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IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

FEB 17 1999

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STATE OF NORTH DAKOTA
FEB 17 '99

State of North Dakota,
ex. rel. Richard Riha in his
capacity as Burleigh County
State's Attorney,

Petitioner,

vs.

Benny A. Graff, in his
capacity as judge of the
District Court, for Burleigh
County, in the South Central
Judicial District,

Respondent.

S.C. NO.

MOTION IN APPLICATION
FOR SUPERVISORY WRIT
AND STAY OF PROCEEDINGS

The State of North Dakota, through its prosecuting attorney, Burleigh County State's Attorney, hereby moves the Court for its Order, authorizing a supervisory writ to issue, and directing the Burleigh County District Court, Honorable Benny A. Graff, presiding, to properly instruct the jury as to the definition of "proper parental care and control" in the case of State of North Dakota v. Terry L. Abe, a/k/a Terri L. Aguilar Burleigh County District Court No. 98-K-1390.

This motion for supervisory writ, is brought under the authority of Section 27-02-04 of the North Dakota Century Code, which states:

1 "27-02-04. Jurisdiction of supreme court--Appellate
2 -Original. The supreme court may exercise appellate
3 jurisdiction only, except when otherwise specially
4 provided by law or by the constitution. Such Court, in
5 the exercise of its original jurisdiction, may issue
6 writs of habeas corpus, mandamus, quo warranto,
7 certiorari, and injunction. In the exercise of its
8 appellate jurisdiction, and in its superintending
9 control over inferior courts, it may issue such
10 original and remedial writs as are necessary to the
11 proper exercise of such jurisdiction. Such court shall
12 exercise its original jurisdiction only in habeas
13 corpus cases and in such cases of strictly public
14 concern as involve questions affecting the sovereign
15 rights of this state or its franchises or privileges."

16 N.D.C.C. Section 27-020-4 (1991) (Emphasis added).

17
18 It is through this Court's exercise of superintending
19 control over the Burleigh County District Court that the State,
20 in the instant application, seeks the Court's supervisory writ,
21 requiring the District Court to properly instruct the jury as to
22 the definition of "Proper Parental Care and Control" which will
23 be explained more fully in the accompanying brief. The State's
24 objection to the trial courts instruction to the jury on Proper
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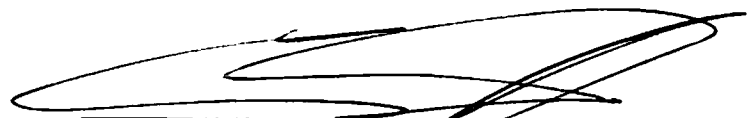
1 Parental Care and Control is made a part of this brief by
2 reference.
3

4 Furthermore, the State seeks the Supreme Court's order
5 staying the jury trial set for February 18, 1999, and enjoining
6 the jury from being impaneled in the Burleigh County District
7 Court. The stay of the jury trial is to preserve the status quo
8 of the parties and the case and is not for the purpose of delay.
9

10 The stay and injunction that the State seeks in the
11 instant application is to prevent jeopardy from attaching to the
12 defendant when the jury is to be impaneled on February 18, 1999.
13 The stay and injunction of the jury trial is a necessary
14 component of the superintending control the Court should exercise
15 over the District Court.
16

17 Respectfully submitted this 17th day of February,
18 1999.

19 Richard J. Riha
20 Burleigh County State's Attorney

21 

22 Cynthia M. Feland, Assistant
23 Burleigh County State's Attorney
24 Burleigh County Courthouse
25 514 East Thayer Avenue
26 Bismarck, ND 58501
27 Bar Id No. 04804
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IN THE SUPREME COURT
OF THE STATE OF NORTH DAKOTA

State of North Dakota,) S.C. NO.
ex. rel. Richard Riha in his)
capacity as Burleigh County)
State's Attorney,)
Petitioner,) BRIEF IN SUPPORT OF
vs.) MOTION IN APPLICATION
Benny A. Graff, in his) FOR SUPERVISORY WRIT
capacity as judge of the) AND STAY OF PROCEEDINGS
District Court, for Burleigh)
County, in the South Central)
Judicial District,)
Respondent. FACTS)

On February 23, 1998, the Defendant, Terri L. Abe a/k/a Terri Aguilar, made a first appearance on a Criminal Complaint charging her with three counts of Abuse or Neglect of a Child. A preliminary hearing was held on April 8, 1998. Abe was bound over to District Court and arraigned, pleading not guilty. The matter was set for trial on February 18, 1999.

On February 8, 1999, Defendant's Requested Jury Instructions were filed with the District Court. On February 11, 1999, the State filed its written objections to the Defendant's jury instructions and its proposed jury instructions.

