

ORIGINAL

20050257-20050259

IN THE SUPREME COURT OF NORTH DAKOTA

S. CT. CASE No. 20050257-20050259

GRANDFORKS CASE No.18-04-K-01644, 1645 & 1646

State of North Dakota

Plaintiff/Appellee,

vs.

LeRoy K. Wheeler

Defendant/Appellant.

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

FEB 21 2006

STATE OF NORTH DAKOTA

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APPEAL FROM JUDGMENT OF CONVICTION AND SENTENCE  
RENDERED DOWN FROM NORTHEAST CENTRAL JUDICIAL DISTRICT  
DATED JULY 27, 2005

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BRIEF FOR APPELLANT

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To: Penny Miller  
Clerk for N.D. Supreme Court

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RE: State v. Wheeler  
Case No.'s 20050257-20050259

20050257 - 20050259

Dear Ms. Miller,

Please find the enclosed unbound original and 7 copies of the Appellants Brief and 8 copies of Appellants Appendix. Also please note that because of the denial of Appellants request for a page extention to 60 pages was denied and there was insufficient amount of time to rewrite the brief, Appellant removed pages 35 - 42 & 57 in order to comply with the courts ruling. If there is any questions please feel free to contact me.

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

Dated February 21, 2006.

FEB 21 2006

sincerely, STATE OF NORTH DAKOTA



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cc: M. Jason McCarthy

TABLE OF CONTENTS

item	page
Table of Authorities .....	iii
Issues presented for review .....	1
Statement of the Case .....	3
Statement of the Facts .....	4
Law and Argument .....	6
I. The jury's verdict is violating the Appellants rights of liberty by returning a verdict of guilty when the evidence against Appellant raises only suspicion, speculation or conjecture .....	6
II. The trial court erred in denying Appellants request for a "Franks" hearing to suppress the fruits of an unlawfully issued search warrant, and denying the suppression of those fruits after a substantial showing was made that Affiant did in fact mislead the magistrate by including false statements and/or omitting information necessary for a magistrate to properly determine a finding of probable cause.....	24
III. The trial court erred in denying Appellants Motion to Dismiss concerning pretrial detention without a proper judicial determination of probable cause.....	31
IV. The Lower Tribunal erred in denying Appellants Demand for change of Judge with a substantial showing of judicial bias attached, forcing Appellant through a fundamentally unfair trial.....	32
V. The Appellants rights were violated by the trial courts denial of his request to see the random jury draw to insure	

an impartial jury from a fair cross-section of the community...	39
VI. The Appellants rights to an impartial jury were violated when he was forced to keep a predisposed jury panel and by being forced to use his peremptory challenges on jurors who should have been excused for cause.....	40
VII. Appellants rights were violated in a fundamentally unfair trial By: A). Denying Appellants ability to offer an alternative explanation for the complainants medical condition. B). Denied the Appellants ability to prepare his witnesses for trial pursuant to jury insruction K 5.50. C). State conducted an Ex-Parte suppression hearing, suppressing statement that states star witness was on probation, and also suppressing all impeachment evidence of three of states witnesses.....	43
VIII. Appellants rights to a fair trial were denied, where Prosecutors misconduct poisoned the whole atmosphere of the trial by: A). Presenting undisclosed evidence of his explanation of complainants medical condition. B). Presenting perjured testimony of Police officers about an alleged pre-arrest statement of accused, and false testimony from other witnesses. C). Asking leading questions on direct examination that showed coercion. D). Improper arguments and comments to the jury that created sympathy for his witnesses and prejudice to the accused.	46
IX. The trial court erred in denying the Appellants request for a directed verdict of Judgment of Acquittal.....	54
X. The trial court erred in denying Appellants Motion for a New Trial.....	55
XI. The trial court erred in entering an unlawful judgment	

<u>WHEN</u> the judgment said the defendant entered a plea of guilty after a jury trial and during sentencing.....	55
XII. The trial court erred in denying Appellants rights of Due Process in requesting to correct the record, and refused....	57
Conclusion .....	58
Certificate of Service .....	59
Certificate of Compliance .....	60

TABLE OF AUTHORITIES

UNITED STATES CASES

North Carolina v. Alford 400 U.S. 25 (1970) .....	56
United States v. Bagley 473 U.S. 667 (1985) .....	46
Barnes v. United States 412 U.S. 837 (1973) .....	14
Beck v. Ohio 379 U.S. 89 (1964) .....	28
Burks v. United States 437 U.S. 1 (1978) .....	35
Chapman v. California 386 U.S. 18 (1967) .....	16
Cool v. United States 409 U.S. 100 (1972) .....	38
Davis v. Alaska 415 U.S. 308 (1974) .....	36
Doyle v. Ohio 426 U.S. 610 (1976) .....	54
Giglio v. United States 405 U.S. 150 (1972) .....	14
Giles v. Maryland 386 U.S. 66 (1967) .....	49
Hayley v. Ohio 332 U.S. 569 (1948) .....	17
Henry v. United States 361 U.S. 98 (1959) .....	32
Holland v. Illinois 493 U.S. 474 (1990) .....	39
Irvin v. Dowd 366 U.S. 717 (1961) .....	42
Jackson v. Virginia 443 U.S. 307 (1979) .....	23
Lego v. Twomey 404 U.S. 477 (1972) .....	14

United States v. Leon	468 U.S. 897 (1984)	26
Mapp v. Ohio	367 U.S. 643 (1961)	19
Michaels v. McGrath	531 U.S. 1118 (2001)	19
Napue v. People of the State of Illinois	360 U.S. 264	49
Powell v. Alabama	287 U.S. 45 (1932)	39
Powell v. Nevada	511 U.S. 79 (1994)	31
Rogers v. Richmond	365 U.S. 534 (1960)	14
Rose v. Clark	478 U.S. 570 (1986)	38
Sandstrom v. Montana	442 U.S. 510 (1979)	14
Tot v. United States	319 U.S. 463 (1943)	14
Turner v. Louisiana	379 U.S. 466 (1965)	43
Tumey v. Ohio	273 U.S. 510 (1927)	39
Thompson v. City of Louisville	362 U.S. 199 (1960)	15
Whitely v. Warden, Wyoming State Penn.	401 U.S. 560 (1971)	26
In re Winship	397 U.S. 358 (1970)	24
Wong Sun v. United States	371 U.S. 471 (1963)	32
Yates v. Evatt	500 U.S. 391 (1991)	15
FEDERAL CASES		
United States v. Gregory	730 F.2d 692 (11Cir. 1984)	40
United States v. Trigg	878 F.2d 1037 (7Cir. 1989)	29
United States v. Vasey	834 F.2d 782 (9Cir. 1987)	29
NORTH DAKOTA CASES		
State v. Allen	237 N.W.2d 154 (ND 1975)	6
State v. Bell	2002 ND 130, 649 N.W.2d 243	31
State v. Blumler	458 N.W.2d 300 (ND 1990)	21

State v. Burk 2000 ND 25, 606 N.W.2d 108 .....	47
State v. Donovan 2004 ND 201, 688 N.W.2d 646 .....	27
State v. Evans 1999 ND 70, 593 N.W.2d 336 .....	47
State v. Hager 271 N.W.2d 476 (ND 1978) .....	32
City of Williston v. Hegstad 1997 ND 56, 562 N.W.2d 91 .....	53
State v. Holzer 2003 ND 19, 656 N.W.2d 686 .....	27
Huesers v. Huesers 1997 ND 33, 560 N.W.2d 219 .....	35
State v. Kunkel 455 N.W.2d 208 (ND 1980) .....	28
State v. Lawenstein 346 N.W.2d 292 (ND 1984) .....	23
State v. McMorrow 286 N.W.2d 284 (ND 1979) .....	23
State v. Mehralian 301 N.W.2d 409 (ND 1981) .....	34
State v. Oasheim 353 N.W.2d 291 (ND 1984) .....	24
State v. Olander 1998 ND 50, 575 N.W.2d 658 .....	46
State v. Reinart 440 N.W.2d 503 (ND 1989) .....	11
State v. Schimmel 409 N.W.2d 335 (ND 1987) .....	38
State v. Scmeets 287 N.W.2d 401 (ND 1979) .....	26
State v. Scmitt 2001 ND 57, 623 N.W.2d 409 .....	30
City of Grandforks v. Scialdone 2005 ND 24, 691 N.W.2d 198 ....	44
State v. Torgerson 2000ND 105, 611 N.W.2d 182 .....	24
State v. Trieb 315 N.W.2d 649 (ND 1982) .....	49
State v. Wicks 1998 ND 76, 576 N.W.2d 518 .....	45

OTHER STATES CASES

State v. Bruna 686 N.W.2d 590 (2004) .....	57
State v. Beckwith 46 N.W.2d 20 (Iowa 1951) .....	41
State v. Carter 250 Wis.2d 851, 641 N.W.2d 517 (Wis.App.2002)..	41
State v. David J.K. 528 N.W.2d 434, 531 N.W.2d 327 (Wis. 1994).	36

State v. Farron 579 N.W.2d 254 (Wis. 1998) .....	42
Ex Rel Gibson v. Dept. Health & Social Services 272 N.W.2d 395 (Wis. 1978) .....	37
State v. Hinchion 299 N.W.2d 748 (Neb. 1980) .....	30
People v. Lemmon 576 N.W.2d 129 (Mich. 1998) .....	55
State v. Michaels 264 N.J.Super 579, 625 A.2d 489 (1993) .....	19
People v. Suchy 371 N.W.2d 502 (1985) .....	44
State v. Utterback 485 N.W.2d 760 (Neb. 1992) .....	27
 CONSTITUTION USCA	
4th Amendment .....	26
5th Amendment .....	23
6th Amendment .....	37
14th Amendment .....	23
 NORTH DAKOTA STATUTES	
NDCC 12.1-20-03 .....	3
NDCC 12.1-32-01 .....	3
NDCC 12.1-32-15 .....	3
NDCC 14-10-06 .....	3
NDCC 29-06-15 .....	28
 NORTH DAKOTA RULES	
N.D.R.Crim.P. 11 .....	56
N.D.R.Crim.P. 41 .....	26
N.D.R.Crim.P. 43 .....	37
N.D.R.Ev. 412 .....	35

N.D.R.Ev. 611 .....	51
NORTH DAKOTA CODE OF JUDICIAL CONDUCT	
Canon 3 (B) (5) .....	35

STATEMENT OF THE ISSUES

- I. The jury's verdict is violating the Appellants rights of liberty by returning a verdict of guilty when the evidence against him raises only suspicion, speculation or conjecture.
- II. The trial court erred in denying Appellants request for a "Franks" hearing to suppress the fruits of an unlawfully issued search warrant, and denying the suppression of those fruits after a substantial showing was made the Affiant did in fact mislead the magistrate by including false statements and/or omitting information necessary for a magistrate to properly determine a finding of probable cause.
- III. The trial court erred in denying Appellants Motion to Dismiss concerning pretrial detention without a proper judicial determination of probable cause.
- IV. The Lower Tribunal erred in denying Appellants Demand for Change of Judge with a substantial showing of judicial bias attached, forcing Appellant through a fundamentally unfair trial.
- V. The Appellants rights were violated by the trial courts denial of his request to see the random jury draw to insure an impartial jury from a fair cross-section of the community.
- VI. The Appellants rights to an impartial jury were violated when he was forced to keep a predisposed jury panel, and by being forced to use his peremptory challenges on jurors who should have been excused for cause.
- VII. Appellants rights were violated in a fundamentally unfair trial by: A). Denying Appellants ability to offer an alternative explanation for the complainants medical condition. B). Denied the

Appellants ability to prepare his witnesses for trial pursuant to jury instruction K 5.50. C). State conducted an ex-parte suppression hearing, suppressing statement that the states star witness was on probation, and also suppressing all impeachment evidence of three of states witnesses. D). Allowed the state to introduce evidence of a wreck that prejudiced Appellant and had no connection to the charged offenses.

