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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Spencer Kerry Curtiss, Petitioner-Appellant v. State of North Dakota, Respondent-Appellee.	Supreme Court No. 20200175 District Court No. 08-2020-CV-0514

BRIEF OF APPELLANT

APPEAL FROM AN ORDER GRANTING MOTION TO DISMISS APRIL 21ST, 2020 AND ORDER DENYING MOTION FOR RECONSIDERATION JUNE 16TH, 2020.

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

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STATEMENT OF THE ISSUES

I. Whether the district court erred in Order Granting Motion to Dismiss and Order Denying Motion for Reconsideration

II. Whether all statutes listed on the Information, and considered essential elements by Legislature, with corresponding language must be given to the jury in which to make finding beyond a reasonable doubt before a defendant has "been found guilty"?

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

STATEMENT OF THE CASE

[¶1] Spencer Curtiss was charged with the offense of Gross Sexual Imposition for engaging in a sexual act with an object with a minor. A twelve person jury returned a verdict of guilty without making a finding beyond a reasonable doubt on sexual act with an object defined as "anything but the person of the actor." His sentence included a five year period of supervised probation with duty to register as stated in Appendix A to the Judgment.

[¶2] The very same fact that that is required to be found beyond a reasonable doubt by a jury is the exact same fact required to place Curtiss upon registry. The process of challenging registry and probation time frame is the same for challenging sufficiency of evidence. The State was excused from its burden in 2010 and Curtiss now bears the burden of establishing that placement on the registry was erroneous.

[¶3] The public has a right to everyman's evidence and Curtiss has the right to be free from structural error in having a fair trial with accurate sentencing upon all essential elements proven beyond a reasonable doubt by the triers of fact, be it the jury.

[¶4] Here Curtiss has asserted the right to have statute language disclosed and unmasked with declaration why Curtiss has to submit to a period of five years of probation and register, and for the court to act upon unmasked material to prevent a miscarriage of justice.

STATEMENT OF THE FACTS

[¶5] Complaint initiated as request for declaratory judgment with injunctive relief The Language within the Complaint contained the required statute authority and through transfer of case assignment, was before the proper sentencing court. Language was clarified in later pleading as an independent action in equity to obtain relief from a judgment. Therefore as precedent asserts when an action is construed as an independent action in equity to obtain relief from a judgment it is a valid means of directly attacking the judgment and is not a collateral attack on a duly entered judgment.

[¶6] The posture of this legal action was originated though stare decisis and assertion in *Denault v State,* 2017 ND 167, 898 N.W. 2d 454 which consisted of Petition for declaratory relief resulting in vacating duty to register and exemption from placement on registration.

[¶7] Here "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)."[Case No 08-2016-CV-02655, Id#93, ¶4] However, there is apprehension with repulsive thoughts to deconstruct the statutory charged sex act itself, being through the use of an object; this explicitly meaning anything but the person of Curtiss. Therefore, Curtiss was not judicially prosecuted within the statutory definition, and as such, not found guilty of a felony sexual offense requiring placement on the registry.

[¶8] Curtiss submitted Interrogatories for the Attorney General to complete and received a motion for a protection order against completing discovery. This requested concealment is simple recognition that that disclosure of requested discovery by Curtiss will be detrimental to the State and that obligatory action within N.D.Prof. Conduct 3.8 will attach and assist in undoing the conviction. These actions are endorsement of reasonable dispute in the statue language with intent

to conceal structural error in failure to submit essential element before the jury to make finding beyond a reasonable doubt before Curtiss has "been found guilty of felonious sexual offense. This error excused the State from its burden of proof on an essential element of the offense and failure to correct is a miscarriage of justice.

[¶9] Curtiss requests this court review the material and entertain the claim that Curtiss has not "been found guilty", therefore negating the requirement for enforcement of registration or the requirement of a minimum of five years of probation. Compel disclosure and unmask requested discovery to the trial court.

[¶10] The public has a great interest in this controversy in that lack of protecting citizens with liberty interest, privileges and immunities, and due process of law that citizens must by presumed innocent until all essential element on information are proven beyond a reasonable doubt. Especially as this error excused the State from its burden of proof on an essential element of the offense.

JURISDICTION

[¶ 11] 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. 29-28-06.

[¶12] STANDARD OF REVIEW

> **Abuse of discretion** is a decision by whim or caprice, arbitrarily, or from a bad motive which amount 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 rationale 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.

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.

A structural error is a "constitutional error", 'so intrinsically harmful as to require automatic reversal' regardless of whether it was forfeited or waived. *State v Rende*, 2018 ND 56, ¶ 8 907 N.W. 2d 361. We apply a de novo standard of review to a claim of a constitutional violation. *State v Decker,* 2018 ND 43, ¶ 6, 907 N.W. 2d 378.

ARGUMENT

I. Whether the district court erred in Order Granting Motion to Dismiss and Order Denying Motion for Reconsideration

[¶13] The Complaint was to request declaratory judgment upon what language the State admits Curtiss was in violation of and convicted of, meaning was presented before a jury for finding beyond a reasonable doubt. The State is loath to put words to the statute numbers admitted Curtiss violated.

[¶14] Registration is not on Criminal Judgment, but sentence to five years of probation is and Registry is on Appendix A. The Criminal Judgment states "as charged in Information "and proper notice and instruction of Statute language on the Information is necessary for registry.

