20150284

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

DEC 01 2015

STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Spencer K. Curtiss, Petitioner-Appellant v. State of North Dakota, Respondent-Appellee.	))))))))))	Supreme Court No. 20150284 District Court No. 08-2012-CV-01810

BRIEF OF APPELLANT

APPEAL FROM AN ORDER DENYING PETITIONER'S REQUEST

FOR RELIEF FROM AN ORDER, AUGUST 19TH, 2015

AND

ORDER ON MOTION FOR RECONSIDERATION, OCTOBER 6TH, 2015

Burleigh County District Court

South Central Judicial District

The Honorable David E. Reich, Presiding

Spencer K. Curtiss
P.O.Box 5521
Bismarck, North Dakota 58506-5521
Appellant/ Petitioner

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[¶ 1] STATEMENT OF THE ISSUES

I. Whether the trial court erred in declaring Petitioner failed to provide trial transcript in post-conviction relief application?

II. Whether the trial court erred in not relying upon trial transcript for judgment decision?

III. Whether the trial court erred in failing to allow proper time for response to state

[¶ 2] STATEMENT OF THE CASE

[¶ 3] This is an appeal arising from an order, filed August 19th, 2015, entered by the Honorable David Reich, denying Petitioner's Request from Relief in Burleigh County District Court.

[¶ 4] Spencer Curtiss was initially charged with gross sexual imposition, a class AA felony, in violation of N.D.C.C. § 12.1-20-03, in a criminal case arising in Burleigh County entitled *State v. Spencer Curtiss*, 08-10-K-01650. The state alleged that between June 1st, 2010 and August 31st, 2010, Curtiss engaged in a sexual act with a minor female under the age of 15 when at the time Curtiss was more than 22 years of age. The matter went to a jury trial and Curtiss was found guilty on December 9th, 2010. Curtiss was sentenced on February 18th, 2011 to serve twenty-five years with the North Dakota Department of Corrections (ND DOCR), with 10 years suspended and five years of supervised probation upon release.

[¶ 5] Curtiss filed a direct appeal of the verdict and sentence to the North Dakota Supreme Court. The Supreme Court summarily affirmed the conviction. *State v. Curtiss*, 2011 ND 175, 803 N.W.2d 834.

[¶ 6] Curtiss filed an application for post-conviction relief on September 17th, 2012. Curtiss alleges ineffective assistance of counsel, religious persecution, due process violations, and newly discovered evidence. Specifically, Curtiss alleges that his trial counsel and appellate counsel, Kent Morrow, failed to investigate and perform pretrial functions to suppress evidence. Curtiss alleges counsel failed to object to improper evidence introduced at trial. Curtiss alleges religious prosecution because his beliefs were presented in a prejudicial way to a Christian jury panel. Curtiss alleges that he could not hear testimony presented at trial because of a hearing impairment.

[¶ 7] The state filed its response on October 23rd, 2012. Throughout the next sixteen months Curtiss filed a series of pretrial motions. The trial court did not rule on any of these motions prior to the evidentiary hearing.

[¶ 8] On May 29th, 2014 the trial court held an evidentiary hearing on Curtiss' petition. The court heard testimony from Kent Morrow, Curtiss' trial and appellate attorney in the criminal matter. Curtiss also testified on his own behalf.

[¶ 9] On December 31st, 2014 the court entered its order dismissing Curtiss' petition for post-conviction relief. [Ex.5, pg.20-26]. The court's order found that Curtiss had (1) failed to show that trial counsel's actions fell below reasonable professional assistance and (2) failed to show how the result of his trial would have been different but for counsel's errors.

[¶10] Curtiss timely filed his Notice of Appeal on January 14th, 2015. The Supreme Court summarily affirmed this order August 7th, 2015. *Curtiss v. State*.

[¶11] Curtiss filed a Request for Relief from an Order under N.D.R.Civ.P.60 (b) on August 6th, 2015. The state responded September 13th, 2015. The district court filed

and Order denying the Request for Relief from an Order on August 19th, 2015. Curtiss filed a motion for Reconsideration with a brief on August 26th, 2015.

[¶12] Curtiss filed a Notice of Appeal with the Supreme Court on September 28th, 2015. The Supreme Court filed an Order of Remand on the district court to rule upon the unanswered Motion for Reconsideration on October 5th, 2015. The district court filed an Order on Motion for Reconsideration on October 6th, 2015.

[¶13] Curtiss has now also filed a Notice of Appeal with the Supreme Court from the Order on Motion for Reconsideration filed October 16th, 2015.

[¶14] STATEMENT OF THE FACTS

[¶15] The underlying facts of the criminal case were addressed in the appellant's brief and the appellee's brief in *State v. Curtiss*, 2011 ND 175, 803 N.W. 2d 834.

