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APPENDIX A

Curtiss v State, 2019 ND 120, 926 N.W.2d 707

Filed 5/16/19 by Clerk of Supreme Court
IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2019 ND 120

Spencer Kerry Curtiss, Petitioner and Appellant

v.

State of North Dakota, Respondent and Appellee

No. 20180392

Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable David E. Reich, Judge.

AFFIRMED.

Per Curiam.

Spencer K. Curtiss, self-represented, Bismarck, ND, petitioner and appellant; submitted on brief.

Tessa M. Vaagen, Assistant State's Attorney, Bismarck, ND, for respondent and appellee; submitted on brief.

Curtiss v. State

No. 20180392

Per Curiam.

[¶1] Spencer Curtiss appeals from an order denying his application for post-conviction relief and an order denying his motions for reconsideration and to correct his sentence. On appeal, Curtiss argues the district court erred in granting summary disposition because there was newly discovered evidence, he received ineffective assistance of counsel in prior post-conviction relief proceedings, and there were conflicts of interest with his attorneys throughout his criminal and post-conviction relief proceedings. He also argues the court erred by denying his motions for reconsideration and to correct an illegal sentence. We summarily affirm under N.D.R.App.P. 35.1(a)(4), (6), and (7). *See Carlson v. State*, 2018 ND 81, ¶ 7, 908 N.W.2d 711 (dismissal is appropriate when the alleged newly discovered evidence does not satisfy the exception under N.D.C.C. § 29-32.1-01(3)(a)(1) because the evidence is not new and would not establish the petitioner did not engage in the criminal conduct for which he was convicted).

[¶2] Gerald W. VandeWalle, C.J.
Jon J. Jensen
Lisa Fair McEvers
Daniel J. Crothers
Jerod E. Tufte

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JUDGMENT

Supreme Court No. 20180392
Burleigh County Case No. 2016-CV-02655

Appeal from the district court for Burleigh County.

Spencer Kerry Curtiss,

v.

State of North Dakota,

Petitioner and Appellant

Respondent and Appellee

[¶1] This appeal having been heard by the Court at the April 2019 Term before:

[¶2] Chief Justice Gerald W. VandeWalle, Justice Daniel J. Crothers, Justice Lisa Fair McEvers, Justice Jerod E. Tufte, and Justice Jon J. Jensen;

[¶3] and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the order of the district court is AFFIRMED under N.D.R.App.P. 35.1(a)(4), (6), and (7).

[¶4] This judgment, together with the opinion of the Court filed this date, constitutes the mandate of the Supreme Court on the date it is issued to the district court under N.D.R.App.P. 40.

Dated: May 16, 2019



By the Court:

A handwritten signature of Gerald W. VandeWalle.

Chief Justice

ATTEST:

A handwritten signature of Penny Hill.

Clerk

APPENDIX B

Orders: Case No: 08-2016-CV-2655

Order: Denial of post-conviction relief

Order: Denying Motions for Reconsideration and to Correct Sentence

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Case No. 08-2016-CV-2655

Spencer Kerry Curtiss,

Petitioner,

vs.

State of North Dakota,

Respondent.

ORDER

[¶ 1] On December 8-9, 2010, a jury trial was held in Burleigh County case number 08-10-K-1650 in which Spencer Curtiss (“Curtiss”) was charged with the offense of Gross Sexual Imposition for engaging in a sexual act with a minor under the age of 15 at the time when he was at least 22 years of age. Curtiss was represented at trial by his court appointed attorney, Kent Morrow. A twelve person jury returned a verdict of guilty against Curtiss on December 9, 2010. Following the completion of a pre-sentence investigation, a sentencing hearing was held on February 18, 2011 and Curtiss was sentenced to a term of 25 years with all but 15 years suspended for 5 years. Curtiss appealed his conviction based on the sufficiency of the evidence. The jury’s verdict was affirmed on appeal in an opinion issued by the North Dakota Supreme Court on September 15, 2011 in *State v. Curtiss*, 2011 ND 175, 803 N.W.2d 834.

[¶ 2] On September 17, 2012, Curtiss, pro se, filed an Application for Post-Conviction Relief, and an amended petition was subsequently filed (08-2012-CV-1650). A hearing on the application was held May 29, 2014. The primary issue argued at the hearing was whether Curtiss received ineffective assistance of counsel at trial for reasons including the failure of his attorney

to call certain witnesses which allegedly could have supported an alibi defense. The court determined that Curtiss failed establish a basis for post-conviction relief on the basis of ineffective assistance of counsel and denied his application. Curtiss filed a motion for reconsideration which was denied. Curtiss appealed the denial of his application and the denial of his request for reconsideration. Both orders were affirmed on appeal in *Curtiss v. State of North Dakota*, 2016 ND 62.

[¶ 3] On August 14, 2014, Curtiss, pro se, filed a second application for post-conviction relief again alleging ineffective assistance of counsel, mistake of law, violations of due process, and a denial of his right to be present during the trial (08-2014-CV-1843). Curtiss' application in 08-2014-CV-1843 was dismissed on the basis that it was time barred by the two year statute of limitations in N.D.C.C. § 29-32.1-01(2). The district court's order in this case was also affirmed by the North Dakota Supreme Court in *Curtiss v. State of North Dakota*, 2015 ND 83.

[¶ 4] Curtiss commenced the pending post conviction relief proceedings with a pro se application filed October 16, 2016 [Index #1]. Curtiss requested, and was provided, court appointed counsel. In his application, Curtiss alleged that he was entitled to post-conviction relief on the basis of newly discovered evidence which had not been previously presented or heard which required the vacation of his conviction and sentence in the interest of justice. The alleged newly discovered evidence consisted of a letter written by Curtiss' son, Branden Curtiss, and sent to Curtiss counsel prior to trial [Index # 82]. Curtiss contends the letter provides him with an alibi defense. Curtiss also asserted in his application that he was denied effective assistance of counsel in his previous post-conviction proceedings. Curtiss also raised additional

grounds which had been raised and determined in previous proceedings and which will not be addressed again in this matter.

[¶ 5] The State filed an answer to Curtiss' Application [Index # 93] and also filed a motion for summary disposition and a supporting brief [Index #'s 91 & 92]. Curtiss filed a response in opposition to the State's motion and requested an evidentiary hearing on the issue of newly discovered evidence [Index # 96].

[¶ 6] After a number of continuances and a reassignment of counsel for Curtiss, a hearing was eventually held March 13, 2018. At the hearing, Curtiss' court appointed counsel, Stuart Askew, requested that the court first address Curtiss' claim that Askew had a conflict of interest in his representation of Curtiss. Curtiss had raised this issue pro se in a number of filings with the court [see, Index #'s 131, 138, 139, 148 & 149]. Curtiss contended that a conflict of interest existed because he was prosecuted for a criminal offense by attorney Robin Huseby in 1992 when she was a State's Attorney in Barnes County. Robin Huseby subsequently became the Executive Director of the North Dakota Commission on Legal Counsel for Indigents. In that capacity, Ms. Huseby was responsible for appointing indigent defense counsel to represent Curtiss both at trial and in his subsequent post-conviction proceedings, including Mr. Askew. The court determined that no conflict of interest existed which would require Mr. Askew to withdraw from his representation of Curtiss in this matter.

