

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Sean Michael Kovalevich,)
Petitioner and Appellant.)

- vs -)

State of North Dakota,)
Respondent and Appellee)

Supreme Court Case No. 20160194
District Court Case No. 18-2015-CV-02064

State of North Dakota,)
Plaintiff/Appellee,)

- vs -)

Sean Michael Kovalevich,)
Respondent/Appellant)

Supreme Court Case No. 20160325
District Court Case No.: 18-2012-CR-03069

APPEAL FROM THE CIVIL JUDGMENTS
NORTHEAST JUDICIAL DISTRICT
GRAND FORKS COUNTY CIVIL. NO.
18-2015-CV-02064 AND 18-2012-CV-03069
THE HONORABLE JON J. JENSEN PRESIDING

BRIEF

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ABBREVIATIONS

Appendix - App.
Transcript - Tr.
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STATEMENT OF THE ISSUES

[¶1] ISSUES:

I. When the State, after receiving the Defendant's Rule 16 Motion for Discovery, failed to disclose exhibits #5 & #6 was the Defendant, Sean Kovalevich at his trial deprived of his constitutional right to effectively cross examine the State's witness BCI agent Craig Zachmeier?

II. Since the deprivation of effective cross examination as to prior inconsistent statements of a material matter is a deprivation of the due process of law and cross examination is a constitutional right is the Defendant, Sean Kovalevich entitled to a new trial?

III. Was Petitioner Kovalevich's trial counsel and/or Appellate counsels legal assistance so ineffective that Petitioner Kovalevich should be awarded a new trial?

NATURE OF THE CASE

[¶2] Trial in this criminal case began in the district court of Grand Forks County North Dakota on October 29, 2013. It ended on October 31, 2013 with a jury verdict convicting Sean Kovalevich on all three counts charged.

[¶3] The judgment of the district court was then appealed by Mr. Kovalevich to the North Dakota Supreme Court. The North Dakota Supreme Court in State vs Kovalevich 2015 ND 11, 858 NW2d 625 affirmed the judgment and conviction of the district court.

[¶4] On November 18, 2015 Petitioner Kovalevich timely filed a Post-Conviction Relief Application that had attached Exhibits A through T.

[¶5] The State filed an Answer to Petitioner Kovalevich's Post-Conviction Relief Application on December 12, 2015. Also filed on that date were a 3.2 Notice of Motion, a 3.2 Motion for Summary Disposition and Brief in Support of a Motion for Summary Disposition and Opposition to Petitioners Petition and Application for Post-Conviction Relief.

[¶6] Petitioner Kovalevich on January 5, 2016 filed a Response to the State's Motion for Summary Judgment.

[¶7] The trial judge entered on January 11, 2016 an Order Granting in Part and Denying in Part Respondent's Motion for Summary Judgment.

[¶8] The Evidentiary Hearing on the Petition for Post-Conviction Relief was held on April 4, 2016.

[¶9] On April 15, 2016 the trial judge entered an Order Denying Petitioner Kovalevich's Post Conviction Relief.

[¶10] An Order for Transcript of the Evidentiary Hearing was filed on May 24, 2016.

[¶11] The Notice of Appeal of the trial judges Order Denying Post-Conviction Relief was filed on May 25, 2016.

[¶12] Petitioner Kovalevich filed a Statement of Preliminary Issues on Appeal on June 2, 2016.

[¶13] The Notice of Filing the Notice of Appeal was filed on June 2, 2016.

[¶14] The Clerk's Certificate of Appeal was filed on June 17, 2016.

[¶15] Mr. Kovalevich then filed an appeal of the district courts denial of his petition for post conviction relief to the North Dakota Supreme Court.

[¶16] While that appeal was pending Mr. Kovalevich wanted to get a ruling on the newly discovered evidence motion his attorney had made under Rule 16 NDR of Crim P in the district court. The district court had denied that motion because it was made under an improper rule. To get this motion before the district court for a ruling on the newly discovered evidence Mr. Kovalevich filed a remand with the North Dakota Supreme Court to send his case back to the district court and get a decision as to whether or not any of the newly discovered evidence entitled Mr. Kovalevich to a new trial. While doing research on this motion Mr. Kovalevich discovered what he believed was additional newly discovered evidence in the field notes of BCI Agent Craig Zachmeier.

