IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO. 20050263

Anthony James Moore,

Petitioner - Appellant,

vs.

State of North Dakota,

Respondent - Appellee.

APPELLEE'S BRIEF

APPEAL FROM DENIAL OF POST-CONVICTION RELIEF
EAST CENTRAL JUDICIAL DISTRICT
DISTRICT COURT CRIMINAL NO. 09-05-C-01021
THE HONORABLE STEVEN E. MCCULLOUGH, JUDGE

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[¶2]ISSUES PRESENTED

[¶3]I. Whether the District Court abused its discretion erred in quashing Moore's subpoena for a television reporter, who had attended his sentencing hearing, to testify at his post-conviction hearing regarding the sentencing hearing.

[¶4]II. Whether the District Court erred in denying Moore's claim for ineffective assistance of counsel.

[¶5]STATEMENT OF THE CASE

[¶6]Appellant Anthony James Moore shall hereinafter be referred to as "Moore". Appellee State of North Dakota shall hereinafter be referred to as "State".

[¶7]The underlying criminal case in this post-conviction appeal relates to Moore's conviction for gross sexual imposition in January 2002. Since that time, Moore has unsuccessfully raised numerous legal challenges. As a matter of convenience and context for the present proceedings, the State here provides a brief summary of the related history.

[¶8]Moore was tried in November 2001 with one count of gross sexual imposition (Class A felony)(Court File No. 09-01-K-2551). Moore was *pro se*, with stand-by counsel. The jury found Moore guilty. Following preparation of a pre-sentence report, Moore was sentenced on January 17, 2002, to twenty (20) years straight time by the Honorable Lawrence Leclerc.

[¶9]Moore filed numerous post-trial motions, which were denied by the District Court, the Hon. Ralph R. Erickson presiding. Moore appealed the denial; this court affirmed the District Court. State v. Moore, 2003 ND 83, 662 N.W.2d 263. Moore filed additional post-trial motions, which were again denied by the District Court, the Hon. Frank L. Racek presiding. Moore appealed that denial; this court

summarily affirmed the District Court. State v. Moore, 2005 ND 159, 704 N.W.2d 573. Moore has filed for and dismissed or otherwise abandoned several other appeals to the North Dakota Supreme Court since November 2001. On multiple occasions Moore petitioned for a writ of certiorari to the United State's Supreme Court (Nos. 03-5391, 03-5493, and 03-5963), all of which were denied.

[¶10]Moore filed for a writ of habeas corpus in the District Court in Burleigh County, North Dakota (Court File No. 08-04-C-0340). That court denied him any relief. Moore then petitioned for a writ of certiorari to the United State's Supreme Court regarding the habeas denial (No. 03-9899), which was also denied.

[¶11]Regarding the current case (Court File No. 09-05-C-01021), Moore filed an application for post-conviction relief on April 4, 2005. Docket No. 1. A hearing on KVLY-TV's objection to Moore's subpoena of one of its reporters, together with an evidentiary hearing, was held on July 29, 2005, the Hon. Steven E. McCullough presiding. Moore appeared with counsel. The District Court quashed Moore's subpoena of the reporter. App. p.4. The District Court denied all of Moore's post-conviction allegations, with the exception of ineffective assistance of counsel, on which it heard testimony. Tr.p.10, p.11-19. After the evidentiary hearing, the District Court denied or summarily dismissed all of Moore's post-conviction relief claims. Tr.p.43, ln.16-22; App.p.5-6. Moore now appeals those rulings.

[¶12]By way of additional context, Moore recently filed another application for post-conviction relief (Court File No. 09-05-C-03071), requesting a DNA test pursuant to the new law, N.D.C.C. §29-32.1-15. On December 2, 2005, the District Court issued an order denying Moore any relief in that matter.