[¶15] The claim was to vacate, remove, inhibit the duty to register and remove the minimum time frame of five years of probation. The State claims this action was before an appellate court and not the sentencing court, however IT WAS before the sentencing court. Curtiss as denied and withheld remedy as did trial court did not enforce NDCC 12.1-01-03, therefore Curtiss entitled to relief.

[¶16] The State claimed dismissal as pursuant to NDRCivP 12(b), but by transferring to sentencing court the jurisdiction was proper and a claim for relief can be granted. Be it in equitable relief. As such, the finding of fact by the sentencing court regarding jurisdiction is clearly erroneous as it is not supported by the evidence. Therefore, the Order granting Motion to dismiss and the motion for reconsideration was made in mistake and based upon fraud and misrepresentation.

> See N.D.R.Civ.P. 60(b) On motion and just terms, the court may relive a party ... from a final judgment, order, or proceeding for the following reasons: 1) mistake,

> inadvertence...; 3) fraud, misrepresentation, or misconduct by an opposing party; 6) any other reason that justifies relief.
> d) Other powers to grant relief this rules does not limit a courts power to: 1) entertain an independent action to relive a party from a judgment, order or proceeding; 3) set aside a judgment for fraud on the court.

[¶17] The sentencing court has jurisdiction to modify under N.D.C.C. § 12.1-32-07 and the case was transferred to the sentencing court without notice to Curtiss and most importantly without correction on the record that court did have the subject matter jurisdiction therefor the motion for reconsideration is meritorious under mistake, inadvertence, fraud, misrepresentation and misconduct by the opposing party.

[¶18] The procedure In N. D. R. Civ. P. 60(b), N.D.C.C. § 12-1-32-07 and an independent action in equity does provide an established method for addressing issues about a claimed fraudulent concealment.

> "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.

[¶19] The finding of fact that the court did not have jurisdiction is clearly erroneous as the action was transferred before Judge Reich, the sentencing Judge, and for the court to rely upon that erroneous fact is an abuse of discretion.

> A district court abuses its discretion if it acts in an arbitrary, unreasonable or unconscionable manner; its decision is not a product of a rationale 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.

[¶20] The finding of fact that the Motion for Reconsideration has failed to show he has a right to reconsideration is fraud where the State continued to assert lack of jurisdiction in this matter when the action is before the sentencing court. Thereby entitled to reconsideration.

[¶21] The State admits the statutes on information were violated by Curtiss in legal action November 16th, 2016 with an Order denying post-conviction filed July 18th, 2018 with Denied Motion for Reconsideration filed September 25th, 2018; therefore statute language within Information is unequivocally relied upon for this judgment, .and the issue of registration.

[¶22] Furthermore The Report and Recommendation was adopted May 10th, 2018 from the N. D. Federal District Court recognizing no sufficiency of evidence has ever occurred during any legal action of Curtiss.

[¶23] Fraud from dates where no cognizance or regard to the statute language on Information in which the State judgment of conviction relied as to simply read the statutes any competent person would interpret what the State has based judgment and violation of law upon. The State must be responsible for cognizance of the statute language upon an information, especially when a citizen appeals the conviction directly and collaterally. Failure to give notice on what the State holds liability upon Curtiss.

[¶24] The Complaint was to prove what the State admits to and that the State has committed fraud by failure to disclose/unmask the statute language, thereby misleading the court that conviction was valid and without structural error. Fraud from the state's admission of admitted statutes, not the underlying conviction, but pursuant to N.D.R.Proff.Condut 3.8 the unmasked statute language and proof not instructed before a jury will result in correction of errors. Fraud for concealing structural error of trial court and all subsequent legal actions

[¶25] Connecting the abovementioned previous declarations with no sufficiency of evidence and no record of disclosure or unmasking of statute language in the Third Amended Information would lead a reasonable person to question what the statute do say and how they have been processed

throughout the trial court and all appellate court action especially when the State is holding confidence and complete reliance upon the language to assert Curtiss has "been found guilty."

[¶26] Therefore as claimed fraud by the State upon the court and public and the time frame of N.D.R.Civ.p. 60(b) had passed, Curtiss has submitted action based upon similar case law on passed time frame with a need for correcting miscarriage of justice.

[¶27] The definition was not established during the prosecution's recitation of the statement of the facts or at any point during the jury trial. The determination had to be made as matter of law by the trial court. To allow some person or entity other than the trier of fact to determine a fact necessary for placement on the Registry would lead to an incongruous result. Especially when the same fact was necessary for the conviction to be valid itself.

[¶28] Determined post hoc by whatever process deemed appropriate that Curtiss engaged with an object. Without being authorized by statute, regulation, or case law and after the underlying criminal proceeding had concluded, as jury was not instructed upon definition, Curtiss was determined to have engaged with an object-"meaning anything but the person of the actor" as the State has admitted such. This fact was necessary to prove Curtiss' guilt and necessary to trigger sex offender registration.

[¶29] If the Court were permitted to make such a finding, that finding could be made without notice and non-publicly, and would not necessarily be required to meet any particular standard of proof, such as proof beyond a reasonable doubt.

[¶30] It would be difficult to conceive that the Legislature intended placement on the Registry to be determined by an entity different than the trier of fact. Allowing such a determination would lead to the circumstance presented here where it is incumbent on Curtiss to seek relief from the

Court's finding, after the criminal proceeding has concluded, without knowing how the Court reached its conclusion.

