20100025

IN THE SUPREME COURT

STATE OF NORTH DAKOTA



State of North Dakota,

Plaintiff-Appellee,

vs.

Jay Larry Hammer,

Defendant-Appellant.

Supreme Court No. 20100025

District Court No. 09-09-K-00450

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**BRIEF OF APPELLANT JAY LARRY HAMMER**

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APPEAL FROM CRIMINAL JUDGMENT OF THE DISTRICT COURT ENTERED ON DECEMBER 18, 2009 [PREDICATED UPON A CONDITIONAL PLEA], THE ARRAIGNMENT OF FEBRUARY 27, 2009, THE PRELIMINARY HEARING OF MARCH 26, 2009 AND APRIL 23, 2009, THE ORDER DENYING MOTION IN LIMINE AND THE MOTION TO SUPPRESS AND/OR DISMISS FILED ON OCTOBER 12, 2009, THE ORDER ALLOWING AMENDMENT OF THE PLEADINGS AND THE PRELIMINARY HEARING AND/OR ARRAIGNMENT OF NOVEMBER 12, 2009, THE ORDER DENYING DEFENDANT'S MOTION IN LIMINE TO EXCLUDE EVIDENCE OF INJURED WORKER STATUS ENTERED ON DECEMBER 18, 2009, AND THE ORDER DENYING DEFENDANT'S REQUESTED JURY INSTRUCTIONS.

CASS COUNTY DISTRICT COURT, EAST-CENTRAL JUDICIAL DISTRICT
HONORABLE GEORGIA DAWSON

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## ISSUES ON APPEAL

1. Does the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, or Article I, § 12, of the North Dakota Constitution, bar the criminal prosecution of Hammer because he had already been subject to the equivalent of criminal punishment by North Dakota Workforce Safety and Insurance?

2. Did the District Court err when it denied Hammer's Motion to Suppress certain bank records, and evidentiary fruits thereof, obtained by a Special Assistant Attorney General's Administrative Subpoena Duces Tecum(s), without prior notice or judicial oversight, for any one of the following reasons:

a. The evidence was unlawfully acquired, without a judicial or administrative search warrant, in violation of the Fourth Amendment to the Constitution of the United States of America, made applicable to North Dakota by the Fourteenth Amendment, and by Article I, Section 8 of the Constitution of North Dakota;

b. The evidence was unlawfully gathered by a Special Assistant Attorney General, without either (1) notice to Hammer, (2) judicial supervision, or (3) warrant, and is fruit of the poisonous tree subject to the exclusionary rule when the Special Assistant Attorney General acts as investigator, lawyer, witness, and prosecutor in violation of Fourth Amendment policies set forth in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971);

c. The evidence was illegally acquired by a Special Assistant Attorney General by issuing subpoena(s) without following procedures mandated by Chapter 28-32 of the North Dakota Century Code;

d. The discovery rules of the North Dakota Rules of Civil Procedure would not sanction the Special Assistant Attorney General's subpoena(s) because they were issued without notice;

e. The illegally obtained evidence is bank records, and neither Workforce Safety & Insurance, nor the Special Assistant Attorney General complied with the provisions of N.D.C.C. § 6-08.1-05;

f. Violating Fourth Amendment principles, the evidence was acquired by an illegal administrative search wherein the agency delved into matters beyond its authority, by broad and indefinite subpoenas, issued without compliance with procedural rules or law?

3. Was Hammer denied Due Process of Law, and the procedural protections of N.D.R.Crim.P. 47, when the District Court authorized the amendment of the Information three days before the scheduled trial?

4. Was Hammer deprived of legal defenses to the criminal prosecution for any one of the following reasons:

a. By the amendment of the Information three days before the scheduled trial thereby depriving/restricting HAMMER of the defense of "mistake of law";

b. By the District Court repudiating or rejecting Hammer's requested jury instructions;

c. By the District Court adopting Title 12.1's definition of "willfully" for the *mens rea* instead of the definition of "willfully" used in Fettig v. Workforce Safety an Insurance, 2007 ND 23, 728 N.W.2d 301;

d. By the District Court improperly excusing defective status reports that do not contain requisite language notifying injured workers of possible penalties for failure to report any work activities;

e. By the District Court not recognizing that income from the spouse is not material?

## STATEMENT OF THE CASE

This is an appeal from a Criminal Judgment of the District Court entered on December 18, 2009 [Predicated upon a Conditional Plea], and earlier proceedings including the following:

A. the Arraignment of February 27, 2009;

B. the Preliminary Hearing of March 26, 2009 and April 23, 2009;

C. the Order Denying Motion in Limine and the Motion to Suppress and/or Dismiss filed on October 12, 2009;

D. the Order Allowing Amendment of the Pleadings and the Preliminary Hearing and/or Arraignment of November 12, 2009;

E. the Order Denying Defendant's Motion in Limine to Exclude Evidence of Injured Worker Status entered on December 18, 2009; and

F. the Order Denying Defendant's Requested Jury Instructions.

Pursuant to the conditional plea entered, it was the intent of Appellant Jay Larry Hammer ["HAMMER"] to appeal from every adverse judicial decision arising out of the legal issue(s) raised by HAMMER in the underlying prosecution.

The State of North Dakota initiated the prosecution of HAMMER by Information

dated February 5, 2009 [Appendix, page 1] alleging two (2) felony counts. Count 1 alleged HAMMER had wilfully failed to report wages between April 13, 2007, and May 12, 2008, by "fail(ing) to report to WSI earnings from a mobile home repair business and from selling scrap metal." Count 2 alleged HAMMER had filed a false claim or false statement between the same dates by "receiv(ing) income from a mobile home repair business and selling scrap metal and wilfully fail(ing) to report the income to WSI."

HAMMER made an initial appearance on February 27, 2009, and objected to the fatally defective Information. Transcript of February 27, 2009, page 9.[1] HAMMER also posed an objection based upon "double jeopardy". 2/27/2009 Tr., ps. 9-10.

A preliminary hearing on the two (2) count Information was held on April 23, 2009. Special Assistant Attorney General Robin Forward, a staff attorney for Workforce Safety and Insurance ["WSI"], provided the only witness testimony. Special Assistant Attorney General Forward testified that he was not a magistrate, nor a judge, but rather a North Dakota licensed attorney responsible for preparing some of State's Exhibit #1 (Case Summary) [Appendix, pages 1-268; Docket Entry #17]. 4/23/2009 Tr., page 9. The staff attorney-witness testified that Workforce Safety and Insurance had made no attempt to obtain a search warrant to be issued by a magistrate or judge under the North Dakota Rules of Criminal Procedure, Constitution of the United States, or the Constitution of North Dakota. 4/23/2009 Tr., ps 9-10. Instead, *at a time that no administrative proceedings involving HAMMER*

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[1] Many of the objections were eliminated by the recent decision of the North Dakota Supreme Court in State of North Dakota v. Brown, 2009 ND 150, 771 N.W.2d 267.

