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IN THE SUPREME COURT

OF THE STATE OF NORTH DAKOTA

APR 19 2016

STATE OF NORTH DAKOTA

Robert Duane Beeter,)
)
 Petitioner/Appellant,)
)
 vs.)
)
 State of North Dakota,)
)
 Respondent/Appellee.)

Supreme Court No. 20160041

Civil No. 51-2015-CV-00398

BRIEF OF RESPONDENT-APPELLEE

**Appeal from Judgment Entered on January 20, 2016
In District Court, Ward County, State of North Dakota
The Honorable Gary H. Lee, Presiding**

Marie A. Miller (#06617)
Ward County Assistant State's Attorney
315 3rd St. SE
PO Box 5005
Minot, ND 58702-5005
701-857-6480-5682
marie.miller@wardnd.com

TABLE OF CONTENTS

TABLE OF CONTENTS.....p. 1

TABLE OF AUTHORITIESp. 2

STATEMENT OF ISSUE.....p. 3

STATEMENT OF THE CASE.....¶1-3

STATEMENT OF THE FACTS¶4-11

LAW AND ARGUMENT¶12-34

CONCLUSION.....¶35

AFFIDAVIT OF SERVICE BY MAIL.....¶36

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Paragraph</u>
<u>Bahtiraj v. State</u> , 2013 ND 240, 840 N.W.2d 605	¶31
<u>Clark v. State</u> , 2008 ND 234, 758 N.W.2d 900	¶12
<u>Everett v. State</u> , 2015 ND 149, 864 N.W.2d 450.....	¶31
<u>Gideon v. Wainwright</u> , 372 U.S. 335 (1963).....	¶12
<u>Hill v. Lockhart</u> , 474 U.S. 52 (1985)	¶31
<u>Kinsella v. State</u> , 2013 ND 238, 840 N.W.2d 625.....	¶12, 13, 14, 15, 25
<u>Klose v. State</u> , 2005 ND 192, 705 N.W.2d 809.....	¶ 13, 15
<u>Osier v. State</u> , 2014 ND 41, 843 N.W.2d 277	¶18
<u>Stopplesworth v. State</u> , 501 N.W.2d 325 (N.D. 1993).....	¶16
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984).....	¶10, 14, 18, 21, 29, 31, 35
<u>Tweed v. State</u> , 2010 ND 38, 779 N.W.2d 667	¶16
<u>Rules</u>	<u>Paragraph</u>
N.D.R.Civ.P 52	¶12
<u>North Dakota Constitution</u>	<u>Paragraph</u>
Article I, § 12	¶13
<u>United States Constitution</u>	<u>Paragraph</u>
U.S. Const. amend VI	¶13

STATEMENT OF THE ISSUE

- I. Whether the trial court erred in denying Petitioner's application for post-conviction relief.**

STATEMENT OF THE CASE

[¶ 1] Robert Duane Beeter (hereinafter "Beeter") entered a plea of guilty in Criminal Nos. 51-2013-CR-02320, 51-2013-CR-03019, and 51-2013-CR-0321 on May 14, 2014. (See Appellee's App. pp. 1, 5, 7). On May 15, 2014, the North Central Judicial District Court entered Criminal Judgments in Criminal Nos. 51-2013-CR-02320, 51-2013-CR-03019, and 51-2013-CR-0321. (See Appellant's App. pp 4-13). The court ordered Beeter to serve twenty (20) years in jail on count 1, Possession of a Controlled Substance with Intent to Deliver Methamphetamine, a Class A Felony, in Criminal No. 51-2013-CR-02320. (See Appellant's App. p. 4). Also in Criminal No. 51-2013-CR-02320, the court ordered Beeter to serve five (5) years on count 2, Possession of a Controlled Substance, a Class C Felony, to serve five (5) years on count 3, Possession of a Controlled Substance, a Class C Felony, to serve five (5) years on count 4, Possession of Drug Paraphernalia, a Class C Felony, and to serve thirty (30) days on count 5, Possession of a Controlled Substance, a Class B Misdemeanor. (See Appellant's App. pp. 5-8). In Criminal No. 51-2013-CR-03019, the court ordered Beeter to serve five (5) years in jail on the charge of Failure to Appear after Release-Bail Jumping, a Class C Felony. (See Appellant's App. p. 9). Finally, in Criminal No. 51-2013-CR-03021, the Court ordered Beeter to serve twenty (20) years on count 1, Possession of a Controlled Substance with Intent to Deliver, a Class A Felony, to serve five (5) years on count 2, Possession of Drug Paraphernalia, a Class C Felony, to serve one (1) year on count 3, Possession of Marijuana by a Driver, a Class A Misdemeanor, and to serve five (5) years on count 4,

