IN THE SUPREME COURT 20090391

FOR THE STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,

APPELLEE,

VS S. CT. NO. 20090391

LA VERNE KOENIG, DIS. CT. NO. 08-K-00331

APPELLANT.

PETITION FOR REHEARING

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FACTUAL STATEMENT AND STATEMENT OF CASE

The facts are those set forth in Appellants Appeal Brief, the Appellate Addendum and by reference thereto by incorporation, as if fully set forth hereinafter.

STANDARD OF REVIEW

The "clearly erroneous" standard of review under an erroneous view of controlling legal principles is the proper standard. **Pullman-Standard v. Swint**, 456 U. S. 273 (1982). The courts have misconstrued the record and thereafter have arbitrarily and unreasonably, misinterpreted and misapplied the law. A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or misinterprets or misapplies the law. **State v. Ness**, 2009 ND 182, 774 N. W. 2d 254. Appellants appeal was arbitrarily denied pursuant to N.D.R.App. P. Rule 35.1(a)(1),(3), and (4).

The legal definition of "frivolous" as found in Black's Law Dictionary, Sixth Edition, 1990, states:

"A claim or defense is frivolous if a proponent can present no rational argument based upon the evidence or law in support of that claim or defense." **Liebowitz v. Aimexco Inc.**, Colo. App.. 701 P. 2d 140, 142. ***Id*** Blacks Law Dictionary, at page 668.

The record proves that Appellant can and has presented rational argument based upon the evidence and of which, the law clearly and fully supports that defense. This Courts decision is "clearly erroneous" under controlling Supreme Court legal principles.

THE COMPLAINT: The North Dakota Legislature has afforded its citizens greater protections, than afforded by the State or Federal Constitutions, [**In the Interest of D.S.**, 263 N. W. 2d 114, 119 (N.D. 1978)] by mandatory requiring "COMPLAINTS" to contain Six specific elements. NDCC 29-05-01. The word "must" as ordinarily used

indicates a mandatory duty. **Federal Land Bank of St. Paul v. Waltz**, 423 N. W. 2d 799, 802 (N.D. 1988). NDCC 1-02-07. *Cf.* **Anderson v. Yungkau**, 329 U. S. 482, 67 S. Ct. 428 (1947)(Words like 'must' and 'shall' are ordinarily 'The language of command').

A specific statute controls a general statute. **Johnson v. Nodak Mut. Ins. Co.**, 2005 ND 112, 699 N. W. 2d 45. We must presume that [the] legislature says in a statute what it means and means in a statute what it says there. **Dodd v. United States**, 545 U. S. 353, 357-59, 125 S. Ct. 2478, 2482-83. Supreme Court interprets statutes to give meaning and effect to every word, phrase, and sentence, and it does not adopt a construction that would render part of a statute mere surplus age. **State v. Backmeier**, 2007 ND 42, 729 N. W. 2d 141. When wording of statute is clear and free of all ambiguity, letter of statute cannot be disregarded under pretext of pursuing its spirit, the Supreme Court cannot invade providence of legislature when legislature has so clearly spoken. **In the Interest of D.S.**, 263 N. W. 2d 114, 119 (N.D. 1978).

Without a legally sufficient Complaint, A court lacks subject matter jurisdiction. A judgment entered by a court lacking jurisdiction is legally void. Subject matter jurisdiction properly comprehended refers to a tribunal's 'power to hear a case' and 'can never be forfeited or waived.' **Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers & Trainmen,** 130 S. Ct. 584 (2009). Whether a court has subject matter jurisdiction is a question which can be raised at any time, even of a court's own accord. **City of Grand Forks, v. Thong**, 2002 ND 48 Par 9, 640 N. W. 2d 721. A judgment or order entered without the requisite jurisdiction is void. **Albrecht v. Metro Area Ambulance**, 1998 ND 132 Par 11, 580 N. W. 2d 583.

The record further proves ***lack of "personal jurisdiction."*** The preliminary hearings held on October 29, 2008, proves that Appellant was never served a copy of the complaint; never served with a summons to appear; never arrested for any offense, and at the time of the plea, had not been served, nor received a copy of the complaint. *See* Record, [proceedings held on October 29-Judge Irby presiding]. Lack of personal service, renders a judgment void. **Sanderson v. Walsh County**, 2006 ND 83, Par. 13, 712 N. W. 2d 842, 847, Par. 13.

