

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Spencer Kerry Curtiss,)	
)	
Petitioner-Appellant)	
)	Supreme Court No. 20180392
v.)	District Court No. 08-2016-CV-02655
)	
State of North Dakota,)	
)	
Respondent-Appellee.)	
_____)	

BRIEF OF APPELLANT

APPEAL FROM AN ORDER DENYING THE PETITIONER'S APPLICATION
FOR POST-CONVICTION RELIEF ENTERED JULY 18TH, 2018; AND THE ORDER
DENYING MOTION FOR RECONSIDERATION AND MOTION TO CORRECT
SENTENCE ENTERED SEPTEMBER 25TH, 2018

Burleigh County District Court

South Central Judicial District

The Honorable David E. Reich, Presiding

Spencer Kerry Curtiss
P.O.Box 5521
Bismarck, North Dakota 58506-5521
Appellant/ Petitioner

TABLE OF CONTENTS

Table of Contents.....	p.1
Table of Authorities.....	p.2,3,4
Statement of the Issues.....	p. 5
Statement of the Case.....	¶ 1
Statement of the Facts.....	¶ 3
Jurisdiction.....	¶ 5
Standard of Review.....	¶ 6
Argument.....	¶ 7
I. Whether the trial court erred in granting Summary Disposition of Post-Conviction Application resulting in the denial of relief	
II. Whether the district court erred in the denial of Motion for Reconsideration	
III. Whether the district court erred in the denial of the Motion to Correct an Illegal Sentence	
IV. Whether the district court erred in review and denying the Motion for Summary Judgment upon Additional Conflicts of Interest	
V. Whether the district court committed a miscarriage of justice in this legal action	
Conclusion.....	¶ 74

TABLE OF AUTHORITIES

Statutes

NDCC § 28-27-01	¶5
NDCC § 29-32.1-14	¶5
NDCC § 12.1-20-03(1) (d)	¶48
NDCC § 27-13-12	¶50
NDCC §12.1-20-02(3)	¶48, ¶53
NDCC §12.1-20-03(3)	¶48
NDCC §12.1-32-01(1)	¶48
NDCC §21-32.1-01(f)	¶30
NDCC §29-32.1-01(3) (a) (1)	¶39
NDCC §29-32.1-01(3) (a) (3)	¶30, ¶39
NDCC §29-32.1-09(2)	¶15, ¶49
NDCC §29-32.1-11	¶6, ¶31, ¶36, ¶37, ¶45

Rules

NDCivP 61	¶44, ¶73
NDR CivP 52(a)	¶ 6, ¶20, ¶28, ¶31, ¶36, ¶37
NDR CrimP 52(b)	¶6, ¶48, ¶53, ¶58

NDREvid 301	¶42
NDREvid 404(b)	¶46
 <u>Constitution Law</u>	
<u>Art 1, §10, United States Constitution</u>	¶19
N.D. Const. art1§13	¶30
N.D. Const. Art VI §§ 2 & 6	¶5
 <u>Case Law</u>	
<i>City of Mandan v Baer</i> , 1998 ND 101, ¶19, 578 NW 2d 559	¶6
<i>Commonwealth v Batista</i> , 32 Mass App Ct 910, 585 NE 2d 335, 336 (Mass App Ct 19920)	¶67
<i>Curtiss v Curtiss</i> , 2016 ND 197, ¶13, 886 NW 2d 568	¶60
<i>Curtiss v State</i> , 2016 ND 62 ¶11	¶8
<i>Davis v State</i> , 2013 ND 34, ¶15, 827 NW 2d 8	¶9
<i>Desert Partners IV, LP. v Benson</i> , 2016 ND 37 ¶9,10, 875 NW 2d 510	¶6
<i>Garcia v State</i> , 2004 ND 81, ¶81, 678 NW 2d 568	¶9
<i>Jensen v State</i> , 373 NW 2d 894 (ND 1985)	¶9
<i>Kotteakos v United States</i> , 328 US 750, 90 Led 1557, 66 S.Ct. 1239	¶67
<i>Meeks v Carter</i> , 5 Ga App 421, 63 SE 517	¶9

<i>Moore v State</i> , 2007 ND 96, ¶9, 734 NW 2d 336	¶6
<i>Nix v Whiteside</i> , 475 US 157, 166, 89 LED 2d 123, 106 S Ct 988	¶14
<i>State v Curtiss</i> , 2011 ND 175	¶8
<i>State v Ebertz</i> , 2010 ND 79, ¶8, 782 NW 2d 350	¶6
<i>State v Erickstad</i> , 200 ND 202, ¶22, 620 NW 2d 136	¶6
<i>State v Hatch</i> , 346 NW 2d 268, 276 (ND 1984)	¶23
<i>State v Martinez</i> 2011 ND 173, 865 NW 2d 39	¶29
<i>State v Mathre</i> , 2004 ND 149, ¶21, 683 NW 2d 918	¶48
<i>State v Olander</i> , 1998 ND 50, ¶28	¶41
<i>State v Olander</i> , 1998 ND 50, pp. 27-28, 575 NW 2d 558	¶48
<i>State v Vogel</i> , 407 NW 2d 86, 89(1991)	¶53
<i>Syvertson v State</i> , 2005 ND 128, ¶4, 699 NW 2d 855.	¶6
<i>Taylor v Maddox</i> , 366 F.3d 992, 1001, (9 th Cir)	¶8
<i>Tillich v Bruce</i> , 2017 ND 21, ¶21, 889 NW 2d 899.	¶6
<i>United States v Wright</i> , 799 F.2d 423, 426 8 th cir (1986)	¶51
<i>Varnson v Satron</i> , 368 NW 2d 533, 536 (1985)	¶6
<i>Waldie v Waldie</i> , 2008 ND 97, ¶11, 748 NW 2d 683	¶6
<u>Other Authority</u>	
5 Am J2d A&E § 774	¶6

STATEMENT OF THE ISSUES

- I. Whether the trial court erred in granting Summary Disposition of Post-Conviction Application resulting in the denial of relief;
- II. Whether the district court erred in the denial of Motion for Reconsideration;
- III. Whether the district court erred in the denial of the Motion to Correct an Illegal Sentence;
- IV. Whether the district court erred in review and denying the Motion for Summary Judgment upon Additional Conflicts of Interest;
- V. Whether the district court committed a miscarriage of justice in this legal action

STATEMENT OF THE CASE

[¶ 1] This case has inception in an unfounded ‘suspicious activity’ incident report filed May 27th, 2010. The legal situation erupted August 20th 2010, whereas strong influence of controlled substances in individuals generated sheer hysteria and panic in others, and once the bell is rung no turning back. This resulted in two intertwined storylines occurring simultaneously in Bend, Oregon and Bismarck. During investigations unusual facts with no followed protocol, no involvement of Child Advocacy for forensic interview, only the single pressured witness to create narrative based upon suspicious activity. Outside influence also engaged in stratagem by creating a digital platform to support allegations intentionally designed to be found and used at trial. [See Id# 3, pgs. 12-14]

[¶ 2] Jury became so enamored by the suspicious activity in May that they were misled to ignore the overwhelming otherwise lack of credible evidence, especially as during deliberations clear comprehension of ‘lake’ allegation in call; and with no cautionary instruction given to jury the outcome resulted upon suspicious activity and the lake. When given the choice, the court left full discretion to the jury resulting in two verdicts dated and autographed. Moreover without specific allegation declared in verdict no unanimous verdict conclusive to a single charge in light of multiple allegations

STATEMENT OF THE FACTS

[¶ 3] Facts of the case encompass no legally binding attorney of record; fabricated digital evidence used at trial destroyed to prevent forensics; newly discovered evidence to challenge outcome of trial as entire case surrounds supporting ‘suspicious activity’ report in May 2010; failure to convict upon essential elements listed in statutes; lack of pointed jury instruction allowing decision based upon suspicious activity and evidence outside jurisdiction. All issues intrinsic and innate to denial of a fair trial.

[¶ 4] Gist of the Orders is that Curtiss lacks exception for review and lacks legal precedent upon whether he presented genuine issues of material facts to preclude summary disposition.

JURISDICTION

[¶ 5] This Court has jurisdiction to hear this appeal from a district court judgment under N.D.Const. Art VI §§ 2 & 6; N.D.C.C. § 28-27-01, and N.D.C.C. § 29-32.1-14.

[¶6] STANDARD OF REVIEW

NDRCivP 52(a) Findings of fact will not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

"A finding of fact is clearly erroneous if it is induced by an erroneous view of law, if it is not supported by the evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction that a mistake has been made." *Syvertson v State*, 2005 ND 128, ¶4, 699 NW 2d 855.

In an appeal from a judgment under the Uniform Act we apply the "clearly erroneous" standard of Rule 52(a) NDRCivP in reviewing fact question. *Varnson v Satron*, 368 NW 2d 533, 536 (1985)

"When a district court may do something, it is generally a matter of discretion." *Waldie v Waldie*, 2008 ND 97, ¶11, 748 NW 2d 683

NDCC §29-32.1-11 requires the district court to make explicit findings on questions of fact and state expressly its conclusion of law relating to each issue presented.

Abuse of discretion is a decision by whim or caprice, arbitrarily, or from a bad motive which amounts practically to a denial of justice as a clearly erroneous conclusion, one that is clearly against logic and effect of the facts presented. *5 Am J2d A&E* § 774

A district court abuses its discretion if it acts in an arbitrary, unreasonable or unconscionable manner; its decision is not a product of a rational mental process leading to a reasoned determination, or it misinterprets the law or misapplies the law. *Tillich v Bruce*, 2017 ND 21, ¶21, 889 NW 2d 899.

NDRCrimP 52 (b) An obvious error or defect that affects substantial rights may be considered even though it was not brought to the Court's attention.

To determine whether error affecting substantial rights of the defendant has been committed, the entire record must be considered and the probable effect of the error determined in the light of all the evidence.

Summary Judgment is a procedural device for the prompt resolution of a controversy on the merit without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed fact, or if the only issues to be resolved are question of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record.

On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Summary Judgment is inappropriate if reasonable difference of opinion exist regarding inference that may be drawn from undisputed facts.