On February 15, 1999, the State was notified by phone that the District Court would be instructing the jury as to the

1 definition of proper parental care and control as follows:

2 "Proper parental care or control or 'other care or
3 control as necessary for the child's physical, mental
4 or emotional health' means that the custodian's conduct
5 must satisfy the minimum standards of care which the
6 community will tolerate. Further, for there to be a
7 failure to provide proper care or control, there must
8 be a showing that there is a resulting physical or
9 moral harm to the child."
10

11
12 The State immediately requested a conference call with
13 defense counsel and the Court. During the conference call the
14 State again objected to the District Court's jury instruction as
15 to the definition of "proper parental care and control"
16 attempting to cite additional case law supporting the State's
17 position. The District Court declined to hear further comment by
18 the State and informed the parties that the Court's instruction
19 on proper parental care and control would be given to the jury.
20

21 No jury has as of yet been impaneled and therefore no
22 jeopardy has yet attached to the life or limb of the defendant.
23 The selection and impaneling of the jury in the case of State v.
24 Abe is set to begin at 9:00 a.m. on Thursday, February 18, 1999,
25 in the courtrooms of the District Court for Burleigh County.
26
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28

1 At the conclusion of the telephone conference, the
2 prosecution requested a continuance pending its Application for a
3 Supervisory Writ. The District Court denied the State's request
4 for a continuance.
5

6 On February 17, 1999, the State filed with the District
7 Court written objections to the Court's Jury Instructions.
8

9 POINTS AND AUTHORITIES

10 The Supreme Court has the power to exercise its
11 general superintending authority and control over the state's
12 inferior courts, such as the District Court for Burleigh County.
13 State ex.rel. Jacobson v. District Court, 68 N.D. 211, 277 N.W.
14 843 (N.D. 1938); State ex.rel. Johnson v. Broderick, 75 N.D. 340,
15 27 N.W.2d 849 (1947). In the case at bar, the District Court for
16 Burleigh County has denied the State's request that it properly
17 instruct the jury as to the definition of "Proper Parental Care
18 and Control". Rule 30 of the North Dakota rules of Criminal
19 Procedure provide that "... the court should instruct the jury
20 only as to the Law of the case".
21

22 It was the State's position in the District Court, just as
23 it is the State's position in presenting this application for a
24 supervisory writ, that the District Court erred in refusing to
25 give the proper jury instruction as to the definition of "Proper
26 Parental Care and Control". The District Court's jury
27
28

1 instruction is clearly inappropriate in that it places an
2 additional burden on the state to prove an element not included
3 in the offense in order to prove the charge of abuse or neglect
4 of a child. The State objection to the instruction is concisely
5 stated in the brief that is appended to this instant motion.
6

7 Therefore, by denying the State's request that the
8 proper definition of Proper Parental Care and Control be given,
9 the District Court is forcing the State to go to trial to prove
10 the elements of parental termination rather than Abuse or Neglect
11 of a child thereby abusing its discretion in forcing jeopardy to
12 attach to the defendant, Terri L. Abe, in an abuse case where the
13 State is required to meet a greater burden of proof at trial that
14 the offense charged.
15

16 In the exercise of its general superintending control
17 over the inferior courts, the Supreme Court may control the
18 course of litigation in the district courts to prevent injustice
19 incases where there is no appeal, or the remedy by appeal would
20 be inadequate. State ex.rel. Lemke v. District Court, 49 N.D.
21 27, 86 N.W. 381 (N.D. 1921); State ex.rel. Shafer v. District
22 Court, 49 N.D. 1127, 194 N.W. 745 (N.D. 1923); and State ex.rel.
23 Johnson v. Broderick, supra.
24
25

26 Applying the above authority to the facts of the
27 instant case, the State argues that the District Court would in
28

1 essence force the State to take a case to trial on February 18,
2 1999, and require the state to prove an additional element,
3 actual harm to the children. An element which is not a part of
4 the offense charged but is an element in a termination
5 proceeding. The status quo is that jeopardy has not attached to
6 the life or limb of the defendant, Terri L. Abe. Jeopardy will
7 undoubtedly attach on or about February 18, 1999. If the State
8 is forced to go to trial on February 18, 1999 and the defendant
9 is acquitted, then the State will never ever have its chance to
10 convict the defendant of the abuse or neglect of her children.
11

12
13 The State, in this application for a supervisory writ,
14 has attached copies the Defendant's Requested Jury Instructions,
15 the State's Requested Jury Instructions, the State's Response to
16 the Defendants Jury Instructions, the State's Objection to the
17 District Court's Jury Instruction and the District Court's Jury
18 Instructions, which were all filed in the District Court. The
19 District Court's refusal to properly instruct the jury as to the
20 definition of proper parental care and control is an abuse of
21 discretion, since the Court's jury instruction is clearly
22 contrary to case law and statutory authority.
23
24

25 Since there is no other adequate remedy available to the
26 State, and since the State has no statutory avenue of appeal of
27 the District Court's refusal to properly instruct the jury as to
28

1 the law of the case, it is incumbent upon the Burleigh County
2 State's Attorney to seek this supervisory writ from the Supreme
3 Court. Other authority stands for the proposition that a
4 supervisory writ is appropriate where a denial to grant such a
5 writ will result in grave or serious prejudice to the State and
6 for which the State has no other remedy. See e.g. Ingalls v.
7 Bakken, 167 N.W.2d 516 (N.D. 1969).
8

9 In the case at bar it is undisputable that the double
10 jeopardy clause of the United States and the North Dakota
11 Constitutions prohibits the State from ever charging the
12 Defendant with abuse or neglect of her children if the State is
13 forced to go to trial on February 18, 1999, and the defendant is
14 acquitted. Furthermore, since jeopardy has not yet attached the
15 State is acting prudently in seeking a continuance of the trial
16 until this application can be heard and decided on its merits.
17 The District Court's refusal to properly instruct the jury as to
18 the law of the case is tantamount to an abuse of discretion that
19 would result in the irreversible injustice of never holding the
20 defendant, Terri L. Abe, legally answerable for the abuse or
21 neglect of her children.
22

