

20090391

IN THE SUPREME COURT  
FOR THE STATE OF NORTH DAKOTA

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CLERK OF SUPREME COURT

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STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,

APPELLEE,

VS

S. CT. NO. 20090391

LA VERNE KOENIG,

DIS. CT. NO. 08-K-00331

APPELLANT.

APPELLANTS BRIEF

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STATEMENT OF ISSUES PRESENTED ON APPEAL

- I. THE COMPLAINT IS LEGALLY INSUFFICIENT UNDER NORTH DAKOTA STATUTE 29-05-01.
- II. NDCC 47-26-01 IS UNCONSTITUTIONAL, IS VAGUE, OVERBROAD, AND VIOLATES THE EQUAL PROTECTION AND DUE PROCESS OF LAW CLAUSES.
- III. THE DISTRICT COURT JUDGE, WICKHAM CORWIN, LACKED JURISDICTION, POWER AND AUTHORITY TO PRESIDE OVER THIS CASE.
- IV. THE PRACTICE OF THE EAST CENTRAL JUDICIAL DISTRICT, VIOLATES THE EQUAL PROTECTION; DUE PROCESS OF LAW CLAUSES AND STATE STATUTES.
- V. DEFENDANT WAS DENIED THE EQUAL PROTECTION AND DUE PROCESS OF LAW, WHEN THE DISTRICT COURT FAILED TO ALLOW DEFENDANT A FULL AND FAIR HEARING ON MOTION.
- VI. THE STATE ENGAGED IN SELECTIVE AND VINDICTIVE PROSECUTION IN VIOLATION OF THE EQUAL PROTECTION AND DUE PROCESS OF LAW CLAUSES.
- VII. DEFENDANT WAS DENIED THE EFFECTIVE, MEANINGFUL ASSISTANCE OF LEGAL COUNSEL AT TRIAL AND NO COUNSEL AT AN IMPORTANT PHASE OF THE CRIMINAL PROCESS; AND WHERE COUNSEL HAD AN ACTUAL CONFLICT OF INTEREST.
- VIII. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A JUDGMENT OF CONVICTION. THE COURT ERRED, AS A MATTER OF LAW, IN FAILING IT TO GRANT A JUDGMENT OF ACQUITTAL.
- IX. THE STATE DENIED DEFENDANT A FULL AND FAIR TRIAL WHERE DUE TO ITS MISCONDUCT WHEN IT DELIBERATELY WITHHELD REQUESTED, DISCOVERABLE EVIDENCE, IN VIOLATION OF BRADY V. MARYLAND; AND UNITED STATES V. AGURS, AND PRESENTING FALSE AND MISLEADING EVIDENCE VIOLATING NAPUE V. ILLINOIS.
- X. DEFENDANT WAS DENIED EQUALITY IN THE STATE COURT PROCEEDINGS, WHICH VIOLATES THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION AND THE CONSTITUTION AND STATUTORY LAWS OF THE STATE OF NORTH DAKOTA.

XI. DEFENDANT WAS DENIED EQUAL PROTECTION AND DUE PROCESS OF LAW, WHEN HE WAS DENIED LEGAL COUNSEL AT CRITICAL STAGES OF THE CRIMINAL PROCESS AND ON DIRECT APPEAL, AN APPEAL GRANTED AS A MATTER OF RIGHT, UNDER NORTH DAKOTA LAW.

## STATEMENT OF THE CASE

Appellant was charged by Complaint, September 16 2008, of Livestock Running At Large in violation of NDCC 36-11-01. Appellant appeared, entered a not guilty plea, and a Scheduling Order was entered October 29, 2008, setting forth the dates and times established in the case. Judge Steven Marquart was assigned to the case, a jury trial was scheduled for January 7, 2009. Neither party filed any Motion to disqualify Judge Marquart, as required by NDCC 29-15-21. Defendant filed a pro se MOTION, challenging the sufficiency of the complaint. A scheduled proceeding was held on January 7, 2009. Judge Cynthia Rothe-Saeger presided, denied the Motion as premature, continued bail and Noticed the scheduled Jury trial for January 29. Appellant contacted private counsel, but due to indigency, said counsel advised Appellant to apply for court appointed counsel. Counsel was appointed, whom immediately and unbeknown to Appellant, filed for a continuance of the jury trial. Four months later, May 21, he moves to withdraw, which was granted. Unbeknown to Appellant, a Jury Trial had been scheduled for May 28, 2009. Deputy Clerk of Courts contacts Appellant, May 27, to see if the scheduled jury trial is still on for the following day. Appellant advises said Clerk that he still wants an attorney, which he represents that he does, she advises him to put something in writing and get it filed that day. Appellant files a Notice of Demand, noting he's exercising his Constitutional rights. District Judge Gloria Dawson, decides to hold a hearing to inquire about this Notice of Demand. She was not the Judge assigned to the case. She represents that the case is now before her, and the proceedings conclude with the intent of a Jury Trial the following day. A hearing is held, out of the presence of

potential jurors, at which time, Judge Dawson grants a continuance of the jury trial, representing to the State that it is a continuance only, no additional discovery allowed, and instructs Appellant to resubmit an application for appointment of counsel.

On June 2, 2009, the Fargo Public Defenders Office is appointed counsel by Judge Corwin. A week later, June 9, 2009, he enters a new Scheduling Order, reassigning the case to himself. He is not the presiding Judge of the District. Appellant has consistently challenged this rotational judge practice as a violation of his Due Process and Equal Protection rights.

Appellant is informed that Gordon Dexheimer is assigned to represent him. Defendant immediately request that he do some legal research; obtain the transcripts of the prior proceedings; take necessary action in regards to Defendants pro se Motion, and do some investigation into the complaining witness, Lynn Dammen. Counsel refused to do so.

Appellant meets with Mr. Dexheimer, June 14, 2009, at which time, Mr. Dexheimer, informed Appellant he was a prosecutor, assistant city attorney for the city of Fargo ND. Appellant instructed counsel to file a resistance against this arbitrary reassignment Order, reassigning the case to Judge Corwin. Counsel failed to do so. Appellant thereafter filed a pro se oral motion, at the next opportunity he had, the only time he appeared in open court, July 30, 2009. Judge Corwin denied the motion, implying a lack of showing of prejudice or bias. Appellant informs the Court, he feels “forced” to proceed to trial with Mr. Dexheimer. The District Court fails to make any inquiry.

During the jury trial, counsel represented that he was the State making a Rule 29 Motion; and performed in a mere perfunctory manner. The Jury rendered a guilty verdict.

The Court thereafter discharged the jury, and proceeded with a hearing on restitution.

That hearing had to be continued, due to a surprise claim, made by the complaining witness, Lynn Dammen. Appellant filed a pro se Motion for New Trial and requested the appointment of new counsel. Mr. Dexheimer moved to withdraw, even though he had previously represented to Appellant that his representation ended at the time Judgment of conviction was entered, which occurred August 2009. The Court refused to appoint Appellant another attorney.

Appellant was forced to proceed without the assistance of legal counsel thereafter, which included the proceedings on his Motion for New Trial and the continued Restitution. District Court Judge Corwin specifically stated that he would not appoint Appellant another attorney-a request also made by Mr. Dexheimer- and that any entitlement to appellate counsel had to be made with the clerk of the Supreme Court.

Appellant filed a Motion for Appointment of Appellate Counsel, which this Court denied, due to this Court not appointing appellate counsel. Clerk of Supreme Court informs Appellant that a deficiency appears in the Judgment that needs to be corrected for the Judgment to be appealable. Appellant files a Motion with the District Court, with the Order from this Court attached, noting the deficiency in the Judgment and the fact that the District Court had not entered a Written Order on Appellants Motion for New Trial and Motion for Counsel, setting forth additionally that his financial circumstances had not changed, since the filing of the Motion for Counsel in August, 2009.

The district Court Amended its Judgment of Conviction January 14, 2010, but has not entered the written order as it pertains to the Motion for New Trial and Motion for

Counsel, nor has it appointed Appellant Appellate Counsel. Appellant filed a Notice of Appeal of the Amended Judgment of Conviction. Appellant had previously filed Order for Transcripts. This Appeal follows.

## STATEMENT OF FACTS

The facts in this case and on Appeal are as follows:

1. The Complaint is legally insufficient to allege a criminal act, and fails to meet Statutory requirements as mandatory required by NDCC 29-05-01, the district court has failed to address that issue, fairly upon presentation, contending it was for jury to decide.
2. The alleged crime, a violation of NDCC 36-11-01, requires as an element thereof, a violation of NDCC 47-26-01, willful failure to maintain a lawful fence. This Statute, NDCC 47-26-01, is vague, overbroad and violates the Equal Protection and Due Process of Law Clauses, as alleged by Appellant, and of which, the limited evidence abducted at trial supports. The district court failed to a properly instruct the Jury on that issue.
3. The original Scheduling Order, dated October 29, 2008, set the time and dates for this case. Judge Steven Marquart was the Judge assigned to the case. The parties, did not exercise their Statutory rights, pursuant NDCC 29-15-21 et al., to disqualify Judge Marquart, nor did Judge Marquart give Notice of Self-disqualification. Each scheduled proceeding was before a different Judge, the Appellant [and possibly the State] were never informed who that Judge in the rotation would be prior to their presiding.
4. Appellant had filed a MOTION, in compliance with the Scheduling order, which was to be heard on January 7, 2009. This Motion contained, among other issues, a Motion to Suppress and Motion to Dismiss. Judge Cynthia Rothe-Saeger, denied the motion as premature, issues for a jury to decide. Appellant believing the Court was in error, contacted a private attorney. Due to Appellants indigency, said private attorney advised Appellant to apply for court appointed counsel. Upon doing so, the court appointed

counsel, whom immediately, without first consulting Appellant, filed a motion for a continuance and for discovery.

5. Appellant immediately contacted said attorney, upon his being notified of the appointment, at which time, counsel advised Appellant of his prior actions, and represented that he would obtain the record from the Clerk of District Court and thereafter would contact Appellant to discuss the case. Counsel represented that would be within a week or two of his appointment.

6. Over four months passed, before counsel contacted Appellant, leaving a message on the answer machine that a jury trial was scheduled, later that Month. No date specific was represented.

7. Appellant attempted to meet with counsel, but was unsuccessful, counsel supposedly to busy, counsel finally responded to Appellants telephone calls, he had worked out a plea deal, which Appellant had previously specifically advised counsel he was not interested in, at which time a dispute arose about counsels failure to protect Appellants rights, whereupon counsel moved to withdraw his representation. This motion to withdraw was granted, by a different judge, other than the one assigned to the case and without any procedural due process hearing.

8. Unbeknown to Appellant, a jury trial was scheduled to commence less than a week later. The day before the scheduled jury trial, the Deputy Clerk of Courts called Appellant to see what the status was. Appellant informed said clerk, that he was unaware of the jury trial date and that he wanted the assistance of legal counsel. She advised him to put something in writing and file it with the court that same day.. Appellant drafted a Notice

of Demand, putting the Court on notice that he was exercising his Constitutional rights, he had the right to the assistance of legal counsel and the right to a speedy trial. Upon delivery of the written Notice to the Clerks office, the clerk requests Appellant stay there, she'll take the Notice up to Judge Dawson, for her review and she may have some questions. Later, a proceeding is held, at which time, Appellant advises said judge he wasn't waiving his constitutional rights. She fails to competently address the issues.

9. The next day, May 28, 2009, with a jury panel waiting, Judge Dawson holds a hearing, thereafter reluctantly continuing the scheduled jury trial, represented to the parties there would be, in essence, no new scheduling order, and ordered Appellant to resubmit an application for court appointed counsel.

10. On June 2, 2009, another district Judge, Judge Wickham Corwin, appoints the Fargo Public Defenders Office to represent Appellant.

11. On June 9, 2009 Judge Wickham Corwin enters a new Scheduling Order, reassigning the case to himself. He is not the presiding Judge of the Judicial District; NDCC 29-15-21, specifically provides only the presiding judge of the district has assignment [and reassignment] authority. Judge Corwin, in effect overruled the prior scheduling order and the rights attached thereto and Judge Dawson representations [order] that there would be, in essence, no new scheduling order she [Judge Dawson] was only continuing the jury trial.

12. Upon receiving notification that Appellant had been appointed counsel, Appellant immediately requested counsel to do some legal research into the issues involved herein; obtain the transcripts of the prior proceedings; and undertake some investigation into the

complaining witness, Lynn Dammen. Counsel failed/refused to do so.

13 . Appellant made an appointment to meet with court appointed counsel, June 14, 2009, to discuss the case, specifically told counsel to file a resistance to this arbitrary reassignment of this case to Judge Corwin. Counsel at that time informed Appellant that he was also a prosecutor, an assistant city attorney for the City of Fargo ND. Counsel failed/refused to file this resistance to the reassignment order. Appellant was advised by the Fargo City Commission, as of Mid-September, 2009, Gordon Dexheimer, was still listed as an assistant city attorney, the same attorney that had been appointed to represent defendant. Defendant has the Constitutional right to the assistance of conflict free Counsel, an issue that the District court has failed to impartially address.

14. Judge Corwin failed to hold the scheduled hearing on July 15, 2009, [per his order] thus Appellants' first opportunity to file a pro se objection to this reassignment order occurred on July 30, 2009, coincidentally the day the jury trial was scheduled to start. The Court denied the motion. The State represented that it would appear "an entitlement to the same [assigned] judge, would be a reasonable expectation.". Appointed counsel did not support his client, in defending against this arbitrary reassignment Order..

15. On July 30, after Judge Corwin had denied Appellants request to vacate the arbitrary reassignment Order assigning the case to himself, he advised Appellant that the trial would be proceedings at that time, he asked Appellant if he was proceeding with assigned counsel, Appellant stated he was "forced" too. Judge Corwin made no inquiry as to why Appellant indicated that he was "forced" to proceed with appointed

counsel. Counsel put on a perfunctory performance in defending Appellant, at the end of the States case he makes a Rule 29 motion, and clearly states that he's representing the "State", which the Court ultimately denies. Defense counsel has proposed no jury Instruction(s), which the testimony clearly implies should have been requested.

