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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

SUPREME COURT NO.: 20110318

Elijah Addai,

Petitioner-Appellant

- vs -

State of North Dakota

Respondent-Appellee

APPEAL FROM THE CRIMINAL JUDGMENT
EAST CENTRAL JUDICIAL DISTRICT
CASS COUNTY CR. NO. 2010-CV-01281
THE HONORABLE WICKHAM CORWIN, PRESIDING

BRIEF

ELIJAH ADDAI

PETITIONER-APPELLANT
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I.. Did the Defendant, Elijah Addai receive ineffective assistance of counsel based on the failure of his attorney in inquire about the presence of possible exculpatory evidence described in police reports after the State did not disclose it in early discovery? . . . . ¶1

II. Did the Defendant, Elijah Addai receive ineffective assistance of counsel based on his attorney's failure to examine the physical evidence in its entirety, including possible exculpatory evidence, while at the Fargo Police Department? . . . . ¶2

III. Did the Defendant, Elijah Addai receive ineffective assistance of counsel based on his attorney's failure to request furthe DNA and fingerprint analysis completed on multiple items of evidence, the results of which would likely be exculpatory in effect? . . . ¶3

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ABBREVIATIONS

Transcript of Jury Trial - “T”

STATEMENT OF THE ISSUES

[¶1] ISSUE: **I.** Did the Defendant, Elijah Addai receive ineffective assistance of counsel based on the failure of his attorney in inquire about the presence of possible exculpatory evidence described in police reports after the State did not disclose it in early discovery?

[¶2] ISSUE: **II.** Did the Defendant, Elijah Addai receive ineffective assistance of counsel based on his attorney's failure to examine the physical evidence in its entirety, including possible exculpatory evidence, while at the Fargo Police Department?

[¶3] ISSUE: **III.** Did the Defendant, Elijah Addai receive ineffective assistance of counsel based on his attorney's failure to request furthe DNA and fingerprint analysis completed on multiple items of evidence, the results of which would likely be exculpatory in effect?

[¶4] ISSUE: **IV.** Should the Defendant, Elijah Addai be allowed to have DNA and fingerprint analysis completed on evidence related to the case that has exculpatory potential, namely DNA analysis on the clothing from Tesfaye and Delonais and fingerprinting of hte other knives?

[¶5] ISSUE: **V.** Should the Defendant, Elijah Addai be allowed to have a forensic examiner review the coroner's findings against all fo the knives recovered by the police department?

NATURE OF THE CASE

[¶6] On December 11, 2008 Elijah Addai was convicted of first degree murder after a jury verdict of guilty. (Transcript of Jury Trial ("T.") at 915.) The charge was comprised of a single-count Information, charging that on August 19, 2007, Elijah Addai murdered David Delonais by stabbing him with a knife, a Class AA felony. The trial was held before Judge Cynthia Rothe-Seeger in the District Court of Cass County, beginning with voir dire on December 1, 2008 and concluding with a unanimous verdict on December 11, 2008 following lengthy deliberations that stood at an impasse for a significant period. (T. at 893.)

[¶7] On February 17, 2009, Mr. Addai appeared before District Judge Douglas Hermanson, who presided over the sentencing in place of retired Judge Rothe-Seeger, and was sentenced to life in prison with the possibility of parole. (Sentencing Hr'g, 24, Feb. 17, 2009.)

[¶8] As part of the factual background in this request for post-conviction relief, the other participant in the altercation, Semereab Tesfaye (also known as "7-Up"), whose knife contained the deceased's DNA, was never charged with a crime.

[¶9] Mr. Addai appealed from the jury's guilty verdict on several grounds. The North Dakota Supreme Court affirmed the judgment of the District Court by concluding it did not err in denying Mr. Addai's motion to suppress evidence of the stop, the eyewitness identification procedure used, and that the identification was reliable. *State v. Addai*,

2010 ND 29, ¶ 1, 778 N.W.2d 555, 560. Additionally, the Supreme Court held that the

lower court did not abuse its discretion in denying Mr. Addai's motion to dismiss for discovery violations, and competent evidence supported the jury's verdict. *Id.*

[¶10] On April 21, 2010, Mr. Addai applied for post-conviction relief with the District Court under NDCC 29-32.1. He was granted approval and thereafter, the undersigned was appointed to represent Mr. Addai.