23 Therefore, the Supreme Court, in entertaining the points and
24 authorities raised in this application for a supervisory writ,
25 should grant the State's request staying the jury trial set for
26
27
28

1 February 18, 1999. Additionally, the Supreme court should
2 exercise its superintending jurisdiction over the District Court
3 and review the abuse of discretion by the lower court when it
4 refused to properly instruct the jury as to the definition of
5 "Proper Parental Care and Control".
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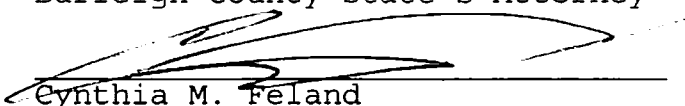
CONCLUSION

For the above-stated reasons and authorities, the State of North Dakota asks that a supervisory writ issue to the Burleigh County District Court, ordering the lower court to properly instruct the jury as to the definition of proper parental care and control. Furthermore, in order to preserve the status quo and in order to prevent the irremediable injustice of attaching jeopardy to the defendant when trial begins on February 18, 1999, and where the defendant would in all likelihood be acquitted, the State also moves this Court for its further Order staying or continuing the trial set for February 18, 1999, until this instant application can be heard and decided on its merits, and a hearing on the merits of this application can be scheduled.

Respectfully submitted this 17th day of February, 1999.

Richard J. Riha
Burleigh County State's Attorney

By:


Cynthia M. Feland
Assistant Burleigh County
State's Attorney
Courthouse, 514 E Thayer Avenue
Bismarck, ND 58501
(701) 222-6672
ID No. 04804

FEB 09 1999

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

State of North Dakota,

Plaintiff,

v.

Case No. 98 K 1390

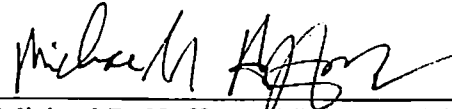
Terri L. Aguilar,

Defendant.

DEFENDANT'S REQUESTED JURY INSTRUCTIONS

Dated this 8 day of February, 1999.

TUNTLAND AND HOFFMAN
Attorneys for Defendant
104 Third Avenue NW, Third Floor
P. O. Box 1315
Mandan, North Dakota 58554
(701)667-1888



Michael R. Hoffman, I.D. No. 04366

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 1

CHARGE TO JURY

This is a criminal action brought to this Court by the filing of an Information charging Defendant, Terri L. Aguilar, with having committed three counts of the crime of Abuse or Neglect of Child within Burleigh County, North Dakota, on or about February 21- 22, 1998. The Information charges the three counts to have been committed as follows:

COUNT I:

"The defendant was the custodian of a child and willfully failed to provide proper parental care or control, subsistence, or other care or control for the child's physical, mental or emotional health; specifically, the defendant was the custodian of her child, whose age is six, and left such child unattended in their home:"

COUNT II:

"The defendant was the custodian of a child and willfully failed to provide proper parental care or control, subsistence, or other care or control for the child's physical, mental or emotional health; specifically, the defendant was the custodian of her child, whose age is three, and left such child unattended in their home:"

COUNT III:

"The defendant was the custodian of a child and willfully failed to provide proper parental care or control, subsistence, or other care or control for the child's physical, mental or emotional health; specifically, the defendant was the custodian of her child, whose age is almost two, and left such child unattended in their home:"

Source: NDJI - Criminal 2000 (1985);
Amended Information on file in this case, dated August 12, 1998

Given: _____

Denied: _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 2

ABUSE OR NEGLECT OF CHILD

A custodian of any child who willfully fails to provide proper parental care or control, subsistence, or other care or control necessary for the child's physical, mental, or emotional health, is guilty of Abuse or Neglect of Child.

Source: N.D.C.C. 14-09-22(1)(b)
Amended Information on file in this case, dated August 12, 1998.

Given: _____

Denied: _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 3

"CUSTODIAN" DEFINED

"Custodian" means a person, other than a parent or legal guardian, who stands in loco parentis to the child or a person to whom legal custody of the child has been given by order of a court.

Source: N.D.C.C. 27-20-02(2)

Given: _____

Denied: _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 4

"WILLFULLY" DEFINED

A person engages in conduct "willfully" if he engages in the conduct intentionally, knowingly or recklessly.

A person engages in conduct "intentionally" if, when he engages in the conduct, it is his purpose to do so.

A person engages in conduct "knowingly" if, when he engages in the conduct, he knows or has a firm belief, unaccompanied by a substantial doubt, that he is doing so, whether or not it is his purpose to do so.

A person engaged in conduct "recklessly" if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct.

Source: N.D.C.C. 12.1-02-02(1)

Given: _____

Denied: _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 5

"PROPER PARENTAL CARE OR CONTROL" DEFINED

"Proper parental care or control" means that the custodian's conduct must satisfy the minimum standards of care which the community will tolerate.

Further, for there to be a failure to provide proper parental care or control, there must be a showing that there is a resulting physical or moral harm to the child.

