

ORIGINAL

Supreme Court Number 20040137  
District Court Number 98-K-2957

IN THE SUPREME COURT  
FOR THE STATE OF NORTH DAKOTA

20040137

Randy Scott Jensen,

Applicant/Appellant,

vs.

State of North Dakota,

Respondent/Appellee.

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

JUN 18 2004

STATE OF NORTH DAKOTA

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APPEAL FROM ORDER DENYING POST-CONVICTION RELIEF  
DISTRICT COURT OF GRAND FORKS COUNTY

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BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

- I. THE HEARING AT WHICH JENSEN FAILED TO APPEAR DOES NOT EXIST AND THE ORDER TO APPEAR DOES NOT EXIST.
- II. THE DUI COURT DID NOT HAVE PERSONAL JURISDICTION OF JENSEN AND THUS THERE WAS NO AUTHORITY TO ORDER JENSEN TO APPEAR, NOR TO HAVE THE HEARING.
- III. THE UNDERLYING DUI CHARGE IS A CLASS B MISDEMEANOR.
- IV. THE FAILURE TO APPEAR DID NOT FOLLOW A RELEASE ON BAIL BY THE COURT SUBSEQUENT TO AN APPEARANCE BEFORE THE COURT FOR BAIL.
- V. JENSEN'S ATTORNEY-CLIENT PRIVILEGE WAS VIOLATED.
- VI(a). THE QUESTION WAS OUTSIDE THE DIRECT EXAMINATION.
- VI(b). THE QUESTION VIOLATED JENSEN'S RIGHT TO HAVE PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR.
- VI(c). THE QUESTION VIOLATED THE RIGHT TO NOTICE.
- VI(d). THE QUESTION VIOLATED THE RIGHT TO PUT ON A DEFENSE.
- VI(e). THE QUESTION ALLOWED THE STATE TO ILLEGALLY REVIVE THEIR CASE-IN-CHIEF.
- VI(f). THE QUESTION GAVE THE STATE AN ILLEGAL CROSS-EXAMINATION RIGHT.
- VII. JENSEN WAS DENIED A FAIR TRIAL AND A FAIR AND UNBIASED JUDGE OR A COMPETENT JUDGE.
- VIII(a). THERE WAS INSUFFICIENT EVIDENCE THAT JENSEN HAD NOTICE OF THE HEARING.
- VIII(b). PRESUMPTIONS WERE USED TO HELP THE STATE BEAR ITS BURDEN.
- VIII(c). THE PRESUMPTIONS VIOLATE THE REASONABLE-DOUBT STANDARD.
- VIII(d). THE 'WAIVER RULE' VIOLATES THE STATE'S DUTY TO BEAR THE BURDEN OF PROOF, AND IT WRONGLY SAYS THAT JENSEN WAIVED THE STATE'S OBLIGATION.
- VIII(e). THE COURT CAN NOT DEFER RULING ON A RULE 29 MOTION IN ANTICIPATION THAT THE DEFENDANT MAY PUT ON A DEFENSE.

- VIII(f). THE 'WAIVER RULE' DOES NOT APPLY IN THIS CASE.
- IX. GIVING A PERSON PROBATION TO DO AFTER IMPRISONMENT IS AN EVASION OF THE LAW.
- X. JENSEN HAD INEFFECTIVE ASSISTANCE OF COUNSEL FOR HIS TRIAL AND ON DIRECT APPEAL.
- XI. JENSEN WAS DENIED COUNSEL FOR THIS POST-CONVICTION CASE AND FOR HIS PRIOR POST-CONVICTION CASE.
- XII. THE POST-CONVICTION JUDGE SHOULD HAVE RECUSED HERSELF.
- XIII. THE POST-CONVICTION COURT'S ORDER DENYING RELIEF IS INSUFFICIENT AS A MATTER OF LAW.

## STATEMENT OF THE CASE

Jensen filed his post-conviction application on December 31, 2003. App.P.4; R.A.#99 (Appendix page 4; Register of Action number 99. Along with the post-conviction application, Jensen filed a Memorandum in support of the application. R.A.#100. A copy is not in the Appendix.

Jensen was imprisoned pursuant to a conviction of bail jumping, in violation of N.D.C.C. 12.1-08-05, a Class C felony. The criminal judgment was entered on March 28, 2001. App.P.8; R.A.#41.

The State filed a Brief in opposition to application for post-conviction relief, dated February 2, 2004. App.P.9; R.A.#107.

Jensen filed an Affidavit and Motion for recusal of the judge, dated February 14, 2004. R.A.#116.

On March 1, 2004, the District Court entered an Order denying application for post-conviction relief and denying the motion for recusal. App.P.15; R.A.#117.

Jensen filed a Motion for reconsideration, dated March 5, 2004. R.A.#119.

On April 6, 2004, the District Court entered an Order denying the reconsideration motion. App.P.18; R.A.#122.

Judgment was filed on May 25, 2004. R.A.#124.

Notice of Appeal was filed on May 17, 2004. App.P.19; R.A.#123.

## STATEMENT OF FACTS

The criminal judgment was entered on March 28, 2001.

Direct appeal was then taken. State v. Jensen, 2001 ND 159, 639 N.W.2d 706, rehearing denied December 5, 2001.

Jensen then filed a post-conviction application, dated January 15, 2002. R.A.#51. The District Court denied it on May 13, 2002. R.A.#72. Jensen appealed to this Court. Supreme Court file number 20020166; Jensen v. State, 2002 ND 184, 655 N.W.2d 84, rehearing denied on December 20, 2002. Most of the issues in this post-conviction case were raised before this Court in this appeal, but were not considered. See Supreme Court file number 20020166.

Jensen filed his second post-conviction application on December 31, 2003. App.P.4. This is the subject of this appeal.

No evidentiary hearing was had in the District Court on this post-conviction application. The facts were all admitted to or not contested nor denied by the State. See the State's Brief in opposition to application for post-conviction relief. App.P.9. Also see the District Court's Order denying the application. App.P.15.

Jensen was charged with bail jumping because he failed to appear for an arraignment hearing scheduled for August 13, 1998 in the underlying DUI case, District Court file number 98-K-1813. However, this arraignment hearing was scheduled even though there had been no prior preliminary hearing nor was there a waiver of the preliminary hearing.

Jensen never had an initial appearance nor any appearance before the DUI court before August 13, 1998.

The underlying DUI charge was charged out as a Class C felony, not as a Class B misdemeanor, as it should have been. Jensen had four prior DUI convictions before this DUI charge.

Jensen made a 'promise to appear' or 'bail' to the jailor, not to the District Court or Magistrate. Jensen was not released by the court on bail, but was released from custody by the jailor/sheriff/police. The District Court or Magistrate never acquired personal jurisdiction of Jensen because Jensen never had an initial appearance nor any appearance before August 13, 1998, the date he did not appear.

During the bail jumping trial, Jensen did not waive his attorney-client privilege, yet his attorney testified against him at the trial. Bail Jumping Trial Transcript, page 97, lines 5-6 and lines 14-15; App.P.34. This Supreme Court has a complete copy of the trial transcript from Jensen's two prior appeals: Supreme Court number 20010097, the direct appeal, and Supreme Court number 20020166, the appeal from the first post-conviction application. Also, a copy of the trial transcript should be in the file the District Court docketed with this Court, for this appeal.

The trial judge did not halt the State's Attorney's cross-examination of Jensen's attorney. Trial transcript page 97; App.P.34.

At his bail jumping trial, Jensen's attorney made a Rule 29, NDRCrimP motion for judgment of acquittal at

the close of the State's case-in-chief. Trial Transcript page 87-88; App.P.25-26 The District Court denied this motion. Transcript page 89; App.P.27. The trial court had prior knowledge that Jensen intended to call his attorney as a defense witness, but only on the point that there never was a waiver of the preliminary hearing. Transcript page 15-19; App.P.20-24.

