IN THE SUPREME COURT

IN THE STATE OF NORTH DAKOTA

State of North Dakota

Appellee,

v.

Lynn C. Goulet

Appellant.

Appeal from the District Court
South Central Judicial District
Burleigh County, North Dakota
The Honorable Gail Hagerty

SUPREME COURT NO. 980131
BURLEIGH COUNTY NO. 97-K-2826

****

BRIEF OF APPELLANT

****

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STATEMENT OF ISSUES:

ISSUE I.

WHETHER IT WAS REVERSIBLE ERROR AND WHETHER JUDGMENT OF ACQUITTAL SHOULD BE ENTERED WHEN THE COURT VIOLATED THE DEFENDANT'S DUE PROCESS AND EQUAL PROTECTION RIGHTS BY DISCLOSING HIS EX PARTE APPLICATION FOR FUNDS, THEREBY DISCLOSING THE DEFENSE'S ENTIRE THEORY OF THE CASE?

ISSUE II.

WHETHER IT WAS REVERSIBLE ERROR AND WHETHER JUDGMENT OF ACQUITTAL SHOULD BE ENTERED WHEN THE STATE DID NOT DISCLOSE A CRITICAL DOCUMENT AND SURPRISE WITNESS EVEN THOUGH THE STATE HAD ALWAYS PLANNED ON USING SUCH EVIDENCE, GIVEN THAT THE STATE WAS INFORMED OF ALL DEFENSE WITNESSES, INCLUDING THE DEFENSE'S ENTIRE THEORY?

ISSUE III.

WHETHER IT WAS REVERSIBLE ERROR AND WHETHER JUDGMENT OF ACQUITTAL SHOULD BE ENTERED WHEN THE COURT REFUSED TO ALLOW THE DEFENDANT AN OPPORTUNITY TO RESPOND TO THE STATE'S REBUTTAL EVIDENCE, IN VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHTS AND EQUAL PROTECTION RIGHTS?

STATEMENT OF THE CASE:

The Appellant, Lynn Goulet, was convicted of a Class A Misdemeanor Assault and sentenced to a period of one year to the North Dakota Department of Corrections, and also ordered to pay restitution in the amount of $2,688.55.

Prior to trial, the defense made an ex parte application for funds to the Court. This application included attorney/client privileged information, including the entire theory of defense. Out of concern that this application would be disclosed to the State, defense counsel put in bold/underlined print the following:

> *This ex-parte application should be sealed from the State, pursuant to N.D.R.Cr.P. Rule 16 (b)(2), as it contains confidential information not subject to disclosure for the defendant's defense, and such information would unfairly prejudice the defendant and give the State an advantage if it were disclosed.* (Appendix, p. 27, 31).

That same day, the Court refused to seal the document and released it to the State.

With this information, the State knew that entire defense theory and strategy, using it their advantage during trial. Given this significant advantage, and based upon this disclosed information, the State was able to locate a document and witness to attack and cripple the defense's theory.

Because the surprise document and witness were never disclosed to the defense, the defense was unprepared and unable to present evidence to prove the State's accusations untrue. Moreover, when the defense attempted to rebut the State's rebuttal witness, the Court flatly denied surrebuttal and refused to even inquire as to what the defense would offer on surrebuttal.

STATEMENT OF FACTS.

The Defendant was charged with a Class A Misdemeanor Assault. On October 16th, 1997, Defendant's attorney, Chad McCabe ("McCabe"), served upon the State a Rule 16 Request for Discovery and Inspection (Appendix, p. 61).

One week prior to trial, McCabe located a key witness, Jason Baca ("Baca"), in Texas after numerous unsuccessful attempts. McCabe immediately applied for a continuance, (Appendix. p. 9-12, 18-20), and also moved for leave of court to depose this witness, or in the alternative, pay expenses to subpoena Baca (Appendix, p. 14-16).

The supporting affidavit and brief were carefully prepared in general terms, and did not disclose the theory of the case, given that it was served upon the State. (Appendix. p. 11, 15-16. 19-20). The State responded and objected to the expenditure of money for depositions, and suggested that the Court allow expenses only for returning Baca to North Dakota for trial. (Appendix, p. 22).

The Court granted the continuance, but would not authorize payment of any expenses. (Appendix, p. 25). The Court stated "The defense has not made a showing that the proposed witness would testify favorably to the defense and has not communicated with the proposed witness directly." (Appendix. p. 25).

McCabe was then advised by the presiding Judge, Benny Graff. that he should get authorization of funds by an ex parte application to Judge Hagerty. (Appendix, p. 38). Thus, in response to Judge Hagerty's Order, McCabe made an ex parte application for funds to depose Baca and provided an Order for Judge

Hagerty to sign. (Appendix, p. 27-31). This application contained very specific attorney/client privileged details of the Defense's theory of the case, including information about Baca's disability with his wrists. (Appendix, p. 28-29).

Specifically, the application contained the following detailed information:

1) *Jason Baca is crippled and has deformed arms. Specifically, his wrists are fused together so that he cannot even make a fist.*

2) *Jason was on the ground in front of Bucks as he was being struck by one or more bouncers.*

3) *The defendant Lynn Goulet was standing away from the scene, when he finally intervened and picked Jason up, attempting to move him away from the fighting.*

4) *As Lynn Goulet moved Jason away, both Lynn and Jason were being hit by one or more bouncers.*

5) *Lynn went to lay Jason down and immediately struck one blow to the person hitting him.*

6) *Lynn then walked away from the fight.* (Appendix, p. 28-29).

Out of concern that this application would be disclosed to the State, McCabe put in bold/underlined print, both in the application and the Order:

> *This ex-parte application should be sealed from the State, pursuant to N.D.R.Cr.P. Rule 16 (b)(2), as it contains confidential information not subject to disclosure for the defendant's defense, and such information would unfairly prejudice the defendant and give the State an advantage if it were disclosed.* (Appendix, p. 27, 31).