[¶ 7] The court also granted the State's motion for summary dismissal of Curtiss' claim for post-conviction relief on the basis of alleged ineffective assistance of counsel in his previous post-conviction relief proceedings. Such a claim is not permitted under N.D.C.C. § 29-32.1-09(2).

[¶ 8] Regarding Curtiss' claim that he was entitled to post-conviction relief on the basis of newly discovered evidence, Mr. Askew requested that the court continue the hearing on that issue to a later date. The court granted the request for continuance and the matter was rescheduled for hearing on July 17, 2018. Curtiss appeared at the rescheduled hearing with his attorney, Mr. Askew. The State was represented by Burleigh County Assistant State's Attorney Tessa Vaagen.

[¶ 9] At the hearing, the State renewed its request for summary dismissal of Curtiss' post-conviction application. Curtiss argued that new evidence existed consisting of a letter written by Curtiss' son, Branden Curtiss, which provided an alibi defense for Curtiss. The undated letter [Index # 82] was allegedly written to Curtiss' trial counsel Kent Morrow. Mr. Morrow did not call Branden Curtiss as a witness at trial. The letter which was in existence prior to trial and provided to defense counsel prior to trial is not "newly discovered evidence" under N.D.C.C. § 29-32.1-01(3)(a), nor is it evidence which would require vacation of the conviction or sentence under N.D.C.C. § 29-32.1-01(1)(e). The letter refers to events which occurred on May 26, 2009. The Information alleges that the incidents of Gross Sexual Imposition occurred between June 1, 2010 and August 31, 2010. Because the events in the letter occurred outside the scope of the date range of the alleged offense, it cannot be considered to provide an alibi for Curtiss.

[¶ 10] At the hearing, Curtiss indicated that other witnesses identified for trial, but not called by either the State or Mr. Morrow, could provide testimony regarding his alibi defense. This issue was previously raised and addressed in Curtiss' previous application for post-conviction relief (08-2012-CV-1650) and will not be reconsidered in this action.

[¶ 11] Petitioner Curtiss has not provided any newly discovered evidence in this matter and has not asserted any other exception under N.D.C.C. § 29-32.1-01(3) which would permit him to

file an application for post-conviction relief more than two years after his conviction became final. For the reasons stated above, the State's motion for summary disposition of Curtiss' application for post-conviction relief is GRANTED and the application for post-conviction relief is DENIED.

SO ORDERED.

Dated this 18th day of July, 2018.

BY THE COURT:



David E. Reich, District Judge
South Central Judicial District

Distribution:
Tessa Vaagen
Stuart Askew

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

IN DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
Case No. 08-2016-CV-2655

Spencer Kerry Curtiss,
Petitioner,
vs.
State of North Dakota,
Respondent.

**ORDER DENYING MOTIONS FOR
RECONSIDERATION AND TO
CORRECT SENTENCE**

[¶ 1] On July 19, 2018, the court entered an order granting the State's motion for summary disposition and denying the Petitioner's application for post-conviction relief [Index # 156]. On August 13, 2018, Petitioner, *pro se*, filed a Motion to Correct an Illegal Sentence [Index # 167] and a Motion for Reconsideration [Index #170]. On August 17, 2018, the State filed a response in opposition to the motion for reconsideration [Index # 194] and a response in opposition to the Petitioner's Rule 35 motion for correction of sentence [Index # 195].

[¶ 2] The court, having reviewed the motions and supporting and opposing documents and the file, determines that the Petitioner' motions for reconsideration and to correct an illegal sentence shall be DENIED. The issues raised in the motions have, or could have been, raised on appeal or in the Petitioner's previous post-conviction petitions. Any issues not previously raised or addressed are either untimely or without merit. For these reasons, the Petitioner's Motion for Reconsideration is DENIED and his Motion to Correct an Illegal Sentence is also DENIED.

SO ORDERED.

Dated this 25th day of September, 2018.

BY THE COURT:



David E. Reich, District Judge
South Central Judicial District

APPENDIX C

Order on Petition for Rehearing

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER ON PETITION FOR REHEARING

Supreme Court No. 20180392
Burleigh Co. No. 2016-CV-02655

Spencer Kerry Curtiss,
v.
State of North Dakota,

Petitioner and Appellant
Respondent and Appellee

[¶1] This appeal having been heard by the Court at the April 2019 Term and an opinion having been filed on May 16, 2019 by:

[¶2] Chief Justice Gerald W. VandeWalle, Justice Daniel J. Crothers, Justice Lisa Fair McEvers, Justice Jerod E. Tufte, and Justice Jon J. Jensen;

[¶3] and a petition for rehearing having been filed by Spencer K. Curtiss, Appellant, and the Court having considered the matter, it is hereby ORDERED AND ADJUDGED, that the petition be and is hereby **DENIED**.

[¶4] AND IT IS FURTHER ORDERED, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this Court.

Dated: June 27, 2019

By the Court:

Gerald W. VandeWalle

Jerod E. Tufte

Daniel J. Crothers

Lisa Fair McEvers



APPENDIX D

Applications for Indigent Defense services

Notice of eligibility for appointed counsel

APPLICATION FOR INDIGENT DEFENSE SERVICES CRIMINAL CASES

REQUIRED FEE: You must pay a \$25 fee when submitting this application. The Court may waive or reduce the fee if you cannot pay the entire fee. If the fee is not waived and you do not pay the fee, the amount will be added to any costs you are ordered to reimburse at the conclusion of your case.

NOTICE: You may be required to submit verification of your Gross Income. Verification of Gross Income includes one of the following: 1) most recent pay stub reflecting current wages, or 2) most recent W2, or 3) most recent Tax Return, or 4) Written Statement from Employer.

DEFENDANT'S NAME: Spencer Kerry Cantsiss
CRIMINAL CHARGE(S): Gross Sexual Impersonation
CASE NUMBER(S): 10 K 1650
AMOUNT PAID FOR BOND: \$ 10,000

Please Print All Information

PART A

What is your full name (include any aliases)? Spencer Kerry Cantsiss
Home phone number: _____ Work: _____ Cell: 701-371-1023
City and State of Home Address: Bismarck North Dakota
Year of birth: 1969
Have you ever had an appointed lawyer? YES NO
If yes, who was your attorney? _____
If yes, when and in what county/state? _____

PART B

Do you receive any of the following governmental benefits:

TANF: YES NO Medical Assistance for the Elderly: YES NO
Supplemental Security Income: YES NO

If you answered yes to receiving TANF, Supplemental Security Income, OR Medical Assistance for the Elderly, skip parts C, D, and E and go to Part F.

If you answered no to receiving TANF, Supplemental Security Income, AND Medical Assistance for the Elderly, complete the entire application in order for your eligibility for indigent defense services to be determined.

RECEIVED & FILED

AUG 25 2010

Cir. of Cr. Burleigh Co.