VIII. Appellants rights to a fair trial were denied, where Prosecutors misconduct poisoned the whole atmosphere of the trial by: A). Presenting undisclosed evidence of his explanation of complainants medical condition. B). Presenting perjured testimony of Police officers about an alleged pre-arrest statement of accused, and false testimony of other witnesses. C). Asking leading questions on direct examination that showed coercion. D). Improper arguments and comments to the jury that created sympathy for his witnesses and prejudice to the accused.

IX. The trial court erred in denying the Appellants request for a directed verdict of judgment of acquittal.

X. The trial court erred in denying Appellants Motion for a New Trial.

XI. The trial court erred in entering an unlawful judgment, when the judgment said the defendant entered a plea of guilty after a jury trial, during sentencing.

XII. The trial court erred in denying Appellants rights of Due Process in requesting it to have the record corrected, and refused.

STATEMENT OF THE CASE

Appellant was arrested on June 16, 2004, and charged with one count of gross sexual imposition, NDCC 12.1-20-03 (1)(d)(3), 12.1-32-15 & 12.1-32-01 (2), one count of encouraging the deprivation of a minor NDCC 14-10-06 (1) & 12.1-32-01 (5), and two counts of contributing to the delinquency of a minor, Class A misdemeanor, NDCC 14-10-06 (2). These alleged offenses were alleged to have occurred on June 12 & 13, 2004, at Mini-Stor-All in Grandforks, N.D.

Appellant was arrested without a warrant, and the preliminary hearing was held on October 15, 2004, in which probable cause was not shown, so Appellant appealed, but was fruitless due to altered transcripts. No proper judicial determination of probable cause was ever had. Appellant filed Motions, requesting a Franks hearing, Motion to Suppress and Motion to Dismiss. All three were heard at the suppression hearing held on December 21, 2004, and later erroneously denied on February 9, 2005. None of the rulings had legal ground to support the trial courts conclusions, nor was a factual basis set out in the ruling to support those conclusions. There was multiple requests for Appellant to access the Chester Fritz and Medical School libraries, because the states case substantially depending on medical evidence. These requests were also erroneously denied showing deep seated favoritism to the state. Requests were made to suppress all scientific and medical evidence because the Appellant was unable to prepare to meet the state at trial on such evidence. This was also denied. There was also held a Motion in Limine hearing on April 21, 2005, where the state declared that there was no DNA evidence and that

he would not even mention any DNA at trial. Even though he did. But he did not say he would not enter medical evidence; he did say, however, that he was not going to subpoena the Doctor. Then the case went through a 4 day trial, from May 3-6, 2005, where the Appellant was convicted of all counts, and on July 27, 2005, sentencing was had, and a Motion for a New Trial was heard and was erroneously denied. Appellant was then sentenced to life in prison on the gross sexual imposition, and five years on the encouraging the deprivation of a minor count, and two one year sentences for the misdemeanor counts, all run concurrent, and this appeal follows.

#### STATEMENT OF THE FACTS

On June 12, 2004, J.S. and R.D. wanted to be with the guy they liked, James McLeod. So when J. had to take her sisters home, her and R. made plans to come back and be with him. (transcripts, herein after tr.p. 297 L.7-10). J. had requested Appellant to come pick them up because it was such a long ride on bicycles. (tr.p.319 L.9-13). After meeting at Hugo's, the three went to James McLeods apartment and waited for him. (tr.p.299 L.21-24). When James arrived, the 4 went to the Mini-Stor-All, (herein after, MSA), to hang out. (Doc.#291 p.6). James was Appellants cousin, and he allowed James to drive the girls around but had to be present because James only had a drivers permit. (tr.p.533 L.16). All through the night Appellant asked if the girls wanted to go home or be dropped off somewhere because Appellant didn't want them to get into trouble. J. declined, because she wanted to stay with James. (tr.p.347 L.17). On June 13, 2004, A.S. showed up at the

MSA, and began a furious outbreak of words towards James and Appellant and this fury outbreak put the girls in fear of going to juvenile detention. (Doc.#290 p.33 & tr.p.275 L.17). After the gate was opened A. hollered at the girls and made them ride their bikes home alone just the two of them. (tr.p.182 L.19-24). A 4 mile ride home. (Preliminary hearing transcripts, herein after, P.H.tr.p.60 L.12, Doc.# 110). After they all met up at home, A. questioned the girls and then called the Police and R.'s mother. (P.H.tr.p.60-61). Arrangements were made and the girls were taken to the hospital to do sexual assault examinations on both of them. After extensive questioning, and sexual assault kits were completed, with negative results of any sexual assault occurring, (Doc.#305). The Appellant was assaulted by members of the Desjarlais family and brought to the hospital. The Appellant was questioned about the assault on him, and then informed about the allegations these girls were making against him. He was asked if he would admit to these allegations or deny them. Naturally he denied any criminal activity when no laws have been broken, but he did not deny being with them. With no evidence of a crime actually occurring, Appellant was free to leave the hospital. On June 14, 2004, Detective Iwan, took formal statements from the girls, starting with J., the alleged witness. Afterwards he took R.'s statement and was unhappy because her story was not matching J.'s statement and decided to coerce her testimony to change her story. (Doc.#290 p.22-24 & 26-28). After these statements, he realized he did not have enough probable cause for arrest warrant, so he decided to arrest Appellant without a warrant. (Doc.#123 exhibit D). Appellant was subsequently tried by jury and convicted on May 3-6, 2005, and this

appeal follows. The transcripts are not true and correct. Appellant did file Motions to Correct the Record and was fruitless. (See Appendix p. 138-148).

#### LAW AND ARGUMENT

I. The jury's verdict is violating the Appellants rights to liberty by returning a verdict of guilty when the evidence against Appellant raises only suspicion, speculation or conjecture.

**Standard of Review:** Review of a jury verdict requires to merely review the record to determine if there is competent evidence that allows the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. State v. Allen 237 N.W.2d 154 (ND 1975 ).

The Appellant hereby challenges the sufficiency of the evidence that was used to support the guilty verdict. (All docket #'s used in this brief are located in the docket entry in the appendix under case number 1644, and will appear as Doc.#).

In the case at bar, there is absolutely no physical evidence that a crime occurred. When there is no physical evidence, then the verdict can only rest on testimony or circumstantial evidence. First the Appellant will discuss the testimony. J. and R. are two juvenile females who set out on June 12, to be with a guy they liked named James McLeod. (tr.p.233 L.21-25 & p.312 L.24- p.313 L.7). When they had difficulties being able to see him, they sought another way. They came to the trailer in hopes to see James. Upon arrival, the Appellant

was on the phone to Pizza Hut. (tr.p.316 L.11-13). He was ordering a pizza and seems how the girls showed up, Appellant asked if they wanted something to drink, and they replied yes. So Appellant ordered a 2 liter bottle of Mountain Due for the minors to drink, because all the Appellant had was alcohol. (tr.p.317 L.4-7). James Simundson, the manager for Pizza Hut, testified that Appellants check, Doc.#302, was consistant with the purchase of a medium pizza, with a 2 liter soda and a \$1.00 tip for delivery. This corroberates Appellant did furnish non-alcoholic beverage for the minors. (tr.p.496 L.6-19). J., R.and James McLeod, testified that there was in fact a 2 liter bottle of Mountain Due in the Van. (tr.p.317 L.4-8, p.271 L.16-18 & p.535 L.16-18). When the girls left the trailer, R. claims to have left with some kind of vodka, she also claims to have concealed it in her sleeve. (tr.p.242 L.5-17). They had to take J.'s younger sisters home, so J. & R. made a plan to tell them to tell their mother that they were going to spend the night with some other girl. (tr.p.322 L.2-6), &(tr. p.188 L.21-23). When J. & R. left to take her sisters home, J. requested of the Appellant to pick them up at Hugo's. Appellant hesitatingly agreed. (tr.p.319 L.9-13). Appellant picked the girls up about 10-10:30 pm. The girls both testified to this. (tr.p.244 L.17 & p.324 L.2). The Appellee, alleges that they were not paying attention to time, but they knew that they had to get J.'s sisters home at 9:30 pm., so they had to be watching the time. (tr.p.318 L.6 & p.243 L.1-11). Once the girls got into the Van, J. testified that the 3, J., R. & Appellant, went straight to James apartment, waited 5-10 minutes then went straight to MSA. (tr.p.324 L.2- p.327 L.6). Then J. testified, she thought the three were in the MSA for about one and a

half hours. (tr.p.327 L.13). Here the Appellee wants to use R.'s testimony because it allows the Appellee plenty of leeway for time for the alleged crimes to have occurred. R. testified that the three went driving around first, but on cross-examination she declared that she really didn't remember. (tr.p.244 L.15-24). Immediately after the alleged sexual encounter, J. & R. both testified that James was picked up, (tr.p.246 L.9-18 & p.327 L.14- p.328 L.24). Now both girls testimony, the alleged sexual encounter was the very first event of the evening and the very first night R. met Appellant. (tr.p.234 L.4-5), and this 12 year old was a virgin. (tr.p.465 L.12-15). And this time fram was brought on because they were in trouble and was trying to make it look like it happened before James got into the Van, because he would be a witness that no crime had occurred. But they did not plan on the MSA activity log to contradict their testimony. (Doc. #301). The earliest entry of Appellants code punched in was 12:30 am. According to the testimony of the girls, the alleged sexual encounter could not have occurred, and was only made up to get themselves out of trouble with their parents and the Police. (tr.p.461 L.1- p.462 L.13). Using common sense, like the Appellee told the jury, who could believe that a 12 year old virgin, on the very first night that she met Appellant, and the very first event of the evening, would do a strip tease, and have sexual intercourse willfully with a total stranger. After James was picked up there was no more of the sexual crimes occurring or even being spoke of. (tr.p.537 L.17-22). The only other crime mentioned was the contributing to the delinquency of a minor which allegedly occurred on June 13, 2004. J. testified that she drank 2, and R. had vodka and 3 Mike's Hard Lemmonaids. (Doc.#291 p.