That same day, the Court responded with an Order different than that prepared by McCabe. The Court stated:

> *The defense asks that the application be sealed under N.D.R.Cr.P. Rule 16(b)(2). That Rule deals with information which is not required to be disclosed by the defense during discovery, but does not protect*

communications by the defendant with the Court.(Appendix, p. 32).

The Court then accused McCabe of attempting to conduct a secret deposition, noting that leave of Court would be required, and further stated, "The Court will not grant the defendant's application and will not seal the request." (Appendix, p.33).

Immediately thereafter. McCabe made efforts to enter into a conference with both the State's Attorney and the Court to resolve the issue, but the State's Attorney's office refused to cooperate in any manner. (Appendix, p. 38). Subsequently, McCabe scheduled a hearing and made motion for leave of Court to either 1) allow McCabe the opportunity to travel to Texas for purposes of conducting a deposition with the State's Attorney or their representative; 2) allowing McCabe the opportunity to conduct a phone deposition with the State's Attorney; or 3) providing expenses for Baca to come to trial in North Dakota. (Appendix, p. 35-41).

McCabe explained to the Court that the deposition was never intended to be secret, but that merely the securing of funds was intended to be secret. (Appendix, p. 38). The State responded to this motion and suggested that an Affidavit be provided by Baca prior to the Court authorizing payment of any expenses. (Appendix. p. 43-44). McCabe responded that the State should not be involved in the Defendant's acquiring of funds, stating, "How, When, Why, or even Where the Defendant manages to acquire funds in order to defend himself should not be something which the State should involve itself with, and vice versa. (Appendix, p.

47).

McCabe further provided, in ex parte fashion, an affidavit from Baca, stating, "the Defendant prays that this affidavit be ordered sealed and that it not be disclosed to the State". (Appendix, p. 48-50). The Court placed this affidavit in the Court file and did not seal it. (Appendix, p. 6).

McCabe was then informed by the Court to move for subpoena under the Uniform Act to Secure the Attendance of Witnesses. Such motion was submitted to the Court, (Appendix, p. 51), and the Court signed a Certificate under Seal of Court, authorizing the expenses to be paid. (Appendix, p. 59).

During trial, Baca displayed his disabled hands to the jury. (Appendix, p. 65-1, Transcript, p. 72). He rolled up his sleeves and told the jury that his two bones were fused together, but he could only visibly show them that he couldn't turn his hands. (Appendix, p. 65-1, Transcript, p. 72). During cross-examination of Baca in trial, the State attempted to use a report regarding Baca's disability. (Appendix, p. 66, Transcript, p. 74). At bench conference, McCabe objected to the State using the report, arguing that he was never given notice of such a report. Judge Hagerty informed counsel that the State did not have to give notice of documents on rebuttal and denied the objection. (Appendix, p. 64).

This report was a questionaire which his probation officer filled out in his presence. (Appendix, p. 66, Transcript, p. 74). Jason only remembered being asked about his health to which he replied that he was in good health, but that he never shared his disability to her. (Appendix, p. 66, 66-1, Transcript, p. 74)

After the defense rested, the State then called a rebuttal witness, Cathy Schweitzer ("Schweitzer"), Baca's probation officer, regarding Baca's disability. (Appendix, p. 67, Transcript, p. 79). At bench conference, McCabe objected to the State using Schwietzer as a rebuttal witness, arguing that he was never given notice of such a witness. Judge Hagerty informed counsel that the State did not have to give notice of a rebuttal witness and denied the objection. (Appendix, p. 64).

Schwietzer testified that she questioned Baca about his health and physical status, and that he never indicated that he had problems with his arms. (Appendix, p. 67-1, 68, Transcript, p. 80).

After the State's rebuttal, the defense attempted to call a rebuttal witness, stating, "Your honor, could I call one rebuttal witness?" The Court responded, "No, you may not" (Appendix, p.68, Transcript, p. 82). Further, the Court stated, "Of course, there is no rebuttal for the defense. The State has the burden of proof. With that goes the right of rebuttal." (Appendix, p. 69, Transcript, p. 83).

Lynn Goulet was found guilty and sentenced to a period of one year to the North Dakota Department of Corrections, and also ordered to pay restitution in the amount of $2,688.55. (Appendix, p. 7-1).

STANDARD OF REVIEW:

Questions of law are fully reviewable on appeal. *Moran v. North Dakota Dept. Of Transportation*, 543 N.W.2d 767, 769 (N.D.1995); *State v. Zimmerman*, 529 N.W.2d 171 (N.D.1995).

LAW AND ARGUMENT:

ISSUE I.

WHETHER IT WAS REVERSIBLE ERROR AND WHETHER JUDGMENT OF ACQUITTAL SHOULD BE ENTERED WHEN THE COURT VIOLATED THE DEFENDANT'S DUE PROCESS AND EQUAL PROTECTION RIGHTS BY DISCLOSING HIS EX PARTE APPLICATION FOR FUNDS, THEREBY DISCLOSING THE DEFENSE'S ENTIRE THEORY OF THE CASE?

1. Ex Parte.

In its more usual sense, ex parte means that an application is made by one party to a proceeding in the absence of the other. *United States v. Meriwether*, 486 F.2d 498 (5th Cir.1973), rehearing denied 487 F.2d 1401, certiorari denied 94 S.Ct. 3074, 417 U.S. 948, 41 L.Ed.2d 668. A hearing is "said to be ex parte when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested. *Black's Law Dictionary* 576 (6th ed. 1990).

