

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

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City of Fargo,  
Plaintiff and Appellee

Appeal from Cass County District  
Court Summary Affirmance  
Order

v.

Jason White,  
Defendant and Appellant

**MR. WHITE'S BRIEF AND  
ADDENDUM**

**Supreme Court No. 20130191**  
Cass County No. 2013-CR-00532

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## **STATEMENT OF JURISDICTION**

1. This Court has jurisdiction under N.D. Const. art. VI, §§ 2, 6, and N.D.C.C. § 29-28-6.

## **STANDARD OF REVIEW**

2. Questions of law are reviewed de novo. Interest of J.K., 2009 ND 46, ¶14, 763 N.W.2d 507.
3. When the district court dismisses a case with prejudice the standard of review is abuse of discretion. State v. Erickson, 2011 ND 49, ¶12, 795 N.W.2d 375. “A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law.” Citibank v. Reikowski, 2005 ND 133, ¶6, 699 N.W.2d 851.

## LEGAL ISSUES

- I. The district court's Summary Affirmance Order is a final order and is therefore appealable pursuant to N.D.C.C. § 29-28-06(2).

State v. Adams, 2009 ND 168, 772 N.W.2d 878..

State v. Jelliff, 251 N.W.2d 1 (N.D. 1977).

Dunseith Sand and Gravel Co., Inc. v. Albrecht, 379 N.W.2d 803 (N.D. 1986).

City of Grand Forks v. Lamb, 2005 ND 103, 697 N.W.2d 362.

N.D.C.C. 29-28-6

N.D.R.Crim.P. 37

N.D.R.Crim.P. 37(l)

- II. The district court erred when it dismissed Mr. White's appeal for his failure to appear at a dispositional conference as the proper remedy is continuance or issuance of a bench warrant and a district court judge is without discretion to dismiss an appeal at a dispositional conference.

City of Bismarck v. Uhden, 513 N.W.2d 373 (N.D. 1994).

City of Fargo v. Komad, 2006 ND 177, 720 N.W.2d 619.

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N.D.R.Crim.P. 43

N.D.R.Crim.P. 43 (a)(1)

## **STATEMENT OF THE CASE**

4. This is an appeal from a Cass County District Court Order summarily affirming a Fargo Municipal Court Judgment finding the Defendant, Mr. White, guilty of disorderly conduct. A criminal complaint was filed alleging Mr. White to be in violation of Fargo Municipal Ordinance prohibiting Disorderly Conduct. A municipal trial was held resulting in Mr. White's conviction. Upon properly perfected appeal pursuant to N.D.R.Crim.P. 37, Mr. White's case was transferred for "trial anew" to the Cass County District Court. Mr. White failed to appear for a preliminary dispositional conference whereupon the district court dismissed the appeal and summarily affirmed the municipal judgment. Mr. White appeals this summary affirmance as clearly erroneous. Mr. White contends a dispositional conference is not akin to a "trial anew" and the proper procedure when a defendant fails to appear at a preliminary proceeding is to continue the proceeding, issue a warrant for the absent party's arrest, or both.

## STATEMENT OF FACTS

5. Jason White, charged with Disorderly Conduct (Fargo City Ordinance 10-0301), was tried and convicted in Fargo Municipal Court on February 7, 2013.
6. Mr. White timely and properly filed notice of appeal with the Fargo Municipal Court on February 12, 2013 whereupon the proceedings were forwarded to Cass County District Court.
7. Mr. White personally appeared before the Honorable Wade Webb with counsel Stormy Vickers in Cass County District Court on March 4, 2013 and entered a not guilty plea.
8. March 4, 2013, Mr. White personally signed a Scheduling Order. Paragraph 4 of the Scheduling Order lists the May 29, 2013 at 10:00 A.M. as the date and time for the Dispositional Conference. Paragraph 4 immediately below the date and time for the dispositional conference states the following: **“DEFENDANT MUST APPEAR IN PERSON”**.
9. Mr. White did not appear on May 29, 2013 for his scheduled dispositional conference. Mr. Vickers, attorney for Mr. White, and Ms. Kristal Kadrie, attorney for the City of Fargo, both personally appeared.
10. At the Dispositional Conference, Mr. Vickers requested a continuance noting that he had been in recent contact with his client. Ms. Kadrie requested the District Court summarily affirm the Fargo Municipal

Judgment due to Mr. Whites non-appearance and pursuant to N.D.R.Crim.P. 37(l).