Jensen was sentenced to imprisonment with probation to do after imprisonment. See the Judgment, App.P.8.

For his bail jumping case, Jensen had three attorneys: Kip VanVoorhis was the first attorney. He removed himself before trial. Tom Kuchera was then appointed. But Jensen 'fired' him after his DUI trial. Steve Simonson was then appointed. He was the attorney for the trial and for the direct appeal.

On Jensen's first post-conviction case, he requested an attorney, but was denied. R.A.#56. On appeal on this first post-conviction case, Jensen again requested court appointed counsel. On August 6, 2002, the trial court again denied him counsel. R.A.# 80.

#### **ARGUMENT**

##### **APPLICABLE STANDARD OF REVIEW**

Findings of fact are reviewed under a clearly erroneous standard, and questions of law are reviewed de novo. Ellis v. State, 2003 ND 72, Par.#6, 660 N.W.2d 603, 606. Since there is no dispute about the facts in this case, the issues are one of law only. Appellate review of a summary denial

of post-conviction relief is like the review of an appeal from a summary judgment. Vandenberg v. State, 2003 ND 71, Par.#5, 660 N.W.2d 568, 571. Since there are no facts in dispute, the question is one of law only. On review of a summary judgment, the record is reviewed de novo. Casteel v. Continental Cas. Co., 273 F.3d 1142, 1143 (8th Cir. 2001); Schoffstall v. Henderson, 223 F.3d 818, 824 (8th Cir. 2000). A question of law is reviewed de novo. Morstad v. Dept. of Corrections & Rehab., 147 F.3d 741, 743 (8th Cir. 1998) (We review de novo a grant of a motion to dismiss for failure to state a claim.); In re Grand Jury Subpoenas Duces Tecum, 85 F.3d 372, 375 (8th Cir. 1996).

**I. THE HEARING AT WHICH JENSEN FAILED TO APPEAR DOES NOT EXIST AND THE ORDER TO APPEAR DOES NOT EXIST.**

The basis for this bail jumping charge is that Jensen failed to appear for an arraignment hearing scheduled for August 13, 1998, in the underlying DUI case, trial court file number 98-K-1813.

This August 13, 1998 arraignment hearing was scheduled even though there had been no prior preliminary hearing nor was there a waiver of the preliminary hearing. A forged waiver of preliminary hearing was used to schedule the arraignment hearing.

Jensen was brought back to the trial court in the DUI case in the year 2000. A second arraignment hearing was had on August 11, 2000 (the first was the August 13,

1998, for which Jensen did not appear).

However, since the August 11, 2000 arraignment hearing was based upon the forged waiver of preliminary hearing, the DUI court then had a (second) preliminary hearing on August 23, 2000 because there was no waiver (the court had a first preliminary hearing for the bail jumping but did not have it for the DUI because it said it had a waiver of the preliminary hearing for the DUI case).

Then the DUI court had the third arraignment hearing on September 1, 2000.

The DUI court, because it recognized the August 11, 2000 arraignment hearing was void, it had to have the final and another arraignment hearing on September 1, 2000. Thereby it recognized that the August 13, 1998 arraignment hearing was also void.

This N.D. Supreme Court also recognized that the prosecutorial misconduct, the forged waiver, made the arraignment hearing void, which is why a preliminary hearing was eventually had on August 23, 2000. Jensen v. State, 2002 ND 184, 655 N.W.2d 84; and State v. Jensen, 2001 ND 117, 636 N.W.2d 674.

The August 13, 1998 hearing was null and void and the order to appear for it was null and void.

Since the August 13, 1998 hearing was a nullity and void and the order to appear for it was void, then there is no valid reason and no valid order for Jensen to appear on August 13, 1998. City of Grand Forks v. Thong, 2002

ND 48, Par.#19, 640 N.W.2d 721, 725 (A failure to appear conviction was overturned for the reason that the underlying hearing at which Thong did not appear was void.).

Since the August 13, 1998 hearing was void and thus did not exist as a matter of law, then there was no fact to show that there was a hearing at which Jensen did not appear. There was insufficient evidence for a judgment of bail jumping.

The bail jumping court was without jurisdiction to render the judgment rendered. The judgment is void.

Although a court may have jurisdiction of the person and of the subject matter, it must also have jurisdiction to render the judgment rendered. Waltman v. Austin, 142 N.W.2d 517, 521 (N.D. 1966); Schillerstrom v. Schillerstrom, 32 N.W.2d 106, 122 (N.D. 1948); Isenhower v. Isenhower, 666 P.2d 238, 241-242 (Okla.App. 1983); Taylor v. Oulie, 55 N.D. 253, 258, 212 N.W. 931, 932 (1927); In re Solberg, 52 N.D. 518, 525, 203 N.W. 898, 901 (1925); Berumen v. Casady, 515 N.W.2d 816, 819 (Neb. 1994); Lamplighter v. State ex rel. Heitkamp, 510 N.W.2d 585, 590 (N.D. 1994); Scott v. Reed, 820 P.2d 445, 447 (Okla. 1991); 49 C.J.S. Judgments, Section 18(d).

The judgment should be overturned based upon this Ground One. The judgment is void.

**II. THE DUI COURT DID NOT HAVE PERSONAL JURISDICTION OF JENSEN AND THUS THERE WAS NO AUTHORITY TO ORDER JENSEN TO APPEAR, NOR TO HAVE THE HEARING.**

The DUI court never acquired personal jurisdiction

and did not have personal jurisdiction of Jensen as of the August 13, 1998 arraignment hearing.

Jensen never had an initial appearance nor any appearance before the DUI court before August 13, 1998.

The DUI court nor any court ever acquired jurisdiction of the body of Jensen because he never appeared before it.

And Jensen did not waive the required preliminary hearing before jurisdiction could be transferred from the 'magistrate court' to the district court for arraignment, from the 'initial appearance or preliminary hearing court' to the district court for arraignment.

The DUI court was without personal jurisdiction of Jensen, and thus the order to appear on August 13, 1998 and the hearing are void. See State v. Mudgett, 299 N.W.2d 621, 624 (Wisc.App. 1980) (When the character of the proceeding changes and there is no waiver of procedural privileges, there is no waiver of personal jurisdiction.).

Since personal jurisdiction did not exist, there was no order which had the jurisdiction to order Jensen to appear for the August 13, 1998 arraignment hearing and to have such a hearing. City of Grand Forks v. Thong, *id.*

The bail jumping court was without jurisdiction to render the judgment rendered because no hearing and no order existed for Jensen to fail to appear at and to require him to appear at.

The judgment must be overturned based upon this Ground Two. The judgment is void.

**III. THE UNDERLYING DUI CHARGE IS A CLASS B MISDEMEANOR.**

The DUI charge is a Class B misdemeanor, not a Class C felony. Upon conviction the punishment level may be a Class A misdemeanor or a Class C felony, based upon the number of prior convictions. But the offense is to be charged out only as a Class B misdemeanor, regardless of the number of prior convictions.

A sentence enhancement does not change the charge itself. See the "Attorney General Opinion", Number 92-18, issued November 23, 1992 ("Although persons convicted of a first or second DUI offense may still be considered to have been convicted of a Class B misdemeanor, those persons will be subject to the 90-day mandatory minimum imprisonment if the Section 39-08-01 violation caused serious bodily injury to another person."--Referring to N.D.C.C. 39-08-01.2, which enhances the penalty.).

The DUI charge was charged out as a Class B misdemeanor. Jensen was bailed out by the sheriff on a Class B misdemeanor. The bail jumping trial transcript, Tr.P.91, L.16-17; App.P.28.

A sentence enhancement does not change the charge itself, a provision which authorizes a more severe penalty for a second or subsequent offense is not part of the crime itself and pertains only to the punishment which the court

may impose, a sentence enhancing prior conviction does not enhance the offense itself. State v. Gahner, 413 N.W.2d 359, 362 (N.D. 1987).