[¶16] The underlying facts of the appeals made of this criminal case are addressed in the appellant's brief and appellee's brief in Supreme Court No. 20140365 and Supreme Court No. 20150007.

[¶17] Curtiss brings appeal starting with statement "transcript apparently was not filed in this case" [Ex.13, pg.71] from Post-Conviction Hearing may 29th, 2014.

[¶ 18] This is followed with Order [Ex.5, pgs.20-26] specifically ¶4 "No transcripts of the trial or any previous hearings were filed in support of the petitioner's application". Now this declaration was never mentioned any further by either counsel in Supreme Court Appeal case # 2015007. Petitioner now has made direct challenge on this very issue with Rule 60 motion [Ex. 6, pgs.27-38] that being the failure of the trial court to discover provided transcript and rely decision upon trial transcript.

[¶19] This follows with State's Answer to Request from an Order [Ex.10, pgs. 47-63] in which grounds for dismissal were misuse of process because presentation of a claim for relief on issue that had failed to have been raised in post-conviction proceeding, claim is frivolous, and claims have fully and finally been adjudicated in a previous proceeding.

[¶ 20] Subsequently the very next day the trial court filed an Order [Ex.8, pgs. 43-44] denying the Request for Relief from an Order by affirming the state's contention that: 1) Curtiss failed to provide a transcript for the court to consider; 2) he failed to raise the lack of transcript issue at his post-conviction hearing; and 3) he failed to show how reliance on the transcript would have changed the court's ruling on his application", and asserts motion to be denied pursuant to N.D.C.C. § 29-32.1-12.

[¶ 21] Curtiss after receiving State's Answer to Request for Relief from an Order collects and begins preparation for Response to State's Answer to Request from an Order [Ex. 10, pgs. 47-63] upon state's declaration of claim being frivolous. So being put to proof, prepares to file necessary disclaimer against 'non-existence of any merit', when Curtiss receives Order [Ex.8, pgs.43-44], therefore Curtiss then also prepares and files Motion for Reconsideration [Ex.9, pgs.45-46] along with Response to State's Answer to Request from an Order.

[¶22] Curtiss upon no response from Motion for Reconsideration filed a Notice of Appeal [Ex.1, pg.1] appealing Order [Ex.8, pgs. 43-44]. The Supreme Court thereupon receipt of Notice of Appeal being received and filed did then make Order of Remand [Ex. 11, pg. 64] to have trial court consider and dispose on pending Motion for

Reconsideration. The trial court on the next day filed an Order on Motion for Reconsideration [Ex. 12, pgs. 65-67].

[¶23] Curtiss upon receipt of letter from Supreme Court declaring if Petitioner wished to appeal the Order on Motion for Reconsideration he must immediately file a Notice of Appeal. Curtiss then filed Notice of Appeal [Ex. 2, pg. 2] appealing Order on Motion of Reconsideration. Curtiss also requested that both Orders on appeal be joined together in one case; this was granted.

[¶ 24] Curtiss currently appeals both Orders made by the Honorable Judge Reich.

[¶ 25] JURISDICTION

[¶ 26] "Appeals shall be allowed from decisions of lower court to the Supreme Court as may be provided by law." N.D.Const. art. VI, § 6.

[¶ 27] STANDARD OF REVIEW

[¶28] The standard of review for post-conviction proceedings is well established. A trial court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless clearly erroneous under N.D.R.Civ.P. 52(a). A finding 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 it, a reviewing court is left with a definite and firm conviction a mistake has been made.

Broadwell v. State, 2014 ND 6, ¶ 5, 841 N.W. 2d 750. Questions of law are fully reviewable on appeal of post-conviction relief proceedings. *Id.* The issue of ineffective assistance of counsel is a mixed question of law and fact that is fully reviewable. *Id.*

[¶ 29] *US v. Guarino*, 517 F3d 1067, 1068 (8th cir 2008) (appellate court may exercise discretion to correct an error seriously affecting fairness, integrity, or public reputation of judicial proceedings)

[¶ 30] Appellate review for abuse of discretion is not an empty formality. A decision calling for the exercise of judicial discretion "hardly means that it is unfettered by meaningful standards or shielded from through appellate review." *Albemarle Paper Co. v. Moody*, 422 US 495, 416, 95 S.Ct. 2362 (1975)

[¶ 31] ARGUMENT

I. Whether the trial court erred in declaring Petitioner failed to provide trial transcript in post-conviction relief application?

II. Whether the trial court erred in not relying upon trial transcript for judgment decision?

III. Whether the trial court erred in failing to allow proper time for response to state.

[¶32] Curtiss argues that the trial court erred when it denied Curtiss' application for post-conviction relief without use of the trial transcript by declaration of no filing or provision of transcripts.

