

RECEIVED BY CLERK
SUPREME COURT
MAY 15 2007

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)	
	)	Supreme Court No. 20060140
Plaintiff/Appellee,)	
	)	Morton County No. 04-K-1344
vs.)	
)	
Paul A. Fischer,)	
)	
Defendant/Appellant.))	

BRIEF OF APPELLANT FISCHER

APPEAL FROM JUDGMENT OF CONVICTION

APPEAL FROM THE DISTRICT COURT
MORTON COUNTY, MANDAN, NORTH DAKOTA
SOUTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE ROBERT O. WEFALD, PRESIDING

Paul A. Fischer, pro se
J.R.C.C.
2521 Circle Drive
Jamestown, North Dakota
58401

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES Supreme Court Cases	ii
TABLE OF AUTHORITIES United States Court of Appeals Cases	iii
TABLE OF AUTHORITIES State Cases	iii, iv
TABLE OF AUTHORITIES Century Code Statutes	v
TABLE OF AUTHORITIES Court Rules	v
TABLE OF AUTHORITIES Other Authorities	v
STATEMENT OF ISSUES	vi
STATEMENT OF CASE	1
STATEMENT OF FACTS	2
STATEMENT OF JURISDICTION	7
LAW & ARGUMENT I.(a.)	7
LAW & ARGUMENT II.(a.)	15
LAW & ARGUMENT III.(a. & b.)	18
LAW & ARGUMENT IV.(a.)	22
LAW & ARGUMENT V.(a.)	28
LAW & ARGUMENT VI.(a.) . . . . .	.35
CONCLUSION . . . . .	.40

TABLE OF AUTHORITIES

CASES	Page
Supreme Court Cases	
Batson v. Kentucky, 476 U.S. 79 (1988)	34
Bell v. Wolfish, 441 U.S. 520 (1979) . . . . .	.25
Bounds v. Smith, 430 U.S. 817 (1977)	20, 21, 27
Cuyler v. Sullivan, 466 U.S. 335 (1980) . . . . .	.13
Faretta v. California, 422 U.S. 806 (1975) . . . . .	.20
Frazier v. United States, 335 U.S. 497 (1948)	31
I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984)	35
Mapp v. Ohio, 367 U.S. 643 (1961)	35
McKaskle v. Wiggins, 465 U.S. 168 (1984) . . . . .	.20
McMann v. Richardson, 397 U.S. 759 (1970)	19
Murphy v. Florida, 421 U.S. 794 (1975)	32
Nordon v. United States, 308 U.S. 338 (1939)	36
Patterson v. Illinios, 487 U.S. 285 (1988) . . . . .	.16
Powell v. Alabama, 287 U.S. 45 (1932)	9, 14
Richards v. Wisconsin, 520 U.S. 385 (1997)	38
Ross v. Oklahoma, 487 U.S. 81 (1988)	34
Strickland v. Washington, 466 U.S. 668 (1984) . . . . .	.8, 14, 19
Terry v. Ohio, 392 U.S. 1 (1968)	39
United States v. Cronin, 466 U.S. 648 (1984)	13, 15
United States v. Salerno, 481 U.S. 739 (1987)	25
Wong Sun v. United States, 371 U.S. 471 (1963) . . . . .	.35

TABLE OF AUTHORITIES

CASES	Page
United States Court of Appeals Cases	
Crandell v. Bunnell, 25 F.3d 754 (9th Cir. 1994)	16
Dorman v. U.S., 435 F.2d 385 (D.C. Cir. 1970)	38
Hall v. Moore, 253 F.3d 624 (11th Cir. 2001)	18
Jackson v. Ylst, 921 F.2d 882 (9th Cir. 1990)	18
Meechaicum v. Fountain, 696 F.2d 790 (10th Cir. 1983) . . .	23
Pilkinton v. Circuit Court of Howell County, 324 F.2d 45 (8th Cir. 1963)	23
Reese v. Nix, 942 F.2d 1276 (8th Cir. 1991)	18
Sistruuk v. Lyons, 646 F.2d 64 (3rd Cir. 1981)	23
Tate v. Wood, 963 F.2d 20 (2nd Cir. 1992)	27
U.S. v. Beasley, 48 F.3d 262 (7th Cir. 1995)	34
U.S. v. Curry, 993 F.2d 43 (4th Cir. 1993)	29
U.S. v. Friedman, 837 F.2d 48 (2nd Cir. 1988)	24
U.S. v. Ifosere, 228 F.3d 816 (7th Cir. 2000)	20
U.S. v. Kind, 194 F.3d 900 (8th Cir. 1999)	27
U.S. v. Sandles, 23 F.3d 1121 (7th Cir. 1994)	20
U.S. v. Silkwood, 291 F.3d 95 (1st Cir. 2002)	16
U.S. v. Theron, 782 F.2d 1510 (10th Cir. 1986)	25
U.S. v. Woodard, 291 F.3d 95 (1st Cir. 2002)	16

CASES

State Cases

City of Bismarck v. Holden, 552 N.W.2d 471 (N.D. 1994) . . .	31, 32
Fedorinehik v. Stewart, 286 N.W.2d 673 (Mich. 1939) . . .	30, 31
Friedman v. Dozore, 312 N.W.2d 585 (Mich. 1981)	12
Garcia v. State, 2004 ND 81, 678 N.W.2d 568	7
Klose v. State, 2005 ND 192, 705 N.W.2d 809	8

TABLE OF AUTHORITIES

CASES	Page
State Cases	
Kusek v. Burlington Northern Railroad Company, 552 N.W.2d 778 (Neb.App. 1996)	30
Martinson Manufacturing Company Inc. v. Seery, 351 N.W.2d 772 (Iowa 1984) . . . . .	.12
People v. Hubbard, 552 N.W.2d 493 (Mich.App. 1996)	33
Rohl v. State, 279 N.W.2d 731 (Wis. 1979)	23
Sambursky v. State, 2006 ND 223, 723 N.W.2d 524 . . . . .	.7
State v. Albaugh, 2007 ND 86, 752 N.W.2d 712	39, 40
State v. Boyd, 2002 ND 203, 654 N.W.2d 392 . . . . .	.39, 40
State v. Causer, 2004 ND 75, 678 N.W.2d 552	8
State v. Engel, 289 N.W.2d 204 (N.D. 1980)	30
State v. Foster, 1997 ND 8, 560 N.W.2d 194	15
State v. Handtmann, 473 N.W.2d 830 (N.D. 1989) . . . . .	.35
State v. Harmon, 1997 ND 233, 575 N.W.2d 635	17
State v. Klein, 2006 ND 37, 711 N.W.2d 606	8
State v. Langseth, 492 N.W.2d 298 (N.D. 1992)	38, 39, 40
State v. McLain, 301 N.W.2d 616 (N.D. 1981) . . . . .	.32
State v. Micko, 393 N.W.2d 741 (N.D. 1986)	14
State v. Newsom, 414 N.W.2d 354 (Iowa 1987) . . . . .	.19
State v. Robles, 535 N.W.2d 729 (N.D. 1995) . . . . .	.32
State v. Seaton, 103 N.W.2d 833 (Neb. 1960) . . . . .	.24
State v. Simon, 297 N.W.2d 206 (Iowa 1980)	20, 21, 22
State v. Skaro, 474 N.W.2d 711 (N.D. 1991)	15
State v. Wetsh, 304 N.W.2d 67 (N.D. 1981)	35
State v. Wilson, 488 N.W.2d 618 (N.D. 1992) . . . . .	.17
State v. Whitecomb, 413 N.W.2d 839 (Mich.App. 1987)	24

