

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

State of North Dakota,)	
)	
Plaintiff/Appellee,)	Supreme Court No. 20050208
)	
vs.)	District Court No. 09-04-K-2615
)	
Jeffrey Max Garten, Sr.,)	
)	
Defendant/Appellant.)	

Brief of Defendant/Appellant Jeffrey Max Garten, Sr.

**Appeal from Criminal Judgment and Commitment entered
June 8, 2005, in District Court, County of Cass,
State of North Dakota, The Honorable Steven E. McCullough**

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Statement of The Issues

1. Whether the Trial Court's denial of Mr. Garten's Motion to Suppress was erroneous?
2. Whether the Trial Court's denial of Mr. Garten's Motion to Sever Counts was an abuse of discretion?
- 3 Whether the Trial Court's denial of Mr. Garten's Motion for a New Trial was an abuse of discretion?

Statement of the case

This is an appeal by Jeffrey Max Garten, Sr. from the Criminal Judgment and Commitment entered by the Honorable Steven E. McCullough, East Central Judicial District Court on June 8, 2005. (App. 22; D 211).¹ Appellant Jeffrey Max Garten, Sr. (hereinafter Mr. Garten) was charged with Possession of a Controlled Substance with Intent to Deliver pursuant to **N.D.Cent. Code §19-03.1-23(1)**, as a Class A Felony, and Theft pursuant to **N.D.Cent. Code §12.1-23-02** by Amended Information dated April 7, 2005. (App. 10; D 115). The case was tried to a jury of twelve on April 7, 8, 11 and 12, 2005. (Transcript of proceedings; D 115-155). The jury returned verdicts of guilty. (D 154 & 155). A pre-sentence investigation was ordered. Mr. Garten made a motion for a new trial. On June 6, 2005, a hearing was held on the motion for a new trial and sentencing. The Court denied the motion, and proceeded to sentencing. The Court sentenced Mr. Garten to ten years in the custody of the North Dakota Department of Corrections and Rehabilitation. (App. 22).

¹In the brief, the appendix will be App and the Clerk's Docket Sheet will be D.

Statement of the facts²

On June 8, 2004, two men were suspected of stealing videos from the Blockbuster video store on North Broadway in Fargo, North Dakota. (T 27-39)³ There was an inventory of the store on June 23, 2004. (T 47). There were 20 to 25 items missing, valued at about \$1,000. (T 51). In a typical month, one or two products may be missing. (T 51). Ms. Malvin, an assistant manager, could not say who took the items, or how many people may have taken the items, or when the items were taken. (T 52). Ms. Malvin told law enforcement that the older man had large, black rimmed glasses. (T 55). She could not say that Mr. Garten was the older man, just that he looked "familiar." (T 57). The store marked its items for sale with a black marker "BBV." None of the items recovered had the BBV mark on them, but some matched their inventory, and looked as if something had been rubbed off. (T 59).

The two men came back to the store on June 24, 2004. (T 63). The clerk suspected they stole more videos. (T 65). She was able to write down license numbers for both of their vehicles. (T 66; D 119). She knew one of them as Brandon Jacobs, a high school classmate. (T 68). She felt that the older man was the same one who had been in the store with Mr. Jacobs before, but she could not be sure. He had changed his appearance. (T 69).

Officer Jeffrey Newton was dispatched to the Blockbuster store on June 24,

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The record appears to support the proposition that the facts are not so much disputed by the parties, but the parties certainly have a different interpretation of the facts.

³The trial transcript will be referred to as T, followed by the page number.

2004. (T 77-79). He viewed the store surveillance tapes, and observed two people taking items and removing them from the store. (T 79). He was given the name of Brandon Jacobs, or Brandon Jacobs-Simonson. (T 80). The officer was given the description of the vehicles and the license plate numbers. (T 81). The van's license number was checked and the vehicle was registered to Jeffrey Max Garten. (T 82). Brandon Jacobs-Simonson had given the address of 1341 Seventh Avenue North. That was the same address for the van registered to Jeffrey Max Garten. (T 84).

After additional investigation, on July 6, 2004, Officer Newton went to 1341 Seventh Avenue North, which is a single family dwelling with a garage in back and a fenced back yard. (T 96). The vehicle belonging to Brandon Jacobs was parked in a business lot directly east of the residence. (T 96). Mr. Garten's van was parked in the alley behind the house. The police had information that Brandon Jacobs was selling videos out of the trunk of his car. (T 98). Police arrived at the house at about 1:45 p.m. on July 6, 2004. (T 98). Two other patrol cars were called to the location. (T 99). Officer Newton knocked on the door. Two people came to the door. One was Brandon Jacobs. (T 100). He thought the other man was Mr. Garten, but he was not certain at the time. (T 101). Officer Newton told Mr. Jacobs that they were going to seize and search his vehicle. He asked Mr. Jacobs for consent to search his car. The other man was telling Mr. Jacobs what he should do. (T 102). Officer Newton asked the other man who he was and he did not give his name. (T 102). While the officer was on the porch, he saw a man run into the fence on the side of the house. He saw another officer jump on this person, and went to

the other officer's aid. (T 104). The man who had hit the fence was having a medical problem, so the officers administered aid. (T 104). This man was identified as Steven Higdem. (T 106). Mr. Higdem had exited the back door of the house at 1341 Seventh Avenue North. The other officer had drawn his weapon, because Mr. Higdem had taken out a silver object and told the officer to shoot him. (T 107). They called for an ambulance for Mr. Higdem. Officer Newton thought he was under the influence of drug. (T 108).

Mr. Higdem told another officer that he had taken a gram of methamphetamine. (T180). Steven Higdem knows Jeff Garten Sr., Jeff Garten Jr., Brandon Jacobs, and Becky Coste. (T 373). Mr. Higdem was living with Brandon Jacobs on College Street in July, 2004. (T 374). Mr. Jacobs did not stay with Mr. Higdem every night. (T 375). Mr. Higdem has had contact with Ms. Coste, Mr. Jacobs, and Jeff Garten, Jr., since July 6, 2004. He remains friends with Mr. Jacobs. Mr. Higdem was at Defendant Jeff Garten's house on July 6, when law enforcement arrived. (T 376). Mr. Higdem testified that he had ingested 2 grams of methamphetamine on that day. (T 377). Mr. Higdem testified that he had eaten what he had on him and went out the back door. A policeman stopped him at the gate with his gun pointed at him. (T 378). At trial he testified that he could not remember what he said to the police that day. (T 379). He agreed that he had made some statements to the officers that day, but he was not in a normal state of mind. (T 379). He had called an officer's wife a crack whore. (T 380). He testified that he did not remember what happened before he arrived at the house. (T 380). Mr. Higdem did bring a briefcase to the house that day. (T 381). He did not take