[¶33] Curtiss argues that the trial court erred in stating (1) Curtiss failed to provide a transcript for the court to consider; (2) he failed to raise the lack of transcript issue at his post-conviction relief hearing; and 3) he failed to show how reliance on the transcript would have changed the court's ruling on his application.

[¶34] Curtiss begins with diligent process to provide trial transcript to all necessary parties, including trial court.

Curtiss filed Motion for Discovery [Ex. 16, pg. 74] initially with Post-Conviction application [see Ex. 3, pgs.3-4] prior to Assignment of counsel [Ex.3, pg.4 (index #12)].

[¶35] In the State's Response to Plaintiff's Request for Discovery [Ex.17, pgs75-76] the state declares "Mr. Martin made a request for discovery in this case and the state provided all documents on February 7th, 2013 to Mr. Martin"; Mr. Martin was appointed attorney to Curtiss. [see P97, page 26]

[¶36] Curtiss contends here that with both Petitioner and counsel requesting discovery, any issue of discovery to the court would be covered and considered filed. Curtiss along these lines also produces [Ex. 20, pg.79] letter from Lee Grossman on April 9th, 2014, (substituted attorney for Curtiss), declaring sending a copy of discovery and transcripts in *Curtiss v. State*- post-conviction relief prior to post-conviction hearing.

[¶37] Curtiss presents use of citation of trial transcripts on record file:

1) In States Argument in Opposition to Plaintiff's Motion for Post-Conviction Relief (pg.4) [Ex.18, pg. 77] there is citation "Trial Trans. P.20, ln 22-23" in regards to hearing issues.
2) In State's Argument in Opposition to Plaintiff's Supplemental Motion for Post-Conviction Relief (pg.3) [Ex.19, pg.78] there is citation "Trans. Pp. 47,53,66,100" regarding testimony from trial on drug usage;
3) Adding also from Post-Conviction Hearing (pg.59) [Ex.13, pg.70, (lns.9-13)] "look back at the transcript," "The record is very clear as to that."

[¶38] The abovementioned Exhibits display the use of the trial transcript to make and support argument against post-conviction relief. Curtiss contends here if state using/citing trial transcript for support of argument that the trial court judge has it on record to validate such to make ruling on such. Otherwise the state's argument would fail as well.

[¶39] The statement from Order [Ex.5, pg.25] "Curtiss testified at trial and appeared to be able to hear and understand the question posed to him" is not from testimony given in Evidentiary Hearing, could only be making opinion of trial from reading trial transcript. (Trial Court held in room 303, large vaulted room versus small conference room that held Evidentiary Hearing.)

[¶ 40] Curtiss displays Jury Trial Volume I cover page [Ex. 14, pg.72] and Jury Trial Volume II cover page [Ex. 15, pg. 73] clearly displaying filing dates of such as "Filed in the Office of Supreme Court March 30, 2011", and then received and filed "Clk of Crt Burleigh October 14, 2011".

[¶41] Curtiss upon diligence corresponded with Clerk of District Court on 'electronic files and filing', and presents [Ex.24, pg.81] letter from Clerk of District Court January 22nd, 2015, declaring "All of our case files are electronically scanned into the computer system...case number 08-10-K-0165...has been manually scanned into our system...so the physical file is no longer in existence." With this, Curtiss' entire criminal case files and appeal files are therefore on computer software and digital storage, (Odyssey®), so to have access of any file filed in relevant case is a click of a mouse away.

[¶42] The trial court declare in Order [Ex.5, pg.21] "The discovery was conducted and a number of motions were filed." So again, Curtiss contends trial court did indeed have trial transcript on record file of post-conviction. However there is no language on any ruling of the motions.

[¶43] On the issue presented through post-conviction application proceedings on hearing, Curtiss displays Response to Motion to Produce Medical Records from Office of Attorney General [Ex. 23, pg.82] declaring "no objection to an Order authorizing disclosure to Mr. Curtiss audiology reports." This motion was not ruled on especially with particularized need for this discovery. This displays resistance to allow exculpatory and clear and convincing discovery evidence in appeals as the very issue presented in current appeal.

[¶44] Curtiss presents Letter from District Court , Burleigh County, North Dakota [Ex. 24,pg.83] in regards to post-conviction application case # 08-2014-CV-01843 declaring "To be fully considered...," and this contains no language declaring one must specifically 'file trial transcript to be fully considered.'

[¶45] Curtiss presents Clerks Certificate on Appeal [Ex. 25, pg. 84] case 08-10-K-01650, and Clerks Certificate on Appeal [Ex. 26, pg.85] case 08-2012-CV-0181 declaring Supreme Court has the Record of Appeal pursuant to the laws of this state. If Supreme Court has law to demand Record of Appeal to be transmitted/filed to that court, then only reasonable to infer district court on appeal would also have similar respect to demand transmission of files to appellate court for consideration.