TABLE OF AUTHORITIES

	Page
Century Code Statutes	
N.D.C.C. 12.1-22-03	3
N.D.C.C. 19-03.1-23	2
N.D.C.C. 19-03.4-03	2
N.D.C.C. 27-05-06(1) . . . . .	.7
N.D.C.C. 29-01-06(5)	26, 29
N.D.C.C. 29-28-06 . . . . .	.6
N.D.C.C. 29-28-06(1)(2) . . . . .	.7
18 U.S.C. § 3109 . . . . .	.37
18 U.S.C. § 3142 (b) & (c)	24
18 U.S.C. § 3161-3174	26
28 U.S.C. § 1867(a), (d) & (f)	29
Court Rules	
N.D.R.Crim.P. 21 . . . . .	.30
N.D.R.Crim.P. 24(b) . . . . .	.34
N.D.R.Crim.P. 37(b) . . . . .	.7
N.D.R.Crim.P. 48(b)	6, 26, 28
N.D.R.Civ.P. 52(a)	15
N.D.R.App.P. 4(b)(1) . . . . .	.7
N.D.R.App.P. 35(b)(2)	6
Other Authorities	
N.D. Constitution art. I, § 8, § 9, § 12	7, 24, 35
N.D. Constitution art. VI, § 6, § 8 . . . . .	.7
U.S. Constitution 4th, 6th, 8th, & 14th	7, 22, 24, 35

STATEMENT OF ISSUES

Page

I. Whether Fischer received "Effective Assistance" of counsel to produce adversarial testing.

a. Whether Fischer received "Ineffective Assistance" of counsel, obstructing his Due Process Rights to procure a fair trial by jury. 7

II. Whether Fischer was forced to choose between ineffective assistance or self-representation and was the waiver valid.

a. Whether Fischer was forced to choose between unwilling counsel and self-representation as his only apparent means to secure trial. . . . 15

III. Whether Fischer's Due Process rights were violated by not having access to the courts.

a. Whether Fischer's Due Process rights were violated by his inability to access legal materials and lengthy incarceration attributed to excessive bail bond required by the court. . . 18

b. Whether appointment of standby counsel fell short of acceptable access. 18

IV. Whether the State is deemed to have brought this case to trial in timely fashion.

a. Whether Fischer's Due Process rights were violated because the State did not bring this case to trial in a timely fashion.22

V. Whether Fischer was afforded an impartial jury representing a fair cross section of the community in which he as tried.

a. Whether Fischer was tried by a jury of his peers that did not represent a fair cross section of the community of which the crime was alleged and in which he was tried.28

VI. Whether Fischer's rights were violated by illegal search and seizure in violation of the 4th Amendment.

a. Whether the evidence offered was taken in violation of 4th Amendment rights and was it sufficient to convict.35

STATEMENT OF THE CASE

On November 30, 2004, 911 emergency operator Amy Ingersoll received a 12:30 am phone call from one Ricky Nelson Jr., (hereinafter "Complainant") that defendant Paul A. Fischer (hereinafter "Fischer") was on "his" property and that Fischer had been evicted. The call was transferred to officer Sergeant Tad Pritchett of the Morton County Sheriff's Dept. (hereinafter "Pritchett"). Pritchett's report states that the complainant told him that he was the owner of this property and that the property was suppose to be vacant, giving consent to search.

Pritchett was assisted by Patrol Deputy Dion Bitz (hereinafter "Bitz") and relayed the information to Bitz who told Pritchett that he believed Fischer may have returned to the property to conduct illegal narcotics manufacturing. The property referred to is a farmstead pole barn that Fischer rented one fourth portion of along with the farmhouse at the same location (hereinafter "Shop") located approximately five miles south of Mandan, N.D., in Morton County.

Officers Pritchett and Bitz entered the shop through the unlocked walk-in door with weapons drawn and fixed on Fischer and his wife who was with him at the time, shouting identification and repeated orders at elevated levels. The Fischers complied and after cuffing Fischer and his wife for safety, Bitz did a cursory search of the shop while Pritchett remained with the suspects. Bitz's search yielded evidence of methamphetamine and manufacturing equipment. The suspects were escorted from the shop and officer Pat Haug of the Mandan

Police Dept. was called to transport Fischer to the Morton County Correctional Center while Pritchett transported Fischer's wife (hereinafter "Tatia"). Bitz was instructed by Pritchett to remain on the location to secure the scene until Task Force arrived to inventory and dismantle the lab site. The Fischers were turned over to the jail and detained for formal charges.

Tatia Fischer's bond was set at \$2,000 cash, her charges bound over for trial. Fischer was charged and bond was set at \$50,000 cash. Fischer maintained a "not guilty" plea, went to trial and subsequently was convicted by jury of three of the four counts against him. Fischer maintains that he was prejudiced in Due Process rights in an apparent attempt to break him down during the pretrial procedure for the purpose of extracting a guilty plea. That he was prejudiced by ineffective assistance of counsel. That he was prejudiced in jury venire. And, finally, that he was prejudiced by prosecutorial misconduct. Fischer has appealed all aspects of the criminal judgment of conviction to this Supreme Court.

STATEMENT OF THE FACTS

On November 30, 2004, Investigator Curtis Barreth of the Morton County Sheriff's Department filed a criminal complaint against Fischer, No. 04-K-1344, charging, Count I: MANUFACTURE OF A CONTROLLED SUBSTANCE in violation of N.D.C.C. §19-03.1-23; Count II: POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER (METHAMPHETAMINE) in violation of N.D.C.C. §19-03.1-23; Count III: POSSESSION OF DRUG PARAPHERNALIA in violation of N.D.C.C. §19-03.4-03; Count IV:

CRIMINAL TRESPASS in violation of N.D.C.C. §12.1-22-03. See (R.A. #1, App. pp. 7-8).

The case Fischer brings before this Court for appeal review was piggy-backed with similar charges in Morton County Crim. No. 04-K-1160 stemming from an arrest on October 9, 2004. See Crim. Complaint (App. pp. 9-10). Fischer was released on bond of \$500 from the October arrest at the time he was arrested in November. See Promise to Appear (App. p. 11). The court set bond and \$50,000 cash for the November arrest. See (R.A. #2, App. p. 1). Pretrial motions and hearings were conjoined and ruled on as one with the exception of preliminary hearings and jury trials. Fischer had applied for court appointed counsel on the October charges and was appointed Robert V. Bolinske, Jr. (hereinafter "Bolinske") who was also assigned the November charges. See (R.A. #3-4). After an inability to make contact with Bolinske from October 14, 2004 thru December 8, 2004, Fischer petitioned the court to remove Bolinske as counsel. See (R.A. #8). Fischer then filed a motion titled "Defendants Petition RE: Representation" asking the court to allow self representation, allowing some sort of legal access. See (R.A. #9, App. pp. 12-13). This petition went unanswered. After several other petitions went unanswered, Fischer petitioned on December 13, 2004 to "Access Court As Scheduled." This is the only petition that the court responded to and it was "Denied" by judge Sonna Anderson. See (App. p. 14). Note: This is also a document that does not appear on the register of actions.

Finally, Fischer filed one more motion titled "Motion To Terminate Counsel For The Defense" but, went unanswered. This document not only asked to remove Bolinske and allow defendant access, but also asked for a hearing. See (R.A. #15, App. pp. 15-16).

Eventually, on January 6, 2005, Bolinske submitted his own motion to withdraw, citing reasons not explained. ^(App. p. 17) The motion was granted on January 7, 2005. Upon granting withdrawal to Bolinske, the court still did not respond to defendant's motions. Instead, the court sua sponte assigned another court appointed attorney, Susan Schmidt. See (R.A. #21). Ms. Schmidt refused to go to trial because State's Attorney Allen Kopyy told her he had a solid case against Fischer in both criminal numbers. Fischer refused to accept the proposed plea recommendation and informed Ms. Schmidt he was going to trial with or without her. Ms. Schmidt motioned to withdraw citing conflicts on how to proceed between the defendant and herself. See (R.A. #30, App. p. 18).