the briefcase with him when he left the house. (T 381). He had some papers, a car title, and a drug scale in the briefcase. (T 382). He identified Exhibit 10 as the scale he brought to the house. He claimed he did not know how it got out of his briefcase. (T 382). He never went back to the house to retrieve any of his belongings. (T 383). He has talked to Jeff Garten, Jr. about the case, and a black man at the jail named Ashley Hunter. (T 383). He has also talked to Brandon Jacobs about the case. (T 384). Mr. Higdem denied that he had told Ashley Hunter that, if he were blamed for the meth in the case, he would say he was buying a bag and that he had handled several bags so he could pick out the biggest one. (T 385). Mr. Higdem testified that he ran from the house because he was on felony probation and had been on the run, and knew he would be arrested. (T 386). Mr. Higdem testified that the drugs he ate were the only drugs that were his at that location on that day. (T 387).

Mr. Higdem was placed under arrest at 2:40 p.m. on some outstanding warrants. He was also arrested for terrorizing. (T 184). The officers secured the area. Officer Newton went to the station to help write a search warrant. (T 110). During that time Mr. Jacobs again left the residence and he was detained for the investigation. (T 111). The search warrant was signed at about 6:30. The house had been under observation the entire time. (T 112).

During the afternoon, the owner of the home, Rebecca Coste, came home. (T 115). She said she had to get ready for work. She was allowed to enter the residence. She was inside for about 15 minutes. (T 115). No other person came or went from the house. (T 115). On July 6, 2004, Ms. Coste's son, Andrew

Stumbo, was living in the house, as well as Mr. Garten. (T 326). Mr. Garten came to live with her when he was evicted from his apartment. He is a friend of Ms. Coste's ex-husband, Danny Stumbo. (T 326). Ms. Coste has known Mr. Garten since highschool. He was going to help her pay bills. (T 326). Ms. Coste came to her home at 2:30 on July 6, 2004, to change clothes for work. She had to be at work at 3:00. She found police officers at her home when she arrived. (T 328). She spoke to the officers briefly and went inside. She was inside for only minutes. Mr. Garten and Mr. Jacobs were in the house at the time. (T 328). Mr. Garten was in the bathroom. (T 343). She was searched when she left the house. (T 329). Mr. Garten had full run of the house. He stored items in boxes in the basement and washed his clothes down there. (T 330-331). Ms. Coste did not know what was in the boxes. (T 331). Mr. Jacobs also had access to the basement. (T 337).

Ms. Coste denied bringing any illegal drugs into the house. She also denied knowing about any illegal drugs in the house. (T 331). Mr. Jacobs is Ms. Coste's nephew. He would occasionally stay at the house, but did not live there. (T 332). When Ms. Coste got off work, she went back to her house. The police officers and Mr. Garten were there at the time. (T 332). Ms. Coste had stayed at the Dakota Magic Casino the night before. (T 334). Ms. Coste was told by the officers that they were looking for DVDs. (T 335). Ms. Coste testified that she had never seen the plastic bowl with the drug paraphernalia. (T 341). Ms. Coste also had never seen the other State's Exhibits before. (T 342). She had never seen the hat before. (T 343). Ms. Coste had never seen Mr. Garten with a briefcase. (T 344).

Officer Newton stated in his report that when he talked to Brandon Jacobs

he thought he was lying. (T 126). During one interview with Mr. Jacobs, Officer Newton felt he was giving contradictions and denials. (T 129). Officer Newton thought Mr. Jacobs was "tweaking on meth." Officer Newton had done an investigation of a burglary where over 100 DVDs had been taken. (T 132). There was no mention of Mr. Garten during that investigation. (T 132). Officer Newton learned that Mr. Jacobs would sell DVDs out of his car. (T 133). The investigation was of a theft of property, no mention of drugs. (T 134). The primary suspect was Mr. Jacobs. (T 134). Mr. Jacobs did plead guilty to theft of over \$500. (T 135). Officer Newton interviewed Mr. Jacobs at the jail. He was uncooperative and disrespectful. (T 136). Officer Newton was aware that Mr. Higdem had been associated with selling drugs. (T 137). The arrest report for Mr. Jacobs showed that he was arrested at 5:25 p.m. (T 141). (Defendant's Exhibit 15; D 132). Officer Newton got information that Mr. Jacobs was staying with Jeff Dale Garten, Jeff Max Garten's son. (T 146).

Brandon Jacobs lived at 1341 Seventh Avenue North. (T 151). Mr. Jacobs went to Blockbuster on June 8, 2004. He opened the door to allow Mr. Garten to leave the store. They went there to take DVDs and Xbox games. (T 152). They went back later in June and took some more games. (T 152). Mr. Garten actually took the items out of the store. (T 153). Mr. Jacobs pleaded guilty to a Class C felony for theft by deception. (T 153). He was required to pay \$600 in restitution. (T 153). When the officer came to 1341 Seventh Avenue North on July 6, 2004, he, Mr. Garten, and Mr. Higdem were in the house. (T 154). At no time did Mr. Garten or Steve Higdem make any mention of drugs or attempt to get rid of any drugs. (T

163). Mr. Jacobs is friends with Mr. Garten, Mr. Garten's son, and Mr. Higdem. (T

164). Defense Exhibit 20 is the Judgment in Mr. Jacob's case. (T 6). Defense Exhibit 17 is a picture of the door of the room Mr. Garten stayed in. (T 172, D 134).

Detective Paul Lies was the crime scene investigator at 1341 Seventh Avenue North. He was involved with the search of Brandon Jacob's car. (T 191). Detective Lies then went back to the house to serve the search warrant at 8:40 p.m. (T 193). The officers had Mr. Garten sit in the kitchen during the search. (T 194). The officers talked to Mr. Garten about why they were there and what they were looking for. He asked why they were there and what was going on. (T 249). Mr. Garten also told the officers which bedroom was his. (T 249). Mr. Higdem had made comments that Mr. Garten was barricading himself in the house and stated that he would not be taken alive by law enforcement. This not found to be true. (T 221).

