

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

JAN 11 2016

Spencer K. Curtiss, )  
 )  
 Petitioner-Appellant )  
 )  
 v. )  
 )  
 State of North Dakota, )  
 )  
 Respondent-Appellee. )  
 \_\_\_\_\_ )

STATE OF NORTH DAKOTA

Supreme Court No. 20150284  
District Court No. 08-2012-CV-01810

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**REPLY BRIEF OF APPELLANT**

**APPEAL FROM AN ORDER DENYING PETITIONER'S REQUEST**

**FOR RELIEF FROM AN ORDER, AUGUST 19<sup>TH</sup>, 2015**

**AND**

**ORDER ON MOTION FOR RECONSIDERATION, OCTOBER 6<sup>TH</sup>, 2015**

Burleigh County District Court

South Central Judicial District

The Honorable David E. Reich, Presiding

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



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Spencer Kerry Curtiss, Appellant, pro se, does hereby honorably submit this Reply Brief in response to Brief of Appellee.

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

[¶2] Curtiss contends that state is mistaken on statements made in brief as trial transcript was and is on the files of the court.

[¶3] “An obvious error or defect that affects substantial rights may be considered even though it was not brought to the court’s attention.” N.D.R.CrimP. 52(b). “This rule applies to both the trial courts and appellate courts.” N.D.R.Crim.P 52(a), explanatory note.

[¶4] According to Administrative Order 19 Scanned documents

A) 1) Documents that could have been e-filed but that are submitted instead on paper will be scanned and an electronic copy of the document will be made part of the case file.

G) Effective date March 17, 2011

[¶5] So in all intent and purpose the discovery process declared to have been completed by assistant state’s attorney Nesvig and would have been e-mailed to all parties; and this action would have been implied to have occurred as Nesvig makes several citations to and directly instructs the court to review the trial transcript in post-conviction evidentiary hearing.

[¶6] Curtiss presents that on Case Summary [Ex 3, pg.8] (Index # 84) Request for transcript, and to challenge the statement made in Appellee brief [¶ 14] “None of the 127

entries on the Case Summary for 08-2012-CV-1810 contain a transcript of the jury trial, and none of them are labeled as such”; there is in fact language of such.

[¶6] Curtiss here also wishes to enumerate the numerous requests to have this documentation directly in play in this litigation displaying a particularized need, necessity, and justification of such. [Ex. 3, pgs. 3-11] (Index #'s 8, 9, 10, 11, 21, 22, 24, 25, 42, 50, 53, 56, 57, and 58)

[¶7] To simply direct and click a mouse on a computer screen is not an assisted search of the record for evidence to support a litigation position.

[¶8] In determining whether a prima facie case has been established, the district court must accept the truth of the moving party’s allegations; in *Curtiss* the district court determined an evidentiary hearing was necessary from review of post-conviction application. The petition presented competent evidence and was entitled to evidentiary hearing to fully present that evidence. Only due to current litigation are we here to fully develop the evidence presenting ineffective assistance of counsel and due process violations.

[¶9] The Court has stated in *Addington v. Texas*, 441 US 418, 60 L. Ed. 2d 323, 99 S.Ct. 1804 (1974), that “In our opinion, the same concepts and ideologies apply to procedures and due process which, in many instances, are inseparable.”

[¶10] With regard to proper procedure and due process we must give full credit to the discovery process, which is where this important document falls, which requires all parties to be served, and in which the state is a party. And to violate a discovery process is to violate Curtiss’ due process of law in liberty interest.

[¶11] With the continued argument by the state and standing that no mistake was made it should also be mentioned that with the declaration of “no provision of transcript” would present Nesvig would have failed to properly to serve all parties discovery and/or the clerk of court failed to properly acknowledge the documentation and with that is harmful err and continues to require reversal and remand to district court for further review.

[¶12] The discovery process in this proceeding must have occurred in a manner which the parties, that being *Curtiss*’ attorney and Assistant state’s attorney, have agreed. This is due to fact no orders ever filed on discovery motions or requests. And the disclosure of discovery was declared completed by state’s attorney Nesvig with no stipulation or claim under N.D.R.Civ.P. 26(b) (5) Information withheld or any other claim that trial transcripts were not supplied in discovery process.

[¶13] The duties of state’s attorney Nesvig to provide all parties discovery is provided under previous presentation in brief (see ¶ 35, 92) and is a ministerial duty.

[¶14] A ministerial duty is a simple and definite duty imposed by law, arising under condition admitted or proved to exist, and regarding which nothing is left to discretion. 46 CJ 136.

[¶15] See *State v. Ruth*, 9 SD 84, 68 N.W. 189, wherein it was held that “ an officer who, without legal excuse, fails to perform a ministerial duty, is liable for the proximate results of his failure to any person to whom he owes performance of such duty.”

[¶16] So upon all the intent and diligence, requests and reply, to have this particular documentation included in the files of the court, it can only be a mistake by a party other than the Petitioner; thereby by the severe injustice of it not being available is harmful error.

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

[¶ 18] The state concedes with “it is clear the district court did not rely on the trial transcript in its order,” thereby admits to not relying upon crucial, necessary evidence to make a judgment.

[¶ 19] See USC Title 28 § 1746; Curtiss’ post-conviction application/affidavit meets the verification requirement of 28 USCS § 1746 and therefore must be considered truth and must be addressed before and dismissal of case.

[¶ 20] “For the proposition that under certain circumstances a verified application for post-conviction relief, like an affidavit, can be considered as evidence or other comparable means capable of opposing summary disposition.” *First Nat’l Bank of Hettinger v. Clark*, 332 N.W. 2d 264, 267 (ND 1983)

[¶ 21] See also N.D.C.C. § 1-01-42 Verified  
Verified means sworn to before an officer authorized to administer oaths.