PART C

Are you employed? YES NO
 If yes, print your employer's name, telephone number and address: Lanto Construction

Stanley South Dakota Construction

What type of work do you do? Construction
 Is your job waiting for you? YES NO NOT SURE

What is your supervisor's name? Terry Lanto

Is your spouse employed? YES NO NOT MARRIED

Your Monthly income before taxes	<u>\$1600-</u>	Cash on Hand	<u>\$ 0-</u>
Spouse's monthly income before taxes	<u>\$ 0-</u>	Bank Accounts	<u>\$ 12-</u>
Governmental/Public Assistance:	<u>\$ 0</u>	Tax refund coming	<u>\$ -</u>
Unemployment	<u>\$ 0</u>	Stocks/Bonds	<u>\$ -</u>
Pension	<u>\$ 0</u>	Land/Real Estate	<u>\$ -</u>
VA Disability	<u>\$ 0</u>	Value of Home/Mobile Home	<u>\$ -</u>
Military Allotment	<u>\$ 0</u>	Value of Vehicles	<u>\$ 500-</u>
Spousal/Child support	<u>\$ 0</u>	Livestock	<u>\$ 0</u>
Other Income	<u>\$ 0</u>	Household Goods	<u>\$ 0</u>
Total Monthly Income	<u>\$1600-</u>	Other Assets	<u>\$ 0</u>
		Total Assets	<u>\$ 500-</u>

PART D

If you own or are buying property listed below, circle the item and then fill in the information about the property.

Property:	What is the make/model & year	Cost when you bought it	Present Value	How much do you still owe on it?
Car	90 Camaro	900-	500-	0-
Second Car	8	8	6	8
Pickup				
Truck				
Motorcycle				
Recreational Vehicle				
House / Mobile Home				
Other Real Estate				
Other Property:				
Other Property:				

PART E

Names of People living in your household (do not provide full name of minors, use only initials):

	Name	Age	Relationship
1.	Spencer K Curtis	41	Self
2.	Savannah R Curtis	22	Wife
3.	T C	14	Daughter
4.	D C	8	Son
5.	D C	5	Daughter

Names, ages, and relationship of other dependents or others you support financially (do not provide full name of minors, use only initials):

1.	B C	16	Son
2.			

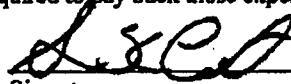
Are there any extraordinary financial conditions that would prevent you from hiring a private lawyer?

YES NO If yes, please explain: _____

PART F

I have answered all questions honestly and truthfully to the best of my knowledge and I am requesting that a lawyer be appointed to represent me. I understand that the information supplied on this form is not confidential, and that the accompanying reference list identifying redacted information will be provided to my attorney and to the ND Commission on Legal Counsel for Indigents. I also understand that if I have supplied false information in the application, it may lead to criminal prosecution and conviction.

If counsel is appointed for me, I understand that I have a continuing responsibility to inform the court of any changes in my financial condition. I understand that even if I am found eligible to have the costs of an attorney and related expenses paid for me at this time, I may be required to pay back those expenses to the State at a later time.

Date: 8-24-10 _____

 Signature

FOR COURT USE ONLY

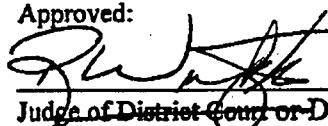
Case Title(s): _____

Application Fee: Paid _____ Reduced to \$ _____ Waived _____ Due X

Applicant is found to be:

 Not Indigent. The Application for appointed defense services is denied. Indigent. Counsel is to be provided by the ND Commission on Legal Counsel for Indigents. The Court hereby advises the defendant of the defendant's potential obligation to reimburse the Commission the amounts expended on behalf of the defendant.Date: 8-25-10 _____

Approved:


 Judge of District Court or Designee

APPLICATION FOR INDIGENT DEFENSE SERVICES
CRIMINAL CASES

REQUIRED FEE: You must pay a \$25 fee when submitting this application. The Court may waive or reduce the fee if you cannot pay the entire fee. If the fee is not waived and you do not pay the fee, the amount will be added to any costs you are ordered to reimburse at the conclusion of your case.

NOTICE: You may be required to submit verification of your Gross Income. Verification of Gross Income includes one of the following: 1) most recent pay stub reflecting current wages, or 2) most recent W2, or 3) most recent Tax Return, or 4) Written Statement from Employer.

DEFENDANT'S NAME: Spencer Kerry Curtiss
CRIMINAL CHARGE(S): GSI
CASE NUMBER(S): 08 2012 CV 1810
AMOUNT PAID FOR BOND: \$ _____

Please Print All Information

PART A

What is your full name (include any aliases)? Spencer Kerry Curtiss
Home phone number: _____ Work: _____ Cell: _____
City and State of Home Address: Bismarck, North Dakota
Year of birth: 1969
Have you ever had an appointed lawyer? YES X NO _____
If yes, who was your attorney? Kent Marrow
If yes, when and in what county/state? 2010, Burleigh, ND

PART B

Do you receive any of the following governmental benefits:

TANF: YES _____ NO X Medical Assistance for the Elderly: YES _____ NO X

Supplemental Security Income: YES _____ NO X

If you answered yes to receiving TANF, Supplemental Security Income, OR Medical Assistance for the Elderly, skip parts C, D, and E and go to Part F.

If you answered no to receiving TANF, Supplemental Security Income, AND Medical Assistance for the Elderly, complete the entire application in order for your eligibility for indigent defense services to be determined.

PART C

Are you employed? YES NO

If yes, print your employer's name, telephone number and address:

701-328-6161 3303 E Main, Bismarck ND 58501

What type of work do you do? Furniture assembly / production

Is your job waiting for you? YES NO NOT SURE

What is your supervisor's name? Lloyd, Bob

Is your spouse employed? YES NO NOT MARRIED

Your Monthly income before taxes \$ <u>1150 - 200</u>	Cash on Hand	\$ <u>20</u>
Spouse's monthly income before taxes \$ <u>0</u>	Bank Accounts	\$ <u>0</u>
Governmental/Public Assistance: \$ <u>0</u>	Tax refund coming	\$ <u>0</u>
Unemployment \$ <u>0</u>	Stocks/Bonds	\$ <u>0</u>
Pension \$ <u>0</u>	Land/Real Estate	\$ <u>0</u>
VA Disability \$ <u>0</u>	Value of Home/Mobile Home	\$ <u>0</u>
Military Allotment \$ <u>0</u>	Value of Vehicles	\$ <u>0</u>
Spousal/Child support \$ <u>100 - 200</u>	Livestock	\$ <u>0</u>
Other Income \$ <u>0</u>	Household Goods	\$ <u>0</u>
Total Monthly Income \$ <u>1160</u>	Other Assets	\$ <u>0</u>
	Total Assets	\$ <u>0</u>

PART D

If you own or are buying property listed below, circle the item and then fill in the information about the property.

Property:	What is the make/model & year	Cost when you bought it	Present Value	How much do you still owe on it?
Car	n/a			
Second Car	"			
Pickup	"			
Truck	"			
Motorcycle	"			
Recreational Vehicle	"			
House / Mobile Home	"			
Other Real Estate	"			
Other Property:	"			
Other Property:	"			

PART E

Names of People living in your household (do not provide full name of minors, use only initials):

Name	Age	Relationship
1. _____	_____	_____
2. _____	_____	_____
3. _____	_____	_____
4. _____	_____	_____
5. _____	_____	_____

Names, ages, and relationship of other dependents or others you support financially (do not provide full name of minors, use only initials):

1. <u>D. C.</u>	<u>10</u>	<u>Son</u>
2. <u>P. B. L. C.</u>	<u>7</u>	<u>Daughter</u>
3. <u>T. A. C.</u>	<u>15</u>	<u>Daughter</u>

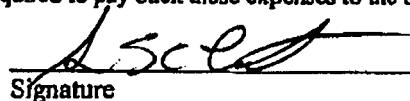
Are there any extraordinary financial conditions that would prevent you from hiring a private lawyer?