[¶13]STATEMENT OF THE FACTS

[¶14]The State disagrees with many of the alleged "facts" outlined by Moore in Appellant's Brief. In particular, Moore's alleged Fact No. 4, that his counsel conceded he was ineffective, is completely without support in the record. Appellant Brief, p.1. The key facts of this case are as follows, and as more fully addressed within the Argument section of this brief.

[¶15]1. Andrea Larson, a reporter with KVLY-TV in Fargo, was present at Moore's sentencing hearing on January 17, 2002 (Court File No. 09-01-K-2551), while performing her duties as a news reporter. Tr.p.7, ln.16-25.

[¶16]2. A court reporter was present for the sentencing hearing and a transcript was prepared in Court File No. 09-01-K-2551.

[¶17]3. Moore, as part of his post-conviction case (Court File No. 09-05-C-01021), served a subpoena upon Andrea Larson to appear at his July 29, 2005, evidentiary hearing. Docket No. 15, App. p.3.

[¶18]4. Andrea Larson, together with her employer KVLY-TV, objected to Moore's subpoena. Docket Nos. 19 and 20.

[¶19]5. On July 29, 2005, the District Court heard arguments on the subpoena by Moore's counsel and Larson/KVLY's counsel. The Court signed an Order quashing the subpoena, finding the information Moore sought from the reporter was obtained while she was engaged in her broadcast news role and that failure to disclose it would not cause a miscarriage of justice. Docket No. 23, App. p.4.

[¶20]6. At the evidentiary hearing on July 29, 2005, the District Court heard

testimony from Moore, and Moore's former counsel, Mark Beauchene.

[¶21]7. Attorney Beauchene was appointed to represent Moore in 2002, after Moore filed a *pro se* notice of appeal of his conviction. During the course of his representation, Attorney Beauchene filed with the Supreme Court a motion to dismiss Moore's appeal. Exhibit 2, App. p.15-23. The Supreme Court granted the motion in Supreme Court File No. 20010295. Attorney Beauchene also filed with the District Court a motion for a Rule 35 reduction of sentence. Exhibit 1, App. p. 8-14. The Rule 35 motion was denied by the District Court. Docket Nos. 310 -311, Court File No. 09-01-K-2551.

[¶22]8. With the motion to dismiss Moore's appeal, and also with his Rule 35 motion, Attorney Beauchene enclosed numerous letters Moore had written to Attorney Beauchene, and Moore had written to the various courts but submitted to Attorney Beauchene, in support of dismissing his ongoing appeal *and* filing for a Rule 35 reduction. Within those letters Moore often indicated his concern was with reducing the length of his sentence. He acknowledged his responsibility for his crime and stated he was changing his ways. Also enclosed was a Motion to Dismiss Appeal signed by Moore, indicating he was freely and voluntarily dismissing his appeal. Exhibits 1 and 2, Docket Nos. 21 and 22, App. p. 8-23.

[¶23]9. Attorney Beauchene testified at the July 29, 2005, evidentiary hearing regarding his representation of Moore. He stated, among other things, that: he has been practicing criminal defense since 1979 (Tr.p.33, ln.11-13); he has been a public defender since 1980 (Tr.p.33, ln.16-17); Moore told Beauchene his *only* interest was in reducing the length of his 20-year sentence (Tr.p. 35, ln.9-25,

Tr.p.40, ln.18-19); Beauchene told Moore perhaps the best avenue for that reduction was through a Rule 35 motion (Tr.p.35, ln.18-25, Tr.p.36, ln.6-21); Moore told Beauchene he wished to pursue a Rule 35 motion for sentence reduction and dismiss the ongoing appeal (Tr.p.36, ln.6-21, Tr.p.39, ln.10-18); Beauchene advised Moore he should prepare a statement acknowledging he was sorry for having committed the crime, if that was how he truly felt (Tr.p.38, ln.9-18, Tr.p.42, ln.13-21); Beauchene did not ask Moore to submit nearly a dozen letters on the topic, which Moore nevertheless did (Tr.p.38, ln.9-15); Beauchene did not guarantee Moore a particular result on the motion (Tr.p.36, ln.22 - Tr.p. 37, ln.8); and Beauchene does not recall nor believe he told Moore the Supreme Court has not overturned a rape conviction for 23 years, as Moore claimed, and Beauchene personally understands that statistic to be inaccurate (Tr.p.41, ln.4-19).