2. Recognized Ex Parte Proceedings in North Dakota.

In North Dakota, indigent defendants can request an **ex parte**, in camera hearing when seeking state-funded mental health services. See N.D.C.C. § 12.1-04.1-02 (allowing defendants that cannot afford to hire a mental health professional to apply to the court for assistance). These proceedings are conducted in private,

and the court order providing a defendant with financial assistance must go on the record. *Id.*

Also in North Dakota. indigent defendants may file an ex parte application with the court when requesting financial assistance in connection with subpoenaing a witness. Specifically, N.D.R.Crim.P. 17(b) states:

> ***Defendants unable to pay.*** *The court shall order at any time that a subpoena be issued for service on a named witness* ***upon an ex parte application*** *of a defendant upon a satisfactory showing that the defendant is financially unable to pay the fees of the witness and that the presence of the witness is necessary to an adequate defense. If the court orders a subpoena to be issued, the costs incurred by the process and the fees of the witness so subpoenaed must be paid in the same manner in which similar costs and fees are paid in the case of a witness subpoenaed in behalf of the prosecution.* (emphasis added).

N.D.R.Crim.P. 17(b) follows F.R.Crim.P. 17(b). This subdivision provides a means by which the defendant unable to pay witnesses' fees and travel costs may have persons subpoenaed. In this case, given that the Hon. Gail Hagerty had appointed McCabe as indigent defense counsel in this matter, indigency and inability to pay were clearly understood by the Court.

3. Recognized Ex Parte Prodeedings in Federal Court.

A. 18 U.S.C. § 3006A.

18 U.S.C. § 3006A (e) states:

> *Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for an adequate defense may request them in an ex parte application.*

Thus, under 18 U.S.C. § 3006A(e) , hearings for the purpose of considering motions of the allowance of investigative funds under the Criminal Justice Act of

1964 are conducted ex parte. Under 18 U.S.C. § 3006A(e)(4), only the amounts paid under this subsection are made available to the public. No other information is disclosed.

The primary purpose behind an ex parte hearing is to protect defendants from revealing their case prematurely. *United States v. Greschner*, 802 F.2d 373, 379-380 (10th Cir.1986)(stating that this is what the Criminal Justice Act was trying to prevent when allowing for ex parte hearings).

Where counsel for defendant objects to the presence of government counsel at such a hearing the failure to hold an ex parte hearing is prejudicial error. *Mason v. Arizona*, 504 F.2d 1345, 1352, n.7 (9th Cir.1974), citing *United States v. Sutton*, 464 F.2d 552 (5th Cir.1972); *Marshall v. United States*, 423 F.2d 1315 (10th Cir.1970).

Judge William F. Smith of the Third Circuit Court of Appeals echoed this sentiment, stating that an early disclosure of the defendant's case would be inappropriate. *See* Donna H. Lee, Note, *In the Wake of Ake v. Olkahoma: An Indigent Criminal Defendant's Lack of Ex parte Access to Expert Services*, 67 N.Y. U.L.Rev. 154, 157 (1992)(quoting Judge Smith's testimony before House and Senate committees). Congress recognized that adequate representation required more than counsel when enacting the Criminal Justice Act. *Id.* Testimony from persons like Judge Smith helped to convince Congress that a defendant should not have to reveal his defense strategy to obtaining adequate representation. *Id.*

B. F.R.Crim.P. 17(b).

A criminal defendant's right to subpoena and present witnesses and evidence rests not only on Rule 17 (b), but also on the "Fifth Amendment right not to be subjected to disabilities by the criminal justice system because of financial status..." *U.S. v. Florack*, 838 F.Supp. 77 (W.D.N.Y.1993), citing *United States v. Moore*, 917 F.2d 215, 230 (6th Cir.1990); *United States v. Sims*, 637 F.2d 625, 629 (9th Cir.1980); *United States v. Barker*, 553 F.2d 1013, 1019 (6th Cir.1977).

Moreover, departure from the indigent ex parte process which results in disclosure of the defense's theory of the case is a violation of the Defendant's Fifth and Sixth Amendment rights if such disclosure results in prejudicial error, *United States v. Espinoza*, 641 F.2d 153, 158 (4th Cir.1981), certiorari denied 102 S.Ct. 153, 454 U.S. 841, 70 L.Ed.2d 125, and if the proposed testimony of the witness would be material to the case, the judgment should be vacated. *Holden v. United States*, 303 F.2d 276, 278 (1968).

Also *see United States v. Brown*, 535 F.2d 424, 429 (8th Cir.1976)(in order to obtain a reversal of his conviction, defendant is required to show that he was prejudice by the rule). Where counsel for defendant objects to the presence of government counsel at such a hearing the failure to hold an ex parte hearing is prejudicial error. *Mason v. Arizona*, 504 F.2d 1345, 1352, n.7 (9th Cir.1974), citing *United States v. Sutton,* 464 F.2d 552 (5th Cr.1972); *Marshall v. United States*, 423 F.2d 1315 (10th Cir.1970).

C. Fifth and Sixth Amendment Protection.

Thus, there is a principle that defendants are not to be avoidably

discriminated against because of their indigency. In fact, discovery of the defense's theory, though only partial, would clearly be a discrimination. *Holden at 278*, citing *Douglas v. People of State of California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Griffin v. People of State of Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). The breadth of discretion to be exercised by the trial court under Rule 17(b) is considerably narrowed by two constitutional rights of the defendant: (1) the Sixth Amendment right "to have compulsory process for obtaining witnesses in his favor"; and (2) the Fifth Amendment right to protection against unreasonable discrimination which means that, as between those financially able and those financially unable to pay the fees of the witness, there should be no more discrimination than is necessary to protect against abuse of process. *United States v. Hegwood*, 562 F.2d 946, 952 (5th Cir.1977), certiorari denied 98 S.Ct. 1274, 434 U.S. 1079, 55 L.Ed.2d 125.

D. History of F.R.Crim.P. 17(b).

Prior to the amendment to F.R.Crim.P. 17(b) in 1966, an indigent defendant was required to submit an affidavit, which was available to the Government, setting forth the names and addresses of the witnesses sought to be subpoenaed, the substance of their testimony, and an explanation as to why their testimony was material to the defense. *Espinoza* at 158; *Florack at* 78. This former procedure was widely criticized by courts and commentators alike, *Espinoza at 158. Florack at 78,* because while each of the government and a defendant able to pay for subpoenas were permitted to have subpoenas issue in blank without being required so to

disclose. an indigent defendant was so required. *Espinoza at 158.*

As Judge J. Skelly Wright noted in *Smith v. United States*, 312 F.2d 867, 871 (D.C. Cir.1962)(concurring in part and dissenting in part), "Rule 17(b) apparently presents an indigent with Hobson's choice: either make no defense or disclose his whole case to the Government before trial." *Florack* at 78.