[¶31] Failure to reverse will create precedence that Registration is in fact punitive in that the trial court utilized it as punishment, for deterrence and retribution, by matter of law not matter of fact.

[¶32] There was no notice provided for change of judge. Curtiss was not notified of Demand for Change of Judge, as the Honorable Bruce A. Romanick was assigned February 10th, 2020. This is in violation of NDRCivP 5 (a)(1)(F) in not serving Curtiss every document filed with the clerk or submitted to the judge. This transaction changed the dynamic of the jurisdiction by placement before the sentencing court and Judge Reich.

[¶33] Actual notice consists of express information of a fact NDCC § 1-01-23.

> Where the law prescribes a written notice as a method of giving information, the receipt of a letter containing the information is conclusive proof of knowledge of the purpose thereof. *Brown v Otesa*, 80 N.W. 2d 92(ND 1956)

[¶34] The transgression by the State in failing to cognitive recognize the statutes listed on the Third Amended Information is fraud in that the State has pressed every method to sustain the conviction and sentence. There must be granted accommodation/remedy for the transgression and maneuverers to conceal the structural error in violating North Dakota statute law, stare decisis and Constitutional protections of Due Process, Privileges and Immunities, and equal protection of the law to its citizens.

[¶35] The State's methods were couched in censorship and suppression predicated on the idea of sustaining judgment no matter the cost. Application of law to these occult language will unmask a structural error. The energy produced by the State emphasizes the desire to permanently conceal the merits of Curtiss' claim.

[¶36] Case was assigned to Judge Bruce A. Romanick on February 10th, 2020, yet was later submitted before the sentencing court, Judge Reich, thereby negating the ground for dismissal.

And as such this court does have the jurisdiction to alter, amend or modify Curtiss' prior sentencing judgment.

[¶37] Hereafter is case law and authority in which part of the action is based for an independent action in equity to obtain relief form a judgment and where concealment of material information has occurred, plus most particularly the similar case precedence with very relevant issues to Curtiss.

> Any person interested under a ...written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute,...contract may have determined any question of construction or validity arising under the instrument, statute,...contract ... and may obtain a declaration of rights, status, or other legal relations thereunder." NDCC 32-23-02
>
> A court of record within its jurisdiction shall have power to declare rights, status, and other legal relation whether or not further relief is or could be claimed. NDCC 32-23-01 Further relief based upon a declaratory judgment or decree may be granted whenever necessary or proper. NDCC 32-23-08.
>
> *Hamilton v Hamilton*, 410 N.W. 2d 508 Held: that former wife's action was valid means of directly attacking judgment and was thus not improper collateral attack.
>
> The remedy of an independent action in equity to obtain relief from the judgment is reserved to "those unusual and exceptional circumstances in which a party may not avail himself of the motion procedure presented in Rule 60(b) N.D.R.Civ. P." *Hamilton,* 410 N.W.2d at 518-19.
>
> Under the procedure recognized in Hamilton, a court may entertain an independent action in equity and grant relief from a judgment if more than one year has passed since entry of the judgment. The available relief stems from the court's equitable powers to enjoin enforcement, or otherwise grant relief from a blatantly unjust judgment. *Hamilton*, 410 N.W. 2d at 518-19.
>
> *Walstad v Walstad* 2012 ND 204, 821 N. W. 2d 770. Held: that in action in equity to obtain relief from divorce decree, trial court should have considered husband's economic fault or misconduct, before dividing concealed property. We conclude a district court has equitable authority in an independent action in equity to grant relief from the earlier judgment on the basis of fault in that proceeding.
>
> *Walstad* similar to Curtiss in that the State and Attorney General has wrongfully concealed the statute language and the instructional error upon essential elements and has pursued method to keep them secret. Continual denial of reversible structural error in trial court.

United States v Beggerly, 524 US 38, 47, 118 S.Ct. 1862, 1412 L.Ed 2d 32(1998) (independent action in equity available only to "prevent miscarriage of justice.")

See *Rogers v State of Maryland*, 468 Md 1, 226 A. 3d 261 (Ct App Md 2020) Where Rogers filed a complaint for declaratory judgment against the state of Maryland seeking a declaration that he was not required to register as a Tier II sex offender and an order compelling the Department to remove him from the registry. The court granted Rogers motion for summary judgment on the ground that the victim's age had not been proven. The circuit court issued an order declaring Rogers was not required to register and removed Roger's name from the registry.

The Appellate court concluded that determination of a fact necessary for placement on the Registry –e.g. the victim's age- must be made by the trier of fact beyond a reasonable doubt during the adjudicatory phase of the criminal proceeding prior to sentencing.
No statute or regulation gives the Department the authority to make a factual determination as to the victim's age for the purposes of determining registration required.

Here the court of Appeal held the conclusion that sex offender registration under the current statutory scheme is sufficiently punitive, i.e. serving as more than a mere civil regulation, to require determination of a fact necessary for placement on the registry.

[¶38] The stare decisis from above mentioned authority assert strong alignment with Curtiss' dispute where the issue of the condition precedent is absent in placement on the registry. In the search to find remedy for placement Curtiss has been inhibited from producing the words the statute numbers take to mean.