[¶24]ARGUMENT

[¶25]I. District Court Did Not Abuse Its Discretion in Quashing Subpoena of Reporter.

[¶26]Moore subpoenaed Andrea Larson, a reporter for KVLY-TV, Fargo, to appear and testify at his July 29, 2005, evidentiary hearing. It appears the only reason Moore wanted the reporter's testimony was to dispute the accuracy of the January 17, 2001 sentencing transcript. Within his Petition for Post-Conviction Relief and related Affidavit, Moore alleges the sentencing judge altered the transcript. However, Moore provided no credible bases to support that statement, the State knows of nothing within the record to give it credence, and the State asserts the proposition is patently frivolous.

[¶27]Section 31-01-06.2, N.D.C.C., provides:

[¶28]*§ 31-01-06.2. Disclosure of news sources and information required only on court order* -- No person shall be required in any proceeding or hearing to disclose any information or the source of any information procured or obtained while the person was engaged in gathering, writing, photographing, or editing news and was employed by or acting for any organization engaged in publishing or broadcasting news, unless directed by an order of a district court of this state which, after hearing, finds that the failure of disclosure of such evidence will cause a miscarriage of justice.

[¶29]This is North Dakota's shield law. Grand Forks Herald v. Grand Forks County District Court, 322 N.W.2d 850, 852 (ND 1982). It establishes a privilege for a news person against disclosure in any proceeding of any information gathered while acting as a news person unless a district court orders disclosure after a hearing and a finding that the failure to testify will cause a miscarriage of justice.

[¶30]On July 29, 2005, the District Court established Larson was working as a reporter in covering Moore's January 17, 2001, sentencing hearing (Tr. P. 7, ln. 16 – 25) and ruled Moore had not established that a miscarriage of justice would occur if Larson did not testify. The subpoena was quashed.

[¶31]This Court has established that an abuse of discretion is the standard of review to use in considering decisions under the shield law and that the abuse of discretion is never assumed, but must be affirmatively established. Herald, 322 N.W.2d at 854.

[¶32]In Herald, this Court, in defining what would cause a miscarriage of

justice, fashioned a balancing test of all the factors involved. These included the availability of the evidence from other sources; a compelling interest; whether or not the information is necessary or critical to the defense; if other reasonable means available to obtain the information have been exhausted; the public interest in the free flow of information against other important interests; and that it does not appear from the record that the action or defense is patently frivolous. Herald, 322 N.W.2d at 855.

[¶33]While Herald did not specifically set out numbered tests, the decision has generally been regarded as following the standard three and four part tests numerous state and federal courts have since adopted. See, for example, the three-prong test outlined in E&J Gallo Winery v. Encana Energy Services, Inc., U.S. District Court, Southern District of New York, No. M8-85, January 12, 2005; 33 Med. L. Rptr. 1413.

[¶34]The Florida District Court of Appeals, in Johnson v. Bentley, 457 So.2 507 (*1984*), interpreted the Herald case as requiring the following standard three-part test:

[¶35]"(1) Is the information relevant; (2) Can the information be obtained by alternative means; and (3) Is there a compelling interest in the information."

[¶36]Florida's shield law is found at Section 90.5015, Florida Statutes. It states, in part, that a party seeking to overcome the privilege must make a clear and specific showing that: (a) The information is relevant and material to unresolved issues that have been raised in the proceeding for which the information is sought; (b) The information cannot be obtained from alternative sources; and (c) A Compelling interest exists for requiring disclosure of the information. Section

90.501(2), Fla. Stat. For a recent interpretation of theses tests, see Smoliak v. Greyhound Lines, Inc., U.S. District Court of Florida, Northern District, No. 5:04cv245-SPM/AK; October 17, 2005; 33 Med. L. Rptr. 2452.