[¶17] A motion for new trial based on newly discovered evidence was filed by Mr. Kovalevich with the district court on August 3, 2016.

[¶18] The State filed a response to Mr. Kovalevich's motion for new trial on August 9, 2016.

[¶19] Mr. Kovalevich filed an Order for Transcript on August 29, 2016.

[¶20] The hearing on the Newly Discovered Evidence Motion was held on September 1, 2016.

[¶21] The State filed a responsive brief on September 6, 2016.

[¶22] The district court entered an Order Denying a Motion for New Trial on the newly discovered evidence on September 7, 2017.

[¶23] A Clerk's Supplemental Certificate of Appeal was filed on September 19, 2016.

[¶24] An Order for Transport was entered on September 28, 2016.

[¶25] A Second Notice of Appeal was filed on September 29, 2016.

[¶26] A Notice of Filing the Second Notice of Appeal was filed on September 29, 2016.

[¶27] The Clerk's Supplemental Certificate of Appeal was filed on September 30, 2016.

[¶28] The newly discovered evidence and the post-conviction cases are now consolidated and are on appeal before the North Dakota Supreme Court.

STATEMENT OF FACTS

[¶29] Petitioner Kovalevich was charged in the city of Grand Forks County of Grand Forks, North Dakota with two class AA Felony counts of Gross Sexual Imposition and one class C Felony county of Corruption of a Minor. His jury trial on these three counts began on October 29, 2013 and ended on October 31, 2013 with Petitioner Kovalevich being found guilty on all three counts.

[¶30] During Sean Kovalevich's criminal jury trial new evidence was disclosed by the State to him and his attorney. No motion was made about this new evidence by his attorney until after Mr. Kovalevich's trial ended. The newly discovered evidence motion that his attorney brought was under Rule 16 of NDR of Crim.P. The trial court refused to rule on that Rule 16 motion but said it would rule on the motion if it were brought under the proper rule. Mr. Kovalevich's trial attorney refused to change from a Rule 16 Motion and the district court refused to decide the motion until it was brought under the proper rule.

[¶31] Petitioner Kovalevich appealed the judgment from his jury trial to the North Dakota Supreme Court. In State v. Kovalevich 2015 ND 11, 858 NW2d 625 the North Dakota Supreme Court affirmed the judgment of the district court.

[¶32] On November 18, 2015 Petitioner Kovalevich filed a Petition for Post-Conviction Relief. His grounds for Post Conviction Relief were prosecutorial misconduct and ineffective assistance of counsel.

[¶33] Petitioner Kovalevich gives the following reasons as to why he is claiming ineffective assistance of counsel:

1. The failure of Petitioner Kovalevich's trial counsel to make a pre-trial motion to suppress and/or a motion in limine;
 2. Petitioner Kovalevich's trial counsels filing of a procedurally deficient post-trial motion regarding potential discovery violations;
 3. Petitioner Kovalevich's trial counsels failure to request a continuance;
- and

4. Failure of Petitioner Kovalevich's trial counsel to take the deposition of the victim prior to his trial.

[¶34] Mr. Kovalevich had a different attorney appointed for his post conviction appeal. His new attorney made a motion for remand of his post conviction appeal to the North Dakota Supreme Court in order to get a district court ruling on the new evidence given to the Mr. Kovalevich during the criminal trial.

[¶35] This new attorney also had a subpoena issued to the BCI agent Craig Zachmeier, who was the main law officer in the State's case, for everything he and the BCI had in their possession relative to Mr. Kovalevich's case. That subpoena turned up new evidence, the field notes of BCI agent Zachmeier, which contained a statement made to him by an individual in a county other than Grand Forks about Vincent having sex with the victim in that county. Neither the name of the person who made that statement or the fact that the victim was having sex with Vincent was ever disclosed by the prosecutor from Grand Forks County in any of his responses to Mr. Kovalevich's rule 16 discovery motion.

ISSUES

[¶36] ISSUE I. When the State, after receiving the Defendant's Rule 16 Motion for Discovery, failed to disclose exhibits #5 & #6 was the Defendant, Sean Kovalevich at his trial deprived of his constitutional right to effectively cross examine the State's witness BCI agent Craig Zachmeier?