YES NO If yes, please explain: Currently unable to earn appropriate funds necessary

PART F

I have answered all questions honestly and truthfully to the best of my knowledge and I am requesting that a lawyer be appointed to represent me. I understand that the information supplied on this form is not confidential, and that the accompanying reference list identifying redacted information will be provided to my attorney and to the ND Commission on Legal Counsel for Indigents. I also understand that if I have supplied false information in the application, it may lead to criminal prosecution and conviction.

If counsel is appointed for me, I understand that I have a continuing responsibility to inform the court of any changes in my financial condition. I understand that even if I am found eligible to have the costs of an attorney and related expenses paid for me at this time, I may be required to pay back those expenses to the State at a later time.

Date: 8-21-12


Signature

FOR COURT USE ONLY

Case Title(s): 08 2012 CV 1810 Post Conviction ReliefApplication Fee: Paid _____ Reduced to \$ _____ Waived Due _____

Applicant is found to be:

 Not Indigent. The Application for appointed defense services is denied. Indigent. Counsel is to be provided by the ND Commission on Legal Counsel for Indigents. The Court hereby advises the defendant of the defendant's potential obligation to reimburse the Commission the amounts expended on behalf of the defendant.Date: 10-3-2012

Approved:



Judge of District Court or Designee

NOTICE OF ELIGIBILITY FOR APPOINTED COUNSEL

County: BURLEIGH

Party Name/Address: Spencer Kerry Curtiss
North Dakota State Penitentiary
PO Box 5521
Bismarck ND 58506

Case Number: 08-2012-CV-01810

In Custody: Y Where: North Dakota State Penitentiary

Signed: 10/3/2012 4:04:37 PM

Date: October 03, 2012

By:

Michele Bring
(Court Personnel)

This is to certify that notification has been sent electronically to lead counsel/Indigent Defense Commission on October 03, 2012 by Michele Bring.

ASSIGNMENT OF COUNSEL NOTICE (Completed by Lead Contractor or Commission Personnel)

Attorney Assigned: _____

Address: _____ Phone No.: _____

Date Assigned: _____

Faxed To: _____

(FAX to Assigned Attorney, Clerk of Court Personnel and Commission)

This is to certify that notification has been faxed/mailed/mailed (circle one) to the

Party on _____, _____ by _____.

COMMISSION ON LEGAL COUNSEL FOR INDIGENTS
REQUEST TO ASSIGN CASE TO APPELLATE ATTORNEY

Name of Requesting Attorney Robert L. Martin Phone: 857-7751

Address: 11 First Ave. Fax No: 857-7750e

Defendant/Respondent Name: Spencer Curtiss #36987

Type of Matter: Appeal Post-Conviction Appeal of Post-Conviction

County: Burleigh Supreme Court Case No. _____

Case No(s): 08-2012-CU-01810 Charge(s): GSI Severity Level: FAT

Case No(s): _____ Charge(s): _____ Severity Level: _____

Case No(s): _____ Charge(s): _____ Severity Level: _____

Case No(s): _____ Charge(s): _____ Severity Level: _____

Pending Deadlines: _____ for: _____

Present status of case/ any post-conviction filings: Hearing to be Set

Requested Assistance: _____

Reason for Request: please indicate reason for request on a separate sheet of paper.

The Defendant/Respondent is in custody YES L NO _____

The Defendant/Respondent may be located at NDSP - POBox 5521 Bismarck, ND 5850e

**Notice of Appeal has been Filed NO YES _____

**Transcript has been ordered NO YES _____

Send or Fax to the Commission (701) 845-8633, along with copies of the Notice of Appeal and Request for Transcript

Jane Jackson
 I, Robin Huseby and/or Jean Delaney, do hereby GRANT X DENY _____ this request to assign case to an appellate attorney.

Dated this 5th day of March, 2013

Appellate Attorney Assigned: Russell Mybre

Address: 341 Central Ave N, Valley City, ND 58072

Phone: 701-845-1444 Fax: 701-845-1888

This notice shall be mailed or faxed to the requesting counsel, assigned counsel, defendant, court reporter (if transcript has been ordered), Clerk of the District Court and, if applicable, Clerk of the Supreme Court.

RECEIVED & FILED

Version 3/25/2010

Date Closed _____ Case Hours _____ Travel Hours _____

MAR 11 2013

Clerk of Cr. Burleigh Co.

APPENDIX E

Case Summary: Case No: 08-2016-CV-02655

Spencer Kerry Curtiss vs. State of North Dakota

BURLEIGH COUNTY
CASE SUMMARY
CASE NO. 08-2016-CV-02655

Spencer Kerry Curtiss vs. State of North Dakota

§ Location: Burleigh County
 § Judicial Officer: Reich, David E
 § Filed on: 10/19/2016
 § Case Number History:
 § Supreme Court Docket 20180392
 Number:

CASE INFORMATION

Related Cases

08-10-K-01650 (Related Case)
 08-2012-CV-01810 (Related Case)
 08-2014-CV-01843 (Related Case)

Case Type: Post Conviction Relief

DATE	CASE ASSIGNMENT
Current Case Assignment	
Case Number	08-2016-CV-02655
Court	Burleigh County
Date Assigned	10/19/2016
Judicial Officer	Reich, David E

PARTY INFORMATION

		<i>Lead Attorneys</i>
Petitioner	Curtiss, Spencer Kerry	Pro Se 701-390-0029(H)
Respondent	State of North Dakota	Vaagen, Tessa Marie <i>Retained</i> 701-222-6672 x0000(W)

DATE	EVENTS & ORDERS OF THE COURT	INDEX
10/19/2016	❑ Post Conviction Relief Application	<i>Index #1</i>
10/19/2016	❑ Memorandum <i>in Support of Post-Conviction Application</i>	<i>Index #2</i>
10/19/2016	❑ Affidavit <i>in Support of Post-Conviction Application</i>	<i>Index #3</i>
10/19/2016	❑ Civil Filing <i>Invocation of Rights</i>	<i>Index #4</i>
10/19/2016	❑ Service Document <i>Certificate of Service by Mail</i>	<i>Index #5</i>
10/19/2016	❑ Notice of Assignment and Case Number	<i>Index #6</i>
10/19/2016	❑ Letter <i>from Clerk of Court to Spencer Curtiss</i>	<i>Index #7</i>
10/19/2016	❑ Notice of Hearing <i>- Evidentiary</i>	<i>Index #8</i>