11. The Honorable Wade Webb denied Mr. Vickers' request for continuance and granted Ms. Kadrie's request for summary affirmance. The Court noted the personal appearance requirement of the Scheduling Order, the bold, capital letters used on the Scheduling Order's personal appearance requirement, and Mr. White's personal signature acknowledging the terms and receipt of the Scheduling Order. The Court then dismissed Mr. White's appeal pursuant to Rule 37(l) and summarily affirmed the Fargo Municipal Court Judgment.

12. May 30, 2013 the Court signed an Order Summarily Affirming the Judgment of the Fargo Municipal Court.

## **ARGUMENT**

**I. The district court's Summary Affirmance Order is a final judgment of conviction and is therefore appealable pursuant to N.D.C.C. § 29-28-06.**

13. Mr. White filed his appeal from municipal court to district court pursuant to N.D.R.Crim.P. 37 (Rule 37). When Mr. White failed to appear at a scheduled dispositional conference the district court issued an order to summarily affirm the municipal court judgment. At issue in this case is whether or not the district court is allowed to dismiss a

municipal appeal for a defendant's nonappearance prior to the trial anew. Mr. White seeks no review by this Court of the facts or conclusions made by the municipal court.

14. The right of appeal is statutory and if there is no statutory basis the appeal must be dismissed. State v. Adams, 2009 ND 168, ¶4, 772 N.W.2d 878. N.D.C.C. § 29-28-6(2) states that a criminal defendant may appeal a final judgment of conviction. Rule 37(1) specifically directs the district court to enter a summary affirmance judgment "as a judgment of the district court". Summarily affirming the municipal conviction as a judgment of conviction of the district court squarely falls under the statutory requirement of N.D.C.C. § 29-28-06(2).
15. Although Rule 37 labels the district court summary affirmance as a judgment this Court has previously stated the effect, not the label controls. "Statutes conferring the right to appeal must be liberally construed, and that in determining appealability it is not the label which controls but, rather, the effect." State v. Jelliff, 251 N.W.2d 1, 4 (N.D. 1977). Considering when an order is the equivalent of a judgment this Court has directed when "a judgment is consistent with the order, we will treat the appeal as an appeal from the judgment." Dunseith Sand and Gravel Co., Inc. v. Albrecht, 379 N.W.2d 803, 805 (N.D. 1986).
16. Here the municipal court filed a judgment of conviction. The district court issued an order consistent with the municipal judgment –

summary affirmance order – that affirmed in whole, with no additions, corrections, or changes, the municipal order. No addition, correction, or change is the very definition of consistent.

17. This Court should liberally construe the Summary Affirmance Order to be the equivalent of a judgment pursuant to *Dunseith Sand and Gravel* as this court has further stated “[a] prohibition on appeals to this Court will not be inferred unless the statute expressly states that appellate jurisdiction is conferred upon the district court and expressly prohibits any further appeal.” City of Grand Forks v. Lamb, 2005 ND 103, ¶ 9, 697 N.W.2d 878, 362. (Citing Bland v. Commission on Med. Competency, 557 N.W.2d 379, 384 (N.D. 1996)). Rule 37 does expressly confer upon the district court the appellate jurisdiction of the municipal courts. However, Rule 37 does not expressly prohibit any further appeal.
18. Whether by the plain language of Rule 37(l) requiring the district court to enter the summary affirmance as its own order of judgment, or by an order consistent with a judgment, this issue is reviewable by this Court pursuant to N.D.C.C. 29-28-06.