Escape, a Class C Felony. (See Appellant's App. pp. 10-13). The court ordered all criminal cases and all criminal counts to run concurrent to each other. (See Appellant's App. pp. 4-13).

[¶ 2] Beeter filed an Application for Post-Conviction Relief on March 16, 2015. (See Appellant's App. pp. 1, 14-16). A Post-Conviction Relief hearing was held on December 22, 2015. (See Appellant's App. p. 2). The court issued its Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment on January 20, 2016. (See Appellant's App. pp. 32-44). The court ordered the petition for post-conviction relief was denied and dismissed the action. (See Appellant's App. p. 43).

[¶ 3] Beeter filed a timely Notice of Appeal from said Findings of Fact, Conclusions of Law, Order for Judgment, and Judgment. (See Appellant's App. pp. 45-47).

STATEMENT OF THE FACTS

[¶ 4] Beeter entered pleas of guilty in Criminal Nos. 51-2013-CR-02320, 51-2013-CR-03019, and 51-2013-CR-0321 on May 14, 2014. (See Appellee's App. pp. 1, 5, 7). On May 15, 2014, the North Central Judicial District Court entered Criminal Judgments in Criminal Nos. 51-2013-CR-02320, 51-2013-CR-03019, and 51-2013-CR-0321. (See Appellant's App. pp 4-13). The court ordered Beeter to serve twenty (20) years on two counts of Possession of a Controlled Substance with Intent to Deliver, each Class A Felonies; five (5) years on the charges of Escape, Failure to Appear-Bail Jumping, and two counts of Possession of a Controlled Substance, each Class C Felonies; one (1) year on the charge of Possession of Marijuana by a Driver, a Class A Misdemeanor; and thirty (30) days on Unlawful Possession of a Controlled Substance, a Class B Misdemeanor. Id. The court ordered all criminal cases and all criminal counts to run concurrent to each other. Id.

[¶ 5] On March 16, 2015, Beeter, *pro se*, filed an Application for Post-Conviction Relief on March 16, 2015. (See Doc ID# 1). Beeter identified primary claims of Ineffective Assistance of Counsel, Conviction Unlawfully Induced by Plea Bargain, and Plea was not Voluntary due to lack of Understanding of the Consequences of the Entry of a Plea. (See Appellant's App. pp. 14-16).

[¶ 6] On April 2, 2015, Steve Balaban was appointed to represent Beeter in the Post-Conviction Relief matter. (See Doc ID# 9). On April 16, 2015, the State of North Dakota responded to Beeter's Application for Post-Conviction Relief, arguing that the Court should summarily dismiss the petition because Beeter had failed to show any genuine issue of material fact for each of the allegations. (See Appellee's App. pp. 10-15).

[¶ 7] On May 27, 2015, Beeter, through counsel, filed a Reply Brief to the State's motion for summary dismissal of the petition for post-conviction relief. (See Doc ID# 23, 24, & 25). Beeter articulated specific allegations of trial counsel conduct and argued that a hearing before the District Court was appropriate. (See Appellee's App. pp. 16-28).

[¶ 8] On June 10, 2015, the State of North Dakota filed a Response to Petitioner's Reply to State's Motion for Summary Dismissal. (See Doc ID# 29). The State of North Dakota asserted that Beeter's Application for Post-Conviction Relief should be summarily dismissed because Beeter failed to make a threshold showing that the outcome of the case(s) would have been different had he received effective trial counsel. (See Appellee's App. pp. 40-42).