ARGUMENT

[¶11] A person who has been convicted of and sentenced for a crime may institute a proceeding applying for relief under N.D. Cent. Code § 29-32.1-01 upon the ground that:

> a. The conviction was obtained or the sentence was imposed in violation of the laws or the Constitution of the United States or of the laws or Constitution of North Dakota;
> b. The conviction was obtained under a statute that is in violation of the Constitution of the United States or the Constitution of North Dakota, or that the conduct for which the applicant was prosecuted is constitutionally protected;
> c. The court that rendered the judgment of conviction and sentence was without jurisdiction over the person of the applicant or the subject matter;
> d. The sentence is not authorized by law;
> e. Evidence, not previously presented and heard, exists requiring vacation of the conviction or sentence in the interest of justice;
> f. A significant change in substantive or procedural law has occurred which, in the interest of justice, should be applied retrospectively;
> g. The sentence has expired, probation or parole or conditional release was unlawfully revoked, or the applicant is otherwise unlawfully in custody or restrained; or
> h. The conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error available before July 1, 1985, under any common law, statutory or other writ, motion, proceeding, or remedy.

N.D. Cent. Code § 29-32.1-01.

[¶12] The North Dakota Supreme Court has held that a petitioner requesting post-conviction relief has the burden of establishing grounds for relief. *Flanagan v.*

State, 2006 ND 76, ¶10, 712 N.W.2d 602. "An application for post-conviction relief may be denied on the ground that the same claim or claims were fully and finally determined in a previous proceeding." N.D. Cent. Code § 29-32.1-12(1). A court may deny relief on the ground of misuse of process, including when the applicant "[p]resents a claim for relief which the applicant inexcusably failed to raise either in a proceeding leading to judgment of conviction and sentence or in a previous post-conviction proceeding." *Id.* § 29-32.1-12(2)(a). "[W]hen claims have been previously raised on direct appeal they cannot be raised again in a subsequent post-conviction application." *Heyen v. State*, 2001 ND 126, ¶9, 630 N.W.2d 56.

[¶13] Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Ineffective assistance of counsel is a claim within the Uniform Post-Conviction Procedure Act under N.D. Cent. Code § 29-32.1. Generally, a claim of ineffective assistance of counsel is more effectively presented in a post-conviction proceeding under Chapter 29-32.1 than in a direct appeal from the judgment. *State v. Ricehill*, 415 N.W.2d 481 (N.D. 1987). A post-conviction proceeding affords an opportunity to establish a record for review. *See State v. Wilson*, 488 N.W.2d 618, 622 n.7 (N.D. 1992). "Thus, in most instances, the issue of ineffective assistance of counsel should be raised before the trial court and a hearing held." *Woehlhoff v. State*, 487 N.W.2d 16, 18 (N.D. 1992).

[¶14] Ineffective assistance of counsel at any phase of a criminal proceeding, if proven, violates a defendant's Sixth Amendment constitutional right to a fair trial and adequate representation.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime

> shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

[¶15] The companion North Dakota State Constitutional provision provides:

> In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel. No person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.

N.D. Const. art. I, § 12.

[¶16] Together, the Sixth Amendment to the United States Constitution, applied to the States through the Fourteenth Amendment, and Article I, § 12 of the North Dakota State Constitution, guarantees a defendant effective assistance of counsel. *DeCoteau v. State*, 1998 ND 199, ¶6, 586 N.W.2d 156. In accordance with the test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant claiming ineffective assistance of counsel has a heavy burden of proving that the representation received fell below an objective standard of reasonableness considering prevailing professional norms, and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Woehlhoff v. State*, 487 N.W.2d 16, 17 (N.D. 1992).

[¶17] "As to the first prong, the petitioner must overcome the strong presumption that counsel's representation fell within the wide range of reasonable professional assistance." *Laid v. State*, 2005 ND 187, ¶9, 05 N.W.2d 845. "An attorney's

performance is measured considering the prevailing professional norms." *Sambursky v. State,* 2006 ND 23, ¶13, 723 N.W.2d 524.

[¶18] In order to meet the second prong, the petitioner must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Roth v. State,* 2006 ND 106, ¶10, 713 N.W.2d 513. In determining whether counsel's performance was deficient, "[C]ourts must consider all the circumstances and decide whether there were errors so serious that defendant was not accorded the 'counsel' guaranteed by the Sixth Amendment." *Klose v. State*, 2005 ND 192, ¶10, 705 N.W.2d 809. The petitioner must prove not only that counsel's representation was ineffective, but must specify how and where counsel was incompetent and the probable different result. *Id.*

[¶19] "Unless the record affirmatively shows ineffectiveness of constitutional dimensions, parties must provide this Court with some evidence in the record to support their claim. The representations and assertions of counsel are not enough." *State v. McDonell*, 550 N.W.2d 62, 65 (N.D. 1996). Conclusory statements do not meet the minimum threshold to support a claim for ineffective assistance of counsel. *Adoption of J.M.H.*, 1997 ND 99, ¶22, 564 N.W.2d 623.

