

IN THE SUPREME COURT, STATE OF NORTH DAKOTA

JOE R. Blurton

PETITIONER APPELLANT

v.

STATE OF NORTH DAKOTA

RESPONDENT APPELLEE

No. 2010 000182

Appeal from the Distric Court of Cass County, East Central
Judical Distric, Honorable Steven L. Marquart, Judge

File No. 09-2010-CV-00028

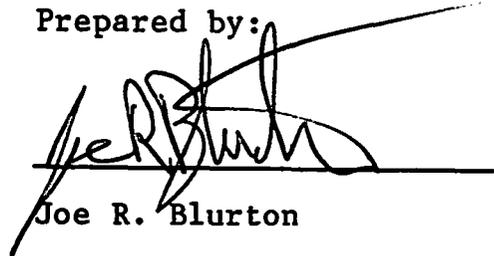
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River Correctional Center, 2521 Circle Drive, Jamestown
North Dakota 58401. On Original case;

File No. 09-07-K-03531

Pursuant to N.D.R.App. P. Rule 31; the appellant hearby
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Signed this 21 day
of July, 2010.

Prepared by:


Joe R. Blurton

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STATE OF NORTH DAKOTA

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N.D.R.App.P Rule 28(b)(3) Jurisdiction

The appellant ask the Supreme Court of North Dakota review the Distric Court Memorandum Opinion of Post-Conviction Relief; pursuant to Chapter 29-32.1 of the North Dakota Century Code. The Notice of Appeal was recieved by the Clerk of the Supreme Court June 14, 2010 and assigned Number 20100182.

N.D.R.App.P. Rule 28 (b)(5) History of Case

A **Final** Judgement and Commitment occurred on Oct. 03, 2008 in violation of N.D.C.C 12.1-20-03(1)(b). This was re-litigated in Amended Final Judgement on Feb. 13, 2008 of Gross Sexual Imposition in violation of N.D.C.C 12.1-20-03(1)(c) and 3(c). This Final Judgement and Commitment was re-litigated in Amended Final Judgement and Commitment on April 13, 2009 of Gross Sexual Imposition in violation of N.D.C.C 12.1-20-03(1)(c) and 3(b).

Prior to sentence, the petitioner makes notice of these motions; A Motion to Withdraw Hearing on June 12, 2010 before Judge Marquart, States Response to Defendant's Motion to Withdraw Guilty plea filed on June 27, 2008 and Defendants motion for Reduction of Sentence per N.D.C.C 12.1-32-04 was filed in Brief Form Aug 25, 2008.

The petitioner filed a Pro Se direct appeal of judgement Jan 09, 2009 State v. Blurton ND 144 case Number 20090009. The petitioner then filed Application for Post Conviction Relief, Dec. 30th 2009 upon which the Court responded.

N. D. R. App. P. Rule 28(b)(4) Issues Involved

The appellant's 34 page Application for Post-Conviction Relief, and as advised by the guidelines; "...you must include all grounds for relief and all facts supporting such grounds...". To supplement a "jail-house" knowledge and for clarity and brevity, the appellant cites Georgetown Law Journal. Citing 38 Geo. L.J. Ann. Rev. Crim. Proc. pgs. 416-422 (2009):

"The constitution requires that a defendants plea be made knowingly, intelligently and voluntarily. A defendant must be competent in order to enter a guilty plea. A guilty plea may be set aside as involuntary if the defendant can establish prejudice resulting from prosecutorial misconduct."

Prosecutorial misconduct in using "improper methods to produce wrongful convictions." **Whether a "knowingly, intelligently and voluntarily" plea was made without prejudice by prosecutorial misconduct.**

"Ineffective assistance of counsel may also prevent a defendant from entering a knowing and voluntary plea. To demonstrate ineffective assistance of counsel, a defendant must show that; (1) counsel's assistance was not "within the range of competence demanded of attorneys in criminal cases" and (2) a reasonable probability exist that he or she would not have plead guilty had counsel been competent." Id. at 418

Whether counsel provided Constitutional safeguards, asserting the defendant's rights in criminal prosecution, and counsel's effect on a plea made.

"A defendant may withdraw a plea of guilty or nolo contendere "for any reason or no reason" before the Court accepts the plea. A defendant may withdraw a plea of guilty or nolo contendere after the Court accepts the plea but before the court imposes a sentence only if; (1) the court rejects a

plea agreement under Rule 11(c)(5) or (2) the defendant provides a "fair and just reason" for requesting the withdrawal. In determining whether a "fair and just reason" exist, courts consider; (1) whether there has been an assertion of legal innocence; (2) the amount of time between the plea and the motion; and (3) whether the government would be prejudiced by withdraw of the plea. If motion to withdraw is granted, the defendant must live with the consequences of the request." Id at 420.

Whether an "assertation of legal innocence" occurred and continues, based upon the elements of offense charged.

"The denial of a motion to withdraw a plea, whether pre-sentence or post sentence, is reviewed under an abuse of discretion standard. Rule 11 states that "[a]fter the court imposes a sentence, the defendant may not withdraw a plea of guilty or nolo contendere and the plea may be set aside only on a direct appeal or collateral attack. Courts will set aside a plea of guilty on collateral attack only if doing so is necessary to correct a miscarriage of justice. Id at 421.

Whether a denial of a proceeding the defendant wanted and a denial of due process prejudiced the defendant.

It should be further noted; Brady evidence and relationships to guilty pleas, as cited by 38 Geo. L.J.

Ann. Rev. Crim. Proc. page 351 (2009):

"However it is unclear whether the prosecution must disclose material exculpatory evidence under Brady before a guilty plea is entered. "

Whether a Brady Violation so prejudiced the defendant to allow withdraw of the plea to correct a miscarriage of justice.

PROSECUTORIAL MISCONDUCT

¶1 Prosecutorial misconduct was raised in direct appeal: State v. Blurton 2009 ND 144 ¶18 770 N.W. 2d 231. The Court partially cited McMorrow v. State 2003 ND 134 ¶5, 667 N.W. 2d 577: "...a defendant who voluntarily pleads guilty waives the right to challenge 'non-jurisdictional defects' and may only attack the voluntary and intelligent character of the plea."

¶2 A prosecutors duty is to seek justice; (e.g. Berger v. U.S. 295 U.S. 78, 88 (1935)) and may not use "improper methods calculated to produce wrongful conviction". Clearly prosecutors have wide discretion in decisions to prosecute. Courts, however, must protect the individual's rights; from decisions of "bad faith". Blurton's rights upon a warrantless arrest were given by U.S. Constitutional Amendment IV, defined by Gerstein v. Pugh 420 U.S. 103 113-114 95 S. Ct. 854 43 L. Ed. 2d 273 (1975):

"[A] policeman's on the scene assesment of probable cause provides legal justification for arresting a person suspected of a crime, and for a brief period of detention to take the administrative steps incident to arrest [...] [but] the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."