Source: In the Interest of L.N., 319 NW2d 801, 802-803, 804-805 (N.D. 1982)

Given: _____

Denied: _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 6

"OTHER CARE OR CONTROL NECESSARY FOR THE CHILD'S
PHYSICAL, MENTAL, OR EMOTIONAL HEALTH" DEFINED

"Other care or control necessary for the child's physical, mental, or emotional health" means the custodian's conduct must satisfy the minimum standards of care which the community will tolerate.

Further, for their to be a failure to provide care or control necessary for the child's physical, mental, or emotional health, there must be a showing that there is a resulting harm to the child's physical, mental, or emotional health.

Source: See, In the Interest of L.N., 319 NW2d 801, 802-803, 804-805 (N.D. 1982)

Given: _____

Denied: _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 7

ESSENTIAL ELEMENTS OF OFFENSE

The burden of proof resting upon the State is satisfied only if the evidence shows, beyond a reasonable doubt, the following essential elements of the offense charged:

1. That on or about the 21st to 22nd day of February, 1998:
2. In Burleigh County, North Dakota:
3. The Defendant, Terri L. Aguilar:
4. The custodian of the child;
5. Willfully;
6. Failed to provide proper parental care or control, subsistence, or other care or control necessary for the child's physical, mental, or emotional health.

These essential elements apply to each count charged. You must apply the burden of proof and the essential elements to each count charged.

Source: N.D.C.C. 14-09-22(1)(b)
Amend Information on file in this case, dated August 12, 1998

Given: _____

Denied: _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 8

COMPLAINT NOT EVIDENCE

Terri L. Aguilar pleaded not guilty to each count charged in the Information. The fact that Terri L. Aguilar has been charged with a criminal offense or offenses is not evidence and must not be considered by you as evidence. The Information charging Terri L. Aguilar with the crimes is itself not evidence and must not be considered by you as such. The Information merely states the charges in legal form and outlines the issues on which the prosecution has the right to offer evidence.

Source: NDJI-Criminal 2001 (1995)(modified)

Given: _____

Denied: _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 9

PRESUMPTION OF INNOCENCE

Terri L. Aguilar is presumed to be innocent of each crime charged, and you must give her that presumption. The trial begins with Terri L. Aguilar having a "clean slate" and with no evidence against her. The presumption of innocence standing alone is sufficient to require the acquittal of Terri L. Aguilar, unless you find in your final deliberations that the State has proved to your unanimous satisfaction, beyond a reasonable doubt, that she is guilty of the crime charged.

The presumption of innocence should accompany and remain with Terri L. Aguilar throughout the trial unless and until you find in your final deliberations that the presumption of innocence has been overcome by proof of guilt beyond a reasonable doubt. If the State has not overcome the presumption of innocence by proving Terri L. Aguilar guilty beyond a reasonable doubt, you must find her not guilty.

Source: NDJI-Criminal 2001 (1995)(modified);
Devitt and Blackmar 12.10;
CJINY 3.05

Given: _____

Denied: _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 10

BURDEN OF PROOF

In a criminal case, the burden of proof is always on the prosecution to prove the crime charged beyond a reasonable doubt. The burden of proof in a criminal case is never on the accused, and the burden of proof never shifts to the accused. In that regard, Terri L. Aguilar has no burden or duty of calling any witnesses, producing any evidence, or even cross-examining the witnesses for the prosecution. Terri L. Aguilar has no burden of proving anything, including innocence because, as I have already told you, Terri L. Aguilar starts out with the presumption of innocence.

Source: Devitt and Blackmar 12.10 (modified)

Given: _____

Denied: _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 11

PROOF BEYOND A REASONABLE DOUBT

The State must prove all of the essential elements of the crime charged by proof beyond a reasonable doubt. If you have a reasonable doubt even as to only one of the essential elements of the crime charged, then you must find Terri L. Aguilar not guilty of that crime.

The State is not required to prove guilt beyond all possible doubt, but beyond a reasonable doubt. You should not imagine doubts to justify acquittal. Everything is open to some possible or imaginary doubt. On the other hand, Terri L. Aguilar should never be convicted on mere surmise, suspicion or conjecture.

You should find Terri L. Aguilar guilty only if you have a firm and abiding conviction amounting to an evidentiary certainty of Terri L. Aguilar's guilt based on a full and fair consideration of the evidence presented in the case. Therefore, a reasonable doubt is an honest and reasonable uncertainty in your minds about the guilt of Terri L. Aguilar after you have given full and impartial consideration to all of the evidence. A reasonable doubt may arise from the evidence itself, from a lack of the evidence, or from no evidence. It is a doubt that a reasonable person hearing the same evidence would harbor.

You can have a possibility or a probability of guilt without reaching the evidentiary certainty required by proof beyond a reasonable doubt.

Also, "innocent" and "not guilty" are not the same. You do not have to believe Terri L. Aguilar is innocent to return a verdict a not guilty.

You should always give Terri L. Aguilar the benefit of the doubt under these instructions.