*existed*, WSI's staff attorney signed four (4) non-discovery,[2] "investigative"[3] Administrative Subpoena Duce Tecum(s) [App., ps. 39-42 [July 31, 2007 - Harwood State Bank]; 43-46 [July 31, 2007 - First State Bank of ND]; 47-50 [June 10, 2008 - Harwood State Bank]; and 51-54 [June 10, 2008 - First State Bank of ND] to secure HAMMER'S bank records. 4/23/2009 Tr., ps. 9-13; 16.

None of the investigative subpoenas issued by Special Assistant Attorney General Forward were served upon HAMMER [4/23/2009 Tr., ps. 14-15], nor did HAMMER consent [4/23/2009 Tr., p. 17], but the results of the Administrative Subpoena Duces Tecum(s) were set forth in prepared tables within State's Exhibit #1. 4/23/2009 Tr., p. 19.

Special Assistant Attorney General Forward testified that HAMMER had been penalized by WSI's issuance of an Order whereby HAMMER had lost his payments and benefits, including his right to medical care. 4/23/2009 Tr., ps. 20-21. HAMMER asserted such penalty would invoke the Double Jeopardy Clause of the Constitution. 4/23/2009 Tr., ps. 21-22.

Upon receipt of State's Exhibit #1, and without inquiry of HAMMER of his intentions, the Court found probable cause and directed an arraignment take place. HAMMER objected to the Information,[4] plead not guilty, and HAMMER was released on bail. 4/23/2009 Tr., ps. 23-26.

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[2] 4/23/2009 Tr., p. 13.

[3] 4/23/2009 Tr., p. 16. See also, legal argument advanced by State of North Dakota; 8/12/2009 Tr., p. 10.

[4] See Footnote 1.

On June 10, 2009, HAMMER served a Motion in Limine, Motion to Suppress, and/or Motion to Dismiss which was the subject of a hearing on August 12, 2009. HAMMER'S motions sought the exclusion or suppression of documents intended to be used by the State of North Dakota including (1) the WSI Order of September 26, 2008, and its referenced exhibits, and (2) all checks or other documents concerning bank accounts obtained by WSI, or its attorneys, under or through any of the four (4) Administrative Subpoena Duces Tecum(s) signed and issued by Rob Forward, as Special Assistant Attorney General, and (3) all evidence of wages, payments, compensation, or other income arising out of his wife's business. App., p. 269. HAMMER'S motion for dismissal was predicated on his having been previously in jeopardy and punished by the State of North Dakota [WSI] "when his vested right to receive medical reimbursement for March 31, 2005 work related injury was taken away." App., p. 271.

Awaiting a judicial ruling on HAMMER'S motions, jury trial scheduled for September 1, 2009, was postponed; jury trial re-scheduled for October 1, 2009, was again postponed. On October 12, 2009, District Judge Dawson issued an Order Denying Motion in Limine, Motion to Suppress, and/or To Dismiss. Jury trial was re-scheduled for October 27, 2009.

On October 20, 2009, the State of North Dakota served a Notice of Hearing for October 23, 2009 – three (3) days later – on a Motion for Leave of Court to Take Deposition of Jolene Hammer [HAMMER'S spouse], and a Motion to Exclude Evidence Relating to Purported Mistake of Law. App., ps 279-283. On October 21, 2009, HAMMER filed his Response(s) to both motions. App., ps. 284-289.

At the onset of the untimely hearing [N.D.R.Crim.P. 47(c)], the State of North Dakota filed an Amended Information [App., p. 290], and made verbal request so to do. 10/23/2009 Tr., ps. 3-4. Despite HAMMER'S objection, and in an apparent belief that the State is "allowed as a matter of course" to file amended information(s), the District Court allowed the amendment – without even examining the document – based upon the State's *erroneous* representation there were no substantive changes in the charges lodged against HAMMER. 10/23/2009 Tr., ps. 4-6. When the District Court was required to actually examine the accepted Amended Information due to new objections raised by HAMMER, the District Judge discovered there were several substantive changes in the charges, but still allowed the amendment, canceled the re-re-rescheduled October 27, 2009, jury trial, and stated an intent to "schedule preliminary hearings on the new charges .." 10/23/2009 Tr., ps. 6-13; 14; 20. When HAMMER "protested the entire proceedings" based on Due Process of Law, the District Court threatened HAMMER with "the jury trial on Tuesday based on the Amended Information", which HAMMER noted "would be an even worse constitutional violation." 10/23/2009 Tr., p. 14. Extensive discussion occurred as to HAMMER'S defense of "mistake of law", and he was then again considered as having made his "initial appearance" [N.D.R.Crim.P. 5] on the Amended Information, with the preliminary hearing to be later scheduled. 10/23/2009 Tr., ps. 20-23.

A second preliminary hearing was held on November 12, 2009, with WSI Senior Claims Adjuster Jenny Toman providing the only testimony, and investigator-witness Special Assistant Attorney General Forward in attendance at counsel table having been "appointed as a special Cass County State's Attorney for purposes of this case". 11/12/200 Tr., ps. 4-5.

WSI Senior Claims Adjuster Toman testified that WSI had accepted HAMMER'S claim on April 5, 2005, which caused him to be entitled to benefits fixed by law. 11/12/2009 Tr., p. 30. WSI Senior Claims Adjuster Toman further testified that all of the checks from Gerdau Steel were not payroll checks, but rather represented proceeds from the sale of assets. 11/12/2009 Tr., ps. 20-22; 37-38. WSI Senior Claims Adjuster Toman also testified to knowledge of HAMMER'S prior work with a mobile home business and scrap metal sales – knowledge existing prior to April 2007. 11/12/2009 Tr., ps. 22-24. After HAMMER moved for a dismissal, the District Court found probable cause [based upon a culpability level of "wilfully"] and ordered a jury trial for December 16, 2009, after which HAMMER was again arraigned. 11/12/2009 Tr., ps. 43-44. All prior motions and legal arguments previously advanced to contest the legitimacy of HAMMER'S prosecution were preserved so that he need not again submit the same. 11/12/2009 Tr., ps. 44-45.