16. State witnesses presented false, misleading testimony, inadmissible, prejudicial hearsay testimony and evidence, defense counsel makes not attempt to exclude this testimony or evidence, makes no objections to it; makes no motion for mistrial.

17. The jury ultimately returns a guilty verdict, upon being discharged of their duties, the court proceeds to judgment, enters a partial judgment, and addresses the issue of restitution. Due to a "surprise claim" those proceedings have to be continued, to allow for discovery.

18. Appellant lets his counsel know, by letter July 31, that he will be appealing. The court enters a written Judgment of Conviction, whereupon appointed defense counsel advises Appellant-in writing- that his representation of Appellant is concluded. He has no further obligations to Appellant.

19. Appellant files a Motion for New Trial , alleging ineffective assistance of counsel at trial, among other issues, and Motion for Counsel. Counsel files a Motion to Withdraw. a hearing is scheduled September 23, at which time the Court grants the Motion to Withdraw. At that same time, appointed counsel, Gordon Dexheimer, specifically requests the Court not appoint Appellant another attorney. Judge Corwin grants his request, refuses to appoint another attorney, and specifically states that he will not appoint another attorney. Judge Corwin even states that any right to counsel on appeal, must be taken up with the Clerk of the Supreme Court.

20. Judge Corwin, proceeds to deny Appellants Motion for New Trial [based in part on ineffective assistance of counsel at trial], but has refused to render a written order.

21. The continued restitution hearing is held October 21, whereupon Appellant was denied the right to counsel at, the Court ultimately entered a judgment of \$5,400.00 for alleged damages, the States expert witness, testified that he could only use “conjecture” as to what caused the injury at issue. The State had failed to produce the evidence, Appellant made a Rule 16 motion for, and what evidence it did produce was untimely and only part of the materials requested.

22. Judge Corwin entered a written Judgment on November 13, 2009, which Appellant filed a Notice of Appeal from. The clerk of the Supreme Court noted a deficiency in the Judgment, brought it to the attention of the parties, whereupon, appellant filed a Motion to correct the errors, attached thereto the Supreme Courts Order denying the Appointment of Appellate Counsel, and requested that Judge Corwin enter a written Order as it pertains to the Motion for New Trial and Motion for Counsel and noted that his financial status had not changed since the Motion for Counsel had been filed back in August, 2009.

23. On January 14, 2010, Judge Corwin Amended the Judgment of Conviction, but has not entered any Written order, as it pertains to the remaining issues in the Motion.

24. North Dakota grants defendants an appeal of criminal convictions, as a matter of right, the United States Supreme Court has held that Defendant would have the Constitutional right, under the United States Constitution to the Assistance of legal counsel on that direct appeal, granted as a matter of right. The North Dakota Supreme Court has held that the Constitution of the State of North Dakota and the States Statutes

grant greater protections than those afforded by the United States Constitution.

25. Appellant is thus “forced” to perfect an appellate brief, pro se, without the assistance of legal counsel, in violation of State Law; the Constitution(s) of the State of North Dakota and of the United States, in view of the fact, that the District Court Judge Corwin, has clearly held he will not appoint Appellant legal counsel; he will not entertain any motions Appellant may desire to file at the District Court level and the State Supreme Court represents that it does not appoint appellate counsel, Appellant is being denied Equality in the State Court system, in violation of the Equal Protection and Due Process of Law Clauses.

## JURISDICTIONAL STATEMENT

This Supreme Court, for the State of North Dakota, has jurisdiction over this direct criminal appeal under the North Dakota Constitution, Article VI, Subsection 6 and N.D.C.C. 29-28-06.

## STANDARD OF REVIEW

Appellant moves this Court to adopt a new higher “Standard of Review” that being a “Common Sense, Equality under the Law” standard.

The present standard(s) for Attorneys is “Reasonable” and for Judges its “abuse of discretion” these standards, in essence, are borderline incompetence, or as compared to the “preponderance of evidence” standard, more believable than not.

Taking this Court out of the Courtroom, into the real world, for a comparison of the present standard and Appellants proposed higher standard.

Take for example: The City of Bismarck, ND has a fire department. The fire department has a policy. The policy, in relevant part, provides that all single alarm fires, the department shall not be on the scene more than two hours. Two alarm fires, not more than four hours, etc.

The firemen have a union. The union agreement, in part, provides that the firemen shall take scheduled breaks, including lunch breaks at specified times and those breaks shall be taken at their respective place(s) of employment, e.g. firehouse.

The City of Bismarck, has a policy, due to limited budget constraints, no department is allowed to put in any overtime.

Under the “Reasonable Standard of Review” these policies would be reasonable. But do

they meet the “Common Sense, Equality under the Law” Standard Appellant proposes? Application, would prove Reasonable is in fact incompetent and unrealistic.

[EXAMPLE] One of this Courts Justices, lives approximately one half hour from the nearest Bismarck fire department. The 9-1-1 call comes in at 2:30 p.m. that their [Justices] house is on fire.

The fire department arrives at 3:00 p.m., they have only started to knock down the fire, when they realize that their shift is over at 4:00 p.m., they are not allowed to put in any overtime, it takes them one half hour to get back to the fire house. Without putting out the fire, they pack up and leave. Their “policy”, “agreement” require it. Under these facts, their acts would be reasonable. They have to comply with the rules, policies and agreements that are in place and they are required to adhere too.

But under the common sense standard, their acts would amount to incompetence. By the same token, other fire departments, that are not unionized, or a part of the City of Bismarck, policy, rules, agreements would be allowed to stay on the scene, until the job is completed.

The Justices’ house burns down, under the “reasonable standard” but under the “common sense, equality standard” minimal damage occurs.

This Court, the States highest Court, should be more interested in exercising common sense and seeing that equality under the law prevails.

As Justice Marshall stated, way back in 1924, “Common sense often makes good laws.” See Madison v. Monroe, (??) 24 S. Ct. \_\_\_\_ (??) [I don’t remember the page no]

This Court may question why the higher standard of review?

District Court Judge Wickham Corwin, stated on the record:

“...I will tell you that I have now been a lawyer or a judge for close to thirty-five years...”

*See*, Appendix I, page 76 [PT (9-23), page 14, lines 1-2].

**COMMON SENSE, standard of review:**

He [Judge Corwin] should have known what the laws of this State are:

He [Judge Corwin] should have known that the States laws did not allow him to undertake the actions that he did, e.g., reassigning a case to himself, when the State Statute only allows assignment or reassignment of cases to be done by the Presiding Judge of the District;

He [Judge Corwin] knew he was not the Presiding Judge of the District,;

He [Judge Corwin] knew, or should have known, that there had been an Original Order appointing Judge Steven Marquart to this case,;

He, knew or should have known that the Record, clearly and undeniably, proves that the parties to the action, did not request that he be disqualified

He, knew or should have known that same Record, clearly and undeniably, proves that Judge Steven Marquart never filed any Notices to the Parties, that he was disqualifying himself.

He knew or should have known that when the State stated there was an “entitlement that the expectation same [assigned] judge would preside throughout, it should have given him reason to believe his actions were illegal and thus he should question the lawfulness of his actions;

A “Common Sense” approach, would clearly prove that Judge Corwin’s

“experience” stood in the way of his “ability” to do what the law clearly prohibits him from doing, e.g., arbitrarily reassigning a case to himself, when he is not the Presiding Judge of the District, See NDCC 29-15-21 (8).

Furthermore, the abuse of discretion standard, gives the Judges an opportunity to, in essence, plead ignorance of the law, which is no defense in the real world. By adopting this higher realistic standard of review, Judge Corwin apparent “thirty-five years” of experience, would have told him to stay the hell out of ongoing cases that he has not been properly assigned too, by the Presiding Judge of the District.

#### THE ULTIMATE QUESTION! WHY?

This Supreme Court has held that the Constitution of the State of North Dakota and the statutory laws of the State of North Dakota, affords its residents *greater protections*, than those afforded by the United States Constitution.

Providing that is the truth, WHY NOT, require its Judges and Attorneys to a Higher Standard [of review] for their respective performance, under the Equality of the Laws standard, than those under the United States Constitution, which this Court has stated does not afford the same [greater] protections this States Constitution and Statutory Laws guarantee. Which the “reasonable” standard was premised under.

It would seem implausible that a State that affords its citizens a higher protection of the laws, would allow its Judges and Attorneys performance to be judged on a lower standard, adopted under a Constitution [United States], that does afford that higher protection of rights.

As noted, that “Common Sense, Equality under the Law” standard would be more

appropriate in this, the real world, and its constantly changing standards, values, etc.

WHEREFORE, Appellant respectfully moves this Court to adopt a higher “Common Sense, Equality under the Laws” standard of review, in light of this States Constitution and Statutory Laws providing greater protections, than those afforded by the United States Constitution. In view of the fact, in reality the “reasonable standard”, “abuse of discretion standard” is borderline “gross incompetence” when viewed equally for what it actually is.

## ARGUMENT

IS THE COMPLAINT LEGALLY SUFFICIENT UNDER NORTH DAKOTA  
STATUTORY REQUIREMENTS?

THE COMPLAINT IS LEGALLY INSUFFICIENT UNDER NORTH DAKOTA  
STATUTE 29-05-01.

NDCC 29-05-01 provides:

“What complaint must state. A complaint **must** state:

1. The name of the person accused, if known, or if not known and it is so stated, that person may be designated by any other name;
2. The county in which the offense was committed;
3. The general name of the crime or public offense committed;
4. The acts or omissions complained of as constituting the crime or public offense named;
5. The name against whom, or against whose property, the offense was committed, if known; and
6. If the offense is against the property of any person, a general description of such property.

The complaint must be subscribed and sworn to by the complainant.” (*Emphasis added*).

The complaint herein fails to meet these mandatory statutory requirements.

Defendant filed a pro se MOTION, challenging the sufficiency of the complaint. *See* Appendix D, pages 5-6. The district court, ruled that Defendant pro se MOTION was premature, issues for a jury to decide. *See* Appendix E, pages 8-10, [PT 2-4]. The Complaint only alleges four of the elements, statutorily required. *See* Appendix B, page 3.

It is recognized that a specific statute controls a general statute, words are to be given there everyday meaning. The usage of the word “**must**” makes it mandatory that the complaint contain six (6) specific elements. Each of these elements were known

to the State, prior to the filing of the complaint, yet were not set forth in the Complaint.

The Complaint is further legally insufficient in that the person known to the State as having made the complaint, was not the person that “subscribed and swore to” as provided by the mandatory language of NDCC 29-05-01. *See* Appendix B, page 3.

The district court abused its discretion, when it failed to allow Defendant a full or fair opportunity to argue the insufficiency of the Complaint, even though, it was, an issue that the Court must address, to determine if it has subject matter jurisdiction.

The U.S. Supreme Court in Giordenello v. United States, 357 U. S. 480 (1958) held that to support the issuance of a warrant the complaint must contain in addition to a statement “of the essential facts constituting the offense” a statement of the facts relied upon by the complainant to establish probable cause.

Defendant had put the Court on Notice, the complaint was insufficient to allege a crime. The Complaint, fails to allege all six of the elements mandatory required by NDCC 29-05-01 and appears to fail to establish the facts to establish probable cause. The State was not required to prove each element of the offense required by NDCC 29-05-01. The Court erred in failing to address that issue and acted without subject matter jurisdiction, due to the Complaint being insufficient to allege a crime under NDCC 29-05-01

## II

NDCC 47-26-01, IS UNCONSTITUTIONAL, IT IS VAGUE, OVERBROAD, AND VIOLATES THE EQUAL PROTECTION AND DUE PROCESS OF LAW CLAUSES.

NDCC 47-26-01, which pertains to fences, is an essential element of the offense of Livestock Running At Large, a violation of NDCC 36-11-01. Defendant raised the issue that NDCC 47-26-01 was unconstitutional, it is vague, overbroad and as such violates

Equal Protection and Due Process Clauses of the United States Constitution and the Constitution of the State of North Dakota. *See* Appendix D, pages 5-6.

The test for vagueness is whether persons of ordinary understanding and intelligence would differ in its interpretation.

NDCC 47-26-01 provides:

Definition of legal fence. The following shall constitute a legal fence:

1. Any fence four and one-half feet [1.37 meters] high, in good repair, consisting of rails, timber, boards, stone walls, or any combination thereof.
2. All brooks, rivers, ponds, creeks, ditches, or hedges.
3. All things which, in the judgment of the fence viewers within whose jurisdiction the fence may be, are equivalent to the things specified in subsections 1 and 2.
4. Any fence upon which the interested parties may agree.
5. A barbed wire fence consisting of at least three barbed wires with at least number twelve and one-half gauge wire, the wire to be fastened firmly to posts which shall be not more than twenty feet [6.10 meters] or not more that forty feet [12.19 meters] and three stays apart. The top wire shall be not less than forty inches [101.6 centimeters] high, the bottom wire shall be not more than sixteen inches [40.64 centimeters] above the ground, and no two adjacent wires shall be separated by more than sixteen inches [4064 centimeters].
6. A wire fence consisting of five smooth wires with posts not more than two rods [10.06 meters] apart and with good stays not more than eight feet [2.44 meters] apart, the top wire being not less than forty-eight inches [121.92 centimeters] not more than fifty-six inches [142.24 centimeters] and the bottom wire being not less than sixteen inches [40.64 centimeters] nor more than twenty inches [50.8 centimeters] above the ground.

While it may appear that this statute is clear, the testimony during trial proved that from the State's own witnesses, the law enforcement officers interpretation, it was not clear, they each had their own interpretation of what would and would not be a legal fence.

Subsection 2 provides: "All brooks, rivers, ponds, creeks, ditches, or hedges...:

Deputy Steve Hunt, questioned what would constitute a ditch.