**II. The district court erred when it dismissed Mr. White's appeal for his failure to appear at a dispositional conference as a defendant's presence is neither required by rule nor is a dispositional conference a "trial anew".**

19. N.D.R.Crim.P. Rule 43 (Rule 43) specifies when a defendant is required to be present. Rule 43(a)(1) requires the defendant's presence at the initial appearance, arraignment, and plea; at every trial stage, and at sentencing. Although Rule 43 does not require the defendant to be present at preliminary hearings or conferences, the Explanatory Note to Rule 43 does state the rule alone does not give the defendant the right to be absent and gives the district court discretion whether or not to require the presence of the defendant. N.D.R.Ct. Rule 6.6 (Rule 6.6) provides when a person fails to appear in court as required the judge may issue a bench warrant for the person to be brought immediately before the court.

20. Neither court rule nor criminal procedure rule specifically required Mr. White to appear at the dispositional conference. However, pursuant to the scheduling order issued by the district court, Mr. White was informed in no uncertain terms the court required his personal appearance. It is without question Mr. White did not heed this direction as he failed to appear at the dispositional conference without excuse. The proper remedy provided by Rule 6.6 is for the district court to issue a bench warrant.

21. In lieu of the bench warrant, the City requested the district court summarily affirm the municipal judgment. The Explanatory Notes to Rule 43 state: “Rule 37 provides for summary affirmance if the defendant does not appear at a trial anew”. Rule 37(1) states: “If the appellant fails to appear at the trial anew, the district court must summarily affirm the judgment and enter it as a judgment of the district court ...”.
22. A trial anew occurs when the evidence is heard “by the judge acting as factfinder during trial”. City of Bismarck v. Uhden, 513 N.W.2d 373 (N.D. 1994). In this case there was no trial anew held. The date scheduled for the trial anew had not presented at the time the appeal was dismissed and the municipal judgment was summarily affirmed. A dispositional conference, where guilty pleas are taken, plea hearings are scheduled, trial intentions are confirmed, and the occasional ancillary matter is determined is not a judge acting as a factfinder during trial and is therefore **not** trial anew. Summary affirmance at any stage prior to trial anew is premature and is error pursuant to the plain language provided in the rules of criminal procedure.
23. In City of Fargo v. Komad a similar issue appeared before this Court. Komad initially appeared in municipal court for his trial and was convicted whereupon he appealed the municipal judgment to district court. City of Fargo v. Komad, 2006 ND 177 ¶1, 720 N.W.2d 619.

Komad then failed to appear at his scheduled trial date in district court and the court gave Komad's counsel the choice of either dismissing the appeal or proceeding with the trial in Komad's absence. *Id.* Ultimately counsel for Komad chose to proceed to trial where Komad was again convicted. *Id.* Upon review this court determined neither federal nor state constitutional guarantees to trial apply upon a trial anew as that guarantee is met at the initial municipal trial. *Id.* at ¶7. However, having determined Komad was never present for his trial in district court and that Komad did not give permission to his attorney pursuant to Rule 43 to proceed in his absence this Court held it was error for the district court to proceed. *Id.* at ¶¶12-16. "The district judge's discretion was to determine whether to grant the continuance or issue a bench warrant for Komad or to do both." *Id.* at ¶16.

24. It is important to note when *Komad* was decided – Rule 37 did not allow for, nor mandate as is presently the case, summary affirmance. Justice Maring in her special concurrence specifically suggested such a section be added to the rule. Similarly, Justices Sandstrom and Crothers in dissent stated summary affirmance was permissible at the time of *Komad* based upon a thorough review of legislative history and the history of the creation of the rules of criminal procedure. In response to *Komad* the Joint Procedure Committee proposed Rule 37 be amended to allow for summary affirmance if the defendant failed to appear at trial

anew. Minutes of the Joint Procedure Comm., September 28-29, 2006, pg. 8. Upon review of the meeting minutes, all references are to summary affirmance upon failure to appear at the trial anew – no discussion appears to have been undertaken regarding dismissal or summary affirmance for nonappearance prior to the trial anew. See Id. pg. 8-10.