Desert Partners IV, LP. v Benson, 2016 ND 37 ¶9,10, 875 NW 2d 510

The substantial rights of the defendant are affected if the error is prejudicial. The error is prejudicial if it has affected the outcome of the district court proceedings. *City of Mandan v Baer*, 1998 ND 101, ¶19, 578 NW 2d 559

The interpretation of a court rule or statute is a question of law that we review de novo. *State v Ebertz*, 2010 ND 79, ¶8, 782 NW 2d 350

Newly discovered evidence is evidence that was discovered after trial, and the failure to learn about the evidence at the time of the trial was not the result of the petitioner's lack of diligence; the newly discovered evidence is material to the issues at trial, and the weight and quality of the newly discovered evidence would likely result in an acquittal. *Moore v State*, 2007 ND 96, ¶9, 734 NW 2d 336

"In order to affect 'substantial rights', an error must have been prejudicial, or affected the outcome of the proceeding". *State v Erickstad*, 200 ND 202, ¶22, 620 NW 2d 136

ARGUMENT

[¶ 7] Curtiss presents an Initial Statement of Importance:

Neither the state district court in its conclusion of Curtiss's petitions for post-conviction relief nor the North Dakota Supreme Court on direct appeal or appeal from the denial of amended first post-conviction relief made any factual finding regarding the evidence presented at trial.

[¶ 8] However, all pleadings subsequent to *2011 ND 175* has stated this appeal was based upon the sufficiency of the evidence. In the Court opinion *2016 ND 62* ¶11 it is stated that "the Court made its decision based on the parties' briefs and testimony given at the hearing, rather than the criminal trial transcript". This of itself has created unwarranted detriment to the review of issues and displays the force of presumption that Curtiss must face.

Taylor v Maddox, 366 F.3d 992, 1001, (9th Cir) (commenting that "where the state courts plainly misapprehended or misstate the record in making their findings...that misapprehension can fatally undermine the fact-finding process, rendering the factual findings unreasonable")

[¶ 9] This legal action has not been about Curtiss, nor K.D., but about the presumptions set forth and relied upon by the prosecution team and all subsequent reviewers of stated case facts. There has been persistence in providing others with false information and thereby depriving the finder-of-fact of true and accurate information. Censorship to the truth. No paralegalize.

In *Meeks v Carter*, 5 Ga App 421, 63 SE 517, it is said "By justice we mean that end which ought to be reached in a case by the regular administration of the principles of law involved as applied to the facts."

Post-Conviction is a means for vindicating actual claims.
Davis v State, 2013 ND 34, ¶15, 827 NW 2d 8

The Uniform Post-Conviction Act creates a procedure which implements the writ of habeas corpus and provides an opportunity for more extensive development of the issues and a more complete record for review. *Jensen v State*, 373 NW 2d 894 (ND 1985)

A defendant filing a subsequent application for post-conviction relief does not misuse the process if he or she establishes an excuse, such as newly discovered evidence, that could not have been raised in the first post-conviction relief application, *Garcia v State*, 2004 ND 81, ¶81, 678 NW 2d 568.

[¶ 10] Sole attempt by Curtiss to establish the requisite probability that a constitutional violation has probability resulted in the conviction of one who is actually innocent and show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence. The adequate opportunity to present claims fairly is not exclusion by the trial judge. Curtiss attained a high level of genuine issue of material fact only to collide with all the misrepresentation of the Law of the Trial and Law of the Case creating misapplied preclusion to review.

[¶ 11] At hand is two Orders containing several issues of controversy with merit and relevance in each along with compliance to amount of wording in this brief Curtiss will attempt to be concise, nevertheless honorably requests review of documents presented by Curtiss plus give the most probative force to the facts presented, especially as Curtiss directly has filed all documentation towards the issues of trial and appeal.

[¶ 12] Curtiss asserts that the district court erred in the summary dismissal of claims with clear error against the evidence in the record and/or no conclusion of law; the Motions denied was an abuse of discretion; and the Conflict of Interest was clear error against the rules of law and agency and created actual prejudice to Curtiss.

[¶ 13] To prevent duplicity upon argument Curtiss respectfully requests full review of submitted documents with specific invite to listed Id#'s. If expansion upon any issue arises,

Curtiss will willingly submit a directed supplement upon that issue as Curtiss does not waive any arguments.

I. Whether the trial court erred in granting Summary Disposition of Post-Conviction Application resulting in the denial of relief

[¶ 14] In this post-conviction proceeding Curtiss has been diligently attempting to place upon the record an accurate accounting of events plus the errors that permitted a judgment of conviction to occur. As “The very nature of a trial is a search for truth” *Nix v Whiteside*, 475 US 157, 166, 89 LED 2d 123, 106 S Ct 988, and the private interest in the accuracy of a criminal proceeding that places an individual life or liberty at risk is almost uniquely compelling, Curtiss asserts that numerous findings are clearly erroneous and as such is entitled to relief.

Petitioner declares violation of 14 Amendment of the United States Constitution, that being denial of Due Process and limited 6th Amendment violation of ineffective assistance of post-conviction counsel violation. Petitioner also contends that statute 29-32.1-09(02) is unconstitutional and is not applicable in this case.

[¶ 15] The district court summary dismissed this claim pursuant only to NDCC §29-32.1-09(2), against the genuine issue of material fact with exception, and must be reviewed as a question of law.

Please refer to [Id# 1, pgs. 4-26; Id#2, pgs. 4-21; Id #3, pg. 7; Id#’s 131; #138 thru 150; # 47; # 46; # 45; # 32; and # 29] for material presented and legal theories behind the claim itself.

[¶ 16] No language constituting that no claim can be made against due process violation of ineffective assistance of counsel; the state is holding too much to the word “ineffective” as meaning only as remedy for relief and no thought towards precedence use for exception to procedural default as asserted in the pleadings.

[¶ 17] Due process violation to ineffective assistance claim specific to create exception to procedural default with encompassed well-established habeas precedence. The legal theory also presented was not given audience to proof of actual innocence that will enable exception to preclusion of procedural default toward trial counsel. The word ineffective is taken presumptuously to solely mean remedy and no comprehension from the Memorandum.

[¶ 18] Had district court read argument it would be clear under limitation, that the review of post-conviction counsel performance in the event Curtiss display genuine issue of material fact of innocence would occur to the *Strickland* standard, and in that such counsel did not meet wide range of performance and that Curtiss was prejudiced, that the court could review any previously raised issues and not be held to res judicata nor misuse of process. And here Curtiss had laid out the claims against trial and appellate attorney Morrow that would clearly show performance outside of wide range and did cause prejudice and absent the errors the outcome would result in acquittal.

[¶ 19] Please review the legal theory and argument in the record that support that 29-32.1-09(2) should not be applied to Curtiss in violation of Art 1, §10, United States Constitution as to the time frame of appointment of Myhre and Grossman and that the exception to procedural default is applicable to this case.

This controversy interrelated to Conflict of Interest.

Petitioner presents Newly Discovered Evidence

[¶ 20] The district court summary dismissed this claim against the weight of evidence upon the record. NDR CivP 52. The findings declared hinge on upon the information and statutes within, proper jury instruction and the verdict(s).

[¶ 21] Judicial Notice to Law of Case, Law of the Trial that a singular charge has been submitted to the trial court with multiple alleged occurrences starting May 23rd, 2010; yet the court has obstructed the process for challenging each independent allegation through sustaining an unspecific jury determination asserting which allegation the jury found guilt beyond a reasonable doubt upon. The court cannot presume that conviction did not rest upon the only date given by the sole witness before the jury.

[¶ 22] The May 26th allegation in “suspicious activity” was presented to prove the truth of the matter asserted by the state and had significant impact upon the jurors, and with any genuine challenge to this allegation the outcome of the trial would have been different. The state did not contain testimony to only after June 1st, 2010 and utilized the “on or about” interpretation to include testimony of unfounded “suspicious activity” and by doing such has introduced time as inherent to the case. The court denied cautionary instruction to jury to not consider “suspicious activity” in May to assert truth of the matter to a guilty verdict.

[¶ 23] Characterization of time frame in hearings not accurate to testimony given at trial especially as jury left to their discretion to determine ‘on or about’.

“unless time is an element of an offense, it is not required in a criminal prosecution that the crime be proved to have been committed on the precise date or time period

alleged in the complaint or information.” *State v Hatch*, 346 NW 2d 268, 276 (ND 1984)

[¶ 24] The language of the court continues to force toward “alibi” and not distinguish an opposing eyewitness accounting rebutting the sole witness. Alibi does not challenge the alleged action itself, but places the individual ‘elsewhere’, and the court fails to recognize that the scene of the crime is the genitalia of the K.D. Here challenges the happening never occurring.

[¶ 25] Sworn affidavit by Branden Curtiss [Id#188] states specifically time frame in which letter was written and sent to Mr. Morrow, allowing for inference that Curtiss did not know of its existence. Directed counsel Askew did not submit this Affidavit to the court prior to evidentiary hearings to eliminate any misinterpretation or misunderstanding towards time frame and who letter was in possession of. New evidence discovered after trial that attorney did not disclose, that is material to the issue at trial that will recalibrate the liability of trial and result in acquittal. Review trial transcript.

Please take notice of [Id # 1, pgs. 26-31; Id # 2, pg. 10; Id# 3, pgs. 2-5, pgs. 8-9; Id#’s 82; 76; 64; 13; 188; 177; 176; 175; 169, pgs. 4-8; and 190, pgs. 2-7, pgs. 33-34]

Please take notice to Transcript of Hearing March 13th, 2018 (pg4, ln 9-25; pg. 5, ln 1-4; and language “in one of the filings that have come in” as Curtiss was sending material information to Askew; pg. 6, ln 5-6, “Mr. Curtiss filed everything”; Pg. 8, ln 1-6; pg. 9, ln 1-5, as state declares could support finding of guilt; pg. 11, ln 18-25; pg. 12, ln 1-5]

Please take notice to Transcript of Hearing July 17th, 2018 (pg. 6, ln 18-25; pg. 7, ln 1-25; pg. 8, ln 1-15; (pg. 10, ln 16-17, as now “not a sexual act” and compare to [App # 32, ln 12-15] and Hearing March 13th Transcript pg. 9); pg. 11, ln 11-22; pg. 13, ln 1-11]

Please take invite to supplied appendix with Judge Reich's statements [App# 31, 32, 33, 34], K.D's testimony [App# 19thru 28], and the numerous connections to May 26th, 2010 in [Id #190].