Q. How about number two, All brooks, rivers, ponds, creeks, ditches, or hedges”?

A. It didn't seem to apply in this case either.

Q. Well, it's part of the statute. Does a ditch constitute a lawful fence?

A. I guess that would depend on your definition of “ditch.”

Deputy Hunt admits that Defendants fence contains a ditch.

Q. Is there a ditch there?

A. On the front side of the pasture there is.

*See*, Appendix G, page 41,[JT page 128, lines 8-22].

Deputy Hunt further testified:

Q. So you don't know if a ditch is a legal fence or not, do you?

A. I do not. I don't believe it is.

Q. And you don't know if a brook is a legal fence or not?

A. In this case, I do not.

*See*, Appendix G, page 43,[JT page 130, lines 9-14.]

Deputy Hunt also gives testimony regarding the denial of Equal Protection and Due process of Law issue.

Q. Are you familiar with the type of fences that the Department of Transportation uses?

A. Along the interstates?

Q. Yes.

A. Yes, I am.

Q. Do you know what they are?

A. From my recollection, they're woven wire fences.

Q. But according to your interpretation of the fence statute, woven wire is not in there. So the Department of Transportation or the State of North Dakota is using an unlawful fence?

A. They're not holding livestock, as far as I know.

Q. Well, it's not there for the cars, is it:?

A. (no response).

*See*, Appendix G, pages 44-45,[JT page 132, line 26 and page 133, lines 1 thru 15]

NDCC 47-26-01 *supra*, makes no reference to what a “legal fence” is to be utilized

for. Thus whether the State Department of Transportation utilizes “woven wire” for holding livestock or control of the cars, becomes immaterial to whether the State discriminates in its usage of woven wire, yet forbidding its usage by the farming, and livestock community.

It is common knowledge and widely recognized that the area next to all roads, is known as a “ditch”. State Exhibit “1” clearly proves that Defendants property has a ditch on the front side, as testified to by Deputy Hunt surpa.

The legal fence being the “ditch” any fence that may exist thereon, or the condition thereof, would be totally irrelevant. Whether that fence consisted of one strand; two strands or 10 strands. Since the “ditch” is the legal fence, whether the fence posts holding up those strands of wire, were perpendicular or not, twisted or leaning or whether the wires are firmly attached or not, all becomes irrelevant. State Exhibit “1” furthermore proves Defendants allegation [in his MOTION] of selective preserving of evidence. What caused the fence post to be leaning or twisted? Are the wires actually firmly fasted to the post, but the photograph, taken from the back side of the fence and at a distance fails to prove that fact?

Common sense says, these factual matters, also proves ineffective assistance of legal counsel. His failure to inquire about those issues, whereupon, if he had competently represented his clients interests, he would have made a motion to suppress, for failure to preserve evidence favorable to the Defendant, trespassing upon Defendants property to collect evidence without a warrant; failure to properly investigate.

Defense counsels failures prejudiced Defendant, as those State Exhibits should not

have been allowed into evidence. As Fred Frederickson, later testified, he couldn't really tell how many wires were on the fence, as that Exhibit alleged to purport. [ He believes there are five, based on the clips]. A close up of the front side of that fence, evidence deliberately and intentionally not preserved by the Deputy Sheriff, would have proven the fact that the fence did meet State Statutory requirements. That although the post may appear twisted the wires were still fastened to the post and that the fence was still at the statutory 48" height requirements.

As Fred Frederickson, a representative from the North Dakota Stockman's Association and also a law enforcement officer testified:

Q. Okay. And in this definition of a "lawful fence," we have five other categories. One is, "A wire fence consisting of five smooth wires"?

A. Yes.

Q. Okay. Does that mean five separate smooth wires?

A. Yes. The way I understand it, it would be five woven wires.

Q. Woven wires?

A. The way I take it. I don't --I'm not a fence expert.

*See* Appendix G, pages 54-55, [JT page 151, lines 20-25; page 152, lines 1-5].

Q. Any you're saying that you believe the five smooth wires means a netted fence?

A. No. You've got your netting fence where they put two barbed wires on top, or you've got the five-wire. And most -- *I guess* what I'd say is a good fence for -- I've been around, you know, cattle--

Q. But I'm just asking what you interpret "five smooth wires" to be?

A. Okay. *I guess* what I take as "five smooth wires" would be twisted wire without the barb.

Q. Okay.

A. *I guess* that's how I interpret it. (Emphasis added)

*See*, Appendix G, pages 55-56, [JT page 152, lines 21-25; page 153, lines 1-7].

As this testimony clearly proves, law enforcement officers can *not* give a consistent interpretation of what "5 smooth wires" are per the Statute to mean, they guess at its

interpretation or what it means. One time he interprets it to mean “woven wires” another time he interprets it to mean “twisted wires”. Each form of wire, is actually different.

This testimony clearly indicates the vagueness of the Statute, the reasonable person standard, as law enforcement do not understand it to be clear enough to give consistent interpretations thereof.

Frederickson further testifies:

Q. Can you clearly say when you look at a fence that it doesn't fit this statute?

A. *I guess* there's a lot of fences around that wouldn't meet what that statute--what they-

Q. Including the Department of Transportation's fences?

A. Yes, in some areas.

Q. Did you actually look at this fence?

A. No, I didn't...

*See*, Appendix G, pages 56-57, [JT page 153, lines 20-25; page 154, lines 1-3].(Emphasis added).

As this testimony clearly proves, law enforcement officials agree, the State Department of Transportation fences don't meet what the statute requires.

Frederickson testified that a “ditch” would not be a good fence, unless it had wires on it.

Q. And do you think a ditch is a good fence?

A. Not unless there's some good wires up.

Q. But it doesn't say anything about having wires on them, does it?

A. That's how --

Q. Or brooks or streams or anything else?

A. Yes.

*See*, Appendix G, pages 59-60, [JT page 157, lines 23-25; page 158, lines 1-4]

This testimony additionally provides evidence that the Statute is vague, as law enforcement officers disagree as to what constitutes a “lawful fence”.

Defense Counsel, did not allow the witnesses to complete their answers and refused to call defense witnesses, that would further have proven how unconstitutional and discriminatory this statute is.

*See* Appendix A, page 2,[subpoenas for defense witnesses dated January 15, 2009].

As noted *infra*, Section VII, defendant received the ineffective assistance of legal counsel. The State's Exhibits, 1-8, were inadmissible, highly prejudicial hearsay; would have been suppressed, had the district court given defendant "equal treatment under the law" and allowed defendant to call witnesses in support of his Motion to Suppress, which, because appointed defense counsel having an actual conflict of interest, allowed into evidence without objection, and made no attempt to suppress.

As Defendants Rule 60 Motion clearly proves, the Exhibits attached thereto, there exists a "ditch" along that fence line [State Exhibits 4-8] which per Statute, was the "lawful fence". In addition, the woven wire fence does not belong to Defendant, but the adjoining landowner and the fact that the landowner in question, whom any "fence agreement" would have been with, was not the complaining witness, Lynn Dammen. Lynn Dammen has no legal standing to challenge that fence, or any fence agreements that may exist long before Deputy Steve Hunt became a law enforcement officer in Traill County, ND, and defense counsel, due to his gross incompetence and refusal to present his clients case, failed to point those facts out, establish a clearer record of those facts, or do any investigation into.

It is evident that the State of North Dakota's use of woven wire fence material, which is not allowed per statute NDCC 47-26-01, violates the due process and equal

protection of law clauses, and where woven wire has been utilized throughout the farming community, yet the Statute does not allow its usage. The Statute is unconstitutional as applied, and must be struck down.

### III

THE DISTRICT COURT JUDGE, JUDGE WICKHAM CORWIN, LACKED JURISDICTION, POWER AND AUTHORITY TO PRESIDE OVER THIS CASE.

The record proves that Presiding Judge John Irby, entered a Scheduling Order on October 29, 2008, assigning this case to District Court Judge Steven Marquart.

*See* Appendix C, page 4.

NDCC 29-15-21 (1) gives any party to a civil or criminal action the right to demand a change of judge. It further requires that the demand for change of judge be filed with the clerk of the court not later than ten days after the occurrence of the earliest of any one of the following events:

- a. The *date of the notice of assignment* or reassignment of a judge for the trial of the case;
- b. The date of notice of that a trial has been scheduled; or .... [Emphasis added]

The record proves that the parties to this action did not exercise their rights by filing a demand for a change of judge, with the Clerk of District Court. Judicially Noticed Fact, *See* Appendix A, page 1-2.

It is recognized that laws are passed for the protection of the people, not the will of the judge. The equal protection and due process rights thereby attaches that Judge Marquart would be the only judge that has jurisdiction, power or authority to act. In compliance with the Scheduling Order, Appendix C, page 4. proceedings were held on January 7, 2009.

Based on the Scheduling Order, dated October 29, 2008, Judge Dawson was acting without jurisdiction, power or authority. Judge Dawson was not the judge assigned to the case.\*

The Scheduling Order, dated June 9, 2009 by Judge Wickham Corwin, reassigning the case to himself is also, invalid.

It is clearly a *sub silento* overruling of the Original Scheduling Order by a District Court Judge that lacks statutory authority or power to enter it.

This Court may Judicially Notice that District Court Judge Wickham Corwin is not the Presiding Judge of the East Central Judicial District.

The clear intent of NDCC 29-15-21, et al *only* the Presiding Judge of the district has the statutory authority to assign or reassign a case to another judge, *and only, if* a Demand for change of judge has been timely filed. *See*, NDCC 29-15-21(8). The Record Appendix A, pages 1-2, proves that the parties did not exercise their rights to remove the assigned judge, Judge Steven Marquart.

Under NDCC 29-15-21. the equal protection and due process of law clauses, Judge Steven Marquart, was the only judge that has power, authority and jurisdiction in this matter. The new Scheduling Order, reassigning the case to Judge Corwin, ordered and signed by Judge Corwin, is clearly arbitrary, usurpation of authority and power, and a deliberate misapplication of State Statutory provisions.

The State appears to have agreed, that the parties have an entitlement to an expectation

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\* The record below indicates that the parties [Defendant and the State] agree that the proceedings held on January 7, 2009, were held before Judge Cynthia Rothe-Saeger and not before Judge Gloria Dawson, as the Certified Transcripts represent. *See* Appendix E, page 13, [PT page 14, line 17-23]. Appendix F, page 19, [JT , page 23, line 14].

that one judge be assigned to the proceedings from start to finish.

*See* Appendix F, page 21, [JT page10, lines 8-11]

MR. LARSON: Yes. There should be a record of what she said. All I can tell you is, if it said this is continued, ***it appears to be somewhat valid that the expectation would be that it would be the same judge. (Emphasis added)***

Therefore, Judge Wickham Corwin acted without jurisdiction, power or authority, as authorized by State Statute, and all resultant orders and the judgment of conviction is invalid. His acts were arbitrary, a clear usurpation of power and authority and clearly violates the Judicial Code of Ethics; the Equal Protection and Due Process of Law Clauses of the United States and the State of North Dakota and State Statutes.

The record further proves his arbitrary misuse of judicial power. Even before he arbitrarily reassigned the case to himself, he enters the order assigning the Fargo Public Defenders office as counsel for Defendant. *See* Appendix E, page 16.

His order appears dated June 2, 2009, the [new scheduling order] was dated June 9, 2009. *See* Appendix F, page 17. *See* also, Appendix A, page 1, Doc. Entry No. 40].

Additional acts without jurisdiction, power or authority as authorized by NDCC 29-15-21 et al. supra. Judge Corwin erroneously believed that a showing of prejudice must be made before he could be disqualified, prior to his entering any orders in this matter. This belief, contradicts **State v. Zueger**, 459 N.W. 2d 235 (ND 1990).

This Court should adopt a “common sense” approach to judges acts, instead of the “abuse of discretion” standard of review.

Judge Wickham Corwin stated at the proceedings on September 21, 2009, that:

THE COURT: “.... I will tell you that I have now been a lawyer or a judge for close to thirty-five years. ...”

*See* Appendix I, page 76,[PT,(9-23) page 14, lines 1-2].

Using a “common sense” standard of review, Judge Corwin, knew or should have known that he did not have statutory authority to reassign the case to himself; he knew or should have known that NDCC 29-15-21 (8), only gave that authority [to assign or reassign cases] to the presiding judge of the district; Judge Corwin knew that he was not the presiding judge of the district; Judge Corwin knew or should have known that he was not the judge assigned to the case on October 29, 2008, and that the parties had not exercised their rights and/or privileges provided by NDCC 29-15-21, et al, to timely remove Judge Steven Marquart from the case; Judge Corwin knew or should have known that he lacked jurisdiction and authority to appoint an attorney for defendant on June 2, 2009; Judge Corwin knew or should have known what the State Statutes provided and that those same Statutes were passed for the protection of the people, not the will of the judge; Judge Corwin knew or should have known that “ignorance of the law is no defense” and as [a so called] experienced lawyer and judge, Defendant did have the right-  
-Constitutional and Statutory- to have his attorney represent his interest in more than a perfunctory manner. Defense counsels ethic duty and obligation to his client was to forcefully support Defendant in resisting this arbitrary reassignment, taken without statutory authority, which, the record clearly proves, counsel gross incompetence failed to support. As noted each of these same factors proves that Judge Corwin did clearly “abuse his discretion” in all matters pertaining to this case.

There is a need to correct errors that seriously affect the “fairness, integrity or public

reputation of judicial proceedings.” United States v. Olano, 507 U. S. 725, 736 (1993).

Judge Corwins’ rulings are merely his prejudicial, biased justifications for his arbitrary acts, without authority, which a fair and impartial hearing, before an impartial judge would have proved to be totally incorrect. His findings of facts and conclusions of law, are based upon his biased, prejudice viewpoint. Equality under the law, a truly fair and impartial hearing, would have produced evidence that would have proven how clearly erroneous his findings and conclusions are.

As the State recognized, the reasonable expectation that the same judge preside throughout the whole proceedings, Judge Steven Marquart, being the only authorized judge on this case, Judge Corwins’ order are all invalid, for lack of jurisdiction, power or authority, and it would be mandatory that this court reverse all such orders.

