ORIGINAL

20000185

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

The City of Harvey, Plaintiff - Appellant, vs. Kyle Fettig, Defendant - Appellee	SUPREME COURT No. 20000185 District Court No. 99-K-282

REPLY BRIEF TO APPELLEE'S BRIEF

APPEAL FROM BENCH RULING AT

MAY 9, 2000, EVIDENTIARY HEARING,

DENYING ADMISSION OF

DEFENDANT'S PRIOR CONVICTION TESTIMONY

SOUTHEAST JUDICIAL DISTRICT

THE HONORABLE JOHN E. GREENWOOD, PRESIDING

CRIMINAL NO. 99-K-282

APPEAL FROM THE ORDER GRANTING, IN PART,

DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

DATED MAY 31, 2000

SOUTHEAST JUDICIAL DISTRICT

THE HONORABLE JOHN E. GREENWOOD, PRESIDING

CRIMINAL NO. 99-K-282

REPLY BRIEF TO APPELLEE'S BRIEF SUBMITTED BY:
Kathleen K. Trosen, ND ID 05365
Attorney for the Plaintiff-Appellant
City Attorney, Harvey, North Dakota
120 West 9th Street
Harvey, ND 58341
TEL. (701) 324-2583

STATEMENT OF THE CASE

The City's Notice of Appeal specifically stated that the Court's Order suppressed "all evidence relating to the alcohol found in the Defendant's truck, including any statements made to the officers." [A. at 31] The City's Notice of Appeal was specifically stated in the City Attorney's Affidavit to be

> inconjunction with the Notice of Continuance and Motion for Continuance . . . [and that] the jury trial date . . . does not provide sufficient time for the Plaintiff to Appeal the Order Suppressing Evidence, certify the question and provide a transcript of the suppression hearing, as well as, brief the certified question for the review and appeal . . . and thus, the Plaintiff is asking for sufficient time to Appeal said Order Suppressing Evidence because the Plaintiff does not want to in any way infringe upon the Defendant's Constitutional right prohibiting double jeopardy, and it is the Plaintiff's concern that Double Jeopardy may attach if the Jury is sworn and a trial is held before the Plaintiff is able to Appeal said Order Suppressing Evidence. [A. at 31-32]

There are additional statements in Plaintiff's request for jury instructions that indicate the nature of the appeal as the Plaintiff stated "[a]t this time, these are the jury instructions requested by the Plaintiff, but should the appeal be successful, and other evidence allowed to be utilized, then, there will need to be additional instructions for the minor in possession charges." [A. at 34] The Plaintiff also indicated the material nature of the evidence as in one of the requested jury instructions the Plaintiff stated "[t]his to only be used if the Defendant takes the stand and testifies about his admission of having alcohol in his Pickup or tries to deny such admissions." [A. at 37]

INCORRECT STATEMENT OF FACTS BY APPELLEE

The Appellee states "Balfour knew that the truck, if not owned, was at least normally operated by Fettig." [Appellee Brief at 2] This is a misstatement as Officer Balfour never stated that he **knew** the truck or that it was normally operated by Fettig, but rather, Officer Balfour indicated that from the license plate check, and physical description of the male running from the pickup that he believed the driver was Kyle Fettig [Tr. at 36, 39, 41] and that he didn't actually know who was the

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operator of the vehicle. [Tr. at 62] The Appellee states that "Balfour **hastily traveled** [emphasis added] additional blocks in order to get around to where he could view the pickup." [Appellee Brief at 2] This statement is not supported by any evidence before the Court, and should not be considered by the Court.

The Appellee states "[t]he Chief told Balfour to have the vehicle impounded, but did not tell Balfour to search the vehicle." [Appellee Brief at 3] There is no evidence supporting or denying what the Chief said about a search as no questions were asked whether or not Chief told Officer Balfour to search the vehicle, and therefore, the Court should not allow the Appellee to speculate as to an area in which the Appellee could have asked Officer Balfour directly. The Appellee incorrectly states that "Officer Balfour was not instructed to search or inventory the vehicle" [Appellee Brief at 10] because Officer Balfour stated that Officer Brower told him to do an inventory search. [Tr. at 35]