Even though there are prior convictions, it does not enhance or change the DUI from a Class B misdemeanor to a Class A misdemeanor or to a Class C felony because a prior conviction which enhances a sentence does not enhance the seriousness of the offense, it is not an element of the offense. City of Fargo v. Cossette, 512 N.W.2d 459, 461 (N.D. 1994).

The trial court was without jurisdiction to render the judgment rendered of a Class C felony bail jumping because the underlying offense was a Class B misdemeanor. N.D.C.C. 12.1-08-05(2).

The judgment is void. The judgment must be overturned based upon this Ground Three.

**IV. THE FAILURE TO APPEAR DID NOT FOLLOW A RELEASE ON BAIL BY THE COURT SUBSEQUENT TO AN APPEARANCE BEFORE THE COURT FOR BAIL.**

Jensen never had an initial appearance nor did he have any appearance before the DUI court before he was released on 'bail'. (His bail was given by the jailor.)

Jensen was released from custody by the jailor, not by a judge or magistrate before whom Jensen appeared. The city/police/jailor let Jensen go and thus gave up custody and personal jurisdiction of Jensen. And the DUI court never acquired personal jurisdiction of Jensen because he never appeared before the court. And the DUI court

did not release Jensen on bail because he never appeared before it. Bail and release was given by the jailor.

In substance, Jensen's 'bail' was not a bail but was a promise to appear made to the city police/sheriff/jailor. The court did not release Jensen from its presence on bail.

There was no bail and the court never acquired and did not have personal jurisdiction of Jensen. There was no bail jumping offense. The bail jumping statute, N.D.C.C. 12.1-08-05, makes an offense if there is a release on bail after an appearance before a court and not to a release prior to such appearance. State v. Howe, 257 N.W.2d 413, 417, 419 (N.D. 1977) (For the elements of bail jumping to exist, the release on bail must be subsequent to an appearance before the court, not prior to an appearance before the court.).

Before a person can be convicted of bail jumping, all the elements of the bail jumping statute must be proven by the prosecution. Cf. State v. Dawson, 536 N.W.2d 119, 122-123 (Wisc. 1995) (Bail jumping conviction was overturned for failure to prove all the elements of the bail jumping statute.).

The court was without jurisdiction to render the judgment rendered because no fact was introduced and no fact exists that Jensen's failure to appear occurred after an appearance before the court and after release by the court on bail.

The judgment is void. No offense exists, none occurred. It must be overturned based upon this Ground Four. Jensen's

conduct was not illegal. He did not violate the bail jumping statute, N.D.C.C. 12.1-08-05.

**V. JENSEN'S ATTORNEY-CLIENT PRIVILEGE WAS VIOLATED.**

Jensen did not waive his attorney-client privilege with respect to his former attorney, Kip VanVoorhis, when VanVoorhis was on the witness stand. Tr.P.97, L.5-6 (Bail jumping trial transcript, page 97, lines 5-6); App.P.34.

Yet the first question the State's Attorney asks Kip VanVoorhis on cross-examination is if he had given Jensen notice <sup>of</sup> on the August 13, 1998 arraignment hearing, the hearing at which Jensen did not appear. Tr.P.97, L.14-15; App.P. 34. Jensen's trial attorney, Steve Simonson, did not object to this question, nor did the trial Court halt this question.

This question was confidential communication between attorney and client. Rule 502(a)(5), NDREv.

Jensen's attorney-client privilege was violated. Rules 501 & 502, NDREv. And his Sixth Amendment right to counsel was violated because his right was used to testify against him and convict him. Or his due process right to an attorney was violated for the same reason.

The District Court was without jurisdiction to proceed forward toward judgment in the manner it proceeded because and attorney-client privilege Jensen's right to an attorney was violated.

Although a court may have jurisdiction of the parties and of the subject matter, a court must also have jurisdiction to proceed forward towards judgment in the

manner it is proceeding, a judgment is void when the court proceeds without authority and in a manner forbidden by law. Soper v. Foster, 51 S.W.2d 927, 929 (Ky. 1932); Andrean v. Secretary of U.S. Army, 840 F.Supp. 1414, 1425 (D.Kan. 1993); Shopper Advertiser v. Wis. Dept. of Revenue, 344 N.W.2d 115, 118 (Wis. 1984); Windsor v. McVeigh, 93 U.S. 274, 282, 23 L.Ed. 914, 917 (1876); Grignon's Lessee v. Astor, 43 U.S. (2 How.) 319, 338, 11 L.Ed. 283, 290 (1844); Ex Parte Nielson, 131 U.S. 176, 182-183, 9 S.Ct. 672, 674 (1889); Walls v. Director of Inst. Services, etc., 269 N.W.2d 599, 601 (Mich. 1978); Johnson v. Zerbst, 304 U.S. 458, 467-468, 58 S.Ct. 1019, 1024-1025 (1938); Security Sav. Bank v. Mueller, 308 N.W.2d 761, 762-763 (S.D. 1981); St.Cloud v. Leapley, 521 N.W.2d 118, 121 (S.D. 1994); In re Anderson's Estate, 34 N.W.2d 413, 415-416 (N.D. 1948); Schrier v. State, 573 N.W.2d 242, 244-245 (Iowa 1997); Ex Parte Bailey, 198 P.2d 660, 661-662 (Okla. 1948).

The judgment is void. The judgment must be overturned for this Fifth Ground.

**VI. OTHER RIGHTS OF JENSEN WERE VIOLATED BECAUSE OF THE QUESTION THE STATE'S ATTORNEY ASKED.**

On cross-examination, the State's Attorney asked Jensen's former attorney, Kip VanVoorhis, if he had mailed notice to Jensen of the August 13, 1998 arraignment hearing. Tr.P.97, L.14-15; App.P. 34.

This raises several issues:

**VI(a).** This question was outside the subject matter

of the direct examination by Jensen. Jensen examined Kip VanVoorhis only on whether or not he had signed a waiver of preliminary hearing. Tr.P.92-95; App.P.29-32.

This violated Rule 611(b), NDREv, that cross-examination is limited to questions relating to the subject matter of the direct examination.

Cross-examination should be limited to what was raised on direct examination, unless the court allows otherwise. Rule 611, NDREv; State v. Klein, 1999 ND 76, Par.#12, 593 N.W.2d 325, 328; State v. Gagnon, 1999 ND 13, Par.#14, 589 N.W.2d 560, 565.

This violated Jensen's due process right and liberty interest in the Rules of Evidence and in the common law in being tried and adjudged only according to the rules of law and the rules of evidence.

**VI(b).** This question violated Jensen's right to have compulsory process for obtaining witnesses in his favor.

The State did not subpoena Kip VanVoorhis to testify on their behalf so as to complete their chain of evidence that Jensen had knowledge of the hearing date. Of course, if the State had subpoenaed him, both Jensen and VanVoorhis would have moved to quash the subpoena on the ground of attorney-client privilege.

The State took Jensen's subpoena in his favor and they used it as if it was their subpoena in their favor.

This violated Jensen's right to process in his favor. Sixth and Fourteenth Amendments, U.S. Constitution.

VI(c). This question violated Jensen's due process right to notice.

Jensen was not given notice that Kip VanVoorhis would be a witness for the State. His due process right to notice of who the witness against him were going to be was violated. This also violated Rule 7(g), NDRCrImP, which rule requires that the names of all the witnesses the State intends or proposes to call. And this violates Rule 16, NDRCrImP, the discovery rule.

VI(d). Jensen has a right to put on a defense. This question violated this due process right. Fifth and Fourteenth Amendments.

The State used Jensen's defense to revive their case-in-chief.

The defendant's defense, cross-examination, can not be used to revive a right to introduce evidence that could have been, but was not, introduced in the prosecutor's case-in-chief. People v. Rice, 597 N.W.2d 843, 851 (Mich. App. 1999); State v. Klein, id.