BURLEIGH COUNTY
CASE SUMMARY
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10/25/2016	<input type="checkbox"/> Application for Indigent Defense Services <i>Approved</i>	Index #9
10/25/2016	<input type="checkbox"/> Notice of Eligibility for Appointed Counsel	Index #10
10/25/2016	<input type="checkbox"/> Exhibit <i>Exhibit #: 72. Exhibit Description: FC Child and Family Team Notes. (Received) Plaintiff</i>	Index #11
10/25/2016	<input type="checkbox"/> Exhibit <i>Exhibit #: 71. Exhibit Description: Transcript on Appeal - Sentencing Hearing. (Received) Plaintiff</i>	Index #12
10/25/2016	<input type="checkbox"/> Exhibit <i>Exhibit #: 70. Exhibit Description: Transcript of Deposition of K.D.. (Received) Plaintiff</i>	Index #13
10/25/2016	<input type="checkbox"/> Exhibit <i>Exhibit #: 69. Exhibit Description: Not Guilty Verdict 10 K 1650. (Received) Plaintiff</i>	Index #14
10/25/2016	<input type="checkbox"/> Exhibit <i>Exhibit #: 68. Exhibit Description: Order 11/24/2010 Exclusion of Evidence. (Received) Plaintiff</i>	Index #15
10/25/2016	<input type="checkbox"/> Exhibit <i>Exhibit #: 67. Exhibit Description: Letter for Harold Snow. (Received) Plaintiff</i>	Index #16
10/25/2016	<input type="checkbox"/> Exhibit <i>Exhibit #: 66. Exhibit Description: Letter from Natanya Flowers. (Received) Plaintiff</i>	Index #17
10/25/2016	<input type="checkbox"/> Exhibit <i>Exhibit #: 65. Exhibit Description: Letter from Eric Bjork. (Received) Plaintiff</i>	Index #18
10/25/2016	<input type="checkbox"/> Exhibit <i>Exhibit #: 64. Exhibit Description: Definitions. (Received) Plaintiff</i>	Index #19
10/25/2016	<input type="checkbox"/> Exhibit <i>Exhibit #: 63. Exhibit Description: State's Requested Jury Instructions. (Received) Plaintiff</i>	Index #20
10/25/2016	<input type="checkbox"/> Exhibit <i>Exhibit #: 62. Exhibit Description: Phone Call - Terrance Lanto 09/20/2010. (Received) Plaintiff</i>	Index #21
10/25/2016	<input type="checkbox"/> Exhibit <i>Exhibit #: 61. Exhibit Description: Response Cover Sheet 09/20/2010 no text found. (Received) Plaintiff</i>	Index #22
10/25/2016	<input type="checkbox"/> Exhibit <i>Exhibit #: 60. Exhibit Description: Complaint. (Received) Plaintiff</i>	Index #23
10/25/2016	<input type="checkbox"/> Exhibit <i>Exhibit #: 59. Exhibit Description: Information. (Received) Plaintiff</i>	Index #24

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10/25/2016	 Exhibit <i>Exhibit #: 58. Exhibit Description: Amended Information. (Received) Plaintiff</i>	Index #25
10/25/2016	 Exhibit <i>Exhibit #: 57. Exhibit Description: Severin Ringsak & Morrow 11/24/2010 to Nesvig. (Received) Plaintiff</i>	Index #26
10/25/2016	 Exhibit <i>Exhibit #: 56. Exhibit Description: Subpoena Duces Tecum - Simile Middle School. (Received) Plaintiff</i>	Index #27
10/25/2016	 Exhibit <i>Exhibit #: 55. Exhibit Description: Material For Lanto Building & Const.. (Received) Plaintiff</i>	Index #28
10/25/2016	 Exhibit <i>Exhibit #: 54. Exhibit Description: State's Reponse to Plaintiffs Req for DIs. 03/27/2014. (Received) Plaintiff</i>	Index #29
10/25/2016	 Exhibit <i>Exhibit #: 53. Exhibit Description: St. Alexis Archway Health Ser. 12/16/2009. (Received) Plaintiff</i>	Index #30
10/25/2016	 Exhibit <i>Exhibit #: 52. Exhibit Description: Response to Motion to Produce Medical Records. (Received) Plaintiff</i>	Index #31
10/25/2016	 Exhibit <i>Exhibit #: 51. Exhibit Description: Aff of Electronic Ser/Cer. of Ser. Medical Records. (Received) Plaintiff</i>	Index #32
10/25/2016	 Exhibit <i>Exhibit #: 50. Exhibit Description: Follow up/ Continuation Report. (Received) Plaintiff</i>	Index #33
10/25/2016	 Exhibit <i>Exhibit #: 49. Exhibit Description: to the Police Involved in this Case. (Received) Plaintiff</i>	Index #34
10/25/2016	 Exhibit <i>Exhibit #: 48. Exhibit Description: EnCase Computer Analysis Report 14 pages. (Received) Plaintiff</i>	Index #35
10/25/2016	 Exhibit <i>Exhibit #: 47. Exhibit Description: Search Warrant 11/16/2010. (Received) Plaintiff</i>	Index #36
10/25/2016	 Exhibit <i>Exhibit #: 46. Exhibit Description: Request for Computer Foresics. (Received) Plaintiff</i>	Index #37
10/25/2016	 Exhibit <i>Exhibit #: 45. Exhibit Description: Report of Investigation 4 pages 01/23/2010. (Received) Plaintiff</i>	Index #38
10/25/2016	 Exhibit <i>Exhibit #: 44. Exhibit Description: Letter to Tim Erickson 11/15/2010. (Received) Plaintiff</i>	Index #39

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10/25/2016	 Exhibit <i>Exhibit #: 43. Exhibit Description: Bis. Police - letters to Bend Police Dept 10/26/2010 and 11/08/2010. (Received)Plaintiff</i>	Index #40
10/25/2016	 Exhibit <i>Exhibit #: 42. Exhibit Description: State's Response to Plaintiff's Motion to Return Property. (Received)Plaintiff</i>	Index #41
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10/25/2016	 Exhibit <i>Exhibit #: 40. Exhibit Description: Continuation of Statement - Rebecca Curtiss 12/03/2010. (Received)Plaintiff</i>	Index #43
10/25/2016	 Exhibit <i>Exhibit #: 39. Exhibit Description: Jury Instructions. (Received)Plaintiff</i>	Index #44
10/25/2016	 Exhibit <i>Exhibit #: 38. Exhibit Description: Order 02/2014. (Received)Plaintiff</i>	Index #45
10/25/2016	 Exhibit <i>Exhibit #: 37. Exhibit Description: Substitution of Counsel - Lee Grossman. (Received)Plaintiff</i>	Index #46
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10/25/2016	 Exhibit <i>Exhibit #: 35. Exhibit Description: Evidentiary Hearing 05/29/2014. (Received)Plaintiff</i>	Index #48
10/25/2016	 Exhibit <i>Exhibit #: 34. Exhibit Description: Trial Transcript Day 1 and Day 11. (Received)Plaintiff</i>	Index #49
10/25/2016	 Exhibit <i>Exhibit #: 33. Exhibit Description: Sheriff's Return Tessa Curtiss. (Received)Plaintiff</i>	Index #50
10/25/2016	 Exhibit <i>Exhibit #: 32. Exhibit Description: Sheriff's Return Jerrica Sauer. (Received)Plaintiff</i>	Index #51
10/25/2016	 Exhibit <i>Exhibit #: 31. Exhibit Description: Sheriff's Return Kathy Nelson. (Received)Plaintiff</i>	Index #52
10/25/2016	 Exhibit <i>Exhibit #: 30. Exhibit Description: Release of Information to Kathy Nelson. (Received)Plaintiff</i>	Index #53
10/25/2016	 Exhibit <i>Exhibit #: 29. Exhibit Description: Phone Call - Kathy Nelson will be in court. (Received)Plaintiff</i>	Index #54
10/25/2016	 Exhibit <i>Exhibit #: 27. Exhibit Description: Fax to Jerrica Sauer 12/08/2010 with note releasing</i>	Index #56