[¶ 26] Curtiss was denied the adequate opportunity to present the legal basis and connection between Branden Curtiss's Statement and the outcome of the trial per the failure of directed counsel Askew to submit supplemental briefs as directed by the court prior to July 17th, 2018, to preclude Summary disposition. The majority of witnesses at trial presume the May 26th, 2010, allegation occurred and was used to assert the truth of the matter asserted by the state

[¶ 27] Denial by district court stresses the time frame and not what the precognition asserts to the case itself, and with review against the record a clear error has occurred. The interests of justice will require the application to be granted as Curtiss has provided better than alibi defense with direct eyewitness accounting.

The disputes within this issue dependent upon matters of proper jury instruction, essential elements, no unanimous verdict and failure to follow jury instruction with two verdicts.

[¶ 28] Summary dismissal was inappropriate in the presence of genuine issues of material facts and the information available to the district court. Findings under NDRCivP 52 are clearly erroneous and as such, law cannot summary dismiss genuine issues of material fact; and with error here, further eyewitnesses can be deposed as to similar material facts on eyewitness accounting due again to the undisputed fact the trial jury did not specifically state which allegation verdict based upon.

[¶ 29] This issue has presented argument toward the verdict to secure this conviction, yet the verdict did not specify the exact allegation/event/location that the jury unanimously found guilt beyond a reasonable doubt upon, thereby allowing for precedence in:

State v Martinez 20115 ND 173, 865 NW 2d 39, that district court's failure to include information in the jury instruction identifying the underlying act for each count of the offense or the district court's failure to instruct the jury that it had to unanimously agree on the underlying act for each count constituted obvious error.

[¶ 30] New North Dakota state appellate court interpretation to have a unanimous verdict under NDConst art1§13, asserts the NDCC §29-32.1-01(3)(a) (3) exception to two year limitation and should be applied retroactively under §21-32.1-01(f) as: 1) it is a ND Constitution article and 2) the district court has created a focal point upon a single date where the jury was not instructed to state a specific allegation. Verdict could have been based upon any allegation or one by one juror and one by another, as jury not told otherwise and this not a fair proceeding. This interpretation will serve the interest of justice to be applied here to assist in resolving this controversy. Furthermore, this permits for additional exception for review upon the verdict and unfair trial.

Please grant reversal upon summary judgment on this issue and apply the statement to the facts of the trial in its entirety for probative weight challenging the testimony presented. Reverse and remand with instruction to dismiss with prejudice the conviction.

Petitioner declares violation of 14th and 5th Amendment of United States Constitution with the destruction of physical evidence.

[¶ 31] The court summary dismissed this claim without giving any explicit finding or conclusion pursuant to § 29-32.1-11 and NDRCivP 52(a).

[¶ 32] The destruction of evidence is a denial to ascertaining the truth of manufactured evidence presented as evidence-in-chief at trial with its intent to receive conviction. Proof that evidence displayed was not what the state purports to be and was altered and modified in material aspect to deceive law enforcement.

[¶ 33] Metadata can reveal the evaluation of a document. Earlier drafts of a document, the dates of subsequent revision and the identity of persons revising a document are routinely capture by software application. Yet, that process has been thwarted by the authority responsible for retaining evidence.

[¶ 34] This argument goes to support all claims and efforts that this case was manufactured to produce a conviction simply due to allegation of suspicious activity, and not because any actual crime occurred, but solely for nefarious motive of individuals involved in the initial disclosure of law enforcement action.

Please take notice of [Id #1, pgs. 23-25, 31-38; #2, pgs. 2-3; # 3, pgs. 13-14; Id#'s 81; 80; 79; 77; 74; 73;72;71;70;69; 68;67;66;65; 42;41;40; 38; 37;36; 35; 34; and 33]

[¶ 35] The electronically stored information was a greater source of evidence to support manufacture of charge claim, and direct challenge to essential elements of the singular charge. Initially had this material been subjected to independent forensic review it would not have been inadmissible at trial due to alteration, and during trial had the jury been informed of this forensic review that material was intentionally modified the outcome would have been different.

[¶ 36] As no finding was found under 29-32.1-11 or NDRCivP 52(a) this Court is left with the discretion to reverse for clarity or to review all material on the record and determine if the state is obstructing the legal process and thereby grant favor to Curtiss in review of all probative evidence produced in this legal action.

Petitioner declares violation of 6th Amendment of the United States Constitution.

[¶ 37] The court summary dismissed this claim without giving any explicit finding or legal conclusion pursuant to § 21-32.1-11 and NDRCivP 52(a).

[¶ 38] This claim is centered on the denial of a fair trial before an impartial jury in that support for manufactured testimony was intentionally withheld from the jury and denied Curtiss a fair trial.

Please take notice to [Id#'s 1, pgs. 28, 38-40, #3, pgs. 6-7; 190; 11; 51; 52; 53; 54; 56; 58; 62; and 63]

Review the affect that subpoenaed witnesses were discharged the day of trial when their testimony would place K.D. at the residence during in-home therapy for another sexual assault victim; thus learning the language necessary for fabrication.

In summary to above:

[¶ 39] The conviction of Curtiss was obtained in the violation of state law and North Dakota Constitution and the laws and Constitution of the United States and cannot be sustained.

Curtiss has submitted material to rebut all allegations in light of no unanimous verdict exists upon a specific allegation and knowing that no challenge to sufficiency of evidence has occurred. [See Id#190]

Curtiss asserts that pursuant to §29-32.1-01(3)(a)(1) that existence of newly discovered evidence including DNA, defined as forensic material or scientific evidence, which if proved and reviewed in the light of the evidence as a whole, would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted.

This evidence being the specific review of:

- the statutory language in the Third amended Information and the jury instructions failing to contain such;
- the independent review of the digital metadata to support manufactured evidence;
- forensic review of the bathroom allegation will reveal critical error contrary to K.D.'s testimony;
- the car allegation with forensic review of testimony will reveal critical error contrary to K.D.'s testimony;
- Branden's statement with forensic review of testimony supports critical error contrary to K.D.'s testimony;
- forensic review of the two autographed verdict forms will display forgery of signature;
- forensic review of the contracts appointing attorney of record to Curtiss was unenforceable as Director Huesby was in violation of statute law to act in Curtiss' behalf; and

- had Mr. Askew filed any of Curtiss' filings the court would have had the exception in 29-32.1-01(3)^(c)(3) in that no unanimous verdict was filed with the specific allegation in which the jury found reasonable doubt upon.

EXCEPTIONS

[¶ 40] This legal action has become about presumption of the state versus the exceptions presented by Curtiss, and where exception allows review without bar, the court should follow well-established precedence and proceed; as in the 'safety valve' exception.

[¶ 41] Curtiss has submitted exceptions to prepare a fair and meaningful opportunity for review that Curtiss is actually innocent of the single charge as listed in the Third Amended Information.

An accused guilt or innocence is not the determinative factor; rather the fairness and integrity of proceeding is paramount. *State v Olander*, 1998 ND 50, ¶28

Here in the light of credible evidence the trier of fact did not cease to operate on the basis of presumption. Especially after Curtiss directly supported this burden in his Application, Memorandum, Affidavit, and presentation of numerous exhibits and documentation.

[¶ 42] Pursuant to NDREvid 301 presumption substitutes for evidence of the existence of fact presumed, however if the trier of fact finds from credible evidence that the fact presumed does not exist, the presumption is rebutted and ceases to operate.

[¶ 43] Time has become an inherent element of the case by the language of the district court and as such the assertion of missed accounting becomes a genuine issue of merit to the numerous independent alleged occurrences stemming from the May 26th allegation.

[¶ 44] Exception in this case as follows:

- #1 There has not been any challenge to the sufficiency of evidence presented at trial;
- #2 There does exist a conflict of interest as no legal agency can form in contract from Robin Huesby, therefore no Power of Attorney to bind Curtiss plus no advocate to assist against the state;
- #3 No supplemental brief to introduce material presented in Motions and other filings to court prior to evidentiary hearings. No sanction to either officer of the court, yet granted state's re-motion for summary dismissal. Deficiencies were strategic choices and another facet of a systematic operation of malice in fact due to 'Conflict of Interest', and had attorney of record presented the material now presented within the Motion for Reconsideration and Brief in Support the outcome for the proceedings would have been different, further Curtiss has attempted to supplement the record with documentation;
- #4 There has been a miscarriage of justice in this criminal legal proceeding with sustaining a charge not produced with due process upon Curtiss and without assistance of counsel;
- #5 There exists no unanimous verdict upon a specific allegation in the existence of multiple allegations over different times and locations, even outside the jurisdiction;
- #6 The state audited the language to format the charge, and presumption sustains the language. Please review [Id#156] Order and [Id#169, Notice pg. 3];

The district court is demanding exceptions prior to any consideration of Curtiss' claims and additionally as the district court requires specific direction in which to find material here attorney neglect has denied adequate opportunity to place evidence material to preclude any bar presented and summary disposition, upon the record.

II. Whether the district court erred in the denial of Motion for Reconsideration

[¶ 45] The Judgment contains two possibilities for finality with no specific legal conclusion to each independent issue pursuant to §29-32.1-11. Please also review exceptions above. Curtiss prays this Court will either reverse for clarity or this Court can review each directed issue for obvious error.

The following are listed Issues from [Id# 170 and 169] to secure undisputed facts relating to genuine issues in the continuing appeal process. A finding upon each is required.

1. The fact that May 26th, 2010 was a pivotal event that the jury did base finding upon for guilt, and as such is included upon the on or about June 1st.