[¶ 9] On July 29, 2015, the Court denied the State of North Dakota's motion for summary dismissal. (See Doc ID# 36).

[¶ 10] On December 22, 2015, a Post-Conviction Relief hearing was held. (See Appellant’s App. p. 17). Beeter and William Hartl, Beeter’s trial counsel, each testified at the Post-Conviction Relief hearing. (See Tr. pp. 2-61). Beeter argued that trial counsel’s performance did fall below a standard in the community and the representation caused a difference in the outcome of the case. (See Tr. p. 64). The State of North Dakota asserted that Beeter failed to satisfy the second prong of the Strickland test. (See Tr. p. 66 (citing Strickland v. Washington, 466 U.S. 668 (1984))).

[¶ 11] On January 20, 2016, the court denied and dismissed Beeter’s Application for Post-Conviction Relief. (See Appellant’s App. pp. 31-44).

LAW AND ARGUMENT

I. Whether the trial court erred in denying Petitioner’s application for post-conviction relief.

A. Standard of Review.

[¶ 12] “The standard of review for a claim of ineffective assistance of counsel in a post-conviction appeal is well-established: Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure. Whether a petitioner received ineffective assistance of counsel is a mixed question of law and fact and is fully reviewable on appeal. Under N.D.R.Civ.P. 52(a), the district court’s findings of fact will not be disturbed on appeal unless clearly erroneous. ‘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.’” Kinsella v. State, 2013 ND 238, ¶ 4, 840 N.W.2d 625 (quoting Clark v. State, 2008 ND 234, ¶ 11, 758 N.W.2d 900).

B. The trial court did not err in finding Petitioner failed to establish an ineffective assistance of counsel claim.

[¶ 13] “The Sixth Amendment, made applicable to the states through the Fourteenth Amendment, provides that ‘[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.’” Kinsella v. State, 2013 ND 238, ¶ 4, 840 N.W.2d 625 (quoting U.S. Const. amend VI; see also Gideon v. Wainwright, 372 U.S. 335, 342, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963)). “Article I, § 12 of the North Dakota Constitution also guarantees a criminal defendant the right to effective assistance of counsel.” Kinsella v. State, 2013 ND 238, ¶ 4, 840 N.W.2d 625 (citing Klose v. State, 2005 ND 192, ¶ 9, 705 N.W.2d 809).

[¶ 14] “In Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), the United States Supreme Court established the test for whether a convicted criminal defendant’s ineffective assistance of counsel claim warrants a reversal of conviction. ‘First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment.’ Second, the defendant must show that the deficient performance prejudiced his or her defense. ‘This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.’” Kinsella v. State, 2013 ND 238, ¶ 5, 840 N.W.2d 625 (quoting Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

[¶ 15] “Establishing both elements is a heavy burden and requires a defendant to both overcome the strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance and establish that there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different. This requires the defendant to demonstrate with specificity how and where trial counsel was incompetent, and it is probable a different result would have been obtained had trial counsel not performed incompetently." Kinsella v. State, 2013 ND 238, ¶ 6, 840 N.W.2d 625 (citing Klose v. State, 2005 ND 192, ¶ 9, 705 N.W.2d 809).

[¶ 16] "[A] defendant claiming ineffective assistance of counsel has a heavy burden of proving (1) counsel's representation fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel's deficient performance." Tweed v. State, 2010 ND 38, ¶ 26, 779 N.W.2d 667. Petitioner "must first overcome the 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" Id. (quoting Stopplesworth v. State, 501 N.W.2d 325, 327 (N.D. 1993)). Moreover, "[t]rial counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the distorting effect of hindsight." Tweed v. State, 2010 ND 38, ¶ 26, 779 N.W.2d 667.