Federal Rules of Criminal Procedure, Rule 4, which the State patterned its Rule 4 after, specifically requires personal service of process of the complaint, or summons, or an arrest warrant. *See* also Notes of Advisory Committee on Rules, Note to Subdivision (c) (3). Par. 2. Federal Rules also require a defendant have been served a copy of the complaint prior to the taking of a plea. *See e.g.,* **Regional Agricultural Credit Corp v. Stewart**, 69 N.D. 694, 289 N.W. 801 (N.D. 1940) (Courts of North Dakota take judicial notice of the laws of the United States and their scope, whenever such laws are involved in the trial of cases). *Id* at 803. *Cf.* **State ex rel Stenehjem v. Freeeats.Com.,** 2006 ND 84, Par 19; 712 N. W. 2d 828, (state law is preempted when it conflicts with federal law)(when language of federal statute is plain, sole function of courts, is to enforce it according to its terms). The Courts lacked all jurisdiction in Appellants case. **NDCC 47-26-01**, is unconstitutionally vague and overbroad. Said statute violates the dictates of **Kolender v. Lawson**, 461 U. S. 352, 359 (1982). The testimony of Deputy Hunt, was in effect he was criminally trespassing upon Defendants property at the time he took the photographs. JT 118-126; 138-148. **Wong Sun v. United States**, 371 U.S. 471

(1963) required its suppression and exclusion from the trial, as the fruit of illegal activity by law enforcement. *Cf.* **State v. Oien**, 2006 ND 138, Par. 8, 717 N.W. 2d 593.(same). Mere suspicion of criminal activity, does not rise to a level of probable cause to search. **State v. Ebel**, 2006 ND 212, Par. 14, 723 N. W. 2d 375.

As Chief Justice Vande Welle represented, cattle walk through ditches; a ditch would not control cattle without wires placed upon it. NDCC 47-26-01 makes no reference to "cattle" or that "wires be placed upon ditches" to constitute a legal fence.

We will not interpret a statute as though language not present should have been added. **Haggard v. Meier**, 368 N. W. 2d 539, 541 (N.D. 1985); We will not add words or additional meaning to a statute. **First Union Nat. Bank v. RPB 2, LLC**, 2004 ND 29, 674 N. W. 2d 1, 7 Par. 17. The Court is not free to rewrite the Statute that Congress has enacted. **Dodd v. United States**, supra, U.S at 359, S. Ct. at 2483. The State Legislature made no reference to any other Statute; to "cattle" ; or placed any limiting effect upon Ditches, e.g., requiring "wires be placed thereupon" in implementing NDCC 47-26-01, thus it must stand along. It makes no reference that it is a "criminal statute." Further, Subsection 3, of NDCC 47-26-01 violates the Fifth Amendment, compulsory self-incrimination provisions. *Cf.* **Michigan v. Tucker**, 417 U. S. 433. 94 S. Ct. 2357 (1974); the Fourth Amendment, **Wong Sun** supra. NDCC 47-26-01 is unconstitutional.

JUDGE CORWIN LACK OF JURISDICTION: This Court is "clearly erroneous" in its contention that Appellant did not raise a timely objection under the statute in the trial court assigning a different district judge. This conclusion is clearly contrary to the record. JT 7-14. This is clearly erroneous under prevailing Supreme court case law.

A controlling legal principle, may constitute a prior decision on the specific issue; or a Statute specifically addressing the issue. **State v. Zueger**, 459 N. W. 2d 235 (N.D. 1990), specifically addresses the issue and the State Statute at issue, N.D.C.C. 29-15-21.

In **Zueger**, this Court held a number of important issues applicable to NDCC 29-15-21. ***First***, it determined that "Under our law, a party is entitled to a peremptory challenge of an assigned judge, without alleging bias or prejudice." ***Second***, it determined, "[T]he party seeking to disqualify a judge must file a timely request before that judge has ruled upon any matter pertaining to the case. NDCC 29-15-21(2), (4)." ***Id*** at 236.