E. 1966 Changes.

The 1966 amendment attempted to rectify this discriminatory treatment of indigent defendants and removed the constitutionally objectionable procedure from the provisions of Rule 17(b) by permitting such disclosure to be made to the court ex parte, thus assuring that the government not become privy thereto. An ex parte procedure was established so that an indigent defendant could approach the court and request subpoenas. without the knowledge of the Government, so that he was not required to reveal his trial strategy, or identify his witnesses. *Espinoza* at 158; *Florace* at 78. The system was designed to place all defendants, regardless of economic status, on an equal footing. *Id.* citing 8 J. Moore, *Moore's Federal Practice* ¶ 17.01[6] at 17-5 (2d ed. 1986)(citing *Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice* (1963) p. 27).

Rule 17(b) now provides an ex parte procedure for indigent defendants. Upon an ex parte application, the court may issue a subpoena. The Government is not notified of the proceeding and therefore the defendant is not forced to disclose potential defense witnesses or their expected testimony. This, of course, puts a defendant on an equal footing with the government. *Id.*

F. Shield the Theory of Defense.

The ex parte provision of the rule was not intended to protect the defendant from opposition from the prosecutor, it was intended to shield the theory of his defense from the prosecutor's scrutiny. *United States v. Meriwether*, 486 F.2d 498, 506 (5th Cir.1973), cert.denied, 417 U.S. 948, 94 S.Ct. 3074, 41 L.Ed.2d 668 (1974). *See United States v. Brinkman*, 739 F.2d 977, 980 (4th Cir.1984); *Marshall v. United States*, 423 F.2d 131, 1318 (10th Cir.1970); *U.S. v. Hart*, 826 F. Supp. 380 (D.Colo.1993).

Allowing the prosecutor to observe the defendant's support of his motion permits this scrutiny, even when the prosecutor remains silent. When an indigent defendant's case is subjected to pre-trial scrutiny by the prosecutor, while the monied defendant is able to proceed without such scrutiny, serious equal protection questions are raised, and it appears that major reason for the amendment was to avoid such questions. *Meriwether* at 506. The fact that a defendant with funds may proceed without application mandates that a defendant without funds also be allowed to proceed ex parte. An application for a subpoena and payment of fees must be allowed ex parte in order to avoid penalizing defendants financially unable to pay. *U.S. v. Jenkins*, 895 F.Supp. 1389 (D.Hawai'i1995).

4. Other Indigent Requests in North Dakota Unclear.

State law does not expressly allow courts to authorize assistance than that necessary to obtain mental health services or subpoena witnesses. See N.D.C.C. § 12.1-04.1-02 (authorizing ex parte, in camera requests by defendants);

N.D.R.Crim.P. 17(b)(ex parte application). However, there is no language indicating that indigents cannot apply for or receive an ex parte hearing when requesting non-psychiatric assistance or non-subpoena assistance. *Id.*

5. Due Process Right to Present a Defense.

It is well established that a defendant has a fundamental due process right to present witnesses and introduce evidence in defense of a criminal prosecution. *City of Fargo v. Stutlien*, 505 N.W.2d 738 (N.D.1993). *E.g., Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973); *United States v. Marion*, 404 U.S.307, 324, 92 S.Ct. 455, 465, 30 L.Ed.2d 468 (1971). *See State v. Flohr*, 301 N.W.2d 367, 371 (N.D.1980).

In *Ake v. Oklahoma*, the Supreme Court recognized that States "must take steps to assure that the [indigent] defendant has a fair opportunity to present his defense." 470 U.S. 68, 76 (1985). *Ake* stated that mere access to the courthouse was insufficient and that indigent defendants should have access to the "raw materials" necessary for preparing an effective defense. *Id.* at 77-78 (holding that Oklahoma had to provide the defendant with access to a psychiatrist).

This is a principle grounded in the Fourteenth Amendment's Due Process Clause. *See Id.* at 76 (stating the belief that even impoverished defendants should not be "denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake"); *see also* Donna H. Lee, *Access to Ex Parte* at 166-168 (stating that due process is rooted in fundamental fairness and should protect defendants from arbitrary action).

The Court's language would seem to indicate that defendants cannot be precluded from obtaining additional services if they can demonstrate their need. *See Ake*, 470 U.S. at 78 (stating that the state's interest is "in the fair and accurate adjudication of criminal cases" and not in "maintaining a strategic advantage"). It would stand to reason that the courts should handle all of theses requests for assistance in the same manner-hearing them outside the presence of the opposition and holding their substance in confidence. See 18 U.S.C. § 3006A(e) (allowing defendants to receive assistance for services shown necessary for their defenses); Minn. Stat. § 611.21 (1991)(providing ex parte application and hearing of defendant's request for expert assistance). To do otherwise may afford the State an early form of discovery and insight into defense strategy. See Donna H. Lee, *Ex Parte Access* at 174.

6. Defense Witnesses in North Dakota.

If a defendant intends to offer evidence of an alibi as a defense or to base his defense on lack of criminal responsibility, then he must notify the prosecution of his intentions prior to trial. See N.D.R.Crim. P. 12.1,12.2; *see also Griffin v. Delo*, 33 F.3d 895 (1994)(holding that a state mandate to disclose the identity of defense alibi witnesses obligates the state to disclose its rebuttal witnesses). Otherwise, defendants are not required to take affirmative steps to provide the opposition with access to their documents or witness lists. See N.D.R.Crim.P. 16(b). In fact, defendants are under no obligation to disclose the names, addresses, or statements of non-alibi witnesses before trial unless ordered to do so by the court. *See State*

v. Hanson, 558 N.W.2d 611, 615 (N.D.1996)(holding that a statute requiring disclosure by defendants was unconstitutional).