[¶46] Accordingly under Habeas Corpus 28 USCS 2254 Rule 8(a) ("[T]he judge must review the answer [and] any transcripts and records of state-court proceeding...to

determine whether an evidentiary hearing is warranted") In *Curtiss* an Evidentiary Hearing was held May 29th, 2014.

[¶47] Concluding from abovementioned and subsequent additions , the trial court presiding over post-conviction relief application 08-2012-CV-01810 did indeed have on record file the trial transcript from case 08-10-K-01650 but declared otherwise to Petitioner's detriment. So statement that Petitioner failed to provide trial transcript is incorrect.

[¶48] The trial court erred in not relying upon provided trial transcripts

[¶49] To prove a claim for ineffective assistance of counsel, the petitioner must show that trial counsel's performance fell below an objective standard of reasonableness and the petitioner was prejudiced by the deficient performance. *Strickland v. Washington*, 466 US 668, 687 (1984).

[¶50] To determine whether the petitioner was prejudiced by his counsel's performance, the petitioner "must establish there is a reasonable probability that, but for the counsel's errors, the result of the proceedings would have been different. *Coopage v. State*, 2013 ND 10, ¶21, 827 N.W.2d 320.

[¶51] Curtiss has shown that his trial counsel was ineffective in Evidentiary Hearing by conduct, lack of integrity, untruthfulness on actions taken at trial and appeal process, and demonstrated indifference with statements concerning his approach of the case, nonchalant attitude towards Evidentiary Hearing especially in regards toward exhibits presented at Evidentiary Hearing.

[¶52] However, without trial transcript no party can substantiate statements made at Evidentiary Hearing to the actual actions and statements made at trial. Furthermore

without all necessary evidence to procure a fair judgment the issue of ineffective assistance of counsel has not been fully and fairly adjudicated as state has claimed. To date all appeals have been denied on other grounds.

[¶53] In Response to State's Answer to Request for Relief from an Order [Ex.10, pgs. 47-63] Curtiss clearly and convincingly documents the evidence providing the necessary prongs of *Strickland.* Had Judge Reich relied upon the evidence presenting Mr. Morrow's actions and statements, that being the trial transcript, to what was put on record in Evidentiary Hearing there is more than a reasonable probability of finding substantiated grounds for ineffective assistance, and Curtiss would have been acquitted of the charge.

[¶54] Petitioner presents the conduct that judicial officials shall be held liable to in displaying why court erred in not acknowledging trial transcript.

[¶55] Under the Rules of Professional Conduct, "'Knowingly' may be inferred from the person's conduct in the circumstances." North Dakota Rules of Professional Conduct 1.0(g)

[¶56] When an attorney accepts a retainer to represent, he is obligated to exert his best efforts wholeheartedly to advance his client's legitimate interest with fidelity and diligence until he is relieved of that obligation either by his client or by the court. *State of Michigan v. Daggs*, 384 Mich 729, 187 N.W. 2d 227 (1971) Therefore, a Lawyer's Responsibility to stay involved and interested in legal suit is an obligation to client.

[¶57] ("[T]he mandatory [term] 'shall'...normally creates an obligation impervious to judicial discretion") *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 US 26, 118 S.Ct.

[¶58] Under North Dakota Code of Judicial Conduct, Petitioner presents the following from Cannon I: "A judge shall uphold and promote the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety;" Rule 2.6: "A judge shall accord to every person who has a legal interest in a proceeding, the right to be heard according to law;" and from Rule 1.1: "A judge shall comply with the law, including the Code of Judicial Conduct."

[¶59] Under North Dakota Rules of Professional Conduct the Petitioner presents:

Rule 1.1 Competence

A lawyer shall provide competent representation to client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.

Rule 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Rule 1.4 Communication

A lawyer shall:

1) Promptly inform the client of any decision or circumstance with respect to which the client's consent is required by these Rules;

2) Reasonably consult with the client about the means by which the client's objectives are to accomplished;

4) Promptly comply with the client's reasonable request for information.

Rule 3.3 Candor toward the Tribunal

a) A lawyer shall not knowingly:

1) Make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

2) Offer evidence that the lawyer knows to be false.

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, or offer an inducement to a witness that is prohibited by law;

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;

d) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

Under comment

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by contending parties. Fair competition in the adversary system is secured by prohibition against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedures, and the like.

[¶60] The failure of the trial court to use trial transcript in judicial decision of Post-Conviction Application for relief has substantial and injurious effect to Petitioner by the withholding of clear and convincing evidence Post-Conviction Application has strong grounds for ineffective assistance of counsel, and high likelihood of remedy.

[¶61] Petitioner presents the following exhibits describing prejudice and providing necessary prong from *Strickland* as previously filed to district court and labeled "Notwithstanding the arguments in his reply" [Ex 10, pgs.47-63]. Also to be added here, the state put Petitioner to his proof [Ex.7, pg.41] (¶¶ 7, 8) and the following is that proof:

("Notwithstanding" defined as: in spite of, without being opposed or prevented by, in spite of the fact that, nevertheless.)