At some point, Detective Lies went into the basement. He noticed a strong smell of bleach. He found a Tupperware container sitting next to the washer and dryer with marijuana pipes and scales in it. (T 197; State's Exhibit 3; D 120). The Detective placed the items in a paper bag. (T 199). Detective Lies testified that there were bubbles in the water and the water was warm. (T 203). States Exhibits 4,5 and 25 are pictures of the items found in the bowl. (T 206). Detective Lies described the items as a black meth scale, a marijuana pipe, and a marijuana cleaning pipe, some razor blades, a blue meth scale, a spoon, a tube, and a glass jar. (T 207). He further described them as drug paraphernalia, items used to consume or digest or weigh out, and measure drugs. (T 208). The scales are used

to weigh powdery substances like methamphetamine or cocaine. The spoon is used to heat up narcotics to ingest them into the system through a syringe. (T 208). The razor blades are used to break up small rocks of meth. (T 209). As the evidence is found, it is logged as to where it is found and what it is. (T 210). The evidence is taken to the station, logged into the evidence system and placed in a secure locker. (T 210). Detective Lies took the items out of the bowl and laid them out in the kitchen to be photographed. He wore gloves when he handled the items. (T 217). There was a briefcase located in the house, but it was not seized. (T 218).

Detective Lies went into the northeast bedroom, which was occupied by Mr. Garten. (T 212). State's Exhibits 26 and 27 are pictures of the items found in Mr. Garten's bedroom. (T 214). The items found were DVDs and other disks. (T 214). Some of the disks had something rubbed off them. (T 215). A large number of items were identified as those taken from the Blockbuster store. (T 216). There were multiple copies of the same DVD movies. (T 216). Detective Lies could not specify which items were taken from the Blockbuster store. (T 232). There were literally hundreds of DVDs on the bed and it appeared as though someone was sorting them. (T 250). There were items found in Mr. Jacob's car which were stolen from the Blockbuster store. A pry bar was also found in Mr. Jacob's car. (T 233). A pawn slip was found in Mr. Jacob's car. Defense Exhibit 31 is a copy of that pawn slip. (T 269; D 148). The name on the pawn slip is Jeffrey Dale Garten, date of birth 09-20-1985. (T 269).

One police report stated that Mr. Garten was placed under arrest at 7:20 p.m. Detective Lies testified that that was not possible, because the officers did not enter

the residence and make contact with him until 8:40 p.m. When Detective Lies arrived at the residence between 5:30 and 6:00 p.m, Mr. Jacobs was gone. He did not enter the house until 8:40 p.m. Mr. Garten was alone in the house after Ms. Coste had been there. (T 242).

Detective Lies was in the basement when Detective Holte found bags of suspected methamphetamine. (T 226). A narcotics officer was called to the scene and performed a field test and weighed one of the baggies. (T 226). The search terminated at 12:30. Ms. Coste came back to her residence at about 10:00 p.m. She was sleeping on the couch when the search was concluded. (T 235).

The items found during the search were sent to the crime lab for fingerprint analysis. (T 237).

Detective Holte opened a stain can which was found in the basement. He used a file that was lying on the floor next to the can. (T 238). The file was lying on the floor on some paper towels. It had a brown stain or brown liquid substance on it that was still wet. (T 252). The can of brown stain matched what was on the file. (T 253). Detective Lies photographed the stain can before it was opened. He did not know who placed anything in the stain can, or how the items got in the house. (T 238). When Detective Holte opened the stain can, inside was a Ziplock bag. (T 253). He could see that there were items inside the bag. He took the bag upstairs and found three scales inside the bag. (T 254). State's Exhibits 29, 30, 6 and 7 are pictures of the file, and the stain can. (T 257, D 146,147; 123,124). State's Exhibits 9, 10 and 11 are pictures of the items found in the stain can. (T 257-258, D 126, 127, 128). The items are scales that are used to weigh drugs. (T 259). The stain

can was left at the scene. (T 273). Next to the stain can on the same shelf was another box with caulking tubes in it. (259). State's Exhibit 8 is a picture of the box. (T 260, D 125). There was a blue beanie-style cap in the box. State's Exhibit 12 is a picture of the cap. (T 261, D 129). Inside the cap were 30 bundles of a white powdery substance. (T262). State's Exhibit 13 is a picture of the bundles found in the cap. (T 263, D 130). The picture was taken upstairs on the counter. Detective Holte weighed all of the bags, and they were all about 1.5 grams each. (T 264). Based upon his training and experience, these items were packaged for sale. (T 264). The bags were logged on the evidence sheet. State's Exhibit 14 are the items re-packaged by the Sate Crime Lab. (T 266). Detective Holte wore gloves during the search and when he handled the evidence. He did touch every individual bag. (T 274). The two bags which contained the smaller bags may have been discarded. (T 275). Detective Holte does not know who put any of the items where they were found. (T 276).

Fargo Narcotics Investigator Glen Hanson was qualified as an expert witness by the court without objection. (T 350). Investigator Hanson testified that the 30 baggies of methamphetamine would sell for about \$100 per gram, each baggie weighing about 2 grams, for a total value of \$6,000.00. Drug dealers go to a supplier and have an amount fronted, and would pay the supplier after the dugs were sold to their clients. Or, the dealer may pay the supplier for an amount of the drug, and may get a better price for paying up front. So, a person would not have to have money to get a quantity of drugs. (T 354). Investigator Hanson testified that a person may destroy drugs to avoid detection, but with a quantity of \$6,000

worth of drugs, if the drugs were taken or destroyed, the person would have no way to pay back his supplier. (T 355). Investigator Hanson did the field test in this case. He wore gloves when he handled the baggies. (T 357). Investigator Hanson concluded that someone would have just received the drugs, because there was no money found. (T 359). Investigator Hanson testified that law enforcement had successfully retrieved drugs and cash from Steve Higdem. (T 60). Fingerprints are sometimes found on bags containing drugs. Fingerprints can be rubbed off.

Ms. Carol Carlisle was the Evidence Room Custodian for the Fargo Police Department in July, 2004. (T 282). She sent evidence in the case to the State Lab in July, 2004, and again in February and March, 2005. (T 283). She described how evidence is handled and processed. (T 283). Jennifer Penner works at the North Dakota State Crime Lab and her primary duties are to conduct analysis on suspected controlled substances. (T 291). She described how evidence is handled and processed by her at the lab. (T 292). She described the analytical procedure she follows. (T 293). She uses standardized tests which are generally accepted in the scientific community. (T 294). She tested the substance in all of the bags in this case, and they are tested positive for methamphetamine and Dimethyl Sulfone. (T 296). Ms. Penner also did an analysis of the bags for the presence of fingerprints. She did not find any fingerprints of value on the items. (T 296). She also tested the electronic scales for fingerprints and found none. (T 297). State's Exhibit 32 is a copy of the reports Ms. Penner prepared. (T 298, D 149). The total amount of the methamphetamine found after the testing was completed was 50.57 grams. (T 298).