#### IV

THE PRACTICE OF THE EAST CENTRAL JUDICIAL DISTRICT, VIOLATES THE EQUAL PROTECTION; DUE PROCESS OF LAW CLAUSES AND STATE STATUTES.

The practice of the East Central Judicial District, of rotating the District Court Judges, throughout the Judicial District, violates the parties equal protection; due process of law rights and State Statutes.

NDCC 29-15-21 et al, clearly gives the parties to any action, civil or criminal, or proceeding pending in the district court, the right to remove an assigned judge. The demand for change of judge, is statutorily required to be filed with the clerk of the district court not later than ten days after the parties have been given a) notice of the assignment or reassignment of a judge for trial of the case; b) the date of notice that a trial has been

scheduled; or c) the date of service of any ex parte order in the case signed by the judge against whom the demand is filed. NDCC 29-15-21(2),(a), (b), (c).

The record herein, Appendix A, pages 1-2, clearly proves that the Clerk of Courts did not give the parties Notice that the proceedings held on January 7, 2009 would be held before Judge Gloria Dawson; or that the scheduled jury trial to be held on May 28, 29, 2009, were to be before Judge Gloria Dawson. No Order of Reassignment, appears of Record. No Notice to the parties, that the jury trial had been rescheduled to May 28, 29, 2009 appears of record. Judicially Noticed Fact. *See* Appendix A, pages 1-2.

This violates the parties equal protection and due process of law rights. The parties have a constitutionally protected right to have only the judge assigned to their case preside over matters pertaining to their case. They have the right to fair notice when the jury trial is rescheduled for, with that Notice coming directly from the Clerk of the District Court. This record proves a denial of that due process and equal protection right.

Defendant received no Notification from the Clerk of Courts that the jury trial had been scheduled for May 28-29, 2009. Appointed defense counsel didn't even advise Defendant of that fact.

NDCC 29-15-21 clearly requires the Clerk of the Court to give the parties notice, if the case is reassigned to another judge. It further mandatory requires that only the presiding judge of the district has the authority to make that reassignment. NDCC 29-15-21 (8). An exception exists when the Supreme Court has that reassignment authority.

The East Central district courts rotational practice violates the Equal Protection and Due process of law rights, where, the parties are not informed who the judge coming up

on the rotation may be; the upcoming judge may not be the judge assigned to hear the case; a judge previously disqualified may come into that rotation, then would preside over matters and enter orders that affect substantive rights, the parties would be required to make 11<sup>th</sup> hour motions to disqualify, or forced to proceed through a trial, only to raise the issue on appeal requiring a reversal for a new trial.

The prejudice to the parties rights becomes obvious. A previously properly disqualified judge, arbitrarily presides entering orders in the case. This practice clearly violates the parties procedural due process of law rights. They were never notified who the next judge would be. It further is evidence of denial of the equal protection of the law, since NDCC 29-15-21 (7) implies that a party is only entitled to one change of judge, e.g., “ the presiding judge may decline to grant another demand for a change of judge...” This appears consistent with this Courts interpretation also. *See Township of Noble v. Aasen, 86 N.W. 742 (1901)* ( Person accused of civil contempt was not entitled to have presiding judge disqualified for prejudice and another judge called to determine the case).

The failure to notify the parties that the assigned judge was not the one presiding was brought to the district courts attention. *See* Appendix E, pages 12-14 [PT page13-15]; Appendix E, page 22, [J T page 11]. *See* also, Appendix A, page 3, [Defendants Motion for New Trial and Brief in support, page 15].

The East Central District Court rotational judge practice is thereby unconstitutional and needs to be declared unconstitutional, under State NDCC 29-15-21 et al; and the Equal Protection and Due Process Clauses of the United States Constitution and the Constitution of the State of North Dakota.

V.

DEFENDANT WAS DENIED THE EQUAL PROTECTION AND DUE PROCESS OF LAW, WHEN THE DISTRICT COURT FAILED TO ALLOW DEFENDANT A FULL AND FAIR HEARING ON MOTION.

The Scheduling Order, Appendix C, page 4, clearly informs the parties that any Motion filed shall be heard on January 7, 2009. Defendant filed a document entitled MOTION. *See* Appendix D, pages 5-6. This Motion alleged numerous issues. E.g., Complaint was insufficient to allege a crime; Statute unconstitutional; Motion to Dismiss; Motion to Suppress; Selective prosecution; States failure to preserve evidence favorable to Defendant.

In **Haines v. Kerner**, 404 U.S. 519, 92 S. CT. 594 (1972), the Supreme Court ruled that pro se pleadings must be liberally construed, held to less stringent standards than those drafted by attorneys. It also required the Courts to look to the substance of the pro se pleadings, not to the titles the pro se pleader may have used. *Cf.* **State v. Himmerick**, 499 N.W. 2d 568 (N.D. 1993) ( a reviewing court will choose the substance of a document over its form).

Defendants pro se pleading clearly stated that it was a Motion to Suppress Evidence, as the State had failed to preserve evidence favorable to Defendant. This Motion was supported by Affidavit. *See* Appendix D, page 6.

On January 7, 2009, the district court, not only abused its discretion, but it also arbitrarily ruled that the Motion was premature. It also lacked jurisdiction, power and authority over the case, the judge, was not the judge assigned to the case. These were not issues that a jury decides. *See* Appendix E, pages 8-9.

The U.S. Supreme Court in Snyder v. Mass., 291 U.S. 97, 54 S. Ct. 330 (1934) stated that the right to confrontation was an aspect of procedural due process. This Court has held that a hearing on a motion to suppress evidence is a critical stage of the prosecution and the Confrontation Clause of the Sixth Amendment of the United States Constitution guarantees an accused the right to confront witnesses against him at such hearing. State v. Mondo, 325 N.W. 2d 201 (N.D. 1982).

Defendant was deprived of those constitutional rights, by a District Court Judge that lacked personal jurisdiction over the case. See supra, Section IV.

The U.S. Supreme Court has held that the failure of the State to preserve evidence favorable to the defendant, is a Constitutional violation, requiring suppression of all evidence. Here, the District Court refused to address the issue, abusing its discretion, and arbitrarily ruling the issue(s) were for a jury to decide. See Appendix E, page 8-9.

This was prejudicial to Defendant, as material evidence was not preserved that would have proven without a doubt that Defendants Livestock did not get out and Running at Large as alleged; Defendant was denied his confrontational rights at motion to suppress illegally obtained evidence. This also constitutes reversible error .

## VI

THE STATE ENGAGED IN SELECTIVE AND VINDICTIVE PROSECUTION IN VIOLATION OF THE EQUAL PROTECTION AND DUE PROCESS OF LAW CLAUSES.

The record, Appendix A, page 1, proves that Defendant filed a timely Rule 16 Motion. The Motion requested certain documents in the possession of the State. The State produced a document, which, was prepared by the Complaining witness Lynn Dammen.

It was dated August 6, 2008, the date of the alleged offense.

*See* Appendix H, pages 64–66

Lynn Dammen statement, undeniably would constitute an admission of criminal activity.

He states that he was attempting to drive Defendants livestock [a horse] to Cass County.

This would constitute an admission of:

- a) an attempt to deprive another of their property;
- b) the property was livestock;
- c) under the statute, that crime would be Grand Theft;
- d) Grand Theft is a felony under North Dakota Statute.

His statement further proves other criminal acts. He wanted compensation for three hours of loss work [caused by the above criminal activity]; he wanted compensation for his employer, for their loss of income caused by his criminal activity; he had trespassed upon property of another [Kurt Reimer's beet field]; during this trespass, he engaged in further criminal activity, [prevented property of another--livestock--from returning to their rightful owner]; thereafter engaging in additional criminal activity, forced that property of another--livestock-- onto his property.

He further wanted compensation for undocumented injury-loss of horse shoe, farrier expense, caused by his criminal activity. . All of which Lynn Dammen testified to at Trial.

This selective prosecution issue, timely raised in Defendants Motion, was not an issue for a jury to decide. An abuse of discretion in so finding is evident, warranting reversal.

This Court may take Judicial Notice, pursuant to Rule 609, that Defendant filed a Complaint with the North Dakota State Bar Association, against Stuart A. Larson, the Traill County States Attorney, prosecutor herein, for misuse, and abuse of his office, as

States Attorney, to further the interests of a private client of his. This evidence sustains Defendants representation that he was vindictively prosecuted. *See* also, Appendix A, page 3. [ Docket entry No. 133].

The State has not brought any criminal charges against Lynn Dammen, even though the evidence clearly proves guilt of specific intent crimes and crimes of a felony level. An admission of approximately ten (10) separate crimes. Judicially Noticed Fact.

The Record further supports selective prosecution as others similarly situated have never been prosecuted for this alleged offense, even though, they have had their livestock get out many times. *See* Appendix D, page 6

Selective, vindictive prosecution, violates the Equal Protection and Due process Clauses, when, as here, is undertaken for Constitutionally impermissible reasons. The State has in fact, engaged in bad faith prosecution. Retaliation for Defendants filing of the Complaint against him with the State Bar Association. The District Courts failure to allow Defendant the right to present this evidence on January 7, 2009, constituted a denial of his procedural due process rights; his Confrontational Rights, the right to present a defense; the right to call witnesses and constitutes an arbitrary and clear abuse of discretion, where the issue(s) are not issues for a jury to decide. *Cf. Snyder v. Mass*, supra; *State v. Mondo*, supra.

It further was prejudicial to Defendant in presenting his defense(s), due in part to ineffective assistance of legal counsel, court appointed counsel having a conflict of interest. And counsel not putting his clients interest first and foremost and presenting the true factual evidence that was admissible and fully available.. *See* Argument Infra, at VII

VII

DEFENDANT WAS DENIED THE EFFECTIVE, MEANINGFUL ASSISTANCE OF LEGAL COUNSEL AT TRIAL AND NO COUNSEL AT AN IMPORTANT PHASE OF THE CRIMINAL PROCESS; AND WHERE COUNSEL HAD AN ACTUAL CONFLICT OF INTEREST.

The United States Supreme Court has held that a criminal defendant has the Constitutional right to the effective, meaningful assistance of legal counsel, at all phases of the judicial process, including appeal. Gideon v. Wainwright, 83 S. Ct. 792 (1963); Douglas v. California, 83 S. Ct. 814 (1963);

The Sixth Amendment provides that a criminal defendant shall have the right to “the Assistance of Counsel for his defence.” This right has been accorded, we have said, “not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.” It follows from this that assistance which is ineffective in preserving fairness does not meet the constitutional mandate. Mickens v. Taylor, 535 U.S. 162 (2002) (internal quotes omitted) . The Court noted an exception to the general rule. That being where assistance of counsel has been denied entirely or during a critical stage of the proceedings. When that has occurred, we have held in several cases that “circumstances of that magnitude” may also arise when the defendant’s attorney actively represented conflicting interests. Id. U.S. at 166.

The complete denial of counsel during a critical stage of a judicial proceeding, mandates a presumption of prejudice because “the adversary process itself” has been rendered “presumptively unreliable.” Roe v. Flores-Ortega, 528 U. S. 470, 120 S. Ct. 1029 (2000) (quoting) United States v. Cronic, 466 U.S. 648, 659, 104 S. Ct. 2039.

It has long been recognized that a attorney is an assistant, an assistant, however expert,

is still just an assistant. Upon notification that the Fargo Public Defenders office had been appointed to represent Defendant, defendant requested counsel to do some legal research and obtain the transcripts of the January 7, 2009 hearing. Counsel refused to do the research or obtain the transcripts. *See*, Appendix F, pages 19-20, [JT page 8, lines 15-25; page 9, lines 1-16]; *See* also, Record, [Rule 60 Motion, Exhibit attached thereto].

Counsel was appointed in this matter, late in the proceedings. Having not been on the case from the beginning, it would only seem logical or “common sense” that he would want to obtain a copy of the transcripts of all prior court proceedings to determine for himself what had occurred and how to proceed. What pre-trial motions and discovery requests had to be filed to support his clients case. Defendants counsel refused to obtain those transcripts. As set forth supra, major issues that should cause concern to an attorney representing his clients best interest were at issue.

When Defendant meet with Counsel on June 14, 2009, Counsel advised Defendant that he was an assistant city attorney for the City of Fargo, ND. This was of great concern to Defendant. At that meeting Defendant expressly told Counsel to file a Motion Objecting to the arbitrary reassignment of this case to Judge Wickham Corwin and his new Scheduling Order. “Common sense” an experienced, competent attorney would have known that NDCC 29-15-21 did not allow for Judge Wickham Corwin to arbitrarily enter new Scheduling Order. Counsel, knew or should have known that Judge Corwin was not the presiding judge of the district; that a competent review of the record, the parties had not exercised their rights to remove Judge Marquart; based thereon, only Judge Marquart had jurisdiction, power and authority in this case. Counsel failed to do so.

The new scheduling Order, was clearly contrary to the representations made by the District Court Judge Gloria Dawson on May 28, 2009, that the jury trial was being continued only. No new scheduling order, allowing for discovery etc, would be allowed. *See* Appendix E, page 14, [PT page 15] . An experienced, attorney, advocating forcefully his clients cause, would have discovered this clear usurpation of power and authority and supported his clients cause, by filing the resistance to the arbitrary reassignment, without having to be told to do so by his client.

When Judge Corwin failed to hold the scheduled hearing on July 15, 2009, Defendants first and only opportunity to personally object to the arbitrary reassignment occurred on July 30, 2009, prior to the commencement of the jury trial. Judge Corwin denied that request, as noted supra, Judge Corwin lacks all jurisdiction in this matter.

As the record further proves, on June 2, 2009, Judge Corwin interfered with this criminal matter, without jurisdiction, power or legal authority, he was the one that appointed legal counsel, the Fargo Public Defenders Office. *See* Appendix E, page 16.

