20160025

STATE OF NORTH DAKOTA | IN DISTRICT COURT

COUNTY OF CASS | EAST CENTRAL JUDICIAL DISTRICT

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAR 28 2016
STATE OF NORTH DAKOTA

Damon White Bird,
Petitioner,

Vs.

State of North Dakota,
Respondent.

File No. 09-2015-CV-1767

BRIEF INSUPPORT OF APPEAL OF ORDER FROM DISTRICT COURT DENYING POST CONVICTION RELIEF

.....

STATEMENT OF ISSUES AND DESIGNATION OF CONTENTS OF APPENDIX-STATE

NOW COMES the Defendant-Appellant, Damon J. WhiteBird (Solgado), Pro Se, and pursuant to N.D.R.App.P.35, respectfully designates the following issues which he intends to present to this Honorable Court for the full review of all matters for appealability, and the contents of the appendix:

STATEMENT OF ISSUES

1. Whether the district court abused its discretion when it denied petitioners application for post conviction relief when it applied the Strickland standard.

2. Whether appellate counsel was rendered constitutionally ineffective on direct appeal when it argued petitioners competency to waive trial counsel, with an incompetent summation of facts.

3. Whether appellate counsel was rendered constitutionally ineffective on direct appeal when it failed to argue that his client was prejudicially denied his 6th amendment const. right to having competent trial defense representation, when trial counsel failed to file any motions and failed to raise any issues.

4. Whether appellate counsel was rendered constitutionally ineffective on direct appeal when it failed to argue that his client did not knowingly and intelligently waive the right to trial counsel, prior to proceeding pro se, [including whether trial court erred

in denying petitioner's repeated requests for new court appointed trial defense counsel].

5. Whether appellate counsel was rendered constitutionally ineffective on direct appeal when it failed to argue that his client did not knowingly and intelligently waive the right to trial counsel, as such waiver was obtained by trial counsel's connivance with the prosecution.

6. Whether appellate counsel was rendered constitutionally ineffective on direct appeal when it argued evidentiary issues with an incompetent summation of facts.

7. Whether appellate counsel was rendered constitutionally ineffective on direct appeal when it failed to argue that Petitioners convictions all counts must be reversed on due process grounds when state witness Nicolle J. Koehler knowingly provided false witness testimony [on behalf of the state] while testifying at petitioner's jury trial.

8. Whether appellate counsel was rendered constitutionally ineffective on direct appeal when it failed to argue insufficiency of evidence to convict petitioner.

9. Whether appellate counsel was rendered constitutionally ineffective on direct appeal when it failed to argue prosecutorial misconduct in the opening, closing, and rebuttal arguments/statements made to jury at trial, [including whether the state failed to prove matters/crimes charged].

10. Whether appellate counsel was rendered constitutionally ineffective on direct appeal when it failed to argue whether trial court erred in denying petitioners Rule 29 motion for acquittal on the grounds of insufficient evidence.

11. Whether appellate counsel was rendered constitutionally ineffective on direct appeal when it failed to argue all issues petitioner communicated his [petitioner] desire for appellate counsel to raise, brief, and effectively argue on direct appeal, [including on any reply brief or any other motion that could have been filed by appellate counsel].

12. Whether appellate counsel could have secured any and all proper/exclusive relief/remedy[s] available to petitioner on direct appeal.

13. Whether district court erred in limiting petitioner's issues to that of whether appellate counsel was constitutionally ineffective on direct appeal, at petitioner's evidentiary hearing December 18th 2015.

14. Whether district court erred in failing to consider that both appellate counsel and prosecution admitted knowledge that petitioner's Rule 29 motion to acquit on grounds of insufficient evidence was not frivolous, at petitioner's evidentiary hearing December 18th 2015.

15. Whether the Defendant-Appellant suffered manifest injustice, and was prejudiced by the cumulative weight to the foregoing errors.

STATEMENT OF FACTS

1. On December 18th, 2015, District Court abused its discretion when it erred in section 2 of its Order denying Petitioners application for post conviction relief and Order for judgment, when it ruled that "the Strickland standard should be applied" to the issue that "it has not been definitively announced that there is a constitutional right to effective assistance of counsel at the appellate level".

2. Appellate Counsel, Monty G. Mertz, was rendered constitutionally ineffective on Direct appeal when he chose to argue petitioners competency to waive trial counsel, with an improper/incompetent summation of facts. [see 1,2,3, and 4, section 4.pet.notice of appeal].

3. Appellate Counsel, Monty G. Mertz, was rendered constitutionally ineffective on Direct appeal when he failed to argue petitioner was prejudicially denied his 6th Amend. Const. Right to having the full benefit of effective assistance of trial counsel, when trial counsel failed to file any motions and failed to raise or bring any issues that were trial counsel's duty to file and raise. [see section 5.pet.notice of appeal].

4. Appellate Counsel, Monty G. Mertz, was rendered constitutionally ineffective on Direct appeal when he argued that petitioner's competency to waive the right to trial counsel was made knowing and intelligent based on a psych evaluation quoting two to three years old data from when petitioner was placed in the North Dakota State Hospital, rather than petitioners waiver was not knowing and intelligent as facts of the case strongly suggest.

5. Appellate counsel, Monty G. Mertz, was rendered constitutionally ineffective on Direct appeal when he argued evidentiary issues with an improper/incompetent summation of facts [see section 1,2,3,4,5, & 6 section 7 pet.notice of appeal], rather than arguing the evidentiary issues would not have occurred had petitioner had the full benefit of competent trial defense representation.

6. Appellate counsel, Monty G. Mertz, was rendered constitutionally ineffective on Direct appeal when he failed to secure the proper/exclusive relief/remedy[s] available to petitioner, when he argued Nicolle J. Koehler's false witness trial testimony with an improper/incompetent summation of facts.

7. Appellate counsel, Monty G. Mertz, was rendered constitutionally ineffective on

On direct appeal when he failed to argue the issue of insufficiency of evidence. Appellate knew that there existed proper/exclusive relief/remedy[s] available to petitioner, yet he failed to secure the proper exclusive relief/remedy[s] for petitioner.

8. Appellate counsel, Monty G. Mertz, was rendered constitutionally ineffective on direct appeal when he failed to argue the issue of fabrication of evidence. Appellate counsel knew that there existed proper/exclusive relief/remedy[s] available to petitioner, yet he failed to secure the proper/exclusive relief/remedy[s] for petitioner.