However, it is possible that a prosecutor with access to a defendant's request for financial assistance could circumvent these rules of discovery and obtain this information. See Donna H. Lee, *Ex parte Access* at 188 (stating that the disclosure of ex parte communications between a defendant and the court could provide the State with a form of pre-trial discovery exceeding the scope of discovery required under most state rules).

7. General Supervisory Powers Remedy.

Given the severe and irreparable constitutional violations which occurred in this case, this Court may dismiss the indictment pursuant to its general supervisory powers. *U.S. v. Luttrell*, 889 F.2d 806, 811 (9th Cir.1989), *citing Hampton v. United States*, 425 U.S. 484, 489, 96 S.Ct. 1646, 1649, 48 L.Ed.2d 113 (1976) (Powell,J.,concurring)(Brennan,J.,dissenting); *citing United States v. Russell*, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1642-43, 36 L.Ed.2d 366 (1973).

Supervisory power is commonly viewed as an inherent power to preserve the integrity of the judicial process. In *United States v. Hasting*, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983), the Supreme Court listed three purposes which may properly underlie use of the power: (1) to implement a remedy for violation of recognized rights; (2) to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and (3) as a remedy designed to deter illegal conduct.

CONCLUSION.

The National Association of Criminal Defense Lawyers (NACDL) recently requested permission from this Court to file an Amicus Curiae Brief regarding this significant constitutional issue now before the Court. In response to this request, the State accused the Defense, much like the Hon. Gail Hagerty did, of requesting funds for a "super-secret" trial deposition, without notice to the State. Moreover, the State suggested a violation of Canon 3 (B)(7)(a) of the North Dakota Code of Judicial Conduct (requiring prompt disclosure of any ex parte communications by a party with a judge).

Such an accusation is completely out of line and has unthinkable consequences for defense counsel, not only in terms of stricken evidence, but also ethical violations. Whenever a party seeks to conduct a deposition, either for discovery purposes or to perpetuate testimony, notice is given to the other party, and a convenient time and location is then set up for both parties. This is the way it has always been done in the practice of law, and this Court can take judicial notice of that fact.

The only thing the defense was doing was seeking approval for funds. To consider anything else is beyond belief. After all, if a deposition were conducted outside the presence of the State, it would be inadmissible anyway. What would be the point of such an absurd result?

We shall never fully know Judge Hagerty's reasons for assuming such an unbelievable and impermissible tactic on the part of defense counsel. Rather than

considering why the application was done ex parte and realizing that there was attorney/client privileged information within the document, the Court was quick to reveal the document to the State. Had the Court known of N.D.R.Crim.P 17(b), there would have been an understanding as to why such an application was done ex parte, and the Court would have recognized defense counsel's request to seal the application.

In this case, the State was never entitled to the defense's witness list, and yet, on open record, the defense openly disclosed such witnesses in the spirit of discovery. However, the defense was extremely careful not to reveal any defense theories, particularly the disability of Baca. In fact, had the deposition been granted, this theory still would not have been revealed until trial, by and through other defense witnesses.

The defense in this case first attempted to subpoena or depose Baca. Upon denial, the defense then attempted to depose Baca. Upon this denial, the defense asked for "anyway" the Court would see fit in obtaining testimony from Baca. Upon further denial, the Court made counsel comply with the Uniform Act to Secure the Attendance of Witnesses prior to granting payment of expenses. While the requests bounced back and forth from subpoena requests to deposition requests, the spirit of the request was to obtain or preserve testimony of Baca. Thus, the applicable law in this brief either directly or analogously addresses the constitutional rights denied to the defense in this case. In fact, it has even been hinted that a request to take depositions at government expense could be treated as a Rule 17(b)

request for a court-ordered subpoena. *United States v. Nichols*, 534 F.2d 202 (9th Cir.1976).

As can be seen from the numerous motions, applications, affidavits, and briefs, the Court dragged the defense counsel through the mud, and ultimately, severely crippled the defense by revealing to the State the entire defense strategy. The State was able to obtain this information, providing the State with a significant advantage. By disclosing the application to the State, the Court provided prosecutors with a strategic advantage and failed to preserve the State's and the defendant's interest in the fair and accurate adjudication of a criminal case. This is the kind of result that the United States Supreme Court was trying to avoid in *Ake.*

During trial, the State knew the defense's entire theory and was able to shape its case around such advantageous information. Also during trial, the State pulled out a surprise document and witness and literally destroyed Baca and the defense's theory of defense of others and self-defense. The entire defense theory centered around the defendant saving Baca because of his disabled wrists. When the State came "loaded for bear" to crush Baca and his disability, the defense was unprepared to offer any medical doctors or reports to rebut the State's accusations that Baca was lying about his disability. The entire defense theory was crippled from these surprise accusations, and as a result, Lynn Goulet was convicted.

in this case, the hands of time can never be turned back, for the State will always have the defense theory of the case. Given the irreparable and crippling damage caused by the Court's disclosure, it would be difficult for Lynn Goulet to

ever have a fair trial. Thus, Lynn Goulet prays that this Court will find that the only proper remedy is a judgment of acquittal, dismissal with prejudice, or at the very least, reversible error.

ISSUE II.

WHETHER IT WAS REVERSIBLE ERROR AND WHETHER JUDGMENT OF ACQUITTAL SHOULD BE ENTERED WHEN THE STATE DID NOT DISCLOSE A CRITICAL DOCUMENT AND SURPRISE WITNESS EVEN THOUGH THE STATE HAD ALWAYS PLANNED ON USING SUCH EVIDENCE, GIVEN THAT THE STATE WAS INFORMED OF ALL DEFENSE WITNESSES, INCLUDING THE DEFENSE'S ENTIRE THEORY?