Pursuant to Court order, HAMMER timely submitted his requested jury instructions. App., ps. 292-302.

On December 16, 2009, HAMMER requested the opportunity to withdraw his plea of not guilty for purposes of entering a conditional plea of guilty. As part of the conditional plea, the District Court entered two (2) Orders [12/16/2009 Tr., ps. 6-7 {as to culpability level}; p. 7 {as to injured worker's status report}] recognizing issues HAMMER had raised, and preserved for appellate review: (1) Order Denying Defendant's Requested Jury Instructions [App., p. 311]; and (2) Order Denying Defendant's Motion in Limine to Exclude Evidence of Injured Worker Status Report [App., p. 312].

The requirements of N.D.R.Crim.P. 11(a)(2) were recognized to exist, and

HAMMER submitted his written submission entitled "Conditional Plea Issues Reserved for Appeal Per N.D.R.Crim.P. 11(2)" (sic). App., ps. 303-310.

The District Court heard two (2) different factual accounts, but found sufficient factual basis and accepted the guilty plea, and imposed a suspended sentence of one (1) year with two (2) years of unsupervised probation, and later, the issuance of a stipulated restitution order. 12/16/2009 Tr., ps. 9-14. App., ps. 313-316; 319-320.

HAMMER timely appealed from every adverse judicial decision by Notice of Appeal dated January 15, 2010. App., ps. 317-318.

## STATEMENT OF FACTS

On March 31, 2005, HAMMER sustained a compensable injury that caused an amputation of his right lower leg by accident while employed by Mid America Steel, Inc. WSI assigned claim number 2005-713653 and accepted liability for this injury, and awarded payment of the associated benefits as of April 5, 2005. App., p. 10; 11/12/2009 Tr., p. 30.

On August 28, 2008, WSI punished HAMMER because HAMMER had "willfully and intentionally made material false statements by not reporting (his) income and work activities on (his) Injured Worker Status Reports (FL214s). Therefore all workers compensation benefits will be terminated after April 12, 2007. In addition, an overpayment of benefits has occurred." App., p. 10. HAMMER even lost future medical care benefits for the previously accepted amputation claim. 4/23/2009 Tr., ps. 20-21.

The April 13, 2007, Injured Worker Status Report has two (2) questions giving rise to ambivalent answers:

"1. During this calendar year, have you gone back to work, or done any type of

work, whether for pay or not, that you have not already disclosed on a prior status report? ☐ Yes ☐ No" (and)

2. During this calendar year, have you received money from any source other than WSI that you have not already disclosed on a prior status report. ☐ Yes ☐ No"

WSI Senior Claims Adjuster Toman testified to knowledge of HAMMER'S prior work with a mobile home business and scrap metal sales – knowledge existing prior to April 2007. 11/12/2009 Tr., ps. 22-24. WSI Claims Adjuster Toman also testified that none of the monies paid by Gerdau Steel represents a paycheck, and would be proceeds from the sale of assets. 11/12/2009 Tr., ps. 20-22; 37-38.

HAMMER had been informed by several lawyers, and even a WSI representative, of the statutory spousal exception relating to income or wages. 10/23/2009 Tr., ps. 15-18.

All financial evidence arose from the non-discovery, investigative Administrative Subpoena Duces Tecum(s) issued by Special Assistant Attorney General Forward, and was accomplished without the knowledge or consent of HAMMER. 4/23/2009 Tr., p. 14-15; 19.

## STATEMENT OF THE STANDARD OF REVIEW

There are several different standards of review in this comprehensive attack on the underlying proceedings. In essence, it will be "a question of law", but the process for getting there may be regarded as circuitous.

As to issues related to the preliminary hearings, in State v. Blunt, 2008 ND 135, ¶ 14, 751 N.W.2d 692, it was stated:

> This Court has said that in determining whether probable cause exists, the district court may judge credibility and make findings of fact. *State v. Foley,* 2000 ND 91, ¶ 10, 610 N.W.2d 49; *State v. Serr,* 1998 ND 66, ¶ 9, 575 N.W.2d 896. On appeal, we will not reverse the district court's findings of fact in preliminary proceedings in a criminal case if, after resolving conflicts

in the evidence in favor of affirmance, sufficient competent evidence exists that is fairly capable of supporting the court's findings and the decision is not contrary to the manifest weight of the evidence. *Foley,* at ¶ 8; *Serr,* at ¶ 9. Whether the facts found by the district court reach the level of probable cause is a question of law, fully reviewable on appeal. *Heick v. Erickson,* 2001 ND 200, ¶ 10, 636 N.W.2d 913; *Foley,* at ¶ 8; *Serr,* at ¶ 9.

As to issues related to suppression of evidence, in State v. Bachmeier, 2007 ND 42, ¶ 5, 729 N.W.2d 141, it was stated:

> [¶ 5] The standard for reviewing a district court's decision on a motion to suppress is well established:
>
> > We will defer to the [district] court's findings of fact in the disposition of a motion to suppress. Conflicts in testimony will be resolved in favor of affirmance, as we recognize the [district] court is in a superior position to assess credibility of witnesses and weigh the evidence. Generally, a [district] court's decision to deny a motion to suppress will not be reversed if there is sufficient competent evidence capable of supporting the [district] court's findings, and if its decision is not contrary to the manifest weight of the evidence.
>
> *State v. Oien,* 2006 ND 138, ¶ 7, 717 N.W.2d 593 (quoting *State v. Linghor,* 2004 ND 224, ¶ 3, 690 N.W.2d 201; *State v. Kitchen,* 1997 ND 241, ¶ 11, 572 N.W.2d 106). "Questions of law, such as the ultimate* conclusion of whether the facts support a reasonable and articulable suspicion, are fully reviewable on appeal." *State v. Parizek,* 2004 ND 78, ¶ 7, 678 N.W.2d 154.

As to jury instructions, in City of Minot v. Rubbelke, 456 N.W.2d 511, 513 (N.D. 1990), it was stated:

> It is well settled that jury instructions must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury. *State v. Saul,* 434 N.W.2d 572, 576 (N.D. 1989); *State v. Skjonsby,* 319 N.W.2d 764, 774 (N.D. 1982). .. Thus, this Court must consider if the trial court's instructions, as a whole, correctly and adequately advised the jury of the law. If we determine that the challenged jury instruction, when read as a whole, is erroneous, relates to a subject central to the case, and affects the substantial rights of the accused, we will have found adequate grounds for reversal. (citing *State v. White,* 390 N.W.2d 43, 45 (N.D. 1986) and *State v. Bonner,* 361 N.W.2d 605, 609 (N.D. 1985)).