[¶39] The following display concern that arose pursuant to actions of Attorney General where methodology to conceal material information preventing both the Attorney General and the court from unmasking the essential element to the trial court.

[¶40] The burden to show good cause is clearly upon the defendants, the defendants "must show an adequate reason [for forbidding the discovery] by a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *Akron Beacon*, 1995 U.S. Dist. LEXIS 5183, 1995 W.L. 23471 at *10. Further, "broad allegations of harm unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test."

[¶41] Under these rules there is a presumptive right of public access to discovery in all civil cases. See *Akron Beacon,* 1995 U.S.Dist. LEXIS 5183, 1995 W.L. 234710 at *10. The issue of

transparency and public trust in judicial integrity exist in that all individuals are presumed innocent until all essential elements of statutory provisions in charging instrument are proven beyond a reasonable doubt. The public has the right to have authoritative definition of the statute language Curtiss is being held by.

[¶42] The state has declared "the State is entitled to some form of protection because the conduct alleged against the State arises solely from its involvement in the underlying lawsuits filed by the Plaintiff." [¶9] Brief in support of motion for protective order. And the facts sought in this discovery will substantially effect the resolution of the pending dispositive motion.

[¶43] The sentencing court made no statement to decision on declaratory judgment and dismissed upon grounds not founded in fact as when transfer to sentencing court and the statutes grant authority to grant relief the court has evaded the initial request altogether

[¶44] The legal theory is present and the jurisdiction is correct, the sentencing court has abused its discretion in granting order and denying reconsideration upon misrepresented facts. The refusal to require disclosure has resulted in a miscarriage of justice in the absence of compliance with N.D.C.C. § 12.1-01-03(1). Proper adherence to stare decisis on essential element will establish error in condition of registration. Curtiss is entitled to relief in prohibition from enforcement of serving a five term of probation and duty to register.

[¶45] Reverse and remand with instruction to supply discovery as requested in Interrogatories, Production of documents and admissions and demand declaratory judgment on unmasked statute language, with any other appropriate remedy.

II. Whether all statutes listed on the Information, and considered essential elements by Legislature, with corresponding language must be given to the jury in which to make finding beyond a reasonable doubt before a defendant has "been found guilty"?

[¶46] It is a fact the condition "been found guilty" is the statutory requirement for placement on the registry and for serving a minimum of five years' probation. See the following emphasized;

> N.D.C.C. § 12.1-32-15(2) The court shall impose, in addition to any penalty provided by law, a requirement that the individual register,...the court shall require an individual to register by stating this requirement on the court records, if that individual:
>
> (a) Has pled guilty or nolo contendere, or **been found guilty** as a felonious sexual offender or an attempted felonious sexual offender,..."
>
> N.D.C.C. § 12.1-32-06.1 Length and termination of probation
>
> (4) If the defendant has pled or **been found guilty** of a felony ...the court shall impose at least five years..."

[¶47] The unsettled dispute is that the essential element was not instructed to the trial court jury, therefore has not been determined beyond a reasonable doubt, and as such Curtiss has not been found guilty of the felony as charged in the information.

> "Ordinarily, questions not raised at trial will not be considered on appeal, but where a pertinent statute has been overlooked resulting in plain error that is of public concern, an appellate court will consider the error though it be not brought to our attention by either of the parties." *Megarry Bros v City of St. Thomas*, 66 N.W. 2d 704, 704-5 (ND 1954)

[¶48] There is error in the pertinent statutes on Third amended Information, N.D.C.C. § 12.1-01-03, and the nexus to applied action of N.D.C.C. § 12.1-32-06.1 and N.D.C.C. § 12.1-32-15(2).

> *State v Flatt*, 2007 ND 98, ¶7, 733 N.W. 2d 608
> The Legislature has specifically defined the meaning of "element of the offence" in N.D.C.C. § 12.1-01-03(1). "Element of the offence" 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 non-existence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue.

[¶49] The State's Attorney action charged Curtiss upon Affidavit submitted by Detective Jerry Stein August 23rd, 2010 upon allegations of sexual acts consisting of vaginal digital penetration in which the Third Amended Information listed appropriate statute N.D.C.C. § 12.1-20-02(3).

[¶50] The legal statute authority by which Curtiss is being held according to the Third Amended Information in North Dakota Century Codes are:

- 12.1-20-03(1)(d)
- 12.1-20-03(3)
- 12.1-20-02(3)
- 12.1-32-01(1)

The date of the authority above-mentioned is December 8th, 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...

[¶51] It is significant that the definition removes the person of the actor from the commission of a sexual act. The victim must describe the kind of act committed with sufficient specificity; yet no narrative upon object or any other act committed by anything but the person of Curtiss. There exist not one inference that could lead a reasonable person to find guilt beyond a reasonable doubt that Curtiss engaged in the commission of sexual act with an object.

[¶52] Where a jury did not find beyond a reasonable doubt Curtiss engaged in a sexual act with an object with K.D. then it is obvious error and a miscarriage of justice to sentence Curtiss to a five year period of probation and placement of registry.

[¶53] The district court has asserted that Curtiss's claims are without jurisdiction and an impermissible collateral attack by Curtiss, and in the event this Court affirms with the lower court this question is of great public interest and deemed necessary to prevent miscarriage of justice.