[¶ 46] The trial court was reliant upon the testimony of May 26th to assert the truth of the matter as the state did not demand cautionary instruction to exclude May allegation and did not give notice for use of May allegation under NDREvid 404(b). Further, all subsequent state witnesses testified about May initial disclosure. Please review [Id#190, pgs. 2-6, pgs. 33-34; Id#169, pgs. 2-8; Id# 188, and 49]

Please review as this statement true and accurate and parallels newly discovered evidence as rebuttal to presumption made by court in summary disposition.

2. That hearing impairment of the Petitioner was a disability at trial and that no comprehension and clear understanding of testimony occurred at trial.

[¶ 47] Please see the Hearing transcripts [March 13th, pg.2, ln19-25; pg.3, ln1-5], [July 17th pg. 3, Ln. 22-25; pg.4, lns1-4; Id# 169, pgs. 8-12] Displays fact of concern for due process not once, but twice.

The lack of hearing prevented Curtiss from testifying in the manner he wanted to as unable to state facts in manner wanted due to inability to properly comprehend testimony given in courtroom preventing accurate understanding of trial testimony resulting in appearance of untruthfulness before the jury. The state cannot claim to know level of audio comprehension in Curtiss, and inquiry displays this fact of no assumption by ASA Vaagen.

This is abuse of discretion to request material already claimed, however, this is the only evidence presented in open court toward any claim. Please submit this evidence as proof Curtiss did have a substantial hearing disability and could not properly comprehend testimony at trial.

3. That the essential elements by statute(s) of the offense require clear and precise definition and Judicial Notice.

[¶ 48] “The State admits that the Petitioner was convicted of Gross Sexual Imposition in violation of N.D.C.C. §§ 12.1-20-03(1) (d), 12.1-20-03(3), 12.1-20-02(3) and 12.1-32-01(1).”[Id#93, ¶4] Please review statutes as applied in 2010. As sexual act was defined as being with an object. The district court must track the statutory language, and Curtiss can

only be held by whatever is in the information by statutory elements. No testimony involving an object.

An exact interpretation of the statutes listed on the Third Amended Information is a question of law for this Court.

“An error that infringes upon substantial rights of a defendant is noticeable notwithstanding lack of an objection or in the absence of a request for an instruction.” *State v Mathre*, 2004 ND 149, ¶21, 683 NW 2d 918

Failure to instruct on an essential element was obvious error, proper instruction on the element of the offense implement fundamental due process. *State v Olander*, 1998 ND 50, pp. 27-28, 575 NW 2d 558

We believe sustaining a conviction without informing the jury about an essential element of the crime would seriously affect the fairness, integrity, and public reputation of our criminal justice. *Id* ¶28

Please take notice of [Id#’s 2, pgs. 14-17; #3, pgs. 5-6; 169, pgs. 12-18; Id#190, pgs. 21-23; Id#23; 24]

Please review this claim for obvious error NDRCrimP52(b) as this critical error has undisputedly affected substantial rights as Curtiss was charged with ‘on or about June 1st through August 24th, 2010, to have one time engaged in a sexual act, with an object, and proof he was not absent from the scene of the crime, with a person under the age of fifteen within Burleigh county.’

4. That N.D.C.C. 29-32.1-09(2) is being applied retroactively, and is otherwise unconstitutional in this case.

[¶ 49] This has been raised for preservation and review as a question of law.

Please take notice to [Id#169, pg.15; Id#190, pgs. 7-9]

5. That N.D.C.C. 27-13-12 was in fact violated in the criminal legal action and also in all subsequent legal actions.

[¶ 50] Please take notice to [Id# 169, pgs. 15-17; Id# 190, pgs. 7-9, pgs. 12-14; and Id# 173]

This issue is specific in finding that statute was violated and that all interconnected actions, is the cause for conviction and due process violation. Again, this issue was not countered by the state. Please review the record to determine as question of law this statute been violated.

In conclusion:

Curtiss asserts the above in best effort to supply genuine facts to the record paramount in support that a mistake has been made and that without errors the trial would have resulted in acquittal.

III. Whether the district court erred in the denial of the Motion to Correct an Illegal Sentence

[¶ 51] Please see above-mentioned Motion for review standard.

Sentences based upon material misinformation or erroneous assumption violate due process. *United States v Wright*, 799 F.2d 423,426 8th cir (1986) also at [Id#2, pg. 15]

Please take notice of [Id# 167 and Id#166]

- A. There is undisputed fact that two verdicts for the same offense exist for this criminal case.

[¶ 52] Please take notice of [Id# 14; Id# 190, pgs. 14-16, pg.33; App #'s 38, 39]

Definition of verdict: Black's law 8th ed. Pg. 1592 1) A jury's finding or decision on the factual issues of a case. It is clear by presented evidence that two findings were reached that day. The verdict became valid upon dating and signature.

The two verdict prejudiced Curtiss by not knowing specifically which allegation the jury found decisions upon. Two instruments with intent to authenticate a verdict were created at trial December 9th, 2010. Not unanimous unless proof all jurors agreed on the same allegation/event and without unanimous determination no fair trial to sustain sentence.

A definition that with two conclusions by jury did conclusively violate given Jury Instruction to date, sign and contact bailiff; as such no confidence can be had in the outcome.

B. There is undisputed fact that the jury was not instructed upon the essential element of object.

[¶ 53] Please refer to [Id# 44; 19; 20; 190, pgs. 34-35] as no instruction upon 12.1-20-02(3) "object"

When the state fails to prove all the elements of the offense charged beyond a reasonable doubt, the outcome should be acquittal. *State v Vogel*, 407 NW 2d 86, 89(1991).

Please review for obvious error NDRCrimP 52(b) in parallel with similar claim.

C. There is undisputed fact that the State did not elect to assume criminal jurisdiction over any other county than Burleigh.

[¶ 54] Please take notice to [Id# 190, pgs. 31-32]

Any evidence presented for the truth of the matter asserted from outside of the jurisdiction cannot be used to sustain a conviction. This finding to set clear evidence that ‘call’ was outside of jurisdiction.

D. There is undisputed fact that Rebecca Curtiss statement in Exhibit #A declares three people in the bathroom.

[¶ 55] Please take Notice to [Id# 40; 185; 190, pgs. 9-11, pgs. 17-21] as Curtiss details architecture obstruction prohibiting the testimony given at trial and notice to language in Rebecca Curtiss’s statement that three people in the bathroom during the only allegation by K.D.

This determined finding asserts a different outcome with forensic review and supports insufficiency of the evidence to sustain the conviction as ‘bathroom incident’ rebutted as narrated by K.D.

E. There is undisputed fact that the “pretext call” contained material outside the jurisdiction of the court.

[¶ 56] Please take notice to [Id# 190, pgs. 24-29, pgs. 31-32]

Please see [Id # 195, ¶9], where the state concedes “controlled call placed by the victim to the Petitioner may have had parts that took place outside of Burleigh County.”

[¶ 57] The trial court did not give ‘pointed instruction’ that jury could not consider call for its truth upon lake allegation. The call was not transcribed intentionally to prevent subsequent accurate review of the language for location and pauses in the language. This

call was testimonial, yet not in alignment with the statutory and essential elements and cannot sustain the conviction.

[¶ 58] Please review under Obvious error NDRCrimP 52(b) as even though this evidence may have been received at trial, it is what the trial court did with it; as it was intentionally created by law enforcement to be testimonial with intent to for use at trial circumventing laws of protection, be it assistance of counsel or due process as defendant cannot cross-examine sexual history, here the testimony contained material clearly determined during trial to be outside of jurisdiction. However, the court determined not to grant cautionary instruction to jury upon such decision. [See App# 31,32, 33,34,35,36] and the jury requested to re-hear the call, which has no transcript, then or now, in a quiet environment with no public and the jurors all standing close to speakers.

It would not be unreasonable to believe that the jury made a decision upon call, and again without pointed instruction to jury directing do not use for truth of the matter or provide specific alleged event, guilty verdict was based upon evidence outside of jurisdiction.

No officer of the court specifically polled the jury upon which specific allegation the verdict based upon as would be reasonable in light of multiple allegations.

This Court must now determine if patchwork verdicts with absence of unanimous verdict can sustain a verdict of guilt and grant proper remedy.

In conclusion:

[¶ 59] Curtiss has asserted that there was no fair trial before an impartial jury, no unanimous verdict upon specific allegation/location, due process violations and a

triggering of double jeopardy with two instruments that declare a decision upon issues at trial with the action of patchwork verdicts.

**IV. Whether the district court erred in review and denying the Motion for
Summary Judgment upon Additional Conflicts of Interest**

[¶ 60] The district court denied this Motion for Summary dismissal filed by Curtiss without any findings or legal basis for conclusion in contrast to matters of law. No review of additional conflict. The finding is clearly erroneous as it is induced by erroneous view of law and not supported by the evidence. As matter of law this issue cannot be summarily dismissed.

Please take notice to [Id#'s 131; 139 through 150; 169, pg. 17 Notice to court...; 47; 46; and 173] See Transcript hearing March 13th, [pg. 6, ln 12-16; pg. 10, ln 2-7; pg. 12, ln 6-25; pg.13, 1-5] And see Transcript hearing July 17th, [pg. 13, ln14-22; pg. 14, ln 24-25; pg. 15, ln 1-7]

A district court must adequately explain the evidentiary and legal basis for its decision, allowing the parties and this Court to understand the decision. *Curtiss v Curtiss*, 2016 ND 197, ¶13, 886 NW 2d 568

[¶ 61] Here exists genuine defense to all res judicata and misuse of process assertions by the state in that no lawful agency attached in regards to appointed assistance of counsel; thereby permitting a review of all claims previously raised without attorney support. Curtiss marks invite to the record in Evidentiary Hearing March 13th, 2018 [pg. 6, ln 13-19; pg. 10 ln 2-7; pg. 12, ln 6-25; pg. 13, ln 1-5] No Public Defender's Office or Lead Contractor to minimize violation. All attorney(s) of record hired by Robin Huesby and assigned to Curtiss by her or indirectly by her office.

[¶ 62] Fundamental factor here is the weight of every legal process against defendant versus the disqualifying fact that Mr. Morrow and all subsequent attorney of record could not legally attain Power of Attorney over defendant. Facts show that no agency can be created in violation of law and no enforceable contract for services can be applied in behalf of Curtiss from the office of Robin Huesby.