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10/25/2016	<p> Exhibit <i>Exhibit #: 26. Exhibit Description: Severin Rinsak Morrow 11/29/2010 to Mountrail County Sheriff-Terranc Lanto. (Received)Plaintiff</i></p>	Index #57
10/25/2016	<p> Exhibit <i>Exhibit #: 25. Exhibit Description: Severin Ringsak Morrow 11/29/2010 to Burl Cnty Sheriff-Jerrica Sauer and Kahty Nelson. (Received)Plaintiff</i></p>	Index #58
10/25/2016	<p> Exhibit <i>Exhibit #: 24. Exhibit Description: Subpoena Terry Lanto 11/24/2010. (Received)Plaintiff</i></p>	Index #59
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10/25/2016	<p> Exhibit <i>Exhibit #: 17. Exhibit Description: Letter to Clerk of District Court 02/04/2014. (Received)Plaintiff</i></p>	Index #66
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10/25/2016	<p> Exhibit <i>Exhibit #: 15. Exhibit Description: Letter to Kim Bless.Cert of Service 12/03/2013. (Received)Plaintiff</i></p>	Index #68
10/25/2016	<p> Exhibit <i>Exhibit #: 14. Exhibit Description: Affidavit from Fabian Volk 06/15/2015. (Received)Plaintiff</i></p>	Index #69
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10/25/2016	<p> Exhibit <i>Exhibit #: 12. Exhibit Description: Email to Lee Grossman 3 pages detail on destruction of evidence. (Received)Plaintiff</i></p>	Index #71
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12/15/2016	 Request <i>for Continuance of Hearing</i>	Index #95
12/28/2016	 Response <i>Response to Motion for Summary Disposition</i>	Index #96
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01/03/2017	 Proposed Order <i>for Transport - Charles Stock</i>	Index #98
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01/04/2017	 Order <i>Request for Continuance GRANTED</i>	Index #100
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07/21/2017	❑ Notice <i>Notice of Motion served on Spencer Curtiss</i>	Index #117
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07/21/2017	❑ Service of Motion <i>Affidavit of Service Spencer Curtiss, Tessa Vaagen</i>	Index #119
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07/27/2017	❑ Request <i>for Continuance (submitted by Spencer Curtiss / Plaintiff)</i>	Index #121
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08/04/2017	 Order <i>Granting Continuance. (Incorrect Plaintiff Listed.)</i>	Index #126
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01/04/2018	Exhibit <i>F - Contract for Appellate Attorney</i>	Index #146
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for Reconsideration

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01/31/2019	❑ Exhibit <i>106: Certificate of Service by Mail February 13, 2018</i>	<i>Index #225</i>
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01/31/2019	❑ Exhibit <i>113: Certificate of Service by Mail July 6, 2018</i>	<i>Index #232</i>
01/31/2019	❑ Exhibit <i>114: Clerk of District Court July 9, 2018</i>	<i>Index #233</i>
01/31/2019	❑ Exhibit <i>115: Clerk of District Court July 20, 2018</i>	<i>Index #234</i>
01/31/2019	❑ Exhibit <i>116: Clerk of District Court August 6, 2018</i>	<i>Index #235</i>
01/31/2019	❑ Exhibit <i>117: Clerk of District Court August 31, 2018</i>	<i>Index #236</i>
01/31/2019	❑ Exhibit <i>118: Production of Documents August 30, 2018</i>	<i>Index #237</i>
01/31/2019	❑ Service of Motion <i>Certificate of Service by Mail on Clerk of Court and Vaagen</i>	<i>Index #238</i>

BURLEIGH COUNTY
CASE SUMMARY
CASE NO. 08-2016-CV-02655

02/07/2019	✉ Receipt <i>Return Receipt for Document Request From Plaintiff</i>	Index #239
03/12/2019	✉ Clerk's Supplemental Certificate of Appeal <i>Clerk's Supplemental Certificate of Appeal</i>	Index #240
03/18/2019	✉ Letter <i>from the North Dakota Supreme Court dated March 18th, 2019</i>	Index #241
07/24/2019	✉ Supreme Court Judgment/Opinion <i>Opinion (Affirmed) (Per Curiam)</i>	Index #242
07/24/2019	✉ Supreme Court Judgment/Opinion <i>Judgment</i>	Index #243
07/24/2019	✉ Transcript <i>Transcript dated March 13, 2018 Evidentiary Hearing</i>	Index #244
07/24/2019	✉ Transcript <i>Transcript dated July 17, 2018, Evidentiary Hearing</i>	Index #245

DATE	FINANCIAL INFORMATION
	Petitioner Curtiss, Spencer Kerry
	Total Charges 8.00
	Total Payments and Credits 8.00
	Balance Due as of 8/2/2019 0.00

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution 5th Amendment

“No person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a Grand Jury...; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall 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; nor shall private property be taken for public use without just compensation.”

United States Constitution 6th Amendment

“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.

United States Constitution 13th Amendment § 1

“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

United States Constitution 14th Amendment § 1

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

North Dakota Constitution article 1§1

“All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.”

North Dakota Constitution Article 1 § 9

“All courts shall be open and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and the right of justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as to legislative assembly may, by law, direct.”

North Dakota Constitution Article 1 § 12

“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.”

North Dakota Constitution article 1§13

“The right of trial by jury shall be secured to all, and remain inviolate. A person accused of a crime for which he may be confined for a period of more than one year has the right of trial by a jury of twelve. The legislative assembly may determine the size of the jury for all other cases, provided that the jury consist of at least six members. All verdicts must be unanimous.”

NORTH DAKOTA CENTRUY CODE

NDCC § 12.1-01-03

1. No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. An accused is presumed innocent until proven guilty. The fact that the accused has been arrested, confined, or charged with the offense gives rise to no inference of guilty of the accused at trial. “Element of an offense” means:

- a) the forbidden conduct;
- b) the attendant circumstances specified in the definition and grading of the offense;

- c) the required culpability;
- d) any required result; and
- e) the nonexistence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue.

Attendant circumstance [Black's Law 8th ed., pg. 260] A fact that is situationally relevant to a particular event or occurrence.

N.D.C.C. § 12.1-02-01. Basis of liability for offenses.

1. A person commits an offense only if the person engages in conduct, including an act, an omission, or possession, in violation of a statute which provides that the conduct is an offense.
2. A person who omits to perform an act does not commit an offense unless the person has a legal duty to perform the act, nor shall such an omission be an offense if the act is performed on the person's behalf by a person legally authorized to perform it.

N.D.C.C. § 12.1-02-02. Requirements of culpability.

1. For the purposes of this title, a person engages in conduct:
 - a. "Intentionally" if, when he engages in the conduct, it is his purpose to do so.

- b. “**Knowingly**” if, when he engages in the conduct, **he knows or has a firm belief**, unaccompanied by substantial doubt, **that he is doing so, whether or not it is his purpose to do so**.
- c. “**Recklessly**” if he engages in the conduct in **conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks**, such disregard involving a gross deviation from **acceptable standards of conduct**, except that, as provided in **section 12.1-04-02**, awareness of the risk is not required where its absence is due to self-induced intoxication.
- d. “**Negligently**” if he engages in the conduct in **unreasonable disregard of a substantial likelihood of the existence of the relevant facts or risks**, such disregard involving a gross deviation from acceptable standards of conduct.
- e. “**Willfully**” if he engages in the conduct **intentionally, knowingly, or recklessly**.

2. If a statute or regulation thereunder defining a crime does not specify any culpability and does not provide explicitly that a person may be guilty without culpability, the culpability that is required is willfully.