[¶ 22] Under 28 USCS § 1746, documents signed and dated under penalty of perjury are treated as verified. *Burgess v. Moore*, (1994 CA8 Mo) 39 F.3d 216.

[¶ 23] However the court did not rely or use the verified “Application” for decision, as the “Application” itself qualifies as evidence or “other comparable means” capable of creating material factual issues; and with not relying upon any evidence presented by Petitioner is due process violation.

[¶ 24] Upon review of *Swearingen v. State*, 2013 ND 125, ¶ 18, 833 N.W.2d 532, Curtiss presents that this Court stated “We reverse and remand for the court to provide more adequate findings on the issues raise as well as to provide a transcript of the post-conviction evidentiary hearing so that we may adequately review ineffective assistance of counsel and the waiver of a jury trial;” and as such confirms the similar remedy that is

requested in this appeal. There being the difference that Curtiss already had transcript in his case, but the issue of necessity of transcript for adequate findings on issue of ineffective assistance of counsel.

[¶25] In review of *Owens v. State*, 1998 ND 106, ¶ 40,

“The existing record in the underlying criminal case is usually essential to deciding application for post conviction relief, and pro se applicants as well as attorneys may be unsure whether the record is in the court files. We suggest clerks of court devise a method so the underlying record in the criminal proceeding automatically becomes part of the record in a post-conviction relief challenging those criminal proceedings.”

[¶26] The Court therefore implies in *Owens* that there should be an automatic filing for post-conviction applications and to be noted Petitioner’s attorney during the post-conviction appeal process stated that the trial transcript was automatically filed in this case.

[¶27] Curtiss argues against the statement “Curtiss cites no authority to support his contentions that it was the district court’s duty to locate the trial transcripts.”

[¶28] Accordingly under N.D.Adminstrative Rule 46 Section 2:

Clerk of District Court – Duties

A) Take charge of all papers and records filed or deposited in the clerk of district court office and maintain and dispose of the papers and records in accordance with N.D.Sup.Ct. Admin.R.19.

E) Issue all process and notices required to be issued by the district court.

H) Keep in the office a register of civil, criminal, and juvenile actions in which the clerk shall enter the title of each action with brief notes of all papers filed in the action together with the date of the filing, and enter such other matters as required by the Supreme Court rule.

K) Keep other records and perform other duties prescribed by statute, rule, policy, or procedure.

Adopted March 12<sup>th</sup>, 2001, with effective date of April 1<sup>st</sup>, 2001.

Amendments adopted effective May 4<sup>th</sup>, 2005.

[¶29] Curtiss makes notice that above-mentioned administrative rule was in effect previous to requirement of changes to N.D.R.Ct. 3.5, N.D.R.Civ.P. 5, N.D.C.C. 9-16, involving the required use of the information processing system, Odyssey(R) and as such

the language is outdated. To be of notice, as this claim of where is the trial transcript, it is simply on some digital storage device, computer file system, to be simply cut and pasted to another position.

[¶30] Accordingly N.D.C.C. § 11-16-01 Duties of the State's Attorney

- 1) Attend the district court and conduct on behalf of the state all prosecution for public offenses.
- 5) Defend all suits brought against the state or against the county.
- 10) Keep a register of all official business in which must be entered a note of each action, whether civil or criminal, prosecuted officially, and of the proceedings therein.

[¶31] It was the assistant state's attorney duty to serve requested discovery upon all parties, and the duty of Clerk of District Court to file/ move electronically stored files from one case file to another. It is also the duty of the Judge to have his staff properly prepare all documents and files for his use, (see N.D.R.Judicial Conduct 2.5 commentary 2.)

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

[¶33] Regulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid. *Procurier v. Martinez*, 416 US 396, 419, 94 S. Ct. 1800 (1974)

[¶34] Curtiss' reply brief did not change the court's decision because the court will not disturb the finality of judgment after the fact of making it, and to constantly be obstructed to only supply responses after short filing dates is harmful error. With all the obstacles to overcome timing is much hedged against the pro se, prisoner, especially with having to type, print, notarize and send and receive by U.S. postal mail versus all other litigants that must use electronic, instant filing. Petitioner had no time to file a leave of court to serve paper documents in this case. This is a violation of U.S. Const. Amend. I:

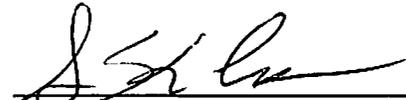
Congress shall make no law ... abridging the freedom... to petition the Government for a redress of grievances.

[¶35] In *Heinrich ex. Rel. Heinrich v. Sweet*, 62 F.Supp. 2d 282, 315 (D.Mass 1999), it states “ that the right of court access is violated when government officials wrongfully and intentionally conceal information crucial to judicial redress, do so in order to frustrate the right, and substantially reduce the likelihood of obtaining redress”

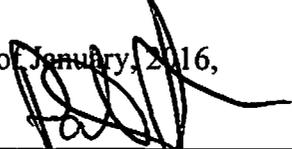
Conclusion

[¶36] Appellate prays the Orders be reversed and remanded to district court for more adequate findings on the issues raised so that district court may adequately review ineffective assistance of counsel and hearing issues and hence then grant Petitioner’s remedy as requested in post-conviction application for relief.

Dated this 2 day of January, 2016.

  
\_\_\_\_\_  
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Subscribed and sworn before me this 7<sup>th</sup> day of January, 2016,  
In the county of Burleigh.

  
\_\_\_\_\_  
Notary Public

PATRICK SCHATZ  
Notary Public  
State of North Dakota  
My Commission Expires January 1, 2021