

20060160

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

DEC 20 2006

State of North Dakota,  
Plaintiff / Appellee,

vs.

Kenneth Loughhead,

Defendant / Appellant.

STATE OF NORTH DAKOTA

Supreme Court Case  
No. 20060160

McHenry County Case  
No. 25-05-K-00230

**APPELLEE'S BRIEF**

Appeal from the Criminal Judgment dated May 18, 2006

McHenry County District Court, Northeast Judicial District

McHenry County, North Dakota

The Honorable John C. McClintock Jr.

Robin L. Thompson Gordon, ND 05035  
McHenry County State's Attorney  
PO Box 329  
Towner, ND 58788-0329  
Phone: 701-537-5682

## TABLE OF CONTENTS

Table of Authorities	ii
Statement of the Issues	1
Statement of the Case	1
Statement of Facts	11
Law and Argument	14
Conclusion	26
Certificate of Service	26

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page No.</u>
<i>Eagleman v. State</i> , 2004 ND 6 ¶6, 673 N.W.2d 241	22
<i>Garcia v. State</i> , 2004 ND 81 ¶5, 678 N.W.2d 568	22
<i>Greywind v. State</i> , 2004 ND 213, 689 N.W.2d 390, 394-395	22 & 23
<i>Lithun v. DuPaul</i> , 447 N.W.2d 297, 300 (N.D. 1989)	16
<i>Miranda v. Arizona</i> , 384 U.S. 436, 445 (1966)	21 & 22
<i>ND Dept. of Transportation v. Michael O. DuPaul</i> , 487 N.W.2d 593, 598 (N.D. 1992)	25
<i>Sabot v. Fargo Women's Health Org.</i> , 500 N.W.2d 889, 894 (N.D. 1993)	20 & 21
<i>Sandbeck v. Rockwell</i> , 524 N.W.2d 846, 851 (N.D. 1994)	15
<i>State v. Bertram</i> , 2006 ND 10 ¶17, 708 N.W.2d 913	21
<i>State v. Clark</i> , 1997 ND 199, ¶ 26, 570 N.W.2d 195	15 & 16
<i>State v. DuPaul</i> , 527 N.W.2d 238, 243-244 (N.D. 1995)	15
<i>State v. Gagnon</i> , 1999 ND 13 ¶9 & 23, 589 N.W.2d 560	15 & 21
<i>State v. Goulet</i> , 1999 ND 80 ¶15, 593 N.W.2d 345	18
<i>State v. Hagar</i> , 271 N.W.2d 476, 482 (N.D. 1978)	17
<i>State v. Messner</i> , 1998 ND 151 ¶10, 583 N.W.2d 109	19
<i>State v. Miller</i> , 388 N.W.2d 522, 523 (N.D. 1986)	20
<i>State v. Murchison</i> , 2004 ND 193, ¶ 15, 687 N.W.2d 725	24
<i>State v. Sievers</i> , 543 N.W.2d 491, 495-96 (N.D. 1996)	18
<i>State v. Steinbach</i> , 1998 ND 18, ¶ 16, 575 N.W.2d 193	21

<i>State v. Thorson</i> , 2003 ND 76 ¶13, 660 N.W.2d 581	18
<i>State v. Tweed</i> , 491 N.W.2d 412, 417 (N.D. 1992)	20
<i>State v. Wicks</i> , 1998 ND 76 ¶17, 576 N.W.2d 518	15
<i>United States v. Augenblick</i> , 393 U.S. 348, 89 S.Ct. 528, 21 L.Ed.2d 537 (1969)	17
<i>United States v. Spotted War Bonnet</i> , 933 F.2d 1471, 1474 (8th Cir. 1991)	19

Statutes and Rules

Section 12.1-32-01(5), N.D.C.C.	24
Section 12.1-32-02.2, N.D.C.C.	24
Section 12.1-32-06.1(1), N.D.C.C.	24
Section 12.1-32-07(2), N.D.C.C.	25
Section 20.1-01-03, N.D.C.C.	25
Section 20.1-01-26, N.D.C.C.	25
Section 20.1-05-07, N.D.C.C.	1
Section 20.1-10-01, N.D.C.C.	24
Section 29-26-22, N.D.C.C.	24
Rule 40(B)(2), N.D.R.Civ.P.	3
Rule 52(a) & (c), N.D.R.Civ.P.	11
Rule 77(b), N.D.R.Civ.P.	11
Rule 35.1(a)(1), (3), & (4), N.D.R.App.P.	26

Rule 28, N.D.R.App.P	14
Rule 30, N.D.R.App.P.	14
Rule 42(b), N.D.R.App.P.	15
Rule 16(a)(1), N.D.R.Cr.P.	3, 4. & 17
Rule 16(f)(1), N.D.R.Cr.P.	18
Rule 34(a), N.D.R.Cr.P.	10
Rule 402, N.D.R.Evid.	19
Rule 404(b), N.D.R.Evid.	19
Rule 509(a), N.D.R.Evid.	19
Rule 608(b), N.D.R.Evid.	20
Rule 611(a), N.D.R.Evid.	20
Rule 611(b), N.D.R.Evid.	19 & 20
Rule 611(c), N.D.R.Evid.	19
Rule 901(a), N.D.R.Evid.	16 & 17
Rule 1005, N.D.R.Evid.	16 & 17

## STATEMENT OF THE ISSUES

1. **Loughead has inadequately presented this case for appellate review.**
2. **The handling of the investigation, prosecution, and trial of the charge against Loughead is legally authorized.**
3. **Loughead was not ineffectively assisted by counsel.**
4. **The sentence for Loughead's conviction for failing to tag an antlered buck deer is legally authorized.**

## STATEMENT OF THE CASE

Kenneth Loughead was criminally charged on December 1, 2005 with the offense of Failure to Tag a Big Game Animal, in violation of section 20.1-05-07, N.D.C.C., a class A misdemeanor, in McHenry County, North Dakota (Register of Actions, No. 1). Loughead had previously been erroneously cited in Ward County, North Dakota but that citation was dismissed without prejudice for lack of jurisdiction, as moved by Assistant Ward County State's Attorney Mark Flagstad.