[¶20] In scrutinizing an ineffective assistance of counsel claim, the primary concern is to confirm whether counsel's conduct so undermined the workings of the adversary process that the findings at trial are unjust. *Strickland*, 466 U.S. at 693. Mr. Addai argues his counsel, Mr. Ross Brandborg, was deficient in his efforts to prepare for trial, thus significantly impairing Mr. Addai's ability to put on a complete defense. Mr.

Addai maintains Mr. Brandborg failed to question the whereabouts of exculpatory evidence in the form of Tesfaye's Tanto knife. This knife, believed to be the murder weapon, remained in the State's custody for fourteen months without inquiry from Mr. Brandborg, until a picture of it was offered during eleventh hour discovery disclosures, despite the fact it was described in detail in police reports. *See* Exhibit 1.

[¶21] The knife belonging to Semereab Tesfaye was found outside Innovis Hospital following the altercation which resulted in the death of David Delonais. The knife was initially found by Detective James Shaw, and was soon after photographed and logged into evidence by CSI officer Kim Claus. The investigative events leading up to the knife's discovery were detailed in Officer Shaw's police report and included in the State's discovery disclosures. *See* Exhibit 1. Mr. Brandborg failed to question the State as to the whereabouts of that particular unique knife, and never requested to view the knife while it was in evidence at the police station.

[¶22] Addai moved for dismissal of the case and suppression of the newly disclosed evidence. The court found the State's untimely disclosure of the photographs violated N.D.R.Crim.P. 16. *State v. Addai*, 2010 ND 29, ¶ 43, 778 N.W.2d 555, 569. The court denied Addai's motion to dismiss, but granted the motion to suppress the new photographs. *Id*. The court found the State had been warned on at least two prior occasions to cooperate with discovery, but there was no evidence that any lack of due diligence was willful on the part of the State. *Id*. The court admonished the State for the failure to disclose this evidence sooner, but found other remedies available more appropriate. *Id*. Addai was unable to prepare for trial in four days because he wanted the knife tested for blood and a DNA analysis performed by an independent lab. *Id*. The

court ordered another continuance to allow Addai to get the knife tested. *Id*. The issue regarding the State's inconceivably overdue disclosure practices is not a question posed to this court as part of Mr. Addai's brief in support of a motion for post-conviction relief.

[¶23] The Tanto knife belonging to Tesfaye was mentioned in police reports disclosed to Mr. Brandborg, including that the knife had blood on it, and the knife was available for inspection. *Id*. ¶ 44. Mr. Brandborg *knew* about the knife but *failed* to inspect it. (emphasis applied) *Id*. The Supreme Court held that "a defendant is in a weak position to assert prejudice from the prosecution's failure to produce requested documents or other materials under N.D.R.Crim.P. 16 when the defendant had other available means to obtain the requested material." *Id*.

[¶24] Clearly, Mr. Addai was prejudiced and placed at a disadvantage to assist in the formulation of his defense when his attorney failed to catalogue and account for the physical evidence clearly listed and described in police reports apart from what the State disclosed through their careless discovery efforts.

[¶25] The Supreme Court held that Addai did not explain how he was significantly prejudiced by the late disclosure. *Id*. ¶ 45. The court suppressed the photographs, and granted a continuance to allow Addai to have the knife tested. *Id*. The Supreme Court reiterated, "Addai argued Tesfaye committed the murder, there was evidence witnesses saw Tesfaye fighting with Delonais, there was evidence the knife belonged to Tesfaye, and an expert testified the knife had blood from Tesfaye on the handle and blood from Delonais on the blade." *Id*. The Court believes that Addai failed to show how he was significantly prejudiced by the State's actions regarding this

untimely disclosure and how a different result would have been likely had the State disclosed the evidence earlier.