43 L.4-12 & tr.p.343 L.12-24), and also (Doc.#291 p.29 L.6), that drinking was after the sex, and in the afternoon. In R.'s statement on page 31, she said her and J. had a chugging contest. James testified that he did not see any minors drinking alcoholic beverages or even himself. (tr.p.535 L.11-22). He also testified that the Appellant drank Coors Light and something out of a clear bottle, (that is the Mike's Hard Lemmonaid that Appellant was drinking). There was also mention of the Appellant going into the El Roco to purchase alcoholic beverages. Now on the CD from the El Roco, Doc.#292, it showed the Appellant purchasing a 6 pack of wine coolers, (Mikes Hard Lemmonaid). At trial Det. Iwan testified that it was a reasonable purchase for one person consumption. (tr.p.447 L.3-19). It was testified also by Iwan that this purchase was at 1:24 pm. on June 13, and A. testified that she found everyone at about 4:00 pm. If only a 6 pack was purchased and there was no other stops to the liquor store, this shows an insufficient amount to corroborate their story. The CD does not match their story, along with the fact that these girls were observed by their parents, the Police and the medical staff and not one person testified that they were obviously intoxicated. The Doctor even testified that the blood alcohol test performed was negative. (tr.p.564 L.17- p.565 L.11). A.S. was furious and started hollering at James and Appellant. Because of this showing of anger, J. & R. were freaking out and in fear of going to juvenile detention, (tr.p.344 L.13-14). A. made them ride their bicycles home just the two of them. (tr.p.182 L.23-24). On the girls way home they had nothing else on their minds except that they were in a lot of trouble. (tr.p.278 L.24- p.280 L.6 & p.343 L.25- p.344 L.17).

Although they both claimed that they did not talk on their 4 mile ride home and plan what they would say to get out of trouble, but common sense would say, that two young girls in that much trouble, you would not be able to shut them up. A. even said that she didn't know for sure if they were talking. (tr.p.193 L.14-16). It is believed that after all the coercion involved in this case, that they were told to say that, as it is proven that they made their own plan to stay out all night. (tr.p.322 L.2-6).

The Appellee offered information to lead the witness, A.S., with testimony that would mislead the jury by false testimony that she followed the girls all the way home, when in fact, J.'s initial statement stated that A. was waiting for them when they got home. (Doc.#291 p.5 L.8-14). Once they all met up at home, A. questioned them. A.'s testimony at the preliminary hearing said, " I talked to her and her friend, and her friend told me that she was bleeding from what happened the night before." A.'s testimony that R. specifically told her this. (Appendix page 115 & 116 or P.H.tr.p.60-61 ). However, A.'s trial testimony was much different, she testified that she did not talk to them at all. Then she was impeached by the preliminary transcripts. (tr.p.194 L.20- p. 197 L.2). How could she possibly forget a conversation like that? Of course, unless it is untrue! After the girls were taken to the hospital to have sexual assault kits done on both of them, probably because both of them were claiming to be sexually assaulted in the begging. (tr.p. 384 L.1-11 & p.502 L.7). J.'s claim of being sexually assaulted and then changing her story shows deliberate falsity. During the exams, the hospital staff and the Detectives are interacting the findings of

the examinations of both girls. The Dr. even testified that there has to be interaction with the staff and the Police to exchange evidence and things like that. (tr.p.559 L.18-19). The Dr. Schanzenbach, at the time of the medical examination, was not under pressure from the state or defense in performing this examination and did his findings, wrote his report according to his expertise. The Dr. testified that there was no evidence of lacerations or first forced contact, eliminating the possibility of any bleeding from R.'s claim. (tr.p.562 L.24- p.563 L.14). The Dr. further examined R., and in his report stated that there was no evidence of any trauma of any sort. (Doc.#305 & tr.p.563 L.15-21). The Dr. also conducted a drug and alcohol test on the exam, and it showed negative and (tr.p.565 L.11), also when asked if she appeared to be intoxicated, he said no. (tr.p.562 L.12-23). When asked if he found any signs of a sexual assault, he said nope. (tr.p.564 L.3-16). The Dr. also testified on the exam, he said the Police were questioning the mother and patients extensively, and in trial he said that the Police had time with the mother and the patients for several hours actually. (tr.p.567 L.12-19). They had to be doing more than just looking at each other in all that time. In State v. Reinart <sup>4</sup>410 N.W.2d 503 (ND 1989), in that case the Dr. examined a 14 year old complainant and declared that she had chronic blunt trauma in his examination and that his conclusion was that there had been non accidental trauma or sexual abuse of this child. That was the testimony of the Dr. in Reinarts trial.

In the case at bar, the examiner says that there is no evidence of any trauma of any sort. There is no comparison, and the Appellee, by unfair surprise, elicited testimony from the defense witness, Dr.

Schanzenbach, over objection the court allowed it. The Appellee, had previously announced that he would not subpoena the Dr. He elicited a line of questioning from which the Appellant was previously denied access to books to prepare for any medical evidence. Appellant objected but the transcripts were altered and the objection was removed. (See App.p.138). The Appellee brought out testimony that was not even in the medical exam. Showing that due to the Appellees contact with this witness prior to trial, coerced this testimony to sway the jury in his favor, (tr.p.574 L.5-21, p.13 L.18- p.14 L.8, p. 308 L.19- p.310 L.16), and also giving his explanation for the results of the exam. The testimony was that of a tanner scale used to measure maturity, and saying that R. was very mature for her age, and making it look like she was very sexually active at 12 years old, to cover up the fact that there was no evidence of any trauma of any sort. This tanner scale, he said would range from 1 to a 5, and 1 being a virgin and 5 being fully mature and that R. was between 4 and 5. (tr.p.568 L.12- p.569 L.7). R. said she was a virgin, but it was excluded by the court as being irrelevant, pursuant to Reinart supra, this excluded testimony should have been permitted on cross-exam, on a limited basis. (tr.p.264 L.22- p.265 L.2). N.D.R.Ev. 412. Afterwards the Dr. was asked by Appellant if both R. & J.'s medical exams were fairly close to each other, almost identical, the Dr. testified it was still possible that these allegations were fabricated. (tr.p.573 L.4-12).

Due to these allegations made against the Appellant, members of the Desjarlais family, sought out and assaulted the Appellant and he was subsequently brought to the hospital. At the hospital, Detective

Thomas Murphy approached the Appellant, and asked him about the assault committed on him. After the conversation on that assault, he questioned Appellant concerning these allegations that J. and R. were making on him. He told Appellant what they were accusing him of. Appellant denied these allegations but did not deny being with them. Det. Murphy asked Appellant if he would be willing to take a polygraph test because of his denial and Appellant agreed. He left and then returned with another Detective named Robert Micheal Iwan, and Iwan questioned Appellant about these allegations. (tr.p.436 L.23- p.438 L.1). Det. Iwan, in his report tried to lie about Appellants statement, saying that he did not inform him of any details of the crime, only we are investigating a sexual assault. Det. Iwan also said at another time he had no idea what was said between Murphy and Appellant. Well tr.p.437 L.2, where Iwans report says, Murphy told me that Wheeler did not say anything in regards to this incident. But on lines 19-20, he said that Wheeler had spoken to Det. Murphy earlier about coming in and taking a polygraph test. Why would a polygraph be needed if he didn't first deny the allegations against him? Det. Iwan was also in denial of Det. Murphy telling R. that he did not believe her story because Appellant was denying her allegations and Appellant was going to be released from his custodial arrest, because there was no probable cause for any arrest. (Doc.#291 p.45 & tr.p.387 L.19). And if Appellant was free to leave the hospital then the presumption that he was trying to create must not have been true. If Appellant did volunteer the statement that Det. Iwan was saying that he did, then that alone would have been probable cause for the arrest. Because Det. Murphy was telling R. that he did not

believe her story, shows that the Appellant did not volunteer this information as alleged. By the Appellee eliciting this testimony of a false prior statement of the accused, he was creating a presumption. shifting the burden of proof to the defense to exculpate. Thus denying due process and is said to be forbidden through Giglio v. United States 405 U.S. 150, 153-154 (1972), Sandstrom v. Montana 442 U.S. 510, 515 (1979), Due Process prevents a prosecutor from relying on testimony he knows to be false, or later learns to be false. In Lego v. Twomey 404 U.S. 477 (1972), a defendant in a criminal case is deprived of due process of law if his conviction is founded in whole, or in part, upon an involuntary confession, citing, Rogers v. Richmond 365 U.S. 534 (1960). In the case at bar, the Appellee elicited this false statement of accused as a confession to the crime, to shift the burden of proof to the defendant. There is no proof that Appellant actually made that statement. Under the totality of the circumstances it could not be true. In Barnes v. United States 412 U.S. 837, 850 (1973), that court said; The vice in Tot was that the burden is on the government in a criminal case to prove guilt beyond a reasonable doubt and that the use of the presumption shifts that burden. We said, I(t) not permissible thus to shift that burden by arbitrarily making one fact, which has no relevance to guilt of the offense, the occasion of casting on the defendant the obligation of exculpation. Tot v. United States 319 U.S. 463, 469 (1943), the use of presumptions and inferences to prove an elements of a crime is indeed treacherous, for it allows men to go to jail without any evidence of one essential ingredient of the offense. It thus implicates the integrity of the

judicial system. Also, may congress enact a law that says juries can convict a defendant without any evidence at all from which an inference of guilt could be drawn? If Thompson v. City of Louisville 362 U.S. 199 (1960), means anything, the answer is in the negative. Due Process rights a freedom from a wholly arbitrary deprivation of liberty.