[¶37]While these are the tests most often followed, some courts, like North Dakota's, have added a fourth test - that the action not be frivolous. Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981), Bruno v. Globe Newspaper Co., 633 F.2d 583, 597 (1st Cir. 1980).

[¶38]The first test is relevancy. The plaintiff made no showing on the record that Larson had any information relevant to his petition. There is no evidence on the record of any discovery, depositions or the like to determine if Larson had any relevant information. And, any information Larson does have was gathered and obtained in her capacity as a reporter. She was not in the court room as a spectator or as a witness.

[¶39]While the Herald decision involved photographs and the Court ruled they had to be disclosed, the Court did seem to indicate that the situation might have been different if the news gatherer had been asked to testify, as in the situation in the case at bar, as to what he observed. Herald, 322 N.W.2d at 857.

[¶40]The second test is the exhaustion of alternative sources of the information. Moore was purportedly seeking information concerning how he was sentenced and the standards used in determining that sentence. Obviously this information is available from other sources including Moore himself, the bailiff, the court reporter, plaintiff and defense counsel, the sheriff's deputy in the court room, the deputy clerk present in court, and last, but certainly not least, the judge who did

the sentencing. In Herald, this Court said that while a specific finding that the only method by which the evidence can be obtained is from the news gatherer is not required as an absolute condition of disclosure, the district court could consider the availability of evidence from other sources in determining whether or not a miscarriage of justice would occur if disclosure were not ordered. Herald, 322 N.W.2d at 855.

[¶41]The third test is a compelling interest. In other words, a showing that the information is so necessary and critical to his case that a miscarriage of justice will occur if the reporter does not testify. The appellant made no showing of this on the record and there was no showing that Larson even had any information concerning this matter, much less information of a compelling nature.

[¶42]Finally, the fourth test added by Herald is that the matter not be patently frivolous. Moore's subpoena does not pass this test. He sought information pertaining to the standard or guide used to sentence him three and one-half years earlier, on January 12, 2002. Larson is not a lawyer and had no knowledge of sentencing guidelines. She has covered hundreds of hearings in the past three and one-half years. It is frivolous to expect that in her reporting of a case three and one-half years ago she would recall the type of notice given by the state regarding sentencing and the standards used to sentence the appellant.

[¶43]In Herald, this Court said a trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner. Herald, 322 N.W.2d at 854. More recently, the Court has added the standard of misapplying or misinterpreting the law to this test. Smith v. Smith, 538 N.W.2d 222,230 (N.D.

1955); In Re Guardianship of Barros, 2005 ND 122, ¶22, 701 N.W.2d 402.

[¶44]The trial court did not abuse its discretion. The plaintiff's subpoena did not meet any of the tests set out in Herald to show that a miscarriage of justice would result if a news gatherer did not testify. The trial court did not act in an arbitrary, unreasonable, or unconscionable manner, but rather precisely applied the law of Section 31-01-06.2, N.D.C.C., as set out in Herald.

[¶45]Moore also claims in his brief, at page 3, that the trial court's action in quashing the subpoena violates Rule 501, N.D.R.Ev., regarding the obligation of persons to testify as witnesses. This Court, in Herald, directly addressed that issue and said that was yet another balancing test to be determined by a trial court; i.e. balancing the obligation of all citizens to give relevant testimony with the protection given to news gatherers by the shield statute. Herald, 322 N.W.2d at 855.

[¶46]For all these reasons, the State asserts the District Court rightly quashed Moore's subpoena and rightly denied any related post-conviction claim.

[¶47]II. District Court Did Not Err in Denying Claim of Ineffective Assistance of Counsel.

