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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Allen Ratliff,)
Petitioner and Appellant,) Supreme Court No. 20150330
vs.)
State of North Dakota,) Civil No. 18-2014-CV-01482
Respondent and Appellee.)

STATE OF NORTH DAKOTA

SUPPLEMENTAL RULE 24 BRIEF-APPELLANT ALLEN RATLIFF

Appeal from Order Entered on October 21, 2015
In District Court, Grand Forks, State of North Dakota
The Honorable Debbie Kleven



Allen Ratliff
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TABLE OF CONTENTS

page/paragraph

TABLE OF CONTENTS.....	P. i
TABLE OF AUTHORITIES.....	P. ii
STATEMENT OF SUPPLEMENTAL ISSUES.....	¶ 1
STATEMENT OF THE CASE.....	¶ 9
STATEMENT OF FACTS.....	¶ 11
JURISDICTION.....	¶ 17
LAW AND ARGUMENT.....	¶ 19
CONCLUSION.....	¶ 53

TABLE OF AUTHORITIES

paragraph #

STATE CASES:

State v. Ratliff, 2014 ND 156,849 N.W.2d 183.....¶ 8

State v. Burkes, 2000 ND 24,606 N.W.2d 108.....¶ 35

NORTH DAKOTA CONSTITUTION:

Article I, Section 12.....¶ 48

NORTH DAKOTA RULES APPELLATE PROCEDURE:

N.D.R.App. P. 24.....¶ 18

NORTH DAKOTA RULES PROFESSIONAL CONDUCT:

N.D.R. Prof. C. 1.1.....¶ 34

N.D.R. Prof. C. 1.3.....¶ 34

N.D.R. Prof. C. 1.4.....¶ 34

UNITED STATES SUPREME COURT CASES:

Strickland v. Washington, 466 U.S. 668,687-88,
694,109.....¶ 23,35

Roe v. Flores-Ortega, 528 U.S. 420,483,120
S.Ct. 1029,145 L.Ed.2d 985 (2000).....¶ 23,40

United States v. Cronin, 466 U.S. 648,104 S.Ct.
2039, 80 L.Ed.2d 657 (1984).....¶ 23,40

Arizona v. Fulminate, 499 U.S. 278,111 S.Ct.
1246, 113 L.Ed.2d 302 (1991).....¶ 24-25

Nader v. United States, 527 U.S. 1,7-9,119 S.Ct.
1827,144 L.Ed.2d 35 (1999).....¶ 24

Gideon v. Wainwright, 372 U.S. 335,83 S.Ct.
729,9 L.Ed.2d 799 (1963).....¶ 25

Berger v. U.S., 295 U.S. 78,88 (1935).....¶ 48

TABLE OF AUTHORITIES cont.

paragraph #

Brady v. Maryland, 373 U.S. 83,87 (1963).....¶ 51

United States v. Bagley, 473 U.S. 667,682 (1985)....¶ 51

EIGHTH CIRCUIT COURT CASES:

Watson v. United States, 463 F.3d 960,963
(8th Cir. 2007).....¶ 23

U.S. v. Donnell, 596 F.3d 913,923 (8th Cir. 2010)...¶ 29

Thomas v. Lockhart, 738 F.2d 304 (8th Cir. 1984)....¶ 36

Wade v. Armontrout, 798 F.2d 304 (8th Cir. 1988)....¶ 36

Grooms v. Solem, 923 F.2d 88,90 (8th Cir. 1991)....¶ 36

Freeman v. Class, 95 F.3d 639 (8th Cir. 1996).....¶ 43

THIRD CIRCUIT COURT CASE:

Everett v. Beard, 290 F.3d 500,513-14
(3rd Cir. 2002).....¶ 43

FIFTH CIRCUIT COURT CASE:

Nealy v. Cabana, 764 F.2d 1173,1177
(5th Cir. 1985).....¶ 36

SIXTH CIRCUIT COURT CASE:

Rickman v. Bell, 131 F.3d 1150,1157
(6th Cir. 1997).....¶ 30

ELEVENTH CIRCUIT COURT CASE:

Thomas v. Dugger, 848 F.2d 149
(11th Cir. 1988).....¶ 31

UNITED STATES CONSTITUTION:

Fourth Amendment.....¶ 50

Sixth Amendment.....¶¶ 48,50,52

Fourteenth Amendment.....¶¶ 48,51,52

[¶1] STATEMENT OF SUPPLEMENTAL ISSUES

[¶2] SUPPLEMENTAL ISSUE #1: Whether the district court erred in denying Petitioner/Appellant ("Appellant") post-conviction relief when trial counsel failed to investigate or call alibi witness, whom placed Appellant over 100 miles away minutes prior to the alleged crime?

[¶3] SUPPLEMENTAL ISSUE #2: Whether the district court erred in denying Appellant post-conviction relief when trial counsel failed to file a motion to sever and further failed to oppose the State's Motion for joinder?

[¶4] SUPPLEMENTAL ISSUE #3: Whether the district court erred in denying Appellant post-conviction relief when trial counsel was unaware if the private investigator was hired to investigate Appellant's claim(s)?

[¶5] SUPPLEMENTAL ISSUE #4: Whether the district court erred in denying Appellant post-conviction relief when trial counsel was not prepared for the arguments concerning the motion for new trial?

[¶6] SUPPLEMENTAL ISSUE #5: Whether the district court erred when it ruled Appellant waived the ground the trial counsel failed to object to jury instruction of definition of "dangerous weapon"?

[¶7] SUPPLEMENTAL ISSUE #6: Whether the district court erred in denying Appellant post-conviction relief when the prosecuting authority promised not to file a notice of habitual offender status if Appellant and co-defendants waived the preliminary hearing, and then filed the notice after the Appellant and co-defendants had waived the preliminary hearing?

[¶8] SUPPLEMENTAL ISSUE #7: Appellant requests this Court to rule on his Federal Claim(s) concerning previously "fully and finally" determined and affirmed issues, specifically the issues of: (1) the unconstitutional search and seizure; (2) the failure of the prosecution to disclose evidence; and (3) the motion for new trial, which were addressed in State v. Ratliff, 2014 ND 156,849 N.W.2d 183.

[¶9] STATEMENT OF THE CASE

[¶10] Appellant does agree with the statement of the Case in the Brief of Petitioner/Appellant Allen Ratliff, which was filed by and through appointed counsel Laura C. Ringsak.

[¶11] STATEMENT OF FACTS

[¶12] Appellant does agree with the Statement of facts in the Brief of Petitioner/Appellant Allen Ratliff, which was filed by and through appointed counsel Laura C. Ringsak, but Appellant would add the following facts:

[¶13] That Appellant informed trial attorney David Ogren ("trial counsel"), "right in the beginning", during the first conversation, that trial counsel, "needs to send somebody out to Fargo to my sister's and get the facts right on this whole situation...". (See, Transcript of Post-Conviction Relief Hearing, (Tr. P-C. H.") p.7, lns. 21-25; p.8, ln. 1).

[¶14] That Appellant further explained to trial counsel at this first meeting why Appellant was at Nadine Garcia's home in Fargo in the early morning hours minutes prior to when the alleged criminal offenses were to have occurred, and how Ms. Garcia would fit into the alibi defense. (See, Tr. P-C. H., p.8, lins. 1-21)

[¶15] That after speaking with trial counsel, Appellant contacted Nadine Garcia and informed Ms. Garcia that there was going to be a private investigator that would contact her, and in-fact Ms. Garcia testified at the post-conviction relief hearing just to these stated facts. (See, Tr. P-C. H., p. 34, lns. 10-25; p. 35, lns. 1-4).