Third, the **Zueger** Court ***did not*** address the clear express intent of the State Legislature, in its Statutory enactment of NDCC 29-15-21(8) that the assignment or reassignment of cases is only statutorily authorized by the Presiding Judge of the District. ***Id*** NDCC 29-15-21(8). In construing statutes, the law is what is said, not what is unsaid, and the mention of one thing implies exclusion of another. **Sanderson v. Walsh County**, 2006 ND 83, 712 N. W. 2d 842. When the statute's language is plain, the sole function of the courts, is to enforce it according to its terms. **Dodd v. United States**, 545 U. S. 353, 357-59, 125 S. Ct. 2478, 2482-83 (2005). The function of the courts is to interpret the law, not to legislate, "regardless of how much we might desire to do so or how worthy an argument." **Sweeney v. Sweeney**, 2006 ND 29, 709 N. W. 2d 4, Par. 12. If the rule is wrong, the legislature has ample power to change it, but the duty of the judiciary is to enforce the law as it exists. **Olson v. Workforce Safety & Ins.**, 2008 ND 59, 747 N. W. 2d 71, 78 Par. 23. When a statute is clear and unambiguous "it is improper for courts to attempt to go behind the express terms of the provision so as to legislate that

which the words of the statute do not themselves provide." **Cervantes v. Drayton Foods, LLC**, 1998 ND 138, Par. 9, 582 N. W. 2d 2. **Zueger**, and NDCC 29-15-21(8) controls here. Appellants motion to disqualify Judge Corwin was "timely" made. It was made "prior to any ruling affecting matters before the court". *See* JT page 7-13. **Zueger** further presents an Equal Protection of Law issue, Appellant similarly situated, has an equal protection right that **Zueger's** protections apply to him equally.

Appellant had the right to not only challenge Judge Corwin reassignment order, as it clearly violated NDCC 29-15-21(8) [being ***he is not the presiding judge of the circuit***], but also an entitlement to his disqualification as he had "made no rulings pertaining to the case" and Appellant was "entitled to a peremptory challenge ...without alleging bias or prejudice." **Zueger**, supra. NDCC 29-15-21(2),(4). The State has presented no evidence to justify the arbitrary, discriminatory denial of equal treatment under the law, nor the denial of the fundamental substantive rights attached to the original scheduling Order dated October 29, 2008 assigning the case to Judge Marquat. NDCC 29-15-21(8), is a stringent procedural requirement that is clear and not absurd. ***E.g.*** **Dodd**, supra, U.S. at 359, S. Ct. at 2483. **Sanderson**, clearly excluded Judge Corwin authority to reassign the case to himself. ***E.g.***, the statute's "mention of one thing implies the exclusion of another". The State Legislatures intent in NDCC 29-15-21(8) , is clear and express, that clear and express language are rights that are not to be narrowed by technical interpretation, or sacrificed to mere expediency. **Moore v. Dempsey**, 261 U. S. 520. Since the legislatures intent is clear, court must give effect to that intent. **Miller v. French**, 530 U.S. 327, 120 S. Ct. 2246 (2000). This Court has "clearly and erroneously

abused its discretion" in its misinterpretation and misapplication of controlling, and well established Supreme Court case law. Judge Corwin acted in total disregard of controlling legal precedent, violating appellants Due Process and Equal Protection of law rights.

More natural reading of statute's text which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight. **United Food & Commercial Works Union Local 751 v. Brown Group, Inc,** 517 U. S. 544, 116 S. Ct. 1529 (1996). ***Id*** U.S. at 550, S. Ct. at 1533.

It is not within the province of courts to restrict statutory rights. **KulmCredit Union v. Harter**, 157 N.W. 2d 700 (N.D. 1968). Judge Corwin acted without all jurisdiction.

THE ISSUE OF THE EVIDENCE: The primary issue is "***inadmissibility of the evidence***" which, when properly excluded, and suppressed, the record would thereafter contain insufficient evidence to sustain a conviction. The evidence contained in the record, was in fact, clearly inadmissible under controlling legal principles. **Wong Sun v. United States**, 371 U. S. 471 (1963). **Wong Sun** requires exclusion of evidence, whether testimonial or documental, that was the fruit of illegal activity by law enforcement. The Courts have continuously subscribed to **Wong Sun's** decision. **United States v. Parker**, 587 F. 3d 871 (8th Cir. 2009) **In the Interest of D.S.,** 263 N. W. 2d 114 (N.D. 1978); ; **State v. Ressler**, 2005 ND 140, Par. 24. 701 N. W. 2d 915, 923; **State v. Gay**, 2008 ND 84, Par 18 748 N. W. 2d 408, 415.