Ms. Penner wore gloves when she handled the baggies. It is possible to remove a fingerprint when touching a baggie with a gloved hand. (T 299). Ms. Penner tested only a few items for fingerprints. She did not test the marijuana pipes, some of the scales, the batteries in the scales, the stain can, the file, the videos, games, or DVDs. (T 305). It is not common to find useable fingerprints on plastic bags. (T 306).

Ashley Hunter testified that he heard Steve Higdem talking about the case against Mr. Garten. (T 389). He also had a conversation with Mr. Higdem about the case. (T 392). Gregory Anderson also testified that he knew Steve Higdem. (T 394). He was driving Mr. Higdem around on July 6, 2004. (T 395). They would do their daily doses of drugs in the morning to "get going." (T 395). On that day, when he got to Mr. Higdem's house, Mr. Higdem was bagging up methamphetamine and arguing with his girlfriend. (T 396). Mr. Higdem had more meth than he had ever seen him with before. Mr. Higdem told him he had two ounces. (T 396). He spent about two hours packaging the meth. They smoked some meth, and then they went to Media Play, a Dollar store, back to the house, and then to Walmart to buy a couple of phones. (T 396). The phones were the kind that you buy cards for to determine the number of minutes the phone will work. One of the phones did not work and had to be returned. (T 397). An employee of Walmart testified that two such phones were purchased at Walmart at 12:27 on that day. He did not know who made the purchase. (T 408-413).

They went back to Mr. Higdem's house and learned that the police had been there looking for Mr. Jacobs. Mr. Higdem grabbed his briefcase and "stuff" and had

Mr. Anderson drop him off at Mr. Jacobs' aunt's house. (T 399). Mr. Anderson did not know if Mr. Higdem had his meth in his pocket or in the briefcase. (T 399). The meth had been tied into corners of sandwich bags, and packed in amounts of a gram and three quarters. (T 400). Mr. Higdem did not leave the house without the meth, because he was afraid of being robbed. (T 400). Mr. Anderson testified that State's Exhibit 13 showed how the meth had been packaged on July 6, 2004. (T 401). Mr. Anderson approached Mr. Garten in jail and told him that he was the one who had dropped off Mr. Higdem on that day. (T 404). Mr. Garten did not solicit his help in this case. (T 404).

Mr. Higdem was recalled by the State after the Defense rested. (T 434). He testified that what Mr. Anderson had testified to about him having two ounces of meth on July 6, 2004 was not true. He did admit that with he was with Mr. Anderson that day, and that they had bought some DVDs. (T 434). Mr. Higdem now testified that he went over to Mr. Garten's house to buy some drugs, and that he did buy drugs from Mr. Garten. (T 435). He claimed he gave the drugs back to Mr. Garten. (T 435). He testified that he had used drugs with Mr. Garten before. Mr. Higdem testified at his deposition that he could not remember what he had done before he got to Mr. Garten's house that day. (T 436). He admitted that he went over to the house to tell Brandon Jacobs that the police were looking for him. (T 437). He also acknowledged that when he had testified at trial earlier he had said the same thing, that he could not remember what he had done earlier in the day. (T 437). He also admitted that he had used meth with Mr. Anderson twice on that day. (T 438). Defense Counsel asked Mr. Higdem if he had ever been engaged in selling meth.

An objection to that question was sustained. (T 442). Defense Counsel was allowed to voir dire Mr. Higdem to make an offer of proof. (T 442). Mr. Higdem testified that he sold meth to a confidential informant on March 24, 2004. (T 443). He has also been charged with possession with intent to deliver from January of 2005. (T 444). Continuing his testimony in the presence of the jury, Mr. Higdem denied that he had taken the meth shown in State's Exhibit 13 to Mr. Garten's house on July 6, 2004. (T 445).

Hope Olson testified that she is the director of the North Dakota Crime Laboratory. (T 414). She does DNA analysis and comparison. (T 415). She did DNA analysis in this case. Her report is Defense Exhibit 35. (T 416, D 152). A blue cap was submitted for analysis, along with a buccal swab from Mr. Garten. (T 418). One human hair fragment was found on the cap. (T 419). Ms. Olson described the steps for DNA analysis. (T 421). The possible results are match, inclusion, exclusion, and no result. (T 422). She arrived at a frequency for item 19A for a Caucasian of 1 in 13. (T 422). This means that 12 out of 13 people of randomly selected people can be excluded. (T 423). The result is that the individual cannot be excluded. (T 423). It is not accurate to say that there is a 1 in 13 chance that Mr. Garten's DNA matched the hat. (T 424). The statistical significance of 1 in 13 is very small compared to what they normally see in a DNA report. (T 425). The results of the tests did not meet the criteria for placement in the National Index System. (T 429). Multiple persons probably had worn the hat, and Mr. Garten could not be excluded as one of them. (T 432). The results were a very small probability or number that Mr. Garten's DNA matched in this case. (T 433).

Defense Counsel filed a Motion for a New Trial. (D 185-188). A hearing was held on the motion on June 6, 2005. (MT 4-85).⁴ The motion was based upon newly discovered evidence and supported by affidavits and written statements. (MT 5; D 185).

Terry Higdem testified that he is Steven Higdem's cousin. (MT 8). Terry Higdem has been in jail with Steven Higdem, and they have talked about Mr. Garten's case. (MT 8). Steven Higdem told Terry Higdem that Mr. Garten got charged with drugs that belonged to him, Steven Higdem. (MT 9). He made this statement several times, starting in late April, 2005. (MT 9). Jeff Garten, Jr. was present when this statement was made. (MT 9). Mr. Garten did not approach him to seek help for his case. (MT 11). Terry Higdem did not think Mr. Garten should go to jail for stuff that belonged to Steve Higdem. (MT 13). Terry Higdem also heard that Steve Higdem had admitted that he had hid the drugs in the basement when the police came. (MT 18).

Lawrence Navarro testified that he had been in jail since the end of March, 2005. (MT 21). He heard Steven Higdem say that he put the stuff downstairs in a box, and that he hoped they did not check the bags for fingerprints because his fingerprints would be on the bags, and if they checked for that, he would be in trouble. (MT 23). He and Dallas Brewer went and told Mr. Garten what Steven Higdem had been saying. (MT 24). He said he would write a letter about what he had heard. His letter, dated April 28, 2005, was received as Defense Exhibit 1 at

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The June 6, 2005 Motion hearing transcript will be referred to as MT followed by the page number.

the hearing. (D 208). He heard other people talking about the same statements. (MT 27). Steven Higdem did also state, "it's Garner's not mine." (MT 32).