[¶ 63] The state chose not filing an answer to the Conflict of Interest as to not dishonor the court, for to have answered would have presented clear and convincing material supportive to the fact presented by Curtiss, and so the state directed to the court's discretion. ASA Vaagen did not wish to place light upon the insufficient protocol of the district court and that a crucial mistake was allowed to proceed unrestrained. Curtiss invites the Court to the Evidentiary Hearings [March 13th pg. 10, ln 2-7; July 17th, pg. 13, and ln 14-22]

[¶ 64] Judge Reich personally directed Askew contrary to law thereby directing enforcement of an unenforceable contract for services; and furthermore, continuing as appointed attorney of record Askew did not file any requested pleadings by Judge Reich. Notably, Mr. Askew did not support case with any filing, even after the court directed him to do so.

[¶ 65] The vast array of trial decisions, strategic and tactical, were made in conflict to the best interests of Curtiss and were performed without binding Power of Attorney, and affected Curtiss' rights as to deprive him of a fair trial, direct appeal, and all subsequent appellate proceedings.

[¶ 66] Curtiss was denied a fair trial and denied the assistance of counsel resulting in actual prejudice and continues to request the remedy of declared “actual prejudice” with remedy of Reversal with instruction to dismiss with prejudice the conviction.

V. Whether the district court committed a miscarriage of justice in this legal action

[¶ 67] Miscarriage of justice is a decision inconsistent with substantial justice
Kotteakos v United States, 328 US 750, 90 Led 1557, 66 S.Ct. 1239

Findings based on legally insufficient evidence are inherently serious enough to create a substantial risk of a miscarriage of justice, thereby warranting full review of the issues whether or not a motion for judgment of acquittal is made during trial. *Commonwealth v Batista*, 32 Mass App Ct 910, 585 NE 2d 335, 336(Mass App Ct 19920

[¶ 68] There has not been a review of the trial evidence for sufficiency and all legal proceeding subsequent to direct appeal of criminal case has presumed sufficiency review has in fact occurred.

[¶ 68] Without legal agency to bind Curtiss to any attorney of record no lawful advocate to challenge the crucible of the state arguments existed. Currently, the district court utilized the delay in review of any legal actions presented by Askew and Curtiss to obstruct Curtiss from submitting any material information to the court, especially as the pending actions related to the legal representation of Curtiss. And when Curtiss had no definitive answer on duty Curtiss attempted to place genuine issues of material fact upon the record but was unreasonably obstructed due to the technicality that Judge Reich had not made any decision in the interest of justice.

[¶ 69] Also by design, the district court has established an unreasonable barrier to defend allegations contrary to what was produced and testified to at trial, in that district court inferred that more alleged events beyond what was declared to jury at trial and in Information, such as a continuous abuse of a child charge. Presumption here in the basis for criminal liability without any physical exhibits. Abuse of discretion in the fact that trier of fact in this appellate process is the presiding judge from criminal trial that has indicated that material from Curtiss directly is inappropriate and will be denied. Curtiss invites the Supreme Court to [Id # 45].

[¶ 70] Pandemonium in the court room where no officer of the court produced a supplemental brief as directed, furthermore, no sanction toward either officer of the court for these failures to submit scheduling briefs and supplemental briefs to the district court.

[¶ 71] A mistake occurred during criminal trial process with 'Conflict of Interest' in appointment of assistance of counsel, inadequate defense approach and the jury was not properly instructed to all the essential elements, definitions, further that specific agreement by all jurors upon which allegation guilt beyond a reasonable doubt must be reached for a unanimous verdict. And more violation of due process in obstructing material to reveal these errors.

[¶ 72] Failure to reverse the conviction will seriously affect the fairness, integrity, public reputation of judicial proceeding and a miscarriage of justice will result if obvious error is not noticed.

[¶ 73] In this legal action there exist clearly erroneous findings of fact in the light of credible evidence upon the record and these errors affects the substantial rights of Curtiss

and is contrary to NDRCivP 61. In the light of all the claimed errors and the supportive evidence presented in this case there is genuine issues of material merit that a miscarriage of justice has occurred

CONCLUSION

[¶ 74] The district court has created a conundrum for this Court by creating so much confusion as to make it difficult to review district court proceedings with expectation for an affirmance of the state jabberwocky. Attorney neglect has denied Curtiss adequate opportunity to present claims fairly to the North Dakota criminal and appellate process.


[¶ 75] The district court has denied opportunity to present evidence that would be newly discovered evidence per display to connections in the trial revealing how the affects would result in an acquittal. The district court has not reviewed any material sent or filed directly by Curtiss affirming a denied access to the court, consequently resulting with court interpretation that no material for the court to make determination upon or rebut presumptions. The sustained guilty verdict results confidently on errors of the trial court.

[¶ 76] The district court and the state has mischaracterized the facts of the case to the state's advantage as the Law of the Case does not involve a review of sufficiency of the evidence at trial. Details make the fact of a case, and here we see that state has not found clear and convincing, correct and accurate facts and this practice of thought and action contains the basis for all previous denial of a fair opportunity to place material upon the record that will display that Curtiss did not commit the single offense as charged in the Third Amended Information.

[¶ 77] THEREFORE, The Appellant, Spencer Kerry Curtiss, hereby prays this Supreme Court reviews directed issues for obvious error and grant a Reversal and Remand with Instruction to the district court for dismissal with prejudice, thereby granting emancipation.

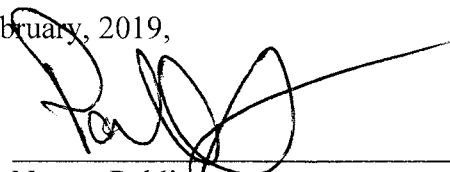
Honorable Submitted this 5th day of February, 2019.

I declare under penalty of perjury that the foregoing is true and correct to the best of my belief.

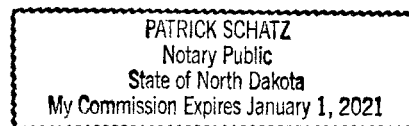


SPENCER KERRY CURTISS
Pro se Appellant
N.D.S.P.
3100 Railroad Avenue
Bismarck, North Dakota 58506-5521

Subscribed and sworn before me this 5th day of February, 2019,
In the county of Burleigh.



Notary Public



[illegible]

By placing it/them in a prepaid envelope, and addressed as follows:

To be sent to the following by electronic service pursuant to NDRAppP 25:

Tessa Vaagen at bc08@nd.gov
Assistant State's Attorney
Burleigh County State's Attorney
514 E Thayer Avenue
Bismarck, North Dakota 58501

Acknowledgment of receipt serves as proof of service in this matter pursuant to NDRAppP 25(d)

And depositing said envelope in the Mail, at the NDSP, P.O.Box 5521, Bismarck, North Dakota 58506-5521.

AFFIANT

P.O.Box 5521
Bismarck, North Dakota 58506-5521

Subscribed and Sworn to before me this 5 day of February, 2019

In the County of Burleigh.

PATRICK SCHATZ
Notary Public
State of North Dakota
My Commission Expires January 1, 2021

Notary Public

ADDENDUM TO APPELLANT BRIEF

The following information is statutes and information pursuant to NDRAppP32(a)(g) for the Court to use in determination of controversy and to display basis for legal argument by Curtiss.

NDCC § 29-32.1-01

1. A person who has been convicted of and sentenced for a crime may institute a proceeding applying for relief under this chapter upon the ground that:
 - a. The conviction was obtained or the sentence was imposed in violation of the laws or the Constitution of the United States or the laws or Constitution of North Dakota;
 - e. Evidence, not previously presented and heard, exists requiring vacation of the conviction or sentence in the interest of Justice;
 - f. A significant change in substantive or procedural law has occurred which, in the interest of justice, should be applied retrospectively.
- 3.a. Notwithstanding subsection 2, a court may consider an application for relief under this chapter if:
 - 1) The petition alleges the existence of newly discovered evidence, including DNA evidence, which if proved and reviewed in light of the evidence as a whole, would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted;

3) The petitioner asserts a new interpretation of federal or state constitutional or statutory law by either the United States Supreme Court or a North Dakota appellate court and the petitioner establishes that the interpretation is retroactively applicable to the petitioner's case.

N.D.C.C. § 29-32.1-07

1) The court may make appropriate orders allowing amendment of the application or any pleading or motion, allowing further pleadings or motion, or extending the time for filing any pleading.

NDCC § 29-32.1-09

1. The court, on its own motion, may enter a judgment denying a meritless application on any and all issues raised in the application before any response by the state. The court also may summarily deny a second or successive application for similar relief on behalf of the same applicant and may summarily deny any application when the issues raised in the application have previously been decided by the appellate court in the same case.

2. The court, on its own motion, may dismiss any grounds of an application which allege ineffective assistance of post-conviction counsel. An applicant may not claim constitutionally ineffective assistance of post-conviction counsel in proceedings under this chapter.

3. The court may grant a motion by either party for summary disposition if the application, pleadings, any previous proceeding, discovery, or other matters of the record show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

4. If an evidentiary hearing is necessary, the court may determine which issues of material fact are in controversy and appropriately restrict the hearing.

N.D.C.C. § 29-32.1-10

1. Evidence must be presented in open court, recorded, and preserved as part of the record of the proceedings.

2. A certified record of previous proceeding may be used as evidence of facts and occurrence established therein, but use of that record does not preclude either party from offering additional evidence as to these facts and occurrences.

3. The deposition of a witness may be received in evidence, without regard to the availability of the witness, if written notice of intention to use the deposition was given in advance of the hearing and the deposition was taken subject to the right of cross-examination.

NDCC §29-32.1-11

1. The court shall make explicit findings on material questions of fact and state expressly its conclusion of law relating to each issue presented; and

2. If the court rules that the applicant is not entitled to relief, its order must indicate whether the decision is based upon the pleadings, is by summary disposition, or is the result of an evidentiary hearing.

3) If the court finds in favor of the applicant, it shall enter an appropriate order with respect to the conviction or sentence in the previous proceedings, and any supplementary

orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper.