1. Required Reciprocal Discovery.

In this case, the defendant's rights of discovery were clearly violated. *See Griffin v. Delo*, 33 F.3d 895 (holding that the order to disclose the identity of a defense alibi witness requires the state to reciprocate and disclose its rebuttal witnesses). The Court's decision to place the defendant's ex parte application on file and open to prosecutorial inspection is analogous to a state mandated disclosure, creating a state duty to disclose its rebuttal witnesses. Compare *Griffen*, 33 F.3d 895 (noting that state law created defendant's duty to disclose).

2. Remedy is Prohibited Use of Evidence.

The remedies available in such discovery violations includes the prohibition of the evidentiary use of undisclosed material. *See State v. Miller*, 466 N.W.2d 128, 132 (N.D.1991)(noting a defendant's objection to the use of an undisclosed tape as rebuttal evidence).

3. Discovery Rules.

The defense made a timely Rule 16 request for discovery in this case. Part of that request was disclosure of the State's witnesses. North Dakota rules of discovery require the state to turn over such information to defendants upon request from the defendant. See N.D.R.Crim.P. 16 (f)(stating that the prosecution shall furnish to the defendant a written list of the names, addresses, and statements of all prosecution witnesses upon the defendant's written request). Before providing relief, courts require defendants to demonstrate that they were significantly prejudiced by the discovery violation. *See State v. Miller*, 466 N.W.2d at 132 (noting that the disputed tape was never played in front of the jury and concluding that the violation was harmless error).

In this case, the defense was under the belief that its application for funds would not be shared with the State and that the Court would limit disclosure of the proceedings to its decision concerning the grant of assistance and the amount of money involved. Had the defendant known that the application would be placed on file, he could have chosen to forego the request entirely. In the alternative, the Court could have ordered that the hearing be made part of the record but remain sealed, avoiding this controversy altogether. See *Brooks v. State*, 385 S.E.2d 81,84 (Ga.1989)(holding that a defendant's requests for funds should be heard ex parte and in camera and ordering that the proceeding be transcribed as part of the record but to remain under seal).

The rules of discovery help preserve a degree of fairness in adversarial proceedings, allowing both prosecutors and defendants a chance to avoid surprises

at trial. *See* Rogelio A. Lasso, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C.L.Rev. 479, 484 (1995)(stating that the modern rules of discovery have led to a reductions of surprises in a lawsuit). In this case, the State violated the spirit of Rule 16 when they used an undisclosed document on cross-examination of Baca, and when they used an undisclosed rebuttal witness.

4. The State's Undisclosed Rebuttal Witness.

A. Prosecution Must Make Timely Disclosure.

Although Rule 16 is silent on the issue of rebuttal witnesses, it does not necessarily mean that defendants are never entitled to disclosure. *See Id.* (stating that the rule prescribes only the minimal amount of discovery both parties are allowed). This rule was never intended to prevent a party from voluntarily disclosing evidence. *See Id.* Additionally, it was never intended to place limitations on a judge's discretion to order broader discovery in appropriate instances. *See Id.*

N.D.R.Crim.P. 16 requires that "upon written request of the defendant, the prosecution shall furnish to the defendant a written list of the names of all prosecution witnesses." N.D.R.Crim.P. 16(f)(1). N.D.R.Crim.P. 7 (g) provides:

> *When an indictment or information is filed, the names of all witnesses on whose evidence the indictment or information was based must be endorsed on the indictment or information before it is presented, and the prosecuting attorney shall endorse on the indictment or information, at such time as the court by rule or otherwise may prescribe, the names other witnesses the prosecuting attorney proposes to call.*

The North Dakota Supreme Court has previously expressed its disapproval

of late disclosure of witnesses by the prosecution. In *State v. Roerick*, 557 N.W.2d 55 (N.D.1996), the Court wrote:

> *We are concerned with the disclosure of the witness such a short time before trial, particularly where, as here, a substantial amount of time has expired since the criminal act and the time of trial, and the witness is one known to the prosecutor from the beginning of the case. We expect compliance with Rule 16, N.D.R.Crim.P. to be the norm, not the exception.*

See also State v. Lince, 490 N.W.2d 476 (N.D.1992), and *State v. Nodland*, 493 N.W.2d 697 (N.D.1992)(granting continuance at the request of the defendant in the face of late witness disclosure by the prosecution).

In this case, the undisclosed document was not a "true" rebuttal document, and the undisclosed witness was not a "true" rebuttal witness. The proffered rebuttal testimony was not in reply to new matters. The State was well aware of the defense's claim and defense as to the incident. In fact, the rebuttal document and testimony was not rebuttal at all. The State knew of the defense well before trial and could, therefore, anticipate the rebuttal testimony.

B. Rebuttal Witness Must Not be Anticipated.

A rebuttal witness is a witness whose testimony cannot be anticipated before trial. *Wirth v. Commerical Resources, Inc.*, 96 N.M. 340, 346, 630 P.2d 292, 298 (Ct.App.), *cert. denied*, 96 N.M. 543, 632 P.2d 1181 (1981). In this case, 1) the State was aware of the witness's testimony ahead of trial; and 2) the State had made preparations for the witness to testify ahead of time.

Attempting to characterized the document and witness as "rebuttal" not subject to disclosure under the North Dakota Rules of Criminal Procedure was a

clear attempt to evade the statutory and constitutional obligations of the State.

C. When the Intent is Formed.

The Supreme Court of Illinois has held that the duty of the prosecution to disclose rebuttal witnesses arises when the State has formed the intent to call such a witness. *See People v. Curtis*, 491 N.E.2d 134 (Ill.1986); *see also People v. Weber*, 636 N.E.2d 902, 906 (Ill.Ct.App.1994). The prosecution forms such intent when the State becomes informed of the direction of the defendant's case, which can arise well before defense testimony is heard. *See People v. Brock*, 611 N.E.2d 1173, 1181 (Ill.Ct.App.1993); *Weber*, 636 N.E.2d at 906.