See Specific lines in Exhibit 10: Pg.51 [14]; Pg. 52 [16-17]; Pg. 53[18-19]; Pg.53 [20-21]; Pg.54 [22]; Pg. 54[23-24]; Pg.54[25]; Pg.56[27,28,29]; Pg.57[30,31,32,33]; Pg.57[34,35,36]; Pg.59[37-38]; Pg.60[39]; Pgs.60-61[40-41]; Pg.61[42](index #114); Pg.62[43-52].

[¶62] Curtiss cited trial transcript @ 71 times displaying action and testimony taken from trial in Post-Conviction Application. Following these citations Curtiss did declare how the issue related would have changed the ruling and the position it took in such, with remedy requested for each.

[¶63] Petitioner declares when court applies trial transcript to statements made in Evidentiary Hearing, May,29th, 2014 and then references those same statements, claims and issues to amended post-conviction application with civil filings the court will discover claims substantiated in favor of petitioner, and be granted relief.

Issues such as Juror and mistrial, witness Branden Curtiss as a witness not present,

Maurci Lauer as a required witness, Jim Harper as a required witness, Helen Harmon as a required witness, Religion being presented throughout trial, and Hearing issues as declared on the record. All these issues are misrepresented in Evidentiary Hearing and clearly upon review of trial transcript display grounds for ineffective assistance of counsel.

[¶64] Mr. Morrow's actions at trial and displayed at Evidentiary Hearing are inconsistent with the rudimentary demand of a fair procedure. This is especially the fact when the determinations of the fact finders (jury panel) depend and rely upon the evidence, testimony and exhibits, presented. Mr. Morrow failed to restrict and prohibit inadmissible evidence and did not allow sufficient alibi witness testimony.

[¶65] Veracity is essential to uphold our judicial system, as untruthfulness and deceit are not objective to judicial process. There can be no freedom in the judicial process to violate Petitioner's substantial rights through the acceptance of verifiable untruthful testimony on very relevant subject matter critical to case verdict.

[¶66] The 'not guilty' form consciously signed by jury foreman, then apparently declared void clearly presents jury panel had reached a unanimous decision; however, as the record shows, the jury did review the recorded call again in the court room.
This is the very piece of evidence Mr. Morrow declared in Evidentiary Hearing had no merit, and with such review the jury on re-deliberation found Petitioner guilty of charge.

[¶67] The prejudice is clearly present, and with all the years of experience, Mr. Morrow still made a harmful error in judgment directly causing guilty verdict. The controlled call must be challenged with a motion to suppress to keep it from jury presentation.

[¶68] The decision made December 30th, 2014 denying post-conviction application 08-2012-CV-01810 falls within the definitions of arbitrary, unreasonable and unconscionable and also was not made in good faith as defined under N.D.C.C.§ 1-01-21, as the court did take unconscientious advantage of petitioner through the forms and technicalities of law by not making fair and full review of the merits presented against the trial transcript. Court simply made decision arbitrarily with the declaration of no supporting documentation, and this is a violation of petitioner's substantial right of due process of law. Court made decision in violation of statute of law not requiring transcript as it is on court files.

[¶69] "The function of this court is to determine if the trial court abused its discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not established." *Fleck v. Fleck*, 337 N.W.2d 786, 789-790 (ND 1983).

[¶70] This is an attempt to avoid, evade, and deny the force and effect of previous actions and statements made by counsel. There can be no judicial discretion when disregarding substantiated proof of genuine issues of merit in favor of personal opinion to override the interests of justice.

[¶71] The trial court has denied acknowledgment and recognition of the trial transcript due to the fact that comparative-causation basis revealed from the verbatim would substantiate Petitioner's claims of ineffective assistance of counsel and deserve remedy. This has been a refusal to give full consideration with court declaration of "no provision of trial transcript."

[¶72] A knowing comparison of the two court records will clearly expose ineffective assistance of counsel and display a definite and firm conviction that a harmful mistake has been made. A harmful mistake was made in trial and to date no party will take liability for their part for such, this of course is to Petitioner's detriment and continued incarceration.

[¶73] Notwithstanding the trial court's acknowledgement of Response [Ex. 10, pgs.47-63], this response set to the side and not considered in Order on Motion for Reconsideration. This judgment defies protocols presented in Cannons. The trial has denied argument on counsel's veracity; this is an abuse of power.

[¶74] Petitioner has provided sufficient ground for setting aside Order denying Post-Conviction Application. Curtiss has prepared and filed all necessary materials and documentation; however due to resilient judicial officials obstructing justice and due process, Curtiss has yet to have full and fair consideration and decision on merits presented.