[¶26] The argument to dismiss the case against Mr. Addai on the grounds that the State was negligent in their discovery practices has already been ruled on and is not arguable in a motion for post-conviction relief. N.D. Cent. Code § 29-32.1-12(1). Mr. Addai does not argue in this brief that the State's negligent discovery practices prejudiced him as much as Mr. Brandborg's failure to properly examine evidence described in police reports as Mr. Addai prepared to contest the State's allegations. Mr. Brandborg's ineffective assistance during trial preparation greatly prejudiced Mr. Addai's ability to formulate an adequate defense to the most serious charge a man can face. The defense was given a brief continuance to allow DNA analysis to be done on the knife. The uncontested results showed that DNA from the blade of the knife matched that of David Delonais. However, Mr. Addai was already prejudiced because the trial strategy prepared over the course of fourteen months could not be amended in such a short time so as to effectively incorporate the new exculpatory evidence.

[¶27] Although the Supreme Court could not find sufficient grounds to warrant a dismissal of the case against Mr. Addai, their opinion reflects the likely prejudice he encountered. "[A]lthough a showing of prejudice is generally required before reversing a criminal conviction for a discovery violation, reversal for conduct which is merely potentially prejudicial may be warranted as a sanction for institutional noncompliance and systemic disregard of the law if the conduct is commonplace." *Addai*, 2010 ND 29, ¶ 46, 778 N.W.2d 555 (citing *Ramstad*, 2003 ND 41, ¶29, 658 N.W.2d 731.) The Supreme Court implies Mr. Addai's inability to have the evidence of the case available to him in

its entirety was potentially prejudicial, but did not warrant complete dismissal due to negligent discovery practices. Had Mr. Brandborg been diligent in his investigation of the evidence, the question of whether or not there was prejudice based on the late discovery materials would not have been at issue and ultimately would have allowed Mr. Addai time to adequately prepare a defense based on the evidence.

[¶28] In *Strickland*, The Supreme Court explained that "access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." 466 U.S. at 685 (quoting *Adams v. United States ex rel. McCann,* 317 U.S. 269, 275-76). "Counsel . . . has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Strickland,* 466 U.S. at 688. Counsel's competence, however, is presumed and the defendant must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. *Id.* at 688-89. In making the competency determination, the court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.* at 690. Because that testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, the Supreme Court noted that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id*. at 691.

[¶29] The defendant must show that he was prejudiced by his attorney's ineffectiveness by demonstrating that "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *See also Id.* at 695, (Where a defendant challenges his conviction, he must show that there exists "a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.") But, the Court maintains, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id.*

[¶30] Failure to investigate evidence Mr. Brandborg knew, or should have known, to be in possession of the police because of its unique description in police reports constituted a failure in pretrial preparation that prejudiced Mr. Addai's right of "ample opportunity to meet the case of the prosecution," *Id.* at 685, (quoting *Adams, supra,* 317 U.S. at 275) and the reliability of the adversarial testing process. *See Strickland*, 466 U.S. at 688. There is no obvious reason why Mr. Brandborg should have decided to defer examining the knife at the police station.

[¶31] As *Strickland* makes clear, the right to effective assistance of counsel is personal to the defendant, and is explicitly tied to the defendant's right to a fundamentally fair trial—a trial in which the determination of guilt or innocence is "just" and "reliable." *Strickland, supra,* 466 U.S. at 685-686, 696; *See also United States v. Cronic,* 466 U.S. 648, 658 (1984). ("[T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.") A criminal defendant who obtains relief under *Strickland* does not receive a windfall; on the contrary, reversal of such a defendant's conviction is necessary to ensure a fair and just result. *Strickland, supra,* 466 U.S. at 685-687.

> As *Strickland* teaches, the right to effective assistance of counsel ensures that defendants have a fair opportunity to contest the charges against them. A

> defendant has a valid ineffective assistance claim whenever he has been denied that opportunity, regardless of the law on which counsel's error is based. It follows that respondent's claim must be judged as a Sixth Amendment claim, according to the standards set forth in *Strickland*.

Kimmelman v. Morrison, 477 U.S. 365, 393 (1986).

[¶32] An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. *Strickland*, 466 U.S. at 691. The North Dakota Supreme Court, in *State v. Addai*, held similar to the United States Supreme Court in *Strickland*. The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. *Id*. at 691-92. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense to constitute ineffective assistance under the Constitution. *Id*. at 692.

[¶33] In certain Sixth Amendment contexts, prejudice is presumed. *Id*. The actual or constructive denial of the assistance of counsel presumed to result in prejudice. *Id*. So are various kinds of state interference with counsel's assistance. *Id*. Prejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost. *Id*.

[¶34] The Supreme Court alternatively states, "[W]e believe that a defendant need not show counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but precise. The standard also reflects the

profound importance of finality in criminal proceedings." *Id*. at 693. The Court states:

> A verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id. at 696.