Then a week later, he arbitrarily enters a new Scheduling Order, reassigning the case to himself. As noted supra, he is not the presiding judge of the district, thus has no statutory authority to reassign cases. NDCC 29-15-21(8).

Counsel's representation of Defendant was merely perfunctory. The record proves that counsel failed to support his client defenses . As noted supra, the fence statute is vague and unconstitutional, State witnesses were inconsistent, in their own interpretation of what a "legal fence" was. Defense counsel failed to object to the admissibility of State exhibits 1-8. The statute states that a legal fence includes "all ditches" Exhibit 1 clearly

proves that Defendants fence is in the ditch. The condition of that fence becomes irrelevant, since the ditch is the legal fence. The other State exhibits, the fences therein, are also next to a ditch. These exhibits prejudiced Defendants defense. Counsel further failed to properly object to inadmissible, prejudicial hearsay;

Fred Frederickson from the North Dakota Stock Growers Association testified as follows:

Q. We're talking about the fence. You never looked at that fence?

A. No. Deputy Hunt was doing that.

Q. And the only thing you've seen are the photographs?

A. Yes.

Q. And do you know when these photographs were taken?

A. No, I don't.

Q. Did you see them taken?

A. Nope.

*See*, Appendix F, pages 57, [JT page 154, lines 11-21.]

An experienced, effective attorney, using "common sense" would thereupon have made a Motion for Mistrial. An experienced attorney, properly investigating his clients case, would have known that Frederickson had never seen Defendants fences, and would have made a motion to take his testimony out of the presence of the jury; preliminary to making a motion to suppress that testimony because it was not based on personal knowledge. Defendants ineffective, incompetent counsel failed to undertake those necessary steps to protect his clients interest of keeping prejudicial hearsay evidence out of the juries hearing.

As the Federal Rules of Evidence Rule 602 provides:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.

Frederickson's own testimony above, clearly proves he had no personal knowledge of the matters he was testifying about. He had never seen the defendants fences, thus the photographs he viewed, he lacked personal knowledge if the matters contained therein were actually of Defendants fences, in addition, he did not know who took the photographs or when they were taken. Defendants Counsel, deliberately and intentionally failed to protect his clients rights, by and through his failure to object to this prejudicial inadmissible hearsay, which infected the whole trial proceedings, and by not making a Motion for Mistrial. No reasonably competent attorney would have allowed that inadmissible, prejudicial hearsay to go uncontested without attempting to move for a Mistrial. In addition, an experienced competent attorney would have objected to the admissibility of the States' Exhibits, on constitutional and statutory grounds and would have requested testimony in connection thereto, be taken out of the presence of the jury, thereafter moving to suppress it and the Exhibits.

Frederickson further testified:

- Q. Since you didn't actually see the fence, you're looking at photographs, you're making an *assumption* based on what you see from the angle in which it's shot that this wire is not firmly attached? [Emphasis added]
- A. Yes, sir.

*See*, Appendix F, page 59,[JT page 157, lines 3-7]

Defense Counsel failed to competently impeach his credibility.

Frederickson testified on direct examination as follows:

- Q. Okay. As part of your job, Mr. Frederickson, are you aware of the legal fence statute in North Dakota?
- A. I've read it, but, you know, there's -- *the way I interpret it*, the minimum height of a fence is something like, on a three-wire fence, it's supposed to be forty inches. On a five-wire fence, it's a minimum height of forty inches

and no higher than fifty -six inches, and the bottom wire is supposed to be something like sixteen inches off the ground. It depends. *On a three-wire fence, you're supposed to have a --supposed to have a post, I believe, every ten feet. With a five-wire fence, you're supposed to have a post every eight feet, I believe it is.* (Emphasis added)

See Appendix F, page 50-51, [JT page 140-141, lines 17-25 and 1-5].

Counsel failed to challenge this clearly false and misleading testimony. The statute clearly does not require the post to be every 8 and 10 feet respectively. As set forth supra, NDCC 47-26-01 clearly requires the post on the three-wire fence to be not more than twenty feet or not more than forty feet, with three stays; and the five-wire smooth fence to have post not more than two rods apart. The five wire fence the minimum height is forty - eight inches, not forty as he represented.

Where the evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury, the judgment of conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." U.S. v. Agurs, 427 U.S. at 120.

It is universally recognized that a rod consists of 16.5 feet, thus the post [on the five smooth wire fence] could be up to 33 feet apart.

Compound this false, misleading testimony with the State's Exhibits, the jury was deliberately misled to believe Defendants fences may be illegal because the posts were farther than the 8-10 feet apart as represented by Frederickson as what the statute provided, and the jury could logically determine that from viewing the State's Exhibits.

Defense Counsel made no attempts to impeach this misleading, false testimony, or

even object to it. Frederickson's lack of personal knowledge of Defendants fences is further evident in his direct testimony as follows:

Q. Okay. So did you get a look at that fence running along that ditch?

A. Just *kind of* from the roadway you can see it, yes.

Q. Did you determine how many strands of wire were there?

A. There *shows to be -- I believe* it's electric fence on the north side here, and it *looks like* there's five clips, *so I take it* that there should be five wires

Q. Okay.

A. *But I can't—I'm not positive.* (Emphasis added)

See Appendix F, page 51-52, [JT Page 141, lines 15-25; page 142, line 1].

His lack of personal knowledge is evident. He can't even state positively how many strands of wire is on that fence, even viewing the States' Exhibit No. 1, a photograph of the ditch and the fence. A closer look at the exhibit, he is basing his testimony on the back fence, not the front one, next to the ditch.

As noted, Fed. Rules of Evidence, Rule 602, his testimony was inadmissible and highly prejudicial, which defense counsel made no attempt to object to; have excluded; or impeach, or move for a mistrial over.

Defense counsel failed to object to State witnesses failure to testify about facts. They were continuously testifying about their "beliefs" "conclusions" "opinions" Defense counsel had a duty to put the State to its burden of proof, with factual evidence, not beliefs, conclusions, or opinions.

*Cf.*

Q. Two strands of what kind of wire?

A. Barbed wire. Two strands of barbed wire. And they, *in my opinion*, don't meet the fencing code. (Emphasis added)

See Appendix F, page 36, [JT 117, lines 4-7]

Deputy Hunt doesn't even know who is actually in the photograph, even though he represents he took the photographs.

Q. And somebody is in that picture. What are they doing?

A. This individual in this picture is Lynn Dammen's father, *I believe is who it is, ...*

*See Appendix F, page 37, [JT 118, lines 5-8]*

Deputy Hunt is unsure where he was at when he took the photographs:

Q. [Exhibit No. 6] ... What is that a picture of?

A. ...*I believe I'm standing on the south pasture* shooting across the corner of the west fence line.

*See Appendix F, page 38, [JT Page 119, lines 2-8].*

This testimony would have given rise to a Fourth Amendment violation, trespassing to obtain evidence, without judicial authorization and without consent of the land owner or person in possession of the "south pasture" had counsel competently represented his clients interests and developed this testimony to support Motion(s) to Suppress and Mistrial. As a result State Exhibits 4-8 should have been suppressed.

Deputy Hunt claims he's reviewed the statute, but later is unsure about what it states:

Q. But you have reviewed the statute concerning a legal fence?

A. That is correct.

*See Appendix F, page 37 [JT page 118, lines 17-19]*

Q. And what does the statute say about the number of strands of woven wire?

A. I don't *believe* it talks about woven wire in the statute.

*See Appendix F, page 38-39, [JT page 119, lines 23-25; page 120, line 1].*

As noted by the above testimony, at one time he implies he has knowledge of facts, [the fence statute] then comes back and it is only a belief. Defense Counsel did not object to this testimony or make any attempts to have it stricken from the record. -27-

Deputy Hunt has no personal knowledge of various material facts:

- Q. One other question. Is this --does Traill County have any designated grazing areas?  
A. Not that I am aware of.

See Appendix F, page 39, [JT page 121, lines 22-25].

An element of the offense --designated grazing area--this was insufficient testimony of that material fact, in view of Deputy Hunts other testimony regarding facts, his lack of knowledge, does not meet the Constitutional requirement of evidence beyond a reasonable doubt. It was a question of law, not a question of credibility of the witness, which the district court erred in its judgment, denying the Rule 29 Motion.

*Cf.*

- Q. How about number two, "All brooks, rivers, ponds, creeks, ditches, or hedges"?
- A. It didn't seem to apply in this case either.
- Q. Well, it's part of the statute. Does a ditch constitute a lawful fence?
- A. I guess that would depend on your definition of "ditch."
- Q. Well, I'm just going by what it says in the statute.
- A. I understand that.
- Q. And you said it was clearly not a legal fence or a lawful fence when you observed it?
- A. In my estimation --
- Q. Is there a ditch there?
- A. On the front side of the pasture there is.
- Q. Okay. Then number three is kind of interesting, "All things which, in the judgment of the fence viewers." Do you know what a "fence viewer" is?
- A. *I believe* that's somebody who's established by the township to go out and view fences.
- Q. Do you know who the fence viewers are in Blanchard Township?
- A. *To my knowledge*, there are none.
- Q. Okay. Were you aware of whether or not there was any agreement that this might have been a lawful fence?
- A. In talking with Mr. Dammen --
- Q. Well, we're not -- *I'm asking you if you were aware of any agreement?*
- A. *I'm aware of none.*
- Q. Okay. Well, then I'm really curious, Deputy Hunt, how you can say in your

report and sit there today and say that this is clearly not a lawful fence, when by your own admission, you're not an expert, and ***you say you looked at this and you understood it, but now*** when I go through it, ***it doesn't seem that you do?***

A. Maybe, I can clarify it for you. ***In my opinion***, it clearly does not meet what the statute ---

Q. But you're not an expert?

A. I am not. Admitted.

Q. So ***you don't know if a ditch is a legal fence or not, do you?***

A. ***I do not. I don't believe it is.***

See Appendix F, pages 41-43, [JT 128-130] (Emphasis added)

Deputy Hunts lack of knowledge of an agreement, further proves ineffective and incompetent, assistance of legal counsel and Deputy Hunt's selective investigation.

Exhibits 4-8, fence, has absolutely nothing to do with Lynn Dammen. He has no legal standing to contest a fence or any fence agreement, that he had no interest in at the time that the agreement was made. The fence at issue, is between Defendants property and the beet field, farmed by Kurt Reimer. The agreement was between the former owner of Defendants farm and owner of the land that Kurt Reimer has his beet field; and not Defendant and Lynn Dammen. This Agreement has grandfather rights attached thereto.

Defense Counsel deliberately failed to point out that fact. Failed to inquire of Deputy Hunt why he hadn't contacted Defendant and/or Mr. Reimer about any fence agreement.

Failed to question Defendant, during his testimony regarding fence agreement(s).

Deputy Hunt further testifies:

Q The last one there is ditches. And what you indicated is there is a shallow road ditch along the north side of the finger of that pasture. Is that what you indicated?

A Yes, it is.

Q. Okay. You testified that there are no fence viewers for that township, is that correct?

A. That is correct.

Q. So there's been no review of the fence?

A. Correct.

*See* Appendix F, page 46-47 [JT page 134-135].

Defense counsel failed to object to the States representation about “shallow ditch” no testimony had been given; further it was irrelevant and immaterial. The Statute clearly states “all ditches” shall constitute a legal fence. Second issue, the question: “So there’s been no review of the fence” That again should have been objected too. Draws a conclusion, based on lack of knowledge, stating it as a fact. Counsel should have questioned that conclusion, for Deputy Hunts lack of [personal] knowledge.

Q. And there’s a ditch here?

A. That is correct. That’s the shallow road ditch that Mr. Larson pointed out.

Q. But it’s a ditch?

A. It’s a ditch?

*See* Appendix F, page 48, [JT page 137, lines 8-12]

The Statute clearly states that “all ditches” shall constitute a legal fence. There is no distinctions recognized in the Statute as to whether it must be shallow or deep; next to a road or not, its still a ditch or any other descriptions that may be attached to the word “ditch”. A ditch is a ditch.

Q. Okay. And you don’t know if there was ever a fence viewer in Blanchard?

A. I’m not aware of any.

Q. So you’re not aware of whether or not there were ever any fence viewers in Blanchard Township?

A. To my knowledge, when I’ve asked in the past for fence viewers, the response was that Traill County does not have fence viewers.

Q. Ever?

A. Ever.

*See* Appendix F, page 49, [JT page 138].

Deputy Hunt’s testimony proves a number of factual issues. The State is using his apparent lack of knowledge as justification for failure to properly investigate; Deputy

Hunt is using his deliberate ignorance of the law to improperly influence the jury; defense counsel was incompetent. A reasonably competent, experienced Defense counsel would have seized the opportunity to challenge his testimony by simply asking him questions as who he had asked before about fence viewers. Who did you ask? Was it the preschoolers at the local school? Was it any land owner with livestock residing in Blanchard township? Did you ask the States Attorney? Did he look up the law and give you an opinion if there were or were not fence viewers? Why was he making that inquiry? When did you make this inquiry? Did it concern Defendant? Defense Counsel deliberately left this lack of knowledge of material fact issue dangling, for the sole purpose of improperly influencing the jury against his client.

Deputy Hunts lack of knowledge is not proof of the existence or non existence of facts. NDCC clearly and unmistakable, prove that Blanchard Township does have fence viewers. NDCC 47-26-02 provides:

Fence viewers. In an organized township, the members of the board of township supervisors *shall* act as fence viewers. (Emphasis added)

This Court can take Judicial Notice that Blanchard Township is an “organized township” in Traill County, North Dakota and it does have a board of supervisors.

Throughout the trial, the testimony further proves that Defense Counsel failed to object to the States witnesses testimony regarding their “beliefs” “conclusions” “opinions”.

Yet, when he asks the states witness a question concerning an “opinion” the State objects and he withdraws the question.

Q. Since you were giving your *opinion, do you have an opinion about this statute?*

MR. LARSON: OBJECTION, Your Honor. Calls for a legal conclusion.