In the case at bar, the jury found the Appellant guilty on no evidence of guilt, solely on inferences and a presumption combined with prejudice. In Yates v. Evatt 500 U.S. 391 (1991), the court said; To say that an error did not contribute to the verdict is, to find the error unimportant in relation to everything else the jury considered on the issue in question as reviewed in the record. Before reaching such a judgment, a court must take 2 quite distinct steps. First, it must ask what evidence the jury actually considered in reaching its verdict. If, for example, the fact presumed is necessary to support the verdict, a reviewing court must ask what evidence the jury considered as tending to prove or disprove that fact. If the presumed fact is not itself necessary for the verdict, but only one of a variety of facts sufficient to prove a necessary element, the reviewing court should identify not only the evidence considered for the fact subject to the presumption, but also the evidence for alternative facts sufficient to prove the element. Once the court has made the first inquiry into the evidence considered by the jury, it must then weigh the probative force of that evidence as against the probative force of the presumption standing alone. To satisfy Chapmans reasonable doubt standard, it will not be enough that the jury considered evidence from which it could have come to the verdict

without reliance on the presumption. Rather, the issue under Chapman is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption. Chapman v. California 386 U.S. 18 (1967).

In the case at bar, the jury depended on that presumption created by the state and called it a prior statement of the accused as a confession to the crime, and without that presumption the verdict would fail.

On June 14, 2004, Det. Iwan took formal statements from J. and R. During R.'s statement, he was getting aggravated with R. because her story was not matching up with J.'s. Evidentially Det. Iwan was not too impressed with R. on June 13, because on page 2 of her statement, he begins her interview by stating, " I am willing to start as if you and I didn't talk yesterday. Start brand new. I'm not going to look at anything you told me yesterday, so we are going to start as if I just met you five minutes ago." This shows a scheme of coercing the alleged victim. His interview goes on to repeatedly tell R. that I know what the truth is, (tr.p.408 L.1- p.409 L.13), as if he has accepted J.'s statement as the truth. (Doc.#290 p.8 L.16, p.9 L.4, p.18 L.14, p.19 L.1 & p.21 l.1). Det. Iwan asked leading questions all the way through this statement, fro example, p.15 L.1, p.22 L.7, & L. 14, p.23 L.4, p.26 L.11- p.28 L.4 & p.32 L.6. On page 22 of this statement, R. was not making favorable statements for them to build a case, because Det. Iwan asked her, Q. Did he offer you any money? A. He gave me some. Q. How much did he give me? A. \$16.00. Then he goes on to, Q. Does he ask you to do anything for it? A. No. Q. Does he

ask you to strip? He doesn't ask you to strip? A. No, after that...

Q. So he says here's \$16.00. A. And then after a while he asks me to strip in front of him. Q. Did he offer you any more money? A. After we were done having sex, he says don't worry I'll give you money for this. These answers did not set well with their investigation so Trish decided to take a break. They shut the tape off, had a little conversation with the alleged victim and taught her what to say. This is obvious because there is no other explanation for taking such a long break to turn over the tape, and also the fact that immediately R. completely changed her testimony. (tr.p.430 L.12- p.432 L.6). Such as, on page 24 L.2, Q. And then what happens? A. Then he gave me money to strip for him. Q. Okay, how much did he offer you? A. \$20.00, but then he was short. Q. So he gave you the \$16.00, then you stripped for him. Okay, you take your clothes off or did he take them off for you? A. I did. Q. Okay, then what happens? A. Then he said he'll give me \$100.00 more if-- This is an obvious showing of coercion, to have such a massive change in testimony after a 14 minute break. The coercive setting here when you have 2 Police officers and a CVIC state employee alone, questioning a twelve year old girl without the parents present or an attorney that could keep the line of questioning legally fair for both alleged victim and the Appellant. In Haley v. Ohio 332 U.S. 569 (1948), the court said; no lawyer stood guard to make sure the Police went so far and no further, to see to it that they stopped short of the point where he became the victim of coercion. Between Haley and the case at bar, the coercive setting was about the same and the outcome was the same, the Police got the answers they wanted. And again on pages 26-28, Det. Iwan was not satisfied

with her testimony concerning the sexual position 69, that J. told him that R. asked Appellant to do and they did it. (Doc.#291 p.19 L.14). Det. Iwan asked R. p. 26 L.13, Q. Did you engage in that? A. No. Q. It doesn't matter. A. No we didn't. Q. You didn't. okay, did anybody ask about that? A. No. She explains that she knows what it means, the 69 position. Det. Iwan persistantly questions her for an answer to match J.'s statement, pushing her to change her story. He continues as follows: Q. So you know what 69 is? A. Yeah. Q. I heard that 69 came up. I'm just trying to clarify. A. No, it did not come up and I can tell you that right now! Q. Then the person that told me that might have been mistaken? A. Yeah, I know J. told you, but she wasn't looking and... Q. Did he ask? A. Yeah, and I said no.

After Det. Iwan volunteered the information, she then changed her story. Thus creating the fruits of the poisonous tree! Though she did finally change her story, she still did not say the same thing as J. This is proof that her testimony is untrustworthy.

The Appellee also used leading questions when he questioned R. concerning the sexual encounter and did not let her give the incriminating testimony, but only asked quetions that required only yes and no responce. (tr.p.223 L.22- p.226 l.12). This is not her testimony, this is the Appellees testimony, she is only agreeing to it. The investigative techniques used in this case are the improper techniques that are disfavored or condemned by experts, law enforcement authorities and government agencies by asking leading questions or suggestive questions, coercive activities, and employing peer presure they obtained stories that were not even close concerning criminal activities. (Doc.#290 p.19). The only consistancies they made were

of innocent explanations. See Michaels v. McGrath 531 U.S. 1118 (2001).  
citing, State v. Michaels 264 N.J. Super 579, 591, 625 A.2d 489, 495  
(1993), here also, as in the case at bar, the physician examined the  
child, but found no evidence of abuse. Nonetheless, based solely on  
the child's statements, the prosecutor and several investigators,  
began an extensive investigation. They interviewed virtually all the  
children with whom petitioner could have had contact. Employing peer  
pressure, making threats, and asking leading or suggestive questions,  
they obtained stories of sexual abuse that " range from relatively  
minor accounts of touching to virtually incomprehensible heinous and  
bizarre acts." The techniques used in the case at bar, would also  
cause these girls to use their imaginations and stray from reality.

The discrepancies in the statements are those of the details of  
the criminal activity. Of course when they made plans on what they  
would say to get out of trouble, there would be some inconsistencies  
of the criminal activity, but that is only enough to prove that they  
had an opportunity to fabricate, but did not consider the details of  
the criminal activity, because the details would not be known unless  
it actually occurred. The Discrepancies are as follows: First, there  
is the offer of money to strip, above, it was already mentioned in R.'s  
statement concerning this testimony, compare to (tr.p.251 L.18- p.263  
L.19), and J. testified that Appellant offered \$100.00 for R. to strip  
(tr.p.328 L.25- p.329 L.4), and 50 for sex, (tr.p.302 L.11-12). Any  
money that was given to them was for both of them as hospitality and  
not for sex or stripping, but for buying things such as beef jerky and  
soda's. (tr.p.335 L.9- p.336 L.4). Second, J. testified that  
Appellant and R. engaged in sex, Det. Iwan asked if Appellant took his

clothes off. J. replied, no when she looked, he was still in his clothes. (Doc.#291 p.17-18 & tr.p.332 L.12-24). R.'s testimony was to the contrary and said that he took his pants and underwear off. (tr.p. 265 L.14-15 & Doc.#290 p.26 L.6). They contradicted each others testimony concerning who was on top. R. testified that he was on top, (tr.p.265 L.22), and J. testified that she was on top. (tr.p.332 L. 20). The last major discrepancy that the Appellant will address and there are many more is concerning the sexual position 69, in which J. testimony in trial appeared to be tampered with because she was contradicting her own statement and it appeared as if her and the state were trying to weaken the contrary statements by saying," because I heard R. saying do it harder, and her or them two asking each other if they wanted to do 69. (tr.p.303 L.5-6). Then on cross she was impeached by her statement. (tr.p.333 L.3-14), and R. had a completely different testimony on this subject in her statement that was discussed above, so Appellant won't go into that again. Now Det. Iwan testified in trial that for J. and R. to have inconsistant statements is normal. This was to get the jury to accept that their stories did not match each other. To weaken the burden of proof beyond a reasonable doubt. (tr.p.475 L.16-22). Here is another place where the transcripts were altered where they omitted where Det. Iwan said it was normal to have inconsistant statements, but the Appellee did not omit his closing argument on this issue, which states it more like the trial testimony. (tr.p.614 L.1-17).

Along with all the coercions of the alleged victim and witness, during trial and during cross examination of R., the gardian ad litem, Rebecca McGurran, spoke to the court saying," your honor, may I just

have a moment with R.? I don't know that she's understanding how she needs to respond at this point." (tr.p.249 L.6-8). Another time she requested of the court that the witness chair be not changed, because as she said it," I did notice that the Clerk was going to be changing the chair today. I asked her not to do that. Both my clients have sat on that chair, it spins less and it doesn't roll as easily, and I'm concerned with nerves if they had a different chair up there, they might roll a little more." (tr.p.215 L.15-21). Also the Appellee says that when Rebecca McGurran steps out on thursday that, I can assure the court that I will have an advocate present, as well, who has been working with both victims. (April 21, tr.p.29 L.1-3). Here we have a list of expressions on behalf of the prosecution that coercive activity has taken place to teach the girls on how and what to testify to. McGurran said both my clients sat on that witness chair, meaning they practiced prior to trial on their testimony. And during trial, her client didn't know how to respond, so she wanted to tell her what to say. Next the state says that the advocate has been working with both victims, showing that they have had lots of professional help on how to testify to convince a jury. In State v. Blumler 458 N.W.2d 300, 302 (ND 1990), citing, Mapp v. Ohio 367 U.S. 643 (1961), any subsequent evidence gained as a result of the initial illegally acquired evidence is considered," fruits of the poisonous tree," and must likewise be suppressed. Due to the improper investigative techniques used in the case at bar, this case should never have been put before a jury.

R. testified that I lied because I didn't want to get into trouble. (tr.p.262 L.2-4), and J. was proven to be a liar because she denied

claiming to be sexually assaulted and then recanting her testimony. (tr.p.384 L.3-11). A. also lied when she said that she never spoke to the girls after she got home. Again she lied when she said that J. never claimed to be sexually assaulted. (tr.p.197 L.3-17), but Det. Murphy corroborated that she did. (tr.p.502 L.7).