[¶ 17] Petitioner claims "1. That his trial counsel failed to provide him with all discovery; 2. That his trial counsel did not pursue pretrial investigation; and 3. That his trial counsel did not adequately advise him of his options as [Petitioner] lacked information to make an informed and intelligent decision to plea." (See Brief of Petitioner-Appellant ¶ 12).

[¶ 18] The trial court set out that "[Petitioner] bears the burden of establishing grounds for post-conviction relief. [Petitioner] must establish that both prongs of the Strickland v. Washington, 466 US 688 (1984) test have been met. That is, one, counsel's representation fell below an objective standard of reasonableness, and two, he was prejudiced by counsel's deficient performance." (See Appellant's App. pp. 34-35 (citing Osier v. State, 2014 ND 41, 843 N.W.2d 277)).

1. The trial court did not err in finding Petitioner failed to establish his first claim for ineffective assistance of counsel.

[¶ 19] The trial court addressed Petitioner’s first claim, that trial counsel failed to provide him with all discovery. The trial court acknowledged that Petitioner and trial counsel each testified, and that the testimony of Petitioner and trial counsel were at odds, with the exception of trial counsel conceding he did not provide copies of compact discs and did not recall playing those discs for Petitioner. (See Appellant’s App. pp. 35-36). The trial court stated, “[t]o a degree, an analysis of this complaint hinges on credibility.” (See Appellant’s App. p. 36). The trial court determined that “[i]nsofar as credibility is concerned, there is no contest.” Id. The trial court found “[a]ttorney Hartl’s testimony that he provided [Petitioner] with discovery, save for the compact discs, is worthy of belief.” Id.

[¶ 20] In addressing trial counsel’s failure to provide copies of compact discs to the Petitioner, the trial court stated that “even if the Court assumes that information contained on the discs was not provided to [Petitioner], he must still establish that the information would have been so compelling that [he] would not have plead guilty and would have insisted on going forward with trial.” Id. The trial court then found that Petitioner “established none of this.” Id.

[¶ 21] Petitioner failed to demonstrate that any failure to provide discovery resulted in any prejudice. As such, Petitioner failed to establish each prong required by Strickland.

2. The trial court did not err in finding Petitioner failed to establish his second claim for ineffective assistance of counsel.

[¶ 22] Petitioner’s second claim of ineffective assistance of counsel asserts that his trial counsel did not pursue pretrial investigation.

[¶ 23] The trial court examined the testimony and facts of each individual file in its determination of Petitioner's second claim.

[¶ 24] First, the trial court addressed Crim. No. 51-2013-CR-02320. The trial court found that Petitioner's story was "ludicrous" and that there simply was no defense to the class A felony charge, Unlawful Possession with Intent to Deliver, as nearly a quarter pound of methamphetamine, a scale, \$6,100.00 in currency, including drug buy money used by a confidential informant to purchase methamphetamine, and prepackaged baggies of methamphetamine were all discovered during the search of Petitioner's residence. Id. at 37-38. The trial court further reasoned that trial counsel testified that he did consider information provided to him by Petitioner, "but believed that any suppression motion would not have been viable." Id. at 38. The trial court then found that Petitioner "offered nothing, other than his complaints, which would tend to establish viability of any suppression motion." Id.

[¶ 25] The trial court then applied its findings in regards to Crim. No. 51-2013-CR-02320 to applicable law. The trial court set out "[t]o bring a successful ineffective assistance of counsel claim based upon an attorney's failure to follow through with pretrial motions to suppress evidence, [Petitioner] must prove that he would have prevailed on his motion, and that there would be reasonable probability that a successful motion would have affected the outcome of any trial." Id. (citing Kinsella v. State, 2013 ND 238, 840 N.W.2d 625.) The trial court then found that Petitioner did not establish ineffective assistance of counsel as Petitioner failed to demonstrate he would have prevailed on his motion and the trial court itself found no viability in a pretrial motion.

[¶ 26] The trial court next addressed Crim. No. 51-2013-CR-03019. The trial court's found Petitioner "offered nothing regarding this file, a Failure to Appear-Bail Jumping

charge. Since he [...] offered nothing, the Court must find that [trial counsel's] failures, if any, did not affect this file.” (See Appellant’s App. 39). Petitioner failed to establish ineffective assistance of counsel.