The court having accepted Susan Schmidt's motion, assigned Attorney Thomas J. Glass as attorney of record. See (R.A. #31). Glass remained appointed defense counsel for approximately five months, or until September 2, 2005. At this point, Fischer chose (only because he had no other choice) to represent himself. While representing Fischer, Mr. Glass submitted a motion and brief in support to Suppress/Dismiss. See (R.A. #45). He failed however, amidst much unanswered written communication from Fischer, to schedule

Depositions in a timely fashion. See (R.A. #45). Glass was responsible for the request for resetting Suppression Hearing, dated June 30, 2005. See (R.A. #48 & 51, App. p. 19). Glass's timing in motion to withdraw was during the September 2, 2005 Suppression Hearing. See (R.A. #52, App. p. ~~30~~, lines ~~4~~-19).

Fischer, using Glass's Motion to Dismiss/Suppress went to the later scheduled Suppression Hearing of October 18, 2005. The court denied the motion to suppress evidence. See (R.A. #54). The trial on the "Companion Case" 04-K-1160, came to calendar on November 3, 2005 for two days. Fischer motioned for Continuance of Jury Trial, asking for the court's consideration of being "treated as new counsel for defense" and citing the "time allotted defendant under self-representation was unreasonably short to pursue a fair defense." See (R.A. #56 & 57, App. pp. 20-21). That motion was returned the same day "Denied" (explained by judge Wefald in later argument). Subsequently, Fischer went to trial on the scheduled date, presented his case before a jury of 12 ans was acquitted of all counts of the complaint and information. See (App. p. 22).

The trial in case 04-K-1344 which had been discussed as scheduled for later in the month, specifically November 28 and 29 of 2005 was now nowhere to be found on the courts docket and was only then scheduled on November 9, 2005 for three and one half months later. See (R.A. #58, App. p. 23). The trial was now scheduled for February 22 and 23 of 2006.

The jail notified the clerk of court of Fischers one year anniversary of incarceration and the court scheduled a Bond Review Hearing for November 22, 2005, at which time the State's Attorney, Allen Kopyy introduced correspondence granting a length of confinement variance from the Director of North Dakota D.O.C.R., Leanne Bertsch. See (R.A. #59, App. pp. 24-25). Just prior to the Bond Review Hearing, Fischer had entered a motion and order for dismissal pursuant to Rule 48(b) of N.D.R.Crim.P., asking the court to dismiss on grounds of untimely trial. After the review hearing and variance, the State resisted and the court ordered its denial of motion. Fischer appealed that decision to this Supreme Court in No. 20050437. This Court's finding was that the lower courts order was not appealable under N.D.C.C. §29-28-06 but that it was reviewable from entry of the final judgment under N.D.R.App.P., Rule 35(b)(2). See (R.A. #67, App. p. 26).

Fischer went to trial on this case at bar on February 22 and 23 of 2006. Prior to the commencement of trial, Fischer made a motion in limine requiring the State to show ownership of the farm property by the complainant where it come out that he was in fact not the owner, but a relative of the estate holding ownership. The State moved to dismiss Count IV, Criminal Trespass and it was so ordered. See (R.A. #78). Fischer was found guilty by a jury of 12 on the remaining counts. See (R.A. #77). Fischer was sentenced on March 3, 2006 to the Department of Corrections and Rehabilitation for a period of twenty (20) years with eleven (11) years

suspended for a period of five (5) years. See Criminal Judgment (R.A. #85, App. pp. 27-31). Fischer has appealed all elements and actions contained in the conviction and sentencing of the present case at bar. See (R.A. #98, App. p. 32).

STATEMENT OF JURISDICTION

In the present case, the district court had jurisdiction under N.D. Const. art VI, §8 and N.D.C.C. §27-05-06(1). This Court has jurisdiction under N.D. Const. art. VI, §6 and N.D.C.C. §29-28-06(1)(2). The appeal is timely under N.D.R.Crim.P., Rule 37(b) and under N.D.R.App.P., Rule 4(b)(1). This Court has de novo review of the issues presented, as some of the issues are questions of law.

LAW & ARGUMENT

~~I. Whether Fischer received "Effective Assistance" of counsel to procure adversarial testing.~~

- a. Whether Fischer received "Ineffective Assistance" of counsel, obstructing his Due Process Rights to procure a fair trial by jury.

The Sixth Amendment of the U.S. Constitution guarantees a criminal defendant the right to effective assistance of counsel, made applicable to the States by the Fourteenth Amendment and Article I §12 of the N.D. Constitution. Sambursky v. State, 2006 ND 223, ¶13, 723 N.W.2d 524; Garcia v. State, 2004 ND 81, ¶5, 678 N.W.2d 568.

"To establish ineffective assistance of counsel, a party must prove (1) its counsel's performance was deficient such that it fell below an objective standard of reasonableness; and, (2) counsel's deficient performance prejudiced the

defendant." State v. Klein, 2006 ND 37, ¶2, 711 N.W.2d 606 (citing Klose v. State, 2005 ND 192, ¶9, 705 N.W.2d 809).

"This Court prefers in an effective assistance of counsel claim be made in an application for post-conviction relief so that an evidentiary record can be made that will allow scrutiny of the reasons underlying counsel's' conduct."

Id. (citing State v. Causer, 2004 ND 75, ¶19, 678 N.W.2d 552).

"Nevertheless, this Court will, on direct appeal, examine the entire record to determine if assistance of counsel was plainly defective." Id. "Assistance of counsel is plainly defective when the record affirmatively shows ineffectiveness of constitutional dimensions or the defendant points to some evidence in the record to support the claim." Id. Fischer maintains that a simple glance through the record shows plainly that there was limited to no representation and that in accordance with the "Strickland" two prong test, the record as it is available will show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defendant, but for counsel's ineffectiveness, the result of the case would have been different. Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068 (1984). To show that the result of the case likely would have been different, the error must be such that there is "a probability sufficient to undermine confidence in the outcome." Id.

The record will show that as early as December 8, 2004 and again on January 4, 2005, under the representation of

Bolinske, Fischer had been making attempts to proceed through the process toward trial in his own motions and petitions. See (R.A. #8 & 15, App. pp. 15-16 [second motion]). Fischer's motions went largely unanswered by the court. See (App. p. 35, lines 14-18). Defendant Fischer, by having established his concerns over lack of any communication with counsel and giving Bolinske a second opportunity between December 8 and January 4 to continue representation by making contact, shows it had become clear that if Bolinske was too busy to accomodate an additional case then he should not have accepted another case to his work load.

Fisher felt that the depth of this criminal proceeding reached much further than a hallway introduction while the court awaited in the case of Bolinske, or an introduction at the defense table during the proceedings in the case of Ms. Schmidt.

"Critical stages are those points in a criminal proceeding during which an attorney's presence is necessary to ensure the defendants right to a fair trial." "The period from arraignment to trial is perhaps the most critical period of the proceedings during which the defendant requires the guiding hand of counsel." Powell v. Alabama, 287 U.S. 45, 57, 69 (1932).

Fischer believes that pursuing a post-conviction hearing is for the most part unnecessary regarding Bolinske, as the record is already established and the only additional information that could be produced is the written correspondence

returned to Fischer apologizing for being so busy and the empty promises of having more time later. An attorney's overburdened schedule becomes a shared burden and therefore falls below an objective standard of reasonableness, ultimately prejudicing the defendant as the recipient of the results of such an overtaxed schedule.

In the matter of appointed counsel Susan Schmidt, again there is no further record to be established as defendant met her at the defense table for his bond review hearing on January 24, 2005. She appeared for his February 14, 2005 Preliminary Hearing and met with the defendant one time at the jail sometime between the hearings with a plea disposition for case No. 04-K-1160 only, dated February 10, 2005. See (App. p. 34). Ms. Schmidt was standing firmly that there was no reason to go to trial because State's Attorney Allen Kopyy assured her that the State had a solid case against Fischer in both actions (04-K-1160 & 04-K-1344). Hence, the follow up of Schmidt's motion to withdraw, citing "Fundamental differences in how we view the evidence in this matter and in developing a strategy regarding how to proceed" See (App. p. 18 §2).