ARGUMENT

[¶37] The standard of review on motions for new trial is set out as follows in Kovalevich:

[¶10] We apply an abuse of discretion standard in reviewing a district court's decision on a motion for a new trial under N.D.R.Crim.P. 33. State v. Ratliff, 2014 ND 156, ¶13, 849 N.W.2d 183. A court abuses its discretion when it acts in an arbitrary, unreasonable, or capricious manner, or it misinterprets or misapplies the law. Id. A defendant is required to assert all alleged errors with particularity in a motion for a new trial. Id., at ¶ 24; N.D.R.Crim.P. 33(a). “[A]lthough a motion for a new trial is not necessary to preserve issues for appellate review, when a new trial is sought, a defendant is limited on appeal to the grounds presented to the district court in the motion for a new trial.” State v. Yarbrow, 2014 ND 164, ¶9, 851 N.W.2d 146.

[¶38] In this case after it was remanded by the North Dakota Supreme Court to the district court additional discovery resulted in the disclosure of field notes prepared by BCI Agent Craig Zachmeier. Some of the information in these field notes weren't disclosed to Sean Kovalevich before or during trial. The part of these field notes not disclosed in the summary of BCI agent Zachmeier's field notes was a conversation he had with a juvenile (RP). During that conversation RP told him that the victim in this case was having sexual intercourse with someone other than Defendant, Kovalevich. (See Hearing Exhibits 5 & 6 September 1, 2016).

[¶39] Defendant Kovalevich's attorney in his closing argument at the newly discovered evidence hearing on September 1, 2016 mentioned State v. Hilling 219 NW2d 164 (N.D. 1974) Tr.P.34, L.16-18. He then went onto mention evidence being admissible for impeachment purposes. Tr.P.35, L.2-8.

[¶40] Many of the facts in Hilling and the case now before the court are similar. Both involved fortuitous events that discovered evidence which would have been used in

each case to impeach the BCI agents trial testimony. In the case now before the court the fortuitous event occurred after trial when BCI agent Craig Zachmeier because of a subpoena turned over his field notes to Defendant, Kovalevich's attorney. Part of these field notes exhibits #5 and #6 App. P's. 37 and 50 reveal that another individual named Vincent was having sex with the victim. No where in Agent Zachmeiers report that was given to Defendant Kovalevich and his attorney after a rule 16 discovery motion before trial is there any statement about an individual named R.P. telling Agent Zachmeier that the victim was having sex with Vincent.

[¶41] According to State v. Hilling, 219 NW2d 164 (ND 1974): "there are at least four rules, statutory or court-made, relating to the duty of prosecution to produce documents for the defense.

One rule is the so-called Brady rule, articulated in Brady v. Maryland, *supra*, which requires production on demand of information known to the prosecution (including the police) favorable to the defendant and material to guilt or punishment. The rule of Brady v. Maryland has many antecedents including People v. Mooney, 178 Cal. 525, 174 P. 325, *cert. den.* 248 U.S. 579, 39 S.Ct. 21, 63 L.Ed. 430 (1918); Mooney v. Holohan, 294 U.S. 103, 55 S.Ct.340, 79 L.Ed 791, 98 A.L.R. 406 (1935); Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935); People v. Savvides, 1 N.Y.2d 554, 154 N.Y.S.2d 885, 136 N.E.2d 853 (1956); and Brady v. State, 226 Md. 422, 174 A.2d 167 (1961).

This rule, incidently, is referred to in the explanatory note to Rule 16, North Dakota Rules of Criminal Procedure, quoting Brady, *supra*, 373 U.S. at 87: "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to the guilt or punishment, irrespective of the good faith or bad faith of the prosecution." The same explanatory note points out that the Brady rule "may require a production of statements of witnesses and potential witnesses at different times under different circumstances than are specified in [Rule 16]."

The duty to produce favorable or exculpatory materials under the Brady rule is not limited to materials in the hands of the prosecutor. It includes material known to the police. Barbee v. Warden, Maryland Penitentiary, 331 F2d 842 (CA4 1964). Other cases are collected in the annotation at 34 A.L.R.3d 16, Sec. 12(a).

We hasten to add that the prosecutors here had no knowledge of the discrepancy between the case report and the daily reports prior to trial. The good faith of the prosecutors, however, does not affect the applicability of the Brady rule. Brady v. United States, *supra*.