[¶35] This was precisely the case for Mr. Addai. The jury, after notifying the court of an impasse on their decision, (T. at 893.) eventually came to their conclusion on the verdict after receiving further instruction from Judge Rothe-Seeger. On appeal, it was argued that the entire record lacked enough evidence to convict beyond a reasonable doubt, though the Supreme Court did not agree. Mr. Addai maintains Mr. Brandborg's failure to be diligent in his review and examination of the physical evidence during the fourteen months of trial preparation cost him the opportunity to prepare a proper defense.

[¶36] Rather than simply relying on the State to disclose their evidence when clearly more evidence was available, Mr. Brandborg should have investigated the actual physical evidence the State planned to use in their case if there was ever a doubt as to the State's veracity. Mr. Addai received ineffective assistance of counsel because knowledge of the exculpatory potential of the knife to Mr. Addai's case was absent during the fourteen month preparation period, resulting in prejudice when the trial strategy could not be effectively amended at the eleventh hour.

[¶37] Under N.D.C.C. § 29-32.1-01(1)(e), post-conviction relief may be granted on the ground that "evidence, not previously presented and heard, exists requiring

vacation of the conviction or sentence in the interest of justice." This ground is similar to a request for a new trial based on newly discovered evidence under N.D.R.Crim. P. 33 and requires the same showing to obtain a new trial. *Breding v. State*, 1998 ND 170, P 19, 584 N.W.2d 493.

> [A] person convicted of a crime may make a motion for the performance of forensic DNA testing to demonstrate the person's actual innocence if . . . [t]he testing is to be performed on evidence secured in relation to the trial which resulted in the conviction; and . . . [t]he evidence was not subject to the testing because either the technology for the testing was not available at the time of the trial or the testing was not available as evidence at the time of the trial.

N.D.C.C. § 29-32.1-15(1).

> A person making the motion must present a prima facie case that identity was an issue at trial, and the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

N.D.C.C. § 29-32.1-15(2).

> The court shall order that the testing be performed if a prima facie case has been established under subsection 2; [and] the testing has the scientific potential to produce new, noncumulative evidence materially relevant to the defendant's assertion of actual innocence; and the testing requested employs a scientific method generally accepted within the relevant scientific community. The court shall impose reasonable conditions on the testing designed to protect the state's interests in the integrity of the evidence and the testing process.

N.D.C.C. § 29-32.1-15(3).

[¶38] The Fargo Police Department, the prosecution, and the State Crime Lab had an opportunity to test many items of evidence collected in this case. According to reports, multiple items logged into evidence were sent to the lab for either fingerprint analysis or DNA analysis and comparison. Some items were tested, including only four of the eight knives, swabs taken from Mr. Addai's

hands, and a swab from the hand of Mohamed Hossein. However, many of the items delivered to the State Crime Lab were not tested, despite a written request from the Fargo Police Department asking for the items delivered to be tested in the interest of identifying what actually happened during the incident in the early morning hours of August 19, 2007.

[¶39] Multiple articles of clothing were delivered to the State Crime Lab that were relevant to this case, including clothing from the deceased, Tesfaye, and Mr. Addai. The letter ("Exhibit 2") sent to the State Crime Lab by Investigator Charles Sullivan commented on the clothing worn by David Delonais, "It is questioned as to whether any of the blood on [Delonais's] shirt or pants is that of Semereab Tesfaye or Elijah Addai. It is suspected that his shirt (#032) would of the two be the most likely to have their blood on it. (*sic*) DNA testing is requested to determine this." *See* Exhibit 2.

[¶40] In regards to the clothing worn by Semereab Tesfaye, Investigator Sullivan wrote, "During this altercation, Semereab Tesfaye received a minor cut to the left cheek of his face as well as a serious stab wound to the left side of his head which from the blood found pooled at the scene, had bled considerably. (*sic*) It is suspected that there may be blood from David Delonais on his clothing. DNA testing is required to see if this is so." *See* Exhibit 2.

[¶41] Also in the letter was a reference to item number #048, which was a swab of a bloody palm print found on a car hood near the site where Delonais was finally assaulted. Multiple other items were listed in the letter to the State Crime Lab along with a description of their relevance to the case against Mr. Addai.

The police department specifically requested these items be tested in order to help establish the series of events determining who was actually responsible for David Delonais's death. *See* Exhibit 2.