Source: NDJI - Criminal 2002 (1996) (modified)
Section 12.1-01-03 N.D.C.C.
Section 29-21-05 N.D.C.C.
State v. Schneider
550 N.W.2d 405, 408-409 (N.D. 1996)
State v. Medina
147 N.J. 43 (1996)
Victor v. Nebraska,
511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994)
State v. Azure,
525 N.W.2d 654 (N.D. 1994)
Sullivan v. Louisiana,
508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)
Estelle v. McGuire,
502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 384 (1991)
Cage v. Louisiana,
498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990)
City of Minot v. Rubbelke,
456 N.W.2d 551 (N.D. 1990)
Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)
Addington v. Texas,
441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)
Taylor v. Kentucky,
436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978)
Johnson v. Louisiana,
406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972)
In Re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)
Wilson v. United States,
232 U.S. 563, 34 S.Ct. 347, 58 L.Ed. 728 (1914)
State v. Bancroft,
23 N.D. 442, 137 N.W. 377 (1912)
Holt v. United States,
218 U.S. 245, 31 S.Ct. 2, 54 L.Ed.2d 1021 (1910)
State v. Montgomery,
9 N.D. 405, 83 N.W. 873 (1900)

Dunbar v. United States,

156 U.S. 185, 15 S.Ct. 325, 39 L.Ed. 390 (1895)

Hopt v. Utah,

120 U.S. 430, 7 S.Ct. 614, 30 L.Ed. 708 (1887)

Miles v. United States,

103 U.S. 304, 26 L.Ed. 481 (1881)

Devitt and Blackmar 12.10

CJINY 3.07

Vincent T. Bugliosi, "Tactics and Techniques for Handling Each Phase
Of a Criminal Trial", found in Warshaw, "The Trial Masters"
PP. 31-34 (Prentice-Hall 1984)

Given: _____

Denied: _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 12

DUTY OF JURY

If you find from all the evidence in this case, beyond a reasonable doubt, that all of the foregoing essential elements of the crime of Abuse or Neglect of Child charged in a count of the Information, viewed in the light of the law, have been proven, then it is your duty to find Terri L. Aguilar guilty of the crime of Abuse or Neglect of Child charged in that count.

If the State has failed to establish any of those essential elements beyond a reasonable doubt, it is your duty to find Terri L. Aguilar not guilty of the crime of Abuse or Neglect of Child charged in that count.

Source: NDJI - Criminal 2100 (1985) (modified)

Given: _____

Denied: _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 13

NUMBER OF WITNESSES

The weight of the evidence is not determined by the number of witnesses testifying on one side versus the other side. You decide, given that Terri L. Aguilar is presumed to be innocent, whether the State has proven the crime charged beyond a reasonable doubt in light of all the instructions in this case.

Source: NDJI - Criminal 2102 (1990)

Given: _____

Denied: _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 14

IMPEACHMENT

A witness may be impeached (meaning that the witness' testimony is discredited) by contradictory evidence you find to be true; or by evidence that on a former occasion the witness made a statement or acted in a manner inconsistent with the present testimony; or by evidence of conviction of a crime; or by evidence of character for untruthfulness.

If you conclude that a witness has been impeached, you may give the testimony of that witness such weight and credibility, if any, as you think it deserves.

If you conclude that a witness has willfully testified falsely concerning any matter, you have the right to distrust that witness' testimony in other particulars. You may wholly disregard the witness' testimony or give it such weight and credibility as you think it deserves.

Source: NDJI - Criminal 2104 (1995) (modified)

Given: _____

Denied: _____

DEFENDANT'S REQUESTED JURY INSTRUCTION NO. 15

OUT OF COURT STATEMENTS BY DEFENDANT

Testimony has been received in this case concerning certain statements made by Terri L. Aguilar out of court and before trial as to the crimes charged.

In determining the weight, if any, to be given an out of court statement by Terri L. Aguilar, you should consider all the evidence of the circumstances under which the statement was made.

Source: NDJI-Criminal 2106 (1990) (modified)

Given: _____

Denied: _____

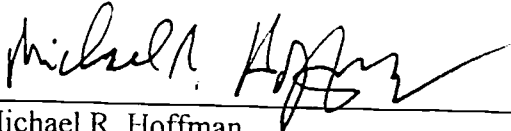
DEFENDANT'S REQUESTED NORTH DAKOTA PATTERN JURY INSTRUCTIONS

	<u>GIVEN</u>	<u>DENIED</u>
NDJI-CRIMINAL 2101 (1998) WEIGHT AND CREDIBILITY	_____	_____
NDJI-CRIMINAL 2108 (1998) DIRECT AND CIRCUMSTANTIAL EVIDENCE	_____	_____
NDJI-CRIMINAL 2122 (1986) DELIBERATIONS AND CONDUCT OF JURY IN RETIREMENT	_____	_____

CERTIFICATE OF SERVICE

I hereby certify that I made service of a copy of the foregoing Defendant's
Requested Jury Instructions Nos. 1-15 and Defendant's Requested North Dakota Pattern
Jury Instructions by mail, on February 8, 1999.