Dallas Brewer testified that he had been in the Cass County Jail for three months. (MT 41). He had conversations with Steven Higdem about what happened at Mr. Garten's house. He asked Brewer how he could explain his fingerprints being all over bags of meth, and other things that went on that day. (MT 42). Steven Higdem also laughed about the fact that Mr. Garten had been found guilty of possessing the drugs. (MT 44). Mr. Brewer's statement was received as Defense Exhibit 2 at the hearing. (MT 46, D 209). Mr. Brewer stated that he gave his statement "because I hate to see an innocent person get cooked for something he didn't do." (MT 47).

Argument

1. The Trial Court's denial of Mr. Garten's Motion to Suppress was erroneous.

Mr. Garten made a motion to suppress the evidence of illegal drugs and drug paraphernalia. (D 25, 26, 27). The trial court granted the motion in part and denied it in part. (App. 12). This case began as an investigation of thefts of video games, and focused on Brandon Jacobs. The investigating officer concluded that Mr. Jacobs was staying with Mr. Garten at 1341 7th Avenue North. Law enforcement went to that residence on July 6, 2004. Ultimately, search warrants were issued and executed. The car was impounded and searched. Numerous items, including X-box games and other items were found in Mr. Jacobs's car. The search warrants were for "premises located at 1341 7th Avenue North, a single

family dwelling with an unattached garage in the City of Fargo, County of Cass, North Dakota. . ." and for a vehicle "described as a white Topaz with MN plates BRT 546. . ." Motion to Suppress, (D 24). At the preliminary hearing in this case, Detective Paul Lies acknowledged that the purpose of the search warrants was to investigate theft and that "no mention, suspicion or expectation that drugs would have been part of the this search". See, Transcript of preliminary hearing, p. 14, lines 13-22.

In ***State v. Matthews*, 216 N.W.2d 90,99 (N.D. 1974)**, three principles were identified to determine the constitutionality of a search. These included the following:

(1) All searches made without a valid search warrant are unreasonable, unless they are shown to come within one of the exceptions to the rule that a search must be made upon a valid search warrant; (2) Where a violation of the Fourth Amendment provision as to search and seizure is asserted, the burden of proof on a motion to suppress is on the state; and (3) Evidence obtained by search and seizure violative of the Fourth Amendment, is, by virtue of the due process clause of the Fourteenth Amendment, inadmissible in state courts.

Matthews at 99 (Other citations omitted). Mr. Garten challenged the search of three (3) separate areas and the seizure of items from those areas. First was the search of the plastic bowl containing bleach and/or other strong chemicals. As a result of this search, several items were seized, including several scales and other items of paraphernalia. The search and seizure of these items is challenged because the State offered them in support of the alleged intent to distribute in Count One of the Information.

It is not clear whether the items in the bowl were readily apparent or, more importantly, whether or not their incriminating nature was obvious.

The second challenge is of the search and seizure of items found in the stain can and inside the hat in a box. The criminal nature of these items was not readily apparent, and the warrantless search and seizure of these items was unlawful.

The final challenge involves the items seized from Mr. Garten's van. Mr. Garten's van was not listed on either of the search warrants, and no exception to the warrant requirement supports the search of the van.

The trial court denied the motion to suppress as to the bowl, stain can, and the box and hat, but granted the motion as to the items found in Mr. Garten's van. (App. 12). The State has not appealed that ruling.

The basic issue is the scope of the search authorized by the warrants in this case. The warrants were specifically related to evidence of theft, including video games, DVDs, and the like. The applications for both search warrants contain no references to drugs or drug related materials. Therefore, the searches and seizures challenged by Mr. Garten as warrantless searches and seizures.

The first part of this analysis is whether the search was reasonable under the circumstances. *See, State v. Gronlund, 356 N.W.2d 144, 146 (N.D.1984).* **Gronlund** involved the search of a vehicle subject to search warrants specifically identifying a walking cane alleged to have been used in an assault. *Id. at 145.* During execution of the search warrant, the officers located a 5-gallon green plastic pail in the trunk. *Id.* The pail was opaque and the lid was securely fastened. *Id.* The officer opened the container and observed a large bong lying on the top. *Id.* Recognizing the bong as drug paraphernalia, the officer removed it and discovered several other containers under the bong, including smaller boxes and a grocery bag.

Id. The contents of these other containers were not visible. *Id.* They were opened and items appearing to be controlled substances and drug paraphernalia were found therein. *Id.* The court in **Gronlund** indicated that the search of the pail would be considered reasonable, based upon the fact that the walking cane might be broken into pieces and placed in the plastic pail. *Id. at 146.* The **Gronlund** court then indicated that once the officers lifted the bong and observed numerous smaller containers, it was unlikely that they could have expected to find even smaller broken pieces of the walking cane. At that point, the search exceeded the scope of the warrant. *Id. at 147.*

Much of the analysis of **Gronlund** relied upon herein involves application of the Plain View Doctrine identified in **Coolidge v. New Hampshire, 403 U.S. 443 (1971)**. Plain view is an exception to the warrant requirement. If the Court finds that items were in plain view, then their seizure may be justified. However, the court in **Coolidge** ruled that plain view alone is never enough to justify a warrantless search absent exigent circumstances.

State v. Planz, 304 N.W.2d 74, 79 (N.D. 1981) held that, absent exigent circumstances, it still may be permissible to seize evidence when it is displayed in a manner that does not afford the reasonable expectation of privacy, and it is the instrumentality of the crime for which the defendant is arrested. That narrow exception does not apply here. The officers were investigating a theft, and searching for evidence of that theft. See, Transcript of Suppression Motion Hearing, 12-01-04, pp. 11-12.

Like **Gronlund**, there were no exigent circumstances in this case. Mr. Garten was handcuffed and/or already removed from the premises at the time of the search. The officers had secured the area and were executing the search, pursuant

to a search warrant. See, Transcript of Suppression Motion Hearing, 12-01-04, p. 13. Detective Lies was specifically asked at the preliminary hearing whether the investigation changed to a drug investigation, or at least added an element of investigation for drug related activity, once the items in the plastic bowl were searched and seized. See, Transcript of Preliminary Hearing, p. 20, lines 22-24. Detective Lies responded "I would say that there was a possibility that we might find more as we continued to search, but I do not know - we didn't specifically go back and seek another search warrant specifically looking for drugs after we found it." See, Transcript of Preliminary Hearing, p. 20, line 25 and p. 21, lines 1-4.

