20110344 and
20110346 – 20110348

FILED original
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DEC 07 2012
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

Mark Christian Palmer, Petitioner/Appellant	)	Supreme Court Nos: ~~20010123-20010126~~ 20110344 20110346-20110348
-vs-	)	McHenry County Case Nos: 25-00-K-0000 ~~35 and 36~~ 33 - 36
State of North Dakota, Respondent/Appellee.	)	PETITION FOR REHEARING & Addendum

COMES NOW, Petitioner/Appellent, Mark Christian Palmer, pro se, and makes request for a Rehearing on the above-entitled matter.

Petitioner/Appellant, would further request that the Court on this Rehearing consider the following:

1.

Petitioner/Appellant applied for post-conviction relief in February 2011, pro se, and Coral Mahler was appointed to represent Petitioner/Appellant.

2.

The State moved for summary dismissal of Petitioner/Appellant's application.

3.

Petitioner/Appellant's court appointed attorney failed in her duty to respond to the State's Motion for Summary Dismissal. Attorneys have a duty and requirement to file a Supplement of Additional Grounds upon a pro se Application for Post-Conviction Relief, and failure to do so is ineffectiveness.

4.

Petitioner/Appellant by and through appointed counsel Russell J. Myhre on or about the 20th day of September, 2012, did file and serve an Affidavit and Brief, (Rehearing Exhibit-1) in the District Court, and this Affidavit and Brief is competent admissible evidence showing genuine issues of material fact, which if appointed

post-conviction attorney would have filed as requested, would have prevented summary disposition of Petitioner's/Appellant's Application for Post-Conviction Relief.

CONCLUSION

Petitioner/Appellant has shown this Court that he has a meritorious argument and not simply that there was a "mistake, inadvertence surprise or excusable neglect: under N.D.R.Civ.P.60(b)(1). Petitioner/Appellant has shown this Court good cause and has tendered the missing answer. See; U.S. Bank Nat'l Ass'n v. Arnold, 2001 ND 130, ¶24, 631 N.W.2d 150; see, also; Bender v. Liebelt,303 N.W.2d 316, 318 (N.D. 1961)

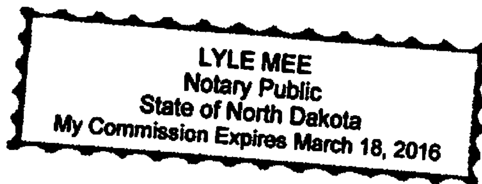
Clearly if it was not for ineffectiveness at the Post-Conviction Relief proceeding Petitioner/Appellant would have been entitled to an evidentiary hearing to fully present the evidence in Affidavit and Brief (Rehearing Exhibit-1).

Dated this 6th day of December, 2012.

Mark Christian Palmer, pro se
JRCC-21986
2521 Circle Drive
Jamestown, ND 58401

Subscribed and Sworn to before me this 6th day of December, 2012, in Stutsman County, North Dakota.

Notary Public



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CERTIFICATE OF SERVICE
Supreme Court Case Nos: 20010123-20010126
McHenry County Case Nos: 25-00-K-0000 35 and 36

I hereby certify that I served by U.S. Mail the following documents.

1.) Petition for Rehearing

2.) Affidavit and Brief (Rehearing Exhibit-1)

3.) Letter to: Clerk of the Supreme Court

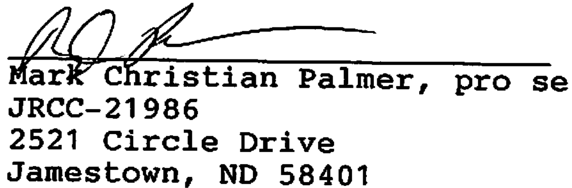
Upon the following persons:

Supreme Clerk of Court
ND Supreme Court
State Capitol
Judicial Wing 1st Floor
600 East Blvd Ave., Dept. 180
Bismarck, ND 58505-0530

Mary Roller
Attorney at Law
407 S. Main Street, Room 307
Towner, ND 58788

Russell J. Myhre
Attorney at Law
PO Box 475
Valley City, ND 58072

Dated this 6th day of December, 2012.