9. Appellate counsel, Monty G. Mertz, was rendered constitutionally ineffective on Direct appeal when he failed to argue the issue that petitioners rule 29 motion to acquit was meritorious, and that trial court erred harmfully when it denied petitioner's motion for acquittal, thereby prejudicing petitioner. Appellate counsel knew that there existed proper/exclusive relief/remedy[s] available to petitioner, yet he failed to secure the proper/exclusive relief/remedy[s] for petitioner.

10. Appellate counsel, Monty G. Mertz, was rendered constitutionally ineffective on Direct appeal when he failed to perfect the appeal filed, with issues petitioner requested [by way of letter detailing these issues] of appellate counsel. Appellate counsel knew there existed proper/exclusive relief/remedy[s] available to petitioner, yet he failed to secure the proper/exclusive relief/remedy[s] for petitioner.

11. District Court abused its discretion when it ruled in its Order denying petitioners Application for post conviction relief and Order for judgment, when it ruled that "the Strickland standard should be applied" as District Court misapplied and misinterpreted the rules governing effective assistance of counsel as set forth in Strickland. A more proper ruling would have been that *"no inquiry into prejudice or likely success on appeal [is] necessary, as an attorney's failure to file a requested appeal automatically satisfies the deficient-performance prong of Strickland."*

12. Appellate Counsel, Monty G. Mertz, was rendered constitutionally ineffective on Direct appeal when he failed to argue that trial counsel's failure to file any motions, raise or bring any issues [while trial counsel represented petitioner] harmfully severed petitioner from his 6th Amend. Const. Right to having effective assistance of counsel, thereby prejudicing petitioner. Appellate counsel knew that there existed proper/exclusive relief remedy[s] available to petitioner, yet he failed to secure the proper/exclusive relief/remedy[s] for petitioner.

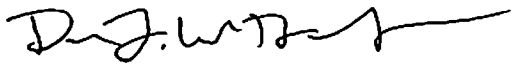
13. Appellate Counsel, Monty G. Mertz, was rendered constitutionally ineffective on Direct appeal, when he made district court fully aware that petitioner's rule 29 motion for acquittal was not frivolous when he testified at petitioners evidentiary hearing. Appellate counsel knew that there existed proper/exclusive relief/remedy[s] available to petitioner, yet he failed to secure the proper/exclusive relief/remedy[s] for petitioner.

Petitioner is entitled to have this court order the immediate reversal of petitioners

Convictions on all counts, on grounds that petitioner was denied his 6th Amend. Const. Right to having effective assistance of trial and appellate counsel, on due process Grounds that petitioner was denied his right to fair trial, petitioner was denied his 6th Amend. Const. Right to compulsory process when trial court harmfully erred in denying Petitioner access to subpoenaed defense witnesses [Audr'e Fischer and Gwen Dubisar] thus denying petitioner's right to present evidence in his favor, prosecutorial misconduct by the states use of false, fabricated evidence, and the use of false witness testimony that was provided by Nicolle J. Koehler, prosecutorial vindictiveness by the states use of presenting insufficient evidence to the jury when prosecuting both cases.

Petitioner is entitled to having this Court enter judgments ordering petitioners acquittal on all counts, on grounds that the state failed to prove its cases, the state had insufficient evidence to convict petitioner, there exists insufficient evidence to sustain petitioners convictions on all counts, and that both appellate counsel and the state [while at petitioner's evidentiary hearing December 18th 2015] made admissions that petitioners rule 29 motion for acquittal for insufficient evidence was not frivolous.

Petitioner is entitled to having this court enter Order of Judgment to release petitioner immediately from unconstitutional custody.



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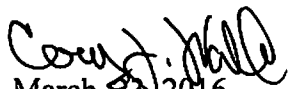
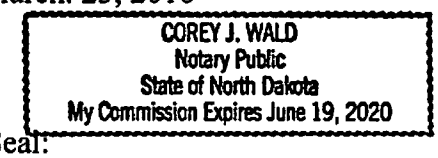


March. 23, 2016



Seal:

PERFECTION OF APPEAL
DESIGNATION OF THE CONTENTS OF THE APPENDIX

1. Table of Authorities [case laws cited].

2. Designated portions of the trial transcripts to which reference is made in the Appellants brief; [referred to as T.T.Ex/ ; pge #]

3. Designated trial exhibits to which reference is made in the Appellants brief; [referred to as T.T.Ex/ ; pge #]

4. Designated portions of the evidentiary hearing transcripts to which reference is made in the appellants brief; [referred to as E.H.Ex/ ; pge #]

COREY J. WALD
Notary Public
State of North Dakota
My Commission Expires June 19, 2020

5. Designated portions of petitioners requested letter to appellant counsel directing Appellate counsel as to what issues petitioner desired appellate counsel to raise, brief and argue on direct appeal; [referred to as Pet.Ex #]

6. Judgment entered by the district court;

7. Receipt from ND Supreme Court acknowledging Appellants Notice of Appeal; [Pet.Ex/20; pge # 1, 2.]
and

8. Relief petitioner is entitled to.

Respectfully submitted,

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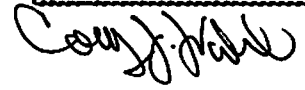