A prosecutor has a duty to inquire into and examine the contents of police files to discover exculpatory and favorable materials and to make timely disclosure of them to the defense, when a demand is made. This is particularly true when, as here, the documents demanded are clearly described.

An inquiry here of the investigative agency would have discovered the discrepant reports of Eastburn, and disclosure should have followed.

The Brady rule does not compel the prosecutor to completely open his files to the defense (although many prosecutors do so, and the prosecutor here involved usually does so, we understand). The prosecutor need not disclose the investigation of false leads. Moore v. Illinois, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed2d 706 (1972).

But evidence which tends to cast serious doubt on the credibility of prosecution witnesses must be disclosed. Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed2d 1217 (1959) [witness testified falsely as to promise of lenient sentence]; Powell v. Wiman, 287 F2d 275 (CA5 1961) [nondisclosure of witness's confession of other crimes, psychiatric treatment, and perjured testimony].

If Eastburn's original tapes had been destroyed after being fairly transcribed, we would have a different question. See United States v. Spatuzza, 331 F2d 214, (CA7 1964), cert. den. 379 U.S. 829, 85 S.Ct. 58, 13 L.Ed2d 38; United States v. Terrell, 474 F2d 872 (CA2 1973).

A second rule is the so-called Jencks rule, articulated in Jencks v. United States, 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed2d 1103 (1967), later modified and put into statutory form as 18 U.S.C. Section 3500, commonly called the Jencks Act. This rule was modified and adopted in North Dakota as part of the North Dakota Rules of Criminal Procedure, in Rule 16(h). This rule requires that "statements" (as defined in the rule) of witnesses be produced for the defense after a witness has testified on direct examination.

A third rule requires the production of specified documents by the prosecution when the defense has initiated the discovery proceedings permitted in Rule 16, Federal Rules of Criminal Procedure, as adopted in Rule 16(a) through (g), N.D.R.Crim.P.

A fourth rule requiring the production of documents in an older one, the rule permitting examination by the defense of documents used by a witness to refresh his [sic]

[¶42] Hilling goes onto say: The right to cross-examine is a constitutional right. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed2d 297 (1973).

The right is absolute and the denial of the right as to material evidence is prejudicial error requiring a new trial. Knoepfle v. Suko, 108 N.W.2d 456 (N.D.1961).

“The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the ‘accuracy of the truth-determining process.’ [Citations omitted.] It is, indeed, ‘an essential and fundamental requirement for the kind of fair trial which is this country’s constitutional goal.’”

Chambers v. Mississippi, *supra*, 410 U.S., at 295.

The right of confrontation guaranteed by the Sixth Amendment to the United States Constitution means more than being allowed to confront the witness physically. “Our cases construing the [confrontation] clause hold that a primary interest secured by it is the right of cross-examination.” Douglas v. Alabama, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed2d 934 (1965), quoted in Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed2d 347(1974). Denial of the right of effective cross-examination is “constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.” David v. Alaska, *supra*.

[¶43] Hilling goes on to set out the following standard that is to be used to determine if a constitutional error is harmless:

In Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed2d 705 (1967), the United States Supreme Court ruled “that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.” We adopt that standard, and since we are unable to declare that the multiple errors in this case were harmless beyond a reasonable doubt, we reverse the conviction and remand for a new trial.

[¶44] From what has been said above in Hilling it is apparent that Defendant, Kovalevich was denied his right to effectively cross examine the State’s main witness, BCI agent Craig Zachmeier about the serious discrepancies between what was written in his field notes the notes that he turned over to the State and the State then turned over to Mr. Kovalevich’s attorney.

[¶45] In this case the State has in its State’s Response Brief App. P. 38, claimed that N.D.R.Ev 412 prohibits the use of evidence offered to prove a victim’s sexual predisposition prohibits evidence offered to prove the victim engaged in other sexual behavior. Mr. Kovalevich is aware of N.D.R.Ev 412 but doesn’t believe it prevents him

from cross-examining BCI agent Craig Zachmeier about serious discrepancies between his field notes and his notes that were turned over to the Mr. Kovalevich's trial attorney as a result of Mr. Kovalevich's Rule 16 Discovery Motion.

[¶46] There are exceptions in 412(b)(1)(A)(B)(C):

(b) Exceptions.