This Court must keep in mind that Fischer appeared before a jury on 04-K-1160 in November of 2005, representing himself without the benefit of experience as learned counsel and was acquitted. This therein shows that counsel's representation on the part of Ms. Schmidt fell below a reasonable standard of expectation and that by following her recommendation the

outcome would have been much different. The defendant was being coerced through his appointed attorney into accepting a plea agreement based on the opinion of the State's view of their case, and that was a serious prejudice to defendant.

Additionally, Schmidt was appointed without request by the defendant and to the contrary against Fischer's written requests. After Schmidt's motions to withdraw, the court assigned yet another attorney, Thomas A. Glass, without being requested. See (R.A. #31). Meanwhile, four and half months had passed before Fischer had been informed by the court that his submissions would not be considered except through counsel. See (App. p. 35, lines 14-18). Fischer had been incarcerated since his arrest, with an elevated bond and was beginning to feel beat down and sumissive. Glass gave Fischer time and an ear to fully hear the events of the arrest and all leading up to it. Fischer shared his disappointment about past counsel with Glass and his intent to go before the jury on both case numbers.

For an additional five months, Glass was generous with his time, but lacked in his efforts. Glass failed to properly schedule a dispositional hearing. See (R.A. #48). And, Glass made the first of two requests for rescheduling or postponement. See (App. p. 19). Fischer was under the impression that Glass was going to accompany him to the suppression hearing and if necessary to the trials. Two days prior to the September Suppression of Evidence Hearing, Glass came to the jail to meet with Fischer. The topic of

the meeting was that we were running out of time and should consider entering a plea agreement. At this Fischer made demands of Glass to produce his notes, questions, supporting case law for suppression issues and anything else in the way of investigatory questioning of Fischer's list of witnesses that Glass was supposed to have been working on for the last five months. See (App. p. 37, line 4 ~~to~~ line 19). The only thing Glass could produce was the transcripts from depositions of the State's witnesses.

"Legal Malpractice," consists of failure of an attorney to use such skill prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in performance of tasks which they undertake. Martinson Mfg. Co. Inc. v. Seery, 351 N.W.2d 772 (Iowa 1984).

Fischer, for nine months, was unable to make bond and pursue elements or research materials of law or even make contact with witnesses because of security restrictions on inmates. He was supplied with the second of three attorneys that he did not ask for only to find he was still at square one. Fischer had been pacified and makes claim that there is no need for a post-conviction hearing.

Fischer made demands to secure his case files from Glass understanding one thing: that the "Duties, professional and actionable, owed to the client by attorney acting as advocate and advisor are broader than obligation of reasonable investigation." Friedman v. Dozore, 312 N.W.2d 585, 412 (Mich. 1981). In the end Glass had not been preparing for

a defense but simply pacifying the defendant by holding him incommunicado. See (App. p. 38, li. 1-3).

The U.S. Supreme Court has considered Sixth Amendment claims based on actual or constructive denial of assistance of counsel altogether, as well as claims based on state interference with the ability to render effective assistance to the accused. See United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, (1984).

Fischer maintains that the State's appointment of three attorneys, who's only intention was to obtain a plea of guilty by recommendation of the State, seriously prejudiced his due process rights and that this is undeniable as two attorneys were accepted under protest. The record shows there was no intention for any of these attorneys to take the defendant's cases to the triers of facts. This is what Fischer made clear from the beginning with his claims of not guilty. Fischer also maintains that by association the court's officers and the State's officers working "hand in hand" influence and accomodate each other and this prejudice to the defendant may or may not have occurred inadvertantly, but occurred just the same. The defendant was prejudiced by ineffective assistance of counsel and denied due process.

Counsel, however can also deprive a defendant of the right to effective assistance simply by failing to render "adequate legal assistance." See Cuyler v. Sullivan, 446 U.S: 335, 344, 100 S.Ct. 1708, 1716 (1980).

Counsel has a duty to know the law and to assert the

rules of law so as to "render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2054, 2065 (1984) (citing Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55 (1932)).

This is exactly what Glass did to the defendant in using reference to an outdated and unanswered motion from two attorneys prior and nine months earlier. See (App. p. 36, li. 4-19). The record will show that only two motions had been submitted by Fischer regarding attorney withdrawal, one on December 8, 2004 and one on January 6, 2005, both in reference to Bolinske, both unanswered. See (App. p. 35, li. 14-18). He deprived Fischer effective assistance by making a motion orally and outside of the presence of the defendant of some matter that was not requested of, nor discussed with the defendant. See (App. 36, li. 4-8, & App. p. 39, li. 4-5). Fischer had only demanded of Glass to produce the fruits of his labors over the past five months. See (App. p. 37, li. 4-19).

Constitutional right of criminal defendant to counsel includes right to effective counsel and ineffective, incompetent, or inadequate representation is equivalent to having no counsel at all. State v. Micko, 393 N.W.2d 741 (N.D. 1986).

"[U]ltimate focus of judicial inquiry is on fundamental fairness." Id.

"Ineffectiveness of counsel is a mixed question of law and fact and we have held such questions are fully reviewable

by this Court without the restraints of Rule 52(a) N.R.Civ.P." State v. Foster, 1997 ND 8, ¶18, 560 N.W.2d 194 (citing State v. Skaro, 474 N.W.2d 711, 716-17 (N.D. 1991)).

Fischer has maintained from the beginning a plea of not guilty. The State has maintained that the defendant was caught with the "smoking gun." Fischer has quipped that there are underlying circumstances that need to be brought forward that would prove he was not the guilty party. Fischer has relied on the court system, has tried to work with the elements of the system and the representatives of both the prosecution and defense all for the ultimate goal of bringing the facts forward. He has found no relief.

"Prejudice is presumed where counsel entirely fails to subject the prosecutions case to meaningful adversarial testing." U.S. v. Cronin, 466 U.S. 648, 659, 104 S.Ct. 2039, 2047 (1984).

The record affirmatively shows ineffectiveness of constitutional dimensions, and evidence herein supports the defendant's claims of prejudice. Whereas, this Court must reverse and remand for new trial.

LAW & ARGUMENT

II. Whether Fischer was forced to choose between ineffective assistance or self-representation and was the waiver valid?

ā. Whether Fischer was forced to choose between unwilling counsel and self-representation as his only apparent means to secure trial.

"If defendant must choose between the right to self-representation and poor counsel the choice may be involuntary."

See Patterson v. Illinois, 487 U.S. 285, 292 n.4, 108 S.Ct. 2389, 2394 n.4 (1988). (Waiver must be vountary). See e.g. Crandell v. Bunnell, 25 F.3d 754, 755 (9th Cir. 1994) (Involuntary waiver when defendant was given choice between self representation and counsel). U.S. v. Woodard, 291 F.3d 95, 102, 109, n.5 (1st Cir. 2002) (Chose between competent counsel and pro se with standby). U.S. v. Silkwood, 893 F.2d 245, 248-49 (10th Cir. 1989) (Involuntary waiver, force to choose between poor counsel and pro se).

Throughout Fischer's pretrial proceedings, the State had purposely misled the court into believing that Fischer was requesting reassignments of appointed counsel and then motioning to have them removed because he wasn't happy with the way things were going. This Court may recall the State's testimony at oral argument on Fischer's appeal of "Order Denying Motion For Extension Of Time To File Notice Of Appeal" in Supreme Court No. 20060153, one more example of the many adversities Fischer has endured in this process.

"Involuntary waiver when trial court impermissibly forced defendant to choose between self representation and poor counsel by attempting to persuade defendant to appoined counsel's adequacy instead of conducting penetrating inquiry into decision to proceed pro se." Id. Silkwood, 893 F.2d at 248-49.

Within the record of the representation hearing the defendant, at no time gives an affirmative answer to the question of representation, he only expresses disapointment

in the quality of representation that he was given. See (App. p. 37, li. 4-19). It is the court that applies the pressure of persuasion in lieu of an undeniable inquiry. See (App. p. 36, li. 8-16, & p. 37, li. 20-23, & p. 38, li. 4-19).