25. Although the instant case is similar to *Komad*, there is still one very specific and paramount difference. While Komad was given the opportunity to appear at his trial anew and did not (regardless of reason), Mr. White was never afforded the opportunity to appear at his trial anew. Rule 37(l) is specific and unambiguous. Rule 37(l) provides a district court must summarily affirm the municipal judgment “[i]f the appellant fails to appear at the trial anew”. Much like *Komad*, the district judge’s discretion when there is nonappearance by a defendant at a dispositional conference is to continue the proceedings, issue a bench warrant pursuant to N.D.Ct. Rule 6.6, or do both. No rule provides for the dismissal of the appeal or summary affirmance for nonappearance prior to the trial anew. “[D]ismissal of [Komad’s] appeal would have been a violation of N.D.R.Crim.P. 43 and the judge was without discretion to dismiss.” *Komad*, at ¶16.

## CONCLUSION

26. Rule 37 specifically provides the summary affirmance order mandated to the district court is to be entered as a judgment [of conviction] of the district court. A judgment of conviction is appealable pursuant to N.D.C.C. 29-28-6. Further, a district court judge's discretion when a defendant fails to appear at a preliminary proceeding in an appeal from municipal court to district court is to continue the hearing, issue a bench warrant, or both. A district court judge is without the discretion to dismiss a municipal appeal for a defendant's nonappearance prior to the trial anew. Mr. White did not appear at a dispositional conference, which subjects him to a bench warrant. A dispositional conference is not the equivalent of a trial anew and therefore the summary affirmance order is error.

27. Mr. White therefore respectfully requests this Court remand the case to the district court for hearing to determine if a bench warrant is appropriate pursuant to Rule 6.6 and trial anew.

Respectfully submitted this 3<sup>rd</sup> day of August, 2013,  
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## **ADDENDUM**

### **28. RULE 37. APPEAL AS OF RIGHT TO DISTRICT COURT; HOW TAKEN**

#### **(a) Filing the Notice of Appeal.**

(1) An appeal permitted by law as of right from a municipal court to the district court may be taken only by filing a notice of appeal with the municipal court clerk within the time allowed by Rule 37(b).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is grounds only for the district court to act as it considers appropriate, including dismissing the appeal.

#### **(b) Time for Filing a Notice of Appeal.**

(1) A defendant's notice of appeal must be filed with the municipal court clerk within 30 days after the entry of the judgment or order being appealed.

(2) If an appeal by the prosecution is authorized by statute, the notice of appeal must be filed with the municipal court clerk within 30 days after entry of judgment or order being appealed.

**(c) Filing Before Entry of Judgment.** A notice of appeal filed after the municipal court announces a decision, sentence, or order, but before the entry of the judgment or order, is treated as filed on the date of and after the entry.

#### **(d) Effect of a Motion on a Notice of Appeal.**

(1) If a defendant timely makes any of the following motions under the North Dakota Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 30 days after the entry of the order disposing of the last such remaining motion, or within 30 days after the entry of the judgment of conviction, whichever period ends later:

(A) for a new trial under Rule 33, but if based on newly discovered evidence, only

if the motion is made no later than 30 days after the entry of the judgment; or

(B) for arrest of judgment under Rule 34.

**(e) Extension of Time.** Upon a finding of excusable neglect or good cause, the municipal court may, before or after the time has expired, with or without motion and notice, extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

**(f) Content of the Notice of Appeal.** The notice of appeal must:

- (1) specify the party or parties taking the appeal;
- (2) designate the verdict, judgment, order, or part thereof being appealed; and
- (3) name the district court to which the appeal is taken.

**(g) Serving the notice of appeal.**

(1) The municipal court clerk must promptly serve notice of the filing of the notice of appeal by mailing or sending by third-party commercial carrier a copy of the notice of appeal to the clerk of district court and each party's counsel of record--excluding the appellant's--or, if a party is proceeding pro se, to the party's last-known address. The municipal court clerk must note on each copy the date the notice of appeal was filed.

(2) The municipal court clerk's failure to serve a copy of the notice of appeal does not affect the validity of the appeal. The municipal court clerk must note on the docket the names of the parties to whom the clerk sends copies and the date they were sent. Service is sufficient despite the death of a party or the party's counsel.

**(h) Transmittal to District Court.** Within seven days after the notice of appeal is filed, the municipal court clerk, or the judge if there is no clerk, must transmit to the clerk of district court all documents filed in the action, which must be docketed by the clerk of district court without charge to the appellant.