[¶16] That Appellant was made aware that a private investigator was hired by one of the co-counsel's and trial counsel informed Appellant that the private investigator would speak with Ms. Garcia. (See, Tr. P-C. H., p. 14, lns. 20-24). Further, Appellant spoke with co-counsel David Dusek who was handling the private investigator situation, and was again informed that, "they were sending a private investigator out". (See, Tr. P-C. H., p. 14, ln. 25; p. 15, lns. 1-13).

[¶17] JURISDICTION

[¶18] Appellant serves and files this pro se Supplemental Rule 24 Brief, pursuant to N.D.R. App. P. Rule 24.

[¶19] LAW AND ARGUMENT

[¶20] ISSUE #1: The district court erred in denying Appellant post-conviction relief when trial counsel failed to investigate or call alibi witness, whom placed Appellant over 100 miles away minutes prior to the alleged crime.

[¶21] The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense".

[¶22] The failure of trial counsel to investigate or even to speak with Appellant's alibi witness, or to have the private investigator investigate or even speak with Appellant's alibi witness, Nadine Garcia, who would have placed Appellant over 100 miles away when the alleged crime was to occur, amounts to the denial of counsel's assistance at a critical stage of the judicial proceeding.

[¶23] Generally Appellant must establish (1) that counsel's performance "fell below an objective standard of reasonableness" and (2) that he suffered prejudice as a result. (Strickland v. Washington, 466 U.S. 668, 687-88, 694, 109 S.Ct. 2052, 80 L.Ed.2d (1984)), when presenting a claim of ineffective assistance of counsel. But in the present matter trial counsel's failure to file a notice of alibi witness and failure to conduct any relevant research into whether Appellant was at Nadine Garcia's home in Fargo, North Dakota when the crime was to have occurred in Grand Forks, North Dakota, or have private investigator Darren Messmer investigate and determine how Ms. Garcia would fit into the alibi defense, satisfies the deficient-performance

prong of Strickland because it was "professionally unreasonable". (Watson v. United States, 493 F.3d 960, 963 (8th Cir. 2007) (quoting Roe v. Flores-Ortega, 528 U.S. 470, 483, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000)). And no showing of prejudice should be required in this unique circumstance, because of trial counsel's failure to investigate and proffer an alibi defense at the pre-trial hearing(s) or at the trial. This failure by trial counsel amounts to the denial of counsel's assistance at a critical stage of the judicial proceeding. (United States v. Cronic, 466 U.S. 648, 659, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984)). Appellant was constructively denied counsel's assistance, and because of this denial, "the adversary process itself was presumptively unreliable". (Flores-Ortega, 528 U.S. at 483) (quoting Cronic, 466 U.S. at 659). Therefore a showing on the second prong of Strickland is not required, instead prejudice is presumed.

[¶24] Constitutional errors have been divided into two classes. (Arizona v. Fulminate, 499 U.S. 278, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). The First the United States Supreme Court called "trial error" because the error(s) "occurred during presentation of the case to the jury" and their effect may "be quantitatively assessed in the context of other evidence presented in order to determine whether they were harmless beyond a reasonable doubt."

(Fulminate, at 307-308). These include "most constitutional error(s)" the United States Supreme Court has called "structural defects". These "defy analysis" by "harmless-error standards" because the effect the framework which the trial proceeds, "and are not" simply an error in the trial process itself. (Fulminate, at 309-310; see also, <*pg. 420> Nader v. United States, 527 U.S. 1, 7-9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). Such is the case in the present matter, because trial counsel's failure to investigate or have private investigator Darren Messmer investigate and determine how Ms. Garcia would fit into the alibi defense was professionally unreasonable and this failure was so likely to prejudice Appellant that it amounts to the denial of counsel's assistance at a critical stage of the judicial proceeding, because had trial counsel presented Ms. Garcia's testimony to the jury no reasonable juror would have found Appellant guilty beyond a reasonable doubt.

[¶25] This error by trial counsel defy analysis by the harmless-error standards and require the automatic reversal of Appellant's conviction, because this constitutional error, which is a structural defect in the constitution of the criminal trial Mechanism infected the entire trial process. (See, Appeal §1535, reversible error-right to counsel; Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 729, 9 L.Ed.2d 799 (1963); Arizona v. Fulminante, 499 U.S. 279, 113 L.Ed.2d 302, 111 S.Ct. 1246 (1991)).