[¶ 27] Finally, the trial court addressed Crim. No. 51-2013-CR-02320. Petitioner claimed that a search conducted without a warrant, following the stop of his motor vehicle, was inappropriate. Id. Trial counsel testified that he did not believe a pretrial motion would have been appropriate as the search was a legal probation search.

[¶ 28] The trial court found that Petitioner offered nothing that would establish the stop was improper, that the probationary search was improper, that the search was not a valid search incident to arrest, and that the search was not justified as a warrantless automobile search. Id. at 40. Additionally, the trial court found Petitioner’s testimony was not only “unworthy of belief,” but that such assertions would have provided trial counsel with no useful information for any defense. Id.

[¶ 29] Petitioner failed to establish ineffective assistance of counsel pursuant to Strickland. As such, the trial court did not err in finding Petitioner failed to establish his second claim.

3. The trial court did not err in finding Petitioner failed to establish his third claim for ineffective assistance of counsel.

[¶ 30] Petitioner finally argues that his trial counsel did not adequately advise him of his options and that he lacked information to make an informed and intelligent decision to plea. (See Brief of Petitioner-Appellant ¶ 12).

[¶ 31] “The two-part Strickland test ‘applies to challenges to guilty pleas based on ineffective assistance of counsel.’” Everett v. State, 2015 ND 149, ¶ 9, 864 N.W.2d 450 (citing Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)). “The

appropriate standard for prejudice in cases involving pleas was established in Hill, which held that a defendant who enters a plea must show ‘a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.’” Id. “In Bahtiraj v. State, 2013 ND 240, ¶ 16, 840 N.W.2d 605, [the North Dakota Supreme Court] explained the prejudice prong in the context of a guilty plea:

All courts ‘require something more than defendant’s ‘subjective, self-serving’ statement that, with competent advice, he would’ not have pled guilty and would have insisted on going to trial. ‘A defendant must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is ‘sufficient to undermine confidence in the outcome’ of the proceeding.’ This standard ‘requires a ‘substantial,’ not just ‘conceivable,’ likelihood of a different result.’ The petitioner ‘must convince the court that a decision to reject the plea bargain would have been rational under the circumstances.’ [...] ‘The movant must allege facts that, if proven, would support a conclusion that the decision to reject the plea bargain and go to trial would have been rational, e.g., valid defenses, a pending suppression motion that could undermine the prosecution’s case, or the realistic potential for a lower sentence.’”

Everett v. State, 2015 ND 149, ¶ 9, 864 N.W.2d 450 (*citing* Bahtiraj v. State,

2013 ND

240, ¶ 16, 840 N.W.2d 605).

[¶ 32] Petitioner asserts that trial counsel gave him less than five minutes to decide to accept the State’s offer. (See Appellant’s App. p. 41). Trial counsel testified that Petitioner’s first attorney had entered into negotiations with the Ward County State’s Attorney, and that from the “very outset, it was the State’s position that [Petitioner] must plead to, and accept a mandatory 20 year sentence.” Id. Trial counsel also testified that the State had communicated this was a “take it or leave it deal,” and that if the Petitioner refused the deal, the State would seek consecutive sentences, and pursue sentencing the

Petitioner as a habitual offender. Id. Finally, trial counsel testified that, with the exception of the habitual offender component, Petitioner would have been informed of the sentence(s) being pursued by the State since mid-March. Id. at 42. Trial counsel testified that the State did not communicate that it would seek habitual offender status until May 13, 2014, the day prior to Petitioner's change of plea. (See Tr. p. 48).