Robert Palda, the attorney for Loughead, appeared on the defendant's behalf and was sent courtesy copies of all documents related to the charge shortly thereafter by the McHenry County State's Attorney's office. Attorney Palda then filed five motions on January 19, 2005, namely a) a motion to dismiss based upon the assertion that Game & Fish Wardens Ken Skuza and Alan Howard were biased and prejudiced against Loughead before arriving at the area where the arrest was made, b) a motion to return a rifle, scope, and Browning Renaissance handgun, c) a motion to reduce the thousand dollar bond, d) a motion to produce copies of

Warden Howard's tape recording made the day the citation was issued, and e) a motion to establish Loughead's membership in the Little Shell Pembina Band of North America and grant him all the rights and privileges therein, along with a supporting affidavit Loughead signed (Register of Actions, No. 8 & 9). The State then filed a Motion to Deny Defendant's Motions, wherein the State again informs the defendant that "the state is only legally required to make available for copying the Game Warden's tape recordings, which the defendant has already been previously informed would be done as a professional courtesy for the defendant if the defendant provides the State with a blank CD" (Register of Actions, No. 11, p. 1, No. 4). At the motions hearing held March 22, 2006, District Court Judge John C. McClintock Jr. denied Loughead's motions on the grounds that insufficient evidence was presented "to indicate that there was any bias or prejudice against the defendant in any arrest or any proceeding in regards to the prosecution of this criminal matter". the rifle and scope were "confiscated for evidence purposes", insufficient proof exists to show that the handgun "was even present in the pickup, nor there isn't any evidence that somebody took it from that pickup". that a thousand dollar bond in a class A misdemeanor case "is typical and usual bond in these matters". that the motion to produce a copy of Warden Howard's tape recordings is moot, that Loughead's request regarding the Little Shell Pembina Band of North America was not only irrelevant but also that Loughead has submitted no proof that he "would be allowed any immunity or any special rights or privileges because of that membership", and the court was not going to establish

any membership of that Band that day (March 22, 2006 transcript, p. 45, lines 8 to 11 & line 16, p. 46, lines 1 to 24). After the denial, Attorney Palda states that “my client has informed me not to continue on in this case” and “he wants to represent himself pro se”, to which Loughead verbally consented and mentioned Attorney Palda’s health problems while Judge McClintock questioned Loughead at length as to whether that is what Loughead truly wanted (March 22, 2006 transcript, p. 47, line 6 to page 48, line 21). Judge McClintock then informed Loughead that he can’t be given any leniency because he’s representing himself with regard to following proper criminal procedure and evidence rules, which information Loughead acknowledges (March 22, 2006 transcript, p. 50, lines 6 to 19). Judge McClintock gave Loughead a deadline of April 12, 2006 to get a lawyer if he wanted to get one, which Loughead acknowledges (March 22, 2006 transcript, p. 48, lines 15 to 21).

On May 8, 2006, Loughead filed a Motion Certificate of Non-Readiness R. 40(B)(2) 133 N.D.R.CV.P. to continue the jury trial scheduled for May 18, 2006 in which motion Loughead first raises his claims of ineffective assistance of counsel, rights violation involving discovery production, and insufficient time to retain an attorney (Register of Actions, No. 35). Judge McClintock entered an order denying Loughead any more time to retain an attorney due to the attorney-retention deadline Loughead was given and acknowledged at the March 22, 2006 pretrial conference, reminding Loughead that the State only needs to make recordings available for inspection or copying pursuant to Rule 16, N.D.R.Crim.P.

so no undue delay occurred in the state's cooperation regarding the production of any recordings, denying a continuance based upon Loughead's claimed need to engage in further discovery due to his failure to indicate what further discovery is needed and the Court being "unaware of any discoverable evidence which the defendant has not had the opportunity to gather", and denying Loughead's claim of ineffective assistance of counsel because Loughead didn't "submit any tangible evidence as to how his attorney did not adequately represent him for these proceedings" (Register of Actions, No. 36). Loughead submitted no proof supporting this motion's allegations.

On May 15, 2006 and May 16, 2006, Loughead filed a Motion to Dismiss and a Motion to Dismiss/Motion for Bench Trial (Register of Actions, No. 37 & 40). In one motion, Loughead asserts that "I have not even done any discovery yet", to which the state responded on May 15, 2006 by stating that Loughead's failure to inspect, copy, or photograph evidence as allowed by Rule 16(a)(1), N.D.R.Cr.P. was Loughead's choice for which no other party can be held responsible and a copy of all document evidence was provided to Palda on January 4, 2006 and January 11, 2006 and the tape-recorded evidence was provided to Attorney Palda on March 22, 2006, and with Attorney Palda stating in an April 6, 2006 letter that he had turned over his complete file to Loughead, including the discovery material sent by the state. In the other motion, Loughead again raises the issues of the alleged missing handgun, bias and prejudice, and the state's failure to name the anonymous tip caller to which the State responded that these issues

had already been raised and answered. (Register of Actions, No. 28, 37, 40, 42, & 43). Loughead submitted no proof supporting the allegations made in these motions. The only thing Judge McClintock granted in Loughead's motions was to change the jury trial to a bench trial (Register of Actions, No. 41).