TABLE OF AUTHORITIES
Case laws cited

53. Powell v. Alabama, (1932) 287 U.S. 45, 68, 77 Led 158, 53 S Ct 55, 84 Ala 527.....
54. Palmer v. Ashe, 96 L Ed 154, 342 US 134.....
55. People v. Bailey, (1969) 1 Cal 3d 180, Cal Rptr 774, 460 P 2d 974.....
56. People v. Bermudez, 25 Misc.2d 1226 (A), 906 N.Y.S.2d 774 (Sup 2009).....
57. Pino v. Dalsheim, 606 F,Supp. 1305, 1319-20 (S.D.N.Y. 1985).....
58. People v. Dennany, (1994) 445 Mich 412, N.W.2d 128, 143.....
59. People v. Reimann, 266 A.D. 505,_, 42 N.Y.S.2d 599, 600 (1943).....
60. People v. Ross, 2015 IL APP (1st) 120089, 32 N.E.3d 184 (Ill. App. Ct. 1st Dist. 2015).....
61. People v. Trakhtenberg, 826 N.W.2d 136 (Mich. App. 2012) *quoting Armstrong*, 490 Mich. At 290, 806 N.W.2d 676, citing Strickland, 466 U.S. at 694-696, 104 S. Ct. 2052.....
62. People v. Trakhtenberg, 826 N.W.2d 136 (Mich. App 2012).....
63. Rhodes v. Warden. Maryland Penitentiary, (1969) 7 Md App 423, 256 A2d 351 Commonwealth v. Peake, (1967) 210 Pa Super 133, 231 A2d 908.....
64. Robison v. State, (1967) 280 Ala 569, 169 SO 2d 415, N.D.R. 1.1. *lawyer competence*.....
65. Rule 2 *Governing laws of Manifest Injustice*.....
66. Samowsky v. State, (1983, Fla App D3) 448 So 2d 509, review den (Fla) 449 So2d 265.....
67. Satcher v. Pruett, 126 F3d 561 (4th Cir. 1997).....
68. State v. Allesi, 211 N.W.2d 733 (N.D. 1973) cited twice.....
69. State v. Albright, 98 Wis 2d 663, 298 N.W.2d 196, 203 (1980).....
70. State v. Cone, 2014 N.D. 130, 12, 847 N.W.2e 761.....
71. Storms v. Cupp, (1973) 13 Or. App. 237, 508 P2d 450, 452.....
72. State v. Dymowski, 459 N.W.2d 777 (ND 1990).....
73. State v. Gonzalez, 2000 ND 32, 606 N.W.2d 873 (2000) cited twice.....
74. State v. Heasley, 180 N.W. 2d 242 (N.D. 1970).....
75. State v. Herzig, (1968, Fla) 208 S o 2d 619, Wright v. State, (1972, Fla App D2) 269 SO 2d 17, 18, Glasser v. United States, 315 U.S. 60, 76 (1942).....
76. State v. Holy Bull, 238 N.W.2d 52 (N.D. 1975).....
77. State v. Johnson, 379 N.W.2d 291 (ND 1986) cert den 475 U.S. 1141, 106 S. Ct. 1792, 90 L. Ed. 2d 337 (1986).....
78. State v. Kraft, 413 N.W.2d 303 (N.D. 1987).....
79. State v. Maresch, 75 N.D. 229, 27 N.W.2d 1 (1947) cited twice.....
80. State v. Miller, 388 N.W.2d 522 (ND 1986) State ex rel. Halverson v. Simpson, 78 ND 440, 49 N.W.2d 790 (1951).....
81. State v. Moya, (1984, Fla App; D3) 460 SO 2d 446.....
82. State v. Northington, (1984, Tenn) 667 S.W. 2d 57, 58.....
83. State v. Ohnstad, 359 N.W.2d 827 (N.D. 1984) cited twice.....
84. Strickland, 466 U.S. At 689, S.Ct. 2052; Id. At 690. 691, 104 S.Ct. 2052. Id.....
85. S.H.A. Const. Art. 1, § 2. People v. Flowers, 2015 IL APP (1st) 113259, 24 N.E.3d 1240 (Ill. App. Ct. 1st Dist. 2015).....
86. S.H.A. 725 ILCS 5/122-1. People v. Montes, 2015 IL APP (2d) 140485, 27 N.E.3d 656 (Ill. App. Ct. 2d Dist. 2015).....

INTRODUCTION

[¶1] An evidentiary hearing was held December 18th 2015, petitioner, *pro se*, was present; the Respondent was represented by Assistant Cass County State's Attorney's Tristan Van De Streek and Ryan Younggren. Testimony was provided by Petitioner, Appellate Counsel Monty Mertz, and both The Respondent's representatives.

[¶2] Petitioner Damon WhiteBird, *in pro se capacity*, hereby appeals the decision of the District Court, denying post conviction relief on petitioners claim of ineffectiveness of appellate counsel, including review of all matters for appealability, as was directed by letter dated January 21, 2016. On December 18th 2015, Petitioner, pro se appeared in Cass County District Court for an evidentiary hearing before The Honorable Judge Susan L. Bailey.

LAW AND LEGAL ARGUMENT

(A)

[¶3] It was an abuse of discretion, for District Court to deny petitioners application for Post conviction relief by ruling "it has not been definitively announced that there is a Constitutional right to effective assistance of counsel at the appellate level" when District Court assumed that the Strickland standard should be applied. Satcher v. Pruett, 126 F3d 561 (4th Cir. 1997); Williams v. French, 146 F3d 203 (4th Cir. 1998); Evitts v. Lucey, 469 US 387, 83 Led2d 821', 105 S.Ct. 830 (1985); U.S. Const. Amend. VI. Scott v. State, 80 S.W.3d 184 (Tex. App. Waco 2002), petition for discretionary review Refused, (2 pets.) (Oct. 2, 2002); Wood v. Ohio Adult Parole Authority, 107 F3d 1178 (6th Cir. 1997); Anderson v. State, (1985, S.D.) 373 N.W.2d 438, 441; Nichols v. Gagnon, (1971, CA 7 Wis) 454 F2d 467, 471 cert. den. 408 U.S. 925, 33 L Ed 2d 336, 92 S. Ct. 2504; Storms v. Cupp, (1973) 13 Or. App. 273, 508 P2d 450, 452; Ex Parte Dunn (1987, Ala) 514 S o 2d 1300, 1303; State v. Herzig, (1968, Fla) 208 S o 2d 619, Wright v. State, (1972, Fla App D2) 269 So 2d 17, 18, Glasser v. United States, 315

U.S. 60, 76 (1942); United States v. Gillis, (1985, CA4 Md) 773 F2d 549, 560; Evitts v. Lucey, (1985) 469 U.S. 387, 83 L.Ed.2d 821, 105 S.Ct. 830 are instructive. [See section 3.pet.notice of appeal]. [E.H.Ex/1; pge # 3,4,5,6,7,78,79,80,81.]

Blacks Law Dictionary defines the legal term "Evidentiary Hearing" as: *A hearing at which evidence is presented*, as opposed to a hearing at which only legal argument is presented.

It was the prerogative of District Court at petitioners evidentiary hearing, to hear all issues of evidence, that petitioner had legal standing to present. It was an abuse of discretion for District Court to 'limit' petitioners testimony, regarding what factual evidentiary support, *if any*, petitioner could have effectively argued and presented, as to the issue of ineffective assistance of appellate counsel. [E.H.Ex/2; pge # 9,10,12,11,82.]