MR. DEXHEIMER: I withdraw the question.

THE COURT. Sustained.

*See* Appendix F, page 60, [JT 158, lines 5-10].

This constitutes unequal treatment in the state court, when the States witnesses are allowed to state “opinions” “conclusions” “beliefs” when the State asks the questions, but is denied when defense counsel attempts to do so. This is not “competent trial strategy” to deliberately fail to object to State’s witnesses testimony about “beliefs”; “opinions” or “conclusions” unless, of course, defense counsel’s true interest in aiding the State in their prosecution.

The record contains evidence, that defense counsel deliberately failed to use, that would have undeniably impeached Lynn Dammen testimony; Deputy Steve Hunt’s testimony. It was Deputy Hunt’s investigation report. Defense counsel had obtained it from the State. This evidence [investigative report] would have clearly proven that Deputy Hunt was committing perjury throughout this trial. Defense counsel made no attempt to utilize this documented, factual evidence to prove and ensure a fair trial for defendant.

The record further proves Defendant received the ineffective assistance of counsel, when, at the restitution phase, the State’s witness, Lynn Dammen testified about damages, yet never produced any documents proving those losses. Defendants counsel never requested documentation at those proceedings, held on July 31, 2009. When Defendant made a Rule 16 Motion, specifically requesting that proof, the State did not produce any of it, and Judge Wickham Corwin would not allow Defendant to inquire about those issues, stating that an Order had already been entered. *See* Appendix I, pages 77-78, [RT pages 6-7 ].

The record further proves that Defense Counsel made a motion to withdraw before the final restitution hearing was held. Representing to Defendant that his services ended upon the Courts entry of Judgment of conviction. *See* Appendix H, pages 67-68.

Defense Counsel was aware of the fact that Defendant would be appealing. Defendant to Court in chambers:

“Now, if your order to refuse to disqualify yourself, rescind that, is final, I’m filing a notice of appeal at this point in time. I have a notice of appeal out there. I’ll serve it on the Court and file it with the Court at this time....”

*See* Appendix F, page 27. [JT page 16, lines 5-9].

As the 8<sup>th</sup> Circuit Court of Appeals, recently noted:

The court acknowledged the Supreme Court’s decision in **Roe v. Flores-Ortega**, 528 U.S. 470, 477, 486, 102 S. Ct. 1029, 145 L. Ed 2d 985 (2000), which held that an attorney’s failure to file a notice of appeal after being requested to do so by the client amounts to per se ineffective assistance regardless of the appeal’s apparent likelihood of success. *Id.* **Watson v. United States**, 493 F.3<sup>rd</sup> 960, 962.(8<sup>th</sup> Cir. 2007).

The 8<sup>th</sup> Circuit further stated, citing **Flores-Oretga**, supra:

“Where an attorney disregards specific instructions from a defendant to file a notice of appeal, he ‘acts in a manner that is professionally unreasonable.’ FN1 528 U.S. at 477, 120 S. Ct. 1029.”

FN1 Where a defendant has not specifically requested an appeal, the reasonableness of counsel’s conduct is judged by whether counsel had a duty to consult the client about the possibility of an appeal. **Flores -Ortega**, 528 U. S. at 480, 120 S. Ct. 1029.

This duty is triggered where there is reason to believe that a rational defendant would want to appeal or where the client has reasonably demonstrated an interest in appealing. *Id.*

*Id.* **Watson**, 493 F. 3d at 964.

The record is undeniable that appointed defense counsel was fully aware and informed that Defendant would be appealing. Defense Counsel's actions, of withdrawing his representation of Defendant, prejudicing Defendant by representing to the Court that he recommended the Court not appoint Defendant another attorney, knowing that the criminal proceedings had not reached finality further prejudiced Defendant, by denying him a full and fair proceeding, at his Motion for New Trial; Hearing on Restitution and Direct Appeal as a matter of right.

Defense Counsels deliberate act of prejudice towards his client:

MR. DEXHEIMER: "... Your Honor, I want to be relieved of representation from Mr. Koenig, but I also don't believe that it would be prudent, nor would it be fair, to saddle Mr. Koenig's case to another horse, another defense counsel, *and I would ask that no new counsel be appointed.* If Mr. Koenig wants counsel, I think it's time that he needs to hire his own counsel..." (Emphasis added).

*See*, Appendix H, page 69 [Hearing held Sept. 23, page 6].

This request by defense counsel, clearly violates the Equal Protection and Due process of Law Clauses of the United States Constitution; the Constitution of the State of North Dakota and the States Statutes.

NDCC 29-01-06 **Rights of defendant.** In all criminal prosecutions the party accused has the right:

1. *To appear and defend in person and with counsel;...*(Emphasis added).

This Supreme Court has held that the Constitution of the State of North Dakota and its Statutes give greater protection than those afforded the United States Constitution. The United States Supreme Court has consistently held that the accused has the Constitutional

right to the assistance of legal counsel at every phase of the criminal proceedings, including appeal. Gideon v. Wainwright, 83 S. Ct. 792 (1963); Douglas v. California, 83 S. Ct. 814 (1963). E.g., Mickens v. Taylor, 535 U.S. 162 (2002).

- Defendant represented to the Court, on July 30, that he was “forced” to proceed with appointed counsel Gordon Dexheimer.

THE COURT: “...but tell us, in black-and-white terms, do you want him to continue as your lawyer, recognizing that this case is going to proceed to trial right now?”

THE DEFENDANT: Well, I’m forced to.

See Appendix F, page 28-29, [JT page 17, lines 23-25; page 18, lines 1-2].

This does not meet the constitutionally mandated “inquiry” as to whether defendant was making an informed choice; why the Defendant felt “forced” to proceed. It does not constitute a knowing waiver of constitutionally protected rights.

Herein, defense counsel specifically informs the States Attorney that his client intends to appeal, then he deliberately and intentionally abandons his client, and prejudices his client, all because he has an actual conflict of interest.

As Justice Ginsburg, stated, [concurring in part and dissenting in part] “This case presents the question whether, after a defendant pleads guilt or is convicted, the Sixth Amendment permits defense counsel simply to walk away, leaving the defendant uncounseled about his appeal rights. The Court is not deeply divided on this question. Both the Court and Justice SOUTER effectively respond: hardly ever. ..” Roe v. Flores-Ortega, 528 U. S. 470, 493-494, 120 S. Ct. 1029, 1043 (2000).

No reasonably competent, experienced defense attorney would ever represent they

had a conflict of interest, unless they actually had one. Here, not only did defense counsel represent to Defendant he was an assistant city attorney for the City of Fargo, ND, but he also made that representation to the Court at the end of the States case:

THE COURT: Mr. Dexheimer.

MR. DEXHEIMER: Your Honor, *the State* (sic) *would make its Rule 29 motion* at this time.

THE COURT: I assume it's opposed?

MR. LARSON: The State objects, of course. ... (Emphasis added).

*See* Appendix H, page 61, [JT page 159, line 5-9].

These representations clearly prove that:

Mr. Larson represents the State; Mr. Dexheimer represents the State; Mr. Dexheimer was supposedly appointed as defense counsel. Defense counsel clearly represents where his true loyalty lies, that is with the State.

As the U.S. Supreme Court recognized in **Mickens v. Taylor**,

“And we have used ‘conflict of interest’ to mean a division of loyalties that affected counsel’s performance. In *Holloway*, 435 U.S. at 482, we described our earlier opinion in *Glasser v. United States*, 315 U. S. 60 (1942), as follows:

“The record disclosed that Stewart failed to cross-examine a Government witness whose testimony linked Glasser with the conspiracy and failed to object to the admission of arguably inadmissible evidence. This failure was viewed by the Court as a result of Stewart’s desire to protect Kretske’s interests, and was thus ‘indicative of Stewart’s struggle to serve two masters...’ [315 U. S.], at 75...”

*Mickens*, 535 U. S. at 172, FN 5.

The Court went on to identify other Circuits that have invoked the *Sullivan* standard. when as here, there is a conflict rooted in counsel’s obligations to former clients... to a job with the prosecutor’s office ... or fear of antagonizing the trial judge. *Id* 535 U. S. at

174-175 (internal citations omitted here).

The representations of counsel, *supra*, clearly proves his loyalty lies with the State, not his criminal defense client. As further noted *supra*, throughout the entire jury trial, he was more interested in aiding the State than protecting the rights of his client.

Common sense, dictates that his failures to object to inadmissible prejudicial hearsay, was the product of “the struggle to serve two masters” and protect the “State’s interest” over that of his defense appointment. *Cf. Mickens*, *supra*.

Defense Counsel, deliberately and intentionally left defense witnesses testimony hanging, with the intent of giving the jury doubt about the credibility of his own defense witnesses, by intentionally withholding material factual testimony from the jury, through his deliberate failure to inquire of those witnesses of known facts.

The Sixth Amendment protects the defendant against an ineffective attorney, as well as a conflicted one. *See Strickland v. Washington*, 466 U. S. 668, 685, 686 (1984). For the right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client, *Von Moltke v. Gillies*, 332 U.S. 708, 725 (1948).

An unwanted counsel ‘represents’ the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense.” 422 U.S., at 820-821.

Defendant clearly informed the trial court that he was “forced” to proceed to trial with counsel, [JT pages 17-18] whom had previously represented to Defendant that he was an assistant prosecutor, an assistant city attorney for the City of Fargo, ND.

As the Supreme Court further stated; “the evil [of conflict-ridden counsel] is in what the advocate finds himself compelled to *refrain* from doing, ... [making it] difficult to judge intelligently the impact of a conflict on the attorney’s representation of a client.”

**Holloway v. Arkansas**, 435 U. S. 475, 490-491 (1978).

As noted supra, counsel’s conflict of interest is clearly evident. Not only his representation that he was the “*State* making a Rule 29 motion”; He failed to object to inadmissible prejudicial hearsay evidence; He failed to see that the state sustained its burden of proof; failed to object to inadmissible evidence; failed to competently investigate, which would have produced evidence requiring the suppression of State’s evidence; failed to utilize State evidence, in his possession, that would have proven the States witnesses were committing perjury; failed to move for a mistrial; failed to follow the instructions of his client, do legal research pertaining to the charges; obtain transcripts; resist the arbitrary new scheduling order; present the issues contained in Defendants Motion; and then deliberately prejudicing his clients rights by making a specific request that the district court not appoint his client another attorney, knowing that, that attorney would amend defendants pro se motion for new trial and brief it more clearly than defendant had done; and wherein, a judgment of acquittal would have been granted.

This Courts decisions in **State v. Dvorak**, 604 N. W. 2d 445; **State v. Harmon**, 575 N. W. 2d 635 and cases discussed therein, *are clearly distinguishable* from this case.

The issue here, an actual conflict of interest by court appointed defense counsel. Defense counsel consistently represents to his client that he has prosecutorial duties,

assistant city attorney for the City of Fargo, ND; the Fargo City Commission represent to Defendant that defense counsel is still listed as an assistant city attorney, weeks after the representations defense counsel states to the court; he makes Rule 29 Motion representing to the Court that he is the “STATE”.

Furthermore, those cases should be overruled, and retroactively reversed. As noted supra, NDCC 29-01-06 unequivocally gives the accused the right to “ Defend in person *and* with counsel.” As the title clearly states, these are the “Rights of Defendant”. *Id*, NDCC 29-01-06 (1). (Emphasis added).

The clear intent of the State Legislature is that the accused has the right to defend [ask questions] *and* [a conjunction of equal force] have counsel defend [ask questions].

There is no “stand-by” provision or authorization; no either or else provision; no provision that “we’ve appointed you 2-3-5-10 attorneys, they have all withdrawn for one reason or another, we won’t appoint you another. Any finding to that effect is clearly a deliberate, intentional misapplication of a clear, mandatory Statute and would be in violation of the Constitution(s) and the rights afforded therein.

The same Statutory requirement applies to this Appeal. Defendant has the right to defend [file a brief] and has the right to have counsel defend [file a brief]. There is nothing to interpret in this statute.

Defend, given its clear everyday interpretation, means:

To maintain against attack (law) to resist, as a claim; to contest (a suit).

To deny. To oppose, repel, or resist. To make a stand for. To uphold by force or argument.

*Id* Webster’s Dictionary.

The word **And**, also needs no interpretation. It means Added to; together with; joined

with; as well as; including. While it is said that there is no exact synonym of the word in English, it has been defined to mean “along with”, “also”, “and also”, “as well as”, “besides”. “together with”. **Oliver v. Oliver**, 286 Ky. 6, 149 S. W. 2d 540 , 542.

Based thereon, **State v. Dvorak**, supra; **State v. Harmon**, supra, were improvidently decided, clearly in contravention of State Statute and this Courts holding that the Statutes of this State and the Constitution of the State of North Dakota gives greater protections, than the U.S. Constitution provides.

While this Court recognized a problem with “hybrid representation” [see **Dovark** supra] State Statute clearly and specifically guarantees that right.

This Court should adopt a higher “common sense” standard of review for claims of attorney incompetence, than the present “reasonable” standard. In reality, the “reasonable” standard amounts to justification for incompetent. Comparable to preponderance of the evidence standard, almost nothing, e.g., more believable than not. The facts set forth supra, which may support a belief of reasonable, under a “common sense” standard, that same performance was merely perfunctory and fails to meet minimum constitutional standards. Had counsel’s unprofessional errors, not occurred, defendant would not have been convicted of this offense, the evidence would have been suppressed; the complaint dismissed for failure to state an offense as required by state mandatory statute; NDCC 47-26-01 would have a complete record to base a declaration that it is unconstitutional. Cf. **Strickland v. Washington**, 466 U. S. 668, 685-686 (1984) (assistance which is ineffective in preserving fairness does not meet the constitutional mandate).

VIII.

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A JUDGMENT OF CONVICTION, THE COURT ERRED, AS A MATTER OF LAW, IN FAILING TO GRANT A JUDGMENT OF ACQUITTAL.