At the May 18, 2006 bench trial, Loughead objected to the introduction of State's Exhibit No. 1, which is a township map, as not being correct without submitting any proof of why it was incorrect, which objection Judge McClintock overruled and admitted the exhibit (Trial Transcript, p. 7, line 25 to p. 10, line 13). Loughead also objected to the State pointing out two highlighted sections on the 2005 North Dakota deer hunting guide as leading questions so then Judge McClintock cautioned the State about leading questions (Trial Transcript, p. 18, lines 6 to 20). Loughead then objects to Warden Skuza reading highlighted sections regarding licenses and tagging requirements on the guide because they are highlighted, which Loughead claims is leading, and objects to the introduction of the 2005 hunting guide into evidence, which Judge McClintock overruled on the grounds that the highlighting was irrelevant and not leading and admitted the exhibit. Loughead never objected to the admission of State's Exhibit No. 2, which was Loughead's unused buck deer tag (Trial Transcript, p. 18, line 21 to p. 21, line 13). Loughead cross-examined Warden Skuza by asking questions about the rifle, the gun shells, the other deer and the meat in the quonset, coaching Warden Howard, Warden Skuza's wedding ring, marital status, duties, and activities in Alaska, Warden Skuza's conversation at the scene with Loughead, the gutting of

the other deer, whether Game & Fish wanted people to buy deer licenses, Loughead's petition to remove Warden Skuza from office, Loughead reporting Warden Skuza to the IRS (Trial Transcript, p. 22, line 19 to p. 36, line 18). During Warden Skuza's cross examination, Loughead asserts his due process rights have been violated because the anonymous tip caller's name wasn't disclosed, which the court overruled since that issue was for the pretrial conference, not the trial (Trial Transcript, p. 31, line 14 to p. 32, line 5). On redirect, Warden Skuza's case investigation report was introduced and admitted into evidence as State's Exhibit No. 4 over Loughead's objection that the report contains perjured statements but Loughead didn't specify what statements (Trial Transcript, p. 37, line 3 to p. 38, line 17). Warden Howard later testifies that he made the highlighted marks on the 2005 North Dakota deer hunting guide previously introduced as the already-admitted State's Exhibit No. 3 (Trial Transcript, p. 44, line 9 to p. 47, line 12). Regarding State's Exhibit No. 5 that was admitted, namely the untagged antlers from the buck deer in question, Loughead made no objection but did question "Is that the deer I had?" and did comment "I thought my deer was bigger than that" (Trial Transcript, p. 46, line 5 to p. 47, line 13). Loughead made no objection to the introduction and admission of State's Exhibit No. 6, namely the receipt listing the seized deer, tag, and rifle with scope, that provided Loughead with notice that these items were being seized as "contraband or having been used in committing a violation of the Game and Fish laws of North Dakota" and that an order of confiscation will be sought if

Loughead is found guilty of the charge, which receipt was signed by Loughead acknowledging his receipt of a copy of the receipt and notice on November 5, 2005 (Trial Transcript, p. 48, line 16 to p. 50, line 18). Loughead never objected to the introduction and admission of State's Exhibit No. 7, which was the photographs of the scene and the untagged buck deer (Trial Transcript, p. 50, line 19 to p. 53, line 6). Loughead objected to the introduction of State's Exhibit No. 8, namely the CD with the recording Warden Howard began making of his conversation with Loughead while he was filling out the citation, on the grounds that the CD did not include a tape-recording of Warden Skuza, has been spliced and was out of sequence, and not the original, not authentic, and not admissible in court but provided no proof to support his objection and demanded that it be heard to see if it's authentic and original (Trial Transcript, p. 56, line 11 to p. 58, line 23). Warden Howard testified about how he downloaded the recording from his tape recorder to a computer and did not edit it and doesn't know how to edit it. (Trial Transcript, p. 59, lines 1 to 18). Loughead then states that the CD isn't authentic and original because Warden Howard is breathing heavy after dragging the buck deer out of the quonset (Trial Transcript, p. 64, line 22 to p. 65, line 3). Loughead moved to dismiss the charge because the tape had static and background noise, wasn't original, and has been spliced, which Judge McClintock overruled and admitted the exhibit (Trial Transcript, p. 66, lines 19 to 25). Loughead cross-examined Warden Howard about Warden Howard not seeing Warden Skuza take any handgun from Loughead's pickup, Warden Howard's marital status,

education, and duties, whether Warden Howard has children, whether Warden Howard had heard of Loughead from other wardens, whether Warden Skuza coached Warden Howard in this citation, the number of deer in the quonset, whether Warden Howard threw a temper tantrum during this citation, the century code on the citation dismissed without prejudice in Ward County, Loughead's claim that he stated his right of silence twice, counseling for Warden Howard's temper, Game & Fish knowing about Warden Howard's temper, and the content of the CD (Trial Transcript, p. 67, line 1 to p. 75, line 6). On redirect. Howard testified that he controls his temper, that he's Loughead's accuser, that he signed the complaint, and that Loughead could have been charged with the harsher offense of Illegal Possession under section 20.1-05-02, N.D.C.C. (Trial transcript, p. 75, line 11 to p. 76, line 23). The State then called Lynn Schultz Stone about the recording of the courtesy copy of Loughead's conversation with Warden Howard that Stone said she made on a computer while Attorney Palda was present and that she never edited or spliced it (Trial Transcript, p. 77, line 22 to p. line 80, p. 3). Stone also testified that the courtesy copy was produced for defense within two weeks of receiving a blank CD from Attorney Palda (Trial Transcript, p. 80, lines 12 to 21). Loughead objected to the introduction of State's Exhibit No. 9, which was the CD copy of the recording Warden Howard provided the State's Attorney's office, on the grounds that it was spliced (Trial Transcript, p. 80, line 22 to p. 83, line 25). Judge McClintock overruled Loughead's objection and admitted the exhibit because no evidence was provided that anything was done to