¶3 North Dakota Supreme Court defined the legislative intent of N.D.C.C. 29-06-25 in State v. Iverson 187 N.W. 2d (ND 1971), cert. denied 404 U.S. 956, 92. S. Ct. 322, 30 L. Ed. 2d 273 (1971):

"The intent of this section is to interpose the judgement of an independant magistrate between the judgement of the peace

officer or a private person in arresting another person without a warrant and the decision to hold him for preliminary examination or to stand trial."

¶4 A denial of due process and Gerstein review in warrantless arrest of Sept. 02, 2007 until First Appearance Sept. 06, 2007. N.D.R. Crim. P. Rule 5(a)(2): "If an arrest is made without a warrant, the magistrate must promptly determine whether probable cause exist under Rule 4(a)." Rule 4(a): "If it appears from the complaint, and any affidavit filed with the complaint, that there is probable cause to believe that a criminal offense has been committed by the defendant, the magistrate must issue an arrest warrant...[Rule 4(b)(1)(B) states] ...be signed by the issuing magistrate with the title of the magistrate's office."

¶5 A complaint as defined by N.D.R. Crim. P. Rule 3(a): "The complaint is a written statement of the essential facts constituting the elements of the offense charged and is the initial charging document for all criminal offenses. The complaint must be sworn to and subscribed before an officer authorized by law to administer oaths within this state and be presented to a magistrate."

¶6 The appellant argues a denial of Constitutional Rights in which a "de novo" review is required by appellate courts. (e.g. Estate of Davis v. Delo 115 F. 3d 1388, 1394 (8th Cir. 1997)). To be sure, Gerstein (Id. @ 119) finds "illegal arrest or detention does not void a subsequent action"; here the defendant suffers a loss of liberty and property, as well as a judicial procedure to protect him from malicious prosecution. The elements of offense and resultant penaltites range from AA felony to Class "B" misdemeanor. Subtle differences, found in N.D.C.C 12.1-02-02, and reviewed later in this brief can become "improper methods calculated to produce a wrongful conviction."

¶7 N.D.C.C. 29-04-05 considers an action to commence, "... when filed by a magistrate having jurisdiction to hear, try and determine the action." Rule 3(a) was amended March 01, 1996 to clarify that the Complaint (which must be subscribed and sworn) to be the initial charging document. The action is fatally flawed; there is no Complaint to begin action. Citing U.S. v. Rivera 370 F. 3d 730, 734 (2004 8th Cir.):

"A person taken into custody without a warrant is constitutionally guaranteed a hearing on the propriety of the warrantless arrest. The Fourth Amendment requires that a procedure exist whereby a judicial officer can make a 'fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty' Gerstein v. Pugh 420 U.S. 103, 125 43 L. Ed. 2954 95 S.Ct. 854 (1975). And as noted by Rivera, we have previously concluded that even a time period of two hours could be too long."

¶8 The Court has underscored the reviewability of probable cause in well cited statements, here from State v. Blunt 2008 ND 135:

"This Court has said that in determining whether probable cause exist, the district court may judge credibility and make findings of fact. State v. Foley 200 ND 91, ¶10, 610 N.W. 2d 49; State v. Serr 1998 ND 66 ¶9 575 N.W. 2d 896" [...] Whether the facts found by the district court reach the level of probable cause is a question of law, fully reviewable on appeal. Heich v. Erickson 2001 ND 200 ¶10, 636 N.W. 2d 913, Foley at ¶8 Serr at ¶9."

¶9 Cited in post-conviction relief pp. 19-20 and from First Appearance Transcript p. 11 @ 9-11 (app. p. ⁴²~~1~~) counsel for defendant Mr. Monty Mertz ensconced his situation:

"Because, you know, obviously one of the problems is everybody in the courtroom knows about these cases except the defense attorney. [The Court] Exactly. [Mr. Mertz] You know, you have a file, he has a file. I know nothing but the guy's name. So I can't speak to ---"

¶10 The appellant argues: denial of assistance of counsel, due process and abuse of discretion stemming from prosecutorial misconduct. The State (maybe the Court) has "files"; whether Gerstein review occurred in Ramsey County; whether the complainant signed and swore a complaint and what was physically attached to Officer Abel's Affidavit of Probable Cause (app. p. ~~2~~⁴¹). Mr. Mertz did object to being "in the dark", well documented throughout the transcript.

¶11 To demonstrate "an objective reasonableness considering prevailing professional norms." (Id at ¶ 29) the appellant cites; 38 Geo. L. J. Rev. Crim. Proc. p. 347 (2009):

"The Fifth and Fourteenth Amendments require the government to disclose certain, specific types of evidence to defendants. For example, in Brady v. Maryland the Supreme Court held that due process requires the prosecution to disclose evidence favorable to an accused upon request when such evidence is material to guilt or punishment. In United States v. Bagley, the Court held that the government's duty under Brady arises regardless of whether the defendant specifically request the material favorable evidence. Favorable evidence is material if there is a reasonable probability that the disclosure of the evidence would have changed the outcome of the proceeding."

¶12 In State v. Blurton 2009 ND 144 ¶ 17 770 N.W. 2d 231 the Court ruled the factual basis supported the plea (app. p. ~~3~~⁶⁹). "We have witnesses from the second floor of Motel 6 that saw all of this going on". (Id at ¶17). These witness statements were available since Sept. 05, 2007, the day before the First Appearance.

¶13 Statements and witness photo identifications were done by Investigator Stanger, FPD 069, of: Brad Pederson (app. p. ~~4~~⁴⁸) and Kandy Pederson (app. p. ~~5~~⁴⁹). These were clearly

withheld in the Sept. 06, 2007 First Appearance; they were not disclosed upon Defendant's Sept. 19, 2007 Request for Disclosure Action No. 15; nor were they disclosed in the Oct. 04, 2007 preliminary hearing; nor were they disclosed by Defendant Supplemental Request for Disclosure of Oct. 04, 2007 Register of Action #19; nor were they disclosed by Nov. 01, 2007 Subpoena to Officer Stanger, Court Index #24.

¶14 Fargo Police Report 07-11541-03 by Officer Amy L. Getz (app. pp. ~~6-8~~³⁵⁻³⁷) is dated "9/04/2007" by computer print-by dating. This report could not have been physically attached to the Affidavit of Probable Cause (app. p. ~~2~~⁴¹) dated "9/3/2007" in handwritten print. Counsel for Defendant Mr. Monty Mertz was assigned by Judge Marquart Sept. 06, 2007 (app. p. ~~9~~⁴³); Mr. Mertz requested discovery Sept. 06, 2007 (app. p. ~~10~~⁴⁴) Blurton was arrested Sept. 02, 2007 (app. p. ~~11~~³⁸) and immediately requested assistance of counsel.