The Appellee states that "[t]he Defendant's vehicle was impounded and towed to the Harvey Armory at 12:07 AM." [Appellee Brief at 10] Officer Balfour attempted to begin the traffic stop at 12:07 AM; proceeded to stop in front of the Defendant's vehicle; chased after the Defendant for 2 1/2 blocks; returned to the police vehicle and the Defendant's vehicle; contacted other officers; apprised other officers of the situation; contacted Gary Wuitschick to impound; and then, the vehicle was impounded and towed to the Harvey Armory. [A. at 85] There was a **series of events and time** between the impound and tow all after the attempt to effect a traffic stop at 12:07 AM because Officer Balfour's statements provide that the Defendant's vehicle was not even stopped at 12:07 AM, and thus, the Defendant's vehicle was not "seized" at 12:07 AM. [Appellee Brief at 14]

The Officer never testified that without the interrogation of the Defendant that he could not identify the Defendant, [Appellee Brief at 11], but rather Officer Balfour said that he had the license check, the description of the male he viewed at

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the scene, and he believed it to be the Defendant, [Tr. at 41] but he did not "know" it was the Defendant and so, he wanted to double check with talking to the Defendant to make sure the vehicle was not stolen. [Tr. at 62]

ARGUMENT

THE PROSECUTION HAS PROPERLY PRESERVED ITS RIGHT TO APPEAL FROM THE ORDER OF SUPPRESSION.

Section 29-28-07 of the North Dakota Century Code does not require that the separate statement be contained only in one document. The City provided a separate statement from the Notice of Appeal, when the City filed all of the documents inconjunction with the Notice of Continuance and Motion for Continuance, and the requested jury instructions, and **all** the documents comprise the "statement" as required by NDCC § 29-28-07(5) and this includes the Affidavit by the City Attorney. [A. at 27-37] The Motion to Continue was to continue the entire proceedings as the charges were jointly criminal and administrative, and thus, the continuance and appeal were together for both the criminal and administrative charges. [See Addendum of attached letters from City, Court and Defense Counsel]. Thus, the City has filed a separate "statement" " as required by NDCC § 29-28-07(5) and the statement was properly filed and served.

The City indicated that the evidence relating to alcohol was material to the Plaintiff's case in chief by providing what evidence the Order suppressed, and also the statements in the Plaintiff's request for jury instructions, and the specific statement contained in one jury instruction. [A. at 34, 37] While the Plaintiff did not use the words "the evidence is a substantial proof of a fact material in the proceeding" the Plaintiff used similar words and stated that the alcohol evidence and alcohol statements were material to prove the Plaintiff's case. When the Plaintiff stated that "the Plaintiff would not be able to properly present the charges against the Defendant" [A. at 32] the Plaintiff was inferring that the evidence is a substantial proof of the charges, and thus, is a material fact to the proceeding.

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The prosecuting attorney did not use the specific words that the appeal is not taken for the purposes of delay, but rather, the City Attorney provided reasons that explained the appeal was not to delay the trial. The City Attorney stated the purpose of the appeal was necessary before the trial by stating that the Plaintiff was concerned about the attachment of Double Jeopardy and that if the trial was held as scheduled, there would not be sufficient time to appeal. [A. at 31-32]

The Appellee appears to want a mere paraphrase of the statutory language, but the City has provided substance to its "statement" and provided various documents as a "statement" with the Notice of Appeal as required by the Court. See State v. Frank, 350 N.W.2d 596 (ND 1984) and State v. Schindele, 540 N.W.2d 139, 141 (ND 1995). Since the City has made a "statement," the State's right to appeal should be viewed favorably by the Court. See State v. Anderson, 353 N.W.2d 324 (ND 1984). The City has properly evaluated and explained the effects of the suppression order, as the Minor in Possession charges were referenced as dismissed charges, and the Plaintiff offered jury instructions regarding a dismissal of some of the charges, as well as, impeachment by an inadmissible statement (listing the statements relating to the alcohol in the pickup) and these supported the Notice of Appeal. [A. 34,36,37] See State v. Rambousek, 358 N.W.2d 223, 226 (ND 1984). Thus, the City has properly preserved its right to appeal from the order of Suppression and this appeal should not be dismissed.