The right to self representation is not amenable to harmless error. State v. Harmon, 1997 ND 233 ¶16, 575 N.W.2d 635, 640. Defendant may waive constitutional rights, as long as waiver is made voluntarily, knowingly and intelligently. State v. Wilson, 488 N.W.2d 618, 620 (N.D. 1992) (Waiver of Constitutional rights must not be inferred but must be clearly and intelligently made).

In "State v. Fischer," the district court makes inquiry (1) "[D]o, you want to represent yourself. . .?" See (App. p. 36, li. 23-23). (2) "Do you want to represent yourself or you want to go hire an attorney or what?" See (App. p. 37, li. 2-3). Fischer tells the court that he is in no position to hire an attorney and goes on to explain that he wanted to know where his defense is at in terms of progress and combative support. Inquiry (3) "[Y]ou actually feel competent to represent yourself in this matter?" See (App. p. 37, li. 24-25). Fischer's responds "No, I don't, and I'm not opposed to having Mr. Glass, but I don't feel -- I feel like I've been held incommunicado." See (App. p. 38, li. 1-3).

Waiver invalid because court did not question defendant to ensure that his choice to appear without counsel was made

with "eyes open" and because defendant never clearly declared to sentencing judge that he wanted to represent himself. Hall v. Moore, 253 F.3d 624, 628 (11th Cir. 2001). Courts are also hesitant to imply a waiver of counsel from a defendant's impulsive request to proceed pro se. See e.g. Reese v. Nix, 942 F.2d 1276, 1281 (8th Cir. 1991) Valid waiver not implied when right to self representation was not "Cleary and unequivocally" asserted and defendant impulsively stated he did not want counsel after motion for substitute counsel was denied. Jackson v. Ylst, 921 F.2d 882, 888 (9th Cir. 1990). Fischer's case is the same, the motion referred to above was old and outdated and unresponded to from nine months earlier referring to another attorney.

LAW & ARGUMENT

- III. Whether Fischer's Due Process rights were violated by not having access to the courts.
 - a. Whether Fischer's Due Process rights were violated by his inability to access legal materials and lengthy incarceration attributed to excessive bail bond required by the court.
 - b. Whether appointment of standby counsel fell short of acceptable access.

The Sixth Amendment recognizes the right to "effective" assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. Because a person happens to be a lawyer, is present at trial alongside the accused, however is not enough to satisfy the

Constitutional command.

For that reason, the U.S. Supreme Court has recognized that "the right to counsel is the right to effective assistance of counsel." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984).

"If the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards or performance by attorneys who are representing defendants in criminal cases in their court." McMann v. Richardson, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970).

Fischer will now argue that the record will show that with the exception of a motion in limine to keep out of trial, the defendant's past criminal history, that concludes attorney Glass's involvement with this case and from that point on the attorney/standby counsel became as useful as a frame around a picture. His presence from that point on became a mere formality of the defendant's rights.

The Constitutional guarantee of right to counsel "is designed to provide for the fair administration of adversarial system of criminal justice by equalizing the imbalance between government's power and average defendants lack of professional legal skills." State v. Newsom, 414 N.W.2d 354, 357 (Iowa 1987). If Defendant invokes (pro se) right to self representation, the court may appoint advisory standby counsel to assist the defendant with basic courtroom mechanics. See

McKaskle v. Wiggins, 465 U.S. 168, 183-84, 104 S.Ct. 944, 953-54 (1984); see also Faretta v. California, 422 U.S. 806, 835, n.46, 95 S.Ct. 2525, 2540, n.46 (1975). See e.g. U.S. v. Irosere, 228 F.3d 816, 828, n.2 (7th Cir. 2000) (When a criminal defendant decides to proceed pro se, it is generally advisable for the district court to appoint "shadow counsel" to be available to assist the defendant if needed).

In Wiggins, the Supreme Court outlined the scope of permissible trial participation by standby counsel. Id. 465 U.S. at 184. See e.g. U.S. v. Sandles, 23 F.3d 1121, 1127 (7th Cir. 1994). Defendant did not properly waive counsel because appointment of standby counsel "cannot function as a substitute for detailed inquiry into a defendant's decision to waive his constitutional right to counsel. Id. Wiggins, at 175-185.

Peppered throughout the record in motions and verbatim at Bond Hearings, in camera discussions and the Representation Hearing, from as early as December 8, 2004, Fischer had been requesting access to legal materials or other means to accommodate such requests.

The Bounds Court recognized that "[i]f a lawyer must perform such preliminary research, it is no less vital for a pro se prisoner." Bounds v. Smith, 430 U.S. 817, 825-26, 97 S.Ct. 1491, 1497 (1977). Thus, legal research was deemed to be an integral part of a defendant's trial preparation and a prerequisite to meaningful court access.

In State v. Simon, 297 N.W.2d 206, 209 (Iowa 1980) the

court noted the language in Bounds, in approving "assistance from persons trained in the law" clearly allows for research by a court appointed lawyer. The key to constitutional sufficiency is not which of the alternatives is used, but whether the one chosen is "adequate." Bounds, at 828, 97 S.Ct. 1491, 1499.

In the present case, Fischer notes that the appearance of back-up counsel, standby counsel, shadow counsel and legal advisor, as Glass was adamantly referred to as by the court, was only and solely for the appearance. Glass in his capacity as the above named could much be compared to a well marked door to an empty room.

In Simon, the court affirming in finding no error in the trial courts denial of the defendant's request to access to a law library because a court appointed lawyer was made accessible to him. The assistance of the lawyer is shown by the court that because he drafted some motions for the defendant and took some depositions, and in light of the courts order that defendant could receive "any legal materials he wishes" through his attorney was a degree of acceptability. Simon, at 210.

In the present case at bar, the record shows that the court told Glass "[T]hat his role was going to be to give some advice, but you are the one who is going to have to be asking the questions . . ." See (App. p. 40, li. 4-11). There was no further involvement from Glass and the record will show no further involvement other than the defendant's shadow.

Glass dropped off some legal materials at the jail three days prior to the suppression hearing of October 18, 2005 so that Fischer could try to put together an argument in a motion to dismiss/suppress. This should be considered by this Court because as in Simon, this defendant recieved some legal research material on search and seizure of evidence, but he received it three days prior to the evidentiary hearing. That short time and the fact that Fischer was forced to rely on a motion to suppress that was not his for that hearing, this defendant would suggest that a very short notice for an experienced attorney, and way too short of time for a pro se defendant. Such attorney would be granted the courtesy that Fischer was denied as a pro se defendant.

Therefore, this Court should see that the defendant suffered prejudice in his due process rights, and reverse and remand this case for new trial.

LAW & ARGUMENT

IV. Whether the State is deemed to have brought this case to trial in timely fashion.

a. Whether Fischer's Due Process rights were violated because the State did not bring this case to trial in a timely fashion.

Due Process requires that a criminal defendant have access to a reasonable bail inailable issues. Bail becomes excessive when a court sets it higher than reasonably necessary either to ensure a defendant's appearance at trial, or to promote other compelling interests. "Excessive Bail Clause integral to ordered liberty and binding on the States through 14th

Amendment." Pilkinton v. Circuit Court of Howell County, 324 F.2d 45, 46 (8th Cir. 1963); see also Sistruuk v. Lyons, 646 F.2d 64, 71 (3rd Cir. 1981); Meechaicum v. Fountain, 696 F.2d 790, 791 (10th Cir. 1983) (per curium).

The "[a]mount of bail pending trial should be determined solely in reference to purpose of bail namely to assure appearance of accused." Rohl v. State, 279 N.W.2d 731 (Wis. 1979).

In the present case at bar, "State v. Fischer," bail was set at his November 30, 2004 arraignment for \$50,000 cash. See (R.A. #2). The State, in requesting such an excessive bond, cited the fact that arrest of this charge occurred at the time Fischer was out on bond from the October charge, No. 04-K-1160, bond of \$500 cash, and argued that Fischer committed a crime against bond conditions already in place. See (App. p. 42. li. 14-21).