[¶48]Moore's situation is somewhat different than a typical post-conviction relief case. Typically a defendant's claim relates to his trial counsel's actions or omissions. In Moore's case, he was *pro se* at trial, with standby counsel. However, he was represented by appointed counsel relating to his subsequent criminal appeal and Rule 35 motion for reduction of sentence. Specifically, Moore alleges Attorney Beauchene ineffectively represented him in dismissing the criminal appeal and filing the Rule 35 motion.

[¶49]A. Post-Conviction Relief - Burden of Proof

[¶50]The petitioner carries the burden of establishing a basis for post-conviction relief. Abdi v. State, 2000 ND 64, ¶8, 608 N.W.2d 292. A district court may summarily dismiss an application for post-conviction relief if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. N.D.C.C. §29-32.1-09(1); St. Claire v. State, 2002 ND 10, ¶11, 638 N.W.2d 39. If the moving party establishes there is no genuine issue of material fact, the burden shifts to the nonmoving party to show the existence of a genuine issue of material fact. Syvertson v. State, 2000 ND 185, ¶13, 620 N.W.2d 362. A party opposing a motion for summary disposition must raise an issue of material fact. Id.

[¶51]B. Post-Conviction Relief - Standard of Review

[¶52]Actions for post-conviction relief under Chapter 29-32.1, N.D.C.C., are civil in nature. St. Claire, at ¶8. Usually issues of ineffective assistance of counsel present mixed questions of law and fact and are fully reviewable by the Supreme Court. Laib v. State, 2005 ND 187, ¶11, __ N.W.2d __. However, a district court's findings of fact in post-conviction proceedings will not be disturbed unless clearly erroneous under Rule 52(a), N.D.Civ.P.. Id. A finding of fact 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 the finding, a reviewing court is left with a definite and firm conviction a mistake has been made. Peltier v. State, 2003 ND 27, ¶6, 657 N.W.2d 238.

[¶53]C. Ineffective Assistance of Counsel - Generally

[¶54]The Sixth Amendment of the United States Constitution and Article I, §12 of the North Dakota Constitution entitle a criminal defendant to effective assistance of counsel. Laib, at ¶9. In order to prove a claim for ineffective assistance of counsel, the defendant must establish two elements: (1) counsel's performance was deficient, and (2) his defense was prejudiced by that deficiency. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); Greywind v. State, 2004 ND 213, ¶13, 689 N.W.2d 390. The defendant has the burden to prove both elements, and failure to do so is fatal to the claim. State v. McLain, 403 N.W.2d 165, 17 (ND 1987). This is a "heavy burden". Laib, at ¶9.

[¶55]For the first element (deficient performance), a defendant must demonstrate his counsel's representation fell below an objective standard of reasonableness. Strickland, 466 U.S. @ 668, 104 S.Ct. 2052 (reasonableness is measured under the prevailing professional norms). The Court should consider all of the circumstances to determine whether there were errors *so serious the defendant was not accorded that counsel guaranteed by the 6th Amendment.* McLain, 403 N.W.2d at 17 (emphasis added). The defendant must overcome a "strong presumption" that trial counsel's representation fell within the wide range of reasonable professional assistance. Laib, at ¶9. Courts must consciously attempt to limit the distorting effect of hindsight. Id.; *see also*, McLain, 403 N.W.2d at 18 (a great deal of deference is accorded to trial counsel); Strickland, 466 U.S. at 689, 104 S.Ct. 2052 (strong presumption of reasonable professional conduct).

[¶56]For the second element (prejudice), a defendant must establish "but for" counsel's unprofessional errors the result of the proceedings would have been

different. Greywind, at ¶13. The defendant must present proof of actual prejudice. McLain, 403 N.W.2d at 18. In a criminal case the question becomes whether or not there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt of the accused's guilt. Id. The term "reasonable probability" in this context has been defined as a probability "sufficient to undermine confidence in the outcome". Strickland, 466 U.S. at 694, 104 S.Ct. 2052 (1984). Unless counsel's errors are so blatantly and obviously prejudicial that they would create a reasonable probability of a different result in all cases, regardless of the other evidence presented, the prejudicial effect of those errors must be assessed within the context of the remaining evidence properly presented and the overall conduct of the trial. Laib, at ¶10.