Mark Christian Palmer, pro se
JRCC-21986
2521 Circle Drive
Jamestown, ND 58401

original

IN DISTRICT COURT, McHENRY COUNTY, NORTH DAKOTA

Mark Christian Palmer,	)	
	)	**Cr. Nos. 25-00-K-00033,**
Petitioner,	)	**34, 35, and 36**
	)	
-vs-	)	
	)	**PETITIONER/**
State of North Dakota,	)	**DEFENDANT'S AFFIDAVIT**
	)	**AND BRIEF**
Respondent.	)	

COMES NOW, Mark Christian Palmer, by and through his attorney of record, and respectfully submits the following Affidavit and Brief to the District Court upon the Petitioner/Defendant's Motion Pursuant to Rule 60(b), NDRCivP.

The attached Affidavit and Brief, which was prepared by the Petitioner/Defendant, is hereby submitted for the purpose of showing the Court that the Petitioner/Defendant has grounds for post-conviction relief sufficient to go forward on his Petition for Post-Conviction Relief, pursuant to Chapter 29-32.1, North Dakota Century Code, such that the Court herein would reverse it's Order dismissing the Motion Pursuant to Rule 60(b), NDRCivP, for failure to file a response; and would allow the Petitioner/Defendant to proceed upon the underlying Petition for Post-Conviction Relief.

The Petitioner/Defendant is cognizant of the comments by Justice Sandstrom in his dissenting opinion in the appeal which reversed and remanded the trial court's dismissal herein, and with this Affidavit and Brief is attempting to show that he has a meritorious argument sufficient to demonstrate to the court there is good cause for him to go forward with his Petition.

> [¶15] In other words, one of the factors a defendant must show is that he or she has a meritorious argument, and not simply that there was a "mistake, inadvertence, surprise, or excusable neglect" under N.D.R.Civ.P. 60(b)(1).

Exhibit-1

Rehearing

[¶16] Similarly, this Court has consistently held that in seeking to vacate a default judgment for failure to answer, a defendant must show good cause and tender the missing answer. See, e.g., US Bank Nat'l Ass'n v. Arnold, 2001 ND 130, ¶ 24, 631 N.W.2d 150:

> In deciding Arnold was not entitled to relief from judgment under N.D.R.Civ.P. 60(b), the district court applied this Court's three-part test for vacating judgment. See Bender v. Liebelt, 303 N.W.2d 316, 318 (N.D. 1981) (judgments may be reopened when a motion is promptly made, when the grounds stated satisfy the requirements of Rule 60, and when an answer appearing to state a meritorious defense is presented). (Emphasis added.) See also Hinz v. Northland Milk & Ice Cream Co., 53 N.W.2d 454 (Minn. 1952); Gepner v. Fujicolor Processing, Inc., 2001 ND 207, ¶ 16, 637 N.W.2d 681; King v. Montz, 219 N.W.2d 836, 840 (N.D. 1974).

[¶17] Here the affidavit of good cause for failure to respond needed to be accompanied by competent admissible evidence showing a genuine issue of material fact preventing summary disposition of Palmer's petition for post-conviction relief.

[¶18] When the State moves to summarily dismiss a petitioner's application for post-conviction relief, the petitioner must provide evidence to support the petition in order for the burden to transfer back to the State. See Ude, 2009 ND 71, ¶ 8, 764 N.W.2d 419 ("A petitioner is not required to provide evidentiary support for his petition until he has been given notice he is being put on his proof. At that point, the petitioner may not merely rely on the pleadings or on unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact.") (citations omitted). In this case, Palmer did not respond to the State's motion for summary dismissal. As a result, under my reading of the cases, the burden did not shift back to the State, and the court could have properly denied Palmer's application without a hearing. See id. ("If the petitioner presents competent evidence, he is then entitled to an evidentiary hearing to fully present that evidence.").

[¶19] Here Palmer did not meet the minimum requirements for a motion for N.D.R.Civ.P. 60(b) relief, because he failed to submit with his motion competent, admissible evidence creating a dispute as to a material fact on the merits of his application for post-conviction relief. Neither the district court nor this Court need look any further than Palmer's filing for relief to see that it was legally deficient on its face. The district court's summary denial was appropriate. And our summary affirmance of the district court would likewise be appropriate.