(1) *Criminal cases.* The court may admit the following evidence in a criminal case:

- (A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the Defendant was the source of semen, injury, or other physical evidence;
- (B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
- (C) evidence whose exclusion would violate the defendant's constitutional rights. (emphasis added)

[¶47] 412 (b)(1)(C) allows evidence to be admissible when exclusion would violate the Defendants constitutional rights. In this case Mr. Kovalevich knows he has a constitutional right to effectively cross examine BCI Agent Craig Zachmeier. The procedure to determine admissibility is in 412 (c)(1)(A)(B)(C).

(c) Procedure to determine admissibility.

(1) *Motion.* If a party intends to offer evidence under Rule 412(b), the party must:

- (A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;
- (B) do so at least 14 days before trial unless the court, for good cause, sets a different time;
- (C) serve the motion on all parties; and

[¶34] In this case the trial judge ruling makes no mention of 412(b)(1)(C) and 412 (c)(1)(A)(B)(C) in his Order Denying Motion for a New Trial.

[¶48] In this case the trial judge relies on the following North Dakota Supreme Court's requirement for a new trial:

To prevail on a motion for new trial, a Defendant must show: “(1) the evidence was discovered after trial, (2) the failure to learn about the evidence at the time of trial was not the result of the defendant’s lack of diligence, (3) the newly discovered evidence is material to the issues at trial, and (4) the weight and quality of the newly discovered evidence would likely result in an acquittal.” (quoting State v. Steinbach, 1998 ND 18, ¶ 22, 575 N.W.2d 193).

[¶49] Using the above requirements the trial court made the following ruling:

(1) Kovalevich has established the first requirement that the BCI notes were discovered after his trial;

(2) Kovalevich has established the second requirement that his failure to learn about the evidence at the time of trial was not a result of his lack of diligence. Kovalevich established this requirement by proving that agent Zachmeier’s field notes existence were only known by BIA agent Zachmeier until he was subpoenaed to produce them at the September 1, 2016 hearing on newly discovered evidence by the attorney appointed to do Mr. Kovalevich’s post conviction appeal;

(3) As to the third requirement the trial judge ruled that newly discovered evidence is material to the issues at trial and the newly discovered was not offered at trial. Therefore the newly discovered evidence is not material.

[¶50] The above trial judges ruling fails to consider that the newly discovered evidence couldn’t have been offered at trial because Mr. Kovalevich at trial time didn’t know that it even existed.

[¶51] Also the trial judge’s ruling on requirement three fails to consider Hilling and the inability of Kovalevich to do effective cross-examination of BIA agent Zachmeier.

[¶52] As to the fourth requirement the trial judge said:

The fourth requirement is that the weight and quality of the newly discovered evidence must be likely to result in an acquittal. The evidence would not be admissible as evidence pursuant to North Dakota Rule of Evidence 412 which precludes a victim's sexual behavior or predisposition from being offered as evidence. Additionally, the evidence does not fit any of the exceptions listed in 412(b)(1).

[¶53] The only way the trial judge can say that the newly discovered evidence does not fit any of the exemptions in 412(b)(1) is to completely disregard the existence of 412(b)(1)(C). The other thing the trial judge had to disregard when he ruled the newly discovered evidence doesn't fit any of the exceptions is Hilling and Mr. Kovalevich's constitutional right to effectively cross examine BCI agent Zachmeier.

[¶54] ISSUE II. Since the deprivation of effective cross examination as to prior inconsistent statements of a material matter is a deprivation of the due process of law and cross examination is a constitutional right is the Defendant, Sean Kovalevich entitled to a new trial?

[¶55] Hilling and Kovalevich's cases both involve similar factual situations about a BCI agent who has serious discrepancies between that agents field notes and his case report.

[¶56] At the trials in both Hilling and Kovalevich the Defendants were denied their rights to effectively cross-examine the BCI's agent about serious discrepancies between his case report and his field notes. In Hilling it was decided that because David Hilling was denied his right to effectively cross-examine BCI agent Gregory Eastburn about serious discrepancies between his case report and filed notes Mr. Hilling was entitled a new trial.

[¶57] During Mr. Kovalevich's trial he couldn't effectively cross-examine BCI agent Craig Zachmeier about discrepancies between his case report and field notes because:

1. he hadn't been given a copy of BCI agent Zachmeiers field notes;
2. he didn't find out about BCI agent Zachmeiers fields notes until more than two years after his trial;

[¶58] According to Hilling a Defendant's right to effectively cross-examine a State's witness is a constitutional right and it is a deprivation of due process for a Defendant not to be able to cross-examine a witness about prior inconsistent statements.

