

ORIGINAL (e-filed)

20070051

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

MAY 22 2007

Luis Hernandez, Sr. )

Petitioner/Appellant )

vs. )

State of North Dakota, )

Respondent/Appellee )

STATE OF NORTH DAKOTA

Supreme Court No. 20070051

Cass Co. No. 06-C-02338

APPEAL FROM THE DISTRICT COURT,  
CASS COUNTY

REPLY BRIEF OF APPELLANT

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## STATEMENT OF THE ISSUES

1. The District Court erred in its denial of the Plaintiff/Appellant's application for Post Conviction Relief based on the Ineffective assistance of counsel.
  - a. Counsel Improperly Objected to past sexual history
  - b. Counsel failed to object to hearsay testimony under Crawford.
  - c. Defense counsel should have called the called the alleged victim and her mother as witnesses.
  - d. Defense counsel "opened the door" allowing past sexual conduct into evidence.
  - e. Defense counsel failed to object to prosecutorial misconduct.
  - f. Because counsel's representation fell below an objective standard of reasonableness, there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.
2. The District Court erroneously held that the Plaintiff/Appellant did not preserve a claim for prosecutorial misconduct.

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**RESPONSE TO STATES BRIEF**

**I. The District Court erred in its denial of the Plaintiff/Appellant's application for Post Conviction Relief based on the Ineffective assistance of counsel.**

Mr. Hernandez continues to assert that the District Court erred in its denial of his application for Post Conviction Relief.

**A. Counsel improperly objected to past sexual history.**

Counsel failed to raise Rule 412 of the North Dakota Rules of Evidence when instances of past sexual history were brought up by prosecution. (T. 304) The State has asserted that the Defendant's argument here is without merit because the rule is a rape shield law and not intended to provide a safe harbor for the Defendant regarding any past sexual misbehavior. The State fails to consider that the rule regardless of the intent applies to all parties and gives very explicit instructions as to how this testimony can be elicited or used. The fact of the matter is that these instructions were not followed by the State and Defense Counsel failed to object.

As stated in Mr. Hernandez's original brief Defense Counsel filed a motion in limine under Rule 404, N.D.R.Evid., which the Court granted. When alleged past instances of sexual conduct by the defendant were raised, Defense Counsel objected under the motion in limine, leaving Rule 412 completely overlooked. Again Rule 412 would have barred any evidence of past sexual conduct by the accused unless the procedure found in the Rule had been followed. N.D.R.Evid. 412(c).

N.D.R.Evid. 412(c) states:

(c) Procedure to Determine Admissibility.

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- (1) A party intending to offer evidence under subdivision (b) must:
- (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
  - (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
- (2) Before admitting evidence under this rule, the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

Mr. Hernandez continues to assert that the District Court failed to recognize the damage done by Defense counsel's improper objections and rather accepted the blatant error as acceptable trial strategy. (App.69-82). Defense counsels failure to object under the proper rule was fatal and inexcusable.

**B. Counsel failed to object to hearsay testimony under Crawford.**

The States alleges in their brief that Crawford v. Washington, 541 U.S. 36 (2004) does not apply in this case because the accuser testified at trial and because, the state is of the opinion that the statements made by the accuser to the Doctor where not testimonial statements. First Mr. Hernandez does not deny that L.H testified at trial however he asserts that Defense counsel was not allowed to cross examine certain issues and failed to call her in his case in chief in order to effectively allow the Defendant the opportunity to face his accuser. In State v. Messner, 1998 ND 151 ¶9,¶10, 583 N.W.2d 109, there is discussion of whether or not the declarant just being present in court is enough to satisfy the confrontation clause. "Although mere physical presence of the declarant is not sufficient to satisfy the Constitutional requirement, a perfectly satisfactory cross-

examination is not required.” Id. “The concerns animating the Confrontation Clause are satisfied as long as the defendant has the opportunity to expose weaknesses in the witness’s testimony.” Id. Had Defense counsel called L.H. to the stand on direct he would have been able to effectively question her regarding the inconsistencies in her story. L.H. made statements to the Doctor and to her mother and during depositions that were contradictory in nature and were not addressed by Defense counsel.

Mr. Hernandez asserts that the statements made by L.H. to the doctor were testimonial in nature as they were made to a physician conducting a rape examination. The very nature of the appointment was that of evidence collecting. Under State v. Blue, 2006 ND134, ¶16, 717 N.W.2d 558, this court discussed Crawford and what a testimonial statement is. Within this discussion this Court ruled that statements made by a child to a forensic interviewer were to be considered testimonial as they were made with police involvement. This Court went on to state that statements made to non-government questioners acting in concert with or as an agent of the government are likely testimonial statements under Crawford. Blue, at ¶16. The statements made by L.H. to the doctor during this examination were testimonial statements.