[¶57]D. Ineffective Assistance of Counsel - Not in Moore's Case

[¶58]Moore's counsel-related claims arise not from representation at his criminal trial, but on his subsequent appeal and Rule 35 motion for reduction of sentence.

[¶59]1. *Moore's Sentence Reduction Claims Are Not Credible.*

[¶60]Moore claims his appointed counsel was ineffective because he promised if Moore dismissed his direct appeal counsel would guarantee Moore a Rule 35 reduction of sentence from 20-years to 7-years, and out on the streets in 5–years. Tr.p.14, ln.7-21, p.31, ln.3-7; Appellant's Brief, p.5. Had he proceeded with a criminal appeal, rather than dismiss it, Moore testified his appellate claims would have been sufficiency of the evidence and faulty jury instructions. Tr.p.15, ln.20 - p.16, ln.2.

[¶61]Moore's testimony and his counsel's testimony on these points are in complete disagreement. His counsel stated Moore's only concern was reducing his sentence. Tr.p.35, ln.8 - p.36, ln.21. That testimony is further buttressed by reading Moore's numerous letters to his counsel and the court. App. p.8-23. Moore testified that his counsel required him to prepare every letter, and told him what to write. Tr.p.16, ln.10 - p.22, ln.7, p.28, ln.4 - p.29, ln.11. His counsel, acknowledging he told Moore that remorse would be an issue, testified that while he thought Moore should provide some statement, he did not ask Moore to prepare all those various letters and did not dictate the contents. Tr.p.38, ln.9-22. As for a Rule 35 reduction versus a criminal appeal, his counsel did not believe Moore's sentence was illegal and told Moore the better course to handle a reduction was through a Rule 35 motion. Tr.p.36, ln.18-21. However, counsel testified Moore knew what the options were and Moore chose to dismiss the appeal and proceed with a Rule 35 motion. Tr.p.36, ln.6-21. This is further evidenced by a Motion to Dismiss Appeal that Moore signed acknowledging he was doing so freely and voluntarily. App. p.17. His counsel categorically denied ever guaranteeing Moore a particular result on the Rule 35 motion. Tr.p.36, ln.22 - p.37, ln.8. He further described Moore's claim as "ridiculous", stating no attorney having any experience in criminal defense would make such a promise. Tr.p.36, ln.25 - p.37, ln.4. His counsel was highly experienced, having handled criminal defense cases since 1979 and being a public defender since 1980. Moore produced no documents or other evidence in support of his claim that counsel was ineffective in proceeding with the Rule 35 motion.

[¶62]A district court's findings of fact in post-conviction proceedings will not

be disturbed unless clearly erroneous under Rule 52(a), N.D.Civ.P.. Laib, at ¶11. The District Court in this case found Moore's counsel more credible than Moore. Tr.p.43, ln.16-22. The District Court ruled that counsel's version of events did not equate to ineffective assistance of counsel. Id.

[¶63]The State asserts Moore has failed to carry the heavy burden of proving his counsel's representation was deficient, has failed to show he was prejudiced by his counsel's actions relating to the Rule 35 motion and has failed to show the District Court's finding of fact was clearly erroneous.

[¶64]2. *Moore's Criminal Appellate Claims Are Unsupported.*

[¶65]Had Moore proceeded with a criminal appeal to its conclusion, he now says he would have contested the sufficiency of the evidence and claimed faulty jury instructions. Tr.p.15, ln.20 - p.16, ln.2.