adulterate the recording on the CD and said that Loughead will have his chance later to present any evidence of splicing but “right now, there isn’t any evidence of any splicing that been going on” (Trial Transcript, p. 82, lines 1 to 12). Loughead then stated “I’ll appeal. I don’t think you’ll be the judge.” (Trial Transcript, p. 82, lines 13 to 14). The judge stated Loughead had a right to appeal (Trial Transcript, p. 82, lines 15 to 17). Loughead cross-examined Stone about Stone’s marital status, Stone’s length of employment with the state’s attorney’s office, and the CD’s content, with Stone responding that Loughead got two recordings of his conversation with Warden Howard because Loughead provided CDs twice and that there was no recording for Warden Skuza (Trial Transcript, p. 83, line 3 to p. 84, line 7). The State rested and Loughead was provided with an opportunity to proceed with his case (Trial Transcript, p. 86, lines 2 to 6). Loughead introduced no exhibits and the only witness Loughead called was Warden Skuza, whom Loughead questioned about Warden Skuza’s education, net worth, involvement in a drug bust, illegal drug use, when Warden Skuza first heard of Loughead, and whether Warden Skuza has heard any game wardens ever make derogatory remarks about Loughead, which questioning Judge McClintock then limited to the time of the incident, to which Warden Skuza said no derogatory comments were made then (Trial Transcript, p. 86, line 16 to p. 90, line 24). Loughead then states that he has no witnesses present, he has no evidence with him that he wants to present, and he doesn’t want to testify himself (Trial Transcript, p. 91, line 18 to p. 92, line 12). In his closing argument, Loughead says he knows in his mind who

the anonymous tip callers are (Trial Transcript, p. 95, line 25 to p. 96, line 9).

Loughead also alleges bias, prejudice, perjury, collusion, and altering and splicing of the tape and moves for “declaratory judgment for full dismissal of all these charges“, which the court denies (Trial Transcript, p. 95, lines 5 to 14; p. 96, line 15 to p. 97, line 16). Loughead was found guilty of the charge and sentenced, with Loughead’s only pre-sentencing objection being his feeling that the state’s sentence recommendation was “very harsh” and he’d appeal it (Register of Actions, No. 47; Trial Transcript, p. 98, line 19 to p. 101, line 15 ). In stating his fact findings and legal conclusions, Judge McClintock states that the State has met its burden of proving the elements of the crime beyond a reasonable doubt and why (Trial Transcript, p. 97, line 17 to p. 98, line 15). Judge McClintock stayed execution of Loughead’s sentence during his appeal period (Trial Transcript, p. 103, lines 3 to 13). Loughead then threatens to sue the two game wardens and the state’s attorney (Trial Transcript, p. 105, lines 8 to 12). Loughead later filed his Notice of Intent to Appeal and later an Amended Notice of Appeal (Register of Actions, No. 50 & 87).

After being tried and convicted, Loughead filed a Motion Arresting Judgment on May 30, 2006 on the grounds that the court and the prosecutor “exceeded their authority and given a severely harsh punishment without justification“, to which the state requested its denial by saying the elements of Rule 34(a), N.D.R.Cr.P. haven’t been proven and the court agreed in its order dated July 7, 2006 (Register of Actions, No. 48, 61, & 78). Loughead submitted no

proof supporting this motion's allegations.

Loughead then filed a Motion for Post Conviction Relief Post Conviction Procedure Act 18 Am.J2d Corem Nobis section 30.1, to which the State responded on June 6, 2006 requesting its denial (Register of Actions, No. 54, 63, & 64). In its order denying this motion after the Supreme Court issued an Order of Limited Remand, the district court stated that the "sentence, including all of the terms and conditions of his probation, is well within the minimum and maximum amount which the Court could impose. The sentence is typical for this type of offense and the Court does not find that it is cruel and unusual." (Register of Actions, No. 71 & 78). Loughead submitted no proof supporting this motion's allegations.

Loughead then filed a Request for Finding of Fact and Conclusions of Law wherein he requests a "complete dismissal of this charge & the return of my rifle & bond \$1,000", to which the state responded and Judge McClintock stated that Rule 52(a) & (c) and Rule 77(b) of the N.D.R.Civ.P. are rules of civil procedure and are not relevant in a criminal case and denied Loughead's Request (Register of Actions, No. 82 & 91). Loughead submitted no proof supporting this Request's allegations.