The evidence was insufficient to sustain a judgment of acquittal. The State alleged and was required to prove that Defendant “willfully” allowed livestock to run at large. State witness Lynn Dammen testimony proves the State failed to prove that essential element.

Lynn Dammen testified (on Recross-Examination):

MR. DEXHEIMER: Q. You told Mr. Larson that these horses got out on their own free will. Did you see them get out?

LYNN DAMMEN: A. No.

Q. Then how can you say that?

A. Because I’m pretty sure Laverne didn’t leave a gate open and let them just run out and down the road.

*See*, Appendix G, page 33, [JT page 98, lines 13-18].

This proves the State had failed to prove that essential element of the offense. It also proves ineffective assistance of counsel. Counsel made no reference to this sworn testimony by the State’s witness in his Rule 29 motion; Counsel made no reference to it in his closing argument to the jury; Counsel deliberately failed to capitalize upon this testimony at any time, which, would not be sound trial strategy in any sense. Counsel failed to see that the jury was properly instructed.

**United States v. Frady**, 102 S. Ct. 1584 (1982), involved a constitutional challenge to jury instructions of the meaning of malice. The court concluded that actual prejudice would exist where it could be shown that “the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. *Id* at 1595.

In this case, Defense counsel failed to request specific jury instructions. It would be fair

to conclude that two separate, distinct jury instructions should have been given concerning the issue of “willful”. One would concern the fence; one concerning the livestock at large. As noted supra, Lynn Dammen testimony would clearly disprove any finding of willful to allow the livestock to run at large.

It is essential to distinguish because, as the testimony of the law enforcement, clearly proves, they could not reasonably state what a legal fence was, thereby the reasonable person standard for vagueness of the fence statute, whether it was adequate to clearly apprise a person of prohibited activity is unclear. The record, quite unclear regarding ‘fence agreement’ would have required the separate instruction on willful, as that pertains to the fence statute; in addition, the jury should have been instructed, what the requirements would be for a determination of when the fence statute could be found vague, that no person could be found guilty for a violation thereof. Any procedural forfeiture resulted from the ineffective assistance of counsel.

Defense counsel did not capitalize upon Lynn Dammens testimony, set forth supra, during closing arguments or in the Rule 29 Motion. The right to effective assistance extends to closing arguments. *See Bell v. Cone*, 535 U.S. 685, 701-702 (2002).

As noted supra, Deputy Steve Hunt’s lack of personal knowledge, regarding the material fact of whether there was a “grazing area” was insufficient to prove that fact, and the State failed to prove it with evidence beyond a reasonable doubt. The court erred, as a matter of law, in denying the Rule 29 Motion for Judgment of Acquittal, the case should never have been given to the jury. Defense counsel’s derelict performance prejudiced defendant, resulting in a conviction that the evidence did not warrant, the State had in fact, failed to sustain its burden of proof. *Cf. Bell v. Cone*, supra.

IX

THE STATE DENIED DEFENDANT A FULL AND FAIR TRIAL WHERE DUE TO ITS MISCONDUCT, IT DELIBERATELY WITHHELD REQUESTED AND DISCOVERABLE EVIDENCE, IN VIOLATION OF **BRADY V. MARYLAND;** **UNITED STATES V. AGURS** AND PRESENTING FALSE AND MISLEADING EVIDENCE VIOLATING **NAPUE V. ILLINOIS.**

The testimony elicited by the State, indicates that the State was knowingly using false and misleading testimony. Fred Frederickson, testified that he knew what the State Statute pertaining to “fences” was:

THE STATE: Q. Okay. As part of your job, Mr. Frederickson, are you aware of the legal fence statute in North Dakota?

A. I've read it, but, you know, there's -- the way I interpret it, the minimum height of a fence is something like, on a three-wire fence, it's supposed to be forty inches. On a five-wire fence, it's a minimum height of forty inches and no higher than fifty-six inches, and the bottom wire is supposed to be something like sixteen inches off the ground. It depends. On a three-wire fence, you're supposed to have a -- supposed to have a post, I believe, every ten feet. With a five-wire fence, you're supposed to have a post every eight feet, I believe it is.

*See*, Appendix G, page 50-51, [JT page 140, lines 17-25; page 141, lines 1-5].

The State knew this testimony, that the post had to be 8 and 10 feet apart, respectively was false and that on the five wire fence, the minimum height was 48 inches, not 40 inches as he testified.

The State made no attempt to correct this knowingly false testimony.

Where the evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury, the judgment of conviction must be set aside “if there is any reasonable likelihood that the

false testimony could have affected the judgment of the jury”. United States v. Agurs, 427 U. S. at 120. For the prosecutor is guilty of misconduct when he deliberately suppresses evidence that is clearly relevant and favorable to the defense, regardless, of whether the evidence relates directly to testimony given in the course of the Government’s case. *Id*, at 121.

Here the majority of the testimony was over NDCC 47-26-01, of which, the State witnesses were giving false, misleading and inconsistent testimony about.

Then on cross examination Frederickson testifies:

Q. Okay. I’m getting back to what constitutes a lawful fence. We’ve been wrestling with North Dakota Century Code 47-26-01. There’s six categories there --

A. Yes.

Q. -- is there not? You’re familiar with this?

A. Kind of. You know, I can’t swear to them, but yeah.

*See*, Appendix G, page 53, [JT page 150, lines 10-16].

Now this State witness is unsure if he knows what the statute says, he can’t swear to them. He previously testified he had a copy of the actual statute. Again the State made no attempt to correct this false misleading testimony.

State witness, Lynn Dammen also gave misleading, false testimony.

On direct examination, he testified that he had arrived home at approximately 1:30 p. m., August 6, 2008.

*See* Appendix G, page 30, [page 82, lines 20-21.

Later he testifies that Defendant arrived to get his stud horse, three-and-a-half hours later, he believes it to be about 4:00.

*See* Appendix G, page 31, [JT page 87, lines 14-18.

On cross examination, he testified he had chased the horses around for “An hour-and-a-half, two hours.”

*See* Appendix G, page 32 [JT page 96, line 7].

This testimony is inconsistent with Deputy Hunt’s testimony.

Deputy Hunt testifies he arrived at the scene “somewhere around 1:30, quarter to 2:00.

*See* Appendix G, page 34, [JT page 100, lines 20-24].

Shortly, he testifies it was “At approximately 2:08 .” [when he arrived on the scene].

*See* Appendix G, page 35, [ JT page 101, lines 7-8].

Then on cross examination, Deputy Hunt testifies that the two brown horses were put back into defendants pasture “Right around that 2:00 time frame.”

*See* Appendix G, page 40, [JT page 124, lines 5-15]

. He later testifies that the horses were all back to defendants place prior to the taking of the Exhibits 1-4, which occurred shortly after 2:00.

*See* Appendix G, page 40, [JT page 124 ].

Lynn Dammen later testified that he spent three hours chasing Defendants horses, trying to run the Stud to Cass County.

*See* Appendix G, page 70,[JT page 261, lines 24-25].

This testimony is clearly inconsistent. There is no way that Dammen could have spent 2-3 hours chasing Defendants horses, if Deputy Hunt was telling the truth. He testified the horses were back in defendants pasture shortly after 2:00. Dammen had testified he had arrived home around 1:30. Thus less than one hour time spent attempting to chase Defendants horse to Cass County.

Alternatively, assuming Dammen to be telling the truth, that he had spent three hours chasing defendant's horse, the clear implication is that since Deputy Hunt arrived shortly after 2:00, actually at 2:08, then he had to sit and watch Dammen committing the Criminal Acts, set forth in Section VI supra. One or the other State witness had to be giving false misleading testimony which the State knew was false.

As the U. S. Supreme Court held the failure of the prosecutor to correct the testimony of the witness which he knew to be false denied petitioner due process of law in violation of the Fourteenth Amendment. Napue v. Illinois, 360 U. S. 264, 265-272 (1959).

As the Napue Court further stated the established principle that a State may not knowingly use false testimony to obtain a tainted conviction does not cease to apply merely because the false testimony goes only to the credibility of the witness. *Id.*, U.S. at 269-270. The State, although not soliciting false evidence, has the responsibility and duty to correct what he knows to be false and elicit the truth.

Dammen also testified that "Nothing shows up on the x-rays."

*See* Appendix H, page 71, [JT 265 line 25].

The testimony given at the Restitution hearing was that x-rays had been performed on Dammen horse of his legs.

*See* Appendix H, page 72[RT page 20].

Q. So other than the Coggins test after August 6<sup>th</sup> of 2008, the only time he's been seen by a vet is by Mark on September 11, 2009?

A. There was one other time he went to Casselton to get looked at. He took some x-rays of his legs to see if they could see anything.

Q. Do you have proof of that?

A. It's all in the vet bills and stuff that you had asked for.

Q. No. But this is a September 11<sup>th</sup> document?

A. That's the 11<sup>th</sup>. That's the one.

*See* Appendix H, page 72, [RT page 20].

This is inconsistent. He claims a Coggins test after August 6, 2008, but the only evidence [his testimony] was not an x-ray, performed on September 11<sup>th</sup> [2009]. It is also inconsistent in that the vet, Mark Weiland, testified he had never done any x-rays. They were [if actually performed] by a partner. Dammens testimony clearly implies that Mark had done them. *See supra*.

Q. Well, the injury here, according to my understanding, is a major pelvic injury.

A. Yep.

*See* Appendix H, page 72, [RT page 20].

Q. Okay. But you don't have any proof of this x-ray?

A. They're at the vet's office.

*See* Appendix H, page 73, [RT page 21].

As the testimony throughout the restitution hearing indicate, the State did not produce the documents requested in Defendants Rule 16 motion. That portion it did produce, was untimely produced, only delivered to defendant during the hearing on October 21, 2009, and was not complete.

MR. KOENIG: We'd object. They were in possession of his, and I made a motion for discovery, and I was just handed this stuff right here a minute or two before court started. I haven't had the opportunity to investigate any of those to see if those are legitimate claims or if they had have those horses.

*See* Appendix H, page 74-75,[RT page 17, lines 22-25; page 18, lines 1-2].

The failure to produce requested discovery, then only producing parts of that discovery and waiting until after the proceedings had started prejudiced Defendants rights to timely and competently inspect the evidence and prepare for the hearing. The State has

suppressed, through its failure to produce most of the requested discovery.

The Supreme Court has held that suppression by the prosecution of evidence favorable to an accused who has requested it violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. **Brady v. Maryland**, 373 U. S. 83, 86-88(1963).

The prejudice to the Defendant denied him the right to present a defense. The requested discovery would have further substantiated Defendants contention that Lynn Dammen was committing perjury, the injury to his horse happened long before August 6, 2008, the date of this alleged incident.. Dammen had testified he had to call a farrier to reshoe his horse, and it cost him \$90.00. Defendant requested discovery of that information. None was produced. Defendant requested information regarding the x-rays that were supposed to have been performed. No evidence was produced. The vet, Mark Weiland, even told Defendant they hadn't done any x-rays. Later he testified that a partner had done some, but only on the horses legs. This was evidence that was relevant to Defendant, that was requested but not produced. No bills from the vet were produced. Only the exam performed on September 11, 2009, over a year after the fact.

A reasonable probability, in turn, is shown "when the government's evidentiary suppression undermines confidence in the outcome of the trial." **Kyles**, 514 U. S. at 433, 115 S. Ct. 1555. An important consideration, under **Kyles**, the question of materiality must be considered "collectively, not item by item." *Id.* At 436, 115 S. Ct. 1555.

The prosecution allowed a false impression to be created at trial when the truth would have directly impugned the veracity of its key witness. **United States v. Sutton**, 542 F.

2d 1239, 1243 (4<sup>th</sup> Cir. 1976). The States suppression of the *Brady* evidence was constitutional error, violating the due process clauses, warranting reversal. The failure of the state to timely produce the requested discovery, denied Defendant a fair opportunity to present a defense at the restitution proceeding. Had the State timely produced the evidence, Defendant would have subpoenas for expert witnesses to prove defendants horse could not have caused the injury to Dammen horse.

As Dr. Weiland testified:

A. I mean, you know, I saw the horse thirteen months later.

Q. Sure.

A. I mean, I can see it happen. I could see where he could stand up, be on his rear legs fighting, and fall. That would be --would certainly be possible; but, I mean, *it's just conjecture to say if he did.* (Emphasis added).

*See*, Appendix I, pages 86-87, [PT pages 38-39].

It would seem unrealistic, in the real world, that conjecture, would be sufficient proof of fact to sustain any burden of proof of evidence standard to support a finding of a fact. As noted, preponderance of the evidence standard, is substantially almost no proof of evidence.

As defined, "conjecture" means a slight degree of credence, arising from evidence to weak or too remote to cause belief.. An idea or notion founded on a probability without any demonstration of its truth; an idea or surmise inducing a slight degree of belief founded upon some possible, or perhaps probable fact of which there is no positive evidence. Oklahoma City v. Wilcoxson, 173 Okl. 433, 48 P. 2d 1039, 1043. In popular use, synonymous with "guess".

The vet's testimony would not sustain any finding that Defendants horse caused the

injury, in addition to the complaining witnesses testimony, which was substantially the same. He never seen the horses actually fighting over the fence; he never seen them rearing up, fighting over his fence; he never actually seen them kicking through the fence. A total lack of evidence, of facts, only conjecture; guess; beliefs, all insufficient to carry the burden of proof. Required to sustain any restitution claim in this action, warranting reversal.

X

DEFENDANT WAS DENIED EQUALITY IN THE STATE COURT PROCEEDINGS. WHICH VIOLATES THE EQUAL PROTECTION AND DUE PROCESS OF LAW CLAUSES OF THE UNITED STATES AND THE CONSTITUTION AND STAUTORY LAWS OF THE STATE OF NORTH DAKOTA

As set forth, throughout this Appeal Brief, Defendant has consistently been denied equality in the State Court proceedings. Defendant filed a Motion, alleging, among other issues, a motion to suppress evidence. Under this States prior decisions, Defendant was entitled to an evidentiary hearing, to confront witnesses in support of that suppression motion. *See State v. Mondo*, 325 N. W. 201 (ND 1982).