**(i) Designation of Parties on Appeal.** A party appealing is the appellant and an opposing party is the appellee, but the title of the action is not changed as a

consequence of the appeal.

**(j) Effect and Scope of Appeal.** A perfected appeal to the district court transfers the action for trial anew. An appeal from a judgment of conviction constitutes an appeal from any verdict of guilty upon which the judgment is rendered.

**(k) Supervision in District Court.** The supervision and control of the proceedings on appeal will be in the district court from the time an appeal is taken except as otherwise provided in these rules. The district court, at any time after an appeal is taken, may hear a motion to dismiss the appeal or direct the municipal court to modify or vacate any order made by the municipal court or by any judge relating to the prosecution of the appeal, including any order fixing or denying bail.

**(l) Summary Affirmance.** If the appellant fails to appear at the trial anew, the district court must summarily affirm the judgment and enter it as a judgment of the district court unless the appellant on motion within seven days after the date set for the trial anew shows good cause for failure to appear.

### **EXPLANATORY NOTE**

Rule 37 was amended, effective September 1, 1983; March 1, 1986; January 1, 1995; March 1, 1999; March 1, 2003; March 1, 2006; March 1, 2008; March 1, 2011.

Rule 37 has no counterpart in the Federal Rules of Criminal Procedure. The requirement for a rule of procedure for criminal appeals is necessary because the North Dakota Rules of Appellate Procedure are limited in scope to appeals to the supreme court while the scope of criminal rules includes the municipal courts. The rule is intended to parallel as closely as possible the procedure of the appellate rules.

Rule 37 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Subdivision (a) parallels N.D.R.App.P. 3(a).

Subdivision (b) parallels N.D.R.App.P. 4(b)(1).

The requirement for filing the notice of appeal with the municipal court clerk within 30 days of the entry of judgment or order being appealed is mandatory and jurisdictional. The mandatory and jurisdictional requirement is eased by subdivision (e) which permits the municipal court to extend the time for appeal upon a showing of excusable neglect or good cause. The provision in Rule 32 that requires the defendant to be advised of the right to appeal and the right of a person who is unable to pay the cost of appeal to have it provided at public expense is a necessary part of a valid sentence and until it is given, the 30-day period for taking an appeal cannot begin to run because there is no valid sentence in existence.

Subdivision (d) is adapted from N.D.R.App.P. 4(b)(3) and addresses the effect of a motion for a new trial or arrest of judgment on a notice of appeal.

Subdivision (e) is adapted from N.D.R.App.P. 4(b)(4) and authorizes an extension of time to file a notice of appeal upon a finding of excusable neglect or good cause.

Subdivision (f) is adapted from the language of N.D.R.App.P. 3(c). A notice of appeal must (1) specify the parties taking the appeal, (2) designate the verdict, judgment or order or part thereof appealed from, and (3) name the court to which the appeal is taken. Under the first requirement, it is important that the notice specify by name the appellant or appellants. Failure of the notice to correctly designate the court to which the appeal is taken does not vitiate it. Misnomer is immaterial, at least if it is obvious to which district court the appeal must go. The requirement that the notice of appeal designate the judgment or part thereof being appealed was designed to simplify the taking of an appeal by requiring nothing more for its perfection than an identification of the judgment by the date of its entry.

Subdivision (g) is adapted from N.D.R.App.P. 3(d); and provides for service of the notice of appeal. Under this subdivision, the appellant is not obligated to serve the notice of appeal on other parties to the action. It is the duty of the municipal court clerk (or magistrate where there is no clerk) to serve notice of the filing of notice of appeal on the clerk of district court and each party's counsel of record,

and note on each copy served the date on which the notice of appeal was filed.

Subdivision (g) allows the clerk to send the notice of the filing of the notice of appeal via a commercial carrier as an alternative to mail.

Subdivision (h) establishes a seven-day maximum time limit for the municipal court clerk, or judge where there is no clerk, to forward to the clerk of district court the file with all documents filed in the action. Subdivision (h) was amended, effective March 1, 2011, to increase the time from five to seven days.