[¶54] However, Curtiss does have the jurisdiction and facts sufficient to support a claim for relief and this is a direct attack with public interest upon the controversy of necessity of all essential elements presented before a jury to make finding beyond a reasonable doubt before probation and duty to registry can apply.

> We have repeatedly held that the judicial power vested in the courts of this State extends only to the determination of actual controversies properly before the Court. Our Court are not authorized to give advisory opinion and will not decide moot questions or propositions that have become abstract because of events occurring subsequent to the commencement of the action or where lapse of time prevents the rendering of effective relief except where questions of great public interest involve the authority and power of public officials and the real merits of the controversy are still unsettled. *Kirchmeir Hjelle*, 129 N.W. 2d 373, 376(ND 1964)
>
> Where...the matter in controversy appears to be one of "great public interest" and involves the authority and power of public officials, the appeal will not be ignored as a moot question. *North Dakota Wheat Growers Ass'n v Moore*, 52 ND 904, 204 N.W. 834, 835

We have recognized Court will determine a moot issue if the controversy is one of great public interest and involves the authority and power of public officials, or if the matter is capable of repetition, yet evading review. *Gosbee v Bendish*, 512 N.W. 2d 450, 453; *State v Liberty Nat'l Bank & Trust Co.*, 427 N.W. 2d 307, 30809(ND 1988); *Forum Publ'g Co. v City of Fargo*, 391 N.W. 2d 169, 170(ND 1986)

"Public interest" means more than mere curiosity; it means something in which the public, the community at large, has some pecuniary interest, or some interest by which their legal rights or liabilities are affected. *Forum Publ'g Co.* at 170(citing *Hart v Bye*, 86 N.W. 2d 635, 637(ND 1957)

An appeal in which subsequent event have eliminated an actual controversy is not moot if the controversy is one of great public interest and involves the authority and power of public officials, or alternatively, if the matter is capable of repetition, yet evading review. In re Estate of Shubert, 2013 ND 215, ¶ 12, 839 N.W. 2d 811; *Bland v Comm'n on Med. Competency*, 557 N.W. 2d 379, 381(ND 1996)

The law must serve the cause of justice... Perhaps some would say that *Haley's* innocence is a mere technicality, but that would miss the point. In a society devoted to the rule of law, the difference between violating or not violating a criminal statute cannot be shrugged aside as a minor detail". *Dretke v Haley*, 541 US, at 399-400; see also *Engle v Isaac*, 456 US 107, 135
A persons' liberty is equally protected even when the liberty itself is a statutory creation of the State. The touchstone of due process is protection of the individual against arbitrary action of the government. *Dent v West Virginia*, 129 US 114, 123(1889)

In a criminal case the state must prove every element of the crime beyond a reasonable doubt. If the state does not do so, the accused must be acquitted of the charge.
State v Vogel, 467 N.W.2d 86, 89(ND 1991)

An appeal is not moot if a trial court's decision continues to have "collateral consequences" for the appealing party. *Millang v Hahn*, 1998 ND 152, ¶ 6, 582 N.W. 2d 665

[¶55] Curtiss' counsel did not address the absent jury instruction and where connection between the finding of fact beyond a reasonable doubt and the legislative intent upon placement on registration, the necessity of proving all essential elements in a sexual charge becomes plain. Especially as Curtiss continues to have collateral consequences of registration and probation.

[¶56] This question of adherence to statute language when an essential element is clearly a public interest and is well established. A citizen can only have "been found guilty" when all essential elements are instructed to a trier of fact to make a finding beyond a reasonable doubt, and when that does not happen no direct, collateral or statutory conditions can be applied for enforcement.

A defendant's tactical decision not to confront an essential element of the crime does not remove the prosecution's burden to prove that element. *Estelle v McGuire*, 502 US 62, 69, 116 L. Ed. 2d 385, 113 S. Ct 475 (1991)

State v Beck, 167 S.W. 3d 767, 788, 789 (Mo Ct App W.D. 2005)

> In the context of instructional error, reversible plain error results when the trial court has misdirected or failed to instruct the jury that it is apparent to the appellate court the instructional error affected the jury's verdict. In that regard and appellate court will be more incline to reverse in cases where the erroneous instruction "did not merely allow a wrong word or some other ambiguity to exist, but excused the State from its burden of proof on a contested element of the crime." *State v White*, 92 S.W. 3d ___, at 192

[¶57] The trial court did not instruct the jury on definition of object NDCC § 12.1-20-02(3). This error excused the State from its burden of proof on an essential element of the offense and Curtiss is entitled to protection from serving a five year term of probation and duty to register.

> We cannot imagine an error more fundamental than convicting a defendant of a crime when not all of the element of a crime are present. "A crime is committed when all of its essential elements are present and complete." *State v Hersch*, 445 N.W. 2d 626, 631(ND 1989)
>
> The District of Columbia Court of Appeals stated that "[f]ailure on the part of a trial court in a criminal case to instruct on all essential questions of law involved in the case, whether requested or not, would clearly affect substantial rights within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure." *State v Thiel*, 411 N.W.2d 66 (ND1987); *State v Kraft*, 413 N.W. 2d 303(ND 1987); *Tatum v United States*, 190 F2d 612, 615 (DC Cir 1951)
>
> 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).
>
> "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
>
> We believe that failure to exercise our discretion to correct the obvious error would seriously affect the fairness, integrity, and public reputation of jury criminal trials. Proper instructions about the burden of proof on the elements of a crime implicate fundamental due process. Those due process considerations form the foundation of our system of criminal procedure that an accused cannot be convicted of a crime unless the State proves every element of the offense beyond a reasonable doubt. See *Schneider,* 550 N.W. 2d at 407; *Vogel,* 467 N.W. 2d at 89.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. An accused's guilt or innocence is not the

determinative factor; rather, the fairness and integrity of the proceeding is paramount. *State v Olander*, 1998 ND 50, ¶¶ 27-28, 575 NW 2d 558

[¶58] The undisclosed statue language has violated a substantial right to a fair trial and has resulted in unwarranted placement on registry and is obvious error.