[¶59] David Hilling was given a new trial in *State vs Hilling*, 219 N.W.2d 164 (N.D. 1974) because at his trial he was deprived from effectively cross-examining a BCI agent about serious discrepancies in that agents case report and field notes. Mr. Kovalevich is entitled to and should be given a new trial because he too was deprived during his trial of effectively cross-examining a BCI agent about serious discrepancies in that agent case reports and field notes.

[¶60] ISSUE III. Was Petitioner Kovalevich's trial counsel and/or Appellate counsels legal assistance so ineffective that Petitioner Kovalevich should be awarded a new trial?

[¶61] The Standard of Review for ineffective assistance of counsel is found in *Middleton v. State* 2014 ND 144, 889 NW2d 196 [5]:

This Court's standard of review for postconviction proceeding has been clearly established:

"A trial court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless clearly erroneous under N.D.R.Civ.P. 52(a). A finding 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 it, a reviewing court is left with a definite and firm conviction a mistake has been made. Questions of law are fully reviewable on appeal of a post-conviction proceeding.”

Broadwell v. State, 2014 ND 6, ¶ 5, 841 N.W.2d 750 (citations and internal quotation marks omitted).

[¶62] According to Peterka v. State 2015 ND 156, 864 N.W.2d 745 [6]:

[¶6] “Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure.” Burke v. State, 2012 ND 169, ¶ 10, N.W.2d 349.

“We review an appeal from a summary denial of post-conviction relief like we review an appeal from a summary judgment. The party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of a post-conviction proceeding, and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact. Once the moving party has initially shown there is no genuine issue of material fact, the burden shifts to the opposing party to present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact.”

DeCoteau v. State, 1998 ND 199, ¶ 4, 586 N.W.2d 156 (citations omitted). “The court may grant a motion . . . [if] there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law,” N.D.C.C. § 29-32.1-09(3). “A genuine issue of material fact exists if reasonable minds could draw different inferences and reach different conclusions from the undisputed facts.” Coppage v. State, 2011 ND 227, ¶ 14, 807 N.W.2d 585 (citation and quotation marks omitted). “[I]neffective assistance of counsel is a mixed question of law and fact [that] is fully reviewable on appeal.” Clark v. State, 2008 ND 234, ¶ 11, 758 N.W.2d 900 (quoting Sambursky v. State, 2008 ND 133, ¶ 7, 751 N.W.2d 247). “Statutory interpretation is a question of law, fully reviewable on appeal.” State v. Stavig, 2006 ND 63, ¶ 12, 711 N.W.2d 183.

[¶63] In the case now before the court the district court on January 11, 2016 entered an Order Granting in Part and Denying in Part Respondent’s Motion for Summary Judgment.

[¶64] In the case now before the court Petitioner Kovalevich’s trial counsel and appellate counsel was put on notice that there was additional evidence that had not been given to the State. That notice is found in the App. P. 80 which is a letter from Assistant States Attorney M. Jason McCarthy to BCI Agent Craig Zachmeier. That letter gave

notice to Petitioner Kovalevich's trial counsel and appellate counsel that assistant States attorney M. Jason McCarthy wanted to get the rest of the evidence that agent Zachmeier had on Petitioner Kovalevich's case. Neither Petitioner Kovalevich's trial attorney or his appellate attorney made any attempt to find out what agent Zachmeier's response was to Assistant States Attorney M. Jason McCarthy's letter.

[¶65] What Petitioner Kovalevich's trial counsel and appellate counsel did do was:

1. Make a Rule 16 NDR of Crim.P. motion on evidence disclosed to the defense during Petitioner Kovalevich's trial that the district court would not rule on because Rule 16 NDR of Crim P. wasn't the proper rule.
2. Refused to bring the motion on the evidence that was disclosed to the defense during trial under any other rule than Rule 16 NDR of Crim.P.
3. Not ask for a continuance during Petitioner Kovalevich's trial so the defense would have time to properly review the evidence given to the defense during Petitioner Kovalevich's trial.
4. Not to depose the victim prior to trial.