#### STATEMENT OF FACTS

On November 5, 2005 in McHenry County, North Dakota, Kenneth Loughead failed to affix to the animal's carcass a tag bearing Loughead's hunting

license number immediately after he killed a big game animal, namely an antlered buck deer that was found in a quonset on a farmstead, **facts which Loughead has never disputed.** The antlered buck deer at issue, a rifle belonging to Loughead, and an unused tag bearing Kenneth Loughead's hunting license number were seized. The investigation was initiated when District Game Warden James Burud called Game Warden Ken Skuza about an anonymous RAP (Report All Poaching) tip about a buck being shot and not immediately tagged in Grilley Township, which is located in McHenry County, North Dakota, and was at the time located in a red Dodge pickup belonging to Richard Johnson (Trial Transcript, p. 7, lines 16 to 24; p. 10, lines 17-19; p. 11, lines 8-9). Warden Skuza found the pickup and asked a group of men near the pickup who Mr. Johnson is. Loughead told Warden Skuza that Warden Skuza couldn't be there because Loughead had filed charges against him for income tax fraud (Trial Transcript, p. 12, lines 13-25 & p. 37, lines 19 to 24). Warden Skuza told Loughead to stand off to the side and then proceeded to interview Johnson, who said the untagged buck was in his quonset, to which Johnson took Warden Skuza and unlocked it and the untagged antlered buck deer Loughead shot was observed (Trial Transcript, p. 12, line 25 to p. 16, line 10). Game Warden Alan Howard, the chief investigating officer in this case, contacted Warden Skuza regarding this incident and met Warden Skuza at the scene (Trial Transcript, p. 40, line 16 to p. 42, line 19). Loughead was walking a tree row and was armed when Warden Howard arrived so Warden Howard approached Loughead to check Loughead's licenses (Trial transcript, p. 42, line 17 to p. 10).

Warden Howard first questioned Loughead and Loughead admitted to shooting the antlered buck deer with the later-seized rifle that morning and the buck was now in the quonset located in McHenry County, North Dakota (Trial transcript, p. 43, lines 9 to 19, p. 47, line 8 to p. 48, line 1; p. 53, line 11 to p. ). Warden Howard seized Loughead's unused tag from Loughead, which seizure Warden Skuza saw (Trial Transcript, p. 17, lines 9 to 24; p. 43, lines 20 to p. 44, line 6; p. 48, lines 8 to 15). An antlerless whitetail doe Loughead did tag was also found in the quonset (Trial Transcript, p. 21, lines 14 to 23; p. 48, lines 2 to 7). Warden Skuza testified that he took no photographs, made no recordings, and seized no equipment or evidence but did remove a rifle from a vehicle, took out three shells, and gave it to Warden Howard (Trial Transcript, p. 21, line 24 to p. 22, line 11 & p. 37, lines 8 to 11). Warden Howard also seized the rifle used to shoot the untagged antlered buck deer (Trial Transcript, p. 48, lines 8 to 17). Warden Howard testified that he started recording his conversation with Loughead as he was filling out the citation and did not edit the recording (Trial Transcript, p. 54, line 18 to p. 55, line 5, p. 74, lines 14 to 17). Warden Howard said he never saw Warden Skuza take a handgun (Trial Transcript, p. 67, line 3 to p. 68, line 8). Warden Howard later got the rifle valued at \$300 at Scheels in Minot, North Dakota (Trial Transcript, p. 65, lines 11 to 20).

## LAW AND ARGUMENT

### **1. Loughead has inadequately presented this case for appellate review.**

Loughead's brief fails to comply with Rule 28(b) and Rule 28(f), N.D.R.App. P. Loughead's appendix doesn't comply with Rule 30, N.D.R.App.P. Specifically, Rule 28(b)(6), N.D.R.App.P., requires a statement of facts relevant to the issues submitted for review, which identifies facts in dispute and includes appropriate references to the record, a record that is to be contained in the appendix filed with the appellant's brief. Loughead has stated many allegations as facts that were never stated under oath, cross-examined, and recorded and he has failed to include such record references in his fact statement or an appendix that includes a record other than a copy of the judgment. The appellant brief also doesn't contain a table of authorities or a statement of the case and it fails to state standards of review. Appellant's brief also does not comply with Rule 28(f), N.D.R.App.P., which requires that a "party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or the transcript at which the evidence was identified, offered, and received or rejected". Rule 28(b)(7)(A) & (B), N.D.R.App.P., requires that the appellant state his contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies and, for each issue, a concise statement of the applicable standard of review. When Loughead dismissed his attorney and decided to proceed pro se, Judge McClintock informed Loughead that he can't be given any leniency because he's representing himself with regard to following

proper criminal procedure and evidence rules. which information Loughead acknowledges (March 22, 2006 transcript, p. 50, lines 6 to 19). This information is in conformance with the Supreme Court’s statement that “we have consistently held that a person acting as his own attorney is equally bound by applicable rules of procedure. even if that person lacks understanding of those rules or the correct procedures.” *State of North Dakota v. Michael O. DuPaul*, 527 N.W.2d 238, 243-244 (N.D. 1995), citing *Sandbeck v. Rockwell*, 524 N.W.2d 846, 851 (N.D. 1994). Pursuant to Rule 42(b), N.D.R.App.P, the appeal could be dismissed.

**2. The handling of the investigation, prosecution, and trial of the charge against Loughead is legally authorized.**

Two issues Loughead has consistently raised as constitutional issues without submitting evidence supporting his allegations or citing anything in the record revealing the alleged errors are a) the content of the CD recording of part of his conversation with Game Warden Howard and b) the State’s refusal to provide him with the name of the RAP (Report All Poaching) caller who provided the anonymous tip about a dead untagged antlered buck deer belonging to the State of North Dakota in a particular pickup truck on December 5, 2005. The standard of review for constitutional claims is de novo. *State v. Wicks*, 1998 ND 76 ¶17, 576 N.W.2d 518. But just because Loughead says these issues are constitutional does not make evidentiary issues subject to the abuse of discretion standard and fact findings subject to the clearly erroneous standard constitutional claims. *State v. Gagnon*, 1999 ND 13 ¶9, 589 N.W.2d 560, citing *State v. Clark*,

1997 ND 199, ¶ 26 , 570 N.W.2d 195. The Supreme Court can decline to review issues presented on appeal if “the record on appeal does not allow for a meaningful and intelligent review of alleged error.” *Lithun v. DuPaul*, 447 N.W.2d 297, 300 (N.D. 1989). The district court can act likewise regarding such unsupported claims.