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.

[¶59] In the event the Court requires interpretation of statute language Curtiss provides the well-established authority.

It is a well settled principle of statutory construction that penal statutes should be strictly construed against the government and in favor of the accused. *State v Drader*, 432 N.W. 2d 553(ND 1988) Thus interrupting penal statutes, "we resolve any doubt in favor [of the criminal defendant]" *State v Hogie*, 424 N.W. 2d 630, 635(ND 1988)

Under N.D.C.C. 1-02-02 **Words to be understood in their ordinary sense.**
"words in a statute are to be understood according to the meaning that an ordinary person could get from reading the section" *State V. Velasquez*, 1999 N.D. 217,602 N.W. 693(1999)

"Penal statues ... are to be fairly construed according to the legislature intent as expressed in the enactment..." *2 Lewis, Sutherland, Stat. Constr. 2d § 519*

In *DeForest v N.D. Dep't. of Transp.*, 2018 ND 224, pp. 8-9, 918 N.W.2d 43, we reiterated our standard for construing statutes:
"Statutory interpretation is a question of law, fully reviewable on appeal." *Teigen v State*, 2008 ND 88 ¶ 19, 749 N.W. 2d 505. "Words in a statute are given their plain, ordinary, and commonly understood meaning, unless defined by statue or unless a contrary intention plainly appears." *Zajac v Traill City Water Res. Dist.*, 2016 ND 134, ¶ 6, 881 N.W. 2d 666. See also NDCC § 1-02-02, "Words and phrases must be construed according to the context and the rules of grammar and the approved usage of the language." *Robot Aided Mfg., Inc. v Moore*, 1997 ND 14, ¶ 12, 589 N.W. 2d 187 (quoting NDCC § 1-02-03). "The primary purpose of statutory interpretation is to determine the intention of the legislation." *Zajac*, at ¶6. Our focus is on what meaning was intended by words and phrases enacted into law. "If the language of a statute is clear and unambiguous, 'the letter of [the statute] is not to be discarded under the pretext of pursuing its spirit." Id, at ¶ 6(quoting NDCC ¶ 1-02-05) We "construe statutes to avoid absurd or illogical results" *State v Stegall*, 2013 ND 49, ¶ 16, 828 N.W.2d 526 (quoting *Mertz v City of Elgin*, 2011 ND 148, ¶ 7, 800 N.W 2d 710).

See NDCC § 1-02-38(4). ("In enacting a statute, it is presumed that... [a] result feasible of execution is intended'). Statutes are interpreted in context. In *Interest of K.G.*, 551 N.W.2d 554, 556(ND 1996). They are "construed as a whole and are harmonized to give meaning to related provisions." *Indus. Contractors, Inc. v Taylor*, 2017 ND 183, ¶ 11, 899 N.W.2d 680.

[¶60] The following authority addresses the core issue in this dispute that stare decisis has not been followed and has similarly produced detriment to Curtiss' substantial rights.

See *Ramos v Louisiana*, 042020 FEDSC, 590 US ___

The reliance the American people place in their constitutionally protected liberties in conviction by a non-unanimous jury as an unconstitutional denial of the Sixth Amendment right to a jury trial.

Every judge must learn to live with the fact he/she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right.

Stare decisis "has been a fundamental part of our jurisprudence since the founding." Indeed "we generally adhere to our prior decisions, even if we question their soundness, because doing so 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decision, and contributes to the actual and perceived integrity of the judicial process." *Alleyne v United States*, 570 US 99, 118 (2013) (Sotomayor, J., concurring) (quoting *Payne v Tennessee*, 501 US 808, 827(1991))

The doctrine "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our Constitutional system of government, both in appearance and in fact." *Vasquez v Hillery*, 474 US 254, 265-266(1986)

In constitutional as in statutory cases, adherence to precedent is the norm. To overrule a constitutional decision, the Courts precedent on precedent shall require a "special justification." *Allen v Cooper*, 589 US ___, 2020.

A case may be egregiously wrong when decided, or may be unmasked as egregiously wrong based on later legal or factual understandings or developments. See *Nevada v Hall*, 440 US 410(1979)

The Privileges and Immunities Clause provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States" Amendment 14 §1. At the time of the 14th Amendment ratification, "the terms 'privileges' and 'immunities' had an established meaning as synonyms of 'rights.' *McDonald v Chicago*, 561 US 742, 813(2010) (THOMAS, J., concurring in part and concurring in judgment) "The ratifying public understood the Privileges and Immunities Clause to protect constitutionally enumerated rights" against abridgment by the States. Id at 837.

