

SEP 30 2010

IN THE SUPREME COURT, STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA

JOE R. BLURTON

PETITIONER APPELLANT

v.

STATE OF NORTH DAKOTA

RESPONDANT APPELLEE

NUMBER 2010 000182

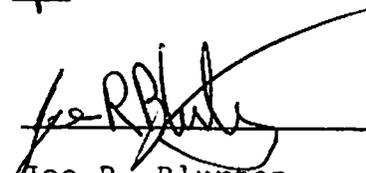
PETITIONER'S REPLY BRIEF

IN REPLY TO SEPT. 23RD, 2010 RESPONDANT-APPELLEE

BRIEF

Pursuant to N.D. R. App. P Rule 31; this Reply Brief was prepared on a manual typrwriter and no electronic version exist and that an un-bound copy was supplied to the Clerk of The Supreme Court.

Signed this 29 day of Sept. 2010.

  
\_\_\_\_\_  
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¶1 PRELIMINARY STATEMENT IN RESPONSE TO APPELLEE BRIEF

¶2 The petitioner responds presenting two arguments;  
(1) an inexcusable denial of the fundamental fairness  
promised him by the Constitution of the United States and  
(2) a collusion of North Dakota governmental persons, acting  
under the "color of law" to deny those Rights.

¶3 DENIAL OF FUNDAMENTAL FAIRNESS

¶4 Quoting State v. Park; 77 ND 860 (1950):

"An accused, whether guilty or innocent, is entitled to a fair trial, and it is the duty of the court, and of the prosecuting counsel as well, to see that he gets one."

¶5 Reviewing; "the duty of the court, and of the prosecuting counsel" to provide a due process of law required by N.D.R.Crim.P. Rule 7(a)(1): "All felony prosecutions in the district court must be by indictment after a grand jury or Information after preliminary examination." Questions of jurisdiction arise as R.A. 09-07-K-3531 No. 1 is an information, not a complaint as required by N.D.R.Crim.P Rule 3. Requirements of probable cause are assumed by prosecutor's beliefs, not a magistrial review of a police officer's "historical facts". See City of Devils Lake v. Grove; 2008 ND 155, P11, 755 N.W. 2d 485: "An arrest must be supported by probable cause."

¶6 U.S. Const. Amend IV unequivocally protects "the right of the people to be secure in their persons [...] against unreasonable [...] seizures [...] and no warrants shall issue, but upon probable cause supported by Oath or affirmation."

¶7           Petitioner was denied two parts of U.S. Const. Amend. IV: wrongly held by Cass County Sherrif Paul Laney without a signed warrant for arrest, and being denied a Magisterial determination of probable cause.

¶8           Distric Court's response makes known the determination of probable cause. Quoting page six of Hon. Judge Marquart's Memorandum Opinion, Finding of Fact, Conclusions of Law and Order for Judgement (App. p. 27):

"Mr. Blurton decided to waive his preliminary hearing because he agreed that the State of North Dakota had probable cause to charge him with these offenses. This is buttressed by Mr. Blurton's statements at his waiver of preliminary hearing on May 5, 2008, where the following colloquy took place."

THE COURT: ...FIRST OF ALL SIR, DO YOU UNDERSTAND WHAT A PRELIMINARY HEARING IS?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you understand you had a right to a preliminary hearing?

THE DEFENDANT: Yes, sir.

THE COURT: And you're willing to waive that right?

THE DEFENDANT: Yes Sir.

¶9           Here it becomes apparant that Magisterial Review required by U.S. Const. Amend. IV made applicable by U.S. S. Ct. determinations in Gerstein v. Pugh (App. Brief ¶ 2) is by a duress of excessive confinement without U.S. Const. Amend XIV due process; see Bell v. Wolfish; 441 U.S. 520 537, n. 16 (1979) "Due process requires that a pretrial detainee not be punished". A period of 245 days pass since the Sept. 02, 2007 arrest, the Warrant for Arrest is unsigned (R.A. 09-07-K-03531 No. 4 App. pp. 45-46) and no Magisterial review of probable cause has occurred. This is often done in Third World Countries such as Iran or China.

¶10           Reviewing; "the duty of the court, and of the prosecuting counsel" (Id at ¶4) as demonstrated in brief ¶ 1 to ¶9, petitioner was denied U.S. Const. Amend VI rights of assistance of counsel. Described in Arraignment transcripts the Distric Court states: "You have the right to be present in court when any essential proceeding happens in your case." (Arr. T. p. 5 at 1-2). "You have the right to have a lawyer advise you before making any statements, answering any questions or at any time when events happen to your case." (Arr. T. p, 5 at 9-11 ).