Defendant filed a Motion for New Trial and Motion for Counsel, which the trial court denied. No written order was entered. Defendant filed a Motion requesting the Courts decision [denying motion for new trial and for counsel] be put in writing. The district court has refused to do so. *See Appendix I*, page 79-80.

This Court in *State v. Henderson*, 156 N.W. 2d 700 (ND 1968) stated: "Statute required appeal be 'from an order' and oral denial of motion did not constitute order denying a motion which was required to be in writing and signed by judge."

As noted the trial court refuses to put the oral order in writing and signing it, a

requisite for appealing that order. Defendant desires to appeal “every issue” in this matter. Defendant believes a “full picture” of the errors of constitutional magnitude taken as a whole, is better than a partial, incomplete one, singling out one or two issues.

The record proves that Defendant made timely Rule 16 Motion(s) for discoverable evidence. The State failed to produce the evidence; produced only some of the evidence; and when it did produce the evidence, it was untimely, immediately before the scheduled trial and/or hearing. Defendant was prejudiced in his defense by these deliberate and intentional acts of the State. Evidence suppressed by the State that went to the credibility of the States evidence and witnesses. Clearly *Brady* violations.

Appointed counsel files motion for continuance and discovery from State, without Defendants knowledge, permission or consent. Defendant is bound by the acts of his counsel. Afterwards, having undertaken no additional discovery, or discussion with Defendant, he agrees to plea agreement with State, which Defendant had clearly advised him not to undertake. When Defendant apprises this appointed counsel that it doesn't appear that he is protecting his constitutional rights, counsel moves to withdraw. He has waited over three months before moving to withdraw. Unbeknown to Defendant a jury trial has been scheduled for two weeks later. The Clerk of Courts has not given Defendant any Notice that a date certain for the jury trial has been scheduled. A district court judge grants appointed counsels motion to withdraw.

It is done by a judge that is not assigned to the case; done without any procedural due process hearing. A day before the scheduled jury trial, the deputy clerk of courts contacts defendant and request he put something in writing and file with the court. Defendant files

a Notice of Demand with Court, clearly exercising his Constitutional and statutory rights.

A district court judge, not the one assigned to the case, has Defendant appear in court, apparently to make a record to cover their errors, failures, abuses of discretion.

The following day, the court decides to continue the scheduled jury trial and directs Defendant to reapply for court appointed counsel. Another judge enters the scene, appoints legal counsel. A week later he reassigns the case to himself. NDCC 29-15-21 does not statutorily authorize his actions; he is not the presiding judge of the circuit; he has no appellate jurisdiction over the other judges of the district. Defendant tells his new court appointed counsel to file a resistance to this reassignment order, it clearly violates the representations made by the district court judge continuing the scheduled jury trial and the rights that have attached from the Original Scheduling Order, which the parties have not exercised their rights to remove that assigned judge. Appointed defense counsel refuses to file the resistance, later he informs defendant he has prosecutor duties as an assistant city attorney for the City of Fargo ND. Defendant believes this to be an “actual conflict of interest”. Defendant is forced to proceed to jury trial with this conflicted attorney. The attorney fails to meet minimal requirements of legal assistance. Defendant ultimately gets convicted. Defense counsel represents that upon the entry of judgment of conviction, his legal representation is concluded. He has been apprised that Defendant wants to appeal. Defendant files a Motion for new Counsel and Motion for New Trial. Defense counsel, moves to withdraw. The court, grants his motion, denies defendants motions. Defense counsel specifically request the court not grant defendant another attorney. NDCC 29-01-06 specifically grants defendant the right to defend in person and

with counsel. Defendant is again forced to proceed without legal counsel, at critical stages of the proceedings. The State withholds evidence; the trial court does not allow defendant a fair opportunity to challenge the Restitution issue, defense counsel had failed to competently challenge a portion of the restitution issue, prior to a continuance of those proceedings, due to surprise claims. During restitution hearing, state presents part of requested discovery, deliberately withholding important material evidence. The trial court renders a judgment.

The trial court, advises defendant if he is entitled to appellate counsel, that issue the defendant would have to take up with the clerk of the Supreme Court.

*See*, Appendix I, page 88, [RT PAGE 66, Lines 5-11].

Defendant files a motion for counsel with the State Supreme Court. Motion is denied, Supreme Court does not appoint appellate counsel. North Dakota grants a direct appeal, as a matter of right; United States Supreme Court has held a defendant has a Constitutional right to the effective assistance of legal counsel, on that appeal of right.

The facts of this case, the trial court judge lacks all power, jurisdiction and authority. He is extremely prejudice and biased. The proceedings held on defense counsels Motion to withdraw are clear and undeniable evidence of extreme prejudice and bias. Defendant is accused of undertaking action, exercising his constitutional rights, that the laws specifically guarantee to citizens of the United States and the State of North Dakota. This trial court judges extreme bias is so overwhelming, he even states he will entertain no motions at the trial court level from defendant. *See*, Appendix I, page 89.

Clearly, the state court system is the source of unequal treatment under the law;

refuses to uphold its own laws and the Constitutions of the United States and the State of North Dakota. *Cf. State v. Dvorak*, supra. North Dakota Statute clearly gives the defendant the right to defend in person and with counsel, NDCC 29-01-06. This Court in *Dvorak*, upheld the trial courts refusal to allow that defendant therein that right, a right granted under state law, the right to defend in person and with [standby] counsel. This constitutes a deliberate denial of equality in the state court system; a deliberate misapplication of State Statutory law by this State's highest Court; and the trial court(s) below, and their practice of depriving its citizens of rights granted to them by the States Legislature, through legislative enactments.

## XI

DEFENDANT WAS DENIED EQUAL PROTECTION AND DUE PROCESS OF LAW, WHEN HE WAS DENIED LEGAL COUNSEL AT CRITICAL STAGES OF THE CRIMINAL PROCESS AND ON DIRECT APPEAL, AN APPEAL GRANTED AS A MATTER OF RIGHT, UNDER NORTH DAKOTA LAW.

The State of North Dakota grants criminal defendants the right to appeal, as a matter of right. ND R. App. Pro. Rule 45.

Where appeal is available as a matter of right, a decision to seek or forgo review is for the convict himself, not his lawyer, who owes a duty of effective assistance at the appellate stage. *Evitts v. Lucey*, 469 U. S. 387, 396, 105 S. Ct. 830 (1985); *Penson v. Ohio*, 488 U. S. 75, 85, 109 S. Ct. 346 (1988)..

*Douglas v. California*, 372 U. S. 353, 83 S. Ct. 814 (1963) required that indigent criminal defendants are entitled to assistance from appointed counsel.

The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage. The same is true on appeal.

*See, Roe v. Flores-Ortega, 528 U. S. 470, 120 S. Ct. 1029 (2000) (internal citations omitted).*

The court further stated “the even more serious denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right, similarly demands a presumption of prejudice. Put simply, we cannot accord any “presumption of reliability,”” *Robbins*, at 286, 120 S. Ct. 746, to judicial proceedings that never took place. *Id.* U. S. at 483.

Defendant had a right to a full and fair hearing on his motion to suppress January 7, 2009. That proceeding never took place. Defendant had a right to the assistance of counsel at other critical stages, which he was denied that right. Defendant timely filed a motion for counsel to assist in presenting his Motion for New Trial. That Motion was denied, as well as, his motion for new trial.

NDCC 29-01-06 clearly and undeniably guarantees the Defendant the right to defend in person and with counsel.

This Court may Judicially Notice that it denied Defendants Motion for Appointment of Appellate Counsel. The district court, Judge Corwin clearly and unequivocally stated that he would not appoint defendant another attorney:

THE COURT: ... But in terms of the implications to you, sir, I’m granting the motion [for counsel to withdraw], and ***I’m not going to appoint another public defender...***” (Emphasis added).

*See* Appendix I page 90, [PT. page 7, lines 12-14].

The district court further stated that any request for appellate counsel had to be taken up with the Supreme Court clerk:

THE COURT: Whether or not you would be entitled to a lawyer on appeal is an issue that you would have to take up with the clerk of the Supreme Court...”

*See* Appendix I, page 88, [PT, page 66, lines 9-11].

In view of the fact that the Supreme Court does not appoint appellate counsel, this is a clear constitutional violation of Defendants right to the assistance of legal counsel on direct appeal, an appeal as a matter of right. Clearly in contravention of NDCC 29-01-06 rights of defendant, the right to defend in person and with counsel. It is also clear that Judge Corwin was extremely prejudiced and biased, denying defendant equality under the law.

Here the record is amply supported, defendant made timely requests for counsel; defendant is indigent; defendant was denied assistance of counsel at critical stages of the proceedings , all in violation of United States Constitutional guarantees and guarantees afforded by the Constitution of the State of North Dakota and its clear specific statutes. *See e. g.*, NDCC 29-01-06.

A Judgment of Conviction was entered in August, 2009, another Judgment was entered on November 13, 2009, with an Amended Judgment of Conviction entered on January 14, 2010. Timely filed Notice(s) of Appeal were duly served and filed Appealing the Judgment(s) to this Supreme Court for the State of North Dakota. *See* Appendix J, pages 91-92.

Whereby this Supreme Court should order the Judgment vacated, and this Court exercise its supervisory jurisdiction, appoint Defendant legal counsel, to amend this Pro Se Appeal Brief and supplement it, of any deficiencies that may exist.

## P R A Y E R F O R R E L I E F

Defendant hereby prays this Court find and grant the following relief:

1. Find that the Complaint fails to meet the Statutory requirements required by NDCC 29-05-01, declaring it legally insufficient to allege a crime;
2. Find that the record is presently insufficient, to make a competent determination that NDCC 47-26-01, is unconstitutional; remanding the matter back to the district court, assigning a Judge, outside the East Central District, to allow Defendant to present evidence to prove that the Statute is vague, overbroad, and violates the Equal Protection of Law and Due Process of Law Clauses.;
3. Find that the Record clearly proves that Judge Wickham Corwin lacked all power, authority and jurisdiction in this case, erred as a matter of law; exhibited extreme prejudice and bias and order said Judge to vacate all orders entered by him and further find that his conduct violated the Judicial Code of Ethics, suspending his judicial authority as a judge indefinitely;
4. Find that the practice of rotational judges in the East Central District [and possibly the entire State] violates NDCC 29-15-21 and the Equal Protection and Due Process of Law Clauses, thereafter entering the appropriate Order to stop the practice;
5. Find that the Defendant was denied his Rights of Confrontation; Rights of Procedural Due Process, at his entitled Motion to Suppress and Motion to Dismiss Proceedings, held on January 7, 2009, warranting a remand;
6. Find that the State engaged in Selective and Vindictive prosecution, in violation of the Equal Protection and Due Process of Law Clauses, with this Court Ordering the State

Attorney General to independently investigate and bring criminal charges against Lynn Dammen; Judge Wickham Corwin; and Stuart A. Larson for those crimes set forth in the Stipulation and Agreement contained in the Record below;

7. Find that Gordon Dexheimer, had an actual conflict of interest, in his legal representation of Defendant; his legal representation of Defendant was merely perfunctory; was professionally unreasonable and deficient; did not meet minimal Constitutional and Statutory requirements; remanding the matter, to this Courts designated Judge, to establish a clearer record, to warrant his license to practice law be permanently revoked;

8. Find that the evidence was insufficient to sustain a judgment of conviction; the trial court improperly instructed the jury; the trial court erred as a matter of law, warranting reversal of the conviction;

9. Find that the States' failure to produce requested evidence violates the *Brady* standards, depriving Defendant of a full and fair trial; and at the restitution phase of these proceedings, warranting remand for reversal;

10. Find that the trial court denied Defendant the equal protection of law in all court proceedings, through its prejudice; bias; failure to comport its actions in compliance with clear State Statutes, warranting remand, reversal and dismissal with prejudice;

11. Find that Defendant was denied Constitutional and Statutory rights to the assistance of legal counsel at crucial phases of the criminal process, including direct appeal, an appeal of right, in violation of the United States Constitution and the Constitution of the State of North Dakota and its Statutes; overruling this Courts decision(s), State v.

Dvorak; supra, State v. Harmon, supra.

12. Find that any deficiencies in Defendants Pro Se Appellate Brief, Defendant has a Constitutional and Statutory right to the assistance of legal counsel on this direct appeal, granted under State law as a matter of right, which guarantees the right to the assistance of legal counsel on that direct appeal of right; thereafter this Supreme Court exercise its supervisory jurisdiction appoint competent legal counsel to correct any deficiencies that may exist and support his client's interest in that supplemental brief.

13. Oral Argument is requested and/or reserved at this time.

Respectfully Submitted, February 15, 2010



La Verne Koenig  
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Blanchard, ND 58009-9326

1-800-292-9320

IN THE STATE SUPREME COURT  
STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,

S. CT. NO. 20090391

Appellee,

VS

AFFIDAVIT OF SERVICE

LA VERNE KOENIG,

Appellant.

---

The undersigned Affiant states, deposes that a true and correct copy of:

MOTION with attached Exhibits and Appellants Pro Se Appeal Brief w/ Appendix, in the above entitled action was duly served upon counsel for the State, by depositing in the United States Mails, first class postage prepaid, addressed as follows:

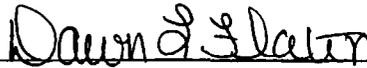
Stuart A. Larson  
States Attorney for Traill County  
Box 847  
Hillsboro, ND 58045

On this 16 day of February, 2010.

SUBSCRIBED AND SWORN BEFORE ME THIS 16 DAY OF FEBRUARY, 2010.



LA VERNE KOENIG  
15520 HWY 200A SE  
BLANCHARD, ND 58009



NOTARY PUBLIC-  
STATE OF NORTH DAKOTA

DAWN L. FLATEN  
Notary Public  
State of North Dakota  
My Commission Expires Oct. 6, 2012