Mr. Garten believes that the officers exceeded the scope of the search warrant by continuing their search after finding items of drug paraphernalia in the bowl of liquid. See, Transcript of Suppression Motion Hearing, 12-01-04, p. 16. The officer recognized a connection between the file on the paper towel and the stain can. They now suspected the presence of drug paraphernalia. They continued to open the stain can and then looked in the box next to the stain can. They were searching for evidence of illegal drug activity. See, Transcript of Suppression Motion Hearing, 12-01-04, p. 19.

It was suggested that the stain can was a gallon can; however, Detective Lies did not commit to whether or not law enforcement expected to find video games, DVDs, or things of that nature in the stain can. See, Transcript of Preliminary Hearing, p. 21, lines 8-15. Under **Gronlund**, the issue in this case is whether or not it could be anticipated that the items related and identified in the search warrant, i.e., video games, DVDs, and videos, would reasonably be expected to be located in a plastic bowl full of chemicals, a can of stain, or underneath a hat inside a box. Officer Holte testified that DVDs are the same size

as a CD Rom, and they could fit inside the stain bucket, along with indicia of residency. These items could also have been in the box with the caulking where he found the cap containing the methamphetamine. See, Transcript of Suppression Motion Hearing, 12-01-04, p. 24.

In ***Horton v. California*, 496 U.S. 128 (1990)**, the United States Supreme Court addressed the plain view issue in detail. In ***Horton***, the Supreme Court distinguished between a search which compromises the individual interest in privacy and a seizure which deprives the individual of dominion over his or her personal property. ***Id.* at 133**. Assuming that plain view would justify an exception from the otherwise applicable warrant requirement, the exception should be focused on the seizure, rather than the search. ***Id.* at 134**. The criteria which guides the analysis of the plain view issue was set forth in ***Coolidge v. New Hampshire, Supra***. These criteria include:

1. Law enforcement must be in the location with justification;
2. The incriminating nature of the item must be apparent; and
3. The observation of the object must be inadvertent.

One significant issue is whether or not the incriminating character of the items is immediately apparent. ***Horton at 136***. For example, in ***Coolidge***, the cars seized where obviously in plain view; however, the interiors were swept and examined microscopically, which then resulted in identifying the incriminating character of the items found therein. ***Horton at 137***. The question is what requirement is there for items that are located in containers. In ***Welfare of G.M.. a/k/a W.M., 560 N.W.2d 687, 693 (Minn. S.Ct. 1997)***, the Minnesota Supreme Court described the following regarding contraband located in containers:

This is a mistaken interpretation of the plain view doctrine, however. Under

the plain view exception of the warrant requirement, a police officer can seize an object in plain view without a warrant only if the object's incriminating character is immediately apparent. In this case, the object in plain view was the pouch not the contraband. Consequently, the plain view exception will apply only if the pouches' incriminating nature was immediately apparent.

Id. at 693. The court went on to indicate that even if law enforcement saw the pouch, they were unable to see the contraband inside the pouch. The warrantless seizure of the item was improper because the incriminating nature of the container was not immediately apparent. *Id.* at 694.

Minnesota v. Dickerson*, 508 U.S. 366 (1993)** is instructive with respect to whether law enforcement can conduct an additional search of a container if the incriminating character of the container itself is not readily available. ***Dickerson involved a "*Terry*" stop where an officer conducted a pat down and identified a lump in an individual's pocket. The officer ultimately had to remove the "*lump*" and conduct a further search to determine its incriminating character. In the present case, it is unclear whether the incriminating character of the plastic bowl or the items contained therein was readily observable. However, it is apparent that the items in the stain can and the hat were not readily apparent. Therefore, the warrantless seizure of these items cannot be justified under the Plain View Doctrine.

The trial court upheld the search and seizure of all the items in the basement, finding that, given the size of the DVDs, they could be found in a bowl, a one gallon paint can, a hat, or a box. (App. 12). The court held that the search and seizure of these items was valid under the warrant, and that it need not address the Plain View Doctrine. (App. 12). However, the trial court went on to comment that if the incriminating nature of the items was immediately apparent the items could be lawfully seized, citing ***State v. Wamre*, 1999 ND, 17, 599 N.W.2d 268**. (App. 12).

The incriminating nature of the items in the bowl may have been apparent. However, certainly there was nothing incriminating about a can of stain or a box of caulking tubes, or a beanie hat located in the box. At the time Officer Holte opened the stain can and pulled the beanie hat out of the box, the bowl containing drug paraphernalia had already been found and brought upstairs. The only places in the house where DVDs were found were in the two upstairs bedrooms. See, Transcript of Suppression Motion Hearing, 12-01-04, p. 16; p. 26. No items listed in the search warrant were found in the basement. (Inventory of Search, D 24).

A trial court's decision to deny a motion to suppress will not be reversed if there is sufficient competent evidence capable of supporting the trial court's findings, and if its decision is not contrary to the manifest weight of the evidence. ***State v. Heitzmann, 2001 ND 136, ¶ 8, 632 N.W.2d 1.*** Once they found evidence of drug activity, the officers should have sought another search warrant for items of that nature. The items found in the stain can and in the beanie hat should have been suppressed. The Plain View Doctrine does not support the search and seizure of the can or the hat. The Officers' actions in opening the can and the beanie hat exceeded the scope of the warrant. The statements that the missing DVDs could have been in the can or the beanie cap are not realistic. Mr. Garten asks this court to reverse the denial of his suppression motion, and order that the evidence supporting the charge of Possession of a Controlled Substance with Intent to Deliver be suppressed.

2. The Trial Court's denial of Mr. Garten's Motion to Sever Counts was an Abuse of Discretion.

Mr. Garten made a pre-trial Motion to Sever the Counts against him. (D 51).

The trial court denied the motion. (App. 18). Mr. Garten was charged and convicted of a two count Information dated July 8, 2004, for Count One, Possession of a Controlled Substance with Intent to Deliver and Count Two, Theft. (App. 10). Although the Criminal Information is dated July 8, 2004, Count One involves conduct that occurred on or about July 6, 2004, and Count Two involves conduct that occurred between June 8, 2004, and July 7, 2004. Count One involves possession of methamphetamine, which was discovered pursuant to the search on July 6, 2004. Count Two, Theft, involves the alleged theft of movies, CDs, DVDs, and electronic equipment items from local stores, which occurred between June 8, 2004, and July 7, 2004. Although the items were located during the execution of the same search warrant referenced above, the alleged theft of these items occurred on separate dates.