Cynthia Feland
Assistant State's Attorney
Burleigh County Courthouse
514 East Thayer Avenue
Bismarck, ND 58501



Michael R. Hoffman

1 STATE OF NORTH DAKOTA

IN DISTRICT COURT

2 COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

3 State of North Dakota,)

4 Plaintiff,)

5 -vs-)

State's Objection to Defendant's
Request for Jury Instructions

7 Terri L. Abe,)
8 a/k/a Terri L. Aguilar,)
9 Defendant.)

Cr. No. 98-K-1390

10 COMES NOW THE STATE OF NORTH DAKOTA, by and through Cynthia M.
11 Feland, Assistant State's Attorney, and objects to the following
12 instructions for the jury as requested by the Defendant:

13
14 Primarily, the State requests this Court to reject any of the
15 Defendant's requested instructions insofar as they do not conform
16 to the North Dakota Pattern Jury Instructions (hereinafter referred
17 to as "PJI"). Where the Defendant has requested instructions the
18 Court deems appropriate, the State asks the Court to adopt the PJI
19 version, rather than the Defendant's.

20
21 Defendant's Requested Instruction #1, #2 and #7: The State
22 objects to this instruction as it does not include the terms
23 "parent, guardian or custodian".

24 Defendant's Requested Instruction #5 and #6: The State
25 objects to these instructions as they do not conform to the North
26 Dakota Supreme Court's decision in In the Interest of L.N., 319
27 N.W.2d 801 (N.D. 1982). In said decision, the Supreme Court stated
28

1 that the term "proper parental care or control" means that the
2 parents or custodian's conduct in raising their children must
3 satisfy the minimum standards of care which the community will
4 tolerate. The Supreme Court only required a showing that " there
5 is a resulting physical or moral harm to the child" in a parental
6 termination action.
7

8 Defendant's Requested Instruction #8, #9 and #10: The State
9 objects to the Defendant's version of PJI 2001. PJI 2001 covers
10 all of the Defendant's requests in one instruction. Defendant
11 requests three separate instructions to cover what is contained in
12 PJI 2001.
13

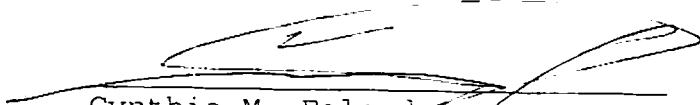
14 Defendant's Requested Instruction #11: The State objects to
15 the Defendant's version of proof beyond a reasonable doubt. The
16 Defendant's version is unduly prejudicial. PJI 2002 adequately and
17 fairly describes proof beyond a reasonable doubt.
18

19 Defendant's Requested Instruction #13: The State objects to
20 the Defendant's requested instruction on number of witnesses as an
21 attempt at placing the State's burden language in yet another
22 instruction. PJI 2102 adequately addresses this issue.
23

24 Defendant's Requested Instruction #14: The State objects to
25 the Defendant's version of impeachment. The Defendant's version is
26 unduly prejudicial. PJI 2104 adequately and fairly describes
27 impeachment.
28

1 The State respectfully requests this Court to instruct the
2 jury in accordance with the law and the North Dakota Pattern Jury
3 Instructions, and to reject those instructions requested by the
4 Defendant which tend to mislead and confuse the jury, and which
5 tend to impose an even greater burden than that already imposed
6 upon the State.
7

8 Dated this 11th day of February, 1999.
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12 
13 Cynthia M. Feland
14 Assistant State's Attorney
15 Burleigh County
16 514 East Thayer Avenue
17 Bismarck, ND 58501
18 (701) 222-6672
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1 STATE OF NORTH DAKOTA

IN DISTRICT COURT

2 COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

3 State of North Dakota,)

4 Plaintiff,)

STATE'S REQUESTED
JURY INSTRUCTIONS

5 vs.)

6 Terri L. Abe,)

Crim. No. 98-K-1390

7 a/k/a Terri L. Aguilar,)

8 Defendant.)

9
10 The State of North Dakota requests that the
11 following N.D. pattern jury instruction be used at
12 trial:

13 2000 charge to jury
14 2001 presumption of innocence/burden of proof
15 2002 reasonable doubt
16 2100 duty of jury
17 2101 weight and credibility
18 2104 impeachment
19 2106 out of court statements by defendant
20 2108 direct and circumstantial evidence
21 2111 matters of common knowledge or science
22 2114 proof of intent
23 2117 penalty or punishment
24 2119 statements by counsel and judge
25 2122 deliberations and conduct of jury
26 2130 forms of verdict
27 2140 verdict form
28 2141 verdict form

23 The State also requests that the attached
24 instructions be given to the jury in addition to the
25 above pattern jury instructions.
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Clk. of Crt. Burleigh Co.

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ABUSE OR NEGLECT OF CHILD

A parent is guilty of Abuse or Neglect of a Child if the parent knowingly fails to provide proper parental care or control, subsistence, or other care and control necessary for the child's physical, mental, or emotional health.

DEFINITIONS

"Willfully" means that a person engages in the conduct intentionally, knowingly, or recklessly.

"Intentionally" means that a person engages in conduct "intentionally" if, when he engages in the conduct, it is his purpose to do so.

"Knowingly" means that the person engaged in conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it was his purpose to do so.

"Recklessly" means a person engages in conduct "recklessly" if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct.