[¶26] ISSUE #2: The district court erred in denying Appellant post-conviction relief when trial counsel failed to file a Motion for joinder and further failed to oppose the State's Motion for joinder.

[¶27] At the post-conviction relief hearing, trial counsel testified during Cross Examination by Appellant's post-conviction Kent M. Morrow to the following facts:

Q. Just to clarify for the record, you did not make a motion to sever?

A. No, I did not.

Q. And you did not oppose the State's Motion for joinder?

A. No, I don't believe I did, ...

(See, Tr. P.C.H. p. 58 at lns. 5-12).

[¶28] Trial counsel's failure to oppose the State's Motion for joinder or to file a Motion for severance was ineffective assistance, because had trial counsel opposed the State's Motion for joinder or filed a Motion for severance and received a separate trial whereby Ms. Garcia testified as to Appellant's whereabouts prior to the alleged crime, no reasonable juror would have found Appellant guilty beyond a reasonable doubt.

[¶29] The transference of the evidence from the co-defendants caused substantial prejudice to Appellant, because there was no evidence linking Appellant to the alleged crime. (U.S. v. Donnell, 596 F.3d 913, 923 (8th Cir. 2010)).

[¶30] Trial counsel's failure to file a motion for severance or prepare in order to oppose the State's Motion for joinder amounts to a "total failure to advocate [Appellant's] cause". (Rickman v. Bell, 131 F.3d 1150, 1157 (6th Cir. 1997)). Trial counsel was ineffective for failing to move for severance. (Thomas v. Dugger, 848 F.2d 149 (11th Cir. 1988)).

[¶31] **ISSUE #3:** the district court erred in denying Appellant post-conviction relief when trial counsel was unaware if the private investigator was hired to investigate Appellant's claim.

[¶32] Trial counsel testified at the post-conviction relief hearing during Cross Examination by Appellant's post-conviction counsel Kent M. Morrow that trial counsel did not personally hire a private investigator, and that he did not know if the co-defendant's attorneys ever did. (emphasis added) (Tr.P.C.H. p.59, lns. 20-25; p. 60, lns. 1-5). But later in his testimony trial counsel states that he was aware attorney Gretchen Handy had hired private investigator Darren Messmer. (Tr.P.C.H. p. 60, lns 6-12).

[¶33] There is no question trial counsel's testimony here is misleading at best, first trial counsel testifies that, he does not know if the co-defendant's attorney's hired a private investigator, then he testifies, which attorney, why and when the private investigator was hired. (Tr.P.C.H

p. 59, lns. 20-25; p. 60, lns. 1-5 and p. 60, lns. 6-12, respectively).

[¶34] Clearly trial counsel failed in his duties to represent Appellant with his skill, thoroughness, preparation, competence, diligence and with proper communication with Appellant and co-defendant's attorneys, as is required of a reasonable attorney and the prevailing professional norms, pursuant to Rule (1.1), (1.3) and (1.4) North Dakota Rules of Professional Conduct, and to make matters worse trial counsel attempted to cover-up his errors by misleading and inconsistent testimony at the post-conviction hearing.

[¶35] Had trial counsel requested Mr. Messmer to investigate Ms. Garcia's alibi statement(s), and the jury would have heard Ms. Garcia's testimony concerning Appellant's whereabouts the early morning hours of the alleged crime day, there is more than a reasonable probability that the outcome would have been different, but for these unprofessional errors. (State v. Burke, 2000 ND 24, ¶36, 606 N.W.2d 108; Strickland v. Washington).