3. a. Except as otherwise expressly provided, where culpability is required, that kind of culpability is required with respect to every element of the conduct **and to those attendant circumstances specified in the definition of the offense**,

except that where the required culpability is “intentionally”, the culpability required as to an attendant circumstances is “knowingly”.

- b. Except as otherwise expressly provided, if conduct is an offense if it causes a particular result, the required degree of culpability is required with respect to that result.
- c. Except as otherwise expressly provided, culpability is not required with respect to any fact which is solely a basis for grading.
- d. Except as otherwise expressly provided, culpability is not required with respect to facts which establish that a defense does not exist, if the defense is defined in **chapters 12.1-01 through 12.1-06**; otherwise the least kind of culpability required for the offense is required with respect to such facts.
- e. A factor as to which it is expressly stated that it must “in fact” exist is a factor for which culpability is not required.

4. Any lesser degree of required culpability is satisfied if the proven degree of culpability is higher.

5. Culpability is not required as to the fact that conduct is an offense, except as otherwise expressly provided in a provision outside this title.

N.D.C.C. § 29-23-11

Any error by the court in or by any decision, ruling, instruction, or other act, and appearing in the record of the action, may be taken advantage of upon a motion for a new trial or in the Supreme Court on an appeal.

STATUTES IN THIRD AMENDED INFORMATION ATTENDANT TO YEAR
2010

N.D.C.C. § 12.1-20-03

1. A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of an offense if:
 - d) the victim is less than fifteen years old.

N.D.C.C. § 12.1-20-02

In section 12.1-20-03 through 12.1-20-12

- 3) "object" means anything used in commission of a sexual act other than the person of the actor.

N.D.C.C. § 12.1-20-03

- 3(a) An offense under this section is a class AA felony if in the course of the offense the actor inflict serious bodily injury upon the victim, if the actor's conduct violates subdivision a of subsection 1, or if the actor's conduct violates subdivision d of subsection 1 and that actor was at least twenty two years of age at the time of the offense... A defendant convicted of a class AA felony under this section may not be sentenced to serve less than five years of incarceration.

N.D.C.C. § 12.1-32-01(1)

Class AA felony, for which a maximum penalty of life imprisonment without parole may be imposed...

N.D.C.C. 27-13-12 Attorney not to aid and Defense when formally as public prosecutor – Penalty

Every attorney who, having prosecuted or in any manner aided or promoted any action or proceeding in any court, as state's attorney or other public prosecutor, afterward, directly or indirectly, advises in relation to or takes any part in the defense thereof as attorney or otherwise, or takes or receives any valuable consideration from or on behalf of any defendant therein, upon any understanding or agreement whatever, express or implied, having relation to the defense thereof, is guilty of a class A misdemeanor and in addition to the punishment prescribed therefore that attorney forfeits that attorney's license to practice.

S.L. 1975, ch 106 § 316

Slavery: (Ballentine's Law Dictionary 3rd ed.) 1) Bondage, involuntary servitude. An institution where one man is owned by and bound to another. 2) The term implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to disposal of his own person, property, and services. 48 Am

J1st Slav § 4, *Plessy v. Ferguson*, 163 US 537, 542, 41 L.Ed. 256, 257,
16 S.Ct. 1138.

APPENDIX G

CONFLICT OF INTEREST

N.D.C.C. 27-13-12 Attorney not to aid and Defense when formally as public prosecutor – Penalty

Every attorney who, having prosecuted or in any manner aided or promoted any action or proceeding in any court, as state's attorney or other public prosecutor, afterward, directly or indirectly, advises in relation to or takes any part in the defense thereof as attorney or otherwise, or takes or receives any valuable consideration from or on behalf of any defendant therein, upon any understanding or agreement whatever, express or implied, having relation to the defense thereof, is guilty of a class A misdemeanor and in addition to the punishment prescribed therefore that attorney forfeits that attorney's license to practice.

S.L. 1975, ch 106 § 316

N.D.C.C. § 27-13-08. Misconduct of attorney – Penalty – Treble civil damages forfeited.

Every attorney who:

1. Is guilty of any deceit or collusion or consents to any deceit or collusion with intent to deceive the court or any party;

2. Willfully delays the attorney's client's suit with a view to the attorney's own gain; or
3. Willfully receives any money or other property for or on account of any money or debt which the attorney has not laid out or become answerable for,

is guilty of a class A misdemeanor and in addition forfeits to the party injured treble damages to be recovered in a civil action.

N.D.C.C. § 27-14-02. Causes for suspension or revocation of certification of admission to bar.

The certificate of admission to the bar of this state of an attorney and counselor at law may be **revoked** or **suspended** by the Supreme Court if that attorney has:

1. **Committed an offense determined by the supreme court to have a direct bearing upon a person's ability to serve the public as an attorney and counselor at law**, or the supreme court determines, following conviction of an offense, that the person is not sufficiently rehabilitated under **section 12.1-33-02.1**;
2. Willfully disobeyed or violated an order of the court requiring the attorney to do or to refrain from doing an act connected with or in the course of the attorney's professional practice;
3. **Willfully violated any of the duties of an attorney or counselor at law**;

4. Engaged, while attorney general or assistant attorney general of this state, or while employed in the office of the attorney general, in the private practice of the law, or rendered to any person, for pay, profit, and remuneration, any legal services other than those required in performing the duties imposed upon the attorney by virtue of the duties of the attorney's office, but an assistant attorney general may finish any case, proceeding, or legal business in which the assistant attorney general was engaged at the time for the person's appointment, and an attorney general or assistant attorney general with the permission of the attorney general may voluntarily represent indigent clients referred by an organized pro bono program in addition to the regular duties of the attorney's office; such pro bono representation must be at no cost to the State of North Dakota;
5. Appeared, while state's attorney or assistant state's attorney of any county of this state or while an employee in the office of the state's attorney, as an attorney for the defense in any criminal action which it was the attorney's duty to prosecute;
6. Been convicted of any offense mentioned in **section 27-13-08, 27-13-09, 27-13-11, or 27-13-12**; or
7. **Committed any other act which tends to bring reproach upon the legal profession.** The enumeration of certain grounds for disbarment or suspension of attorneys at law may not be deemed a limitation upon the

general powers of the Supreme Court to suspend or disbar for professional misconduct.

N.D.C.C. § 27-13-02 Power of Attorney

An attorney and counselor at law may:

1. Execute, in the name of the attorney's client, a bond or other written instrument necessary and proper for the prosecution of an action or proceeding about to be or already commenced, or for the prosecution or defense of any right growing out of an action, proceeding, or final judgment rendered therein.
2. Bind the attorney's client to any agreement in respect to any proceeding within the scope of the attorney's proper duties and powers, but no evidence of any such agreement is receivable, except the statement of the attorney, the attorney's written agreement signed and filed with the clerk, or on entry thereof upon the records of the court.
3. Receive money claimed by the attorney's client in an action or proceeding during the pendency thereof or afterwards, unless the attorney has been previously discharged by the attorney's client, and upon payment thereof, and not otherwise, may discharge the claim or acknowledge satisfaction of the judgment.

North Dakota Rules of Professional Conduct

RULE 1.7. CONFLICT OF INTEREST: GENERAL RULE

- (a) A lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.
- (b) A lawyer shall not represent a client when the lawyer's own interests are likely to adversely affect the representation.
- (c) A lawyer shall not represent a client if the representation of that client might be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, **unless**:
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and
 - (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.
- (d) Except as required or permitted by **Rule 1.6**, a lawyer shall not use information relating to representation of a client to the disadvantage of a client unless a client who would be disadvantaged consents after consultation.