Fischer was able to argue that amount lowered on December 20, 2004, to \$20,000 cash or surety which is far more in line with the crime. However, by that time the punitive damage was done, in that Fischer's Painting and Drywall business of 12 years remained at the place of his arrest ("shop") and in the hands of the estate in control of that property. Contracts went unfinished, accounts went unpaid, tools, vehicles and equipment became scattered and for the most part unaccounted for. Therein lies the prejudicial damage of "Excessive Bail," in this case and to this defendant.

Bail is not excessive unless it is more than the amount

reasonably necessary to guarantee the defendant's appearance for trial. State v. Whitecomb, 413 N.W.2d 839, (Minn.App. 1987, 1987). Excessive bail is prohibited by state and federal constitutions. U.S.C.A. Const. Amend. 8, N.D. Const. art. I § 9. State v. Seaton, 103 N.W.2d 833 (Neb. 1960).

The crippling effect of the excessive bail, even though it was in place for a fairly short time, hit its mark. When bail was reduced and held at the reduced amount, it remained, because of the devastation to Fischer's assets and therefore his ability to pay, out of his reach, and now making the lowered amount excessive.

See 18 U.S.C. § 3142(b)&(c) (2000). Courts that have considered the issue have held that congressional silence on the standard of evidence necessary to prove risk of flight need only be proven by preponderance of the evidence. U.S. v. Friedman, 837 F.2d 48, 49-50 (2nd Cir. 1988) Government must prove risk by preponderance of evidence. In assessing risk of flight, courts consider a variety of factors including the defendant's ties to the community, past criminal history and availability of assets.

Fischer established at the January 25, 2005 bond review and again at the November 22, 2005 bond hearing before the court his inability to pay as a result of his year long incarceration. See (App. p. 42, li. 11-13). Fischer also established that he had life long ties to the community and family ties as well, also that he know the State's attorney his whole life long. See (App. p. 43, li. 7-17). These points

were brushed aside by the court and again referred back to the punitive element of reasoning, therefore depriving Fischer of life, liberty, and property. (App. p. 43, li. 18-25)

Due Process requires that statutes imposing pretrial detention serve a compelling government interest and not impose punishment before adjudication of guilt. See Bell v. Wolfish, 441 U.S. 520, 537, n.16, 99 S.Ct. 1861, 1872, n.16 (1979). "Due Process" requires that a pretrial detainee not be punished, whether a restriction or condition is reasonably related to a legitimate government objective. Id. at 538, 539. The duration of detention may be held to violate due process if the detention continues long enough to constitute punishment. See United States v. Salerno, 481 U.S. 739, 747, n.4, 107 S.Ct. 2095, 2102, n.4 (1987); See e.g. U.S. v. Theron, 782 F.2d 1510, 1516-17 (10th Cir. 1986) (Due process violated by 4 month detention because defendant sought immediate trial but co-defendants delayed trial).

Fischer repeatedly expressed wishes to go forth in a timely fashion by motions of December, 2004, and again in motions and bond hearings of November, 2005.

The record shows without doubt Fischer's financial inability to raise bail in January, 2005. See (App. p. 44, li. 4-8). This inability had not changed by November, 2005. See (App. p. 42, li. 1-13). And, that the court maintained the bond amount for punitive purposes from December 20, 2004 until trial, three months after the November, 2005 Bond Review Hearing for punitive reasons. See (App. p. 45, li. 1-8,

& App. p. 42, li. 14-20). Thus violating Fischer's due process rights rendering a reversal of conviction appropriate.

Second: Speedy Trial.

In North Dakota, for the purpose to avoid an accused "oppressive pretrial incarceration," the legislation has established N.D.C.C. 29-01-06 which provides in part:

Rights of defendant. In all criminal prosecutions the party accused has the right:

5. To a speedy and public trial, and by an impartial jury of the county in which the offense is alleged to have been committed or is triable, but subject to the rights of the state to have a change of the place of trial for any of the causes for which the party accused may obtain the same.

Fischer will address both the right to a speedy trial as well as the right to an impartial jury. Under the Speedy Trial Act of 1974, See 18 U.S.C. § 3161-3174 (2000), specifying time limits between arrest, indictment and trial, and permissible delays within each period. Fed.R.Crim.P., Rule 48(b) authorizing courts to dismiss indictments and N.D.R.Crim.P., Rule 48(b) authorizing courts to dismiss complaints/informations for governments unnecessary pre-indictment or post-indictment delay, and Fed.R.Crim.P., Rule 50(b) requiring district courts to prepare plans for prompt disposition of cases.

Fischer makes claim that the State in this case, has manipulated his due process rights of access to the courts, or in the least allowed the chain of events to occur in the failure to bring him to trial in a reasonable fashion by the string of court appointed attorneys who with the exception

of Bolinske (who was just simply too busy) tried their undeniable best to coerce Fischer to enter a plea agreement.

Due process requires that a pro se defendant have access to legal resouces. See Bounds v. Smith, 430 U.S. 817, 828, 99 S.Ct. 1491, 1498 (1977). "[T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." See e.g. U.S. v. Kind, 194 F.3d 900, 905 (8th Cir. 1999) Defendant has due process right of access to legal resources. Moreover, if the state interferes with a defendants self representation, due process may be violated. See Tate v. Wood, 963 F.2d 20, 26 (2nd Cir. 1992).

In the present case at bar, the record is unclear as to who is responsible for the assignment of two additional attorneys, as there is no recorded requests for such. These assignments most surely were initiated by either the state or the court. Ultimately, the two offices working together on scheduling docket would be accountable, as the record is clear that it was not Fischer. Fischer, however, after several requests for access to the courts, via legal materials, understoed the assignments as the State's way of addressing that very issue, gave each of them ample time to review the files. It was only be their reluctance to do so that Fischer asked each to step down with the exception of Glass, who did so on his own authority. This Court must recall earlier

supporting testimony of September hearing regarding representation. Fischer was not opposed to attorney Glass's representation, however was prepared to motion for him to withdraw if he was not prepared to go to trial. See (App. p. 38, li. 1-3), (App. p. 37, li. 5-7)

The record shows repeatedly the court attempting to persuade Fischer to follow appointed attorney's advice because the State was confident in his case. See (App. p. 47, li. 24-25). Also, that after the fact of self representation, the State blamed Fischer for the length of delay to bring this case to trial and the court followed suit. See (App. p. 46, li. 1-25). The reality of this case is that by his own hand the defendant has had less time to prepare than a trained, learned, and experienced attorney of the Bar.

In as much, Fischer filed his Motion and Order For Dismissal on November 17, 2005. The State resisted and the court denied, under N.D.R.Crim.P., Rule 48(b). Fischer Appealed that order and now offers it to this Supreme Court for review. See (App. pp. 48-60). Further, this Court must reverse under the grounds of Due Process violation.

LAW & ARGUMENT

- V. Whether Fischer was afforded an impartial jury representing a fair cross section of the community in which he was tried.
 - a. Whether Fischer was tried by a jury of his peers that did not represent a fair cross section of the community of which the crime was alleged and in which he was tried: alleged and in which he was tried.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ." (emphasis added).

N.D.C.C. 29-01-06 provides in part:

Rights of Defendant. In all criminal prosecutions the party accused has the right:

5. To a speedy and public trial, and by an impartial jury of the county in which the offense is alleged to have been committed or is triable, . . . (emphasis added).

The J.S.S.A. allows a defendant challenging the jury selection process to inspect and copy relevant records and papers used by the jury commission when such records are not published or otherwise available. See 28 U.S.C.A. § 1867(d) and (f). See e.g. U.S. v. Curry, 993 F.2d 43, 44 (4th Cir. 1993) Rather, if after reviewing the jury list on remand, the defendant can demonstrate a prejudicial violation of the J.S.S.A., the district court shall grant a motion for a new trial pursuant to 28 U.S.C.A. § 1867 (a).

In the present case at bar, Fischer requested of the State ten day prior to trial, the jury pool questionnaires. The court granted the request and the State produced them two days prior to trial. After thorough examination, Fischer began to question bias and the morning of trial in judges chambers he awaited opportunity to motion a challenge to the entire venire. See (App. p. 61, li. 22-25).