## LAW AND ARGUMENT

**POINT 1. The Double Jeopardy Clause precludes this criminal prosecution.**

At his first appearance before a magistrate, HAMMER raised the issue of Double Jeopardy. 2/27/2009 Tr., p. 9.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution is applicable to the States through the due-process clause of the Fourteenth Amendment to the United States Constitution. State v. Allesi, 216 N.W.2d 805 (N.D. 1974). See also, Article I, § 12, of the North Dakota Constitution which provides, "No persons shall be twice put in jeopardy for the same offense .."

HAMMER sought dismissal of all charges against him on the grounds that he has been previously in jeopardy and punished by the State of North Dakota [through the North Dakota Workforce Safety and Insurance] when his vested right to receive future medical reimbursement for a March 31, 2005 work related injury was taken away. Notice of Decision; App. p. 245. The State of North Dakota's taking of a vested right to payment of *future medical expenses associated with an accidental hazardous employment amputation* cannot be said to be remedial, and is the equivalent of criminal punishment.

The Fifth and Fourteenth Amendment [and their North Dakota counterparts] protect HAMMER against multiple punishment for the same act. See also, State v. Stewart, 1999 ND 154, ¶s 13-15, 598 N.W.2d 773, for a discussion as to what factors to apply to determine whether a administrative penalty constitutes a penalty that will trigger the protections of the Double Jeopardy Clause. In that HAMMER was deprived of a vested right having nothing to do with his subsequent earnings – he lost his right to future medical expenses associated

with an accepted claim involving the 2005 work related injury involving an amputation of his limb – HAMMER has already been punished in the prior administrative proceeding resulting in the August 28, 2008, Notice of Decision. App., p. 253.

Utilizing the factors set forth in State v. Stewart, 1999 ND 154, 598 N.W.2d 773, the taking away of the vested right to medical reimbursement is punishment for double jeopardy purposes. It is not a "remedial" sanction in that HAMMER had a vested right to receive such medical reimbursement, which was taken away by the Decision; the payment of future medical expenses had nothing to do with the alleged statements concerning claimed work activities.

As once punished, HAMMER cannot again be punished in these criminal proceedings.

**POINT 2. Fruit of the Poisonous Tree should be spit out.**

As succinctly stated in State v. Torkelsen, 2008 ND 141, ¶ 23, 752 N.W.2d 640:

> "Generally, evidence unlawfully seized in violation of the Fourth Amendment must be suppressed under the exclusionary rule. State v. Utvick, 2004 ND 36, ¶ 26, 675 N.W.2d 387. 'Any evidence obtained as a result of illegally acquired evidence must [also] be suppressed as "fruit of the poisonous tree"....' State v. Gregg, 2000 ND 154, ¶ 39, 615 N.W.2d 515."

**A. All of the evidence was fruit of illegal activity by the investigator-lawyer-witness-prosecutor.**

At a time when no administrative proceedings involving HAMMER existed, WSI's staff attorney acting as a Special Assistant Attorney General signed four (4) non-discovery, "investigative" Administrative Subpoena Duce Tecum(s) involving two (2) banks at two different times [App., ps. 39-54] to secure HAMMER'S [and his wife's] bank records

[among other things].

None of subpoenas issued by Special Assistant Attorney General Forward were served upon HAMMER, nor did HAMMER consent, but the results of the Administrative Subpoena Duces Tecum(s) were set forth in prepared tables within State's Exhibit #1, and form the basis for this prosecution.

HAMMER sought to exclude or suppress several documents or categories of documents, all of which were the "fruit" of the Administrative Subpoena Duce Tecum(s). Motion in Limine, Motion to Suppress, and/or Motion to Dismiss; App., p. 269.

With a clear understanding of the hierarchy of the expression of law in North Dakota, the North Dakota Supreme Court prefaced its analysis in Lubenow v. North Dakota State Highway Com'r, 438 N.W.2d 528, 531 (N.D. 1989) with a "constitutional given":

> The Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides as follows:
>
> > "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
>
> Further, Article I, Section 8 of the North Dakota Constitution protects the right of people to be secure in their persons, houses, papers and effects from unreasonable searches and seizures.
>
> In *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the United States Supreme Court defined a search and seizure within the protection of the Fourth Amendment as a violation of privacy upon which a person justifiably relied. Accordingly, the standard which has evolved from *Katz v. United States, supra,* is that if an individual has a reasonable expectation of privacy in the area searched or the materials seized, then a search and seizure within the protection of the Fourth Amendment has been

conducted. *State v. Johnson,* 301 N.W.2d 625 (N.D.1981); *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

HAMMER'S asserted grounds for exclusion or suppression were four-fold, and are hereinafter discussed with this "constitutional given" in mind:

**1. No search warrant was issued nor attempted under N.D.C.C. Chap. 29-29, the North Dakota Rules of Criminal Procedure, or by way of an administrative search warrant.**

No search warrant was attempted, nor accomplished based upon the statutory authority set forth in N.D.C.C. Chap. 29-29 entitled, "Search Warrants". Further, to the extent some of the statutes have been superseded by the North Dakota Rules of Criminal Procedure, no search warrant was attempted, nor accomplished based upon such superseding rules. Nor was there any attempt to obtain an administrative search warrant under N.D.C.C. Chap. 29-29.1.

The absence of any "warrant" itself recognizes the initial constitutional blunder by the State of North Dakota.

The Fourth Amendment of the United States Constitution, and Article I, § 8, of the Constitution of North Dakota each include a "warrant clause" – "no warrants shall issue .." and/or "no warrant shall issue .." before search or seizure [subject only to few exceptions deemed constitutional by judicial decision(s)].

Calling a "warrant" by another term, *i.e.*, Administrative Subpoena Duces Tecum(s), will not suffice when the United States Supreme Court has already determined that no State may allow such process be issued except by a "neutral and detached magistrate", while

specifically condemning, and recognizing, "there could hardly be a more appropriate setting than this for a per se rule of disqualification" when "determination of probable cause was made by the chief 'government enforcement agent' of the State-the Attorney General-who was actively in charge of the investigation and later was to be chief prosecutor at the trial." *Coolidge v. New Hampshire,* 403 U.S. 443, 449-450 (1971).