¶15 Prosecutorial misconduct is in a malice of false information, "improper methods calculated to produce wrongful convictions." (citations omitted). Concerns expressed by Justice VandeWalle in State v. Nordquist 309 N.W. 2d 109 (1981) apply here citing Justice Botts in his dissent State v. Chance 29 N.M. 34, 54, 221P. 183, 190 (1923):

"...I can not close my eyes to the fact that it is only those cases of this nature where there has been a conviction which find their way here, and that those citizens who may be unlawfully indicted through suspicion, rumor, malice, public clamor, personal influence or worse means and who may thereafter have been acquitted by a petit jury, possible even by direction of the court, in the meantime, will have been compelled to suffer the suspense, humiliation and expense of a trial, the risk of perjury or error and the

disgrace of imprisonment or the burden of bail."

¶16 In a complete citing of paragraph five, McMorrow v. State 2003 ND 134 ¶5 667 N.W. 2d 577:

"Because McMorrow has asserted alledged prosecutorial misconduct, violations of N.D.R.Crim.P 16 and excessive bail occurring before he plead guilty made the pleas involuntary, we will address those issues."

¶17 Futhermore the Court in State v. Blurton 2009 ND 144 ¶22 770 N.W. 2d 231 stated:

"Blurton also raised claims of prosecutorial misconduct and evidence manipulation. However, these issues were not raised before the distric court and this Court will not consider the issues for the first time on appeal. See State v. Kieper 2008 ND 65 ¶16, 747 N.W. 2d 497."

¶18 The appellant submits, prior to plea of May 05, 2008; letters to the distric court asking for relief, by-passing ineffective assistance of counsel in dealing with pre-trial issues. One letter (app. p. ~~12~~⁵²) mailed "4-21-08" attempts to transfer discovery to Oklahoma, to get fresh assistance of counsel. Another letter in response to the Court, dated May 8, 2008 (app. p. ~~13~~⁵³) is Attorney Haugen refutation of Blurton's request. And in a letter directly from defendant to the Court, however inappropriate, (app. pp. ~~14-16~~⁵⁵⁻⁵⁷) the defendant pleads for help; "My point is I paid \$20,000 in a non-refundable deposit and am presently writing you this letter. Apparently that is proof enough I have incompetent representation."

¶19 Even prior to these letters; Court Action # 27 regarding Cell Phones, No. 32 property losses due to excessive bail and incarceration, # 35 supporting letters, # 34 pre-trial loses, letter # 38 and 39 from former employees

and letter # 53 requesting discovery. The issue of ineffective assistance of counsel is further discussed in this brief these issues all stem from initial failure of Fourth Amendment rights. A denial of procedural safeguards that are constitutionally sufficient to protect against unjustified deprivations. As stated in letter dated June 1, 2008 (app.p 16):

"Your Honor I ask you to Enforce the 4th Amendment. Dismiss these charges until the State is capable of producing probable cause. I am being forced by denial of Constitutional Rights to accept a lower plea in face of Malicious Prosecution. I ask for Due Process not intimidation and mis-representation."

¶20 These issues were further presented, State v. Blurton 2009 ND 144 reply brief page 5:

"Mr. Haugen's belated involvement of Sept. 19, 2007 (Court Action #14) is evidence of his lack of effort to defend Blurton. Mr. Haugen blindly accepts probable cause by an assumption of judicial review at arraignment. Clearly there is a lack of diligence by the State, the Court and both defense attorneys. There is no effort to defend or pursue Justice, only to "force" Blurton into a position where he has no choice but to accept the plea bargain."

¶21 These issues do not stop at a forced plea of guilty, they continue with a prosecutorial misconduct that "presently exist malicious, vindictive and unverifiable statements calculated to instill public hatred and contempt of the Inmate." (app. p. ~~19~~⁷⁴) These allegations were made in "Motion for Inspection of Inmate Records Pursuant to: NDCC 12-44.1-28"; (app. pp. ~~17-24~~⁷²⁻⁷⁹ with attachments). The injustice being defined in a letter June 2, 2010 from the Director of Criminal Investigation, Jerald C. Kemmet (~~app. p. 27~~^{Deleted}). Either Mr. Kemmet is being deceived by a AA Felony charge or finds registration is not required because this information is incorrect. (see App. pp. ~~25-26~~⁴⁵⁻⁴⁶ Un-signed Warrant for Arrest)

¶22 Citing Napue v. Illinois, 360 U.S. 264, #1. Ed. 2d 1217, n.1. (Classified to U.S. Supreme Court Digest, Lawyer Edition) (Constitutional Law § 840-Due Process- False Evidence) (1959):

"A conviction obtained through the use of false evidence, known to be such by representatives of the state, must fall under the Due Process Clause of the Fourteenth Amendment, the same results obtains when the state, although not soliciatating false evidence, allows it to go uncorrected when it appears."

¶23 **False Evidence**, not only in physical evidence, but in false statements and allegations known to be false. From First Appearance to parole/probation and sex-offender registration, a deprivation of liberty or property has occurred, along with a Due Process failure. Kirby v. Siegelman, 195 F. 3d 1285, 1291 (11 cir. 1999) considers being labeled as a sex offender a protected liberty. Continuing-Jurisdiction keeps the distric court within jurisdiction over matters of parole/probation, sex offender evaluations and conditions set forth by Appendix "A" to the Final Judgement of Oct. 03, 2008. Clearly the un-signed warrant, Court Action # 4, applies as "charged or convicted" is a term used in MnSort-R evaluations. These are not "non-jurisdictional defects".

¶24 **False Evidence** as cited within Mr. Kemmet's letter ~~(app. p. 27)~~ ^{Deleted} applies not only to AA Felony charges but in the requirement to "...provide a DNA sample for the North Dakota database if one has not already been provided..." These issues of false evidence in DNA testing have been made known to the Distric Court as reviewed in this brief ¶ 18 to ¶ 19 and ¶ 52 to ¶ 55 ~~(app. pp 28-33)~~ ⁵⁵⁻⁵⁷. The issues were

presented in post-conviction application. The appellant ask only one question, where did these samples come from?

¶25 Submitted to the Courts and others of interest is an Affidavit of Complaint; (app.pp. ~~28-33~~⁸⁴⁻⁹⁰ with attachments). The credibility of DNA evidence and the threat of continuing malicious prosecution exist. Assistance of Counsel did not pursue an evidenciary hearing or pre-trial Rule 12 motion to suppress this falsified evidence.