[¶66]The two-pronged Strickland test applies in situations where counsel has failed to file a notice of appeal. Roe v. Flores-Ortega, 528 U.S. 470, 477, 120 S.Ct. 1029 (2000); Whiteman v. State, 2002 ND 77, ¶10, 643 N.W.2d 704. If counsel has consulted with the defendant, counsel performs in an unprofessional manner only by failing to follow the defendant's express instructions regarding an appeal. Flores-Ortega, at 477; Whiteman, at ¶11. Prejudice may be presumed if a defendant was denied the assistance of counsel because a judicial proceeding which he wanted was forfeited. Flores-Ortega, at 483; Whiteman, at ¶12. However, a defendant is required to prove there is a reasonable probability that but for counsel's failure to consult with him about the appeal, the defendant would have appealed. Id. If after an evidentiary hearing the District Court finds a defendant's counsel did not fail to

follow a defendant's wishes regarding filing for an appeal, then the ineffective assistance claim should be dismissed. Whiteman, at ¶23.

[¶67]Moore's case is different than Flores-Ortega or Whiteman. Moore filed a notice of appeal and then, after consulting with counsel, chose to dismiss that appeal and instead move for a Rule 35 reduction. An evidentiary hearing was held. Ignoring for a moment whether the standard is somewhat different in this situation, the District Court, in considering the testimony of Moore and his counsel, concluded their testimony was irreconcilable and that his counsel was more credible. App. p.5-6. Furthermore, there is ample written information, in the form of Moore's letters and the motion to dismiss that Moore signed, that reflects that intent. App. p.8-23. Accordingly, counsel consulted with Moore, ascertained his wishes and then followed them. His performance was not deficient. *See*, Whiteman, at ¶23.

[¶68]If the standard is somewhat different in Moore's case than in Flores-Ortega or Whiteman, and it more approaches the traditional ineffective assistance claim, then if it is easier to dispose of an ineffective assistance of counsel claim because the claimant has not shown sufficient prejudice, then that course should be followed. Laib, at ¶12. Here, Moore has done nothing more than allege what he would claim in a criminal appeal. While Moore's requirement to establish whether he had a legally valid claim may be limited, the State notes that the post-conviction record provides no substantiation for claiming the trial evidence was insufficient. Moore also provided nothing in support of his claim the jury instructions were faulty. The State suspects Moore still fails to fully grasp the exact elements of the crime, a problem which seemed evident in his written and oral arguments in his prior two

appeals. Moore, 2003 ND 83, 662 N.W.2d 263; Moore, 2005 ND 159, 704 N.W.2d 573.

[¶69]The State asserts Attorney Beauchene's legal assistance to Moore was not deficient, and there are no bases to sustain actual, or even a presumption of prejudice regarding his dismissed appeal. Accordingly, pursuant to Laib, and considering the other arguments above, the District Court correctly denied him any relief on that claim.

[¶70]CONCLUSION

[¶71]For the reasons set forth, the State respectfully requests this Honorable Court affirm the District Court's order quashing the subpoena of the television reporter and denying Moore's claim of ineffective assistance of counsel.

Respectfully submitted this 7th day of December, 2005.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Anthony James Moore, Petitioner-Appellant, vs. State of North Dakota, Respondent-Appellee.	)	**AFFIDAVIT OF SERVICE BY MAIL** Supreme Court. # 20050~~133~~363

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

Alyssa Klever, being first duly sworn on oath, deposes and states that she is of legal age and that on this date she deposited in the United States Mails at Fargo, North Dakota, a true and correct copy of the following documents in the above-entitled action:

Appellee's Brief; and Appellee's Appendix

The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

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Penny Miller
Clerk of Supreme Court
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(Appendix only. Brief has been e-filed)

Dated this 7th day of December, 2005.

Alyssa K

Subscribed and sworn to before me this 7th day of December, 2005.

LISA DIVINIUS
Notary Public
State of North Dakota
My Commission expires April 4, 2007

Notary Public