In the context of this case, Special Assistant Attorney General Forward, engaged in a fishing expedition, was *per se* disqualified from issuing such process – he was the "investigator" and initiator of the warrant, he was the "witness" at the preliminary hearing, and he was the "co-prosecutor" having been appointed Special Assistant Cass County State's Attorney. The words of Justice Jackson, noted in *Coolidge* at page 449, bear repeating:

> The classic statement of the policy underlying the warrant requirement of the Fourth Amendment is that of Mr. Justice Jackson, writing for the Court in Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 369, 92 L.Ed. 436:
>
> > 'The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. * * * When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.'

Without a "warrant", or valid process, the fruit of the poisonous tree should be

excluded or suppressed.

**2. The State failed to honor N.D.C.C. § 28-32-33 which requires judicially approved administrative discovery.**

In the lower court, the State of North Dakota successfully argued that N.D.C.C. § 65-02-11 gives unbridled subpoena powers to WSI when conducting an "investigation" ["Section 65-02-11, N.D.C.C., gives WSI broad power to interview witnesses and obtain information. WSI has the power to 'make investigation as in its judgment is best calculated to ascertain the substantial rights of all the parties.' *Id.*".] Docket Entry #23.

Unfortunately, both WSI and the lower court overlooked the "constitutional given" and the first sentence of the cited statute [N.D.C.C. § 65-02-11]:

> Except as otherwise provided by this title, process and procedure under this title is governed by chapter 28-32.

The opening sentence of the cited statute reins in said administrative agency's subpoena powers when there is **no** procedure outlined within N.D.C.C. Title 65 as to how WSI is to exercise its subpoena powers; in the absence of other Title 65 authority, its subpoena powers are limited by Chapter 28-32 of the North Dakota Century Code – the governing law also subject to both Constitution(s).

The investigator-lawyer-Special Assistant Attorney General for WSI failed to follow the procedures mandated by Chapter 28-32 of the North Dakota Century Code when he issued Administrative Subpoena Duces Tecum(s) as of June 11, 2007, and May 20, 2008. Statutorily limited by N.D.C.C. § 28-32-33(3), WSI has subpoena powers *only if the subpoena is issued by a "hearing officer" when WSI is actually conducting an adjudicative*

*proceeding.*

At the time of the Administrative Subpoena Duces Tecum(s), there was no administrative proceedings involving HAMMER, and no "hearing officer" acted.

These "non-discovery", "investigative" subpoenas were ill-conceived, and violated constitutional and statutory law.

What is an "adjudicative proceeding" is broadly defined in N.D.C.C. § 28-32-01 as "an administrative matter resulting in an agency issuing an order after an opportunity for hearing is provided or required." This broad definition would include the four subject subpoenas as they were issued in, or part of, an "administrative matter." Although, by definition, an administrative agency's decision to "initiate an investigation" is not an adjudicative proceeding, the investigation itself is an adjudicative proceeding by legal definition, and WSI tramples on HAMMER'S legal rights when it issued four subpoenas without the involvement of a hearing officer, and/or without HAMMER'S knowledge and consent.

The requirement of only having the hearing officer authorize administrative subpoenas is to satisfy the need to show that there a "reason to believe that the customer information sought is relevant to a proper law enforcement objective ..", to satisfy the probable cause determination required by Article I, § 8, of the Constitution of North Dakota, and to satisfy two Constitutions. See, *Coolidge v. New Hampshire*, 403 U.S. 443, 449-456 (1971) ["Thus the most basic constitutional rule in this area is that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment-subject only to a few specifically established and

well delineated exceptions." The exceptions are "jealously and carefully drawn," and there must be a "showing by those who seek exemption *** that the exigencies of the situation made that course imperative." "(T)he burden is on those seeking the exemption to show the need for it" In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won-by legal and constitutional means in England, and by revolution on this continent-a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important."]

**a. The North Dakota Rules of Civil Procedure do not provide the State of North Dakota with a safe haven.**

The actual testimony of investigator-witness-lawyer-Special Assistant Attorney General Forward precludes the argument [4/23/2009 Tr., p. 13], but should the State of North Dakota argue that WSI, when issuing a subpoena through its attorney, was merely utilizing its right to "discovery" under the North Dakota Rules of Civil Procedure, and possibly, N.D.A.C. 98-02-02-06, said specious argument should be quickly rejected by this Court – HAMMER was never afforded any advance "notice" as to the issuance of the four subpoenas.

Rule 5(c) of the North Dakota Rules of Civil Procedure would require that a "discovery' subpoena, if capable of being issued by WSI without a hearing officer's

involvement, would be required to be first served upon HAMMER as a party to the administrative proceedings. WSI failed to serve HAMMER, and therefore, cannot claim that it has complied with the "discovery" rules of civil procedure. Similarly, N.D.R.Civ.P. 45(b)(2)(B) compels rejection of the so-called "discovery" aspect if advanced by WSI, for it reads:

> (B) Notice of Demand for Production or Inspection. If a deposition notice has not been served, and if the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of the premises before trial, then before it is served, *a notice of demand for production or inspection must be served on each party.* [*emphasis* added]

If that is not enough, N.D.R.Civ.P. 45(b)(2)(C) makes service of the notice on HAMMER mandatory before service of the subpoena.

N.D.A.C. 98-02-02-06 allow the parties to administrative proceedings obtain "discovery in accordance with the North Dakota Rules of Civil Procedure". The failure to first serve HAMMER means that the four questioned subpoenas cannot be sustained under the guise of a "discovery" subpoena – each subpoena was invalid, as is the process. HAMMER was deprived of his right, as a party to the administrative proceedings [if any existed], to challenge the issuance of the subpoenas, by seeking the intervention of a hearing officer or a judicial officer, at a "meaningful time and in a meaningful manner". *Boddie v. Connecticut*, 401 U.S. 371, 377-397 (1971), recognizing and demanding substantive due process of law.

When the notice requirements for this "non-discovery" has not been attempted or accomplished, it is not valid process for governmental access of bank records under N.D.C.C

§ 6-08.1-05.

### 3. N.D.C.C. § 6-08.1-05 was not complied with by Workforce Safety and Insurance or the North Dakota Attorney General.

Without an administrative hearing officer's determination that there is a reason to believe that the bank records are relevant, the Administrative Subpoena Duces Tecum(s) – outside the judicial system – are invalid, and would not support disclosure of the subject bank records.

Absent consent of the customer, bank records may only be accessed by the North Dakota government with "valid" legal process. N.D.C.C § 6-08.1-05. There was no HAMMER consent; there was no valid legal process initiated. "Valid legal process" is defined in N.D.C.C. § 6-08.1-05(2) as being "pursuant to a judicial or administrative subpoena duces tecum served on the financial institution .." No attempt was ever made to secure a "judicial .. subpoena duces tecum" [4/23/2009 Tr., ps 9-10], and the State of North Dakota failed to honor N.D.C.C. Chap. 28-32 – the governing law requiring a hearing officer's participation for issuance of an administrative subpoena duces tecum. See Point 2(A)(2) beginning at page 17.