¶26 Identification of the female, in a failure of N.D.R. Crim.P Rule 3 requirements that a "complaint must be sworn to and subscribed". where vehicle tags of ND/HSF835 (app.p. ~~44~~⁶¹) are registered to an address less than six blocks from the Hotel 6. As well the female uses the same address on other reports but gives a Detroit Lakes address to police. A criminal history in FPD 7-8905 ,occurring at this address and also involving Robert Wenzlof III (app.p. ~~34~~⁶⁶) were disclosed by private investigations. FPD 7-11537 (app.p. ~~35~~⁶⁷) involving Wenzloff at the location of I-29 and 13th Ave. South at "0206" on "9/02/2007" was done by Officer Abel. Wenzlof and Officer Abel both are in the same parking lot at the same time that this alleged assault occurred. The credibility of both are questioned; the prosecution did not disclose this information, it was only after Wenzloff's arrest this became apparant. Futher investigations, statements by Wenzloff and various females listed on the Sept. 06 2007 Hotel 6 register who attempted to extort Blurton in Custody (~~app.p. 36~~^{Deleted}) are available. Presently a comparative review of FPD 7-11541-03

with the States Factual Basis (app.p. ~~3~~⁶⁹) should raise question to credibility, especially when the source of this information is considered.

¶27 On March 25, 2008 the defendant recieved States Discovery Material stamped 000055 to 000095 (~~app. p. 37~~^{Deleted}). N.D.R.Evid. 404 clearly impeaches the credibility of persons involved as witnesses. The State has delayed this disclosure until after the "bogus" three year plea offer (app. p. ~~38~~⁹⁴). States Attorney Gary Delorme, employed by North Dakota or Minnesota can not help but be familiar with the criminal element of the Motel.

¶28 Sentry Security Officer, Henry Jarold Head is wanted in Texas where he is know as "aka/Patterson, Rashaad". A warrant exist (app. p. ~~39~~⁴⁷) "IMMED CONFIRM WARRANT AND EXTRA-DITION ORI". Keith Bradley Pederson is also from Texas with a history of drug offenses and Indecent Exposure (app. pp. ~~40-41~~⁴⁸⁻⁴⁹). Jason Prince, the Hotel 6 night clerk has a history of violent offense (app. pp. ~~42-43~~⁵⁰⁻⁵¹) as well as multiple drug, robbery and assult charges. These complete records, and Robert Wenzloff III are not available to the Inmate for disclosure due to the nature of lienant sentence by Prosecutors. The defendant request the Supreme Court be allowed disclosure of the complete criminal history to judge character in de nove review of probable cause, see brief ¶ 6 and ¶ 8.

INEFFECTIVE ASSISTANCE OF COUNSEL

¶29 Distric Court cites Delvo v. State, 2010 ND 78, ¶16
at pages 5 to 6 of Memorandum Opinion:

"A defendant claiming ineffective assistance of counsel has a heavy burden of proving (1) counsel's representation fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel's deficient performance. Effectiveness of counsel is measured by an objective standard of reasonableness considering prevailing professional norms. The defendant must first overcome the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Trial counsel's conduct is presumed to be reasonable and courts consciously attempt to limit the distorting effect of hindsight."

¶30 The appellant; acting "pro se" establishes "an objective standard of reasonableness considering prevailing norms" by citing: National Legal Aid and Defenders Association, Performance Guidelines for Criminal Defense Representation (1995) from The Spangenberg Group, Review of Indigent Defense Services in North Dakota (Jan. 30, 2004) at the request of The State Bar of North Dakota Task Force on Indigent Defense (~~app. pp. 45-46~~ ^{Deleted}):

"Counsel must be familiar with the elements of the offense charged and the potential punishment for the charge."
"Counsel has a duty to conduct an independant investigation, regardless of the accused's admissions or statements to the lawyer of facts constituting guilt. The investigation should be conducted as soon as possible."

¶31 At page 2 of Haugen's response to the Disciplinary Board; "Part III Timeline" (app. p. ~~47~~ ⁹¹), counsel's performance without hindsight becomes apparant. Substitution of Counsel and Defendant's request for Disclosure, Records No. 14 and 15 occured Sept. 19th, 2007; seventeen days after Blurton's Arrest. The Arraignment was never reviewed as transcription was done April 16th, 2009.

¶32 N.D.R. Prof.C. Rule 1.3 states: "A lawyer shall act with reasonable diligence and promptness in representing a client." By procrastination Haugen has lost valuable time in reviewing the witness statements or in interviewing witnesses that have been hidden by prosecutorial misconduct. Without Rule 16 discovery Haugen has no clue. This, along with Mr. Mertz lack of disclosure at arraignment is in denial of safeguards to Constitutional Rights. Blurton has "fallen through the cracks" of a dysfunctional system.

¶33 In Writ of Certiorari: Blurton argues Roe v. Florez-Ortega 528 U.S. 470, 1452 Ed. 2d 985, 120 S.Ct. 1029:

"In Cronic, Penson and Robbins we held that 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'. Cronic supra at 659, 80 L. Ed 2d 657, 104 S. Ct. 2039. 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, ante, at 286, 145 L.Ed 756 120 S. Ct. 746, to judicial proceedings that never took place."

¶34 The arraignment is "presumptively unreliable" (Id) and a "presumption of prejudice" (Id.) has occurred, the legal maneuvers and self-justifications of Delvo v. State, (Id. @ ¶ 29) are unnecessary. Furthermore the appellant has cited Bell v. Cone 535 U.S. 685, 152 L.Ed. 2d 914, 122 S. Ct. 1843; at 535 U.S. 695 and 696:

"In Cronic, we considered whether the Court of Appeals was correct in reversing a defendant's conviction under the Sixth Amendment without inquiring into counsel's actual performance or requiring the defendant to show the effects it had on the trial. 466 U.S. at 650, 658, 80 L. Ed. 2d 657, 104 S.Ct. 2039. We determined the court had erred and

remanded to allow the claim to be considered under Strickland test. 466 U.S. at 666-667 and N 41, 80 L. Ed. 674, 104 S. Ct. 2052. In the course of deciding this question we identified three situations implicating the right to counsel that involved circumstances 'so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' Id. 658-659, 80 L. Ed. 2d 674, 104 S. Ct. 2052.

¶135 [Three Conditions of Cronic]

First and "[m]ost obvious" was the 'complete denial of counsel'. Id at 659, 80 L. Ed. 2d 674, 104 S. Ct. 2052. A trial would be presumptively unfair, we said, where the accused is denied the presence of counsel at 'a critical stage' Id. at 659, 663, 80 L. Ed. 674, 104 S. Ct. 2052, a phrase we used in Hamilton v. Alabama, 368 U.S. 52, 54, 71. Ed. 2d 144, 82 S. Ct. 157 (1961) and White v. Maryland 3373 U.S. 59, 60 10 L. Ed. 2d 193, 83 S. Ct. 1050 (1963) (per curiam), to denote a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused. Second we posited that a similar presumption was warranted if 'counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. Cronic, supra, at 659, 80 L. Ed. 2d 657, 104 S. Ct. 2039. Finally we said that in cases like Powell v. Alabama, 287 U.S. 45, 77 L. Ed. 158, 53 S. Ct. 55 (1932), where counsel is called upon to render assistance under circumstances where competent counsel very likely could not, the defendant need not show that the proceedings were affected. Cronic, supra, at 659-662, 80 L. Ed. 657, 104 S. Ct. 2039."