1 "Proper Parental Control or Care" means that a
2 parents or custodians conduct in raising their children
3 must satisfy the minimum standards of care which the
4 community will tolerate.
5


6 ESSENTIAL ELEMENTS OF OFFENSE

7 The burden of proof resting upon the State is
8 satisfied only if the evidence shows, beyond a
9 reasonable doubt, the following essential elements of
10 the offense charged:
11

12 1. That on or about the 21st to 22nd day of
13 February, 1998, in Burleigh County, North Dakota, the
14 Defendant, Terri L. Abe a/k/a Terri L. Aguilar, was
15 the parent, guardian, or custodian of a child,
16

17 2. That the Defendant failed to provide proper
18 parental care or control, subsistence, or other care or
19 control necessary for the child's physical, mental or
20 emotional health.

21 Dated this 10th day of February, 1999.
22

23
24 
25 Cynthia M. Feland
26 Assistant State's Attorney
27 Burleigh County
28 514 East Thayer Avenue
Bismarck, ND 58501
ND Bar ID# 04804

IN DISTRICT COURT

SOUTH CENTRAL JUDICIAL DISTRICT

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These instructions, together with the additional instructions I will give you at the close of the case, are to govern you in your consideration of the evidence presented during the trial.

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DIRECT AND CIRCUMSTANTIAL EVIDENCE

A fact in dispute may be proved by either direct evidence or circumstantial evidence, or by both.

Direct evidence, such as the credible testimony of an eye witness, proves a fact in dispute without the aid of an inference and which, in itself, if true, establishes the fact.

Circumstantial evidence consists of facts and circumstances in the case from which the jury may reasonably infer, from the common experience of mankind, the existence of a fact in dispute.

The opening statements and closing arguments of counsel are intended to help you in understanding the evidence, applying the law and in determining the facts. but they are not evidence.

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You may consider their intelligence; the strength of their recollection; their means of knowing that about which they testify; whether their testimony is reasonable; whether they have any interest in the outcome of the trial; and, applying your knowledge of human actions and motives, you will find the truth as it appears to you from all the evidence.

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2 PRESUMPTION OF INNOCENCE AND BURDEN OF PROOF

3 To this Complaint the Defendant pleaded "Not Guilty", which plea
4 puts in issue the material allegations of the Complaint. Before the Defendant can be
5 convicted, the State must prove those allegations to be true to your satisfaction
6 beyond a reasonable doubt.

7 The fact that the Complaint charges the Defendant with a criminal
8 offense is no evidence whatever, and must not be considered by you as evidence.
9 The Complaint merely states the charge in legal form, upon which the State has a
10 right to offer evidence, and outlines the issues to be determined by you from the
11 evidence under these instructions. The Defendant is presumed to be innocent until
12 the contrary, his guilt, is proved to your satisfaction beyond a reasonable doubt. If
13 you have a reasonable doubt as to whether the guilt of the Defendant has been so
14 proven, you must find him not guilty.

15 The State does not have to prove the charge beyond all possible doubt
16 before a conviction can be had, but the State must prove the Defendant guilty
17 beyond a reasonable doubt before you can convict.
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REASONABLE DOUBT

The state must prove all of the essential elements of the crime charged by proof beyond a reasonable doubt. In other words, if you have reasonable doubt that the defendant committed the crime, then you must find the accused not guilty.

The state is not required to prove guilt beyond all doubt, but beyond a reasonable doubt.

You should find the defendant guilty only if you have a firm and abiding conviction of the defendant's guilt based on a full and fair consideration of the evidence presented in the case and not from any other source.

PRETRIAL INSTRUCTIONS TO BE CONSIDERED

Members of the Jury, you will recall that at the beginning of this trial I have given you certain instructions concerning your duties, the determination of certain facts and the law to be applied. The opening pretrial instructions that I gave you will not be reread, but they are a part of these written instructions, and you should apply those instructions in your determination of the facts, in addition to the instructions that follow.

DEFINITION

The Court will now define some of the terms used in these instructions, among which are the following:

ABUSE OR NEGLECT OF CHILD - A parent of any child who willfully fails to provide proper parental care or control, subsistence, or other care or control necessary for the child's physical, mental, or emotional health, is guilty of Abuse or Neglect of Child.

PROPER PARENTAL CARE OR CONTROL - "Proper parental care or control" or "other care or control necessary for the child's physical, mental or emotional health" means that the custodian's conduct must satisfy the minimum standards of care which the community will tolerate. Further, for there to be a failure to provide proper parental care or control, there must be a showing that there is a resulting physical or moral harm to the child.

WILLFULLY - "Willfully" means if a person engages in the conduct intentionally, knowingly or recklessly.

INTENTIONALLY - A person engages in conduct "intentionally" if, when he engages in the conduct, it is his purpose to do so.

KNOWINGLY - A person engages in conduct "knowingly" if, when he engages in the conduct he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so.

RECKLESSLY - "Recklessly" means if he engages in the conduct in conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct.

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IMPEACHMENT

A witness, including a party, may be impeached (meaning that his testimony is discredited) by contradictory evidence which you find to be true, or by evidence that on a former occasion the witness made a statement or acted in a manner inconsistent with his present testimony.

If you conclude that a witness has been impeached, you may give the testimony of that witness such weight and credibility, if any, as you think it deserves.

If you conclude that a witness has knowingly testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars. You may reject all the testimony of that witness, or give it such weight and credibility as you think it deserves.