Due Process incorporation is demonstrably erroneous interpretation of the Fourteenth Amendment. As I have explained before "the notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words." Id at 811

Textual difference between protecting "citizens" (in the Privileges and Immunities Clause) and "persons" (in the Due Process Clause)

[¶61] The above case displays similarity in that the court has their own functionalist assessment of applying law contrary to the Constitution and that there existed no compliance here with stare decisis. The trial court subjected the ancient guarantee of innocence until proven guilty of all essential element to its own functionalist assessment in the first place. The proclivities of the court are not founded in the laws of North Dakota and state constitution nor United States law and Constitution. There was no special justification for the trial court to overlook a constitutional decision. This is definitely a later legal, factual understanding and development.

[¶62] In current evolving case law precedence has been made relevant to Curtiss' claim.

> *Apprendi v New Jersey* ruling that the constitutional guarantee of due process requires that any fact that would increase a defendant's punishment be proven beyond a reasonable doubt.
>
> A sharply divided Maryland high court ruled March 31 that a convict's placement on the Sex Offender Registry qualifies as "punishment" for a sex offense, **meaning that all elements of the crime required for placement must be proven beyond a reasonable doubt at trial or conceded in a plea agreement before his or her name can be placed.**

[¶ 63] Provenance in current usage of N.D.C.C § 12.1-20-02(4) as defining "sexual acts" :*State v Grant*, 2009 ND 2010 (December 15, 2009) in which sexual acts where defined N.D.C.C. § 12.1-20-02(4)and occurred February 2007; *State v Huether*, 2010 ND 233 (December 2, 2010) in which sexual acts where defined under N.D.C.C. § 12.1-20-02(4) and occurred April 2006 thru August 2007; *State v Moe*, 2010 ND 90 (May 11th, 2010) in which sexual acts where defined under N.D.C.C. § 12.1-20-02(4) and occurred April 2008; *R.A. v R.A.*, 2011 ND 119, (June 21, 2011) in which sexual act was defined as N.D.C.C. § 12.1-20-02(4) and occurred March 2010.

See S.L. 2009 ch 131, §1

[¶ 64] It is clear by case law the definition applicable for "sexual acts" during May 2010 is N.D.C.C. § 12.1-20-02(4). Following stare decisis the State choose the definition in which the sexual act was engaged and charged accordingly.

See *State v Flatt*, 2007 ND 98,¶12, 733 N.W. 2d 608; *State v Boysaw*, 99 Conn App 358, 913 A. 2d 1112, 1116(2007) (holding the Court generally applies the law in existence on the date of the offense.)

[¶ 65] Change in penal statute must be applied in Curtiss' favor to the language must be presented before a jury as matter of fact to make a finding beyond a reasonable doubt before any collateral consequences or statutory obligation can attach or be enforced. Not a scintilla of evidence to infer Curtiss engaged with an object.

[¶ 66] In *Curtiss* the presiding judge determined the controversial definition was a matter of law and not a matter of fact for the jury to determine. Thereby usurping the fact-finding and truth seeking functions of the jury. There has been no fact checking nor validation, yet Curtiss is liable to serve a minimum of five years of probation and duty to register without having "been found guilty" of all essential elements beyond a reasonable doubt by a jury of twelve individuals.

[¶ 67] The review to unmask the statute language and apply it to the trial will reveal that no narrative or evidence supports the definition language and furthermore that no finder of fact made a finding beyond a reasonable doubt upon a sexual act with an object, meaning anything but the person of the actor. This will result ultimately in conclusion that Curtiss was denied a fair trial and was not provided the guaranteed protections of the United States and North Dakota Constitutions.

[¶ 68] This error was a structural error and has been hidden in the statute language and not acted upon in the interest of justice and the public interests to know everyman's evidence.

A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Johnson v United States*, 520 US 461, 468, 117 S. Ct 1544, 137 L.Ed 2d 718 (1997)

Such errors "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder v United States*, 527 US 1, 9, 119 S. Ct. 1827, 144 L.Ed 2d 35(1999)

"Structural errors differ substantially from obvious error, for which a defendant bears the burden of showing either prejudice or an adverse effect on the outcome of the proceeding." *State v Decker*, 2028 ND 43, ¶ 8, 907 N.W. 2d 378

Not only do structural errors not require an impact finding, but part of what makes an error a "structural error" is the difficulty in "assessing the effect of the error." *United States v Marcus*, 560 US 258, 263, 130 S. Ct. 2159, 176 L. Ed 2d 1012(2010)

The purpose of the structural error doctrine is to ensure insistence on certain basic, constitutional guarantees that should define the framework of any criminal trial. *Weaver v Massachusetts*, 137 S. Ct. 1899, 198 L.Ed 2d 420 (2017)

[¶ 69] Curtiss requests the assistance in settling this controversy by and through the answering of this question as only due to language set out in statute law and case law does this current action take place. Curtiss is assured that when the court does explicitly review the application of and precisely define all the statutes there will be clear and convincing evidence revealing reasonable cause for action and entitlement for relief, be it in injunction, declaratory or other alternative relief that is appropriate.

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

[¶ 70] As Curtiss has been subjected to numerous maneuvers of failure of notice, change of assigned judge, claims of lack of jurisdiction and serious attempts to prevent the district court from having full notice of all essential elements on the Third Amended Information along with the fact the jury has not made any finding upon one of the elements establishing a structural error is malicious and denied all guarantees of protection of the United States Constitution and North Dakota Constitution.