"Proper occasion for determining whether or not it is

impossible to select a fair and impartial jury is during voir dire examination." N.D.R.Crim.P., Rule 21. State v. Engel, 289 N.W.2d 204, head note 3, 206 (N.D. 1980). Thus Fischer awaited re-assembly in chambers. During voir dire of the State, counsel opened with an adamant concern over possible connection between two sets of parties with the same last name and whether they would be related. See (App. p. 62, li. 1-12). He continues to establish acquaintances. See (App. p. 62, li. 13-18). He then explains why, "The reason I ask the question is, let's say for example, if I was on the same jury as my boss, he would kind of have an opinion advantage over me because he's my boss. So as jurors, however, I think it's important that everybody has the same footing, and that's why I kind of asked the question. I'm concerned about relationship, . . ." See (App. p. 62, li. 19-25).

Parties, an employee of a party, including a corporate party, is ineligible to serve on a jury involving its employer, and the challenge to such potential jurors may be made by either party to the litigation. Proof, when challenge to a potential juror or venire is made on the basis of employment of a potential juror by a party to the litigation, it is not necessary that the challenging party show that the potential juror is biased or cannot be impartial. Kusek v. Burlington Northern Railroad Company, 552 N.W.2d 778 (Neb.App. 1996). Members of a mutual insurance company are disqualified from serving as jurors in an action to which it is a party or in which it is interested. Fedorinehik v. Stewart, 286 N.W.

673 (Mich. 1939).

Fischer makes the claim that his jury was almost incapable of being impartial by the information provided in juror applications on voir dire. The information disclosing the high percentage of State and County employment, 22% and an additional 13% of the jury pool earned government income by their spouses. Even though the spouses were not sitting on the jury pool, their income directly reflected the jury pools standard of living. That would translate to over one third of the community's population would be employed by the State government. The opposing counsel for the prosecution concedes that "My client is the State of North Dakota." See (App. p. 63, li. 6).

"Government employment, by itself, does not disqualify a person from serving as a juror, but a government employee, like others, may be challenged for actual bias." City of Bismarck v. Holden, 522 N.W.2d 471, 473 (N.D. 1994) (citing Frazier v. United States, 335 U.S. 497, 510-11, 69 S.Ct. 201, 208 (1948)).

Fischer does not dispute that the potential exists for venire to contain some element of government employment in a criminal trial. What Fischer does dispute is that the immediate income to the head family members of a particular jury pool amount to 32% of a fair cross section of any community. Further, records from voir dire transcripts, pages 15 to 22 show that 16% of that pool know officers from the prosecutors office, 6% work with prosecutors office, 13% are

directly related to law enforcement in the capacity of immediate family, 3% retired from law enforcement, 29% are previous jurors, 55% knew multiple fellow veniremen, 19% know 3 or more fellow veniremen, 2% are related to each other through marriage and at least 3 of the jury pool know groups of the fellow veniremen from church.

Therein lies the bias or potential for bias even after a question of such by the court.

The Sixth Amendment to the United States Constitution, applied to the States through the Fourteenth Amendment, guarantees an accused the right to a trial by an impartial jury. Holden, 522 N.W.2d 471, 473 (citing State v. McLain, 301 N.W.2d 616, 620 (N.D. 1981); Murphy v. Florida, 421 U.S. 794, 799, 95 S.Ct. 2031, 2036 (1975)).

Regarding Cross Section, the Court in State v. Robles, 535 N.W.2d 729, see headnote 6 (N.D. 1995) In fair cross section challenge to jury venires, "distinctive group" is group whose members share community of interests and have shared attribute that defines or limits their membership. Id.

In the present case at bar, the mere acquaintance and/or comradeship between such numbers made it unavoidable to reach a cross section and must be addressed as if it were a racial bias if by nothing more than indifference, and bias must be inferred.

Fischer attempted to make challenge in judge's chambers first thing before trial. See (App. p. 64, li. 15-25). An "oral motion made during voir dire is sufficient to place

before trial court, and preserve for later appellate review." See e.g. People v. Hubbard, 552 N.W.2d 493 (Mich.App. 1996). Fischer attempted again during a second meeting in judges chambers during jury selection. The court asked Fischer if he had any challenges for cause to which Fischer responded, "I do, Your Honor." The court asked, "Which ones are those?" Fischer responded, "I have several." See (App. p. 64, li. 15-19).

Now to Fischer's limited examination into the mechanics of law he attempted to motion a challenge for cause and told his legal advisor why. Mr. Glass interrupted and swayed the defendant away from his intended purpose and the court joined in. See (App. p. 64, li. 1-24).

Fischer understands that he can't have the perfect pool of jurors to choose from. However, after examining applications and voir dire, the peremptory challenges the court alluded to would not suffice to equal out the potential for bias in the group offered. After exhausting six and one alternate peremptory challenges, the sitting jury still contained a false representation of a fair cross section. Thus prejudicing the defendant by (1) employment or income from State government, (2) association with law enforcement, and (3) association with fellow veniremen. All this leaving the potential of "opinion advantage" even among the most sincere of jury panel.

Indifference, every human being has an impact on another and this venire would fall right in line with influence by association or as the State put it, "opinion advantage."

Peremptory Challenges: generally See Ross v. Oklahoma, 487 U.S. 81, 85-88, 108 S.Ct. 2273, 2276-78 (1988). The Supreme Court held that the defendant's Sixth Amendment rights to an impartial jury was not violated when he was required to use a peremptory challenge to excuse a juror whom the state trial court had erroneously declined to excuse for cause because the defendant failed to show that the jurors who ultimately convicted him were partial.

The presence of even one juror who is not impartial violates a defendant's right to trial by an impartial jury. Ross, at 85, 86, 108 S.Ct. 2273, 2276-77.

This group of potential jurors represents a cognizable group under "Batson," capable of being recognized, especially capable of being identified as a group because of common characterization or interests that cannot be represented by others, namely a fair cross section of the community in which the trial was held. See Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1988).

Impairment of a statutory right to peremptory challenges may be grounds for reversal.

Erroneous refusal to strike jurors for cause arguably deprives defendant statutory right to peremptory challenges under Fed.R.Crim.P. 24(b). U.S. v. Beasley, 48 F.3d 262, 268 n.5 (7th Cir. 1995).

Fischer feels the court was persuading him to use peremptory challenge on potential juror Beverly Krous. See (App. p. 65, li. 13-25, p. 66, li. 18-25, p. 67, li. 1-11).

A defendant should not be compelled to use his peremptory challenges on prospective jurors who should have been excused for cause.

Prejudice has been implied and the record supports the potential for bias. Therefore, this Court must reverse and remand for a new trial.

LAW & ARGUMENT

VI. Whether Fischer's rights were violated by illegal search and seizure in violation of the 4th Amendment.

a. Whether the evidence offered was taken in violation of 4th Amendment rights and was it sufficient to convict.

Questions of law are fully reviewable on appeal and whether a finding of fact meets a legal standard is a question of law. A Fourth Amendment "seizure" occurs only when an officer by means of physical force or show of authority, has in some way restrained the liberty of a citizen. U.S.C.A. Const. Amend. 4, N.D. Const. art. I § 8. It is axiomatic that evidence will not be admissible in a criminal trial when it is seized by means of an unlawful arrest. See I.N.S. v. Lopez-Mendoza, 468 U.S. 1032, 104 S.Ct. 3479 (1984); State v. Wetsh, 304 N.W.2d 67 (N.D. 1981). The exclusionary rule announced by the United States Supreme Court in Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961), requires the suppression of any evidence derived as a result of a violation of the Fourth Amendments protections against unreasonable searches and seizures. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407 (1963); State v. Handtmann, 437 N.W.2d 830 (N.D.

1989).