Subdivision (i) provides the designation of parties on appeal. It makes explicit that the title of the action shall not be changed as a consequence of the appeal. The designation of the party who contends against the appeal as an appellee rather than respondent is intended to avoid confusion, especially in special proceedings.

Subdivision (j) defines the effect of appeal. This subdivision follows N.D.C.C. § 40-18-19 in providing for trial anew when an appeal is taken to the district court from the municipal court.

Subdivision (k) provides the appellee may obtain relief from the appeal by one of the methods stated. The provision contemplates the parties shall first apply to the municipal court for any relief regarding the appeal; however, once the appeal passes to the district court, the municipal court has no power to modify its judgment or dismiss the appeal.

Subdivision (l) was added, effective March 1, 2008, to require the court to summarily affirm the judgment when an appellant fails to appear at a requested trial anew unless the appellant can show good cause for the failure to appear. Subdivision (l) was amended, effective March 1, 2011, to increase the time for an appellant to show good cause for failure to appear from five to seven days.

It should be noted although the rule does not always explicitly say so, it is the intent of this rule that the judge will perform the duties of the clerk where no clerk is appointed.

SOURCES: Joint Procedure Committee Minutes of April 29-30, 2010, page 20; September 28-29, 2006, pages 8-10; January 27-28, 2005, pages 32-33; April 26-27, 2001, pages 4-6; January 29-30, 1998, page 20; April 28-29, 1994, pages

6-7; January 27-28, 1994, page 10; September 23-24, 1993, page 10; November 29, 1984, page 20; February 17-18, 1983, pages 14-20; February 20-23, 1973, pages 5-8; December 11-15, 1972, pages 5-16; July 10-11, 1969, pages 4-6; May 15-16, 1969, pages 2-11; February 20-21, 1969, pages 15-17.

SEE ALSO: N.D. Const. art. VI, § 8.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 29-28-04, 29-28-08, 29-28-09, 29-28-11, 33-12-35, 33-12-40.

CONSIDERED: N.D.C.C. §§ 27-07-02, 27-07.1-18, 27-08-21, 28-27-06, 29-23-11, 29-28-02, 29-28-06, 29-28-07, 29-28-20, 29-28-21, 33-12-34, 33-12-41, 40-18-19.

CROSS REFERENCE: N.D.R.Crim.P. 32 (Sentencing and Judgment); N.D.R.Crim.P. 33 (New Trial); N.D.R.Crim.P. 34 (Arresting Judgment); N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.App.P. 3 (Appeal as of Right--How Taken); N.D.R.App.P. 4 (Appeal--When Taken).

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

---

City of Fargo,  
Plaintiff

Appeal from Cass County District  
Court Summary Affirmance  
Order

v.

**CERTIFICATE OF SERVICE**

Jason White,  
Defendant

**Supreme Court No. 20130191**  
Cass County No. 2013-CR-00532

---

I hereby certify that on August 3, 2013, the following document:

**Brief with Addendum  
Appendix**

was filed electronically with the Clerk of Supreme Court, and that the following will be electronically served therewith:

**Kristal Kadrie** - prosecutor@cityoffargo.com, kkadrie@cityoffargo.com

I further certify that a copy of the foregoing document will be mailed by first-class mail, postage paid, to the following non-e-file participants:

None

Dated this 3<sup>th</sup> day of August, 2013.

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**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

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City of Fargo,  
Plaintiff and Appellee

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v.

**CERTIFICATE OF SERVICE**

Jason White,  
Defendant and Appellant

**Supreme Court No. 20130191**  
Cass County No. 2013-CR-00532

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I hereby certify that on August 12, 2013, the following document:

**Brief with Addendum - corrected**  
**Appendix – (title page only)**

was filed electronically with the Clerk of Supreme Court, and that the following will be electronically served therewith:

**Kristal Kadrie** - prosecutor@cityoffargo.com, kkadrie@cityoffargo.com

I further certify that a copy of the foregoing document will be mailed by first-class mail, postage paid, to the following non-e-file participants:

None

Dated this 12<sup>th</sup> day of August, 2013.

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