[¶ 71] Evasion of stare decisis and North Dakota statute law and the Constitutional protections granted to Citizen Curtiss has resulted in irreparable harm as all efforts against Curtiss to bring to light the errors abovementioned. The court has kept the language of charging instrument from the

court and the public at large. Exactly what offence was committed and in what manner, hence the reason for definitions and attendant circumstances in essential elements.

[¶ 72] Miscarriage of justice, also known as a failure of justice, occurs when a person is convicted and punished for a crime that he/she did not commit. Every "miscarriage of justice" in turn is a "manifest injustice."

[¶ 73] For officers of the court to deny unmasking of admitted statute language to sustain a conviction and perpetuate continued methodology and maneuvers in concealment is clearly a miscarriage of justice.

> *Abdi v State*, 2000 ND 64, ¶ 10, 608 N.W. 2d 292 "A manifest injustice may result from procedural errors by the sentencing court."

[¶ 74] The sentencing court failed to review the specific statue language to assure jury did meet all statute law requirements before sentencing Curtiss to incarceration, probation and placement upon the registry.

> Manifest injustice is the plain error standard under federal law and federal court recognize that this more rigorous standard of review is appropriate when an error, even a federal constitutional error, has not been properly preserved. See *United States v Thame*, 846 F 2d 200, 207(3rd Cir) cert denied, 488 US 928, 102 Led 2d 333, 109 S. Ct. 314(1988)
>
> Manifest injustice [Black's Law 10th ed. 2014, p. 1107] A direct, obvious, and observable error in a trial court.
>
> Miscarriage of justice is a decision inconsistent with substantial justice
> *Kotteakos v United States*, 328 US 750, 90 Led 1557, 66 S.Ct. 1239

[¶ 75] This legal action is to unmask essential material necessary for placement on registry and serving five years of probation and the fact this error has been permitted to remain concealed is against the judicial integrity and public opinion of transparency with the principle of innocence until proven guilty before a jury. Curtiss has not "been found guilty" of a felonious sexual offense as required by statute law and is entitled to relief from all sanctions resulting from such inference.

[¶ 76] To permit the action of suppression and concealment is miscarriage of justice and must be corrected with full disclosure of the actual facts of jury instruction statute language and the resulting effects upon the status rights and all other legal relation of Curtiss.

CONCLUSION

[¶ 77] The authority and citation of stare decisis states clearly what line of legality Curtiss asserts in that the laws of this county have been violated and Curtiss is being held liable where the State was relieved of their burden of proof upon an essential element of the criminal offense which is also an essential element for placement upon the registry: The basis for argument in this action. The statute charged offense involved a sexual component not found by any jury member nor supplied in any narrative, and as such Curtiss was given the illusion of a fair trial providing as words have explicit meaning and effect in jurisprudence and one word can make the ultimate decision.

[¶ 78] THEREFORE, The Appellant, Spencer Kerry Curtiss, hereby prays this Supreme Court reviews directed issues for :

- abuse of discretion;
- obvious error;
- structural error;
- answer question of material importance and public interest and;
- Grant a Reversal and Remand with Instruction to supply discovery as requested for declaratory judgment enabling injunctive relief requested against probation and duty to register, or
- vacate criminal judgment and dismiss with prejudice.

This Appellant Brief honorable submitted this 11 day of August, 2020.

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
Missouri River Correctional Center
1800 48th Avenue S.W.
P. O. Box 5521
Bismarck, North Dakota 58506-5521

Subscribed and sworn before me this 11th day of August, 2020,
In the county of Burleigh, State of North Dakota

Notary Public
Scott Haas

SCOTT HAAS
Notary Public
State of North Dakota
My Commission Expires December 19, 2022

STATEMENT OF COMPLIANCE

I, Spencer Kerry Curtiss, Appellant, do hereby declare the Appellant brief is in within compliancy of North Dakota Rules of Appellate Procedure and submits Appellant Brief being less than 38 pages.

Submitted this 11 day of August, 2020.

Spencer Kerry Curtiss /Appellant

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

CERTIFICATE OF SERVICE BY MAIL

Supreme Court No. 202000175
Burleigh Co. Court No. 2020-CV-00514

Spencer Kerry Curtiss — **Petitioner and Appellant**
v.
State of North Dakota — **Respondent and Appellee**

STATE OF NORTH DAKOTA)
) SS.
COUNTY OF BURLEIGH)

I, Spencer Kerry Curtiss, being duly sworn under penalty of perjury, deposes and says: I'm over the age of eighteen years and on the 11 Day of August, 2020, 1230 PM, I mailed the following:

Supreme Court Appellant Brief and Appendix- Case # 20200175

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

Office of the Clerk
North Dakota Supreme Court
600 East Boulevard Avenue
Bismarck, North Dakota 58505-0530

Tiffany J. Grossman
Assistant Attorney General
Office of the Attorney General
500 N. 9th Street
Bismarck, North Dakota 58501-4505

And depositing said envelope in the Mail, from MRCC, P.O. Box 5521, Bismarck, N. Dak. 58506-5521

AFFIANT

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Subscribed and sworn to before me this 11th day of August, 2020.

In the County of Burleigh, State of North Dakota

SCOTT HAAS
Notary Public
State of North Dakota
My Commission Expires December 19, 2022

NOTARY PUBLIC
Scott Haas