FAILURE OF ACCUSED TO TESTIFY

In the trial of a criminal action before any Court of this City, the defendant, at his own request and not otherwise, is a competent witness. If the defendant chooses not to testify during the trial, his mere silence does not create or raise any inference of guilty against him. The prosecutor cannot mention it and you must not discuss or consider it.

PENALTY OR PUNISHMENT

In arriving at a verdict in this case, you must not discuss or consider the subject of penalty or punishment, as that is a matter which lies with the Court and other governmental agencies, and must not in any way enter into your deliberations or affect your decision as to the guilt or innocence of the defendant

FORM OF VERDICT

One form of verdict will be submitted to you as to the charge against Ms. Aguilar. The form will allow you to render a verdict as you find from the evidence on the charge brought against Ms. Aguilar.

DELIBERATIONS AND CONDUCT OF JURY IN RETIREMENT

Upon retiring to the jury room, you will select one of your number as presiding juror. The presiding juror will preside over your deliberations and will be your spokesperson in court and in communicating with the bailiffs having you in charge.

In order to return a verdict, each juror must agree to the verdict. In other words, your verdict must be unanimous.

During your deliberations, it is your duty to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. You should not hesitate to re-examine your own views and change your opinion if you are convinced it is erroneous. On the other hand, you should not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

After you have agreed upon your verdict, the presiding juror will fill in, date and sign a formal verdict, using the appropriate form accompanying these instructions. The presiding juror will then notify the bailiffs that you have arrived at a verdict, whereupon you will be conducted to the courtroom for the reception of the verdict. You must not disclose your verdict to anyone until it is returned in open court.

If it becomes necessary during your deliberations to communicate with

1 the Court, the presiding juror will send a note by the bailiffs. Except when
2 otherwise directed in open court, you must not reveal to anyone how the jury stands,
3 numerically or otherwise, until you have reached a unanimous verdict.

4 Dated this _____ day of _____, 1999.

5
6 BY THE COURT:

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8 _____
9 BENNY A. GRAFF, DISTRICT JUDGE
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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

STATE OF NORTH DAKOTA,

)

)

Plaintiff,

)

File No. 98-K-1390

)

-v-

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)

TERRI L. AGUILAR,

)

)

Defendant.

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VERDICT

We, the jury duly empaneled and sworn to try the above-entitled action, do find the defendant, Terri Aguilar: (Insert "Guilty" or "Not Guilty")

COUNT I: _____ of the charge of abuse or neglect of a child as it pertains to the six year old child.

COUNT II _____ of the charge of abuse or neglect of a child as it pertains to the three year old child.

COUNT III: _____ of the charge of abuse or neglect of a child as it pertains to the two year old child.

Dated this ____ day of February, 1999.

Presiding Juror

IN DISTRICT COURT

SOUTH CENTRAL JUDICIAL DISTRICT

Crim. No. 98-K-1390

In the North Dakota Supreme Court's decision in In the Interest of L.N., 319 N.W.2d 801 (N.D. 1982), the Supreme Court stated that the term "proper parental care or control" means that the parents or custodian's conduct in raising their children must satisfy the minimum standards of care which the community will tolerate. See, 319 N.W.2d at 802. The additional language included by the court requiring that for there to "be a failure to provide proper parental care and control, there must be a showing that there is a resulting physical or moral harm to the child" is

1 neither supported by the Supreme Court's holding in In the Interest
2 of L.N., 319 N.W.2d 801 (N.D. 1982), nor by statute. To require
3 the State to show a resulting harm is tantamount to terminating the
4 Defendant's parental rights.
5

6 N.D.C.C. Section 27-20-44 provides that the Court may
7 "terminate the parental rights of a parent with respect to his
8 child if:
9

10 a. The parent has abandoned the child;

11 b. The child is a deprived child and the court finds that
12 the conditions or causes of the deprivation are likely to
13 continue or will not be remedied and that by reason
14 thereof the child is suffering or will probably suffer
15 serious physical, mental, moral or emotional harm; or .
16

17"

18 In the Interest of L.N., 319 N.W.2d 801 (N.D. 1982), the North
19 Dakota Supreme Court held that "to terminate parental rights it is
20 not sufficient to show parental misconduct without showing that
21 there is a resulting harm to the child." Id. At 802-803.
22

23 The present case is not a termination proceeding but a
24 criminal prosecution for Abuse or Neglect of a Child. The North
25 Dakota Supreme Court has previously stated that it is an incorrect
26 interpretation to require "proof of actual harm to the children in
27 order to support a conviction." See, State v. Mertz, 514 N.W.2d
28 662 (N.D. 1994). A person cannot avoid criminal liability "merely

1 because a third party intervenes." Id. At 669.

2
3 The State respectfully objects to the Court's jury instruction
4 as to the definition of "Proper Parental Care and Control" as it
5 incorrectly interprets N.D.C.C. Section 14-09-22(1)(b) and the
6 Supreme Court's decision in In the Interest of L.N., 319 N.W.2d 801
7 (N.D. 1982), as requiring proof of actual harm to the children.

8 Dated this 16th day of February, 1999.

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13 Cynthia M. Feland
14 Assistant State's Attorney
15 Burleigh County
16 514 East Thayer Avenue
17 Bismarck, ND 58501
18 (701) 222-6672
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