Loughead has repeatedly alleged that the CD recording is inadmissible in that it is spliced, not original, and not the same as his own recording although he’s never provided any proof that he made or has his own recording or explained what he means by it being spliced and unoriginal except that it contains no recording of any conversation he had with Warden Skuza and contains sounds of heavy breathing from Warden Howard after he moved the buck deer and background noise. Rule 901(a), N.D.R.Evid. states that the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Rule 1005, N.D.R.Evid. states that the content of a copy of an official record can be testified to be correct by a witness who has compared it with the original. Warden Skuza testified that he made no recordings of his interactions with Loughead (Trial Transcript, p. 22, lines 2 to 4). Warden Howard testified about how he downloaded from his tape recorder to a computer his recording of his conversation with Loughead on December 5, 2005, did not edit it, and doesn’t know how to edit it. (Trial Transcript, p. 59, lines 1 to 18). Regarding the production of the courtesy copy made for Loughead, Lynn Schultz Stone, the

state's attorney's secretary, testified that she made the copy from the copy Warden Howard gave her using her computer while Robert Palda, Loughead's attorney at the time, was present and that she never edited or spliced it (Trial Transcript, p. 77, line 22 to p. line 80, p. 3). Judge McClintock's admission of the CD recordings into evidence complied with Rules 901(a) and 1005, N.D.R.Evid.

Regarding Loughead's complaints about the provision of the courtesy copy of the CD recording in March, 2006, the provision of courtesy copies of all documentary evidence in the possession of the state's attorney's office to Attorney Palda occurred in January, 2006, and the undefined *Brady* and *Jencks* material Loughead claims exists but of which Appellee is unaware. Rule 16(a)(1), N.D.R.Cr.P. only requires the state to disclose to the defendant and make available for inspection, copying, or photographing any relevant written or recorded statements made by the defendant, not make copies for the defendant. The defendant's failure to inspect, copy, or photograph evidence as allowed by Rule 16(a)(1), N.D.R.Cr.P. if he was dissatisfied with the courtesy copies provided was the defendant's choice for which no other party can be held responsible.

Regarding Loughead's *Jencks* violation claim on pretrial witness statement provision, "the principles of the *Jencks* Act are not constitutionally mandated and thus are not binding on the state's criminal courts." *State v. Hagar*, 271 N.W.2d 476, 482 (N.D. 1978), citing *United States v. Augenblick*, 393 U.S. 348, 89 S.Ct. 528, 21 L.Ed.2d 537 (1969). Nevertheless, all written pretrial witness statements concerning events and activities testified to by the state's witnesses at trial were

provided to defense counsel in January, 2006 and nothing in the law requires the State to permit discovery of evidence that does not exist.

Loughead alleges *Brady* right violation by the state's failure to name the RAP (Report All Poaching) caller even though he claims to know the caller's name but never explains why such information would be exculpatory or favorable to Loughead as *Brady*. "the Granddaddy case". requires (Trial Transcript, p. 95. line 25 to p. 96. line 9; Appellant's Brief. p. 24. lines 7 to 10). To establish a *Brady* discovery violation, the defendant must show: (1) the government possessed evidence favorable to the defendant; (2) the defendant did not possess the evidence and could not have obtained it with reasonable diligence; (3) the prosecution suppressed the evidence; and (4) a reasonable probability exists that the outcome of the proceedings would have been different if the evidence had been disclosed. *State v. Thorson*, 2003 ND 76 ¶13, 660 N.W.2d 581, citing *State v. Goulet*, 1999 ND 80 ¶15, 593 N.W.2d 345. The *Brady* rule does not apply to evidence the defendant could have obtained with reasonable diligence, and the defendant's failure to discover evidence from a lack of diligence defeats a *Brady* claim the prosecution withheld that evidence. *Thorson*, 2003 ND 76, 660 N.W.2d 581, citing *State v. Sievers*, 543 N.W.2d 491, 495-96 (N.D. 1996). Loughead has failed to satisfy these standards with his unsupported arguments. Moreover. Rule 16(f)(1), N.D.R.Cr.P. doesn't require the State to produce the name of a RAP anonymous tip caller unless the state plans to call said caller as a witness in the presentation of the case in chief, which, in this case, the state did not call,

particularly since any testimony any caller could give was not needed and the defendant was allowed to face his accuser, namely Warden Howard. Rule 509(a), N.D.R.Evid. also provides the state or a subdivision thereof “a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer”. If Loughead believed the RAP caller he claimed to know could provide exculpatory evidence of which the State is unaware, the most logical remedy would have been for Loughead to have subpoenaed that person to testify, not the case’s dismissal in its entirety.

Regarding the trial process itself, Loughead alleges the violation of constitutional rights due to the admission of tainted testimony, use of incorrect evidences, leading witnesses as is allowed by Rule 611(c), N.D.R.Evid. and the blocking of his cross-examination with objections based upon relevancy pursuant to Rule 402, N.D.R.Evid. and the requirements of Rule 404(b), N.D.R.Evid. Bias, prejudice, perjury, coaching, and collusion are other accusations Loughead likes to make. Loughead has never provided any proof of these allegations and, on appeal, fails to cite anything in the record to support his allegations. The North Dakota Supreme Court has stated that the right of confrontation guarantees to a defendant the opportunity for an effective cross-examination but it doesn’t guarantee a cross-examination that is effective in whatever way and to whatever extent the defense might wish. *State v. Messner*, 1998 ND 151 ¶10, 583 N.W.2d 109, citing *United States v. Spotted War Bonnet*, 933 F.2d 1471, 1474 (8th Cir. 1991). Rule 611(b).