HAMMER has standing to challenge the four questioned subpoenas because he has a legitimate expectation of privacy, under N.D.C.C. Chapter 6-08.1, to the bank records, and has a personal stake in the outcome. See, State of Wisconsin v. Popenhagen, 309 Wis. 601, 749 N.W.2d 611 (2008). Since governmental access of bank records is limited to "valid legal process", the Supreme Court should reject the lower court's refusal to suppress the

evidence obtained by the invalid process so that objective(s) of N.D.C.C. § 6-08.1-05 can be achieved. State of Wisconsin v. Popenhagen,, *supra.*, ¶ 4.

The lower court almost summarily dismissed HAMMER'S arguments predicated upon the decision of *United States v. Miller*, 425 U.S. 435 (1976) [App., p. 276], apparently unaware of significant subsequent Federal statutory developments succinctly set forth in State v. Miles, 156 P.3d 864, 868 (Wash.2007):

> FN4. The United States Supreme Court validated the subpoena of third party bank records without a warrant or notice, finding these records were not protected by any Fourth Amendment privacy at all. *United States v. Miller*, 425 U.S. 435, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976), *superseded by statute*, Right to Financial Privacy Act of 1978, 92 Stat. 3697, 12 U.S.C. §§ 3401-3422, *as recognized in Sec. & Exch. Comm'n v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 745, 104 S.Ct. 2720, 81 L.Ed. 615 (1984).

The 1985 enactment of N.D.C.C. Ch. 6-08.1 [S.L. 1985, ch. 129, § 1] is also a significant *subsequent statutory development* ignored by the lower court, as well as WSI when violating North Dakota law.

These "non-discovery", "investigative" subpoenas were ill-conceived, and violated constitutional and statutory law.

**4. The fruit of an illegal administrative search is inadmissible.**

The Fourth Amendment to the Constitution of the United States also requires that a administrative subpoena be sufficiently limited in scope and relevant in purpose. *See v. City of Seattle*, 387 U.S. 541, 544(1967).

For Fourth Amendment purposes, there are three requirements an agency must meet in issuing a subpoena: (1) the agency's inquiry must be within its authority; (2) the agency's demand must not be too indefinite; and (3) the subpoenaed information must be reasonably

relevant to the purpose of the agency's investigation. *United States v. Morton Salt Company*, 338 U.S. 632, 652 (1950). Article I, § 8, of the Constitution of North Dakota should provide HAMMER with the same protection(s) as the Fourth Amendment of the Constitution of the United States, if not greater rights. See dissenting opinion, State v. Jacobson, 545 N.W.2d 152, 157 (N.D. 1996).

As to the first requirement, the four (4) subpoenas were not within WSI's authority [it has no authority when a spouse is the employee of the other spouse, and the authority to issue such subpoena(s) rests with the hearing officer – not the agency or its lawyer], and it was issued outside of the judicial process. See, Point 2(A)(1 & 2).

Secondly, WSI's four (4) subpoenas were broad and indefinite, rather than limited in scope.

As to the third requirement, the subpoenaed information was not relevant to its investigation for it has no authority to investigate the employee-employer relation between a husband and wife.

These "non-discovery", "investigative" subpoenas were ill-conceived, and violated constitutional and statutory law.

**a. HAMMER had no wages from his spouse.**

HAMMER now expands upon his claim that WSI does not have jurisdiction concerning the wages or the employment that HAMMER may have had through his wife, Jolene Hammer. HAMMER requested three (3) specific jury instruction(s) based upon North Dakota law. App., p. 295; 297; and 300.

By statutory definition, HAMMER cannot be an "employee" of his wife for WSI

purposes. N.D.C.C. § 65-01-02(16)(b)(3). The term "wages" for WSI purposes refers only to an "employee's remuneration". N.D.C.C. § 65-01-02(31). By these definitions, the Legislative Assembly of North Dakota has limited WSI's jurisdiction for work related matters wherein one spouse is the employee of another spouse. N.D.C.C. § 65-04-13 limits WSI's right to inspection to records of "employers" of "employees". If a spouse, by statutory definition, *is not an employee of his spouse's business*, WSI has no statutory authority or jurisdiction to obtain the records. Wages and other income that one receives from a spouse's business has nothing to do with the WSI's administration of N.D.C.C. Title 65 – under said title of the code, WSI has duties only to statutorily defined "employees" and "employers" – and HAMMER is neither. See also, Point 3, beginning at page 25.

The State of North Dakota did not make any attempt to argue the relevance of the husband-wife employment records, nor the relevance of the banking records concerning this employment. In other words, the State of North Dakota has failed to show that the issued subpoena(s) were valid under the Fourth Amendment to the Constitution of United States, or its counterpart in the Constitution of North Dakota. The fruit should have been spit out.

**b. The motives of the State of North Dakota were murky.**

HAMMER further submits that the four (4) questioned non-discovery, investigative subpoenas were issued by a Special Assistant Attorney General, and, at the time of the issuance, both the Attorney General's office and WSI contemplated pursuing criminal charges against HAMMER. HAMMER respectfully submits that he has a legitimate, statutorily created, expectation of privacy existed in his bank records, and the records that arises out of his employment through his wife's business. Because the State of North Dakota

had contemplated criminal penalties, it was required to secure a search warrant [involving a "neutral and detached magistrate"; *Coolidge* at page 449] to obtain such records, and its reliance upon Administrative Subpoena Duces Tecum(s) were improper. In other words, the State of North Dakota was required to make a showing of probable cause to a judicial magistrate so as to secure a search warrant before it could access the records it improperly accessed through its four (4) invalid subpoenas. *Coolidge v. New Hampshire*, 403 U.S. 443, 449-456 (1971).

WSI failed to comply with constitutionally mandated procedures to obtain a valid search warrant of the bank records, and has also failed to establish that it received "relevant" evidence through **valid** legal process. The evidence obtained through the invalid "subpoenas" should have been suppressed. All matters concerning the employment or wages through employment by HAMMER'S spouse should have been suppressed as irrelevant.

These "non-discovery", "investigative" subpoenas were ill-conceived, and violated constitutional and statutory law.