N.D.C.C. § 29-32.1-12

1. An application for post-conviction relief may be denied on the ground that the same claim or claims were fully and finally determined in a previous proceeding.

2. A court may deny relief on the ground of misuse of process. Process is misused when the applicant :

a) Presents a claim for relief which the applicant inexcusably failed to raise either in a proceeding leading to judgment of conviction and sentence or in a previous post-conviction proceeding; or

b) Files multiple applications containing claims so lacking in factual support or legal basis as to be frivolous.

3. Res judicata and misuse of process are affirmative defenses to be pleaded by the state. The burden of proof is also upon the state, as to any ground for relief which, by statute or rule of court, must be presented as a defense or objection at a specified stage of a criminal proceeding, the applicant shall show good cause for noncompliance with the statute or rule.

STATUTES IN THIRD AMENDED INFORMATION ATTENDANT TO YEAR 2010

N.D.C.C. § 12.1-20-03

1. A person who engages in a sexual act with another, or who causes another to engage in a sexual act, is guilty of an offense if;

d) the victim is less than fifteen years old.

N.D.C.C. § 12.1-20-02

In section 12.1-20-03 through 12.1-20-12

3) “object” means anything used in commission of a sexual act other than the person of the actor.

N.D.C.C. § 12.1-20-03

3(a) An offense under this section is a class AA felony if in the course of the offense the actor inflict serious bodily injury upon the victim, if the actor’s conduct violates subdivision a of subsection 1, or if the actor’s conduct violates subdivision d of subsection 1 and that actor was at least twenty two years of age at the time of the offense... A defendant convicted of a class AA felony under this section may not be sentenced to serve less than five years of incarceration.

N.D.C.C. § 12.1-32-01(1)

Class AA felony, for which a maximum penalty of life imprisonment without parole may be imposed...

CONSTITUTIONAL LAW

United States Constitution 4th Amendment

“ 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 person or things to be seized.

United States Constitution 5th Amendment

“No person shall be held to answer for a capital or infamous crime; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.”

United States Constitution 6th Amendment

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

United States Constitution 13th Amendment § 1

“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”

United States Constitution 14th Amendment § 1

“No state shall make or enforce any law which shall abridge the privileges or immunities of the United States, nor shall any state deprive any person of life, liberty, or

property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.”

North Dakota Constitution article 1§1

“All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family, property, and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.”

North Dakota Constitution Article 1 § 9

“All courts shall be open and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and the right of justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as to legislative assembly may, by law, direct.”

North Dakota Constitution Article 1 § 12

“In criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person and with counsel; no person shall be twice put in jeopardy for the same offense, nor be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law.”

North Dakota Constitution article 1§13

“The right of trial by jury shall be secured to all, and remain inviolate. A person accused of a crime for which he may be confined for a period of more than one year has the right of trial by a jury of twelve. The legislative assembly may determine the size of the jury for all other cases, provided that the jury consist of at least six members. All verdicts must be unanimous.”

North Dakota Constitution article 1 § 18

“No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.”

North Dakota Constitution article 1§ 21

“No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens.”

North Dakota Constitution Article 1 § 23 Supreme law of the land

“The state of North Dakota is an inseparable part of the American union and the Constitution of the United States is the supreme law of the land.”

North Dakota Constitution Article 1 § 24 Interpretation of the constitution

“The provisions of this constitution are mandatory and prohibitory unless, by express words, they are declared to be otherwise.”

DEFINITIONS AND OTHER AUTHORITIES

On or about: [Black's Law 8th ed., pg. 1122] Approximately, at or around the time specified, language is used in pleading to prevent a variance between the pleading and proof usu. when there is any uncertainty about exact date of a pivotal event.

The decision of an appellate court becomes the law of the case as to all matters properly within the scope of the appeal and as to those matters it controls all subsequent trial or proceedings.

5 CJS, §1964, pg. 1499; 3 Am Jur "Appeal and Error", pg. 730, and pg. 733, §1237

A right of redemption when conferred by statute is an absolute right, which cannot be taken away, or limited or extended by the court. *42 C.J. 355, 391*

Exception: [Black's Law 8th ed., pg. 604], 2) Something that is excluded from a rule's operation.

Exclusion: [Black's Law 8th ed., pg. 605], 2) Evidence- A trial judges determination that an item offered as evidence may not be presented to the trier of fact (esp. the jury).

Excuse: [Black's Law 8th ed., pg. 608], 1) a reason that justifies an act or omission or that relieves a person of duty.

Slavery: (Ballentine's Law Dictionary 3rd ed.) 1) Bondage, involuntary servitude. An institution where one man is owned by and bound to another. 2) The term implies involuntary servitude—a state of bondage; the ownership of mankind as a chattel, or at least the control of the labor and services of one man for the benefit of another, and the absence of a legal right to disposal of his own person, property, and services.

48 Am J1st Slav § 4, *Plessy v. Ferguson*, 163 US 537, 542, 41 L.Ed. 256, 257, 16 S.Ct. 1138.

Malice in fact: (Ballentine's Law Dictionary 3rd ed) Actual malice; a positive desire and intention to annoy or injure another person. *Gamble v. Keys*, 43 SD 245, 178 N.W. 870. In overcoming privilege, a motive which induces the defendant to defame the plaintiff. *Hemmers v. Nelson*, 138 NY 517, 34 N.E. 342.

Disregard, Reckless: (Black's law 8th ed.) 1) Conscious indifference to the consequences of an act. 2) Defamation. Serious indifference to truth or accuracy of a publication: "Reckless disregard for the truth" is the standard in proving the defendant's actual malice toward the plaintiff in a libel action. 3) The intentional commission of a harmful act or failure to do a required act when the actor knows or has reason to know of facts that would lead a reasonable person to realize that the actor's conduct both creates an unreasonable risk of harm to someone and involves a high degree of probability that substantial harm will result.

Autograph: (Random House Webster's Unabridged Dictionary 2nd ed. 1987) a person's own signature, written by a person's own hand, to write one's own name on or in, sign.

Attendant circumstance [Black's Law 8th ed., pg. 260] A fact that is situationally relevant to a particular event or occurrence.

Precognition [Black's law 8th, ed., pg. 1215] 2) The written record of the statement that a prospective witness can give as evidence.

Free, free as defined in Black's Law Rev.4thEd.:

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“Not subject to legal constraint of another; unconstrained; having power to follow the dictates of his own will. Not subject to the dominion of another. Not compelled to involuntary servitude. Enjoying full civic rights; available to all citizens alike without charge; not despotic; assuring liberty; defending individual rights against encroachment by any person or class; certain, and also consistent with an honorable degree in life.”

Americans with Disabilities Act

Title 42 USC § 12131

Applies to “any State or local government, any department, agency, special purpose district, or other instrumentality of a State or States or local government...” (§ 12131[1][A][B].

The ADA defines a “qualified individual with a disability [as] an individual with a disability who, with or without reasonable modification to rules, policies, or practices, the removal or architectural, communicative, or transportation barriers, or the provision of an auxiliary aid and services, meets the essential eligibility requirements for the receipt of services or the participation in program or activities provided by a public entity” (§12131[2])

One is considered disabled if:

“[They have] ‘a physical or mental impairment that substantially limits one or more major life activities,’ (42 USC §12102[1][A]. The statute defines a major life activity to include, but not limited to- caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping walking, standing, lifting, bending, speaking, breathing, learning, reading, thinking, communicating, and working.”

USC 28 § 1731 Handwriting

The admitted or proved handwriting of any person shall be admissible for purposes of comparison, to determine genuineness of other handwriting attributed to such person.

NORTH DAKOTA RULES OF EVIDENCE

N.D.R.Ev. 201. Judicial Notice of adjudicative facts

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

- (1) is generally known within the trial court's territorial jurisdiction; or
- (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

(c) Taking Notice. The court:

- (1) may take judicial notice on its own; or
- (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the

court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

- (f) **Instructing the Jury.** The court must instruct the jury to accept as conclusive any fact judicially noticed.

N.D.R.Ev. 301. Presumptions in a Civil Case Generally

- (a) **Effect.** In a civil case, unless a statute or these rules provide otherwise, if facts giving rise to a presumption are established by credible evidence, the **presumption substitutes for evidence of the existence of the fact presumed.**
- (b) **Rebuttal.** If the trier of fact finds from credible evidence that the fact presumed does not exist, **the presumption is rebutted and ceases to operate.** A party against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than its existence.
- (c) **Inconsistent Presumptions.** If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight neither presumption applies.

NORTH DAKOTA CENTRUY CODE

NDCC § 12.1-01-03

1. No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. An accused is presumed innocent until proven guilty. The fact that the accused has been arrested, confined, or charged with the offense gives rise to no inference of guilty of the accused at trial. "Element of an offense" means:

- a) the forbidden conduct;
- b) **the attendant circumstances specified in the definition** and grading of the offense;
- c) the required culpability;
- d) any required result; and
- e) the nonexistence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue.

N.D.C.C. § 12.1-02-01. Basis of liability for offenses.

1. A **person commits an offense only if the person engages in conduct**, including an **act**, an omission, or possession, in **violation of a statute which provides that the conduct is an offense**.
2. A person who omits to perform an act does not commit an offense unless the person has a legal duty to perform the act, nor shall such an omission be an offense if the act is performed on the person's behalf by a person legally authorized to perform it.

N.D.C.C. § 12.1-02-02. Requirements of culpability.

1. For the purposes of this title, a person engages in conduct:
 - a. **"Intentionally"** if, when he engages in the conduct, **it is his purpose to do so**.
 - b. **"Knowingly"** if, when he engages in the conduct, **he knows or has a firm belief**, unaccompanied by substantial doubt, **that he is doing so, whether or not it is his purpose to do so**.