¶136 Plainly; "a step of criminal proceeding, such as arraignment, that held significant consequences for the accused" Id @ ¶133 was denied assistance of counsel as in brief ¶ 1 to ¶ 9 . The arraignment prejudiced the accused with maliciously prepared charges, and a lack of counsel along with prosecutorial misconduct of withholding critical witness statements prejudiced the defendant into a plea of "self-defense" in light of a dysfunctional process. The second condition of Cronic " counsel entirely fails to subject the prosecutioners case to meaningful adversarial testing." Id @ ¶135 , is in procrastination.

¶37

Mr. Haugen's response to the Disciplinary Board (app. p. ~~48~~⁹¹) is Blurton's "admissions or statements to the lawyer." Id. @ ¶ 30 :

"Mr. Blurton told me that he had a very poor memory of the exact details of September 2, 2007, due to his intoxication. He used the words 'blackout drunk' in a letter from the jail to a friend."

¶38

The importance of witness statements to the lawyer's understanding of facts constituting guilt in this situation can not be overlooked. Mr. Haugen's reply to the Disciplinary Board (app. p. ~~49~~⁹²) in response to Complaint Letters 3 and 4 are very contradictory about Investigator Stanger and statements of Kandy Pederson. More important is if "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing". Id @ ¶35 A presumption of prejudice that can not be denied when reviewing the State; " We have witnesses from the second floor of the Hotel 6 that saw all of this going on." Id.@ ¶12 The multiple issues presented in the States Factual basis, reviewed by the Court (app. p. ~~5~~⁶⁹) State v. Blurton, 2009 ND 144 ¶ 13, 770 N.W. 2d 231: "Section 12.1-20-03 (1), N.D.C.C states a person who engages in a sexual act with another is guilty of gross sexual imposition if: [...] That person knows that the victim is unaware that a sexual act is being committed upon him or her..."

¶39

In State v. Blurton, 2009 ND 144 the appellant established (app. p. ~~50~~⁶⁸) State v. Vantreece, 2007 ND 126: 736 N.W. 2d 428 as a supplemental authority per N.D.R.AppP. 28(k).

Here"...an objective standard of reasonableness considering prevailing professional norms..." Id at ¶29; reviewing "... elements of offense charged and potential punishment for the charges." Id at ¶30. Citing Justice Cruthers in Vantreece ¶30:

"Section 12.1.20.03 (1)(c), N.D.C.C., punishes conduct as a Class A felony if the perpetrator "knows that the victim is unaware that a sexual act is being committed upon him or her". A class A felony carries a maximum punishment of 20 years imprisonment and up to a \$10,000 fine. N.D.C.C § 12.1-32-01(2). Under subsection (1)(a) the crime is punished as a class AA felony if the sexual act was performed performed by a person who "compels the victim to submit by force or by threat of imminent death, serious bodily injury, or kidnapping, to be inflicted upon any human being."

¶40 The statutes make clear that (1) the perpetrator knows that the victim is unaware and (2) the sexual act is performed by a person who "compels" the victim"to submit..." and this become an AA felony only if the victim suffers serious bodily injury, in regards to "force". Futher discussing "force" at ¶35:

"The 'force' that must be proven is not "physical action" standing alone, as suggested by dissent. Some 'force' meaning some 'physical action', would be present in any sexual act or sexual contact committed in violation of any of the three statutes cited above. We therefore need to look at what sets apart conduct proscribed in one statute from the conduct proscribed in the other statutes. Under North Dakota's statutory scheme for sexual offenses, the answer is the nature of the sexual contact, along with the actual or threatened violence that accompanies the contact."

¶41 In the States factual basis, the witness statements do not support "force" or "compulsion" of any sexual act such as oral sex; when reviewed by FPD 7-11541-03 (app.pp.6-8). Still, an act of oral sex viewed "in the nature of sexual contact" is consensual by nature. Futhermore the female would logically be aware she is preforming this act upon another.

¶42 In dissent Justice Kapsner further defines the term "force" at ¶46. "An attacker exhibits sufficient 'force' by exerting the force necessary to penetrate a non-consenting victim. See e.g. State v. Garron 177 N.J. 147, 827 A. 2d 243, 264 (J.J. 2003) State v. Sedia, 614 So. 2d 533, 535 (Fla. District Ct. App. 1993)." Here "the nature of the sexual contact" alleged to be oral sex, does not meet Justice Kapsner's definition or Justice Cruthers, it defies common-sense. A review of FPD 7-11541-03 finds no evidence of physical or verbal confrontation (app.pp. ~~6-8~~ ³⁵⁻³⁷), quite clearly Kandy Pederson states in the report;" Kandy said the two did not appear to be fighting or arguing with each other, it just looked like they were talking." There is no statement by the witness of any type of sexual act being performed on the female or male.

¶43 Justice Kaspner further discusses the word; "acquiesce" and its particular province within Juries as an analytical fact-finder. From ¶ 48 of Vantreece: "There may be concerns that sometimes intercourse which begins consensually can evolve into non-consensual contact and 'force' and 'compulsion' may be more difficult to analyze in such circumstances." In Vantreece it was determined ; "that a token initial resistance is not enough, existing law specifies that the woman must resist 'to the utmost'." Id at ¶16.

¶44 The appellant purpose of citing Vantreece is not in asking the Court to rule on evidence, but as the attorney's "entirely fails to subject the prosecution's case to

meaningful adversarial testing." Id at ¶35 of brief. Clearly Vantreece is well known to Cass County attorneys, courts and police, and is very relevant in time as Vantreece was determined months prior to Blurton's arrest. Counsel made no effort to pursue witness statements, as matter of record, or to confront the State use of non-existent witness statements. The defendant argues that Counsel only sought the issues of "prostitution" as a means of defense.

¶45

Whether the female was a prostitute, an "adult entertainer" or working in conjunction with others to rob a tourist at the local crackhouse hotel would be applicable under Justice Kaspner's definition of "acquiesce" and left to the province of Juries. Specifically these issues fall under "elements of offense" and applicable to probable cause: (1) pursuant to 12.1-20-02 the difference between "sexual act" or "sexual contact" and (2) 12.1-20-03 (1)(a) the issue of force, strangulation and imposition defined by witness and physical evidence of medical examination and (3) 12.1-20-03(1)(c) "knows the victim is unaware that a sexual act is being committed upon him or her" and (4) resistance and most respectfully, any token resistance as witness by Kandy Pederson. Indeed these issues are "common sense" not subject to "an objective standard of reasonableness considering prevailing professional norms" Id at ¶29 Attorney Haugen has entirely failed to subject or pursue the prosecutions malicious charges in any form, there was no Constitutional safeguards of adversarial testing.