[¶4] *Appellate counsel raised and argued the issue of petitioners competency to waive trial counsel, with an incompetent summation of facts* [see 1,2,3,4, of section 4 pet.notice of appeal], which rendered appellate counsel constitutionally ineffective, on direct appeal. Robison v. State, (1967) 280 Ala 569, 196 SO 2d 415, N.D.R. 1.1 *lawyer competence*; Wilson v. Yaklich, 148 F.3d 569 (6th Cir.1998); Powell v. Alabama, (1932) 287 U.S. 45, 68, 77 L Ed 158, 53 S Ct 55, 84 Ala 527; Terry v. Reno, 102 F.3d 1412 (D.C. 1996); Ingram v. Peyton, (1966, CA4 Va) 367 F2d 933; Atilus v. United States, (1969, CA5 Fla) 406 F2d 694; Jackson v. Turner, (1971, CA10 Utah) 442 F2d 1303; People v. Bailey, (1969) 1 Cal 3d 180, 81 Cal Rptr 774, 460 P2d 974; Brown v. Commonwealth, (1971, Ky) 465 SW2d 270; Rhodes v. Warden. Maryland Penitentiary, (1969) 7 Md App 423, 256 A2d 351 Commonwealth v. Peake, (1967) 210 Pa Super 133, 231 A2d 908 are instructive. [See section 4.pet.notice of appeal]. [T.T.Ex/3; pge # 50,51,60,234,235,236,251.]

[¶5] When appellate counsel, [at petitioner's evidentiary hearing December 18th 2015], made the argument that his [appellate counsel's] belief that petitioner was provided effective assistance of trial counsel amount's to *"counsel not having raised any issues or filed any motions, during the course of defense counsel's appointment"*, rendered appellate counsel constitutionally ineffective, *as appellate counsel knew that appellate counsel could have secured any and all proper relief/remedy[s] available to petitioner,* had this issue been properly raised and effectively argued by appellate counsel.

Appellate counsel, an attorney with over 30 years of trial and appellate experience including over 60 criminal appeals, knew/knows that *" a waiver of counsel based on conditions indicating fraud, duress, or coercion, will be enough to set aside a judgment of conviction obtained thereon"* State v. Whiteman, 67 N.W.2d 599 (N.D.1954); People v. Walton, (1979) 78 Ill. 2d 197, 35 Ill Dec 522, 399 NE2d 588; Schmidt v. United Bhd. Of Carpenter's & Joiner of Am., 877 F.2d 384, 386 (8th Cir. 1987) (Per Curiam). Wilson v. State, 1999 ND 222, 603 N.W.2d 47 1999; Const. 1963, art. 1 § 20; U.S. Const., Am. VI; Armstrong, 490 Mich. At 290, 806 N.W.2d 676; *see, also People v. Pickens*, 446 Mich. 298, 521 N.W.2d 797 (1994) (adopting the federal constitutional standards for an

Ineffective-assistance-of-counsel claim as set forth in Strickland); Strickland , 466 U.S. At 689, S.Ct. 2052; Id. At 690-691, 104 S.Ct. 2052. Id.; People v. Williams, (1989, 1st Dist) 192 Ill App 2d 304, 139 Ill Dec 353, 548 N.W.2d 738; People v. Trakhtenberg, 826 N.W.2d 136 (Mich. App 2012) are instructive. [see section 5.pet.notice of appeal]. [T.T.Ex/4; pge # 912,913,914,985,986,1014,1073., E.H.Ex/5; pge # 42,59,60,61,62,63, 66., E.H.Ex/6; pge # 67,35,41., E.H.Ex/7; pge # 67,68,75,76,77,47.]

[¶6] *On direct appeal, appellate counsel raised and argued Evidentiary issues with an incompetent summation of facts* [see 1,2,3,4,5, and 6 Section 7 pet.notice of appeal] which rendered appellate counsel constitutionally ineffective, *as appellate counsel knew that appellate counsel could have secured any and all proper relief/remedy[s] available to petitioner,* had this issue been properly raised and effectively argued by appellate counsel. U.S v. Yee-Chan, 17 F3d 21 (2nd Cir. 1994); State v. Northington, (1984, Tenn) 667 S.W.2d 57, 58 are instructive. [E.H.Ex/8; pge # 46,50,48.]

[¶7] On direct appeal, appellate counsel raised and argued the issue of whether or not Petitioner knowingly and intelligently waived right to trial counsel with an incompetent Summation of facts, which rendered appellate counsel constitutionally ineffective. Appellate counsel knew/knows that *"the attorney's duty to investigate all possible lines of defense is strictly observed, for purposes if ineffective assistance of counsel claims"* Duvall v. Reynolds, 139 F3d 768 (10th Cir. 1998). Cf. Briscoe v. State, (1992, Del Sup) 606 A2d 103, 109; N.D. Rules Appellate procedure; Ali v. United States, (1990, Dist. Col. App.) 581 A2d 368, 379-80, cert den [US] 116 L.Ed.2d 213, 112 S.Ct. 259; N.D. Rules of Prof. Conduct Rule 3.2 [2] are instructive. [T.T.Ex/3; pge # 50,51,60,234,235, 236,251.]

And when petitioner elected to proceed at trial in pro se capacity, appellate counsel Knew that *"the appointment of standby counsel, for a defendant who proceed's pro se, is not an acceptable alternative to a knowing and intelligent waiver of the 6th Amend Right to counsel"* Cf. Briscoe v. State, (1992, Del Sup) 606 A2d 103, 109, as *"The constitution does not force a lawyer upon a defendant"* Adams v. United States, (1942) 317 U.S. 269, 87 L.Ed. 268, 63 S. Ct. 236, 143 ALR 435, reh den 317 U.S. 713, 87 L.Ed. 56; Woehloff v. State, 487 N.W.2d 16 (N.D. 1992); Frazer v. United States, (1994, CA9 Cal) 18 F.3d 778, 783, 94 CDOS 1172, 94 Daily Journal DAR 3187; State v. Heasley, 180 N.W.2d 242 (N.D. 1970); Bland v. California Department of Corrections, 20 F.3d 1469 (9th Cir. 1994); People v. Dennany, (1994) 445 Mich 412, N.W.2d 128, 143 are instructive. [see section 6.pet.notice of appeal]. [T.T.Ex/3; pge # 50,51,60,234,235,236,2351.]