[¶75] Petitioner has substantiated the fact trial court did error in not relying upon trial transcript in making decision on Post-Conviction Application and did abuse discretion with such.

[¶76] North Dakota Rules of Civil Procedure 60 expressly provides relief from only a final judgment or order in any action or proceeding.

[¶77] The state has attached collateral attack rules, post conviction rules, to a direct attack on a judgment/order; with the court affirming. N.D.C.C. § 29-32.1-12 is not applicable grounds for dismissal as Rule 60 Motion is not an application for post-

conviction relief. See [Ex.7, pg.41, ¶9] ("1. An application for post-conviction relief may be denied...")

[¶78] A direct attack on a judgment is an attempt to avoid, correct, vacate, annul, review, cancel, or set-aside the judgment in a proceeding or manner provided by law for such; versus, a collateral attack has a purpose to punish a crime committed by means of the decree or judgment.

[¶79] There is no other post-conviction proceeding to raise the issue of "failure to provide trial transcript", so appropriate to appeal for remedy under Rule 60.

[¶80] Petitioner clearly requested the court to set-aside order, a direct attack on order, in Request for Relief [Ex. 6, pgs.27-38] the state's argument must fail in the claiming misuse of process under N.D.C.C. § 29-32.1-12.

[¶81] The trial court erred in failing to allow proper time for response to state and Curtiss contends the trial court did error in not allowing time to respond to the state upon being put to his proof.

[¶82] The general theory as to all formal proceedings under the Probate Code is that an order is binding as to all who are given notice of the proceeding. N.D.C.C. 30.1-12-06

[¶83] The Petitioner was served no notice on Order, February 13th, 2014 (index 52)[Ex.3, pg.6] as declared in Relief for Order [Ex.6, pg.32] and also Order [Ex.8, pgs.43-44] (Index #111[Ex.3,pg.10]) had no affidavit of service. There has been no Notice given on two relevant and important Orders given by the trial court, and as such the trial court has failed to recognize the Petitioner.

[¶84] N.D.R.Civ.P. 7(d) which deals with notice of entry. It says: within 10 days, after entry of judgment in an action in which an appearance has been made, notice of such entry, together with a copy of such judgment or a general description of the nature and amount of relief and damages thereby granted, shall be served by the prevailing party upon the adverse party. The time periods of both N.D.R.Civ.P 60(b) and N.D.R.App.P. 4(c) is expressly tied to service of notice of entry of the order or judgment involved.

[¶85] ("no notice of entry of the order has been served in this case, therefore, the time for appeal technically has not yet commenced to run") *Matter of Estate of Erickson,* 368 N.W. 2d 525, 528 (ND 1985)

[¶86] Then accordingly Petitioner contends that with no notice of entry has been served upon Petitioner, that Petitioner is not bound by Orders and the time limits for vacating and to set aside such 'un-noticed' Order has no binding effect.

[¶87] Let it also be recognized that in Order on Motion for Reconsideration [E.121,pgs 66-67](¶¶6,7) the court upon declaring time to respond did acknowledge Curtiss' reply brief and did not declare error in the time to respond as grounds fro the denial of the Orders.

[¶88] Time limits for serving notice of judgment under N.D.R.Civ.P.77(d) is a procedural rule and is not jurisdictional. See *Piccagli v. N.D. State Health Dept.*, 319 N.W.2d 484, 486(ND 1982); N.D.R.Civ.P.58 explanatory note (subdivision (b) was formally N.D.R.Civ.P.77(d). A judgment is not enforceable until; notice of entry is properly served upon opposing party.

[¶89] The trial court Judge never made claim that Request for Relief from an Order was groundless, devoid of merit, or filed in bad faith.

[¶90] "An appeal is frivolous if it is flagrantly groundless, devoid of merit, or demonstrates persistence in the course of litigation which could be seen as evidence of bad faith:. *Burris Carpet Plus, Inc. v. Burris*, 2010 ND 118, P56, 785 N.W.2d 164 (quoting *Lucas v. Porter*, 2008 ND 160, P28, 755 N.W.2d 88)

[¶91] This entire appeals process has been full of discovery violations with failure to discover requested and particularized material substantiating basis for requested relief in Post-Conviction Application. Also Petitioner claims court is exploiting the fact of paper filing versus electronic filing, as in lost in transmission. Curtiss' criminal trial was initially filed on paper, however, since that time, and from all appeals, all filing is done by electronic, except those exempt, such as Petitioner. The very issue of filing times would not be an issue if Petitioner had been properly served and could electronically file pleadings.

[¶92] As under N.D.R.Civ.P.5(1) ...each of the following documents must be served under this rule on every party...:A) and order; B) a pleading served after the original summons and complaint; C) a discovery document required to be served on a party.