¶11           Held in Jail without assistance of counsel since Sept. 02, 2007 (R.A. 09-07-K-03531 No.5 ) Blurton is futher denied assistance of counsel, responding "I'd have to speak to my attorney" (Arr. T. p. 11 line 2-3). To which Mr. Mertz responds; "I'm not in any position to speak to it." (Arr. T. p. 11 line 6-7).

¶12           Blurton's Motion to Withdraw Plea; (see R.A. 09-07-K-03531 Nos. 70-90) was never followed through by Counsel of Mr. Mertz. The Court states in a letter, R.A. 09-07-K-03531 No. 107:

"Through you court appointed attorney, Mr. Mertz, the Court was informed that you no longer wished to withdraw your guilty plea."

¶13           Blurton is denied his right to "appear and defend in person with counsel" N.D Const. Art 1 § 12 or the rights described by the Distric Court at Arraignment. Clearly there is no need to be a "ferret" or "psychic" only to provide guarantees of Constitutional Rights.

¶14

COLLUSIVE ACTS TO DENY CONSTITUTIONAL RIGHTS

¶15

Quoting the Distric Courts May 27, 2010 Memorandum Opinion (App. p. 28):

"The DNA analysis reveled a positive match for Mr. Blurton's DNA on an oral swab and a dried secretion swab taken from the victim A.R. on September 2, 2007."

¶16

Here the Distric Court revels it's knowledge of evidence disputed, un-disclosed evidence to Attorney Haugen. Quoting FPD 7-11541-01 (App. p. 38) in regards to DNA evidence collection: "This was all done by Officer Cruze, see her supplement." Attorney Haugen (App. p. 73) states of the evidence: "There is no evidence that Officer Cruze drafted any report [(...)]. Any such report by Officer Cruz, if it exist, has not been provided to me." The State's responds in their brief of this evidence at ¶21: "DNA test results from swabs taken off the victim...".

¶17

The State and the Court seem to be in possession of Officer Cruze's report or this evidence has been falsely produced. In either circumstance a violation of Due Process occurs. Affidavit of Complaint (App. pp. 84-90) makes clear the State had Items 3c and 3d of unknown origin, wrongly placed in the defendants clothing items. Clearly the State intended to pull a bra and a skirt from a bag and claim the defendant's Semen was on her clothes. Amy Gebhardt, Forensic Scientist of the Crime Lab would then testify that indeed that semen belonged to Blurton.

¶18

Petitioner has filed three "Affidavits of Complaint" 09-07-K-03531 R.A. No. 189; 09-2010-CV-00028 R.A. Nos.

10 and 20. To include; appendix pages 55 to 61 and 63 to 67, all raising issues of disputed facts. The response by State, and "rubber-stamped" by Court, is "Summary Judgement. Quoting Wheeler v. Schmidt Lab. Inc.; "451 N.W. 2d 133 (ND 1990): "A movant for summary judgement has the initial burden of showing that there is no dispute as to a material fact." Citing the State's brief, ¶24; "The nonmoving party must then present competent admissible evidence by affidavit or other means which raises an issue of material fact." By failure of post-conviction counsel, both that of Mertz and Krassin, there was no help to present this material.

¶19 In the petitioners issues of Constitutional violations; a response by the State, Counsel and the Courts is in deliberate indifference. Affidavits and informal letters, some prior to sentence, some prior to Change of Plea were denied. Clearly without a doubt, R.A. 09-07-K-03531 No. 96, app. P.60: "I ask the Court to review as I seek collateral relief under applicable state law or the exhaustion of relief prior to filing a petition for federal habeas corpus."

¶20 Deliberate indifference in the conclusory statements of the State's respondent brief ¶ 34: "By simply making conclusory allegations, the Petitioner failed to meet his heavy burden. The district court did not clearly err in finding that Attorney haugen's and Attorney Mertz's performances were not deficient and that they were diligent, competent and noncoercive." The claim of prosecutorial misconduct, evidence manipulation, no assistance of counsel and a clear lack of independence between the State, Court

and Defense has been presented to the best of a "pro se" petitioner's abilities. I do not profess to be educated, I am only a honest hard working electrician who has never been in trouble in his life until coming to this State!