The prosecutor used cross-examination to 'complete' their chain of evidence, as opposed to introducing it in their case-in-chief (if the subpoena was not subject to being quashed).

VI(e). This question violated procedural due process. Case law and the common law says that a plaintiff sometimes can make a motion to revive their case-in-chief.

The State was able to revive their case-in-chief

without having to make a motion for such and without having to give grounds and reasons for such.

This violates due process of law. And it ties in with VI(c) above, violating Jensen's right to notice.

**VI(f).** This question violated the State's right of cross-examination. Instead of cross-examining the witness, the State examined the witness.

This violated Jensen's right to an expectation and liberty interest that cross-examination will be cross-examination, not an examination. 5th and 14th Amendments, U.S. Constitution. This also ties in with VI(d) above.

Thus, for the above six reasons, VI(a)-VI(f), the District Court was without jurisdiction to proceed forward towards judgment in the manner it proceeded because it proceeded contrary to law.

The judgment is void. The judgment must be overturned because of these reasons in this Sixth Ground.

**VII. JENSEN WAS DENIED A FAIR TRIAL AND A FAIR AND UNBIASED JUDGE OR A COMPETENT JUDGE.**

On cross-examination of Kip VanVoorhis, the State's Attorney asked Jensen's former attorney if he had mailed notice to Jensen of the August 13, 1998 arraignment hearing. Tr.P.97, L.14-15; App.P.34.

The trial judge did not halt the prosecutor's inquiry. It was her duty to do so. Rule 611(a & b), NDREv, says that the trial judge is to exercise reasonable control over the interrogating of witnesses. Subsection "a" says that

the court "shall" exercise reasonable control.

Rule 52(b), NDRCrImP, says that the trial judge should have taken notice and sua sponte halted the prosecutor's inquiry because the question affected Jensen's substantial rights, and because the question would divest the court of jurisdiction to proceed forward towards judgment with that question and its answer.

Further, the trial judge did not take notice of the other issues raised in Grounds I-VI above and Grounds VIII-IX below. Rule 52(b), NDRCrImP.

Jensen's right to a fair trial and to a fair and unbiased judge or to a competent judge was denied to him. 5th and 6th and 14th Amendments, U.S. Constitution.

There are many court cases which say that a judge's rulings can not be a basis for a showing of bias or lack of impartiality. However, this is not an absolute rule, or there is an exception to the holding of these court cases.

Where the rulings and conduct of the judge are contrary to law and the circumstances indicate they were not made in good faith, then the wrong rulings or conduct of the judge create a reasonable inference that the court lost its impartiality. Little Rock Sch. Dist. v. Pulasaki Cty. Sp. School, 839 F.2d 1296, 1302 (8th Cir. 1988). Wrong rulings are not alone evidence of judicial partiality or actual bias. Reems v. St. Joseph's Hosp. and Health Center, 536 N.W.2d 666, 671 (N.D. 1995). If the ruling or conduct of the court are not due to good faith mistakes of judgment,

then the judge has "shed the robe of the judge and has assumed the mantle of the advocate or prosecutor"--quoting and paraphrasing. Reserve Mining Co. v. Lord, 529 F.2d 181, 185 (8th Cir. 1976).

The facts show that the judge made her decisions, or failure to act, not due to good faith mistake of judgment.

The issue of attorney-client privilege is too obvious and too well understood an issue such that it is clear that the judge did not act in good faith <sup>when she did not</sup> ~~stop the~~ <sup>did not</sup> prosecutor's question and its answer, and ~~hide~~ Jensen's attorney for not also objecting to the question. In the trial transcript, pages 95-97, App.P.32-34, the issue of a waiver of attorney-client privilege was specifically asked of Jensen. Thus, attorney-client privilege was squarely before the judge (and Jensen's attorney), yet no objection was made to the prosecutor's question on page 97 of the transcript, App.P.34.

Also, the other conduct of the judge shows that she knew what she was doing, yet did not control the cross-examination. This fact is discussed below, in part VIII of this brief.

Jensen was denied a fair trial and a fair and impartial judge, or he was denied a competent judge if it is asserted the judge does not know the law, this contrary to the due process of law. Jensen was also denied justice, contrary to due process of law, and contrary to Article I, Section 9 of the N.D. Constitution, which says that justice shall

not be for sale, nor delayed nor denied.

The trial court was without jurisdiction to proceed forward towards judgment in the manner it proceeded. The judgement is void. It must be overturned for this Seventh Ground.

**VIII. THE STATE DID NOT BEAR ITS BURDEN OF PROOF.**

Jensen's attorney made a Rule 29, NDRCrimP motion for judgment of acquittal at the close of the State's case-in-chief on the ground of "the State's failure to completely establish all the elements of the crime as of this stage of the proceeding. ... Nothing that's been presented from the testimony indicates that Mr. Jensen, in fact, had notice of the hearing ...". Tr.P.87-88, L.25 & 1 & 5-7; App.P.25-26.

The Court had knowledge prior to the making of the Rule 29 motion that Jensen intended to call Kip VanVoorhis as his defense witness. Tr.P.15-19; App.P.20-24. In fact, it was the Court who raised the question of whether Jensen was going to follow through on his intent to call Kip VanVoorhis. Tr.P.15, L.4-5; App.P.20.

After Jensen's attorney made his Rule 29 motion, the Court ruled that the Clerk of Court's mailing of notice to Jensen's attorney, Kip VanVoorhis, was sufficient evidence to survive a motion of acquittal "at this time". Tr.P.89, L.1-9; App.P.27. Then in the next breath the Court asked if Jensen would be presenting a defense witness. Tr.P.89, L.12-14; App.P.27.

The Court's knowledge that Jensen wanted to call Kip VanVoorhis influenced her decision on the Rule 29 motion because she said the evidence was sufficient "at this time", and then in the next breath asked if Jensen would be presenting a defense witness. The judge did not make her decision on the Rule 29 motion in good faith because she was expecting VanVoorhis to testify and that hopefully he would supply the deficiency of proof of notice to Jensen. The judge was prepared to not control the cross-examination. She was biased against the submitting to the rule of law and was biased in favor of obtaining a conviction contrary to the rule of law, biased against Jensen and in favor of the prosecution. As stated in part VII above, the facts and circumstances and her rulings and lack of exercising control over the interrogating of VanVoorhis show that Jensen was denied justice, denied a fair trial and a fair and unbiased judge or a competent judge.

Getting back to part VIII:

**VIII(a).** The Clerk of Court's mailing of notice of the August 13, 1998 arraignment hearing to Kip VanVoorhis is not sufficient evidence that Jensen had notice.

It requires the fact-finder to make a long stretch of an assumption of fact that notice was given to Jensen and that this assumption is definitely beyond reasonable doubt. It requires the fact-finder to assume that Kip VanVoorhis re-mailed the notice to Jensen or otherwise told him about it as opposed to VanVoorhis forgetting to

re-mail the notice, etc. And it assumes that the notice reached VanVoorhis as opposed to the letter accidentally dropping out of the 'mail stack' as the court house employee moves the mail around on its way to the post office, etc.

The Court's use of this fact and the stretched assumption and the many assumptions which necessarily must be made to conclude that Jensen had notice, relieved the prosecution of its burden of proof beyond reasonable doubt, is the District Court's saying that the prosecution does not have to bear the full burden. This is illegal. State v. Vogel, 467 N.W.2d 86, 90 n. 5 (N.D. 1991).

This also undermined or detracted from the <sup>fact-</sup>finder's duty to find the ultimate fact of notice beyond reasonable doubt because the jury could assume guilt because Jensen did not rebut the assumption and accusation that he had notice, assuming that Jensen did not put on a defense and thus the jury would have had to decide the issue as it stood as of the close of the State's case-in-chief.

