2521 Circle Drive
Jamestown, ND 58401

[¶36] CERTIFICATE OF SERVICE

[¶37] I hereby certify that I served the foregoing Supplemental Rule 24 Brief upon the following parties:

Stephanie Pretzer
Bowman County States Attorney
104 First St. NW, Ste. 10
Bowman, ND 58623

Office of the Clerk
North Dakota Supreme Court
600 E. Boulevard Ave., Dept. 180
Bismarck, ND 58505-0530

because Appellant, Antoine Marquis Murray did not have the funds for photocopies or legal postage (indigent).

Scott O. Diamond
Attorney for Plaintiff-Appellant

IN THE SUPREME COURT, STATE OF NORTH DAKOTA

<p>Antoine Marquis Murray, Plaintiff / Appellant, v. State of North Dakota, Defendant / Appellee,</p>	<p>Supreme Court No. 20150124 Bowman County Case No. 06-2015-CV-00002 CERTIFICATE OF SERVICE</p>
---	---

[¶1] I hereby certify that on the 30th day of June, 2015, the following documents:

1. Supplement Rule 24 Brief of Antoine Marquis Murray; and
2. Certificate of Service

were served, via email, upon the following individual:

Email: spretzer@bowmancountynd.gov
Stephanie Laine Pretzer
38 Second Ave. E.
Dickinson, ND 58601

and were served, via regular mail, upon the Plaintiff, as follows:

Antoine Marquis Murray, # 040325
c/o James River Corrections Center
2521 Circle Drive
Jamestown, ND 58401

Dated this 30th day of June, 2015.



Scott O. Diamond
ND bar # 05773
210 Broadway, Suite 401B
Fargo, ND 58102
Telephone: (701) 373-0373
Fax: (701) 373-0330
Email: Scott@scottdiamondlaw.com
Attorney for the Plaintiff / Appellant