[¶93] As under N.D.C.C. § 32-01-05 Criminal action defined

A criminal action is one prosecuted by the state as a party against a person charge with a public offence for the punishment thereof.

[¶94] Also see under N.D.C.C. § 29-32.1-03(1)

> A proceeding is commenced by filing an application with the clerk of the court in which the conviction and sentence took place. The state must be named as respondent...

[¶95] Petitioner clearly presents that the state of North Dakota is a party in these proceedings and as such must receive service of all documents, including all discovery requested by Petitioner and appointed attorneys. Also to make clear that Petitioner is also party and must be served any documentation as a self-represented prisoner.

[¶96] Presenting under N.D.R.Civ.P.5(b)(2)(B) that persons exempt from electronic service and filing under N.D.R.Ct. 3.5 must serve documents under Rule 5(b)(3), which declares other service (C) being mailing it to the person's last known address, in which event service is complete upon mailing.

[¶97] Finally under N.D.R.Ct.3.5 Electronic filing in District Courts:

1) Documents filed electronically in the district courts must be submitted through Odyssey(R) electronic system.
2) All documents filed after the initiating pleading must be filed electronically except for documents filed by self-represented litigants and prisoners.
3) On a showing of exceptional circumstances in a particular case, anyone may be granted leave to court to file paper documents.
4) A document filed electronically has the same legal effect as a paper document.

e) Electronic service

1) All documents filed electronically after the initial pleadings must be served electronically through the Odyssey(R) system except for documents served on or by self-represented litigants and prisoners, on a showing of exceptional circumstances in a particular case, anyone may be granted leave of court to serve paper documents or to be exempt from receiving electronic service.

Electronic filing adopted January 15th, 2013.

[¶98] The district court makes claim under N.D.R.Ct.3.2 Curtiss had seven days after service of state's responsive brief to file a reply brief.. However, the Order denying Rule 60 Motion was signed August 14th, 2015, and filed 6 days later. This presents that trial court did not consider any time frame for reply. See [Ex.3, pgs.9-10(Index #'s 109,110,111)] and [Ex. 8, pg. 44].

[¶99] The time to respond has become an issue only due to fact of recent electronic filing rules, however there is no grace period granted for postal mailings, N.D.S.P. mail searched, delivery, which takes several days at minimum. Curtiss did not even receive state's answer until August 24, 2015. Mail takes a minimum of four days.

[¶100] To make claim of time to respond against self-representing prisoner; especially with mail times, copy days, notary public signature all structured around N.D.S.P. scheduling; is a due process violation under the United States Constitution Amend. 14 as unequal filing times to all other litigants filing pleading. Even through the extreme diligence of Petitioner there can be no possible method a self-representing petitioner to effectively reply to any responses of court.

[¶101] As Curtiss is exempt from electronic filing and service and must file through notary service with letter of service, Notice of Motions, and such, the time in which these deferred materials is filed is even more delayed as service is only complete upon mailing, but the court displays conflicting dates. This is implying if filed electronically then received and filed efficiently, however if filing my mail, the received and filed on date is when the clerk of court physically scans Petitioner's documents, not the date of Certificate of Mailing by Notary Public. This declares contradiction as from N.D.R.Ct. 3.5(4), that a paper document does not have the same legal effect as electronic documents.

[¶102] Curtiss also contends that both state's attorney Nesvig and all appointed counsel filed under electronic means and that all materials needed for disposition on pending Post-Conviction Application were and are on electronic files. Only when Curtiss requested use of Discovery did the trial court 'loose' the trial transcripts. This is simply a mistake and Petitioner is being unfairly and seriously prejudiced due to this mistake.

[¶103] Curtiss submits that court did indeed have trial transcript 'provided' as the following N.D.C.C. provides.

Under N.D.C.C.§ 9-16-14(2)(a) an electronic record is sent when the record is addressed properly to an information processing system, Odyssey(R), and the recipient has designated for the purpose of receiving electronic records and ,especially, the recipient is able to retrieve the electronic record. Adding that under N.D.C.C. § 9-16-14(5) "An electronic record is received under subsection 2 even if no individual is aware of the record's receipt."

[¶104] For clarification on term definition as under N.D.C.C. § 9-16-01

(7) "Electronic record" means a record created, generated, sent, communicated, received, or stored by electronic means.

(11) "Information processing system" means an electronic system for creating, generating, and sending, receiving, storing, displaying, or processing information.

(12) "Record" means information that is inscribed on a tangible medium or which is stored in an electronic or other medium and is retrievable in a perceivable form.

[¶105] As under N.D.C.C. § 9-16-02 this chapter applies to an electronic record or electronic signature..., and N.D.C.C. § 9-16-03 this chapter applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored after July 31st, 2001. The court system has agreed to use Odyssey(R) for such electronic records as under N.D.R.Ct. 3.5. as abovementioned.