Appellate counsel knew that petitioners waiver of right to trial counsel was not knowing And intelligently made, as such waiver was obtained by fraudulent and conniving means Practiced upon petitioner. At petitioners evidentiary hearing, December18th 2015, Petitioner quoted prosecutor Tristan Van De Streek's statements from the trial record, Whose own knowledge of these fact[s] were admitted, detailing this fraud and Connivance that was practiced so openly upon petitioner:

TRISTAN VAN DE STREEK: *I understand why Mr.Mottinger didn't bring any motions when he was counsel, but I just wanted to put that on the record.*

As a result of this direct collusion between both Prosecution and defense counsel [Mottinger*], including appellate counsel, when appellate counsel failed to properly Preserve this issue for appeal by failing to effectively argue it for petitioner while at the Appellate stage,* concerning these issues [rather than simply listing them without briefing them] rendered appellate counsel constitutionally ineffective. United States v. Morrison, 449 U.S. 361 (1981); United States v. Henry, 447 U.S. 264 (1980); Wheatherford v. Bursey, 429 U.S. 545 (1977); Boulas v. Superior Court, 233 Cal. Rptr. 487 (Ct. App. 1987); Hutchinson v. People, (1987, Colo) 742 P2d 875, 880 are instructive. [see section 6.pet.notice of appeal]. [T.T.Ex/3; pge # 50,51,60,234,235,236,251.]

[¶8] *On direct appeal, appellate counsel raised and argued the issue of false witness Testimony that was knowingly provided, on behalf of the prosecution, by Nicolle J. Koehler,* [see section 7 pet.notice of appeal] *with an incompetent summation of facts* which rendered appellate counsel constitutionally ineffective, *as appellate counsel knew that appellate counsel could have secured any and all proper relief/remedy[s] available to petitioner,* had this issue been properly raised and effectively argued by appellate counsel. U.S. v. Haese, 162 F.3d 359 (5th Cir. 1996); Faulder v. Johnson, 81 F.3d 515 (5th Cir. 1996); U.S. v. Wolny, 133 F.3d 758 (10th Cir. 1998); Goodwin v. Johnson, 132 F.3d 162 (5th Cir. 1997); Mesareosh v. US, 352 1, 1 Led2d 1, 77 SCt 1 (1956); Boyle v. Johnson, 93 F3d 180 (5th Cir. 1996); Brock v. State, (1984, Fla App D5) 446 So 2d 1170; Samosky v. State, (1983 Fla App D3) 448 So 2d 509, review den (Fla) 449 So 2d 265; Demick v. State, (1984, Fla App D4) 451 So 2d 526, Cause Dismd (Fla) 458 So 2d 274; State v. Moya, (1984, Fla App; D3) 460 So 2d 446; Lowry v. State, (1985, Fla App D4) 468 So 2d 298; Andres v. State, (1985, Fla App D3) 468 So 2d 1084; Grissom v. State, (1985, Fla App D3) 469 So 2d 1511; Napue v. Illinois, 360 264 (1959); United States v. Hasting, 461 U.S. 499 (1983); United States v. Baca, 687 F.2d 1356, 1359 n.1 (10th Cir. 1982); United States v. Ramirez, 710 F.2d 535 (9th Cir. 1983); United States v. Glist, 594 F.2d 1374 (10th Cir. 1979); United States v. Crow Dog, 532 F.2 1182 (8th Cir. 1976) Napue v. Illinois, 360 U.S. 264 (1959), Pyle v. Kansas, 317 US 213 (1942) are instructive. [See section 7.pet.notice of appeal]. [T.T.Ex/9; pge # 490, 491,492,685,699,700.]

[¶9] Appellate Counsel was constitutionally ineffective on direct appeal, when appellate Counsel failed to make any attempt at any form of effective argument surrounding insufficient evidence. While at petitioners evidentiary hearing December 18th 2015, the following exchange took place when questions were put forth to appellate counsel [while appellate counsel was on witness stand under oath] by petitioner:

Q (Mr. WHITE BIRD CONTINUING) One of the issues you argued on your appeal brief was insufficiency of evidence. Correct?

A *No.* I just told you what the issues were.

Q All right. Prejudicial evidence.

A Right.

Appellate counsel, made District Court fully aware, that he [appellate counsel] knew that petitioners Rule 29 motion for acquittal based on insufficient evidence was not frivolous, which entitled petitioner to relief:

(Questions posed by WhiteBird to appellate counsel Monty Mertz)

Q So would you say a frivolous motion was my rule 29 motion of acquittal based on insufficiency of evidence, was a frivolous motion?

A *No.*

Q Was it a frivolous motion?

A *No.*

Q You testified before this court today that my rule 29 motion to acquit based on insufficiency of evidence, was not frivolous?

A *It wasn't frivolous.*

Appellate counsel knew that *"even given all the facts set forth, the government would be unable to prove the crimes charged"* United States v. Dietrich, 126 F. 676 (C.C. Neb. 1904) When prosecutor Ryan Younggren admitted intimate knowledge, he [Younggren] possessed, during his rebuttal to jury that evidence was fabricated:

RYAN YOUNGGREN: Well folks, it sure is interesting to watch the defendant get up here and ask you to pay attention to him as he's giving his closing argument... *What he can't do thankfully is fabricate evidence.*

Appellate counsel for this case knew that he [appellate counsel] Could have secured any and all proper relief/remedy[s] available to petitioner, had this issue been properly raised and effectively argued by appellate counsel. People v. Reimann, 266 A.D. 505,_, 42 N.Y.S.2d 599, 600 (1943); State v. Albright, 98 Wis 2d 663, 298 N.W.2d 196, 203 (1980); Marshall v. State, 537 P.2d 423, 429-30 (Okla. Crim. App. 1975); United States v. Dietrich, 126 F.676 (C.C. Neb. 1904); N.D.R. Rule 103 *Ruling;s on evidence (e) Taking notice of error*; Thompson v. Calderon, 109 F3d 1358 (9th Cir. 1996); US v. Goodson, 165 F3d 610 (8th Cir. 1999); State v. Maresch, 75 N.D. 229, 27 N.W.2d 1 (1947); Mertz v. State, 535 N.W.2d 834, 838 (N.D. 1995); 28 U.S.C. §753 are

instructive. [T.T.Ex/4; pge # 912,913,914,985,986,1014,1073., E.H.Ex/5; pge # 42,59,60,61,62,63,66., E.H.Ex/6; pge # 67,35,41., E.H.Ex/7; pge # 67,68,75,76,77,47.]