N.D.R.Evid. limits the scope of cross-examination to the subject matter of the direct examination and matters affecting the credibility of the witness but limited to character for truthfulness or untruthfulness by Rule 608(b), N.D.R.Evid., but with Rule 611(a), N.D.R.Evid. permitting the court to protect witnesses from harassment or undue embarrassment. Using the cross-examination process to discover private information about a public employee, such as whether they have had anger management counselling, or discover wrongdoing over the course of their lifetimes, like whether they've spent money on prostitutes, under the guise of character for truthfulness is inappropriate, inherently insulting, and beyond the scope of what Rule 611(b), N.D.R.Evid contemplates (Trial Transcript, p. 35, lines 22 to 24 & p. 73, lines 22 to 23). Judge McClintock's limitation of Loughead's unsportsmanlike cross-examination was, in all respects, proper. Loughead's attempt to circumvent the evidentiary and procedural rules and exact vengeance against the witnesses and prosecutor for doing their jobs in good faith via his post-conviction motions and appellant brief is an unacceptable substitute. Loughead has neither shown an abuse of discretion by Judge McClintock nor the deprivation of his constitutional rights as alleged.

For the first time on appeal, Loughead raises three additional unsubstantiated claims. "Generally, issues not raised in the trial court, even constitutional issues, will not be addressed on appeal." *State v. Tweed*, 491 N.W.2d 412, 417 (N.D. 1992) (quoting *State v. Miller*, 388 N.W.2d 522 (N.D. 1986)). A failure to object to a perceived irregularity at trial acts as a waiver.

*Sabot v. Fargo Women's Health Org.*, 500 N.W.2d 889, 894 (N.D. 1993). The appellate court is therefore limited to whether the claimed error is obvious error under N.D.R.Crim.P. 52(b). See *State v. Bertram*, 2006 ND 10 ¶17, 708 N.W.2d 913. Error is not obvious unless there is a clear deviation from an applicable legal rule under current law, which affects substantial rights. *Id.* Loughead has failed to prove obvious error with these three arguments. First, he claims that his rights were violated by the seating at trial but cites no law or rule on how trial seating of the parties should be or why different seating would have affected the trial's outcome so this argument inevitably fails. Second, he objects to the entire highly perishable deer carcass not being introduced into evidence, which he claims makes the evidence presented insufficient to support the court's decision, although he never objected to it at trial and doesn't state why introducing the entire carcass would have affected the trial's outcome or why not introducing the carcass makes the introduction and admission into evidence of the untagged antlers false. To successfully challenge the sufficiency of the evidence on appeal, a defendant must show there is no reasonable inference of guilt when viewing the evidence in the light most favorable to the decision of the trier of fact. *State v. Gagnon*, 1999 ND 13 ¶23, 589 N.W.2d 560, citing *State v. Steinbach*, 1998 ND 18, ¶16, 575 N.W.2d 193. In deciding whether there is sufficient evidence, the appeals court does not resolve conflicts in the evidence nor does it weigh the credibility of the witnesses. *Id.* at ¶ 17. Loughead has failed in meeting this challenge. Third, Loughead argues that he was questioned in violation of his *Miranda* rights, which is the principle

that law enforcement may not use statements stemming from custodial interrogations. *Miranda v. Arizona*, 384 U.S. 436, 445 (1966). Loughead was only issued a citation and was never taken into custody on December 5, 2005, with the brief interaction between Loughead and Warden Howard not constituting a custodial interrogation requiring the reading of *Miranda* rights, thereby causing this argument to also fail.

**3. Loughead was not ineffectively assisted by counsel.**

In *Greywind v. State*, 2004 ND 213, 689 N.W.2d 390, 394-395, the Supreme Court stated that to succeed on a claim of ineffective assistance of counsel, appellant must prove counsel's performance fell below an objective standard of reasonableness and the deficient performance prejudiced him. *Garcia v. State*, 2004 ND 81 ¶5, 678 N.W.2d 568. To show prejudice, Loughead "must establish a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, and the defendant must specify how and where trial counsel was incompetent and the probable different result. *Eagleman v. State*, 2004 ND 6 ¶6, 673 N.W.2d 241. The standard for review for a claim of ineffective assistance of counsel is a mixed question of law and fact, with the district court's findings of fact being subject to the clearly erroneous standard of review. The reasons Loughead asserts that his attorney, who represented Loughead from the time of the second appearance to near the end of the pretrial conference, was ineffectively assisting him is that a) his attorney was "lazy in

getting tapes“ and b) the motion to suppress was dismissed on a lack of precedent court case cites and “erroneous wordage” to his detriment (Appellant brief, page 12, lines 4 to 10), which assertion the record contradicts. At the motions hearing held March 22, 2006, the court denied Loughead’s motions on the grounds that insufficient evidence was presented “to indicate that there was any bias or prejudice against the defendant in any arrest or any proceeding in regards to the prosecution of this criminal matter”, the rifle and scope were “confiscated for evidence purposes”. insufficient proof exists to show that “that gun was even present in the pickup, no there isn’t any evidence that somebody took it from that pickup”, that a thousand dollar bond in a class A misdemeanor case “is typical and usual bond in these matters”, that the motion to produce a copy of Warden Howard’s tape recordings is moot, that Loughead’s request regarding the Little Shell Pembina Band of North America was not only irrelevant but also that Loughead has submitted no proof that he “would be allowed any immunity or any special rights or privileges because of that membership“, and the court was not going to establish any membership of that Band that day (March 22, 2006 transcript, p. 45, lines 8 to 11 & line 16, p. 46, lines 1 to 24). not on the basis of citations or wordage. Loughead has also failed to raise a genuine issue of material fact as to how he was prejudiced by not having a copy of the CD recording for around two months before the trial due to his lawyer’s “laziness” in getting a copy of the recording earlier than that or otherwise met the standard set forth in *Greywind*. Judge McClintock found that Loughead has failed to prove

ineffective assistance of counsel because Loughead didn't "submit any tangible evidence as to how his attorney did not adequately represent him for these proceedings" (Register of Actions, No. 36) and Loughead has presented nothing on appeal to show that finding was clearly erroneous.