[¶36] Trial counsel failure to investigate alibi witness Nadine Garcia and not presenting any alibi evidence at trial was ineffective assistance. (Thomas v. Lockhart, 738 F.2d 304 (8th Cir. 1984); Wade v. Armontrout, 798 F.2d 304

(8th Cir. 1986); Nealy v. Cabana, 764 F.2d 1173, 1177 (5th Cir. 1985). It was unreasonable not to make some effort to contact Ms. Garcia to ascertain whether her testimony would aid the defense. (Grooms v. Solem, 923 F.2d 88, 90 (8th Cir. 1991)).

[¶37] ISSUE #4: the district court erred in denying Appellant post-conviction relief when trial counsel was not prepared for the arguments concerning the Motion for new trial.

[¶38] At the post-conviction relief hearing, trial counsel testified during Cross Examination by Appellant's post-conviction counsel Kent. M. Morrow that, it would have been nice to have had some case law "onpoint here in North Dakota" along the electronic lines concerning a video tape or audio tape. (Tr.P.C.H. p. 61, lns. 19-25, p. 62, lns 1-2). Further, trial counsel testified that, "there's nothing of of that factual pattern here in North Dakota yet". (Tr.P.C.H. p. 62, lns. 2-3). And trial counsel further testified that the case law cited in their brief was "a little bit of a different case" and basically was not the correct case law, because this was the "first time that fact pattern had come up". (Tr.P.C.H. p. 62, lns. 4-25).

[¶39] During the Motion for new trial, the Court wanted some case law. (Tr.P.C.H. p. 61, lns. 19-21). Trial counsel at the post-conviction relief hearing testified that

there's nothing of the underlying factual pattern in North Dakota case law. (Tr.P.C.H. p. 61, lns. 23-25; p. 62, lns. 1-5).

[¶40] Trial counsel's failure to look to other States or to the Federal Courts for direction and appropriate case law in presenting the Motion for new trial was especially appalling and created a situation whereby trial counsel failed to conduct any meaningful adversarial challenge and was ineffective, and amounts to the denial of counsel's assistance at a critical stage of the judicial proceeding. (United States v. Cronic). And "the adversary process itself was presumptively unreliable" during the Motion for new trial process. (Flores-Ortega, 528 U.S. at 483) (quoting Cronic, 466 U.S. at 659).

[¶41] **ISSUE #5:** The district court erred when it ruled Appellant waived the ground the trial counsel failed to object to jury instruction of definition of "dangerous weapon".

[¶42] This issue stands on its own statement, trial counsel failed to object to jury instruction of definition of "dangerous weapon" it was presented in the Amended Application For Post-Conviction Relief and argued at the post-conviction hearing. (Tr.P.C.H. p. 69, lns. 23-25; p. 70, lns 1-14).

[¶43] Trial counsel failure to object to the jury instruction of definition of dangerous

of definition of "dangerous weapon" which in-fact was not a billy club, a blackjack or bludgeen (small club). Had trial counsel prepared and had knowledge of the applicable law concerning "dangerous weapons" as defined as a club, trial counsel would have objected to jury instructions of definition of "dangerous weapon". Trial counsel's failure to object was due to "lack of knowledge of applicable law". (Everett v. Beard, 290 F.3d 500, 513-14 (3rd Cir. 2002); Freeman v. Class, 95 F.3d (8th Cir. 1996)).

[¶44] ISSUE #6: the district court erred in denying Appellant post-conviction relief when the prosecuting authority promised not to file a notice of habitual offender status if Appellant and co-defendants waived the preliminary hearing, and then filed the notice after Appellant and co-defendants had waived the preliminary hearing.

[¶45] The Prosecuting Authority, Thomas Falck, promised not to file a notice of habitual offender status, if Appellant and his co-defendants would waive the Preliminary Hearing, which each finally did.

[¶46] Trial counsel testified at the post-conviction relief hearing that there was a conversation(s) in one of the conference rooms with all three of the defendants, all three of their attorneys, and Mr. Falck as well. (Tr.P.C.H. p. 57, lns. 10-18). Trial counsel further testified that Mr. Falck was telling the group in the conference room that, if you waive the preliminary hearing the State won't file the

habitual offender notice. (Tr.P.C.H. p. 57, lns 19-25).