A state court decision is "contrary to" clearly established federal law, as stated by the Supreme Court of the United States, where "the state court arrives at a conclusion opposite to that reached by [the] Supreme Court on a question of law or if the state court

decides a case differently than [the] Supreme Court has on a set of materially indistinguishable facts. **Williams v. Locke**, 403 F. 3d 1022 (8th Cir. 2005)(**Williams v. Taylor**, 529 U. S. 362, 413, 120 S. Ct. 1495 (2000). Court appointed defense counsel failed to litigate the Fourth Amendment issue, had he done so, the evidence would have been suppressed, and the State would have had no evidence to support the State in pursuing the charges. The facts Deputy Hunt was trespassing; Appellants property is completely enclosed by fence; a closed gate to the Appellants rural residence and entrance onto his property; attached to that closed gate was a STOP sign. These facts clearly gives appellant a "reasonable expectation of privacy," which, "excludes the public and all others." Deputy Hunt entered Appellants property on its far side, passing through [climbing over the fence] the fenced enclosure, trespassed thereon and thereafter took photographs of the fence between Appellants property and a neighbor. These photographs. were illegally taken and should have been suppressed. Additionally, another law enforcement officer testified that he had never personally seen the fences, [that compromised States Exhibits 4-8]; that he did not know who took them; that he did not know when they were taken. This was clearly inadmissible, prejudicial hearsay evidence, should have been suppressed. Federal Rules of Evidence, Rule 602 control. ***See*** facts in Appeal Brief, pages 23-26. Under the Supremacy Clause, the laws of the United States are the supreme law of the land, and state law that conflicts with federal law is without effect. **State ex rel. Stenehjem v. Freeeats.Com, Inc.**, 2006 ND 84, 712 N. W. 2d 828. Suppression of the illegal evidence, no evidence existed to convict.

RIGHT TO COUNSEL ALL STAGES OF PROCEEDINGS, INCLUDING

DIRECT APPEAL: North Dakota Constitution may provide more protections to its citizens than the federal Constitution. **City of Bismarck v. Fettig**, 1999 ND 193, Par. 7, 609 N. W. 2d 247, 250; State Legislature, by statutory enactment, can provide even greater relief or protections to its citizens, than either the State or Federal Constitution. **State v Carmody**, 243 N. W. 2d 348 (N.D. 1976). NDCC 29-01-06 is clearly a greater right, (rights of Defendant-- to defend in person ***and*** with counsel). **Dodd**, supra mandates the Court recognize that the Legislature said what they meant, they meant what they said. The right to "hybrid representation" is the clear law of the State of North Dakota.

Clearly established Supreme Court decisions, an attorney must act as an effective advocate of his clients cause, not as amicus curiae. **Entsminger v. State of Iowa,** 386 U. S. 748, 87 S. Ct. 1402 (1967); an indigent is entitled to appointment of counsel to assist him on his first appeal. **Douglas v. State**, 372 U.S. 353, 83 S. Ct. 814 (1963) ; **Evitts v. Lucey**, 469 U. S. 387, 105 S. Ct. 830 (1985) (criminal defendant is entitled to effective assistance of counsel on first appeal as of right); **Carnley v. Cochran**, 369 U. S. 506, 82 S. Ct. 884 (1962) (record must show affirmative waiver of counsel-no presumption of waiver of right to counsel from silent record--right to counsel does not depend on a request) ***Id*** U. S. at 512-517, S. Ct. at 888-891. ***Cf.*** **Brewer v. Williams**, 430 U. S. 387, 97 S. Ct. 1232 (1977)(States burden to prove intentional relinquishment or abandonment of known right). The State [at Oral Argument] represented e.g. record silent on waiver. This would constitute a "clear abuse of discretion" by Judge Corwin. ***Cf.*** **State v. Harmon,** 1997 ND 233, 575 N. W. 2d 635(Court required to inquire on record reasons

for complaints about counsel). The record proves Mr. Dexheimer, the court appointed attorney, had an "actual conflict of interest". He was an assistant prosecuting attorney. The Fargo City Personnel records indicated he was still listed as assistant city attorney, as of September 2009. The jury trial was held July 30-31, 2009, he thereafter withdrew his representation in August, 2009.