Use of this assumption or presumption, the Clerk of Court's mere mailing of notice to VanVoorhis, not only violates the reasonable-doubt standard, but it also violates the presumption that one is innocent until proven guilty because it puts a burden of persuasion on the defendant. It allows the jury to assume Jensen had notice from Kip VanVoorhis because he did not rebut it. And it also violates the State's duty to bear the burden of proof beyond reasonable doubt because the defendant is not required

to help carry part of the burden for the State.

This evidence is also insufficient for the reason it can not even be considered to be a prima facie case because it is not strong enough to require a rebuttal. A "prima facie case" means "A case which has proceeded upon sufficient proof to the stage where it will support finding if evidence to contrary is disregarded". Black's Law Dictionary, Fourth Edition, defining prima facie case.

But even if it were a prima facie case, this is proof of itself that it is insufficient evidence because a prima facie case does not meet the "beyond reasonable doubt" standard, because by definition a case is prima facia when it needs to be rebutted, else it stands. Black's, id.

On direct appeal, the State's Attorney and the N.D. Supreme Court relied upon the 'waiver rule', relied upon the after acquired evidence, to show sufficiency of evidence. This is a recognition there was insufficiency of evidence as of the close of the State's case-in-chief, that is, that the State did not bear its burden (of proof beyond reasonable doubt).

The State did not bear its burden. The District Court's decision on Jensen's Rule 29 motion was wrong, was decided with an anticipation that Jensen would help the State carry part of its burden, and thus the District Court made its decision in bad faith.

**VIII(b).** N.D.C.C. 12.1-01-03(4) says that if there are sufficient facts which give rise to a presumption

created by statute, then the "presumed fact" is deemed sufficiently proved to warrant submission of the issue to the jury. And N.D.C.C. 31-11-03(24) says that it is a disputable presumption that a letter duly mailed was received.

To rely upon this "presumed fact" is, of itself, proof that the State did not bear its burden of proof because the State is letting a statute and a presumption bear part of its burden for them.

This is also proof that the State did not bear their burden because "No presumption can be evidence; it is a rule about the duty of producing evidence." U.S. v. Clotida, 892 F.2d 1098, 1106 (1st Cir. 1989). The presumption that a letter mailed was received is not evidence. It is only a presumed fact and thus is not a fact and thus is not evidence. The State still has a duty to produce facts that the letter was received and was read by Jensen or it was read to him. And it is not evidence because the presumption shifts the burden to Jensen to show that he did not receive the letter, which shifting is illegal, and thus the presumption is not evidence, is not a fact.

By relying upon these statutes, the State and Court admit that the State did not bear their burden.

**VIII(c).** N.D.C.C. 12.1-01-03(4) is unconstitutional. And when used in a criminal trial, N.D.C.C. 31-11-03(24) is unconstitutional.

These statutes relieve the prosecution of having to bear the burden of proof of every fact necessary to constitute the crime charged. A presumption violates the reasonable-doubt standard because the reasonable-doubt standard is the prime instrument for reducing the risk of convictions resting on factual error, because a presumption only says that the fact exists and thus there is room that the fact does not exist. In re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072 (1970).

And since a presumption is not a fact, the presumption has thus relieved the prosecution of having to prove the fact. The prosecution has a duty to prove the fact, due process does not allow that the prosecution has a duty to only prove the presumption. In re Winship, *id.*, page 364, 1073 (The reasonable doubt standard requires the prosecution to prove every fact.--Presumed facts are not facts.).

VIII(d). On direct appeal (2001 ND 159, 639 N.W.2d 706), the State's Attorney and the N.D. Supreme Court did not rely upon the evidence as it existed at the close of the State's case-in-chief. Rather, they relied upon the 'waiver rule', the after acquired evidence to say that the State bore its burden, that there was sufficient evidence.

And, reading the trial court's ruling in the context of all the facts, the trial court also relied upon the 'waiver rule' in making her decision, hoping that Jensen's defense would supply the deficiency in the State's proof.

The 'waiver rule' is a tool which violates the law that the prosecution bears the burden to prove its case. It does this by saying that the defendant has waived the requirement that the State must bear the burden, this even though the defendant has not waived his right or the State's duty.

In order for there to be a waiver by the defendant, the judge would have to say in ruling on the Rule 29 motion: "Yes, there is insufficient evidence. The State has not borne its burden. And so I will render a judgment of acquittal. However, if you would like to put on a defense, then I will not render the judgment of acquittal. What do you want to do? Put on your defense and hope the jury acquits you? Or let me acquit you now?"

What defendant would waive the State's burden requirement?

Jensen did not waive.

Here, the courts, via the waiver rule, waived Jensen's right for him. This is unconstitutional.

The 'waiver rule' allows after acquired evidence, evidence introduced by the defendant, to prove the State's case.

This violates the law that the State must bear the burden, must bear all of the burden.

And the 'waiver rule' violates due process in that it lets the court waive the defendant's right for him, as the defendant did not waive, the court deemed a waiver.

The purpose of Rule 29, NDRCRimP, is to enforce the law that the prosecution is required to bear the burden of proving its case. Thus the test to see if there was sufficient evidence at the close of the State's case-in-chief.

As such, the court must consider the record as it existed when the motion was made, in this case at the close of the State's case-in-chief. United States v. Rizzo, 416 F.2d 734, 736 N. 3 (7th Cir. 1969); United States v. Burton, 472 F.2d 757, 763 (8th Cir. 1973); U.S. v. Bethea, 442 F.2d 790, 792 n. 4 (U.S.C.A. Dist. of Col. Cir. 1971); Cephus v. U.S., 324 F.2d 893, 895 (U.S.C.A. Dist. of Col. Cir. 1963). It is noted that North Dakota's Rule 29 is copied from the Federal Rule 29.

Jensen is aware there are federal cases which rule other than as above. And likewise the case of State v. Allen, 237 N.W.2d 154, 156-159 (N.D. 1975). However, in reading these cases, none were based strictly upon the issue presented here: That the prosecution is the one who must bear the burden, and that a court can not waive a defendant's right for him via a deemed waiver, etc. "State v. Allen", id., page 156, was insufficiently based upon the State's duty to only bear a 'prima facie' burden of proof. Thus these cases do not control and must be overruled.

VIII(e). Rule 29, NDRCRimP says that the court "shall" order entry of judgment of acquittal when the motion is

made if the evidence is insufficient as of that moment in time; the rule does not give the court discretion or power to defer ruling on the motion later so as to use after acquired evidence. United States v. Neary, 733 F.2d 210, 218 (2nd Cir. 1984).

The courts violated Rule 29, NDRCrImP by using after acquired evidence.

VIII(f). The 'waiver rule' applies (assuming it were legal) only if the defendant's defense, in seeking to explain, impeach or rebut the state's point, overshoots its mark and tends to cure the deficiency in the state's case. United States v. Neary, id., page 219; United States v. Burton, id.

Jensen's defense did not address the issue of notice of the hearing date. Thus the 'waiver rule' does not apply here.

Also, the conduct of another party, in this case the State and the District Court, can not be used to say that Jensen waived. The conduct of another party does not waive it for the defendant. U.S. v. Clotida, 892 F.2d 1098, 1103 (1st Cir. 1989); Cephus v. United States, id., page 897.

It was the State, not Jensen, who raised the notice issue on the State's cross-examination of VanVoorhis.

The 'waiver rule' does not apply in this case, this assuming the 'waiver rule' were a valid concept.

In summary: For these Six reasons, VIII(a)-VIII(f),

the State did not bear its burden of proof beyond reasonable doubt.

The District Court was without jurisdiction to proceed forward towards judgment in the manner it proceeded because the District Court did not require the State to bear its burden.

The judgment is void. The judgment must be overturned based upon this Ground Eight.

**IX. GIVING A PERSON PROBATION TO DO AFTER IMPRISONMENT IS AN EVASION OF THE LAW.**

Giving a person probation after being punished is an evasion of the law, violating due process of law.