**C. Defense Counsel should have called the alleged victim and her mother as witnesses.**

The State has insinuated in their brief that Mr. Hernandez has failed to show how calling the alleged victim and her mother as witnesses would have changed his case. Mr. Hernandez believes that had his counsel called these two individuals as witnesses he could have effectively shown the jury that the story had been fabricated, and that no

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forced sexual contact or sexual contact of any kind ever occurred between Mr. Hernandez and the alleged victim. Mr. Hernandez asserts that his counsel should have questioned Ms. Haroldson regarding his ongoing relationship with her despite her claims regarding he and L.H. Mr. Hernandez also asserts that once the door was opened regarding any alleged past sexual misconduct that Defense counsel should have then questioned Ms. Haroldson, L.H. and the officer as none of their stories would have matched and the jury would have seen the manipulation and lying that was taking place by L.H. and her mother. If the jury would have seen them testifying contradictory to each other it would have been enough to create a reasonable doubt in the jury's mind.

**D. Defense Counsel "opened the door" allowing past sexual conduct into evidence.**

The State basically agrees in their brief that Defense Counsel opened the door for the Doctors testimony regarding the incubation period of gonorrhea and essentially past sexual misconduct. The State has asserted however that Defense counsel may have believed that the doctor's answer to the questions would simply muddy the water for the jury and create reasonable doubt. This "trial tactic" as labeled by the state should not be glossed over as a tactic that didn't work. Defense Counsel opened this door and then simply did not follow up with further testimony regarding the past history that would have been useful for the jury to hear. If Defense counsel had simply accepted the fact he opened the door and then attempted to discredit the accusations regarding past behavior by calling L.H., her mother and the officer back to the stand and questioning them regarding the past behavior the jury may not have convicted Mr. Hernandez. Defense



counsel failed to recover and close the door that he opened.

**E. Defense Counsel failed to object to prosecutorial misconduct.**

Mr. Hernandez stands by his assertion that Defense counsel failed to object to misconduct and that failure prevented a meaningful appeal. Mr. Hernandez continues to assert that the State continually attempted to circumvent the Rule 412 by introducing evidence of past sexual misconduct without a hearing. Defense Counsel's failure to object to the State's continuous effort to introduce past sexual misconduct prevented a meaningful appeal on the issue. Heckelsmiller v. State, 2004 ND 191, 12,687 N.W.2d 454.

**F. Because counsel's representation fell below an objective standard of reasonableness, there is a reasonable probability that, but for Counsel's unprofessional errors, the result of the proceeding would have been different.**

Mr. Hernandez continues to assert the arguments presented in his original belief regarding the ineffective assistance of counsel. Mr. Hernandez had repeatedly requested that Defense counsel obtain a police report that would shed light on any issues regarding prior conduct, however, this request was never honored by his attorney. Mr. Hernandez further requested that his attorney have the handwriting expert obtain a sample directly from him to show that his handwriting would not match with the handwriting on the letter entered into evidence. Again Mr. Hernandez was not listened to. Mr. Hernandez believes that he was not provided the effective assistance of counsel throughout his trial as his attorney did not follow up on leads as requested by Mr. Hernandez nor did he follow up with questioning witnesses regarding past conduct. Mr. Hernandez was denied his right of effective assistance of counsel and as such, he deserves in the least a new trial.

**II. THE DISTRICT COURT ERRONEOUSLY HELD THAT MR. HERNANDEZ DID NOT PRESERVE A CLAIM FOR PROSECUTORIAL**

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## MISCONDUCT.

The State has asserted that Mr. Hernandez should be barred from pursuing this claim because it was once raised on direct appeal. Therefore the State is claiming *res judicata* on the issue of Prosecutorial Misconduct. Mr. Hernandez asserts that he is in a catch 22 his issues regarding prosecutorial misconduct were glazed over and left unanswered in his direct appeal and now he is being told he cannot address them here because he mentioned them in his appeal. Mr. Hernandez stands by his claim for Prosecutorial Misconduct as argued in his original brief.

## CONCLUSION

Despite any and all arguments set forth by the state Mr. Hernandez continues to assert that the District court erred in denying Mr. Hernandez's Petition for Post Conviction Relief based on ineffective assistance of counsel. There is simply no explanation or trial strategy that accounts for the Defense Counsel's deficiencies in this trial. The District Court should have considered Mr. Hernandez's claim of prosecutorial misconduct. As such, Mr. Hernandez asks this Court to reverse and remand to the District court instructing the Court to consider prosecutorial misconduct and granting him a new trial.

Dated this 22<sup>nd</sup> day of May, 2007

By \_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I do hereby Certify that a true and correct copy of the foregoing **REPLY BRIEF OF APPELLANT** was on the 22<sup>nd</sup> day of May, 2007, delivered by electronic means to:

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By \_\_\_\_\_  
Bonnie L. Storbakken