THE COURT ERRED IN DENYING THE ADMISSION OF TESTIMONY ABOUT THE DEFENDANT'S PRIOR MINOR IN POSSESSION OF ALCOHOL CONVICTION AS EVIDENCE OF THE DEFENDANT'S KNOWLEDGE AND VOLUNTARINESS IN MAKING ADMISSIONS IN THIS CASE, AND OFFICER BALFOUR'S KNOWLEDGE OF THE DEFENDANT'S CONVICTION.

The Appellee incorrectly states the issue as an admission of Exhibit 10, which was admitted, but the City appeals the inadmissibility of the statements about the prior conviction as the Court stated "I will not consider any evidence given in

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response to [Ms. Trosen's] question [about a prior conviction]" because the Court found that "the evidence had nothing to do with voluntariness," and the Court concluded "I'm sustaining your earlier objection about prior conviction and ruling that's inadmissible evidence." [Tr. at 63] The Trial Court found Officer Balfour's knowledge of the prior conviction as inadmissible, and the City appeals this ruling. The City appeals the ruling as the Court incorrectly stated that the reason for the testimony and statements were only for voluntariness, when the City also stated that the statements were for knowledge, state of mind, and voluntariness. [Tr. at 32] The City also appeals the weight given by the trial court to Exhibit 10 because by denying that the prior conviction is evidence of voluntariness, the trial Court, in effect, found that the Exhibit was inadmissible as to voluntariness, and this may be reviewed by this Court. See City of Fargo vs. Thompson, 520 N.W.2d 578, 580 (ND 1994) (providing that the Court may review a decision that goes against the manifest weight of the evidence).

The Court did not rule that the statements made by Fettig were admissible because the Court found any statements dealing with alcohol as inadmissible. The specific knowledge about the minor in possession by both the Defendant and Officer Balfour is an independent source and proof that it was voluntary and an act of free will of the Defendant to admit to the alcohol in his pickup. [Tr. at 29]. [See Brown v. Illinois, 422 U.S. 590 (1975) (providing that the taint of an illegal arrest is purged if the statement is voluntary and the act of free will)]. Rather the Court erred in suppressing the evidence of the prior minor in possession conviction evidence and found instead that the Defendant's statements were fruit of the poisonous tree and inadmissible. [A. at 20, 23]. The Court refused to consider the independent source of Officer Balfour's knowledge of the Defendant's minor in possession conviction that would purge the primary taint of the illegal search because the Court found that the conviction of the Defendant did not provide any evidence of

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voluntariness and found it was inadmissible. [Tr. at 63]. [A. at 20, 23 citing In the Interest of M.D.J., 285 N.W.2d 558, 563 (N.D. 1979) (citing Wong Sun v. United States, 371 U.S. 471 (1963)]. The City argues rather that Officer Balfour would have known to ask the Defendant why he fled from the vehicle because Officer Balfour knew that the Defendant had been convicted of a minor in possession, and thus, this is an independent source for the Defendant's statements that he had alcohol in his pickup, and the testimony evidence of the prior conviction should have been admissible for that purpose. See State v. Gregg, 2000 ND 154 ¶ 41 615 N.W.2d 515 (ND 2000) (providing that evidence cannot be suppressed as fruit of the poison tree unless the government's illegal action is at least the "but for" cause of the later discovery of the evidence). The intervening actions of the Defendant in fleeing the scene and the willful act of abandoning the vehicle provide the intervening circumstances that lead to the Defendant's confession, and not from misuse of the earlier illegal search. See State v. Saavedra, 396 N.W.2d 304, 305 (N.D. 1986). Thus, the confession by the Defendant to having alcohol in the pickup also should not have been suppressed.

THE TRIAL COURT ERRED WHEN IT GRANTED THE MOTION TO SUPPRESS THE EVIDENCE TAKEN FROM THE SEARCHED TRUCK AND THE ADMISSIONS OF SUCH ITEMS DURING LATER INTERROGATION.