Next, circumstantial evidence could also sustain a verdict provided it is of such probative force to exclude every hypothesis of innocence. Appellant was arrested without a warrant and without probable cause. After the arrest, there was a search conducted on Appellants Van. During the search, it is believed that Det. Iwan not only folded down the back seat, but also planted the alleged condom wrapper. The Appellee alleges that the condom wrapper corroborates that a condom was used. In the search they also found a woman's bra, that did not belong to either one of the girls. Even if it was a condom wrapper, that does not prove that it would have been used on R. because the bra proves that there was another woman in Appellant's life. (Doc.#289 defense exhibit #2, & tr.p.286 L.22- p.287 L.1 & p.353 L.14-19). In the search of Appellants Van, Appellant asked Iwan if he had found any more condoms or wrappers in all the bags and boxes in the Van. He replied, no! (tr.p.462 J.19-23). Iwan was also asked if he could prove that this was in fact a condom wrapper, and could not. (tr.p.449 L.1-6). Det. Simon testified that the Van had not been cleaned in quite some time, and who knows how long these items could have been in the Van. (tr.p.489 L.20- p.490 L.17). You can see in the pictures that the Van had not been cleaned in quite a while. But still there was no condom found that proves a crime occurred as J. said it was just thrown down. (Doc.#291 P.19 L.8-10). Transcripts were

omitted where Simon testified "quite some time."

The evidence that is supporting the guilty verdict cannot be fairly characterized as sufficient to had lead a rational trier of fact to find guilt beyond a reasonable doubt. In State v. Lawenstein 346 N.W. 2d 292, 293 (ND 1984), this court said; that circumstantial evidence must be conclusive and must exclude every reasonable hypothesis of innocence, citing, State v. McMorrow 286 N.W.2d 284, 286 (ND 1979).

In the case at bar, the evidence could only raise a suspicion. There is no evidence that a crime occurred, no evidence that the Appellant committed it and the credibility of the alleged victim and witness, is severely in question, when they are in fear of juvenile detention and in big trouble with parents and the Police. Any circumstantial evidence certainly does not exclude every hypothesis of innocence. In Jackson v. Virginia 443 U.S. 307, 319 (1979), they said; Due Process commands that no man shall lose his liberty until the government has borne the burden of convincing the fact finder of his guilt. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty. In FN 10- the power of the fact finder to err upon the side of mercy, however, has never been thought to include a power to enter an unreasonable verdict of guilty. And FN 12- the criterion thus impinges upon "jury" discretion, only to the extent necessary to guarantee the fundamental protection of due process of law. This allows the court to consider witness credibility, whether jury discretion properly passed on the Appellants constitutional rights. 5th & 14th Amendments, USCA.

Also citing, In re Winship 397 U.S. 358 (1970), saying; it is critical that the moral force of the criminal law not be deluted by a standard of proof that leaves people in doubt whether innocent men are being condemned; the standard is "bottomed on a fundamental value determined in our society that it is far worse to convict an innocent man, than to let a guilty one go free." A HIGH standard of proof is necessary, we said, to insure against unjust convictions by giving substance to the presumption of innocence. at 363.

In the case at bar, the Appellee deluted the presumption of innocence by his many unlawful remarks to the jury, and the presumption he created as a prior statement of the accused.

In State v. Oashiem 353 N.W.2d 291 (ND 1984), this court said; that within limits, can weigh evidence and evaluate the credibility of witnesses. And that if the evidence is legally insufficient to sustain a guilty verdict that the 5th Amendment, double jeopardy clause bars a retrial. And in the case at bar, the evidence is legally insufficient.

II. The trial court erred in denying Appellants request for a Franks hearing to suppress the fruits of an unlawfully issued search warrant, and denying the suppression of those fruits after a substantial showing was made that Affiant did in fact mislead the magistrate by including false statements and/or omitting information necessary for a magistrate to properly determine a finding of probable cause.

Standard of Review: De Novo standard of review for conclusions of law and mixed questions of law and fact. State v. Torgerson 2000 ND 105, 611 N.W.2d 182.

The Appellant argues that the court improperly denied his request for a "Franks" hearing, where the Appellant did in fact make a substantial showing that Affiant did in fact omit information that would mislead the magistrate into believing that the stated facts existed, when in fact if Affiant included the information it would have precluded any probable cause for the issuing of the search warrant dated June 18, 2004. (Doc.#9).

The Affiant misled the magistrate into believing the stated facts exist, when a hearing was held for the Affiant to request a search warrant. (Doc.#62). At the time of this hearing, there was no file as of yet concerning the allegations made against the Appellant. (Doc.#62 p.2 L.4-5), as stated by the magistrate. So he had no information concerning whether or not the Appellant was unlawfully arrested. Det. Iwan testified that charges were brought against Appellant, that the crimes were alleged to have occurred on June 12-13, 2004, and involved sexual acts and contributing with two minor females under the age of 15. That Appellant was arrested and in the Grandforks Correctional Center, and that he seized the Appellants 1982 Chevrolet Conversion Van. The assistant states attorney, Mr. Brown, asked Det. Iwan, "what evidence do you have at this point that would indicate to you that you have probable cause to believe that further evidence could be found in the confines of the Conversion Van?" A. " On interviewing the young ladies in question, they said that the sexual intercourse occurred inside the Van. There is possible evidence inside the Van that I would like to obtain." Again Mr. Brown asked Iwan on page 5 L.7, Q. And how did you gain the information that the sexual act occurred inside the Van? A. From interviewing the 2 young ladies that were involved in this case.

Before either a warrant for arrest or search can issue, judicial officer must be supplied with sufficient information to support independent judgment that probable cause exists for the warrant. 4th & 14th Amendments, USCA. Standards applicable to factual basis supporting officers probable cause assessment at time of challenged warrantless arrest and search are at least as stringent as the standards applied with respect to a magistrates assessment. Whiteley v. Warden, Wyoming State Penn. 401 U.S. 560 (1971). In the case at bar, Iwan did not provide sufficient enough information to the magistrate, only bare bones conclusory statements. (December 21, tr.p.19 L.15- p.22 L.5). In State v. Roth 2004 ND 23, 674 N.W.2d 495, this court said; we have warned that sufficient information, rather than a "bare bones" affidavit, must still be presented to the magistrate to allow that official to determine probable cause. That determination cannot be a mere ratification of the bare conclusions of others. We have often emphasized that an affidavit expressed in conclusions without detailing underlying information is insufficient for probable cause.

In the case at bar, there was no affidavit for the search warrant dated June 18, 2004, however, there was sworn testimony and transcripts were ordered. When the search warrant is obtained on the strength of an informants information, the affidavit in support of the issuance of the search warrant must: 1). state the facts demonstrating the basis of the informants knowledge of criminal activity, and 2). establish the informants credibility, or the informants credibility must be established in the affidavit through a Police officers independent investigation. See United States v. Leon 486 U.S. 897 (1984), State v. Schmeets 278 N.W.2d 401 (ND 1979), 4th Amend. USCA. & N.D.R.Crim.P. 41

(c). A citizen informant is defined as a citizen who purports to be the victim of or to have been the witness of a crime who is motivated by good citizenship and acts openly in aid of law enforcement. And is not in fear of going to jail. Roth supra, ¶ 10. State v. Utterback 485 N.W. 2d 760, 768 (Neb. 1992), the status of citizen informant cannot attach unless the affidavit used to obtain a search warrant affirmatively sets forth the circumstances from which the existence of the status can reasonably be inferred. Thus experienced stool pigeons, are persons criminally involved or disposed are not regarded as citizen informants because they are generally motivated by something other than good citizenship. (Dec. 21, tr.p.23 L.20- p.24 L.14). In the case at bar, these girls were obviously experienced stool pigeons because they were in fear of going to juvenile detention. (Doc.#290 p.33). These girls were found to be of the criminal milieu because the alleged victim was on probation and the alleged witness had already been threatened with juvenile detention if she got into trouble again. (tr.p.344 L.13-14). In State v. Donovan 2004 ND 201, 688 N.W.2d 646, 649 said; reliability of an informant who is a "criminal, drug addict or pathological liar," must be established. In State v. Holzer 2003 ND 19, ¶ 11, 656 N.W.2d 686, - the officers who interviewed Gascoine had already discovered evidence of her narcotics involvement, making her a member of the criminal milieu, who's reliability needed to be established. Thus in the case at bar, the girls reliability needed to be established and was not even brought up. So the veracity prong to establish probable cause was not met for issuance of the search warrant requested by Det. Iwan.

Now this information above standing alone is insufficient for the

finding of probable cause. During this hearing requesting a search warrant the Affiant misled the magistrate with inferences to obtain probable cause. (Dec. tr,p.18 L.13-25). First the Affiant used the arrest of the Appellant as an inference that the arrest was based on probable cause when in fact it was only based on suspicion. He failed to inform the magistrate that the interviews of the 2 minor females produced major discrepancies concerning the details of the alleged criminal activity. (See ground I). The Affiant deliberately withheld these statements from the magistrate for the purpose of obtaining the search warrant. In combination with these statements, the girls were taken to the hospital and medically examined. The entire medical exam process revealed not one sign of any sexual assault occurring. These 2 statements & medical exams was all that was available prior to arrest, and Affiant knew he had no probable cause for arrest. Without any exigent circumstances, 2 days after taking the statements, the Affiant makes a warrantless arrest. In Beck v. Ohio 379 U.S. 89 (1964), the U.S. Supreme Court has a strong preference for the use of arrest warrants.

In NDCC 29-06-15 (1)(b), allows a Police officer to arrest a defendant without a warrant when the person has committed a felony, outside the presence of the officer provided, (c) when a felony in fact has been committed, and the officer believes the person arrested has committed it. (Dec. tr.p.24 L.25- p.25 L.12). Now with these statements and medical exams, there was no proof that a felony was in fact committed, and therefore there was no probable cause for the arrest. In State v. Kunkel 455 N.W.2d 208, 211-212 (ND 1980), this court said; an arrest is pretextual when the Police use the fact of an arrest based on probable cause as a device to investigate or search for

evidence for an offense for which probable cause is lacking. United States v. Trigg 878 F.2d 1037 (7th Cir. 1989), probable cause for the search warrant subsequently issued for the Van was based exclusively upon evidence illegally obtained in the warrantless search.