[¶42] Mr. Addai has maintained his innocence throughout the months leading up to his trial, during the trial, through the appeal, and still so today. Mr. Addai believes that further testing of items in evidence, namely the clothing of Tesfaye and Delonais will show that there was deadly contact between Tesfaye and Delonais which will help prove Mr. Addai was not responsible for the injuries resulting in the death of David Delonais.

[¶43] The North Dakota legislature adopted N.D.C.C. § 29–32.1–15 in 2005. 2005 N.D. Sess. Laws ch. 289, § 1. Under the statute, it is Mr. Addai's burden to establish a sufficient chain of custody for the evidence that requires testing. To establish a prima facie case under N.D.C.C. § 29–32.1–15(2)(b), one must present testimony or otherwise show that evidence still exists and has not been substituted, tampered with, replaced, or altered in any material aspect. *Olson v. North Dakota*, 750 N.W.2d 459, 461 (2008). The evidence from the trial of Mr. Addai has a sufficient chain of custody based on Fargo Police Department records to establish the evidence has been in the possession of the Fargo Police Department or the State Crime Lab the entire time.

[¶44] Mr. Addai argues that his trial counsel was ineffective in his efforts to force the State to test additional items that would likely exonerate Mr. Addai or raise reasonable doubt that he was responsible for the injuries that ultimately caused Delonais's death. Alternatively, Mr. Addai argues that his attorney failed

to secure adequate, independent investigation for DNA and fingerprint evidence that could have been exculpatory.

[¶45] The prosecution and witness testimony fail to corroborate which knife was responsible for the various stab wounds and other injuries to the victim and which knife, if any, was in the hands of Mr. Addai. The State Forensic Examiner's report (Exhibit 3) indicates that the stab wound to the lower back of the victim was delivered by a wider knife, or at least created a larger entrance, in comparison to the stab wound of the upper back, suggesting the wounds were not created by the same knife. Considering Tesfaye may have delivered stab wounds with his Tanto knife, which is wider than all but one of the knives in evidence, and given the fact that six of the eight knives were unavailable to the State Forensic Examiner to compare against the stab wounds, Mr. Addai argues it is imperative further examination is done by forensic examiners against all of the knives in relation to the wounds delivered to Delonais.

[¶46] Mr. Addai requests that this court review the evidence described in Investigator Sullivan's letter to the State Crime Lab (Exhibit 3), determine their relevance to the case in accordance with finding the truth, and order DNA and fingerprint analysis to the respective items as allowed by N.D.C.C. § 29–32.1–15.

CONCLUSION

[¶47] The Defendant, Elijah Addai did receive ineffective assistance of counsel based on the failure of his attorney in inquire about the presence of possible exculpatory evidence described in police reports after the State did not disclose it in early discovery.

[¶48] The Defendant, Elijah Addai did receive ineffective assistance of counsel based on his attorney's failure to examine the physical evidence in its entirety, including possible exculpatory evidence, while at the Fargo Police Department.

[¶49] The Defendant, Elijah Addai did receive ineffective assistance of counsel based on his attorney's failure to request further DNA and fingerprint analysis completed on multiple items of evidence, the results of which would likely be exculpatory in effect.

[¶50] The Defendant, Elijah Addai should be allowed to have DNA and fingerprint analysis completed on evidence related to the case that has exculpatory potential, namely DNA analysis on the clothing from Tesfaye and Delonais and fingerprinting of the other knives.

[¶51] The Defendant, Elijah Addai should be allowed to have a forensic examiner review the coroner's findings against all fo the knives recovered by the police department.

[¶52] Because of the above and foregoing, the Defendant, Elijah Addai wants the North Dakota Supreme Court to find that he had ineffective assistance of counsel and remand this case to district court for a new trial.

DATED this 21st day of December, 2011.

_/s/ElijahAddai_______________________

Elijah Addai
PETITIONER-APPELLANT
NDSP
P.O. BOX 5521
BISMARCK, ND 58506

CERTIFICATE OF SERVICE BY MAIL

The undersigned hereby certifies that she is an employee in the office of Pulkrabek Law Firm and is a person of such age and discretion as to be competent to serve papers.

That on December 22nd, 2011, she served, by e-mail, a copy of the following:

APPELLANT'S BRIEF

to:

Leah J. Viste
Cass County State's Attorney's Office
Vistel@casscountynd.gov

The undersigned further certifies that on December 22nd, 2011, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANT'S BRIEF.

_/s/ Sharon Renfrow_____________
Sharon Renfrow, Legal Assistant to
Benjamin C. Pulkrabek