¶46 In application for Post-conviction relief, pages 14 to 21, the petitioner has made known: "If not for the lack of a clear explanation by due process of NDRCrimP Rule 11, this plea would not have happened." Billing submitted to the Disciplinary Board by Attorney Haugen (app.p.~~38~~³⁸) shows that on "2/28/2008" a "Telephone confrence with States Attorney Cherie Clark requarding plea of 3 years" occurred.

¶47 By letter submitted to the Court (app. pp.~~14-16~~⁵⁵⁻⁵⁷) the defendant makes know his desire to fire Haugen. Reguardless, Blurton did not give up his Constitutional Sixth Amendment Right to Assistance of Counsel. Attorney withdraw occurred by Register of Action No. 83 on 06/10/2010. Counsel was not re-instated until Register of Action No. 88 on 06/27/2010. Between these two dates any "critical stage of judical proceeding mandates a presumption of prejudice because the 'adversary process itself' has been rendered 'presumptively unreliable" Id @ ¶ 33. Critical stage would describe the Motion to Withdraw Plea, Pre-Sentence investigation and letters to the Court seeking to replace counsel. It should also be noted the Complaint to the Disciplinary Board # 4779-SE-0806 occurred in this time frame. The defendant was desperately seeking legal counsel and solutions to the ill-informed plea.

¶48 Without the "distorting effect of hindsight" Id @ ¶ 29 counsel deficient performance in which "the record affirmatively shows ineffectiveness of constitutional dimensions" State v. Blurton, 2009 ND 144 ¶20 770 N.W. 2d 231 occurs.

By review of transcript, May 05, 2008 Change of Plea,
page 5 (app. p.⁵⁴~~51~~) the Court States: "But anyway, Mr.
Blurton, you had a chance to talk to Mr. Haugen, your lawyer
here?" Clearly the Court has delegated authority of Blurton's
Constitutional Sixth Amendment Right "to be informed to the
nature and cause of the accusation"; to counsel for the
defendant." [T] he Court will allow the Amended Information
that Count 1, Gross Sexual Imposition is now in violation
of 12.1-20-03(1)(c) and 3(c) and counts 2,3,and 4 are dis-
missed." Did the defendant understand?

¶49

The Amended Information was not presented to the
defendant, but to counsel, and it was counsel that reviewed
and informed Blurton of the "cause and nature of the accu-
sation". It was the State and the Court that Re-litigated
the Amended Information and the Final Judgement and Commit-
ment in Actions No. 126, 127, 128, 129, 132, 140, 141, 142
150, 153, 154, 156, and 157. Counsel was clearly deficient
in his knowledge of "...the elements of the offense charged
and the potential punishment for the charge." Id @ ¶30
The defendant had legitimant reasons of legal innocence to
withdraw the plea of guilty and admittedly by the amendments
to action his knowledge of the charges was inept.

¶50

At the motion to withdraw hearing the defendant was
represented by counsel he was attempting to terminate. "[W]here
counsel is called upon to render assistance under circumstances
where competent counsel, very likely could not, the defendant
need not show that the proceedings were affected." Id @ ¶ 35

ASSERTATIONS OF LEGAL AND FACTUAL INNOCENCE

¶51 Citing Mathews v. Johnson, 201 F. 3d 353, 364-65

(5th Cir. 2000):

"The test for determining a guilty plea's validity is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant' Hill, 474 U.S. at 56 (quoting North Carolina v. Alford, 400 U.S. 25, 31, 27 L. Ed. 2d 162, 91 S.Ct. 160 (1970)). Courts assessing whether a defendant's plea is valid look to 'all of the relevant circumstances surrounding it.' Brady v. United States, 397 U.S. 742 at 749, 90 S. Ct. 1463 25 L. Ed. 747 and may consider such factors as whether there is evidence of factual guilt."

¶52 Timeline review by Court Record; Mr. Mertz assumed counsel by letter from the Court 07/01/2008. The defendant asserted "a lack of fundamental fairness as promised by the Constituiton. [...] [stating] substantial grounds to create a legal defense stratagy." (app. p. ⁵⁹~~54~~). Counsel seemingly failed to develop a defense the defendant wanted, and the Court scheduled sentencing 08/25/2008. The defendant presented to the Court "Defendants Per Se Motion for Reduction of Sentence per SL 12.1-32-04" (app. pp. ⁵⁸⁻⁶¹~~52-55~~ w/Aff. of S.) Court Action No. 97 was more than two pages, these two pages presented being the introduction, the entire copy is beyond an indigent defendant's abilities to reproduce. The defendant's effort may not be proper, it does however represent "all of the relevant circumstances surrounding it [the plea]" Id. The defendant also makes known to the Court (app. p. ⁶⁰~~55~~): "...as I seek collateral relief under applicable state law or the exhaustion of relief prior to filing a petition for federal habeas corpus." The defendant has reserved his right to appeal.

¶53 The "voluntary and intelligent choice" was to rescind the plea, and to fight for this right until federal habeas corpus. Mr. Mertz made no effort to compel disclosure of the witness statements (app. pp. ~~4-5~~³⁹⁻⁴⁰) clearly being the source of the States Factual basis (app. p. ~~5~~⁶⁹). This same episode as with Haugen also falls under Cronic Id. ¶35 "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." And as cited in Roe v. Florez-Ortega at ¶ 33: "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' [...] to judicial proceedings that never took place."

¶54 The defendant cannot get his attorney's attention or the Courts attention, he has attempted to assert his rights and has no help from counsel. Sentencing was rescheduled to 09/22/2008 (Register of Actions) and again Blurton writes the Court (app. pp. ~~56-58~~⁶³⁻⁶⁷): "Common sense would consider an interview the eyewitness (app. p. ~~56~~⁶³)...Common Horse Sense would involve some questioning of the eyewitness, it would be subject to Rule 16 and Brady vs. Maryland laws. (app. p. ~~57~~⁶⁴)...I can prove malicious contamination of evidence by police and loss of Brady evidence by a lack of diligence (app. p. ~~58~~⁶⁵) Not only has the defendant reserved the right to appeal; as well to challenge "non-jurisdictional defects". (Id. @ ¶1).

¶55 The appellant has demonstrated (1) a bias and wrongful arrest in denial of state and federal laws, that (2) counsel was either absent, deficient or in impossible situations to provide Constitutional safeguards of counsel where (3) a "weak" colloquy at change of plea hearing evolved into an ambiguous understanding of the nature and cause of the accusations as well as the consequences of the plea and (4) most importantly a review of FPD 7-11541-03 questions the factual guilt in terms of elements of offense charged.