Jensen was sentenced to imprisonment with probation after release from imprisonment.

Probation is in lieu of punishment, of incarceration. At the time of sentencing, the court determines if the offender deserves to be punished, and if yes, how much. But if the court determines he does not need to be punished, then the defendant is put on probation, suspending the exercise or deferring the exercise of the court's power to impose punishment, suspending the imposition of sentence.

However, in this case, the District Court decided Jensen needed to be punished and so exercised its power and imposed imprisonment. But then the District Court also decided Jensen did not need to be punished and so gave him probation to do, but after he had been punished.

The court cases say it is not a violation of the double

jeopardy prohibition to impose more than one punishment on the offender for the same crime or to put a person in jeopardy of being punished more than once for the same crime, as it is with Jensen.

A reason for saying this is that any sentence containing a probation element is not final, or that the double jeopardy clause does not mean that the defendant has the right to know at any specific moment in time what the exact limit of his punishment will be. U.S. v. DiFrancesco, 449 U.S. 117, 137, 101 S.Ct. 426, 437 (1980); State v. Jones, 418 N.W.2d 782, 784 (N.D. 1988); Davis v. State, 2001 ND 855, Par.#10-11, 625 N.W.2d 855, 858; State v. Ennis, 464 N.W.2d 378, 381 n. 2 (N.D. 1990).

And the cases say that giving a defendant a second punishment does not violate the double jeopardy clause because a statute authorizes it. State v. Jones, *id.*, page 784. In U.S. v. DiFrancesco, *id.*, page 139, 438, it says that even though it is multiple punishment to impose both a fine and imprisonment, that this multiple punishment does not violate the double jeopardy clause if a statute authorized the infliction of both the fine and imprisonment, but if a statute does not authorize it, then it violates the double jeopardy clause to inflict both imprisonment and fine. However, the legislature, in enacting a statute which authorizes this, is "working the wrong", that is, is enacting a statute so as to 'authorize' that which is prohibited by the common law, the due process of law, and

the Constitution.

The due process of law states: "That what cannot be done directly cannot be done indirectly." Cummings v. Missouri, 71 U.S. 277, 288, 325, 329, 18 L.Ed. 356 (1866).

If the imposing of more than one punishment for the same crime is held to be constitutional, or if being put in jeopardy more than once for the same crime is held to be constitutional because it is not done directly, but indirectly under the form of probation and the probation statute, then the prohibition against double jeopardy may be evaded at pleasure. Paraphrasing from Cummings, *id.*, page 289, 325, 329 (The constitutional prohibition against bills of attainder and ex post facto laws can not be evaded by doing it by the form of the enactment.).

If a court sentences a man to prison, and the man finishes his punishment, and later the man is brought back in to court and is given another punishment of more time for the same crime, it would be a violation of the prohibition against double jeopardy.

But if a court sentences a man to prison with probation to do after he gets out of prison, and the man finishes his punishment, and later the man is brought back in to court for violating probation and is given another punishment of more time, it is said that this does not violate the prohibition against double jeopardy because the statute authorized it, or because a man does not have

a right to know the exact limits of his sentence because the double jeopardy clause only prohibits multiple punishments but does not mean that one has a right to know the exact limit of what one's punishment will be.

The legislature can not "work the wrong", that is, can not enact a statute to 'authorize' that which is illegal, that which is prohibited by the double jeopardy clause of the Constitution (and of the common law--U.S. v. DiFrancesco, id., page 128, 432).

Statutes which authorize probation after imprisonment violate due process of law. People v. Hughes, 272 N.W.2d 567, 571 n. 5 (Mich.App. 1978) (The due process clause restricts the power of the legislature to prescribe the punishment which can be imposed.). Neither the legislature nor a statute can take life, liberty and property without due process of law. The probation and sentencing statutes authorize a court to do indirectly via probation that which the court could not do if there were no statute authorizing probation after imprisonment.

N.D.C.C. 12.1-32-02(1 & 3) and 12.1-32-06.1, which authorize probation after imprisonment are unconstitutional, contrary to the due process of law.

And the court cases which say that giving a defendant probation after imprisonment is not unconstitutional must be distinguished due to the issue presented here, and they should be overturned.

In addition: Using the rationale of Cummings, id.,

the statutes and the sentence of the court which imposed probation after imprisonment violate the double jeopardy clause. The rule that what can not be done directly can not be done indirectly is a maxim to aid in the just application of the double jeopardy law. N.D.C.C. 31-11-05 (The maxims of jurisprudence are to aid in the just application of the law.). Using this rationale, the statutes and Jensen's sentence violate the double jeopardy clause of the N.D. Constitution and the U.S. Constitution through the 14th Amendment. The Legislature and the District Court do indirectly via probation that which is prohibited from being done directly. The Legislature could not enact a statute which says that a court can give a defendant multiple punishments. And the Legislature can not enact a statute which authorizes a court to impose probation after imprisonment and thereby indirectly authorize a court to give multiple punishments.

The District Court was without jurisdiction to render the judgment rendered because a court can not sentence a defendant to probation after imprisonment. The statutes and the sentence of the Court violate due process of law, and/or they violate the double jeopardy clause.

The judgment must be overturned based upon this Ground Nine. The excess, the probation element, must be removed from the sentence.

**X. JENSEN HAD INEFFECTIVE ASSISTANCE OF COUNSEL FOR HIS TRIAL AND ON DIRECT APPEAL.**

Jensen had three attorneys assigned as his trial

attorneys: Kip VanVoorhis was his first attorney. He removed himself before the trial, on September 12, 2000. R.A.#8-10. Tom Kuchera was appointed on October 17, 2000. R.A.#12-13. On January 30, 2001, he withdrew after Jensen fired him after his DUI trial for being ineffective. R.A.#22-23. Steve Simonson was appointed on January 30, 2001. R.A.#25. Trial was had on March 6, 2001.

None of the attorneys raised any of the issues I through IX above. Simonson did object and made a Rule 29, NDRCrimP motion for judgment of acquittal, but then did not raise any of the points raised in Ground VIII above.

These nine issues all go to the jurisdiction of the court to render the judgment rendered, or to proceed forward towards judgment in the manner it proceeded, all issues, which if raised, would have resulted in a judgment of acquittal or a not guilty verdict, or would have caused the charge to be dismissed before trial because no cause of action was stated and existed, no crime even occurred. Jensen's conduct did not violate the statute.

Grounds I, II, III and IV, pages 5, 7, 9 and 10 of this Brief, all show that there was no cause of action. These issues could and should have been asserted in a pre-trial motion to dismiss. All three of the attorneys could have and should have made a motion to dismiss, but did not. Plus, the subject of Steve Simonson's motion for judgment of acquittal, that the State had no fact showing that Jensen had notice of the August 13, 1998 arraignment

hearing, could also have been made the subject of a motion to dismiss for failure to state a cause of action. It was not.

The Grounds raised in V-IX arose when Steve Simonson was counsel. He did not assert these issues, neither in the trial court nor on direct appeal.