In the present case at bar, the (then appointed attorney Thomas J. Glass) defense submitted a Motion to Suppress/Dismiss dated May 26, 2005, declaring Fischer having not been served a warrant of any kind and obtaining permission to search from an unauthorized complainant. See (R.A. #41). In the pre-trial conference the State withdrew the Criminal Trespass charges because they had nothing to substantiate their claim on permission to search, authority or ownership of property. See (R.A. #54) also see (Trial Tr. p.2, li. 15, through p. 6, li. 23). Therefore, this making the evidence offered "Fruit of the poisonous tree." E.g. Nordon v. United States, 308 U.S. 338, 60 S.Ct. 266 (1939).

The court's Order, Dismissing, claims "His residence was searched with the consent of a co-occupant, but of greater significance is the fact that the State seized no evidence that it intends to offer at trial, hence there is nothing to suppress." The court made this ruling from his previous case, No. 04-K-1160 information regarding a partial marijuana cigarette that the defendant was not charged with. Thus, fusing the two cases together under one ruling violating Fischer's Due Process. The court also went on to declare a matter of law a question of fact for the jury. In the ruling the court established "unlawful search and seizure" and evidence as "Fruit of the poisonous tree."

During the trial/acquittal of case No. 04-K-1160, common access was clearly established. Thus, depriving Fischer of

reasonable expectation of privacy. Notwithstanding the fact that the first case resulted in an eviction from the property and the defendants were still on the property with the oral permission of the Estate Executor who was the authorized Landlord. See (Trial tr. p. 184, li. 12-19).

The house had been vacated on the designated date and time. It was the outbuilding "shop" that contained Fischer's business belongings. The Fischer's, it had been established, had not been back to the property from November 24, 2004 to November 30, 2004. See (Trial tr. p. 186, li. 12 through p. 187, li. 18). The complainant himself said he was keeping a pretty close eye on the activity on the property. See (Trial tr. p. 187, li. 11-13).

The night of the arrest was the first time that the complainant witnessed Fischer on said property and this is clear by his anticipation to involve the law. See (Trial tr. p. 52, li. 1-11).

Federal knock and announce statute, 18 U.S.C.A. § 3109 (2000) requires officers to announce their authority and purpose before entering the premises to execute a warrant regarding the service of warrant (arrest or search).

However, the circumstances that justify the arrest or search warrant do not automatically constitute exigencies that will justify noncompliance with the "knock and announce" statute.

In the present case at bar, the State has established no exigent circumstances for the Sheriff departments intrusion

upon the shop. The complainant informed law enforcement that Fischer was on the property. Bitz assumed there was the manufacture of drugs taking place. There was never an issue established to support this assumption other than Bitz's surmise from the previous arrest.

Exigent circumstances exist where there is a probable cause for a search and seizure and the evidence sought is in imminent danger of destruction. A warrantless search may be conducted to preserve evidence if the police reasonably believe that unless they immediately conduct a warrantless search, the sought evidence is in imminent danger of being removed or destroyed. The D.C. Circuit noted that the gravity of the offense was only one of several factors to be examined in determining the existence of exigent circumstances. See Dorman v. U.S., 435 F.2d 385, 392 (D.C. Cir. 1970) The other factors include; (1) A reasonable belief that suspect is armed. (2) A clear showing of probable cause that suspect committed a crime. (3) A strong belief that suspect is on premises. (4) A likelihood that the suspect will escape . . .

It is established in Richards v. Wisconsin, 520 U.S. 385, 392-94, 117 S.Ct. 1416, 1420-21 (1997) Absolute exception to knock and announce requirement in drug felony cases violates 4th Amendment, officers must show that knocking and announcing would be dangerous, futile or would have prompted destruction of evidence.

In State v. Langseth, 492 N.W.2d 298 (N.D. 1992) this Court stated: We gauge a police officers conduct in detaining

a citizen by the Fourth Amendments "general proscription against unreasonable searches and seizures." Terry v. Ohio, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879 (1968).

Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred. Id. at 19 n.16, 88 S.Ct. at 1879 n.16.

In respect, the trial court correctly ruled that an officer "may not escalate" a consensual encounter into a seizure unless a valid reason arises for doing so. Langseth, at 300.

The officers were called to remove an identified individual from a rental property. Therefore, they were called upon in the capacity of "community caretaker."

In one of this Court's recent decisions, State v. Albaugh, 2007 ND 86, 732 N.W.2d 712, it is stated: The "community caretaker function" which does not constitute a fourth Amendment seizure can be described as citizen-law enforcement encounters totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. State v. Boyd, 2002 ND 203, ¶7, 654 N.W.2d 392. Albaugh, at ¶12.

When considering whether an encounter was properly characterized under the community caretaker function this Court has considered the manner in which the encounter occurred, any orders directed at the citizens, or a demand for a

response. State v. Langseth, 492 N.W.2d 298, 300 (N.D. 1992). "However even a casual encounter can become a seizure if a reasonable person would view the officers actions if done by another private citizen - as threatening and offensive." Boyd, at ¶7 (citing Langseth, at 300). "This may occur through an order, a threat, or a weapon display." Id. (citing Langseth, at 300). Albaugh, at ¶12.

In the present case, officer Bitz describes entry into the shop as "always an element of excitement when you enter a building like that." Where officers entered guns drawn and fixed upon defendants shouting orders. See (Trial tr. p. 70, li. 4-25). thus removing them from the capacity of community caretakers.

Wherein, Fischer's case is in contrast to law enforcements entry in Albaugh. Therefore, all evidence in Fischer's case was obtained illegally and should be excluded. The case must be reversed or dismissed.

CONCLUSION

From all the arguments set forth, Fischer respectfully asks this Court to overturn the conviction and/or reverse and remand with instructions to suppress illegally obtained evidence.

Dated this 15 day of August 2007.



Paul A. Fischer, pro se
J.R.C.C.

2521 Circle Drive
Jamestown, North Dakota

58401

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)
)
 Plaintiff/Appellee,) Supreme Court No. 20060140
)
 vs.) Morton County No. 04-K-1344
)
 Paul A. Fischer,)
)
 Defendant/Appellant.)
 _____)

CERTIFICATE OF NONCOMPLIANCE

FOR NOT PROVIDING AN ELECTRONIC COPY

I, Paul A. Fischer (Appellant) in the above action do hereby certify that there is no electronic copy of the BRIEF OF APPELLANT FISCHER nor of the APPENDIX OF APPELLANT FISCHER in the above entitled matter because Appellant hand typed the brief. This certificate of noncompliance is personally handed to:

Penny Miller,
Clerk of Supreme Court
600 East Boulevard Ave. Dept.180
Bismarck, North Dakota
58505-0530

Aug. 15, 2007



Paul A. Fischer, pro se
J.R.C.C.
2521 Circle Drive
Jamestown, North Dakota

58401

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota,)
) Supreme Court No. 20060140
 Plaintiff/Appellee,)
) Morton County No. 04-K-1344
 vs.)
)
 Paul A. Fischer,)
)
 Defendant/Appellant.)
 _____)

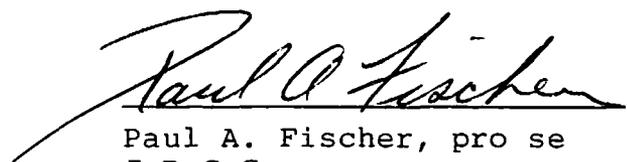
AFFIDAVIT OF SERVICE

I, Paul A. Fischer (Appellant) in the above action do hereby certify that I had my mother, Polly Fischer deliver by hand a true and correct copy of the BRIEF OF APPELLANT FISCHER and APPENDIX TO BRIEF OF APPELLANT FISCHER in the above entitled matter to the following individual:

Brian D. Grossinger,
Assistant State's Attorney
Morton County Courthouse
210 2nd Ave N.W.
Mandan, North Dakota
58554

To the best of affiant's knowledge, information and belief, such address as given above was the actual post office address of the party intended to be so served.

Dated Aug 15, 2007



Paul A. Fischer, pro se
J.R.C.C.
2521 Circle Drive
Jamestown, North Dakota

58401