N.D.R. Crim. P. 14 provides relief from prejudicial joinder "if it appears that a defendant or the prosecution is prejudiced by joinder of offenses or of defendants in an indictment, information or complaint. . . . *the court may order an election of separate trial of counts. . . .*" In this case, the two counts involve significantly different alleged conduct. Count One involves a drug offense and Count Two involves a theft offense. The elements of these offenses are different and the proof involving the violations generally involves conduct that occurred on different dates. The search warrant inventories reflect that the theft events involved dozens, if not hundreds, of separate items allegedly taken from various stores in the Fargo/Moorhead area. The theft count would require significant proof of events that occurred prior to the execution of the search warrant. In fact, the initial search

warrant application in this case occurred as a result of the theft investigation and was not based in any way on a narcotics investigation. The proof related to the controlled substance case involved evidence and testimony strictly related to the search and seizure of the controlled substance items. Due to the bulk of items identified on both search warrant inventories, it is apparent that a jury could have been confused regarding the presentation of evidence in this case. The overwhelming number of items related to the theft charge could certainly have influenced the jury's understanding of the evidence presented in support of the controlled substance offense. Mr. Garten believes the jury was tainted as to both Counts by the introduction of evidence related to the other Count. For example, the jury could have "wrongfully" concluded that items related to the alleged theft could have supported the idea that Garten was more likely to have possessed narcotics. By the same token, Garten faces potential prejudice from the jury wrongfully inferring that possession of narcotics increases the likelihood that he would be predisposed to commit theft crimes. The proof necessary for the State to prove either Count is discrete and independent from the evidence necessary to prove the other Count set forth in the Criminal Information. Due to the discrete nature of these Counts, the Counts should have been severed and presented in separate trials to avoid undue confusion and prejudice to Garten.

The prosecution is permitted, pursuant to Rule 8 of the North Dakota Rules of Criminal Procedure, to join offenses on the same Information "if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or

transactions connected together or constituting parts of a common scheme or plan." **N.D.R.Crim.P. 8.** In this case, Count One and Count Two are "*not of a similar character*", nor are they "*based on the same act or transaction*", nor are they "*two or more acts or transactions connected together constituting parts of a common scheme or plan.*" This is not a case where several Informations involve similar conduct. **See, State v. Boushee, 284 N.W.2d 423 (N.D. 1979).** **See also, State v. Gann, 244 N.W.2d 746 (N.D. 1976).** The only common element of the offenses involves the date on which the alleged contraband, i.e., narcotics and various movies, DVDs, and video games were located. The underlying conduct related to these offenses occurred on different dates and involved separate crimes. Garten acknowledges that the burden is placed upon him to demonstrate prejudice. In the present case, Garten was prejudiced by the fact that the jury could draw inappropriate inferences based upon evidence submitted to prove each of the offenses. Moreover, the theft offense involves a co-defendant, Brandon Jacobs, who was the individual who drew the initial attention of law enforcement in this case. Although Mr. Jacobs was not charged with respect to the narcotics offense, it is possible that he was involved and may have had an incentive to testify in a manner that places responsibility for both Counts on Garten. This possibility would have been eliminated if the trial of the Counts had been severed. Whether offenses should be consolidated for trial is left to the trial court's discretion. **State v. Warmsbecker, 466 N.W.2d 105, 108 (N.D. 1991).** The trial court's decision will not be reversed unless there is clear abuse of discretion. **Id.** Mr. Garten did not testify at trial. He may very well have wanted to testify as to the drug offense, but not as

to the theft offense. That would have been an untenable situation for him. He would not have been presented with that choice had the Counts been severed for trial. The trial court did not clearly instruct the jury that they were trying two separate cases against Mr. Garten. The Trial court did instruct on the essential elements of each offense; but nowhere does the trial court tell the jury that they may find Mr. Garten guilty of one charge and not the other. (Jury Instructions D 153). This failure compounds the trial court's abuse of discretion in not ordering a severance of the Counts. Mr. Garten asks this Court to reverse the Judgment of Conviction, and order the severance of the Counts and a new trial on each Count.

3. The Trial Court's denial of Mr. Garten's Motion for a New Trial was an abuse of discretion.

Mr. Garten made a motion for a new trial based upon newly discovered evidence. (D 185). That motion was denied. (App. 20). The trial court found that the evidence was discovered post trial, that the failure to learn about the evidence prior to trial was not due to lack of diligence, and that the newly discovered evidence was material. However, the trial court concluded that the testimony presented was not of such weight and quality that would result in acquittal. (App. 20).

Mr. Garten was convicted of possession of a controlled substance with intent to deliver. Specifically, he was convicted of possessing methamphetamine packaged into approximately 30 small baggies and placed into two (2) larger baggies. The baggies were located in a cap found in the basement of Garten's residence. Garten's residence was also the residence of several other individuals who resided there on a permanent and temporary basis. At trial, Steven Higdem

was called by the defense as, basically, a hostile witness. Mr. Higdem made admissions regarding the fact he was present on the date the methamphetamine was found, that he possessed methamphetamine on that date and, in fact, ingested methamphetamine. Further, Mr. Higdem admitted he brought a brief case containing a scale to the residence on that date. Finally, Mr. Higdem acknowledged that one of the scales admitted into evidence was his. Mr. Higdem did deny bringing the methamphetamine into the residence. Mr. Higdem's testimony was contradicted by the testimony of Greg Anderson, who testified that he observed Mr. Higdem with methamphetamine packaged similarly to the methamphetamine admitted into evidence on the date in question. The defense attempted to admit the testimony of Ashley Hunter, a witness who overheard certain statements from Mr. Higdem related to the issues in this case. The Court sustained an objection to Mr. Hunter's testimony.

On or about April 27, 2005, counsel for Garten was notified by Garten that several individuals had approached him regarding additional statements made to them by Mr. Higdem. These statements include notarized statements from Larry Navaro and Dallas Brewer. Basically, these statements set out the fact that Mr. Higdem discussed the facts and circumstances of the drugs and whether or not his fingerprints were located on the drugs. Further, Mr. Higdem made suggestions that Garten should simply assume responsibility for these items.

An additional statement was taken from Steven Higdem's cousin, Terry Higdem. Terry Higdem indicated in his statement that Steven Higdem told him he had hidden the drugs found in Garten's house. Moreover, Steven Higdem made fun

of it following Garten's trial and in front of Garten's son, who was apparently incarcerated with all of these individuals.

At trial, the key issue with respect to the controlled substance offense related to possession. One of the witnesses, Greg Anderson, testified that Steven Higdem had these items in his possession. Additional testimony supported the fact that Mr. Higdem possessed methamphetamine with intent to distribute. The newly discovered evidence, pursuant to the statements of the above-named individuals, would impeach Steven Higdem's credibility and contradict his "story" told at trial.