¶56 Citing United States v. Anaya, 32 F. 3d 308 1994 WL 425359 (7th Cir-1994) quoting Anderson v. City of Bessemer City, 470 U.S. 564 573 84 L. Ed. 2d 518 105 S. Ct. 1504 (1985):
"A factual determination is clearly erroneous only if, after considering all the evidence, the reviewing court is left with the definite and firm conviction that a mistake had been committed."

¶57 The defendant is at a disability of a logical knowledge to the elements of offense, a "blackout drunk". His agreement is in "plea agreement". not factual agreement. In Menna v. N.Y. 423 U.S. 61, 63 the Supreme Court noted that a guilty plea removes factual guilt and "simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction, if factual guilt is validly established." Id at 63 n.2. The petitioner contends that factual guilt was never established, indeed probable cause was never established.

PROCEEDURAL FAILURE

¶158 At pages 14-18 of post conviction application, the appellant argues of two adverse prosecutorial conditions; (1) the criminal process of 09-07-K-03531 and (2) pre-sentence investigations binding upon psychological analysis of N.D.C.C. 25-03.3-01.

¶159 The appeal has presented the compelling argument of Cronic, "...the adversary process itself' has been rendered 'presumptively unreliable", Id. @ ¶ 33, and the "denial of the entire judicial proceeding itself [...] demands a presumption of prejudice." Id. @ ¶ 53. A Motion to Withdraw Plea; duly responded upon (Court Index No. 89) and met with deliberate indifference by Court and by Counsel (Court Index No. 96 and 99 App. pp. ~~52-55~~⁵⁸⁻⁶¹ & pp. ~~56-58~~⁶³⁻⁵⁸)

¶160 A denial of legal counsel in pre-sentence investigation from June 06, 2008 until Sept. 08, 2008 is evident in Dr. Benson's timeline (app.p. ~~59~~⁷⁰); this a chronological conflict with the State and Court as noted in Motion to Inspect Inmate Records (app. pp. ~~17-20~~⁷²⁻⁷⁹). Dr. Benson states (app. p. ~~60~~⁷¹): "It took longer than usual to score testing, because Mr. Blurton mixed up the answer sheets..." Somehow Blurton is not only expected to represent himself without counsel, he is also expected to perform his own psychological testing. Clearly an act of tampering has occurred at the Cass County Jail. Futhermore, scoring errors pointed out by Mr. Knutson (app. p. ~~61~~⁶²) have been deliberately ignored by the Courts. Here "charged or convicted" becomes malicious as probable

cause has never been established in the original Warrant
(app. pp. ~~25-26~~⁴⁵⁻⁴⁶). A failure of Fourth Amendment rights has
allowed prosecutorial misconduct in psychological testing.

¶61 Multiple clerical errors noted in ¶ 49 were re-litigated from the Final Judgement of Oct. 03, 2008. Dr. Benson has been wrongly lead to believe in a premeditated act of "administering or employing without the victim's knowledge intoxicants" and prosecutorial over-reaching in the issue of "force" in full review of all four original counts.

¶62 The appeal argues "prosecutorial vindictiveness" in retaliations to the defendant's attempt to withdraw the plea for a "fair and just reason". The "Affidavit of Cherie Clark" presented to the Supreme Court Disciplinary Board in Complaint No. 4779-SE-0806 (see app. pp. ~~17-24~~⁷⁵⁻⁷⁶ full review in Motion) is a collusive act between counsel and State.

¶63 The defendant has sought relief, attempted to withdraw plea, present factual innocence and attempted to hire private counsel. A financial disability occurred while incarcerated under extreme bond; attorney Lindsey Haugen's inept attempt at bail reduction Dec. 12, 2007 with Judge Webb instead of Judge Marquart was inappropriate. Defendant suffered loss of property and insurance delays caused by loss of liberity while a pre-trial detainee, as noted by letters No. 32, 33, 34 and 35.

¶64 The defendant's Rule 35 Motion and letters regarding plea withdraw (Actions 107-110) were ignored in complaint of wrongful charges. However, while seeking appeal, the

State filled several motions to amend Informations and Final Judgements. Actions without representation by defendant, without Notice of Service or Notice of Motion as required in Standing Order of the East Central District Court (~~app. pp. 62-64~~^{Deleted}). The appellant argues the Doctrine of Collateral Estoppel in the re-litigation of the Final Judgement of Oct. 03, 2008. The States Factual Basis (app. p. ~~3~~⁶⁴) is not significantly particular in offense descriptions of 12.1-20 to prevent Double Jeopardy from occurring. There exist an ambiguous allegation; abuse of due process, a failure to provide defendant counsel and lack of balance between Court, State and Defense. A case built upon "clerical errors".

¶65

A noted lack of independence in the Judiciary has been presented in; The Spangenburg Group, Review of Indigent Defense Services in North Dakota, (Jan. 30, 2004) prepared at the request of The State Bar of North Dakota Task Force on Indigent Defense. Cited in the NLADA Performance Guidelines (~~app. p. 45-46~~^{Deleted}) as being "absolutely necessary" for Criminal Defense are national standards which are lacking in 09-07-K-03531. The report notes of North Dakota Contract Attorneys" "A measure of an adequately functioning indigent defense system is an evaluation of whether indigent defense counsel are able to follow these requirements in all cases handled. As described above, North Dakota contract attorneys are not always meeting or able to meet these requirements, placing indigent defendants in the position where neither the courts nor the government can assure their rights are being protected as required under federal and state law."

BRADY EVIDENCE: GUILTY PLEAS AND PUNISHMENT

¶66

In defendant's Application for post-conviction relief, pages 18-21 (app.pp. ~~65-68~~⁸⁰⁻⁸³) Mr. Mertz's explanation of "the cause and nature of the accusation as well as the consequences of surrendering his right to trial" are questioned. The petitioner also questions the pre-sentence investigation (app.p. ~~67~~⁸²), mandatory sentencing, registration and mandatory notification requirements (app. p. ~~68~~⁸³) as well as a time served sentence with total five year combination of ~~prison~~ and probation. This recommendation being made by Dr. Benson in pre-sentence investigation and cited to the Supreme Court Disciplinary Board (app. p. ~~21~~⁷⁶) by the States Attorney.

¶67

The Distric Court in response page 2 of the Memorandum Opinion states: "he [Mr. Blurton] argues that the plea agreement was not made known to the Court as required by N.D.R. Crim. P. 11. Here, there was no plea agreement. It was an open plea with a sentencing recommendation."

¶68

N.D.R.Crim. P Rule 11(c)(3)(B),"the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request." This would have been nice for the defendant to know. Reguardless the Court can sentence to what the provisions allow, ~~whether~~ this effected the voluntariness of the plea is in the determination of the Court.