The Supreme Court cases dealing with "conflict of counsel issues" have unanimously held that such conduct is prohibited. **Holloway v. Arkansas**, 435 U. S. 475, 98 S. Ct. 1173 (1978) (the 6th Amendment right to effective assistance of counsel encompasses the right to representation by an attorney who does not owe conflicting duties to other defendants). **Cuyler v. Sullivan**, 446 U. S. 335, 100 S. Ct. 1708(1980)(A defendant who shows that a conflict of interest affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief). ***See***, e.g., **Iowa Supreme Court Attorney Disciplinary Board v. Zenor**, 707 N. W. 2d 176 (IA 2005) (county attorneys conduct in simultaneously prosecuting and defending the same charges and engaging in criminal defense work while serving as county attorney warranted suspension of license to practice law); ***Id*** pages 179-183; **Ohio State Bar Association v. Wick**, 877 N.E. 2d 660 (Ohio 2007) (attorney who violated conflict of interest rule held public reprimand appropriate sanction) ***Id*** at 661-62. If no actual assistance of the accuser's defense is provided, the constitutional guarantee has been violated. **United States v. Cronic**, 466 U. S. 648. 104 S. Ct. 2039 (1984) The court recognized that "specific errors and omissions may be the focus of a claim of ineffective assistance as well." ***Id*** U.S. at 656-657, S. Ct. at 2045-46. ***Cf.*** **Wright v. Van Patten**, 552 U.S. 120, 128 S. Ct. 743 (2008); **City of**

Fargo v. Rockwell, 1999 ND 125, par 7, 597 N. W. 2d 406, 409 (denial of defendant's constitutional right to counsel requires reversal because prejudice is presumed).

The record proves that Judge Corwin clearly abused his discretion, he failed to protect Appellants right to counsel, impliedly waiving and denying Appellant of a federally protected right, through misinterpretation of the law. **Ohio Bell Telephone Co v. Public Utilities Commission of Ohio**, 301 U. S. 292. 57 S. Ct. 724 (1937) (Supreme Court will not presume acquiescence of loss of fundamental rights) ***Id*** at 306, S. Ct. at 731. ***Cf.*** **Carnley** supra. Defense counsels specific acts and omissions, failure to litigate the 4th Amendment issue, failure to exclude inadmissible, prejudicial hearsay evidence, amounts to ineffective assistance of counsel, where, but for counsels acts, no evidence would have existed to support the State pursuit of the charges.

This Court reliance on its decision in **State v. Blurton**, 2009 ND 144, 770 N. W. 2d 231, is misplaced. **Blurton**, clearly states "the complaining party must show ***some*** evidence in the record to support the claim. ***Id*** at 237 Par. 20. Appellants pro se appeal brief, clearly and plainly points out the evidence to show support for the claims. If this Court deems the record is inadequate, the proper remedy is to remand. In Appellants case, it is clear and plain. Counsel had an actual "conflict of interest" He was a prosecutor and defense counsel. State Courts may not limit nor deprive Criminal Defendants of the greater rights and protections, provided by the State Legislature, in enacting NDCC 29-06-01, without violating their Due Process and Equal Protection of law rights. The district court abused its discretion in refusing to appoint new counsel.

PRAYER FOR RELIEF: Appellant is entitled to relief requested in his Appeal Brief.

LaVerne Koenig

20090391

IN THE STATE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,

Appellee,

VS

LA VERNE KOENIG,

Appellant.

S. CT. NO. 20090391

AFFIDAVIT OF SERVICE

The undersigned Affiant states. deposes that a true and correct copy of:

Petition for Rehearing; Motion to Suspend Rules; Motion for Leave to file over length Petition for Rehearing, in the above entitled action was duly served upon the following, addressed as follows:

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By depositing in the United States Mail, postage prepaid on this 21 day of May. 2010

SUBSCRIBED AND SWORN BEFORE ME THIS 21 DAY OF May, 2010.

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Donna R Porter
NOTARY PUBLIC-
STATE OF NORTH DAKOTA

DONNA R PORTER
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My Comm. Expires July 17, 2014