¶21 Questioning that Mr. Krassin was ineffective in not objecting to "Summary Judgement;" or presenting contradictory material issues, or by presenting exhibits provided to him. Clearly when reviewing R.A. 09-07-K-03531 Nos. 126, 127, 128, 129, 132, 140, 141, 142, 150, 153, 154, 156, and 157; an abuse of jurisdiction has occurred as Notice of Appeal (R.A. 09-07-K-03531 Nos. 115 and 116) were prior to these actions. "When an appeal is taken to this court, this courts jurisdiction attaches." State v. Ertelt; 548 N.W. 2d 775 (1996) citing Orwich v. Orwick; 152 N.W. 2d 95 (1967). "The filing of the Notice of Appeal deprived the trial court of jurisdiction." City of Fargo v. McLaughlin 512 N.W. 2d 700 (1994). Why would the Court and the State amend an Information after Blurton is in prison? And if Blurton is to somehow "admit responsibility to his crime" what crime is it, and will that remain a non-moving target? Treatment becomes a "Clock Work Orange" type situation with no solution, a "cruel and unusual punishment" indeed.

¶22

#### REVIEW IN LAW AND ARGUMENTS

¶23

The right to a speedy trial U.S. Const. Amend. VI was denied by Joint Stipulations, R.A. 09-07-K-3531 NOS. 21 and 28. "[A] defendant can be prejudiced in three ways: 'oppressive pretrial incarceration, anxiety and concern

caused by the delay and an impaired defense." Quoting Everett v. State; 2008 ND 199 P 30, N.W. 2d 530. A stipulation to continue is to await DNA results; results delayed, and results falsely presented. A collusive acts creating an impaired defense; anxiety and concern.

¶24 "Oppressive pretrial incarceration" is clearly Sherrif Paul Laney actions to detain Blurton illegally for 245 days without a warrant. "Anxiety and concern" as defined by Affidavit of Complaints ( see ¶ 18) and letters regarding losses; financial ruin to prevent bail or a change of defense attorneys. Attorney Haugen, when reviewing these letters and affidavits, is "an impaired defense".

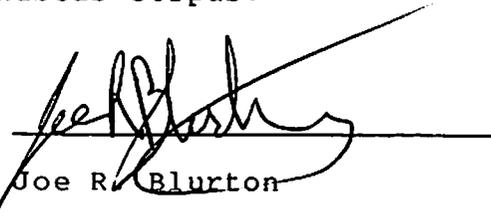
¶25 Quoting Boykin v. Alabama; 395 US 248, 243 (1969):  
"Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. Mallory v Hogan; 378 US 1, 12 L. Ed 2d 653, 84 S. Ct. 1489. Second is the right to trial by jury. Duncan v. Louisiana; 391 US 145, 20 L. Ed. 2d 491, 88 S.Ct. 1444. Third is the right to confront one's accusers. Pointer v. Texas; 380 US 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065. We cannot presume a waiver of these three important federal rights from a silent record."

¶26 "Compulsory self- incrimination" a forced plea of malicious prosecution, not based upon U.S Const. Amend IV requirements of probable cause determinations. An act of "self-defense" in light of a dysfunctional governmental process. And in review of Change of Hearing Transcript, a "silent record". "Trial by jury" and "to confront one's accusers" was the choice of Withdraw of Plea. Collusion by

Court and Defendant's Counsel, "the court was informed that you no longer wished to withdraw your plea" (Id at ¶12) is based upon "silent record". Clearly opposed by the record of actions No. 96, appendix page 60, "as I seek collateral relief under applicable state law..."

¶27

Federal Constitutional Rights have been denied the petitioner, a denial in the fundamental fairness of the United States Constitution, actions sustansive of a denial in a due process of law. The petitioner seeks N.D.R. Civ. P. Rule 60; **VOID JUDGEMENTS** of all Judgements and amendments to such Judgements made without jurisdiction of Federal Constitutional Rights, or the exhaustion of such state relief prior to filing a federal habeas corpus.



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IN THE SUPREME COURT, STATE OF NORTH DAKOTA

JOE R. BLURTON )  
petitioner, ) Supreme Court Number  
v. ) 2010 000182  
STATE OF NORTH DAKOTA, )  
respondent. ) AFFIDAVIT OF SERVICE  
)

STATE OF NORTH DAKOTA )  
COUNTY OF STUTSMAN ) SS

Joe R. Blurton hereby states under the penalty of perjury, true and accurate copies of REPLY BRIEF were delivered to the following parties by placing them postage paid into the J.R.C.C. Inmate Mail System.

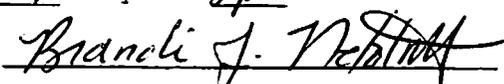
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Signed and sworn this 29 day of Sept 2010.  
  
\_\_\_\_\_  
Joe R. Blurton  
J.R.C.C. # 33767  
2521 Circle Drive  
Jamestown North Dakota

Signed and sworn before me this 29 day of Sept. 2010.  
(Seal)   
\_\_\_\_\_  
Brandi J. Netolicky  
Notary Public