¶69

The determination of punishment, citing the Court, page 21 of the transcribed Oct. 03, 2008 Sentencing Order: "I know that Mr. Blurton basically has a pretty clean

record prior to this happening, but the Court cannot ignore what happened here. This was a very serious crime. It had very serious consequences to the victim here."

¶70 There is no Complaint, or confirmed victim statement, the identity of the female is questioned, the validity of the "Victim Impact Statement" is questioned (app. pp. ~~17-24~~⁷²⁻⁷⁹) and the factual basis is supported by, "We have witnesses from the second floor of the Hotel 6 that saw all of this going on." Id @ ¶12 (app.p. ~~3~~⁶⁹). And, as shown in ¶14 to ¶15 the Affidavit of Probable Cause can only be supported by Officer Abel not FPD 7-11541-03. It can not be denied the witness statement of Kandy Pederson and Brad Pederson (app. pp. ~~4-5~~³⁹⁻⁴⁰) would be a determining factor of guilt or punishment if they were disclosed. It can not be denied the definitions of 12.1-02-02 and the discussions of Vantreece ¶39 to ¶45 become determining factors in the statutory scheme for sexual offenses, these offenses not supported by FPD 7-11541-03 (app. pp. ~~6-8~~³⁵⁻³⁷).

¶71 Citing City of Fargo v. Levine, 2008 ND 64, ¶13
747 N.W. 2d 130 2008:

"...Brady v. Maryland 373 U.S 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215 (1963) Brady instructs that: a due process violation occurs when the prosecution suppresses evidence favorable to an accused "if the evidence is material to guilt or punishment" State v. Muhle 2007 N.D. 132, P25 737 N.W. 2d 647. A threshold requirement for Brady is that the government possess the evidence. See State v. Goulet 199 ND 80, P15 593 N.W. 2d 345."

¶72 Citing Rummer v. State, 2006 ND 216 P 20 722 N.W.
2d 528 2006:

"To establish a Brady violation the defendant must prove (1)

the government possessed evidence favorable to the defendant; (2) the defendant did not possess the evidence and could not have obtained it with reasonable diligence, (3) the prosecution suppressed the evidence, and (4) a reasonable probability exist that the outcome of the proceedings would have been different if the evidence had been disclosed. Syverson v. State, 2005 ND 128, P6, 699 N.W. 2d 855] at P6 (quoting State v. Goulet, 199 ND 80, P15, 593 N.W. 2d 345."

¶73 Brady evidence was expanded, citing Syverson v. State, 2005 ND 128, P6, 699 N.W. 2d 855 (2005):

"The United States Supreme Court extended the Brady rule to the 'suppression of impeachment evidence that might have affected the outcome of the trial' State v. Siervers, 543 N.W. 2d 491, 495-96 (ND 1996) (citing United States v. Bagley; 473 U.S. 667, 676 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985))."

¶74 The State has, by common sense, knowledge of the evidence and what is exculpatory. By deception FPD 7-11541-03 was not disclosed at arraignment or Officer Stanger's investigations with the witnesses (app.p. ~~4,5~~³⁹⁻⁴⁰). Also by deception FPD 7-11537 (app.p. ~~35~~⁶⁷) the involvement of Robert Wenzloff and his criminal record (~~app.pp. 69-71~~^{Deleted}) along with the criminal records of Prince (app.p. ~~42-43~~⁵⁰⁻⁵¹); Pedderson (app.p. ~~40~~⁴⁸⁻⁴⁹); Head (app.p. ~~39~~⁴⁷) and undisclosed criminal history of the alleged female "victim", her false address given to police in comparison to Vehicle Records (app.p. ~~72~~⁶¹) would develop "a reasonable probability [...] the outcome of the proceedings would have been different" (Id @ ¶72). Clearly all four conditions of a Brady violation have been met.

¶75 Further impeachment evidence would be the criminal investigations of 09-8-K-192 involving Wenzloff and with relevance to private investigations. Any evidence that connects the persons in ¶74 with the female, all of whom have Detroit Lakes in common would be exculpatory.

CONCLUSION

¶76 Citing N.D.R. Professional Conduct Rule 3.8:

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) Make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) Not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) Disclose to the defense at the earliest practical time all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

¶77 Without a due process of law, described in ¶1-8 the action is fatally flawed, there exist no complaint or probable cause for action. A denial of counsel in ¶ 9-15 and a failure of constitutional safeguards. In ¶ 16-20 the defendant attempted to assert his rights against the malicious and vindictive allegations described in ¶ 21-28.

¶78 The appellant demonstrated reasonable standards and terms as 'presumptively unreliable' and failure in adversarial testing to describe a failure by counsel to assert constitutional safeguards against malicious prosecutions. These being described in a study of elements of offense by Vantreece and 12.1-20 statutory standards in ¶37-45. Counsel ineffective assistance was developed in ¶46-50, where defendant attempted to assert his rights and a "voluntary and intelligent" choice was made to rescind his plea.

¶179 Fully described in ¶158-65 is a procedural failure in both criminal prosecution and psychological analysis that threatens adverse civil actions. A noted vindictiveness and deliberate indifference by those of the State of North Dakota; prosecution, indigent defense and Courts, and a decisive lack of Constitutional Safeguards to fair and impartial tribunal.

¶180 A noted lack of Brady disclosure (N.D.R.Prof.C Rule 3.8(d)) and its effect to "negate the guilt of the accused or mitigate the offense" discussed in ¶166-70. And in ¶ 71-75 a common sense approach to Brady disclosure leaves these choices:

¶181 (1). Witness statements are indeed inculpatory, describing oral sex between the male and female, the female being unaware she is participating. The male can be described and identified as Joe R. Blurton, the female being A.R.

¶182 (2). Witness statements are close to FPD 7-11541-03 (app. pp. ³⁵⁻³⁷~~6-8~~) leaving mitigating circumstances in the 12.1-20 subsections that were not disclosed by prosecutors in effort to maliciously prosecute an unfortunate tourist from Oklahoma who accidentally stayed at the wrong hotel.

¶183 In either case: defendant can not logically complete requirement for sentence to take responsibility for his offense, this issue being met with a deliberate indifference by North Dakota DOCR, East Central Distric Court and State Prosecutors.

RELIEF REQUESTED

North Dakota Rules of Civil Procedure, Rule 60, allows for relief from judgements or orders. The action was fatally flawed, it can not have commenced without Arrest, being signed by magistrate. The Final Judgement of Oct. 03, 2008 was improperly amended without a due process of law. And, under N.D.RCiv.P 60(b) (iii) Fraud and false evidence was used by the State to force the defendant to enter a plea of guilty as a means of self-protection against malicious and wrongful prosecution.

THEREFORE THE APPELLANT REQUEST: That the Final Judgement and Commitment and all amendments to such be declared VOID.