**POINT 3. HAMMER was untimely subjected to new, and different charges.**

Only three (3) days before the scheduled jury trial, and despite HAMMER'S objections, the State of North Dakota was allowed to amend the Information to alleged new, and different charges. App., p. 290. The lower court gave lip service to the law [see discussion under Statement of Case, page 3], and even threatened HAMMER with immediate trial on the Amended Complaint. The untimely actions allowed by the lower court violated N.D.R.Crim.P. 47, and Due Process of Law.

The resulting preliminary hearing was a farce in that the submitted evidence

established that the monies attributed to HAMMER were not wages, and had to be proceeds from the sale of assets – which need not be reported if the asset is owned by the spouse, or even owned by HAMMER. 11/12/2009 Tr., ps. 20-22; 37-38. See also, Point 2(A)(4) and Point 4(E).

**POINT 4. HAMMER was deprived of a legal defenses to this criminal prosecution.**

**A. HAMMER was denied the right to assert "mistake of law".**

Only three (3) days before the scheduled jury trial, the State of North Dakota sought to restrict HAMMER'S right to assert a legal defense by motion. App., p. 281. Citing N.D.C.C. § 12.1-05-09, the State of North Dakota correctly concluded that HAMMER'S conduct does not constitute a crime if he acted in reasonable reliance upon a statement of law contained in a statute.

The State of North Dakota's initial charges against Hammer, stem from its assertion that HAMMER failed to disclose income from his spouse's business. App., p. 7. The Amended Information tried to differentiate between "receipt of income from work" in Count 1 and Count 2's "fail(ure) to notify Workforce Safety and Insurance that he is or had been working .." App., p. 290.

No matter which charging document exists, both WSI and the District Court failed to understand that our North Dakota statutory definitions exclude "employment" from a spouse's business as being either wages or hazardous employment – so it would not be work within its purview.

The statute that gives rise to HAMMER'S legal defense is N.D.C.C. § 65-01-02 which contains the following pertinent definitions that limit the jurisdiction of WSI:

**65-01-02. Definitions**

In this title:

* * *

16. "Employee" means a person who performs hazardous employment for another for remuneration unless the person is an independent contractor under the "common law" test.

* * *

b. The term does not include:

(1) Any person whose employment is both casual and not in the course of the trade, business, profession, or occupation of that person's employer.

* * *

(3) The spouse of an employer or a child under the age of twenty-two of an employer. For purposes of this paragraph and section 65-07-01, "child" means any legitimate child, stepchild, adopted child, foster child, or acknowledged illegitimate child.

* * *

17. "Employer" means a person who engages or received the services of another for remuneration unless the person performing the services is an independent contractor under the "common law" test. The term includes:

* * *

20. "Hazardous employment" means any employment in which one or more employees are employed regularly in the same business or in or about the establishment except:

* * *

28. "Spouse" includes only the decedent's husband or wife who was living with the decedent or was dependent upon the decedent for support at the time of injury

* * *

31. "Wages" means an employee's remuneration from all employment reportable to the internal revenue service as earned income for federal income tax purposes. For purposes of chapter 65-04, "wages" means all gross earnings of all employees. The term includes all pretax deductions for amounts allocated by the employee for deferred

> compensation, medical reimbursement, retirement, or any similar program, but may not include dismissal or severance pay.[5]

By applying these definitions, HAMMER can never be employed, nor can he receive wages, in hazardous employment, in a business owned by his wife.

WSI'S jurisdiction is limited to "hazardous employment", as defined by state law, and HAMMER must be an "employee" as defined by state law to be employed in hazardous employment. HAMMER, under these definitions, cannot be an employee [for WSI purposes] of his wife's owned business.

As a matter of law, HAMMER has no wages with respect to his wife's business, nor would he ever have an obligation to report such non-income to WSI. See also, Wanner v. North Dakota Workers Compensation Bureau, 2002 ND 201, ¶s 23-27, 654 N.W.2d 760, which confirms that "an ordinary person not steeped in the arcane mysteries of the workers compensation laws as construed and administered by the Bureau would reasonably expect to have to report as work only activities performed in regular employment by others for remuneration, or showing an ability to regularly perform a gainful occupation, and would not ordinarily expect to have to report casual activities not done for remuneration and not performed for an employer." In the instant case, not only was HAMMER aware that he had the spousal statutory exemption, he was aware that all of his work had been previously made known to WSI so that any negative answer he gave to questions 1 & 2 on the Status Reports would be accurate – similar activities had been "already disclosed" to WSI. See, testimony

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[5] Under the Small Business and Work Opportunity Tax Act of 2007, there would be at most a joint venture, and not a "wage" circumstance. HAMMER is not regarded as an employee by the IRS under Federal laws and rules.

of Jenny Toman; 11/12/2009 Tr., ps. 22-24.

WSI acted in excess of its jurisdiction when it first sought bank records relating to HAMMER'S wife's business in that there is no "hazardous employment" by HAMMER associated with that business.

HAMMER can reasonably rely on the statutory limitations to WSI'S jurisdiction. If his interpretation of the statutory definitions were mistaken, HAMMER'S reasonable reliance upon the clear statutory definitions [relating to a statute, an administrative order, and also, a grant of permission] provides a legal defense under N.D.C.C. § 12.1-05-09.

The State of North Dakota must prove the nonexistence of this defense [mistake of law under N.D.C.C. § 12.1-05-09] beyond a reasonable doubt as an "element of an offense" – those crimes charged against HAMMER. See, N.D.C.C. § 12.1-01-03(1)(e). The State of North Dakota's motion to exclude evidence was an impermissible attempt to lessen its statutory burden [the State is required to show, beyond a reasonable doubt, that HAMMER'S acts were not consistent with what he believed North Dakota law is, and was].

How and when HAMMER obtained knowledge of the statutes might be relevant to give rise to the defense. A particular conversation between an attorney and a client is not relevant to the defense because an attorney's statement [or advice] is not a source that HAMMER can rely upon to bring rise to that defense. State v. Lang, 378 N.W.2d 205, 207-208 (N.D. 1985). It is HAMMER'S understanding of North Dakota law [contained in specified types of documents/orders/interpretations/permissions] that triggers the defense – and not a particular statement made by an attorney.[6] Thus, a person charged with a crime

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[6] See specifically, footnote 5 of the Lang decision.

does not need to waive his attorney-client privilege [N.D.R.Ev. 502] in order to trigger the State of North Dakota's duty to prove the non-existence of the defense – in this case a legal defense made known to HAMMER by several lawyers, and even a WSI representative. 10/23/2009 Tr., ps. 15-18.

**B. HAMMER was denied the right to appropriate jury instructions.**

HAMMER requested specific jury instructions [App., ps. 292-302], some of which were specifically repudiated by the lower court, the rest by summary rejection of HAMMER'S positions even though supported by law.