[¶10] On direct appeal, *appellate counsel raised and argued the issue of petitioner's Rule 29 motion to acquit, with an incompetent summation of facts* [see section 9 pet.notice of appeal] which rendered appellate counsel constitutionally ineffective, *when appellate counsel knew that appellate counsel could have secured any and all proper relief/remedy[s] available to petitioner*, had this issue been properly raised and effectively argued by appellate counsel.

Prosecutor Ryan Younggren, Appellate Counsel Monty Mertz, and *Petitioner Damon WhiteBird [by way of agreement with both prosecution and appellate counsel]* all made it known to District Court at petitioners evidentiary hearing, that petitioners Motion for Acquittal upon grounds of insufficient evidence was not frivolous:

Mr. YOUNGGREN: *Judge, we're pretty clear on the record here on this insufficiency of evidence portion.*

Hamm v. Groose, 15 F3d 110 (8th Cir. 1994); Cooper v. Pate, 378 US 546, 12 Led2d 1030, 84 SCt 1733 (1964); Yorke v. Yorke, 3 ND 343, 55 N.W. 1095 (1983); United States v. Douglas, 646 F3d 1134, 1137 (8th Cir. 2011); American Furniture Co. v. International accommodations supply, (1981, CA5 La) 721 F2d 478; Advertisers Exchange, Inc. v. Bayless Drug Store, Inc., (1942, D.C. NJ) 3 FRD 178; *"a court shall enter a judgment of acquittal if the evidence presented at trial is insufficient to sustain a conviction"* Fed. 12 Crim. P. 29 (a); *"where a judgment of acquittal was affirmed"* United States v. Ward, 703 F.2d 1058 (8th Cir. 1983); "a defendant in a criminal action is presumed to be innocent until the contrary is proven and *'in case of a reasonable doubt as to whether the defendants guilt is satisfactorily shown, the defendant is entitled to be acquitted'"* N.D.C.C. 29-21-05 *Presumption of innocence- Acquittal on reasonable doubt*; "trial court erred in dismissing information at close of states case which error was appealable under NDCC 29-28-07 (1) *'trial court which believes evidence to be insufficient to convict defendant should advise the jury to acquit defendant thereby leaving ultimate decision to jury'"* State v. Allesi, 211 N.W.2d 733 (N.D. 1973) as *"a motion for judgment of acquittal is properly granted only if evidence is insufficient to sustain a conviction of offenses charged"* State v. Ohnstad, 359 N.W.2d 827 (N.D. 1984); State v. Maresch, 75 N.D. 229, 27 N.W.2d 1 (1947); State v. Gonzalez, 200 ND 32, 606 N.W.2d 873 (2000); United States v. Hernandez, 301 F.3d 886 (May 14th 2002); Mannes v. Gillespie, (1992, CA9 Cal) 967 F2d 1310, 92 CDOS 5325, 92 Daily Journal DAR 8449, cert den (US) 122 L ed 2d 121, 113 S Ct 964; Fong Foo v United States, (1962) 369 US 141, 7 L Ed 2d 629, 82 S Ct 671 *quoting United States v. Burkes*, (1976, CA6 Tenn) 547 F2d 968, revd 437 US 1, 57 L Ed 2d 1, 98 S Ct 2141, on remand (CA6) 579 F2d 1013, *Id at 16 437 US at 12*; "as the District Court noted, *'a jury's verdict should be overturned if there is a lack of proof beyond a reasonable doubt of even one element of the charged offense'"* United States v. Frausto, 616 F3d 767, 772 (8th Cir. 2010);

"Insufficiency of evidence to convict" Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Allesi, 211 N.W.2d 733 (ND 1973); State v. Gonzalez, 2000 ND 32, 606 N.W.2d 873 (2000); State v. Ohnstad, 359 N.W.2d 827 (ND 1984) are all instructive. [T.T.Ex/4; pge # 912,913,914,985,986,1014,1073., E.H.Ex/5; pge # 42,49,60,61,62,63,66., E.H.Ex/6; pge # 67,35,41., E.H.Ex7; pge # 67,68,75,76,77,47.]

[¶11] In section 3 of its Order denying petitioners application for post conviction relief, *the Court made direct reference to petitioner's desire for appellate counsel of this case to raise and brief all issues having to do with fourth amendment search and seizure, fabrication of evidence, discovery violations, prosecutorial misconduct, conflict of interest, failure to compel attendance of witnesses, and insufficiency of evidence.*

As the Court noted, *appellate counsel chose to forgo all issues petitioner communicated his desire for appellate counsel to raise*, and ultimately decided to brief issues of 1) petitioner's competency to waive trial counsel, and 2) evidentiary issues, without appellate counsel having provided any form of effective argument insupport of these issues with competent summation of facts, when appellate counsel chose to argue these matters with irrelevant points.

Insufficiency of evidence was only argued to the extent that its existence was a result of petitioner having wanted "everything" be heard and presented to the jury, and not the argument that the State had legally insufficient evidence to even warrant initiating Judicial Proceedings against petitioner, let alone having a search warrant for petitioners apartment granted. Petitioners competency to waive trial counsel, and evidentiary issues were also argued with an incompetent summation of facts, thus rendered appellate counsel constitutionally ineffective.

The record shows that petitioner directed appellate counsel [by way of request letter] as to the issues petitioner communicated a desire for appellate counsel to raise and effectively argue on direct appeal and on any reply brief that was or could have been filed, which appellate counsel failed to do. *"The attorneys failure to file a requested appeal automatically satisfies the deficient-performance prong of Strickland because it is professionally unreasonable."*" Watson v. United States, 493 F.3d 960, 963 (8th Cir. 2007) *quoting Roe v. Flores-Ortega*, 528 US 470, 483, 120 S.Ct. 1029 145, L. Ed 2d 985 (2000) 528 US at 477.

Appellate counsel for this case, chose to forgo all issues petitioner communicated a desire for appellate counsel, to properly raise and effectively argue in all briefs filed by appellate counsel, which rendered appellate counsel constitutionally ineffective on direct appeal, *as appellate counsel knew that appellate counsel could have secured any and all proper relief/remedy[s] available to petitioner,* had these issues been properly raised and effectively argued by appellate counsel. Watson v. United States, 493 F.3d 960. 963 (8th Cir. 2007) *quoting Roe v. Flores-Ortega*, 528 US 470, 483, 120 S.Ct. 1029, 145 L. Ed. 2d 985 (2000), *Flores-Ortega 528 US at 477*; Barger v. United States, 204 F.3d 1180, 1182 (8th Cir. 2000); United States v. Cronic, 466 U.S. 648, 659, 104 S.Ct. 2039 80 L. Ed 2d 657 (1984); *Flores-Ortega, 528 US at 483 quoting Cronic 466 US at 659.Id.Id.*; US v.