In ***State v. Steinbach*, 1998 ND 18, ¶22, 575 N.W.2d 193**, the showing required to obtain a new trial was identified as follows:

Under N.D.R.Crim.P. 33(a), the trial court may grant a new trial to the defendant if required in the interests of justice. To prevail on a motion for a new trial on the ground of newly discovered evidence, the 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. ***State v. VanNatta*, 506 N.W.2d 63, 70 (N.D. 1993)**. A motion for new trial based upon newly discovered evidence rests within the discretion of the trial court, and we will not reverse the court's denial of the motion unless the court has abused its discretion. *Id.* If the newly discovered evidence is of such a nature that it is not likely to be believed by the jury or to change the results of the original trial, the court's denial of the new trial motion is not an abuse of discretion. ***State v. Garcia*, 462 N.W.2d 123, 124 (N.D. 1990)**.

Terry Higdem testified that he is Steven Higdem's cousin. (MT 8). Terry Higdem has been in jail with Steven Higdem, and they have talked about Mr. Garten's case. (MT 8). Steven Higdem told Terry Higdem that Mr. Garten got charged with drugs that belonged to him, Steven Higdem. (MT 9). He made this statement several times, starting in late April, 2005. (MT 9). Terry Higdem did not think Mr. Garten should go to jail for stuff that belonged to Steve Higdem. (MT 13).

Terry Higdem also heard that Steve Higdem had admitted that he had hid the drugs in the basement when the police came. (MT 18).

Lawrence Navarro testified that he had been in jail since the end of March, 2005. (MT 21). He heard Steven Higdem say that he put the stuff downstairs in a box, and that he hoped they did not check the bags for fingerprints because his fingerprints would be on the bags, and if they checked for that, he would be in trouble. (MT 23). He and Dallas Brewer went and told Mr. Garten what Steven Higdem had been saying. (MT 24).

Dallas Brewer testified that he had been in the Cass County Jail for three months. (MT 41). He had conversations with Steven Higdem about what happened at Mr. Garten's house. He asked Brewer how he could explain his fingerprints being all over bags of meth, and other things that went on that day. (MT 42). Steven Higdem also laughed about the fact that Mr. Garten had been found guilty of possessing the drugs. (MT 44). Mr. Brewer stated that he gave his statement "because I hate to see an innocent person get cooked for something he didn't do. (MT 47).

Steven Higdem was asked at his deposition about individuals he may have discussed the case with and he did not disclose the fact that discussions occurred with Larry Navaro, Dallas Brewer, or Terry Higdem.

The crux of this case involved the delicate issue of "constructive possession". There is no question that Garten did not actually possess the methamphetamine for which he was convicted. It was located in a cap in a box on a shelf in the basement of a residence, which had multiple tenants who resided there on a permanent and

temporary basis. Testimony was presented regarding whether or not Steven Higdem could have placed the methamphetamine in the location where it was found. Certainly, additional testimony that he had discussed the location of the methamphetamine, his fingerprints located on the baggies, and also joked about the fact that the methamphetamine was his would directly contradict Steven Higdem's testimony. It is highly unlikely that the jury would believe any of Steven Higdem's testimony had they heard the testimony of the newly discovered witnesses. This information is material and directly related to the key issue in the case, i.e., whether or not Garten constructively possessed the methamphetamine.

It was and remains the position of the defense that Garten did not even know that the methamphetamine was present in the residence. The newly discovered evidence advances that theory, in addition to providing the jury with more support for the alternative and more likely situation - that Steven Higdem placed the methamphetamine where it was located. However, the additional statements must be placed in context with the other testimony presented at trial. One individual, Greg Anderson, already testified that Steven Higdem had methamphetamine in the same form on the day that the methamphetamine was seized. Further, Mr. Anderson indicated that Steven Higdem had a briefcase containing methamphetamine on that date. Steven Higdem acknowledged that he brought the briefcase into Garten's residence and identified a scale seized as part of the investigation in this case. The only area of dispute was that Steven Higdem denied placing the methamphetamine at Garten's residence at trial. At some point, the quantity of witnesses willing to testify that Steven Higdem has discussed this case, the location of the drugs, and

the fact that the drugs were his, has to tip the scale in favor of admissibility. The statements contradict the testimony of Steven Higdem. Secondly, the statements support the defense theory that Steven Higdem placed the methamphetamine at the location.

Mr. Garten was convicted of a very serious crime. A jury should be afforded the opportunity to hear the truth about Steven Higdem. As a matter of public policy, we should all hope that the right individual is convicted. Counsel is not suggesting that the prosecution has acted improperly. The State has pursued its case based upon the evidence known to it at the time of the offense and at the time of trial. Obviously, the evidence presented to the jury was sufficient for a verdict of guilty. However, in a new trial where the newly discovered evidence is presented to a jury, an acquittal is likely.

Conclusion

The order denying the Motion to Suppress should be reversed, the order denying the Motion to Sever Counts should be reversed, the order denying the Motion for a New Trial should be reversed, the Criminal Judgment and Commitment should be vacated, and this Court should remand this case for proceedings consistent with such reversals.

Respectfully submitted this 8th day of December, 2005.



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STATE OF NORTH DAKOTA)
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COUNTY OF CASS)

AFFIDAVIT OF SERVICE
BY FACSIMILE

IN RE: **State v. Garten**
Supreme Court case No. 20050208
Cass County Case No. 09-04-K-02615

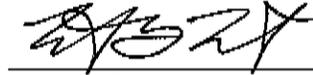
Monty G. Mertz, being first duly sworn, deposes and says that he is of legal age and is not a party to the above-entitled matter and that on the 8th day of December, 2005, he served the following documents:

Brief of Defendant/Appellant Jeffrey Max Garten, Sr.

upon the following person(s) by faxing a copy thereof to:

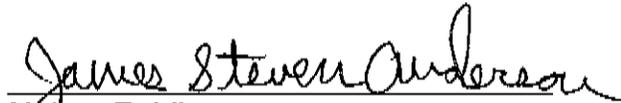
Mr. Gary E. Euren, Assistant State's Attorney, Cass County
Fax: (701) 241-5838

which to the best of affiant's knowledge, information and belief, such fax number(s) is/was the actual facsimile number of the party or parties intended to be served. That the above document(s) was/were duly served in accordance with the rules.



Monty G. Mertz
Affiant

Subscribed and sworn to before me this 8th day of December, 2005.



Notary Public