Jensen's three attorneys so refused or so failed to assist him on the substantive issues which went to the merits of the State's case, that his trial was a farce and a mockery of justice. United States v. Decoster, 624 F.2d 196, 219 (D.Col.Cir. 1976). Jensen's due process right to a fair trial was denied him. Mere presence of counsel and mere advocacy of 'routine' or 'standard', non-substantive issues or defenses is insufficient to satisfy a claim that Jensen had effective assistance of counsel. State v. Orseth, 359 N.W.2d 852, 854 (N.D. 1984) (That physical presence at treatment constitutes compliance elevates form over substance, because the purpose of treatment is to resolve problems.). The three appointments of counsel for Jensen were a sham and nothing more than a mere formal compliance with the Constitution's requirement that an accused be given the "Assistance" of counsel. U.S. v. Cronin, 466 U.S. 648, 654-655, 104 S.Ct. 2039, 2044 (1984). Counsel can deprive a defendant of the right to effective or meaningful assistance simply by not doing anything or failing to do anything meaningful. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064

(1984). Indigent defense services can fail to do anything meaningful or substantial based upon a motive that they are overworked and underpaid and thus they will give only a 'pro forma' defense, that is, in effect, go on strike as a protest against the workload and perceived low pay assigned to them; or as a policy that indigent clients will receive only a 'pro forma' defense because that is all they deserve or whatever their reasoning is; this because it is almost impossible to believe that all three attorneys could be so devoid of knowledge and understanding of the rudiments of the law and the fundamental rules of law raised by Jensen in this Brief, that one has to believe they just have a policy of not giving a meaningful defense to court appointed clients, this even though they contracted to take on indigent cases. Of course, the possibility that all three of them are this 'actually ineffective' is a possibility, but it is not believable.

The State denied Jensen a fair trial and knew it was doing such because the conduct of indigent defense services is a known conduct and practice. The District Court, in appointing this type of counsel with their known policy or presumably known policy with regard to indigents, or with their total lack of knowledge of the rudiments of the fundamentals of law, prevented Jensen from having the assistance required by the Sixth Amendment.

The District Court held that the "Strickland v. Washington" two part test, "actual ineffectiveness", is

the criteria for ineffective assistance of counsel in this case. Jensen must show that counsel was deficient, and he must show that the outcome of the case would have been different, that is, that he was prejudiced by this deficient assistance. Strickland v. Washington, id., page 687 & 694, 2064 & 2068; Eagleman v. State, 2004 ND 6, Par.#6, 673 N.W.2d 241, 243.

However, contrary to the facts, the District Court said that Jensen failed to specify how counsel were deficient, and how he was prejudiced or that their failure would have had any bearing on the disposition of the case. The facts showed that none of the three attorneys raised any of the dispositive, jurisdictional issues raised in this Brief and in the post-conviction application and memorandum in support.

Summary disposition in the State's favor was not warranted.

The District Court was without jurisdiction to render the post-conviction judgment rendered.

The criminal judgment must be overturned based upon this Ground Ten. The judgment is void.

**XI. JENSEN WAS DENIED COUNSEL FOR THIS POST-CONVICTION CASE AND FOR HIS PRIOR POST-CONVICTION CASE.**

Jensen was denied counsel for his first post-conviction case. R.A.#58-59. He was denied twice. R.A.#80. And he was denied counsel for this case. R.A.#106.

Jensen has a due process right to appointment of

counsel on post-conviction.

Counsel is to be appointed an indigent prisoner on post-conviction. State v. McMorrow, 332 N.W.2d 232, 235-237 (N.D. 1983); N.D.C.C. 29-32.1-05 and 29-32.1-14.

When a state opts to act in a discretionary field such as enacting a statute saying it will appoint counsel for a collateral proceeding, it must nonetheless act in accord with the dictates of the Constitution and the due process clause of the Fourteenth Amendment. Evitts v. Lucey, 469 U.S. 387, 401, 105 S.Ct. 830, 838-839 (1985). State laws may give rise to liberty interests protected by the Fourteenth Amendment. Ballard v. Estelle, 937 F.2d 453, 456 (9th Cir. 1991). A statute granting a right creates a liberty interest protected by due process. Board of Pardons v. Allen, 482 U.S. 369, 381, 107 S.Ct. 2415, 2422 (1987).

Where one has a liberty interest in appointment of counsel, then counsel must be appointed. Ennis v. Schuetzle, 488 N.W.2d 867, 869 (N.D. 1992); Ennis v. Dasovick, 506 N.W.2d 386, 393 (N.D. 1993).

N.D.C.C. 29-32.1-05 reads: "Appointment of counsel-  
-Applicant's inability to pay costs and litigation expenses.

1. If an applicant requests appointment of counsel and the court is satisfied that the applicant is unable to obtain adequate representation, the court shall appoint counsel to represent the applicant."

Jensen has a due process right to appointment of

counsel on post-conviction.

The post-conviction court was without jurisdiction to proceed forward towards judgment in the manner it proceeded because it denied Jensen the assistance of counsel when Jensen requested it and he was indigent and thus unable to obtain his own counsel.

The post-conviction judgment must be overturned. It is void.

**XII. THE POST-CONVICTION JUDGE SHOULD HAVE RECUSED HERSELF.**

Jensen filed an affidavit and motion for recusal of the post-conviction judge in this case, dated February 14, 2004. R.A.#116. It was denied. R.A.#117; App.P.15.

The basis for recusal was that Ground Seven of the post-conviction application and of page 16 of this Brief claimed that Jensen was denied a fair and unbiased or competent judge for his trial. This judge was Karen Braaten. And, since Judges Braaten and Debbie Kleven are in the same judicial district and have their offices together, they have a special association and relationship with each other.

Canon 2, North Dakota Code of Judicial Conduct, says that judges shall not allow their relationships with others convey an impression that Karen Braaten is in a special position to influence the judge because of her close working relationship with the judges of the district. And this Canon 2 says that a judge shall avoid even the appearance

of impropriety. And Canon 3(E) says that a judge shall disqualify herself where her impartiality might reasonably be questioned.

An appearance of impropriety requires the judge's disqualification. State ex rel. Heitkamp v. Family Life Services, Inc., 2000 ND 166, Par.#53-55, 616 N.W.2d 826, 844 (Even though the facts did not show actual bias, the appearance of impropriety or partiality mandated that the judge be recused.). Even though no obvious unethical behavior was evident, but because the appearance of propriety is so important, the orders signed by the judge are void and the case was overturned and remanded. Matter of Estate of Risovi, 429 N.W.2d 404, 407 (N.D. 1988). What matters is not the reality or a fact of prejudice or bias, but its appearance, and thus recusal is required where the facts reasonably show there is an appearance. Liteky v. U.S., 510 U.S. 540, 548, 114 S.Ct. 1147, 1154 (1994). Although the facts proved no actual bias, the appearance of impropriety made the judgment void, and thus it was reversed. Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 859-860, 108 S.Ct. 2194, 2202-2203 (1988). No judge, even though free from bias in fact, should try a cause if circumstances exist which give rise to a bona fide appearance of bias. United Hospital v. Hagen, 285 N.W.2d 586, 588 (N.D. 1979); Jones v. Jones, 64 N.W.2d 508, 515 (Minn. 1954).

No judge should hear a case if a party has reason

to believe she is biased or prejudiced, this even in the absence of a statute disqualifying the judge. State v. Ketterer, 69 N.W.2d 115, 116 (Minn. 1955).

Although there may not exist a statutory rule requiring disqualification, a judge should recuse under ABA Standards of Judicial Administration whenever rules apply. Violette v. Midwest Printing Co.--Webb Pub., 415 N.W.2d 318, 326 (Minn. 1987); Sargent County Bank v. Wentworth, 500 N.W.2d 826, 877 (N.D. 1993) (The Rules of Judicial Conduct are not guidelines, they are mandatory.).

That the legislature has not expressly included bias as a ground for disqualifying a judge is immaterial since the N.D. Constitution, Article I, Section 9, says that right and justice shall be administered without sale, denial or delay, and likewise the due process clause and 14th Amendment right to a fair and impartial tribunal are self-executing provisions of the N.D. and U.S. Constitutions and require no legislative provisions for their enforcement; and therefore the rules of the common law and the principles of natural justice are to be applied; and thus failure to recognize bias as a ground of disqualification is an abuse of discretion. Payne v. Lee, 24 N.W.2d 259, 262-264 (Minn. 1946); N.D. Constitution, Article I, Sect. 9 & 12 & 20 & 24; 14th Amendment, U.S. Constitution. No statute is needed to require a judge to disqualify herself. The Constitution and common law mandate it.