Foster, 68 F3d 86 (4th Cir. 1995); State v. Zeno, 490 N.W.2d 707 (N.D. 1992) are instructive. [Pet.Ex/10; pge # 1,2,3,4,5,6,7,8,9,10,11,12,13,14., case strategies 1,2,3,4,., E.H.Ex/11; pge # 13,14,15,16,17,18,20,23,25,26.]

[¶12] District Court abused it's discretion, when it ruled in it's order denying application for post conviction relief and order for judgment, that "the Strickland standard should apply here". *"A district court abuses it's discretion when it fails to consider a relevant and significant factor, gives significant weight to an irrelevant or improper factor, or considers the appropriate factors but commits a clear error of judgment in weighing those factors"* United States v. Stong, 773 F3d 920, 926 (8th Cir. 2014 *quoting United States v. Robison*, 759 F3d 947, 950-51 8th Cir. 2014); Davis v. Norris, 423 F.3d 868, 874 (8th Cir. 2005); State v. Cone, 2014 N.D. 130, 12, 847 N.W.2e 761; State v. Zeno, 490 N.W.2d 707 (N.D. 1992) are instructive. [See Section 11 pet.notice of appeal] [Pet.Ex/12; pge # 1,2,3,4., E.H.Ex/1; pge # 3,4,5,6,7,78,79,80,81.]

[¶13] *It was an abuse of discretion for District Court to apply the Strickland standard to the facts of petitioner's case, when the facts of petitioner's case did not/do not warrant/support such a ruling,* as it denied petitioner fair trial, right to be heard, right to present evidence in petitioner's favor, right to present a defense, and impartial fact finder. Petitioner is entitled to relief.

Petitioner was denied all forms of effective assistance of counsel at the trial stage when trial counsel [Steven D. Mottinger] failed to file any motions and failed to raise issues that were trial counsel's duty to raise. *Petitioner was denied all forms of effective assistance of counsel at the appellate stage when appellate counsel [Monty G. Mertz] failed to file requested appeal when requested by petitioner, argued petitioner's competency to waive trial counsel with an incompetent summation of facts on direct appeal, and argued evidentiary issues with an incompetent summation of facts on direct appeal.*

Appellate counsel knew that remedies/relief were available to petitioner for this type of harmful and prejudicial error as it denied petitioner's 6th amend. Const. right to effective assistance of counsel, yet failed to secure any and all proper relief for petitioner. Petitioner is entitled to relief.

Appellate counsel was constitutionally ineffective on direct appeal when appellate counsel failed to raise and argue the issue of insufficiency of evidence. Appellate counsel failed to raise and argue on direct appeal, that it was an abuse of discretion for Trial Court to deny petitioner's Rule 29 Motion for Acquittal for Insufficiency of Evidence when petitioner motioned the Trial Court, before the trial and during trial; *"as a transcript from the official court reporter when certified to be correct by the presiding judge constituted the statement of the case."* Leu v. Montegomery, 31 ND 1, 148 N.W. 662 (1914); *"Under plenary powers of Supreme Court, where proper and valid appeal had been taken so that record and case were before court, it had authority to direct judgment of acquittal if interest of justice demanded."* State v. Holy Bull, 238 N.W.2d 52 (N.D. 1975); S.H.A. 725 ILCS 5/122-1. People v. Montes, 2015 IL App (2d) 140485, 27

N.E.3d 656 (Ill. App. Ct. 2d Dist. 2015); People v. Ross, 2015 IL App (1st) 120089, 32 N.E.3d 184 (Ill. App. Ct. 1st Dist. 2015); S.H.A. Const. Art. 1, § 2. People v. Flowers, 2015 IL App (1st) 113259, 24 N.E.3d 1240 (Ill. App. Ct. 1st Dist. 2015); S.H.A. 725 ILCS 5/122-2.1(b). People v. White, 2014 IL App (1st) 130007, 24 N.E.3d 158 (Ill. App. Ct. 1st Dist. 2014) ; Fairley v. Luman, 281 F.3d 913, 917 (9th Cir. 2002); Brosseau v. Haugen, 543 US 194, 198, 125 S. Ct. 596 (2004); *"the movant sufficiently demonstrated that he was innocent by clear and convincing evidence, as a result of which relief would be granted on the ground of "actual innocence."* The court held in People v. Bermudez, 25 Misc. 2d 1226 (A), 906 N.Y.S.2d 774 (Sup 2009), *as a result of which the defendant's motion to vacate his sentence would be granted and the indictment dismissed with prejudice."* are all instructive.

Appellate counsel knew that remedies/relief were available to petitioner for this type of harmful and prejudicial error as it denied petitioner's right to due process of law, fair trial, equal protection of laws and impartial fact-finder, yet failed to secure any and proper relief for petitioner. Petitioner is entitled to relief. [See highlighted portions of T.T.Ex/4 all pages, E.H.Ex/5 all pages, E.H.Ex/6 all pages, and E.H.Ex/7 all pages.]

Appellate counsel was constitutionally ineffective on direct appeal when appellate counsel raised and argued the issue of false witness testimony provided by Nicolle J. Koehler while at trial on behalf of The State, with an incompetent summation of facts.

Appellate counsel knew that remedies/relief were available to petitioner for this type of harmful and prejudicial error as it denied petitioner due process of law and right to fair trial, yet failed to secure any and all proper relief for petitioner. Petitioner is entitled to relief.

Appellate counsel was constitutionally ineffective on direct appeal, when appellate counsel stated for the Court:

Mr Mertz:

A *I studied your file, and I didn't see that there were any meritorious pretrial motions.*

A *I wouldn't have filed any pretrial motions, either.*

when providing testimony of his [appellate counsel] ineffectiveness at petitioner's evidentiary hearing December 18th 2015. Petitioner is entitled to relief.