[¶66] Usually all of the above are considered trial tactics of the attorney trying the case. Hind sight can't be used to second guess trial tactics.

[¶67] Facts have developed in Mr. Kovalevich's case since State v Kovalevich 2015 ND 11 858 NW2d 625 that now allow second guessing as to what would have happened at trial if the new evidence that wasn't discovered and disclosed to the defense prior to trial had been discovered and disclosed prior to trial. This new fact situation began after a new attorney was appointed to do Petitioner Kovalevich's post conviction appeal. This new attorney filed a remand with the North Dakota Supreme Court to remand

Petitioner Kovalevichs case to the district court to get a ruling on the evidence the State disclosed to the defense during trial. The district court didn't rule on that evidence because Petitioner Kovalevichs attorney brought the motion under the wrong rule, Rule 16 NDR of Crim.P.

[¶68] After the remand was granted Petitioner Kovalevichs post conviction attorney, used the same language in the subpoena as used in Assistant States Attorney M. Jason McCarthy's letter to BCI agent Zachmeier. Agent Zachmeiers response to the Subpoena was to produce his field notes which contained information never disclosed to the defense. This evidence if known at Petitioner Kovalevichs trial could and would have been used to impeach BCI agent Zachmeier who was the States main law enforcement agent for the State at Petitioner Kovalevichs trial.

[¶69] This newly discovered evidence will be brought before the North Dakota Supreme Court in a consolidated case that will be heard at the same time as this post-conviction appeal. Therefore if the North Dakota Supreme Court in that appeal grants a new trial because of the newly discovered evidence in that case, in the case on post conviction there will be a trial and appeal attorney who at Mr. Kovalevichs trial and appeal failed to discover evidence that would have resulted in a different ending to his trial.

CONCLUSION

[¶70] The State's failure to disclose Exhibits #5 and #6 to Mr. Kovalevich until more then two years after his trial is an error of constitutional magnitude. Before such an error can be held harmless the standard the North Dakota Supreme Court has adopted is that the North Dakota Supreme Court must be able to declare that that error is harmless beyond a reasonable doubt. (emphasis added)

[¶71] When the North Dakota Supreme Court applied the above standard to Hilling it was not able to declare the error was harmless beyond a reasonable doubt. Therefore the North Dakota Supreme Court remanded Hilling to the district court with an Order granting David Hilling a new trial.

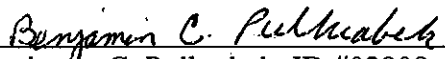
[¶72] In both Hilling and Kovalevich the facts involve a BCI agent, a case report, that he made out from his field notes, that was given by the State to the defense after the defense filed a Rule 16 NDR of Crim Pro.

[¶73] In both cases the field notes contain serious discrepancies from the case report. At both Hilling and Kovalevich's trials because the defense was not given the BCI agents field notes from the prosecutor before trial, the defense wasn't able to effectively cross-examine the BCI agent about the discrepancies between his report and his field notes.

[¶74] Because of the similarity of facts in both Hilling and Kovalevich if the error in Hilling can't be declared harmless beyond a reasonable doubt neither can the error in Kovalevich be declared harmless beyond a reasonable doubt. Therefore the end result in Kovalevich should be the same as Hilling and Mr. Kovalevich's case should be remanded to the district court with an Order granting him a new trial.

[¶75] The North Dakota Supreme Courts decision on the newly discovered evidence in the companion case to his post conviction appeal will decide whether or not Mr. Kovalevichs trial and appeal counsel were ineffective counsel when they represented Mr. Kovalevich.

DATED this 10 day of November, 2016.


Benjamin C. Pulkrabek, ID #02908

CERTIFICATE OF SERVICE BY MAIL

[¶76] 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 November 14th, 2016, she served, by e-mail and mailed a copy of the following:

APPELLANTS APPENDIX AND BRIEF

to: M. Jason McCarthy
Grand Forks Co. States Attorneys Office
sasupportstaff@gfcounty.org

Mailed to: Sean Kovalevich
NDSP - #39835
P.O. Box 5521
Bismarck, ND 58506

The undersigned further certifies that on November 14th, 2016, she served electronically on the Clerk, North Dakota Supreme Court, the APPELLANTS APPENDIX AND BRIEF.



Sharon Renfrow, Admin Legal Assistant
Pulkrabek Law Office