HAMMER specifically identifies the following requested jury instructions as critical, and the lower court's unwillingness to consider HAMMER'S position(s) as grounds for appeal.

1. Requested Jury Instruction #2. App., p. 295. Since HAMMER already had an accepted claim on April 5, 2005, for the work-related amputation, the accuracy of a subsequent Status Report cannot be the basis for a charge relating to "fil(ing) a false claim or mak(ing) a false statement in an attempt to secure payment of benefits or payment for services" under N.D.C.C. § 65-05-33. There is no evidence, nor any suggested, that any false representations were made in the initial claim, duly accepted.

2. Requested Jury Instruction #3 [Count 1] and #4[Count 2] . App., ps. 297; 300. These requested jury instruction relate to the essential elements of the offense, with five (5) distinct paragraphs discussing pertinent legal concepts: (a) inadequacies of the status reports [Point 4(D), page 32], (b) definition of

"wilfully" [Point 4(C), page 31], (c) definition of "receipt of income from work" or "wages" [Point 2(A)(4)(a), page 22], (d) status of spouse as an employee [Point 2(A)(4)(a), page 23], and (e) spousal joint venture income [Point 2(A)(4), page 22; Point 4(A), page 26].

**C. In a prosecution arising out of Title 65, the *mens rea* requirement of "willfully" is different than Title 12.1's definition used by the lower court.**

HAMMER submitted jury instructions invoking Fettig v. Workforce Safety and Insurance, 2007 ND 23, ¶ 13, 728 N.W.2d 301, which recognizes that "(u)nder N.D.C.C. § 65-05-33, to trigger the statutory consequences for a false statement, 'WSI must prove: (1) there is a false claim or statement; (2) the false claim or statement is willfully made; and (3) the false claim or statement is made in connection with any claim or application for benefits.' *Forbes,* 2006 ND 208, ¶ 13, 722 N.W.2d 536 (citing *Hausauer v. North Dakota Workers Comp. Bureau*, 1997 ND 243, ¶ 12, 572 N.W.2d 426). For purposes of this statute's civil penalties, we have 'defined "willfully" as conduct engaged in intentionally and not inadvertently.' Forbes, at ¶ 13 (citing *Dean v. North Dakota Workers Comp. Bureau*, 1997 ND 165, ¶ 15, 567 N.W.2d 626). WSI 'must prove the claimant's state of mind was purposeful in making the false statement.' *Hausauer*, at ¶ 14. 'A state of mind can rarely be proven directly and must usually be inferred from conduct and circumstantial evidence.' *Dean*, at ¶ 20. 'In addition to proving that a false statement is willful, WSI must ... prove the false statement is material.' *Forbes*, at ¶ 14."

When the necessary *mens rea* for a civil penalty under N.D.C.C. § 65-05-08(3)

[2003] is "conduct engaged in intentionally and not inadvertently", how can a criminal *mens rea* be predicated upon a lesser degree of culpability such as "knowingly" or "recklessly" under N.D.C.C. § 12.1-02-02(1)(e) – as used by the lower court in her Order Denying Defendant's Requested Jury Instructions? App., p. 311.

Just as important, the cited statute [N.D.C.C. § 12.1-02-02] identifies use of such definitions "(f)or the purposes of this title (12.1)". HAMMER is being prosecuted under statutes found in Title 65; only penalty sections in Title 12.1 were otherwise referenced. App., p. 291.

The prosecution, and the lower court, used the wrong *mens rea* definition for a Title 65 based prosecution.

**D. The lower court improperly excused defective status reports.**

HAMMER noted the defective nature of the Injured Worker Status Reports because they did not provide the notice of penalties required by N.D.C.C. § 65-05-08(3) ["The form will advise the injured employee of the possible penalties for failure to report any work or activities as required by this section."], rendering them meaningless. App., ps. 298; 301; 309.

None of the Injured Worker Status Report(s) contain reference to the possible penalties except language already deemed inadequate by the North Dakota Supreme Court. App., ps. 24-38. The defective Injured Worker Status Report(s) in the instant case come five (5) years after a resounding judicial condemnation of earlier form language which was described as "opaque and unilluminating passages (which) clearly do not advise an injured employee of the possible penalties of reimbursement of benefits paid or forfeiture of all

future benefits paid or forfeiture of all future benefits under N.D.C.C. § 65-05-33 that may result from failure to report any work or activities required by N.D.C.C. § 65-05-08(3), and therefore, do not provide the notice of penalties required by N.D.C.C. § 65-05-08(3)." Wanner v. North Dakota Workers Compensation Bureau, 2002 ND 201, ¶ 17, 654 N.W.2d 760. The Wanner case makes the giving of proper notice a condition precedent, or *triggering event* for any possibility of statutory consequences under N.D.C.C. § 65-05-33. *Id.*, ¶ 18.

If the necessary trigger for prosecution under the statute was never given – with WSI continuing to use form language previously deemed legally inadequate – the prosecution and the lower court failed to stop an injustice to HAMMER when statutory consequences resulted by this prosecution.

**E. Income from the spouse is not "material".**

Wanner v. North Dakota Workers Compensation Bureau, 2002 ND 201, ¶ 18, 654 N.W.2d 760, recognizes the need to prove "materiality" of the false statement. For reasons noted in the discussion concerning income attributed to HAMMER'S spouse, the requisite materiality does not exist. See also, Point 2(A)(4), page 22.

## CONCLUSION

The Administrative Subpoena Duces Tecum(s) were invalid. The non-judicial subpoenas cannot be sustained as a "discovery" subpoena because HAMMER was not given notice of the same, nor was he afforded an opportunity to contest their need or relevance prior to their issuance. None of the four (4) investigative Administrative Subpoena Duces Tecum(s) can be sustained as an administrative subpoena because none of them were issued by a hearing officer. Without controversy, the State of North Dakota did not obtain a search

warrant. The banking records, and fruits thereof, were obtained by the government without "valid" process, and should have been suppressed. Probable cause of the allegations in the charging documents were not proved when the evidence established none of the monies resulted from work, but rather represented proceeds from the sale of assets. The prosecution was rife with violations of Due Process of Law with respect to proceedings, amendment of the charging document, and the multiple roles played by one actor – investigator, lawyer, witness, Special Assistant Attorney General, and prosecutor. The prosecution was flawed because it was barred by the Double Jeopardy Clause of two Constitutions, and it went downhill from there.

Respectfully submitted this 7th day of April , 2010.

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