Illegally obtained evidence cannot be the basis of a magistrate's finding of probable cause. United States v. Vasey 843 F.2d 782 (9th Cir. 1987). Although in the case at bar, it was not a warrantless search that obtained illegal evidence, it was the warrantless illegal arrest that gave the inference to the magistrate to find probable cause for the search warrant. The Affiant used the pretextual illegal arrest as a device to obtain the search warrant.

And as for the veracity prong, the Affiant used the inference of citizen informants, by allowing the magistrate to infer that they were minors under the age of 15, and that was the extent of his information. (Doc.#62 p.3 L.17-18 & p.4 L.19-21). Dec. 21, tr.p.17 L.25- p.18 L. 9). ( on p.18 L.21, a misprint after statements, there should be an "if" the mag. knew--). By the Affiant deliberately withholding these statements, the magistrate would assume that these girls were citizen informants, but as previously discussed, they were not. If the magistrate had seen the contents of these statements, there would be no justifying a finding of probable cause.

After the hearing held on December 21, 2004, and the Motions filed for the Request for a Franks hearing, Doc.#125, 161 & 179 and the Motion to Suppress Doc.#124, 162 & 179. The judge denied the Request for the Franks hearing & Motion to Suppress on February 9, 2005. She states that defendant cannot meet this first Franks requirement by relying entirely on his or her own accusations of the agents deliberate

or reckless actions. The judge failed to acknowledge that Appellant was not relying entirely on his own accusations. She was provided by the Appellant with a copy of the transcripts of the hearing for the search warrant attached to the Request for the Franks hearing, Doc.#125, she was provided with a copy of both girls statements along with the tapes of the actual interviews of both girls. (Dec. tr.p. 31 L.16- p.32 L.20). The Appellant also attempted to subpoena witnesses for the Franks hearing. (Dec. tr.p.3 L.14- p.5 L.5). Besides the lengthy argument from p.7 L.15- p.26 L.9). The trial court erroneously denied both these motions in showing of bias. The trial court neglected to finding probable cause in her ruling. (Doc.#219). even though the Appellant informed the court that it was a 4th Amendment violation. This was denied without reasons. (Doc.#241). In passing on the validity of a search warrant, the court may consider only information brought to the attention of the magistrate. State v. Hinchion 299 N.W.2d 748, 752 (Neb. 1980). In State v. Schmitt 2001 ND 57, 623 N.W.2d 409, 415, this court said; A finding of fact is clearly erroneous if it is induced by a erroneous view of the law, if there is no evidence to support it, although there is some evidence to support it, on the entire evidence we are left with a definite and firm conviction a mistake has been made. A trial courts finding of fact must be sufficient to enable an appellate court to understand the trial courts factual determinations and the basis for its conclusions of law... a court must specifically state subordinate facts upon which its ultimate factual conclusions rest. In the case at bar, the trial courts denials were in fact a erroneous view of the law. There was no evidence in the transcripts, nor in its order to support its factual

determinations, and no basis for its conclusions.

III. The trial court erred in denying Appellants Motion to Dismiss concerning pretrial detention without a proper judicial determination of probable cause.

**Standard of Review:** Abuse of discretion standard. State v. Bell 2002 ND 130, 649 N.W.2d 243.

The trial court erroneously denied Appellants Motion to Dismiss. (Doc.# 123). Which is also intertwined with the above Request for a Franks hearing and Motion to Suppress, because with the illegal arrest incorporated in the Motion to Dismiss, if proven would suppress all fruits from the illegal arrest.

The Appellant was arrested without a warrant, as discribed above, entirely on suspicion. The allegations made by the alleged victim and witness were contradictory. The Detective knew that the girls were in trouble with their parents and also police. (tr.p.461 L.15- p.462 L. 13). Based on this information, Det. Iwan, knew he had no probable cause for an arrest warrant, so he made his prejudicial decision to make the arrest on his own. (Doc.#123 exhibit D). In Powell v. Nevada 511 U.S. 79, 84 (1994), the court said; citing, County of Riverside v. McLaughlin 500 U.S. 44 (1991), a 48 hour rule of a judicial determination of probable cause, Powells judicial determination of probable cause was held 4 days later and was ruled an unreasonable seizure, violating the 4th Amendment, USC. In the case at bar, the Appellants judicial determination wasn't held until 4 months later, and is a violation of the 4th Amendment. This motion was also heard on December 21, 2004, and erroneously denied. (Dec. tr.p.33 L.1- p.38 L.

25). (note that on page 34 L.19, misprint, replace credible with incredible). (Doc.#122, 123, 163 & 180). citing, State v Hager 271 N.W.2d 476, 479 (ND 1978), but the court erroneously denied it based on the states argument, ignoring the ruling of the N.D. Supreme Court. (Doc.#210). In Wong Sun v. United States 371 U.S. 471 (1963), the court said; It is basic that an arrest with or without a warrant must stand on firmer ground than mere suspicion, citing, Henry v. United States 361 U.S. 98, 101 (1959), to hold that an officer may act in his own, unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant, would subvert this fundamental policy. In the case at bar, Iwan did over step his bounds by not getting a warrant for the arrest, and deprived that judicial officer of that opportunity to determine probable cause for the arrest.

**IV. The Lower Tribunal erred in denying Appellants Demand for Change of Judge with a substantial showing of judicial bias attached, forcing Appellant through a fundamentally unfair trial.**

**Standard of Review:** Abuse of discretion standard. State v. Bell 2002 ND 130, 649 N.W.2d 243.

Appellant was denied his fundamental rights when the lower tribunal denied his Demand for Change of Judge, because the trial judge forced him through a fundamentally unfair trial. (Doc.#245). Was based solely on subsection (a) in which provides in part: 10 days after the notice of assignment of judge. Well the Appellant acted pro-se and had no knowledge of this judge and could not have known that the judge was biased until the actual showing of bias. Which was made obvious when

she made her final denials on access to the medical school library, and also on the denials of the background histories of the states witnesses that Appellant requested for use solely on the credibility or impeachment purposes. On the Appellants Demand for Change of Judge, he specified that he was relying on subsection 2 (c), and the persiding judge erroneously denied it on subsection 2 (a). Section (c) provides in part: 10 days from the date of service of any ex-parte order in the case signed by the judge against whom the demand is filed. The Appellant repeatedly requested access to the Chester Fritz and Medical School libraries to properly be able to meet the state at trial with medical evidence. The Appellant also requested background histories of the states witnesses to show bias and was repeatedly denied, showing a substantial pattern of bias and/or prejudice. See Doc.#244, and all grounds in support of this ground.

The First occurance was when the judge did give the Appellant access to the UND law school law library for  $\frac{1}{2}$ preparation for trial. (Doc.#91). The UND is a college and has 3 libraries, law school, Chester Fritz and Med School libraries. After a short period of time doing research at the law school, Appellant realized that there was no books on medical or scientific evidence. After inquiry of the law school staff, Appellant had to obtain a court order to access the other 2 libraries to get books on medical evidence. Appellant requested a court order. (Doc.#108). Appellant explained these books were necessary in preparation for trial. The trial court denied the request. (Doc.#155). Appellant made another attempt explaining the need for the books because the strength of the states case hinged on scientific evidence. (Doc.#139). Again the trial court denied the

request. (Doc.#185). This is a showing of favoritism to the state. This discussion came up during the suppression hearing on December 21, 2004, about medical experts, (Dec.tr.p.28 L.18- p.31 L.13), during this discussion the trial judge prior to giving the authorization to call expert witnesses at state expense, wanted the names and telephone numbers of the experts, because she wanted to call them before Appellant could. She almost said it in court but stopped short. (tr.p.29 L.14-15). She wanted to tamper with the Appellants expert. Again at this hearing, Appellant made another attempt to access the libraries. (tr.p.49 L.1- p.50 L.14), and was fruitless. At that hearing, Appellant requested to supplement his Request for a Franks hearing and Motion to Suppress and Motion to Dismiss. In the Motion to suppress he added in subsection (7) he wrote that there was no literature in the law school library that would cover medical (Doc.#179). Trial court still erroneously denied it. (Doc.#212). At the Motion in Limine hearing, dated April 21, 2005, the Appellee declared that there was no DNA evidence and would not even mention any at trial. However, the Appellee, by unfair surprise did enter a medical explanation for the complainants medical condition, and over objection the court allowed it. This objection was removed from the transcripts. This denied the Appellant the ability to present a defense due to unfair surprise. This is a severe case of bias. In State v. Mehralian 301 N.W.2d 409 (ND 1981), under our constitutional system, courts stand for those who are weak, out numbered, or victims of prejudice or public excitement; this responsibility requires that rights be preserved for the benefit of every human being subject to our constitution, of whatever race, creed, persuasion and under all

as juror Whalen, who ultimately became juror formen, was a long time friend of states attorney, Thomas Falck, for 20 years. Juror Schantz worked with another states attorney, Faye Jasmer. Juror Fowler, personally knew states witness, Det. Iwan for more than 20 years. (tr.p.22-46). All these jurors could not possibly be impartial with these kind of connection to the states case. In Turner v. Louisiana 379 U.S. 466 (1965), they said; right to a jury trial guarantees to criminally accused a fair trial by a panel of impartial, indifferent jurors, and a failure to accord him a fair hearing, violates even the very minimal standards of due process. 14th, USCA. Jurors verdict must be based upon evidence developed at trial regardless of the heinousness of crime charged, apparent guilt of offender, or station in life which he occupies. In the case at bar, the Appellant was only found guilty on suspicion and prejudice of crime charged.

VII. Appellants rights were violated in a fundamentally unfair trial by: A). Denying Appellants ability to offer an alternative explanation to the complainants medical condition. B). Denied the Appellants ability to prepare his witnesses for trial pursuant to jury instruction K 5.50. C). State conducted an Ex-Parte suppression hearing, suppressing statement that states star witness was on probation and also suppressing all impeachment evidence of the 3 states witnesses.