The Appellee tries to argue that once the first contraband was found, the officer was obligated to cease his search and obtain a search warrant [Appellee Brief at 11], but the North Dakota Supreme Court stated that a search warrant is not required to search an impounded vehicle because the police are only doing later what they could have done at the scene. State v. Garrett, 1998 ND 173 ¶ 18, 26, 584 N.W.2d 502, 506, 508 (ND 1998). An inventory search is valid as long as the vehicle was properly impounded and the search was according to standard police procedure. Id. at ¶ 18, at 506. The Court did not state that a search had to cease and obtain a search warrant for an inventory search to be valid. The record is clear in

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this case that the vehicle was properly impounded for various reasons including the statutory authority for the illegal parking [Tr. at 42], an abandoned vehicle as Fettig ran away [Tr. at 28-29], and officer safety [Tr. at 66-67]. It is clear that there was some exigent circumstances that required the impounding of the vehicle, and that the search be conducted other than at the location of the initial stop because it was dark, the suspect was at large, the vehicle was in the middle of the street, the vehicle is mobile, and the Defendant admitted he still had the keys to the pickup, [Tr. at 101], the area was not secure, it was in the middle of winter, and the Harvey Armory is not a completely secure environment, and it was not because the Officer wanted to go deer hunting in a few hours [Tr. at 78-79], because Officer Balfour completed his shift from 6 p.m. until 6 a.m. [Tr. at 87-88], and later went out to talk to Fettig.

The testimony by Officer Balfour that the search was to inventory the contents of the truck is not directly contrary to his deposition because Officer Balfour stated in his deposition that the impounded vehicle was not a secure environment [Balfour Depo. at 26] and he also described how he bagged and labeled the evidence they removed and took to the police station [Balfour Depo. at 28] and this was later described at the hearing as the inventory search procedure, [Tr. at 10]. Plaintiff's Exhibits 1-9 provide the labeled items and labels [A. at 3] and Defense Exhibits E-F provide the Daily Log [A. at 4] and Officer's Report [A. at 85-86] At no time during the deposition of Officer Balfour did Defense Attorney ask any questions regarding inventory searches or prior impounding of vehicles, but at the hearing Officer Balfour explained that every time a vehicle is impounded an inventory search is conducted, [Tr. at 7, 10], as is supported by Officer Brower's Deposition at page 14. The Appellee states that "Officer Balfour was the lead officer and made the decisions in this case" [Appellee Brief at 11], but Officer Balfour was told by Chief to impound the vehicle [Tr. at 7] and Officer Brower told him to do an inventory search [Tr. at 35], and it is police policy to conduct an

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inventory search after a vehicle is impounded [Tr. at 7 and Officer Brower Depo. at 14] Officer Balfour was following commands of his Chief and a senior Officer, and standard Harvey police policy when he impounded and searched the vehicle.

Officer Brower indicated the inventory procedure was that you take everything out of the vehicle that you find, and then, you catalog it, then, the property is returned. [Brower Depo. at 13] Officer Balfour explained that there is no inventory list or evidence labels, and that they have never made a specific inventory list, but rather that the labels on the evidence, and the list of the evidence was the only list or catalog he ever made. [Tr. at 47] There is no indication that Officer Balfour found other items of value, as a perfume bottle is of little value, and he stated that he attempted to remove all items of value. [Tr. at 10] Officer Balfour also stated that he wrote the labeled items in his daily log (Defense Exhibit E), [Tr. at 81-82] and then, the daily log and labels are used to provide a police report [A. at 85-86], which is also a list of the items. [Tr. at 77] Officer Balfour also explained that he believed he removed valuables, secured them, labeled them, and placed them into the police department. [Tr. at 10] The money and check book were in the police department as per Plaintiff's Exhibit 1. Officer Balfour explained that he was never told to make a separate inventory list, other than evidence, when conducting an inventory search, but items removed are labeled. [Tr. at 47]

This Court has found that such reasonable police regulations relating to inventory procedures administered in good faith are permissible under the Fourth Amendment. Gregg, at ¶ 36, 615 N.W.2d 515, (citing State v. Kunkel, 455 N.W.2d 208, 211 (N.D. 1990) (citations omitted). Officer Balfour conducted an inventory search in good faith following what he believed was standard police procedures, which means that he removed all deemed valuables, all illegal evidence, and tagged every item removed, and then, secured it in the locked police station. The locked police station is secure because only the City of Harvey Police Officers have keys to

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enter the police station. Plus, Officer Balfour then listed all of the valuables that were removed in his Officer's report, and thus, there was an inventory of all of the items of the search. Such inventory searches have been found to be valid. See Colorado v. Bertine, 479 U.S. 367, 383 (1987) (stating that the majority approved an inventory search even though the officer failed to list cash, credit cards, and other valuable items on the inventory form that were discovered in the search). See also, United States v. Cecala, No. 99-4049, 2000 WL 18948 (10th Cir. Jan. 12, 2000) (unpublished opinion) (stating that the failure to add contents of suitcase to inventory list did not affect validity of search where contents were noted in police report). The impounding of the Defendant's pickup in this case was not done for the sole purpose of investigation, and thus, the "inventory search does not somehow become illegal upon the discovery of incriminating objects which do not take the police by complete surprise." Kunkel. 455 N.W.2d, 208, 212.