**4. The sentence for Loughead's conviction for failing to tag an antlered buck deer is legally authorized.**

The North Dakota Supreme Court's review of a sentence "is generally confined to whether the court acted within the statutory sentencing limits. *State v. Murchison*, 2004 ND 193, ¶ 15, 687 N.W.2d 725. A district court judge is allowed the widest range of discretion in sentencing. *Id.* Upon conviction, Judge McClintock sentenced Loughead in conformity with the law (Register of Actions, No. 47). Specifically, section 12.1-32-01(5), N.D.C.C. authorizes the maximum sentence of a \$2000 fine, a one years imprisonment, or both. The probationary period of two years to which Judge McClintock sentenced Kenneth Loughead is statutorily authorized by section 12.1-32-06.1(1), N.D.C.C., which states that two years probation may be imposed in conjunction with a sentence on a misdemeanor. Section 20.1-10-01, N.D.C.C. authorizes seizure of all wild animals killed or possessed contrary to law and the seizure of all vehicles, guns, instrumentalities, appliances, and devices unlawfully used in pursuing, taking, concealing, or disposing of wild animals or any part thereof.. Ordering a contribution of \$300 to the RAP program or forfeiture of the rifle & scope valued at \$300 is authorized by Section 12.1-32-02.2, N.D.C.C. Section 29-26-22, N.D.C.C. authorizes the

imposition of court administrative fees. Section 12.1-32-07(2). N.D.C.C. authorizes the imposition of a restraining order regarding the two game wardens involved in this matter and makes no occupational exemptions therefrom. Section 20.1-01-26, N.D.C.C. authorizes the suspension of hunting, trapping, and fishing privileges for up to three years, with no exemptions being made for violators who eat their prey or claim to earn money from it. As is stated in section 20.1-01-03, N.D.C.C., any person catching, killing, taking, trapping, or possessing any wildlife protected by law at any time or in any manner is deemed to have consented that the title thereto remains in this state for the purpose of regulating the taking, use, possession, and disposition thereof. "A regulated privilege is not a right". *North Dakota Department of Transportation v. Michael O. DuPaul*, 487 N.W.2d 593, 598 (N.D. 1992). Loughead argued about the sentence being harsh, cruel, & unusual in his Motion for Post Conviction Relief Post Conviction Procedure Act 18 Am.J2d Corem Nobis section 30.1 and at trial. Judge McClintock stated in his order denying the motion that the "sentence, including all of the terms and conditions of his probation, is well within the minimum and maximum amount which the Court could impose. The sentence is typical for this type of offense and the Court does not find that it is cruel and unusual." (Register of Actions, No. 78). Nothing Loughead has argued proves an abuse of discretion by the district court.

## CONCLUSION

The State requests that the appeal be dismissed or that the district court judgment be summarily affirmed under N.D.R.App.P. 35.1(a)(1), (3), & (4) since no reversible error of law appears and a) the appeal is frivolous and completely without merit, b) the judgment is supported by substantial evidence, and/or c) the district court did not abuse its discretion. The State also requests such other relief as the Court deems just and appropriate, including sanctions.

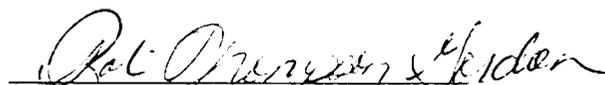
Respectfully Submitted,



Robin L. Thompson Gordon, ND 05035  
McHenry County State's Attorney  
PO Box 329, Towner, ND 58788

## CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was on the 20<sup>th</sup> day of December, 2006 mailed to Kenneth Loughead, PO Box 1394, Minot, ND 58702, with the original unbound copy and seven additional bound copies being filed with the Supreme Court.

  
Robin L. Thompson Gordon

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

RECEIVED BY CLERK  
SUPREME COURT DEC 2 2006

20060160

State of North Dakota,  
Plaintiff/Appellee,

Supreme Court Case  
No. 20060160

vs.

Kenneth Loughead,  
Defendant/Appellant.

McHenry County Case  
No. 25-05-K-00230

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

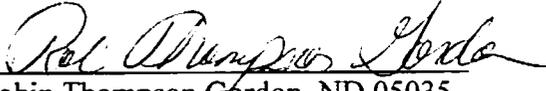
DEC 20 2006

CERTIFICATE REGARDING  
ELECTRONIC COPY

STATE OF NORTH DAKOTA

I, Robin Thompson Gordon, certify that I prepared my brief  
on a computer that has Windows 98 and a Works word  
processing program. My computer does not have Wordperfect  
or Word so I am unable to comply with Rule 31(b)(1)(c).

Dated December 20, 2006

  
Robin Thompson Gordon, ND 05035  
PO Box 329, Towner, ND 58788  
Phone: 701-537-5682  
Fax: 701-537-5969