**Standard of Review:** Abuse of discretion standard. State v. Bell 2002 ND 130, 649 N.W.2d 243.

First, The appellant was denied his ability to prepare to meet the state at trial with medical evidence. The Appellant on several

occasions attempted to get the judge to give him a court order to allow him to access the Chester Fritz and Med. School libraries, explaining to the court that the strength of the states case hinged on scientific or medical evidence. (Doc.#108, 139 & 179), also, (Dec. tr.p.28 L.18- p.31 L.13), but the judge denied. (Doc.#155 & 185). Appellant also requested to suppress all medical evidence, but that was also denied. (Doc.#212), saying that Appellant was not being denied any constitutional rights by not accessing those libraries. Thus denying his 6th Amendment right to a fair trial and equality of the parties. USC. In City of Grandforks v. Scialdone 2005 ND 24, ¶ 3, 691 N.W.2d 198, 202, this court said; that any testimony they planned to offer regarding the calibration of the intoxilizer machine used on Scialdone should have been previously disclosed. In the case at bar, any testimony that the state was going to offer at trial concerning the medical condition of the complainant, elicited from the Dr. should have been disclosed before trial. The Appellant made<sup>4</sup> attempts to obtain discovery from the state. (Doc.#216). Appellant did attempt to offer a alternative explanation, but was denied. (tr.p.264 L.22- p.265 L.2). See People v. Suchy 371 N.W.2d 502 (1985), states late endorsement of witness, court denied continuance. In the case at bar, Appellant objected to the Appellees introduction of his explanation, but court overruled, and objection was removed from the transcripts during altering.

B). Second, the Appellant was denied the ability to contact and prepare witnesses for trial. Appellant was told that he had to go through a Private Investigator to contact these witnesses. He requested of the court and was granted. (Doc.#46). The P.I. contacted

James McLeod and James Simundson, and the stories were so far fetched that Appellant did not want to use him any more. (See App.p.110-113). compare to their trial testimony. Even James McLeod and the Dr. both testified that they had no contact with the Appellant prior to trial. (tr.p.555 L.15-17 & p.562 L.4-6). The trial testimony was much different from the P.I.'s memorandum, and constitutes a 6th Amendment violation of ineffective counsel, inability to prepare for trial and equality of the parties. State v. Wicks 1998 ND 76, 576 N.W.2d 518, the state had substantial abilities to prepare his witnesses, he had the guardian ad litem, advocates, Police and himself. The Appellant was incarcerated with no outside contact.

C). Third, the state conducted an ex-parte suppression hearing to suppress the juvenile and school records of the minors. Even the statement that R. said she was on probation, which was already in the possession of the Appellant for impeachment purposes, was stripped from him during trial when he had no way of objecting to the suppression. The judge had ruled it irrelevant, but in Davis v. Alaska 415 U.S. 308 (1974), said; it is material evidence to reveal that the juvenile witness is on probation, and the right to cross examine on a particular form of bias. Therefore in the case at bar, the probation was relevant and is critical evidence because it would cast doubt on the credibility of the states witnesses. (tr.p.274 L.5-p.275 L.11). The Appellant was completely unaware of the suppression until trial. Also the judge denied disciplinary records of Det. Iwan, as argued in ground IV. There obviously must be more evidence in those records if the judge would strip impeachment evidence out of the Appellants hands and call it irrelevant. (Doc.#243). In United

States v. Bagley 473 U.S. 667 (1985), on impeachment evidence held that regardless of request, favorable evidence is material, and constitutional error results from its suppression by the government, " if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, 473 at 682, (for a Brady claim). In the case at bar, there would have been a reasonable probability of a different result had the impeachment evidence been disclosed for all states witnesses. 5th, 6th & 14th Amendments, USC.

VIII. Appellants rights to a fair trial were denied where Prosecutors misconduct poisoned the whole atmosphere of the trial by: A).

Presenting undisclosed evidence of his explanation of complainants medical condition. B). Presenting perjured testimony of Police officers about an alleged pre-arrest statement of accused, and false testimony from other witnesses. C). Asking leading questions on direct examination that showed coercion. D). Improper arguments and comments to the jury that created sympathy for his witnesses and prejudice to accused.

Standard of Review: Obvious error standard. State v. Olander 1998 ND 50, 575 N.W.2d 658.

The Prosecutor by unfair surprise, entered undisclosed evidence of his explanation of the medical condition of the complainant, by the defense witness, Dr. Scanzenbach, violating Due Process . The Prosecutor knew before trial what testimony he would elicit from this witness prior to trial but did not disclose it. He planned this unlawful testimony through unlawful contact with defense witness.

The Appellant had previously said that the state could contact the Dr., only through a third party. (April 21, tr.p. 21 L.2-4). There was no agreement that the state could have direct contact with the defense witness. Though he did many times. (April tr.p.13 L.18- p.14 L.8, and tr.p.308 L.19- p.309 L.3, & L.20- p.310 L.16, p.574 L.5-21 & July 27, tr.p.16 L.5-7). The state did elicit his explanation for the medical condition for the complainant, which was that of a tanner scale ranging from 1 to 5. 1 being a virgin and 5 very mature. The Dr. said that R. was between a 4 and a 5. When the state is allowed to introduce an explanation, then the defense is also permitted to show an alternative explanation for her condition. Now the Appellants explanation would have been that R. claimed to be a virgin. (tr.p.465 L.12-15). and that the medical exam showed no evidence of any trauma of any sort. (Doc.#305). Compare the exam to State v. Reinart 440 N. W.2d 503 (ND 1989), where the court published the Dr.'s conclusion of the complainants condition. Even with the objection removed, I am sure that obvious error is constituted because the substantial rights of the accused has indeed been violated and denied a fair trial. State v, Burk 2000 ND 25, 606 N.W.2d 108, citing, State v. Evans 1999 ND 70, ¶ 9, 593 N.W.2d 336. The Appellee elicited this false testimony of the tanner scale, to cover up the fact there was no evidence of an assault. If the Appellant would be charged with witness tampering if he would contact and coerce a states witness then the defense witnesses should be equally protected from tampering by the state. 14th, USCA. B). The Appellee elicited false testimony from the Police officers for purposes of persuading the jury to return a guilty verdict. Det. Murphy offered perjurred testimony

when he said he did not inform the Appellant of the allegations the 2 minors were making against him prior to speaking with him in the presence of Det. Iwan. (tr.p.516 L.22- p.517 L.2), but also testified to the contrary because he knew he was lying. (tr.p.512 L.17-20), and during the initial contact between Det. Murphy and Appellant, he did in fact inform Appellant of all of the allegations the girls made against him concerning the sexual assault, gave them alcohol and about R.'s strip tease. Appellant denied the allegations and Murphy asked Appellant if he would be willing to take a polygraph test and agreed. (tr.p.513 L.2-4). After this encounter with Murphy, Det. Iwan and Murphy came back and Iwan questioned Appellant about the allegations and he told him the same thing he told Det. Murphy, so he was free to leave the hospital. Between the Appellant denying these allegations and the results of the medical exams, Det. Murphy told complainant that the Appellant was being released because he did not believe her. (Doc.#291 p.45). Murphy told R. that he did not believe her on June 13, and the Appellant agreed to take the polygraph on June 13, but Iwan's report wasn't written until June 15, 3 days after the encounter. Long enough time for him to realize he had no evidence for the arrest. If the Appellant would have actually volunteered that statement as alleged, he would have been under arrest at the hospital. Iwan testified that Appellant volunteered the statement, "I didn't do anything to these girls. I didn't supply them with alcohol and I didn't ask them to strip. I didn't have sex with them." (tr.p.437 L.13-15). This was a portion of his report see appendix p.96 for the entire report. Iwan also said that Appellant did previously speak to Det. Murphy and an agreement was

made to take a polygraph test. (tr.p.437 L.19-20). So a polygraph would not be necessary unless the Appellant had previously denied the allegations against him. Thus, proof of false testimony of the Police because he said that Appellant did not say anything to him in regards to this incident. The Appellee had to have known that this testimony was perjured. In Giles v. Maryland 386 U.S. 66 (1967), citing, Napue v. People of the state of Illinois 360 U.S. 264, a Napue violation is knowing use of perjured testimony, and the state suppressed evidence of the complainants prior sexual activity, and also suppressed credibility of the states witnesses and of the Police, exactly what is going on in the case at bar. The Appellee used this alleged prior statement of accused as a confession to the crime, and he further pushed the perjured testimony by asking Iwan, Based on Mr. Wheeler's statements to you, did this heighten your suspicion at all as to whether or not he was the suspect that you were looking for? (tr.p. 362 L.9-11). This would not raise his suspicion, it would have give him probable cause, and Appellant would not have been free to leave the hospital. In Rogers v. Richmond 365 U.S. 534 (1961), a state must establish guilt independenly and freely secured, and may not by coercion prove its charge against an accused out of his own mouth...not the probable truth or falsity of confessions. In the case at bar, the so called prior statement of accused is false, and is the states inference as a confession, and is coerced because the accused did not volunteer it and at trial did rebut it. In State v. Trieb 315 N.W.2d 649, 653 (ND 1982), the possibility that Trieb's jurors may have relied on the erroneous presumption in reaching their verdict. FN6). nothing but the bare

presumption was submitted to Trieb's jury. These instructions relied on by the state neither qualified nor explained how the jurors should interpret the presumption, citing, Sandstrom v. Montana 442 U.S. 510, 515 (1979), the key to satisfying Sandstrom, is to explain to the jury the legal effect of the presumption. Sandstrom does, on the other hand, clearly invalidate all conclusive presumptions, and those rebuttable presumptions which shift the burden of persuasion to the defense. In the case at bar, the alleged prior statement of the accused was not proven to be made by the accused. Thus is used as a presumption that the Appellant made a confession to the crime, but is contradicting the surrounding events around the statement. The Appellee used this statement to shift the burden to the defense to exculpate. This violates Due Process and the Appellants right to a fair trial. 6th & 14th Amendments, USCA.

The Appellee also elicited false testimony from A.S. when he asked her a leading question, he said, did the girls ride their bikes home alone? She said, yes. He said, you didn't follow them? Telling her what she needed to say. (tr.p.182 L.23- p.183 L.2), & (Doc.#291 P.5). This was Appellee's plan to cover up the fact that the girls made a plan to get out of trouble on their 4 mile ride home alone. As J.'s statement, she said A. was waiting for them when they got home. (tr.p. 342 L.4-20). A. said she didn't know for sure if they were talking on the way home. (tr.p.192 L.9- p.193 L.16). He also elicited false testimony from J.S. , compare, tr.p.300 L.10-15, to tr.p.325 L.8- p. 326 L.4. and then compare, tr.p.300 L.21- p.301 L.8, to tr.p.342 L. 21- p.343 L.3, showing false testimony, see also Doc.#291 p.29 & p.43, tr.p.303 L.5-6, compare to tr.p.332 L.25- p.333 L.14. He also

elicited false testimony from R. and the Police are on behalf of the state. As the Det. Iwan asked R. when he was questioning her he said in order for me to prosecute this guy, as a means to coerce her to give the testimony he wanted. Doc.#290 P.18 L.10-14, and then there is, Doc.#290 p.22-24, compare to tr.p.253 L.22- p.263 L.19, & p.291 L.4- p.292 L.3, and again, Doc.#290 p.24 L.11- p.25 L.4, compare to tr.p.225 L.7- p.226 L.20, & tr.p.284 L.11-20, and then another place Doc.#290 p.26 L.10-27, compare to, tr.p.266 L.4- p.269 L.21. There is more but knowing that it would contradict their statement, he had Det. Iwan testify that it was normal for these two girls to have inconsistent statements, weakening the burden of proof. (tr.p. 474 L.1- p.475 L.22). This line was elicited to give an excuse for the false testimony, as to why the details of the crime were different, rather than the truth that these crimes did not occur. Giglio supra.