- c. **“Recklessly”** if he engages in the conduct in **conscious and clearly unjustifiable disregard of a substantial likelihood of the existence of the relevant facts or risks**, such **disregard involving a gross deviation from acceptable standards of conduct**, except that, as provided in **section 12.1-04-02**, awareness of the risk is not required where its absence is due to self-induced intoxication.
 - d. **“Negligently”** if he engages in **the conduct in unreasonable disregard of a substantial likelihood of the existence of the relevant facts or risks**, such disregard involving a gross deviation from acceptable standards of conduct.
 - e. **“Willfully”** if he engages in the **conduct intentionally, knowingly, or recklessly**.
2. If a statute or regulation thereunder defining a crime does not specify any culpability and does not provide explicitly that a person may be guilty without culpability, the culpability that is required is willfully.
3. a. Except as otherwise expressly provided, where culpability is required, that kind of culpability is required with respect to every element of the conduct **and to those attendant circumstances specified in the definition of the offense, except that where the required culpability is “intentionally”, the culpability required as to an attendant circumstances is “knowingly”**.
- b. Except as otherwise expressly provided, if conduct is an offense if it causes a particular result, the required degree of culpability is required with respect to that result.
 - c. Except as otherwise expressly provided, culpability is not required with respect to any fact which is solely a basis for grading.
 - d. Except as otherwise expressly provided, culpability is not required with respect to facts which establish that a defense does not exist, if the defense is defined in **chapters**

12.1-01 through **12.1-06**; otherwise the least kind of culpability required for the offense is required with respect to such facts.

e. A factor as to which it is expressly stated that it must “in fact” exist is a factor for which culpability is not required.

4. Any lesser degree of required culpability is satisfied if the proven degree of culpability is higher.

5. Culpability is not required as to the fact that conduct is an offense, except as otherwise expressly provided in a provision outside this title.

N.D.C.C. § 12.1-04-02 Intoxication

2) A person is reckless with respect to an element of an offense even though his disregard thereof is not conscious, if his not being conscious thereof is due to self-induced intoxication.

N.D.C.C. § 12.1-11-02 False statements

2. A person is guilty of a class A misdemeanor if, in a governmental matter he:

c) submits or invites reliance on any material written which he knows to be forged, altered, or otherwise lacking in authenticity.

N.D.C.C. § 29-01-09 (1)

No person can be convicted of a crime or public offense except by the verdict of a jury accepted and recorded by the court.

N.D.C.C. § 29-01-06 Rights of defendant

In all criminal prosecution the party accused has the right:

1. to appear and defend in person and with counsel;
2. to demand and be informed of the nature and cause of the accusation;
3. to meet the witnesses against the party face to face;
4. to have the process of the court to compel the attendance of witnesses in the party's behalf; and
5. to a speedy and public trial, and by an impartial jury in the county in which the offense is alleged to have been committed or is triable, but subject to the right of the state to have a change of place of trial for any of the causes for which the party accused may obtain the same.

N.D.C.C. § 29-22-35

If the defendant has been convicted or acquitted upon an information or indictment for an offense consisting of different degrees, the conviction or acquittal is a bar to another information or indictment for the offense charged or for any lower degree of that offense or for an offense necessarily include therein.

N.D.C.C. § 29-22-26

If the jurors return a verdict of guilty against the accused, the court, before it is accepted, shall ascertain whether it conforms to the law of the case. If, in the opinion of the court, the verdict does not conform to the requirements of the law of the case, the court,

with proper instructions as to the error, shall direct the jurors to reconsider the verdict and the verdict cannot be accepted nor recorded until it is rendered in proper form...

N.D.C.C. § 29-22-27

When there is a verdict of conviction in which it appears to the court that the jurors have mistaken the law, the court may explain the reason for that opinion and may direct the jurors to reconsider their verdict. If, after the reconsideration, they return the same verdict, it must be entered. When there is a verdict of acquittal, the court cannot require the jurors to reconsider it.

N.D.C.C. § 29-23-11

Any error by the court in or by any decision, ruling, instruction, or other act, and appearing in the record of the action, may be taken advantage of upon a motion for a new trial or in the Supreme Court on an appeal.

North Dakota Rules of Criminal Procedure

N.D.R.Crim. P. 29 Motion for acquittal

a) Before submission to the jury. After the prosecution closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the prosecution's case, the defendant may offer evidence without having reserved the right to do so.

b) Reserving decision. The court may reserve decision on the motion, proceed with the trial (when the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

c) After jury verdict or discharge

2) Ruling on the motion. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

N.D.R.Crim.P. 31 Jury verdict

a) The verdict must be unanimous

e) Special verdict

4) Other defenses. If any other defense cannot be reflected in a general verdict, the evidence of the defense is given at trial; the jury, if it so finds, shall declare that fact in its verdict.

N.D.R.Crim.P. 33

a) Defendant's motion. On the defendant's motion, the court may vacate any judgment and grant a new trial to that defendant if in the interest of justice so requires. A motion for retrial must specify the alleged defects and errors with

particularity. If the case was tried without a jury, the court may take additional testimony and enter a new judgement.

b) Newly discovered evidence. Any motion for a new trial based on newly discovered evidence must be filed within three years after the verdict or finding of guilty and be supported by affidavit.

N.D.R.Crim.P. 52

a) Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

b) An obvious error or defect that affects substantial rights may be considered even though it was not brought to the court's attention.

To determine whether error affecting substantial rights of the defendant has been committed, the entire record must be considered and the probable effect of the error determined in the light of all the evidence. To affect the substantial right of a defendant, an obvious error must have been prejudicial or have affected the outcome of the proceedings.

N.D.R.Crim. P. 35

a) Correction of sentence

1) Illegal sentence. The sentencing court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal matter within the time period provided for reduction of sentence in Rule 35(b)(1).

NORTH DAKOTA RULES OF CIVIL PROCEDURE

N.D.R.Civ.P. 30

c) Objection

1) A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the ground of the objection.

2) An objection is timely if:

A) a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 30(b)(1)

B) objects at the opportunity for objection required by Rule 30(b)(2)

d) Preserving objection; plain error

1) A party may assign as error

A) an error in an instruction actually given if that party made proper objection under Rule 30(c) or

B) a failure to give an instruction if that party made a request under Rule 30(a).

2) A court may consider a plain error in the instruction affecting substantial right that has not been preserved as required by Rule 30(d)(1)(A) or (B).

N.D.R.Civ. P. 51

d) Assigning error; plain error

1) Assigning error. A party may assign as error:

A) an error in an instruction actually given, if the party properly objected; or

B) a failure to give an instruction, if that party properly requested it.

2) Plain error. A court may consider a plain error in the instruction affecting substantial rights that has not been preserved as required by Rule 51(d)(1)

N.D.R.Civ.P. 52

(a)(1) In general. In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusion of law separately. The findings and conclusion may be stated on the record after the close of the evidence or may appear in an opinion or memorandum of decision filed by the court.

(6) Setting aside the findings. Findings of facts, including findings in juvenile matters, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witness credibility.

(b) Amended or additional findings. On a party motion filed no later than 28 days after notice of entry of judgment, the court may amend its findings, or make additional findings, and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

RULE 61. Harmless error

Unless justice requires otherwise, no error in admitting or excluding evidence or any other error by the court or a party, is ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order. At **every stage of the proceeding**, the court must disregard all errors and defects in the proceeding **that do not affect any party's substantial rights**.

CONFLICT OF INTEREST

N.D.C.C. 27-13-12 Attorney not to aid and Defense when formally as public prosecutor –
Penalty

Every attorney who, having prosecuted or in any manner aided or promoted any action or proceeding in any court, as state's attorney or other public prosecutor, afterward, directly or indirectly, advises in relation to or takes any part in the defense thereof as attorney or otherwise, or takes or receives any valuable consideration from or on behalf of any defendant therein, upon any understanding or agreement whatever, express or implied, having relation to the defense thereof, is guilty of a class A misdemeanor and in addition to the punishment prescribed therefore that attorney forfeits that attorney's license to practice.

S.L. 1975, ch 106 § 316

N.D.C.C. § 27-13-08. Misconduct of attorney – Penalty – Treble civil damages forfeited.
Every attorney who:

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1. Is guilty of any deceit or collusion or consents to any deceit or collusion with intent to deceive the court or any party;
2. Willfully delays the attorney's client's suit with a view to the attorney's own gain;
or
3. Willfully receives any money or other property for or on account of any money or debt which the attorney has not laid out or become answerable for,

is guilty of a class A misdemeanor and in addition forfeits to the party injured treble damages to be recovered in a civil action.

N.D.C.C. § 27-14-02. Causes for suspension or revocation of certification of admission to bar.

The certificate of admission to the bar of this state of an attorney and counselor at law may be **revoked** or **suspended** by the Supreme Court if that attorney has:

1. **Committed an offense determined by the supreme court to have a direct bearing upon a person's ability to serve the public as an attorney and counselor at law**, or the supreme court determines, following conviction of an offense, that the person is not sufficiently rehabilitated under **section 12.1-33-02.1**;
2. Willfully disobeyed or violated an order of the court requiring the attorney to do or to refrain from doing an act connected with or in the course of the attorney's professional practice;
3. **Willfully violated any of the duties of an attorney or counselor at law**;
4. Engaged, while attorney general or assistant attorney general of this state, or while employed in the office of the attorney general, in the private practice of the law, or rendered to any person, for pay, profit, and remuneration, any legal services other

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than those required in performing the duties imposed upon the attorney by virtue of the duties of the attorney's office, but an assistant attorney general may finish any case, proceeding, or legal business in which the assistant attorney general was engaged at the time for the person's appointment, and an attorney general or assistant attorney general with the permission of the attorney general may voluntarily represent indigent clients referred by an organized pro bono program in addition to the regular duties of the attorney's office; such pro bono representation must be at no cost to the State of North Dakota;

5. Appeared, while state's attorney or assistant state's attorney of any county of this state or while an employee in the office of the state's attorney, as an attorney for the defense in any criminal action which it was the attorney's duty to prosecute;
6. Been convicted of any offense mentioned in **section 27-13-08, 27-13-09, 27-13-11, or 27-13-12**; or
7. **Committed any other act which tends to bring reproach upon the legal profession.** The enumeration of certain grounds for disbarment or suspension of attorneys at law may not be deemed a limitation upon the general powers of the Supreme Court to suspend or disbar for professional misconduct.

N.D.C.C. § 27-13-02 Power of Attorney

An attorney and counselor at law may:

1. Execute, in the name of the attorney's client, a bond or other written instrument necessary and proper for the prosecution of an action or proceeding about to be or

already commenced, or for the prosecution or defense of any right growing out of an action, proceeding, or final judgment rendered therein.