[¶106] N.D.C.C. § 9-16-06 declares a record may not be denied legal effect or enforceability solely because the record is in electronic form. Also N.D.C.C.9-16-07 declares when parties have agreed to conduct transmissions by electronic means and a law requires a person to provide writing to another person, that requirement is satisfied if the information is provided, sent, or delivered in an electronic record capable of retention by the recipient at the time of receipt. And finally adding N.D.C.C.9-16-12 declares evidence of a record in a proceeding may not be excluded solely because it is in electronic form.

[¶107] Curtiss declares that state did provide trial transcript to state court, as required by state being a party, through electronic means and through mistake or error the trial court has declared it was not provided the trial transcript.

[¶108] ("The touchstone of due process is the protection of the individual against arbitrary action of government") *Wolf v. McDonnell*, 418 US 539, 558, 94 S.Ct. 2963 (1974)

"Prison walls do not form a barrier separating prison inmate from the protection of the Constitution". *Turner v. Safley*, 482 US 78, 84, 107 S. Ct. 2254 (1987)

[¶109] It is arbitrary action of trial court to knowingly deny requested discovery in a method that violates substantial rights, to deny constitutional right violations claimed by Petitioner.

[¶110] So Petitioner prays this court acknowledges the facts on filing and gives merit and grants Petitioner relief as requested.

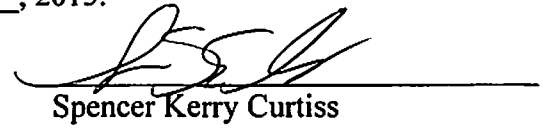
[¶111] CONCLUSION

[¶112] Petitioner declares that with all the disclosures of due diligence in presenting all actions to provide transcripts, Codes and Rules that support the fact that the trial court presiding over the Post-Conviction Application did have provide trial transcripts, combined with the substantiated proof that trial court rely on such provided trial transcripts and finally that Petitioner through all pleadings and responses did substantially declare and produce the differences between the actions and omissions on ineffective assistance of counsel with the prejudice produced through such.

[¶113] Petitioner has presented an insurmountable amount of argument that continues to go unacknowledged in the court that substantiates the claims of violation of: North Dakota Century Codes; North Dakota Rules of Civil Procedure; North Dakota Rules of Court; North Dakota Constitution art 1 §§ 1st, 3rd, 8th, 9th, and 12th, and Art. XIII;

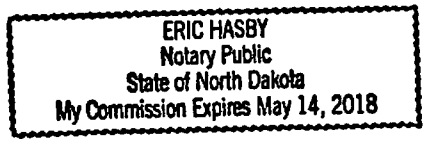
and United States Constitution Amendments 1st, 4th, 5th, 6th, and 14th. In the very ends of justice Petitioner does pray this court will acknowledge and review the argument presented and find favor and grant under N.D.R.App.P. 35 (a)(1)(3) a Reversal of the Order denying Post-Conviction application for relief and Remand to district court for a new trial with specific instructions declaring all issues not fully and fairly adjucated and thereby the issues not to be considered res judicata.

Honorably submitted this 30 day of December, 2015.

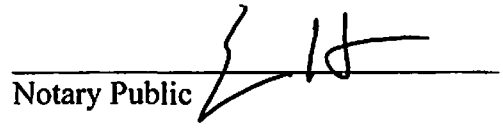


Spencer Kerry Curtiss
P.O.Box 5521
Bismarck, North Dakota 58506-5521

Subscribed and Sworn before me this 30 day of November, 2015.
In the county of Burleigh.



Notary Public



20150284

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IN THE OFFICE OF THE
CLERK OF SUPREME COURT

DEC 01 2015

STATE OF NORTH DAKOTA

CERTIFICATE OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF BURLEIGH)

The undersigned, being duly sworn under penalty of perjury, deposes and says: I'm over the age of eighteen years and on the 30 Day of November, 2015, 6 AM, I mailed the following:

Brief of Appellant - Supreme Court No. 20150284
Appendix of Appellant
Letter to Clerk of Supreme Court

By placing it/them in a prepaid envelope, and addressed as follows:

Office of Clerk
North Dakota Supreme Court
600 E. Boulevard Ave. Dept. 180
Bismarck, North Dakota 58505-5230

Tessa M. Vaagen
Burleigh County State's Attorney
514 E. Thayer Ave
Bismarck, North Dakota 58501

And depositing said envelope in the Mail, at the NDSP, P.O.Box 5521, Bismarck, North Dakota 58506-5521.

AFFIANT

P.O.Box 5521
Bismarck, North Dakota 58506-5521

Subscribed and Sworn to before me this 30 day of November, 2015

In the County of Burleigh.

ERIC HASBY
Notary Public
State of North Dakota
My Commission Expires May 14, 2018

Notary Public