The City also wants this Court to consider the Trial Court's contradiction in finding that the Search was illegal because the Officer knew there was alcohol in the Defendant's pickup and was looking for contraband (alcohol), but, even though the Defendant's statements were not a ***Miranda*** violation as they were voluntary and freely given, the Defendant's statements regarding alcohol are inadmissible because Officer Balfour would not have known about the alcohol but for the illegal search (i.e. "fruit of the poison tree"). How does Officer Balfour have this knowledge of the alcohol and this causes the search to be illegal, but then, Officer Balfour has no knowledge of the alcohol, and this causes the statements to be inadmissible?

None of the evidence should be suppressed as the search was a valid good faith inventory search based upon probable cause and a valid statutory impoundment of Fettig's pickup, and all of the statements should be admissible because the statements were voluntary and freely given and purge any taint of illegal activity. Also, the evidence would have been discovered either by the independent source of

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(701) 324-2583

the identity of Fettig (license plate check, physical description), or the inevitable discovery from Fettig's confession regarding the alcohol. These doctrines apply when the fruit of the poison tree doctrine puts the police in a ***worse*** position than they would have been if there would have been no police error or misconduct. See State v. Winkler, 552 N.W.2d 347 (N.D. 1996). Suppressing the evidence and statements put the police in a worse position than they would have been if there had been no alleged illegal search and no alleged exploitation by Officer Balfour.

CONCLUSION

The District Court's suppression of the evidence was manifestly contrary to both the evidence adduced at the depositions, and at the suppression hearing and the great weight of the authority on the issues of inventory searches, inevitable discovery, and the attenuation exception, and that willful acts and any voluntary statements purge the taint of any illegal activity or government exploitation. Therefore, the City of Harvey urges that Court on appeal to make a full review of the District Court's erroneous determinations, and in doing so, to reverse the District Court's ruling from the bench, which suppressed the evidence relating to the Defendant's conviction for minor in possession of alcohol, to reverse the District Court's order, which ordered the suppression of the evidence obtained as a result of a warrantless search of the Defendant's vehicle by Officer Balfour, and ordered the suppression of the admissions made by the Defendant to Officer Balfour that he had in his possession three (3) cans of Bud Light Beer.

Respectfully Submitted:

Dated: October 25, 2000

Kathleen K. Trosen

Kathleen K. Trosen (ND ID 05365)
City of Harvey, City Attorney
120 West 9th Street
Harvey, ND 58341
(701) 324-2583
Attorney for Appellant

TROSEN LAW FIRM
120 West 9th Street
HARVEY, ND 58341
(701) 324-2583

Kathleen K. Trosen
Licensed in ND & MN
Admitted to Federal Bar

Phone: (701) 324-2583

Trosen Law Firm
Attorney at Law
120 9th Street West
Harvey, ND 58341

Julie C. Goldade
Legal Assistant

Fax: (701) 324-2584

June 14, 2000

SENT VIA FAX #701-251-1006

Honorable Judge John Greenwood
Judge of the District Court
511 Second Avenue SE
Jamestown, ND 58401

RE: City of Harvey vs. Kyle Fettig
Criminal Case #99K-282

Dear Judge Greenwood:

I am writing to inquire about the status of the non-criminal offenses of Care Required, and Open Bottle, as charged against Kyle Fettig. Your Clerk initially raised the issue that we need to try these offenses within 90 days, and so, I am wondering what was decided about those charges. It was my understanding that I made a Motion to Continue so as to continue those charges, as well as, the criminal charges of Fleeing and Minor in Possession. Mr. McIntee indicated that he thought that a continuance was automatic because the Municipal/District Court lost jurisdiction because of the Notice of Appeal. Judge Goodman did not provide a ruling that answered the questions raised because he simply held a telephone hearing to address the immediate issue of whether or not the trial could begin on June 5, 2000, and there has been no written order, ruling or otherwise to clarify Judge Goodman's ruling.