2. Bind the attorney's client to any agreement in respect to any proceeding within the scope of the attorney's proper duties and powers, but no evidence of any such agreement is receivable, except the statement of the attorney, the attorney's written agreement signed and filed with the clerk, or on entry thereof upon the records of the court.
3. Receive money claimed by the attorney's client in an action or proceeding during the pendency thereof or afterwards, unless the attorney has been previously discharged by the attorney's client, and upon payment thereof, and not otherwise, may discharge the claim or acknowledge satisfaction of the judgment.

RULE 1.7. CONFLICT OF INTEREST: GENERAL RULE

- (a) **A lawyer shall not represent a client if the lawyer's ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests.**
- (b) **A lawyer shall not represent a client when the lawyer's own interests are likely to adversely affect the representation.**
- (c) **A lawyer shall not represent a client if the representation of that client might be adversely affected by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:**
 - (1) the lawyer reasonably believes the representation will not be adversely affected; and

- (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.
- (d) Except as required or permitted by **Rule 1.6**, a lawyer shall not use information relating to representation of a client to the disadvantage of a client unless a client who would be disadvantaged consents after consultation.

Analysis of Potential Conflict

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. **If an impermissible conflict of interest exists before representation is undertaken, the representation ordinarily must be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation.** See **Rule 1.16**. Where more than one client is involved and the lawyer withdraws because an impermissible conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by **Rule 1.9**. As to whether a lawyer-client relationship exists or continues after having once been established, see Comment to **Rule 1.3**.

[2] Paragraphs (a), (b) and (c) of this Rule address three separate and distinct conflict of interest situations. Paragraph (a) addresses the situation in which the lawyer's own interests of the lawyer's responsibilities to another client or to a third person *will* adversely affect the lawyer's representation of a client. Paragraph (b) addresses the situation in which the lawyer's own interests *are likely* to adversely affect the representation. In both of these conflict situations, the lawyer is absolutely prohibited

from undertaking or continuing representation of the client. Paragraph (c) addresses the situation in which the lawyer's own interests or the lawyer's responsibilities to another client or to a third person simply *might* adversely affect the lawyer's representation of a client. In this situation the lawyer is permitted to undertake the representation if the lawyer reasonably believes there will be no adverse effect on the representation and if the clients consent after consultation.

[3] An adverse effect is any material limitation on a lawyer's representation of a client attributable to the lawyer's responsibilities to another client, to a former client, to a third person, or arising from a personal interest of the lawyer. When a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests, the representation will be adversely affected and must be declined or terminated. The conflict in effect forecloses alternatives that would otherwise be available to the client.

[4] **Resolution of a conflict of interest problem under this Rule requires the lawyer to:**
1) clearly identify the client or clients; 2) determine whether a material limitation on the representation of the client exists; 3) decide whether the representation may be undertaken despite the material limitation, i.e., whether the conflict is consentable; and 4) if so, **consult with the clients affected under paragraph (c) and obtain their consent.** The clients affected under paragraph (c) include any clients whose representations might be adversely affected. The critical questions are the likelihood that a material limitation will eventuate and, if it does, the likelihood the **conflict will interfere with the lawyer's independent professional judgment** in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

RULE 1.8. CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

- (a) Except for standard commercial transactions involving products or services that the client generally markets to others, a lawyer shall not enter into a business, financial, or property transaction with a client unless:
 - (1) the transaction is fair and reasonable to the client; and
 - (2) after consultation, including advice to seek independent counsel, the client consents to the transaction.
- (b) Except as permitted or required in **Rules 1.6** and **3.3**, a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless after consultation, including written advice to seek independent counsel, the client consents.
- (c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer any substantial gift from a client, including a testamentary gift, unless the client is related to the other one. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
- (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.
- (e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

- (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter;
- (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and
- (3) a lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided that the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided that no promise of financial assistance was made to the client by the lawyer, or by another in the lawyer's behalf, prior to the employment of that lawyer by the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) there is **no interference with the lawyer's independence of professional judgment** or with the client-lawyer relationship;
- (2) **information relating to representation of a client is protected as required by Rule 1.6;** and
- (3) after consultation, the client consents.

(g) A lawyer who represents two or more clients, other than in class actions, shall not participate in making an aggregate settlement of the claims of or against the clients, or an aggregated agreement as to guilty pleas in a criminal case, unless, after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement, each client consents.

(h) A lawyer shall not:

- (1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or
- (2) settle a claim or potential claim for the lawyer's liability for malpractice with an unrepresented client or former client unless, after consultation, including advice to seek independent counsel, the client or former client consents.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

- (1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and
- (2) contract with a client for a contingent fee in a civil case as permitted by **Rule 1.5**.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) A part-time prosecutor or judge permitted by law to engage in the practice of law in addition to the part-time service shall not, in that practice, represent a client if the representation will or probably will require any pleading or appearance on the client's behalf:

- (1) if the lawyer is a part-time prosecutor and the client is charged or expects to be charged with a crime, in the jurisdiction in which the lawyer holds the prosecutorial appointment; and
- (2) if the lawyer is a part-time judge in:
 - (i) the court in which the judge holds appointment; or
 - (ii) any court from which the appeals may be brought to the court in which the judge holds appointment.

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- (l) Neither a lawyer serving as a fiduciary of an estate, trust, or conservatorship nor the lawyer's firm may serve as legal counsel for the fiduciary. This paragraph does not apply to United States Bankruptcy Court proceedings or to matters in which the decedent, trustor, beneficiary, or protected person is a spouse, child, grandchild, parent, grandparent, or sibling of the lawyer.

Comment

Client Consent and Advice to Seek Independent Counsel

[1] There are several requirements under this Rule that the lawyer obtain client consent or provide advice to the client to seek independent counsel. See Paragraphs (a)(2), (b), (g), and (h)(2). Obtaining client consent or providing advice to seek independent counsel in writing is the preferred practice. Lack of a writing may make it difficult to prove client consent or that advice was given if a dispute arises later.

RULE 1.16. DECLINING OR TERMINATING REPRESENTATION

- (a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall seek to withdraw from the representation of a client if:
- (1) the lawyer reasonably believes that the representation will result in violation of these Rules or other law;
 - (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

- (3) the lawyer has offered material evidence in the testimony of the client and has come to know of its falsity and the client has refused to consent to disclosure of its false character to the tribunal; or
 - (4) the lawyer is discharged.
- (b)** Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:
- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
 - (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
 - (3) the client has used the lawyer's services to perpetrate a crime or fraud;
 - (4) a client insists upon pursuing objectives or means that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
 - (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
 - (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
 - (7) other good cause for withdrawal exists.
- (c)** When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.
- (d)** Where the lawyer has sought to withdraw in accordance with paragraph (a)(3) and withdrawal is not permitted, the lawyer may continue the representation without

disclosure of the client's false testimony; such continuation alone is not a violation of these Rules.

- (e) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers relating to the client only to the extent permitted by **Rule 1.19**.

Comment

[1] A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed-upon assistance has been concluded. See **Rules 1.2(c) and 6.5**. See also **Rule 1.3, Comment[4]**.

RULE 3.4. Fairness to opposing party and counsel.

The lawyer shall not:

- (a) **Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value;**
- (b) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;
- (c) Knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

- (d) In pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;
- (e) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or
- (f) Request a person other than a client to refrain from voluntarily giving relevant information to another party unless:
 - (1) The person is a relative or an employee or other agent of a client; and
 - (2) The lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

COMMENT

[1] The procedure of the adversary system contemplates that the evidence in a case is to be marshaled competitively by contending parties. **Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedures, and the like.**

N.D.R. Prof. Conduct

RULE 8.4. Misconduct.

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It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate these Rules, knowingly assist or induce another to do so, or do so through the acts of another;**
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer on other respects;**
- (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation that reflects adversely on the lawyer's fitness as lawyer;**
- (d) knowingly assist a judge or judicial officer in conduct that is a violation of applicable canons of judicial conduct or other law;**
- (e) state or imply an ability to influence improperly a government agency or official; or to achieve results by means that violate these Rules or other law;**
- (f) engage in conduct that is prejudicial to the administration of justice, including to knowingly manifest through words or conduct in the course of representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation, against parties, witnesses, counsel or others, except when those words or conduct are legitimate advocacy because race, sex, religion, national origin, disability, age, or sexual orientation is an issue in the proceeding; or**
- (g) engage in other conduct that is enumerated in the North Dakota Century Code as a basis for revocation or suspension of a lawyer's certificate of admission.**

Comment

[1] Lawyers are subject to discipline when they violate or attempt to violate these Rules, knowingly assist or induce another to do so or do so through acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph

(a), however, does not prohibit a lawyer from advising a client concerning action the client is lawfully entitled to take.

[2] **Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud** and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving “**moral turpitude**.” The concept of “**moral turpitude**” may be construed to include offense concerning matters of personal **morality**, such as adultery and comparable offenses that have no specific connection to fitness for the practice of law. **Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice fall within that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligations.**

[3] A lawyer who, in the course of representing a client knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation violates **paragraph (f)** when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate **paragraph (f)**. For example, a trial judge’s finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this Rule.

[4] **N.D.C.C. Section 27-14-02 provides for the revocation or suspension of the certificate of admission of any lawyer who has committed an offense determined by the North Dakota Supreme Court to have a direct bearing on the lawyer’s ability to serve**

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the public as a lawyer and counselor at law. Statutes also **provide for revocation or suspension in other instances of misconduct**, including **27-13-01** (duties of attorneys), **27-13-08 (misconduct of attorneys)**, **27-13-09** (permitting use of the attorney's name), **27-13-11** (involvement in the defense while a partner of the prosecutor), and **27-13-12** (involvement in the defense after involvement as state's attorney or other public prosecutor).

[5] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of **Rule 1.2(d)** concerning a good faith challenge to the validity, scope, meaning or application of the law apply to challenges to the regulation of the practice of law.

[6] **Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of a lawyer.** The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent, and officer, director or manager of a corporation or other organization.