Analysis of Potential Conflict

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. **If an impermissible conflict of interest exists before representation is undertaken, the representation ordinarily must be declined.** If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See Rule 1.16. Where more than one client is involved and the lawyer withdraws because an impermissible conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by Rule 1.9. As to whether a lawyer-client relationship exists or continues after having once been established, see Comment to Rule 1.3.

[2] Paragraphs (a), (b) and (c) of this Rule address three separate and distinct conflict of interest situations. Paragraph (a) addresses the situation in which the lawyer's own interests or the lawyer's responsibilities to another client or to a third person *will* adversely affect the lawyer's representation of a client. Paragraph (b) addresses the situation in which the lawyer's own interests *are likely* to adversely affect the representation. In both of these conflict situations, the lawyer is absolutely prohibited from undertaking or continuing representation of the client. Paragraph (c) addresses the situation in which the lawyer's own interests or the lawyer's responsibilities to another client or to a third person simply *might* adversely affect the lawyer's representation of a client. In this situation the lawyer is permitted to undertake the

representation if the lawyer reasonably believes there will be no adverse effect on the representation and if the clients consent after consultation.

[3] An adverse effect is any material limitation on a lawyer's representation of a client attributable to the lawyer's responsibilities to another client, to a former client, to a third person, or arising from a personal interest of the lawyer. When a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests, the representation will be adversely affected and must be declined or terminated. The conflict in effect forecloses alternatives that would otherwise be available to the client.

[4] **Resolution of a conflict of interest problem under this Rule** requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a material limitation on the representation of the client exists; 3) decide whether the representation may be undertaken despite the material limitation, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (c) and obtain their consent. The clients affected under paragraph (c) include any clients whose representations might be adversely affected. The critical questions are the likelihood that a material limitation will eventuate and, if it does, the likelihood the conflict will interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

RULE 1.8. CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) Except for standard commercial transactions involving products or services that the client generally markets to others, a lawyer shall not enter into a business, financial, or property transaction with a client unless:

- (1) the transaction is fair and reasonable to the client; and
- (2) after consultation, including advice to seek independent counsel, the client consents to the transaction.

(b) Except as permitted or required in **Rules 1.6** and **3.3**, a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless after consultation, including written advice to seek independent counsel, the client consents.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, unless the client is related to the other one. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and
- (3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided that the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided that no promise of financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;
- (2) information relating to representation of a client is protected as required by Rule 1.6; and
- (3) after consultation, the client consents.

(g) A lawyer who represents two or more clients, other than in class actions, shall not participate in making an aggregate settlement of the claims of or against the clients, or an aggregated agreement as to guilty pleas in a criminal case, unless, after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement, each client consents.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for the lawyer's liability for malpractice with an unrepresented client or former client unless, after consultation, including advice to seek independent counsel, the client or former client consents.

(i) A lawyer shall not acquire a property interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a contingent fee in a civil case as permitted by

Rule 1.5.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) A part-time prosecutor or judge permitted by law to engage in the practice of law in addition to the part-time service shall not, in that practice, represent a client if the representation will or probably will require any pleading or appearance on the client's behalf:

(1) if the lawyer is a part-time prosecutor and the client is charged or expects to be charged with a crime, in the jurisdiction in which the lawyer holds the prosecutorial appointment; and

(2) if the lawyer is a part-time judge in:

(i) the court in which the judge holds appointment; or

(ii) any court from which the appeals may be brought to the court in which the judge holds appointment.

(l) Neither a lawyer serving as a fiduciary of an estate, trust, or conservatorship nor the lawyer's firm may serve as legal counsel for the fiduciary. This paragraph does not apply to United States Bankruptcy Court proceedings or to matters in which the decedent, trustor, beneficiary, or protected person is a spouse, child, grandchild, parent, grandparent, or sibling of the lawyer.

Comment

Client Consent and Advice to Seek Independent Counsel

[1] There are several requirements under this Rule that the lawyer obtain client consent or provide advice to the client to seek independent counsel. See Paragraphs (a)(2), (b), (g), and (h)(2). Obtaining client consent or providing advice to seek independent counsel in writing is the preferred practice. Lack of a writing may make it difficult to prove client consent or that advice was given if a dispute arises later.

RULE 1.16. DECLINING OR TERMINATING REPRESENTATION

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall seek to withdraw from the representation of a client if:
 - (1) the lawyer reasonably believes that the representation will result in violation of these Rules or other law;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;
 - (3) the lawyer has offered material evidence in the testimony of the client and has come to know of its falsity and the client has refused to consent to disclosure of its false character to the tribunal; or
 - (4) the lawyer is discharged.
- (b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) a client insists upon pursuing objectives or means that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Where the lawyer has sought to withdraw in accordance with paragraph (a)(3) and withdrawal is not permitted, the lawyer may continue the representation without disclosure of the client's false testimony; such continuation alone is not a violation of these Rules.

(e) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client only to the extent permitted by **Rule 1.19**.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See **Rules 1.2(c) and 6.5**. See also **Rule 1.3, Comment[4]**.

RULE 3.4. Fairness to opposing party and counsel.

The lawyer shall not:

- (a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value;
- (b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

- (c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;
- (d) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) The person is a relative or an employee or other agent of a client; and
 - (2) The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by contending parties. **Fair competition in the adversary system is secured by prohibitions against destruction or**

concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedures, and the like.

RULE 8.4. Misconduct.

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate these Rules, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer on other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness as lawyer;
- (d) knowingly assist a judge or judicial officer in conduct that is a violation of applicable canons of judicial conduct or other law;
- (e) state or imply an ability to influence improperly a government agency or official; or to achieve results by means that violate these Rules or other law;
- (f) engage in conduct that is prejudicial to the administration of justice, including to knowingly manifest through words or conduct in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation, against parties, witnesses, counsel or others, except when those words or conduct are legitimate advocacy because race, sex, religion, national origin, disability, age, or sexual orientation is an issue in the proceeding; or

(g) engage in other conduct that is enumerated in the North Dakota Century Code as a basis for revocation or suspension of a lawyer's certificate of admission.

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate these Rules, knowingly assist or induce another to do so or do so through acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is lawfully entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." The concept of "moral turpitude" may be construed to include offense concerning matters of personal morality, such as adultery and comparable offenses that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice fall within that category. A pattern of repeated

offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligations.

[3] A lawyer who, in the course of representing a client knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation violates **paragraph (f)** when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate **paragraph (f)**. For example, a trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] **N.D.C.C. Section 27-14-02** provides for the revocation or suspension of the certificate of admission of any lawyer who has committed an offense determined by the North Dakota Supreme Court to have a direct bearing on the lawyer's ability to serve the public as a lawyer and counselor at law. Statutes also provide for revocation or suspension in other instances of misconduct, including **27-13-01** (duties of attorneys), **27-13-08** (misconduct of attorneys), **27-13-09** (permitting use of the attorney's name), **27-13-11** (involvement in the defense while a partner of the prosecutor), and **27-13-12** (involvement in the defense after involvement as state's attorney or other public prosecutor).

[5] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of **Rule 1.2(d)**

concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges to the regulation of the practice of law.

[6] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of a lawyer. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent, and officer, director or manager of a corporation or other organization.