C). The Appellee asked leading questions to his witnesses to elicit his own version of the truth to obtain a conviction. The first was A. when he asked her if the girls rode their bicycles home alone, and A. said yes. But the Appellee used a leading question to elicit false testimony to show his version of the truth when he followed with the question, you didn't follow them? This gave her the testimony she was supposed to say.(tr.p.182 L.23- p.183 L.2). Then the Appellee used leading questions on R. to elicit the most damaging evidence against the accused. This was to fulfill the elements of the charges against the accused, he used only questions requiring yes and no responses. This was not R.'s testimony, it was the state, she only agreed to it. (tr.p.224 L.2- p.225). N.D.R.Ev. 611 (c) does not

permit the use of leading questions on direct examination. These leading questions weren't used to develop the witnesses testimony. These leading questions were used to elicit false testimony, and what the Appellee wanted the jury to hear. Michaels supra.

D). The Appellees arguments and comments to the jury, whether opening, during trial, or closing arguments created sympathy for the girls and caused prejudice to the accused. During jury selection, the Appellee, changed the reasonable doubt standard to essential elements (tr.p.134 L.19-20). This causes prejudice to the accused because it weakens the states burden of proof, and denies the accused the right to have concrete substance in the presumption of innocence. In State v. Schimmel 409 N.W.2d 335 (ND 1987), our final concern is that the prosecutors opinion carries with it, "imprimatur of the government." Improper argument by the states attorney may induce the jury to trust the governments view rather than its own judgment of the evidence when deliberating. In the case at bar, the state is denying due process by reducing the reasonable doubt to elements, and even though it was not objected to, it is obvious error where the jury was misled as to the HIGH level of certainty of the reasonable doubt standard. He also said, "when you weigh the evidence and compare it to the elements." (tr.p.160 L.15-23). The Appellee also created bias against the accused by telling the jury, "this is a very important case, and it deserves your important consideration," a plea to the jury that he severely wants a guilty verdict, imputting guilt on them to return a guilty verdict. (tr.p.605).

The state also vouches for the credibility of R. saying, "I think," (tr.p.609 L.6-14). and also for J. (tr.p.610 L.20-25), when

J. & R. were both immunized from any trouble they could get into just for testifying against the Appellant. In addition to vouching for the credibility of the witnesses, he vouched for the credibility of his evidence, the alleged condom wrapper, (Doc.# 293 & 295), (tr.p.615 L. 13-16). In Schimmel, the court said; prosecutors misconduct on comments on asserting a personal belief or confidence in the evidence. In the case at bar, it is obvious that he is asserting a personal belief in the above said evidence because he has an initiative to win the case. The Appellee is using his governmental representative position to influence the jury that he is trustworthy and if he believes in the evidence, they should too. The Appellee never offered any rebuttal to the coercive action of Det. Iwan, when he coerced R. into changing her story concerning the sexual position 69, but in closing argument he made a remark to the jury that," it is not suprising at all to me and I hope that it is not supprising to you," concerning the discrepancies. He couldn't explain why the stories were different so he pleads to them accepting his version. (tr.p.613 L.8-9). The Appellee goes on to tell them that the Detective will tell you that it is normal for the victim and witness to give inconsistant statements. (tr.p.614 L.3-6). In City of Williston v. Hegstad 1997 ND 56, 562 N.W.2d 91, said; prosecutors improper argument to the jury that Police officers job was to tell the truth. Prosecutors argument must be confined to facts in evidence and proper inferences that flow there from. In the case at bar, the officer did not testify that it was normal, according to the transcripts, so the Appellees argument is exceeding the evidence. Common sense would tell anyone that two people who see the same thing will discribe the

same thing regardless of age.

Further into the states closing, he refers to the presumption, the alleged prior statement of accused, and says to the jury, to cause excitement in the minds of the jurors, and prejudiced to the accused, by saying, " this is a very important key piece of evidence." (tr.p. 615 L.10). Thus like a rung bell, once rung it can't be unrung, and the Appellant suffered unreparable prejudice. The Appellee also attacked the defense witness in his closing argument that James McLoed for the first time, now at trial, he brought his defense, and not at any earlier opportunity, prejudices appellant because the jury is getting the inference that the defense is putting on a false defense. See Doyle v. Ohio 426 U.S. 610 (1976), the court said; A state prosecutor may not seek to impeach a defendants exculpatory story, for the first time at trial... cross exam of a witness as to why he had not told the same story eariler at his first opportunity. In the case at bar, the error did in fact have a substantial and injurious affect or influence in determining jury's verdict. (tr.p.619 L.8-14). Another biased statement from Appellee was he told the jury, "it is my position they are consistant enough," refering to the inconsistant statements. Using his authoritative position to say his evidence is good enough. 5,6 & 14th, USCA.

IX. The court erred in denying the Appellants request for a directed verdict of Judgment of Acquittal.

Standard of Review: Abuse of discretion standard. State v.Bell 2002 ND 130, 649 N.W.2d 243.

The Appellant argues the trial court erred in denying his request for a judgment of acquittal at the close of the states case was due to judicial bias and favoritism to the state. Appellant showed the court that there was no physical evidence that any crime had occurred, and circumstantial evidence to exclude every hypothesis of innocence and that the credibility of the witnesses was severely in question. Also refer to the argument in ground I. In People v. Lemmon 576 N.W.2d 129 (Mich. 1998), Due Process commands directed verdict of acquittal when sufficient evidence to justify rational trier of fact in finding guilt beyond a reasonable doubt is lacking. 14th,USCA.

X. The trial court erred in denying Appellants Motion for a New Trial.

Standard of Review: Abuse of discretion standard. State v. Bell 2002 ND 130, 649 N.W.2d 243.

Appellants Motion for a New Trial was primarily raising sufficiency of the evidence, but also raised issues of Prosecutorial misconduct, unfair surprise, credibility of the witnesses and the unlawful exclusion of evidence. The Motion was heard by the trial court on July 27, 2005. It was erroneously denied. (Doc.#335 & 336). See also ground I for argument. Appellants motion is Doc.#313. In Burk v. United States 437 U.S. 1 (1978), it is immaterial in such situations whether a defendant has sought a New Trial as one of his remedies or even as his sole remedy. 5th, double jeopardy clause, USCA. The case at bar, reveals no evidence that can sustain a guilty verdict and should be barred from any subsequent trial.

XI. The trial court erred in entering an unlawful judgment when the

judgment said the defendant entered a plea of guilty after a jury trial and during sentencing.

**Standard of Review:** De Novo standard of review, mixed question of law and fact. State v. Torgerson 2000 ND 105, 611 N.W.2d 182.

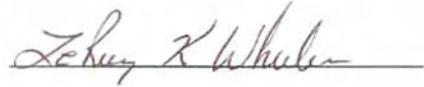
The Appellant argues that the judgment was unlawfully entered by mistake or of bias towards the accused. The judgment could have been drawn up mistakably by a possible pattern that the judge has on her computer, or it could have been done deliberately, nevertheless it is unlawful. The judgment was brought to the Appellant in the county jail during a argument between the Appellant & the Captain Wagner, of the jail, and then asked Appellant to sign it. He only glanced it over and signed it not realizing on the top of it, stated that the defendant, at sentencing entered a plea of guilty in open court. This is far from the truth. There is nothing in the record that even mentions a guilty plea. (See sentencing transcripts dated July 27, 2005). Pursuant to N.D.R.Crim.P. 11 (c) provides in part: insuring that the plea is voluntary. The court cannot accept a plea of guilty without first, by addressing the defendant personally in open court, determining a plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. In North Carolina v. Alford 400 U.S. 25 (1970), ordinarily, judgment of conviction resting on a plea of guilty is justified by the defendants admission that he committed the crime charged against him and his consent that judgment be entered without trial of any kind. In the case at bar, there was a trial, and at no time did appellant enter a plea of guilty, and there is no record that says he did.

conviction. The Appellant filed a Motion to Correct the Record, and the trial court denied the motion the same day as the Appellee filed his response. This denied the Appellant his ability to file his reply brief. Although the Appellant already had his reply brief in the mail before he received the court's denial. See App.p.138-148. Court's denial App.p.90. The trial court and the state are saying that the alterations, the Appellant is claiming, are self-serving. Well if the Appellee is the one altering the transcripts, then he would alter them in his favor, so naturally the cure would appear to be self-serving. Read page 21 L.14 of the sentencing transcripts and replace it with, "that's when it got excluded," and say to yourself, does it make more sense, with the subject being spoken about? All of the alterations the Appellant is speaking about, look it over and see, do they sound unreasonable? And this court will see that the record needs to be corrected. Compare tr.p.474-475, to 613 L.19- P.614 L.17. and then again compare tr.p.274 L.5- p.275 L.8, to the April 21, Motion in Limine hearing transcripts, and also compare them to July 27, sentencing tr.p.19 L.8- p.21 L.2. See how these hearings do not match up, this is a showing of altering.

#### CONCLUSION

Due to the unlawful actions below, and the evidence shown above the Appellant respectfully requests of this Honorable Court reverse and remand for the entry of a Judgment of Acquittal, or alternatively, a change of Judge and order a New Trial.

Dated February 21, 2006.



LeRoy K. Wheeler  
Appellant Pro-se  
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CERTIFICATE OF SERVICE

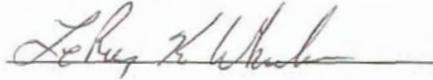
I HEREBY CERTIFY that a true and correct copy of the forgoing BRIEF FOR APPELLANT has been furnished by mail on Mark Jason McCarthy P.O.Box 5607 Grandforks, N.D. 58206-5607, on this 21<sup>st</sup>, day of February, 2006.



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*NON-*  
CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Appellant has no electronic capabilities for computer use or word processor. Also cannot file an electronic copy of the brief.



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