District Court abused its discretion when it refused to hear petitioner's valid claims of ineffective assistance of appellate counsel, at petitioner's evidentiary hearing December 18th 2015 US V. Cross, 128 F3d 145 (3rd Cir. 1997); State v. Kraft, 413 N.W.2d 303 (ND 1987); State v. Johnson, 379 N.W.2d 291 (ND 1986) cert den 475 U.S. 1141, 106 S.Ct. 1792, 90 L. Ed. 2d 337 (1986); State v. Miller, 388 N.W.2d 522 (ND 1986) State ex rel. Halverson v. Simpson, 78 ND 440, 49 N.W.2d 790 (1951); Tweed v. State, 2011 ND 228, 807 N.W.2d 599, 2011 ND LEXIS 234 (Dec. 13, 2011); N.D. Rule 103. *Rulings on*

evidence (e) Taking notice of error; State v. Dymowski, 459 N.W.2d 777 (ND 1990) are instructive. Petitioner is entitled to relief. [T.T.Ex/4; pge # 912,913,914,985,986,1014,1073., E.H.Ex/5; pge # 42,59,60,61,62,63,66., E.H.Ex/6; pge # 67,35,41., E.H.ex/7; pge # 67,68,75,76,77,47.]

It was an abuse of discretion for District Court to issue its order denying petitioner's application for post conviction relief, as District Court had jurisdiction to take notice of error when both appellate counsel and State made District Court fully aware that:

[Mr. Mertz' testimonial answers to questions asked by petitioner while Mr. Mertz was on witness stand at petitioners evidentiary hearing]

Mr Mertz:

A *I think the trial was a travesty of justice. I still think that. I think they should have reversed your trial--your conviction.*

Mr Mertz:

A *I think your case--I think your trial was a travesty. It was an embarrassment to the court system.*

White Bird:

Q Would you say a frivolous motion was my Rule 29 motion of acquittal Based on insufficiency of evidence was a frivolous motion?

Mr Mertz:

A *No.*

Q (MR. WHITE BIRD CONTINUING)

You testified before this court today that my Rule 29 motion to acquit based on insufficiency of evidence, was not frivolous?

A *It wasn't frivolous.*

MR. YOUNGGREN: *Judge, we're pretty clear on the record here on this insufficiency of evidence portion.*

Thus entitling petitioner is entitled to relief.

RELIEF SOUGHT

[¶14] 1.) To prevent manifest injustice, *Petitioner is entitled* to having this Court order judgments of acquittal on all counts, on the grounds that both appellate counsel and The States own admittance that petitioners rule 29 motion for acquittal was not frivolous. 2.) Order the immediate reversal of all petitioner's convictions, on grounds of due process violations, fair trial violations, and that petitioner was denied all forms of effective assistance of counsel at both the trial stage as well as the appellate level. 3.) Order the immediate reversal of all petitioner's convictions, on grounds that petitioner's waiver of right to trial counsel was not knowing and intelligently made, as the waiver was adduced by connivance, fraud, and deceit, practiced upon petitioner by means of prosecutorial misconduct. 4.) Order the immediate reversal of all petitioner's convictions, on the grounds that any and evidentiary errors were gained by prosecutorial misconduct with the help of incompetent trial counsel when State "opened the door" for petitioner to make the errors. 5.) Order the immediate reversal of all petitioner's convictions, on the grounds that appellate counsel's failure to raise, brief, and effectively argue insufficiency of evidence on direct appeal gravely prejudiced petitioner, when appellate counsel knew that he [appellate counsel] should have and could have secured any and all proper/exclusive relief/remedy for petitioner. "A defendant may meet this burden "*even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.*"" People v. Trakhtenberg, 826 N.W.2d 136 (Mich.App. 2012) *Quoting Armstrong*, 490 Mich. At 290, 806 N.W.2d 676, citing *Strickland*, 466 U.S. at 694-696, 104 S.Ct. 2052 is instructive. 6.) Order the immediate reversal of all petitioner's convictions, on the grounds that appellate counsel's failure to raise, brief, and effectively argue [on direct appeal] trial counsel's failure to compel subpoened defense witnesses [Audr'e Fischer, and Gwen Dubisar] appearance for trial testimony, which gravely prejudiced petitioner as it denied him his six amend right to compulsory process, and appellate counsel's failure to argue trial counsel's failure to object to defense witness's [Audr'e Fischer] harmful release from her subpoena by The State and Trial Court, over very strong objections from petitioner at trial, which violated petitioners 6th amend. Const. right to compulsory process and calling for favorable evidence in his favor for jury trial. 7.) Enter judgments ordering for the full expungment of petitioner's criminal record stemming from unlawful/false/unjust convictions, as petitioner was denied any and all forms of effective assistance of counsel [at both the trail stage as well as the appellate stage] and any and all forms of effective defense that could have been made for petitioner, and that petitioner was denied defense witnesses at trial and that petitioner was denied impartial fact-finder[s] at both the Trial Stage as well at the petitioner's Evidentiary Hearing, December 18th, 2015. Grant v. Lefevre, 135 Misc.2d 476, 515 N.Y.S.2d 960 (N.Y.Sup. 1987); Kenney v. Commissioner of Corrections, 393 Mass. 28, 468 N.E.2d 616, 621 (Mass. 1984); Pino v. Dalsheim, 606 F.Supp. 1305, 1319-20 (S.D.N.Y. 1985); Wilson v. Jones, 430 F.3d 1113, 1124, (10th Cir. 2005), Burnsworth v. Gunderson, 179 F.3d 771, 775 (9th Cir. 1999) are all instructive. 8.) *Enter judgment ordering petitioner's immediate release from unconstitutional custody.*

Petitioner has made it known to the Court's [in all petitioner's motions and briefs filed with the Court in the past], that these are the proper/exclusive relief[s]/remedy[s] for petitioner. Palmer v. Ashe, 96 L Ed 154, 342 US 134; Rule 2 *governing laws of manifest*

injustice; United States v. Babwah, (1992, CA2 NY) 972 F.3d 30 are all instructive. [E.H.Ex/ 13; pge 8., T.T.Ex/14; pge # 1,6,8,9,11,12,24., T.T.Ex/15; pge # 1,2,3,17,23., T.T.Ex/16; pge # 740,741,742,877,1073., T.T.Ex/17; pge # 1,8,9,10,11,12,13,14,18,19,20,22., E.H.Ex/18; pge # 30,31,32., T.T.Ex/19; pge # 382,383,728., T.T.Ex/4; pge # 912,913,914,1014,1073.]

Wherefore, Petitioner prays to this Court grant ALL RELIEF petitioner is entitled to.

Damon J. WhiteBird (Solgado)
NDSP
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Bismarck, ND 58506-5521
Tel: (701)328-6100

March 23, 2016

Seal: COREY J. WALD
Notary Public
State of North Dakota
My Commission Expires June 19, 2020