[¶47] Appellant and his co-defendants all waived their right to the preliminary hearing on Mr. Falck's promise and trial counsel's advise. Later in the proceeding Mr. Falck filed the notice of habitual offender status and Appellant was sentenced as a habitual offender.

[¶48] This was a planned and deliberate material misstatement intended to deny Appellant his right to a preliminary hearing. This misconduct by Mr. Falck denied Appellant of due process of law under the Sixth and Fourteenth Amendments of the United States constitution and even greater protection under Article I, Section 12, of the North Dakota Constitution, and helped produce an improper conviction. (Berger v. U.S. 295, U.S. 78, 88 (1935)).

[¶49] **ISSUE #7:** Appellant requests this Court to rule on his **Federal Claim(s)** concerning previously "fully and finally" determined and affirmed issues, specifically the issues of: (1) the unconstitutional search and seizure; and (2) the failure of the prosecution to disclose evidence; and (3) the Motion for new trial, 2014 ND 156, 849 N.W.2d 183.

[¶50] The unconstitutional search and seizure was in violation of Appellant's Fourth and Sixth Amendments to the United States Constitution.

[¶51] The failure of the prosecution to disclose evidence

was in violation of Brady v. Maryland, 373 U.S. 83,87 (1963) and United States v. Bagley, 473 U.S. 667, 682 (1985) and a due process violation. (Fourteenth Amendment).

[¶52] The Motion for new trial is argued and outlined in ¶4 above, was in violation of Appellant's Sixth and Fourteenth Amendments to the United States Constitution.

[¶53] CONCLUSION

[¶54] Alibi witness Nadine Garcia is Appellant's Sister, Ms. Garcia testifies that she only saw Appellant and not her other brother Nathan Ratliff, who is a co-defendant in this matter. (Tr. P.C.H. p. 39, lns 16-24). The fact that Ms. Garcia only testified that She saw Appellant in person and not her brother Nathan Ratliff, really goes towards the credibility of her testimony at the post-conviction relief hearing.

[¶55] The reasonable probability of trial counsel error(s) are outlined above and in the other pleadings, transcripts and the record.

[¶56] Appellant respectfully requests that this Court reverse and remand or for any further relief this Court would deem just and equitable.

[§57] Dated this ²¹00 day of April, 2016.

Allen Ratliff
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STATE OF NORTH DAKOTA

Allen Ratliff,)
Petitioner and Appellant,) Supreme Court No. 20150330
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Respondent and Appellee.)

CERTIFICATE OF SERVICE

[¶1] I hereby certify that I served, by United States Mail (Prison Mail Box System) a true and accurate copy of the SUPPLEMENTAL RULE 24 BRIEF-APPELLANT ALLEN RATLIFF on the following parties:

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Grand Forks, ND 58206-5607

Laura C. Ringsak
Attorney at Law
103 South 3rd Street, Suite 6
Bismarck, ND 58501

[¶2] Dated this 21 day of April, 2016.



Allen Ratliff

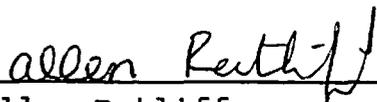
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Petitioner and Appellant,) Supreme Court No. 20150330
vs.)
State of North Dakota,) Civil No. 18-2014-CV-01482
Respondant and Appellee.)

CERTIFICATE OF NON-COMPLIANCE

[¶1] I hereby certify that I am unable to serve and file the enclosed **SUPPLEMENTAL RULE 24 BRIEF-APPELLANT ALLEN RATLIFF** by electronic means and am unable to prepare such in "wordperfect" or "word" format, because I am incarcerated at the James River Correctional Center at Jamestown, North Dakota, and the Correctional Center does not allow electronic filing and the Law Library at the Correctional Center only has typewriters for Inmates to use.

[¶2] Dated this 21 ~~00~~ day of April, 2016.



Allen Ratliff
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