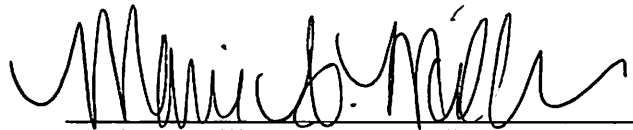
[¶ 33] The trial court found, “[t]he downside risk of meaningless and hopeless pretrial motions was great. Not only would the motions have been unsuccessful, the State may very well have withdrawn the 20 year offer thus exposing [Petitioner] to potentially greater time, including a possible life sentence.” (See Appellant's App. p. 42). The trial court also found, “[t]he downside risk of trial was great. As [trial counsel] testified, the risk of trial did not outweigh the consequences. The evidence against [Petitioner] was overwhelming.” Id. The trial court went on to detail that in Crim. No. 51-2013-CR-02320, Petitioner had a quarter pound of methamphetamine, packaged as if for resale, a scale and \$6,100.00 in cash, including marked drug buy money. Id. In Crim. No. 51-2013-CR-03021, Petitioner was found to be in possession of \$62,000.00 in cash, as well as a quantity of methamphetamine. Id. The trial court additionally pointed out that Petitioner, by means of his own testimony at the Post-Conviction Relief hearing, admitted that he was going to deliver methamphetamine. Id.

[¶ 34] Petitioner failed to convince the trial court that a decision to reject the plea bargain would have been rational under the circumstances. Petitioner failed to demonstrate the existence of any valid defenses, any suppression motions that could undermine the prosecution's case, or any realistic potential for a lower sentence. The trial court did not err in finding Petitioner failed to establish his third claim for ineffective assistance of counsel.

Conclusion

[¶ 35] Petitioner has not demonstrated that the trial court's findings of fact were clearly erroneous. The trial court appropriately applied Stickland and found that Petitioner failed to meet the two (2) prong test in each of his claims. As such, the Findings of fact, Conclusions of Law, Order for Judgment, and Judgment should be affirmed.

Dated this 18th day of April, 2016.



Marie A. Miller (ND Bar ID #06617)
Ward County State's Attorney's Office
315 3rd Street SE
Minot, ND 58701
701-857-6480
51wardsa@wardnd.com

**IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA**

Robert Duane Beeter,)	
)	Supreme Court No. 20160041
Petitioner/Appellant,)	
)	Civil No. 51-2015-CV-00398
vs.)	
)	
State of North Dakota,)	
)	
Respondent/Appellee.)	

[¶36] AFFIDAVIT OF SERVICE BY MAIL

LeAnn Westereng, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, over the age of twenty-one years, and is not a party to nor interested in the above entitled action; that on the 19 day of April, 2016, this Affiant deposited in the mailing department of the United States Post Office at Minot, North Dakota, a sealed envelope with postage thereon duly prepaid, containing a true and correct copy of the following document in the above entitled action:

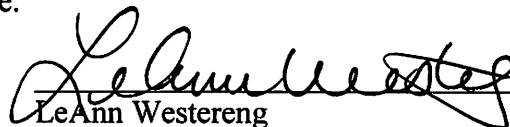
**BRIEF OF RESPONDENT - APPELLEE and
APPENDIX OF RESPONDENT- APPELLEE**

That said envelope was addressed to the following person at his address as follows:

LAURA C RINGSAK
ATTORNEY FOR APPELLANT
103 SOUTH 3RD ST SUITE 6
FARGO ND 58107

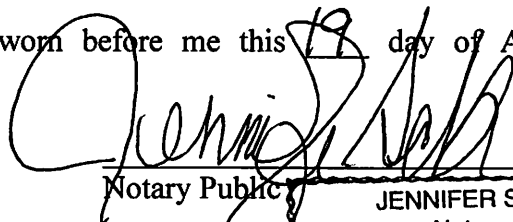
PENNY MILLER
CLERK OF SUPREME COURT
JUDICIAL WING 1ST FLOOR
600 E BLVD AVE DEPT 180
BISMARCK ND 58505-0530

That the above document was duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.



LeAnn Westereng

Subscribed and sworn before me this 19 day of April, 2016 by LeAnn Westereng.



Notary Public

16

JENNIFER SCHLECHT
Notary Public
State of North Dakota
My Commission Expires April 14, 2021