This "intend to call at trial" construction is similar to the "true rebuttal" analysis discussed. *supra*, in that both approaches require the disclosure of all anticipatory witnesses-true rebuttal witnesses being those witnesses whose testimony cannot reasonably be anticipated before trial. In *State v. Manus*, 93 NM 95, 597 P.2d 280 (1979), the court noted that the prosecution "is not allowed to withhold substantial evidence supporting any of the issues which it has the burden of proving in its case in chief merely in order to present this evidence cumulatively at the end of the defendant's case." *Id.*

D. Rebuttal Must be True Rebuttal.

Rebuttal must be true rebuttal and not an attempt to present the State's case-in-chief in the rebuttal. *Id.* The State cannot be permitted to "circumvent discovery rules by withholding a witness from the case-in-chief, and allowing the witness to testify on rebuttal." *Nichols v. State*, 704 So.2d 81, 88 (Miss.1997).

In this case the prosecution had long been aware of the consistent causation defense of the defendant, and the State formed the intent to use the document and the "rebuttal witness" well before the presentation of their case-in-chief. Consistent with other jurisdiction's construction of their similar discovery rule, mandating the State to reveal all witnesses it "intends to call at trial," discovery applies to rebuttal witnesses the prosecution reasonably anticipated it would call, be in their case-in-chief or during rebuttal. *See Izazaga v. Superior Court of Tulare County*, 815 P.2d 304, 316-17 (Cal.1991); *People v. Curtis*, 491 N.E.2d 134 (Ill.1986).

E. ***State v. Jungling.***

To support its position of secrecy, the State might attempt to rely on *State v. Jungling*, 340 N.W.2d 681 (N.D.1983). However, *Jungling* is clearly distinguishable from this case. First of all, in this case, the State received ex parte information regarding witnesses and the defense's theory, when such information should not have been subject to disclosure. Secondly, in *Jungling*, the defense did not object to the witness, while in the case, a clear objection was made. The *Jungling* Court stated:

> *The record does not reflect that the defendant sought an order requiring the State to disclose either additional witnesses or rebuttal witnesses that it intended to call. Further, the defendant made no objection to Samuelson's testimony at trial. When an unlisted rebuttal witness is called to testify "...It [is] incumbent upon the appellant to raise a timely objection and thereby allow the trial court to specifically rule on the issue." Lucas v. State, 376 So.2d 1149, 1151 (Fla.1979). As a general rule, this Court will not review an assignment of error predicated upon wrongful admission of evidence unless a timely objection was made. State v. Bragg, 221 N.W.2d 793, 799 (N.D.1974).*

CONCLUSION.

At a minimum, defense counsel was in a position to inquire of any possible conflict or bias between potential jurors and the newly disclosed witness. In this case, the State deprived the defense of this important opportunity to voir dire these individuals about the affect that testimony from a probation officer might have on them. The defense was robbed of the opportunity to inquire of these jurors on such an issue when the State deliberately sat on their "surprise witness" during voir dire. The remedy for such a violation of Lynn Goulet's due process and equal protection rights under the Constitution of the United States of America and the Constitution of the State of North Dakota should have been dismissal with prejudice, or at the very least, a mistrial.

5. The Undisclosed Document.

A. Defendant's Rule 16 Request for Discovery.

In this case, the defendant made a Rule 16 request, which specified:

> *10. To permit Defendant to inspect and copy or photograph any relevant written or recorded statement of any person, or copies thereof, within the possession, custody, or control of the prosecution, the existence of which is known to the prosecuting attorney and which is not available to Defendant under Rule 16 (a) or Rule 16 (f)(1) or (2).*
>
> * * *
>
> *Continuing Duty to Disclose: If, before or during trial, the State discovers additional evidence or material previously requested or ordered which is subject to discovery or inspection under Rule 16, the State shall promptly notify Defendant or the Court of the existence of the additional material.*

B. Brady v. Maryland.

Under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215

(1963), the State must disclose exculpatory evidence to the defense. Thus, "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution." *See also Moore v. Illinois*, 408 U.S. 786, 92 S.Ct. 2562, 33 .L.Ed.2d 706 (1972); *U.S. v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). The *Brady* rule has been recognized and adopted by the North Dakota Supreme Court as well. *State v. Hilling*, 219 N.W.2d 164, 168-69 (N.D.1974)(recognizing prosecutions duty to disclose exculpatory information, noting that prosecution has a duty to inquire into and examine police files to discover exculpatory material, and noting that good faith of prosecution does not affect the applicability of the *Brady* rules). Failure to produce evidence material to guilt would also violate a defendant's rights under the Constitution of North Dakota.

C. Evidence as to Guilt or innocence.

A *Brady* violation occurs when the State does not disclose to the defense evidence material to the guilt or innocence of the accused. In determining whether information is material to guilt or innocence, the State must gauge the likely effect of all such evidence. *Kyles v. Whitley*, 514 U.S. 419, 437, 115 S.Ct. 155, 1567, 131 L.Ed.2d 490 (1995).

D. Appellate Review.

Appellate cases addressing *Brady* issues typically focus on whether the evidence the government failed to disclose was material. In *Kyles*, the Supreme

Court emphasized four aspects of materiality under *U.S. v. Bagley*, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). First, it is noted that a showing of materiality does not require demonstration by a preponderance of the evidence that disclosure of the suppressed would have resulted ultimately in the defendant's acquittal. "*Bagley's* touchstone of materiality is a 'reasonable probability of a different result." *Id.* at 1566.

The second aspect of materiality is that it is not a sufficiency of the evidence test. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict. The possibility of an acquittal on a criminal charge does not imply an insufficient evidentiary basis to convict." *Id.* Third, once a reviewing court has found constitutional error under *Bagley*, there is no need for further harmless error review. *Id.* Finally, the materiality evaluation must consider the collective impact of the suppressed evidence-not merely review it item-by-item. *Id.* at 1567. *See also U.S. v. Dimas*, 3 F.3d 1015, 1017 (7th Cir.1993)(evidence is material under Brady if, had it been disclosed, a reasonable probability exists that the outcome of the trial would have been different.