It is a constitutional right to have a neutral and

detached judge. Bride v. Heckart, 556 N.W.2d 449, 455 (Iowa 1996); Ward v. Village of Monroeville, Ohio, 409 U.S. 57, 60, 93 S.Ct. 80, 83 (1972) (It violates the 14th Amendment and due process of law to subject a person's liberty or property to the judgment of a court, the judge of which has or may have a reason to be biased.).

The post-conviction Judge, Debbie Kleven, should have recused herself. The post-conviction judgment is void. It must be overturned.

However, there is one more point here:

Subsequent to Jensen's motion to recuse, the Judge ruled on the merits of the case.

Adverse rulings are not evidence of bias.

However, where the rulings and conduct are contrary to law and they were not made in good faith, then the wrong rulings of the court create a reasonable inference that the court lost or never had impartiality, and thus recusal is required. Little Rock Sch. Dist. v. Pulaski Cty. Sp. School, 839 F.2d 1296, 1302 (8th Cir. 1988); Reems v. St. Joseph's Hosp. and Health Center, 536 N.W.2d 666, 671 (N.D. 1995) (Adverse rulings are not alone evidence of judicial partiality or actual bias.).

The facts show that the Judge's decision was not the result of a good faith mistake of judgment. She not only shed her robe of being an impartial judge, but the facts and record show she never put on her robe of impartiality and instead lent her Office to advance the State's

Attorney's wants. Reserve Mining Co. v. Lord, 529 F.2d 181, 185 (8th Cir. 1976). The record shows that she did not rule in subservience to the rule of law. Id., page 188 (The Judge Lord in this case was recused for not ruling according to the will of the law, his rulings were not good faith mistakes of judgment but were knowingly and intelligently made in violation of law.--Id., page 185 & 186.).

Not only should the post-conviction Judge have recused herself due to an appearance of impartiality, but subsequent facts prove that she was partial and biased.

The post-conviction judgment must be overturned for this Ground Twelve.

**XIII. THE POST-CONVICTION COURT'S ORDER DENYING RELIEF WAS INSUFFICIENT AS A MATTER OF LAW.**

The post-conviction Court denied relief with its Order dated March 1, 2004. App.P.15. R.A.#117. Jensen then filed a motion for reconsideration. R.A.#119.

The Court's Order found the fact or conclusion of fact that the issues have been addressed before. And found the fact that Jensen did not say how the attorney's incompetency would have affected his case. And the Court found the fact that Jensen did not cite a statute nor a court case supporting his motion to recuse. And thereby the Court denied all relief. (Equally, the State likewise cited no statute nor court case in its 'brief' for its claim as to why the issues being addressed before gives<sup>rise</sup>

to a rule of law requiring denial of post-conviction relief. And likewise, the Court cited no statute nor court case for its decisions.)

The Court simply made findings of fact or conclusions of fact (whether true or not).

But the Court made no conclusions of law, which law arises from the facts found, and which thus state that post-conviction relief and recusal must be denied.

The Court did not state a rule of law which its findings of fact give rise to. For example: Is the rule of law res judicata or misuse of process; no ineffective assistance of counsel; and the not citing of any court case or statute, is that an abandonment or waiver of the issue or does that mean that the issue is meritless; these as they relate to the findings of fact made in the Order. If there is a law, then the Court should have said it. If there is no rule of law based on those findings or incomplete or false findings of fact, (and there is no rule of law which arises), then the findings of fact made by the Court are not material and thus are meaningless.

In order for a court's order or judgment or decision to be valid, findings of fact plus the conclusions of law which arise from the facts found must be given and stated. Rule 52(a), NDR CivP (A court shall find the facts specially and shall state separately its conclusions of law thereon.). The rules and concepts of the rules of civil procedure apply to post-conviction cases. Vandeberg v. State, 2000

ND 71, Par.#5, 660 N.W.2d 568, 571; Varnson v. Satron, 368 N.W.2d 533, 536 (N.D. 1985).

A judgment is the "conclusion of law upon facts found or admitted by the parties or upon their default in the course of the suit." Black's Law Dictionary, Fourth Edition, defining judgment.

"A judgment must be based upon the record, and the court should state the legal grounds for its judgment." Cumber v. Cumber, 326 N.W.2d 194, 195 (N.D. 1982).

A judgment is made up of the law, not the facts. "Not by the facts of the case, but by the law must judgment be made.--Non exemplis sed legibus judicandum est." Black's Law Dictionary, Fourth and Sixth Editions, citing the Latin for the legal maxims of law.

A judgment is something more than a finding of fact, it is the decision or sentence of the law; a judgment is a conclusion of law based upon facts that have been admitted or established. 49 C.J.S. Judgments, Sect. 2, notes 9-10 and 14. A judgment is the sentence of the law on the ultimate facts admitted by the pleadings or proved by the evidence. 49 C.J.S. Judgments, Sect. 3, note 40.

A decision is insufficient if both the facts and the law are not stated. All Seasons Water Users Ass'n, Inc. v. Northern Imp. Co., 399 N.W.2d 278, 281 (N.D. 1987) (Headnote #3.).

Thus, here again the post-conviction Court did not do right. The post-conviction Court's Order was

insufficient as a matter of law, this without even looking at the merits and issues of the case. N.D.C.C. 29-32.1-11(1) says that the court "shall ... state expressly its conclusions of law relating to each issue presented."

The Order is void for being insufficient as an order or decision. The Court was without jurisdiction to render a decision like this.

#### CONCLUSION

Wherefore, for the above Thirteen Grounds or issues, the post-conviction judgment must be overturned, and the criminal bail jumping judgment must be overturned, and Jensen must be restored to his liberty and released from his imprisonment.

Dated this 5th day of June, 2004.

  
\_\_\_\_\_  
Randy Jensen  
P.O. Box 5521  
Bismarck, N.D. 58506-5521



**CERTIFICATE OF SERVICE BY MAIL**  
 DEPARTMENT OF CORRECTIONS & REHABILITATION  
 PRISONS DIVISION  
 SFN 50247 (Rev. 04-2001)

20040137

STATE OF NORTH DAKOTA )  
   ) SS.  
 COUNTY OF BURLEIGH        )

The undersigned, being duly sworn under penalty of perjury, deposes and says: I'm over the age of eighteen years and on the 18th Day of June, 2004, \_\_\_\_\_ M, I mailed the following:

Jensen's Brief and Appendix and Motion for Clarification and Certificate of Mailing.

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

by placing it/them in a prepaid enveloped, and addressed as follows:

JUN 18 2004

David T. Jones  
 P.O. Box 5607  
 Grand Forks, ND 58206-5607

STATE OF NORTH DAKOTA

and depositing said envelope in the Mail, at the NDSP, P.O. Box 5521, Bismarck, North Dakota 58506-5521.

I declare under penalty of perjury that the above facts are true.

AFFIANT Randy Jensen

*Randy Jensen*  
 P.O. Box 5521  
 Bismarck, North Dakota 58506-5521

Subscribed and sworn to before me this 18th day of June, 2004.

Notary Public  
 28 U.S.C. 1746

*[Handwritten Signature]*

My Commission Expires On

**PATRICK SCHATZ**  
 Notary Public  
 State Of North Dakota  
 My Commission Expires Oct. 31, 2008

20040137

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

JUN 28 2004

Randy Jensen )  
Petitioner/Appellant )  
VS. )  
State of North Dakota )  
Respondent/Appellee )

STATE OF NORTH DAKOTA

Supreme Court No. 20040137

District Court No. 98-K-2957

Certificate For Non-Compliance  
With Rule 31(b) N.D.R.App.P

The Appellant Randy Jensen, in the above titled matter states that he was/is not able to write this/his Brief on computer where as, He is an inmate at the North Dakota State Penitentiary. So he is not able to send an electronic copy of his Brief to your Court. *my Brief was typed-*

Dated this 23rd day of June, 2004.



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