At this time, I am requesting that the Court provide some sort of ruling or Order to clarify the status of this case. I believe it is necessary for the City to know the status before a proper appeal may be filed, and before the question or questions may be certified for Appeal. If the non-criminal charges are not continued, then, we need to set up a trial date and I expect that the Court will dismiss the Open Bottle charge due to the Order to Suppress the alcohol discovered in the search. If these charges are continued, I believe an Order is necessary so that the Defendant will not argue that these charges were not timely heard under his speedy trial rights. I believe an Order, ruling, or some sort of documentation is necessary and must be issued from the Court so as to properly maintain a documented record of these proceedings and decisions. It is, of course, my argument that these non-criminal charges must be continued as the City will be prevented from bringing the Open Bottle charge if the Order to suppress remains in place.

I am faxing this letter to the Court, Mr. McIntee and the Wells County Clerk, as well as, mailing a copy. I thought a fax was necessary because this is a timely issue and I need this information as soon as possible, so that I may certify the question for appeal, and also, brief the legal arguments for appeal. Thus, I would greatly appreciate your prompt attention to this matter and a quick response to this request for clarification and a status report.

Thank you.

Sincerely,

Kathleen K. Trosen

Kathleen K. Trosen
City Attorney

KKT/jcg

cc: Michael McIntee, Fax (701) 537-5435
Cheryl Colby, Wells County Clerk of Court, Fax (701) 547-3719

STATE OF NORTH DAKOTA

Southeast Judicial District

511 2nd Ave. S.E. · Jamestown, North Dakota 58401
Phone: 701-252-9044 - Fax: 701-251-1006

Hon. John E. Greenwood
District Court Judge

Arnold E. Strand
Court Reporter

June 22, 2000

Ms. Kathleen K. Trosen
Attorney at Law
120 9th Street West
Harvey, ND 58341
Fax: 701-324-2584

Mr. Michael S. McIntee
Attorney at Law
P.O. Box 90
Towner, ND 58788-0090
Fax: 701-537-5435

Re: City of Harvey v. Kyle Fettig
Wells County Court Case No. 99K282

Dear Counsel:

This is in response to Ms. Trosen's fax of June 14, 2000. It was always my position that the administrative traffic matters be held within the 90 days as set forth in the statute. It was only by agreement of the parties that I allowed the evidence regarding those matters be presented at the time of the presentation of evidence to the jury, with the Court ruling based on that evidence. The City chose to include criminal and civil matters in one complaint, which is now on appeal. I do not believe that I have jurisdiction over the file because of the appeal. If the City and the defendant can separate the Care Required, (Count I); and Open Bottle Law, (Count III), from the Complaint on appeal I would attempt to schedule them for trial as soon as possible. Although, it appears Ms. Trosen is asking for a continuance on Count III because of the Court's ruling on the suppression motion.

I would appreciate a response from counsel as to the status of the various counts and what effect the appeal has on the civil traffic charges.

Sincerely,

John E. Greenwood

JEG:aes
cc Clerk

JOSEPH C. McINTEE (1920-1988)
MICHAEL S. McINTEE*
*(Also Licensed in Montana)

McINTEE LAW FIRM

Rec 6-29-00

207 MAIN STREET SOUTH
P.O. BOX 90
TOWNER, ND 58788-0090
OFFICE PHONE: 701-537-5425
TELECOPIER: 701-537-5435

116 WEST 5TH
BOTTINEAU, ND 58318
OFFICE PHONE: (701) 228-3624
TELECOPIER: 701-228-3625

June 29, 2000

Hon. John Greenwood
District Judge
511 2nd Ave. SE
Jamestown, ND 58401

Via Facsimile: 701-251-1006

Dear Judge Greenwood:

I am writing in response to your letter of June 22, 2000.

It is my opinion that everything is on hold regarding the various counts.

I don't believe these cases can be tried independently from the other.

Sincerely,
MCINTEE LAW FIRM

Michael S. McIntee
MsMc:jf

cc: Kathleen Trosen via Facsimile
Kyle Fettig