Palmer v. State, 2012 ND 98, 816 N.W.2d 807, ¶¶ 15-19.

Here, the Petitioner/Defendant in his Affidavit and Brief has demonstrated to the Court there are good and sufficient grounds to proceed to an evidentiary hearing pursuant to Section 29-32.1-10, NDCC, on the basis of his assertion of "ineffective assistance of counsel".

WHEREFORE, The Court should grant the Rule 60(b) Motion in part, allowing the claims for ineffective assistance of counsel to go forward, and dismissing those claims which are not substantiated or which may more properly be brought under the general umbrella of ineffective assistance of counsel for failing to raise the Multiplicity of Counts/Double Jeopardy claims, for failing to subpoena information regarding the complainant and being inadequately prepared for trial, and for failing to bring his claims previously or failing to bring them on direct appeal.

This matter should not be dismissed in its entirety, however, since the basic premise of Martinez v. Ryan, 566 U.S. --- (March 12, 2012), is that procedural failures of counsel should not frustrate an overall claim of ineffective assistance of counsel.

This Affidavit and Brief prepared by the Petitioner/Defendant is attached hereto and incorporated herein as "Exhibit 1". It is submitted for the purpose of addressing the issues and concerns expressed by Justice Sandstrom in his dissent and to present good and sufficient grounds for the Court to reverse its prior Order dismissing the Rule 60(b) Motion.

Dated this 20th day of September, 2012.

Russell J. Myhre
Attorney at Law
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341 Central Ave. N., Ste. 3
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Telephone: (701) 845-1444
Fax: (701) 845-1888
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Attorney for Petitioner Palmer

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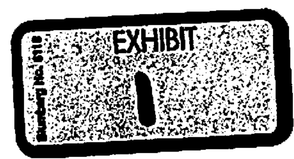

September 18, 2012

Russell J. Myhre
Attorney at Law
Myhre Law Office
P.O. Box 475
Valley City, ND 58072-0475

RE: Palmer v. State (post-conviction)

Dear Mr. Myhre:

I received your letter of September 10, 2012.

I now understand the purpose of the Rule 60 motion hearing in early October, and I thank you for explaining that so clearly.

The following are allegations I feel we should present in affidavits at this Rule 60 motion hearing:

You may consider this an Affidavit of Supporting Grounds.

IT WOULD HAVE BEEN REASONABLE FOR AN ATTORNEY REPRESENTING ME TO:

A.) Prepare my defense compentently. See; United States v. Tucker, 716 F.2d 576 (5th Cir. 1963). The record shows that my counsel's overall representation was mechanical at best perfunctory. My counsel failed to: **1.)** obtain legally relevant facts from me; **2.)** pursue obvious leads provided by me **3.)** interview or attempt to interview key witnesses; **4.)** properly review the trial exhibits made available by the State. See; United States v. Hammands. 425 F.2d 597 (D.C. Cir. 1970).

B.) Ask a qualified expert to investigate or to investigate on his own, any possible defense, including but not limited to:

1.) Projection; this being:

Rehearing Exhibit-1

"when the mother is under stress or is herself being abused physically or emotionally, and she "projects" things into her children, making them into victims."

2.) Displacement; this being:

"when a child has been abused by someone, but they are unable to accuse the actual abuser through fear or intimidation, so they accuse a "safe person."

3.) The fact that the child was in a highly disfunctional family situation.

4.) Obtain an order allowing an independent psychological evaluation of the alleged victim's Social History, or obtain an expert to prepare a Social History of alleged victim.

5.) Question everyone who had contact with the alleged victim, including the father, mother, school teachers and the neighbors.

"Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing certain lines of investigation when he has not yet obtained the facts on which a decision could be made." See; Strickland v. Washington, 466 U.S. at 680; see also; U.S. v. Gray, 878 F.2d 202 (CA 3 1989). The amount of investigation into expert opinions that may be required of a defense attorney is discussed in Davis v. Alabama, 596 F.2d 1214, 1221 (5th Cir. 1984). My counsel's failure to consult an expert, failure to conduct any relevant research contributed significantly

to counsel's ineffectiveness. My counsel's failure to investigate reasonable, genuine and knowing issues which would have shown the Jury and the Court highly relevant evidence of my innocence. Strategy of counsel requires an actual existence of a strategy. See; Berryman v. Monten, 100 F.3d 1089 (CA 3 1996). Just pointing to holes in the State's case during trial does not equal a strategy. See; Fisher v. Gibson, 282 F.3d 1263 (CA 10 2002). A tactical decision requires first an investigation. See; Reynosa v. Giurbino, 462 F.3d 1099 (CA 9 2006). My counsel failed to have a trial strategy and clearly lacked a "game plan".

C.) Move the Court for a **TAINT HEARING**. Federa Rule of Evidence 602 and the corresponding State rules require that a witness must testify from personal knowledge. If a witness is unable to testify from personal knowledge because memories have been altered or manipulated, they are said to be tainted. See, Lorandos & Campbell, Benchbook in the Behavioral Sciences p. 143-146 (2005). In my case there should have been an understanding of whether the questioning, interviews, interogations or counseling of the child witness (alleged victim) were unduly suggestive, and required an highly nuanced inquiry into the atmosphere and demeanor surrounding verbal interaction between the children and adults. See; Holden v. State, 202 Ga. App. 558, 562, 418 SE.2d 910, 914 (1992) The broad question of whether children as a class are more susceptible to suggestion than adults is one that has been definitely answered in psychological research. Buy this inquiry-vis-a-vis a taint

hearing - would have been more focused. The issue that would have been before the trial court is whether the interviewing, questioning and counseling techniques used with the child witness were so suggestive that they had the capacity to substantially alter the alleged victim's recollections of events and thus compromise the reliability of the alleged victim's personal knowledge. See; Goodman & Helgeson, Child Sexual Assault: Children's Memory and the Law, 40 V. MIAMI L. REV. 181 (1985); see also; Myers, The Child Witness: Techniques for Direct Examination, Cross-Examination, and Impeachment, 18 PAC L.J. 801, 889 (1987); Younts, Evaluation and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions, 41 DUKE L.J. 691 (1991).

I believe that with these issues I will extablish a reasonable probability that, but for the unprofessional errors of counsel, the result of the proceeding would have been different. I have demonstrated with specificity how and where trial counsel was incompetant. See; State v. Burke, 200 ND 24 ¶36, 606 N.W.2d 108. Had my counsel done even a perfunctory job there is a very good chance I would have been found not guilty.

Each of the afore presented claims of ineffective assistance of counsel stands on its own. See; Scott v. Jones, 915 F.2d 1185, 1191 (6th Cir. (1990). Each of these errors are sufficiently prejudicial to me, and the aggregate effect of these errors of counsel are ineffective assistance of counsel. See; Henry v. Scully, 78 F.3d

51 (CA 1 1996); see also; U.S. v. Tory, 52 F.3d 207 (CA 9 1995); Silva v. Woodford, 279 F.3d 825 (CA 9 2002), and Middleton v. Roper, 455 F.3d 838 (6th Cir. 2006).

Each of my claims of ineffective assistance of counsel support ineffective assistance of counsel on their own, as each error is sufficiently egregious and prejudicial. See; United States v. Cronic, 466 U.S. 648; see also; Murray v. Carrier, 477 U.S. 496 91 L.Ed.2d 397, 106 S.Ct. 2639 (1986); Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979)(holding in some cased, a single critical error may render counsel's performance constitutionally defective). "The standard of ineffective assistance of counsel is the same for both death penalty cases and all other felony improsonment cases." See; Hardin v. Wainwright, 678 F.2d 569, 592 (5th Cir. 1982); see also; Vela v. Estella, 708 F.2d 954 (1963).

This prejudice component requires me to show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have bee different." Strickland [...], I "need not show that counsel's deficient performance 'more likely then not altered the outcome in the case - rather, I must show only a probability sufficient to undermine confidence in the outcome.'" Jacobs, 395 F.3d at 105 [citing Strickland]. "This standard is not a stringent one" Id. Although Strickland does not set a high bar with respect to the prejudice inquiry, I have shown there is a reasonable likelihood that I would not be convicted but for counsel's errors.