CONCLUSION.

The document used against Baca should have been disclosed under *Brady*. There is no question that such information gathered by the State would be material to this case. Moreover, such information was material to the issue of Lynn Goulet's guilt or innocence in this case. As such, *Brady* mandates that the undisclosed

information, a signed statement of Baca, should have been provided to the defense.

The remedy for such a violation of Lynn Goulet's due process and equal protection rights under the Constitution of the United States of America and the Constitution of the State of North Dakota should have been dismissal with prejudice, or at the very least, a mistrial.

ISSUE III.

WHETHER IT WAS REVERSIBLE ERROR AND WHETHER JUDGMENT OF ACQUITTAL SHOULD BE ENTERED WHEN THE COURT REFUSED TO ALLOW THE DEFENDANT AN OPPORTUNITY TO RESPOND TO THE STATE'S REBUTTAL EVIDENCE, IN VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHTS AND EQUAL PROTECTION RIGHTS?

1. Surrebuttal.

In a surrebuttal, a defendant calls a witness to respond to the testimony given by the state's rebuttal witness. *United States v. Wilford*, 710 F.2d 439, 451(8th Cir.1983), cert. denied, 464 U.S. 1039 (1994) (noting the defendant's request to present evidence following the government's rebuttal). .

2. N.D.C.C. § 29-21-01(4).

State law affords both prosecutors and defendants an opportunity to present rebuttal testimony. Specifically, N.D.C.C. § 29-21-01(4) states:

> *The parties then, respectively, may offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, or to correct an evident oversight, permits them to offer evidence upon their original case;*

3. Right of Rebuttal Appears to Be Mandatory.

While the term "may" seems to connote a power of discretion for the Court, the statute, in subsection 3, provides that the defendant or his counsel, "may open

his defense and offer his evidence in support thereof." Clearly, the term "may" is not a discretionary matter under that subsection. While this statute appears unclear because of the term "may", given subsection 3, it appears that the right of surrebuttal is a mandatory matter under this statute. Unfortunately, North Dakota's position concerning a defendant's right to a surrebuttal is unclear.

4. A Chance to Respond To Prosecution's Rebuttal.

The Eighth Circuit has held that defendants are not necessarily guaranteed the right to a surrebuttal. *See United States v. Wilford at* 451-52 (finding that the denial of a surrebuttal did not prejudice the defendant); *see also State v. Mitchell*, 491 N.W.2d 438, 447 (S.D.1992)(stating that "as a general rule, a party has no right to reply to evidence given on rebuttal or to introduce evidence by way of surrebuttal, unless facts are introduced in the case for the first time on...rebuttal"). Courts are allowed to exercise their discretion when determining whether a defendant is entitled to a surrebuttal-or a chance to respond to the prosecution's rebuttal evidence. *See Id.* (citing *United States v. Burgess*, 691 F.2d 1146, 1153 (4th Cir.1982).

5. To Refute the Rebuttal Testimony.

In *State v. Mitchell*, 491 N.W.2d 438, 447 (S.D.1992), the South Dakota Supreme Court stated that a surrebuttal may be used to refute the testimony of the opposition's rebuttal witness, but not to attack overall inferences drawn from rebuttal evidence.

Apparently, appellate courts are using an abuse of discretion standard when

reviewing a defendant's denial of surrebuttal, and that it is up to the Court to inquire as to whether or not the testimony would be repetitive or whether or not the evidence would merely be cumulative. *See United States v. Wilford*, 710 F.2d at 452; *State v. Friend*, 493 N.W.2d 540, 544 (Minn.1992).

Missouri appellate courts also have applied the abuse of discretion standard when deciding whether a defendant was wrongly deprived of the opportunity to offer a surrebuttal. *State v. Sanders*, 714 S.W.2d 578, 586 (Mo.Ct.App.1986). There, the court stated that defendants to not have to be granted a surrebuttal unless the prosecutor presents new matters or arguments in the state's rebuttal. *Also see State v. Dizdar*, 622 S.W.2d 300, 303 (Mo.Ct.App.1981).

CONCLUSION.

However, in this case, the Judge refused to inquire as to the surrebuttal the defense was prepared to offer. Instead, the Court stated:

> *No you may not...Of course, there is no rebuttal for the defense. The State has the burden of proof. With that goes the right of rebuttal.*

Such analysis by the Court was an abuse of discretion with regard to N.D.C.C. § 29-21-01 (4). This statute appears to mandate the defendant's right to surrebuttal. However, should this Court find the matter of surrebuttal discretionary, the Court still abused its discretion. The Court never inquired, nor did the Court make any analysis as to the defendant's surrebuttal.

Instead, the Court made the decision to deny surrebuttal without any indication of consideration. Such action on the Court's part demonstrated a lack of

knowledge as to N.D.C.C. § 29-21-01(4). Moreover, the Court should have inquired as to the defense's presentation of surrebuttal to determine whether such information would be a reasonable or unreasonable surrebuttal. Such action on the Court's part should be considered an abuse of discretion by this court.

The proper remedy for a procedural due process constitutional injury is determined...by measuring the remedy sought against the nature of the interests protected by the constitutional rights in question." *Brewer v. Chauvin*, 938 F.2d 860 (8th Cir.1991).

The remedy for such a violation of Lynn Goulet's due process and equal protection rights under the Constitution of the United States of America and the Constitution of the State of North Dakota should have been dismissal with prejudice, or at the very least, a mistrial.

FINAL CONCLUSION.

For the reasons above, the Appellant, Lynn Goulet, by and through his attorney, Chad R. McCabe, prays that this Court either grant a judgment of acquittal, dismiss the case with prejudice, or at the very least, find reversible error.

Dated this 6th day of September, 1998.

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