

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

Kengi Moses,
Defendant and Appellant

v.

State of North Dakota
Plaintiff and Appellee

Supreme Court No.: 20220101
District Court No.: 09-2021-CR-229

On appeal from the Judicial decision during the Preliminary Hearing held on July 21, 2021, the order denying Appellant's motion to strike, suppress, and dismiss stated on the record for the hearing held on September 28, 2021, and the order denying his motion to dismiss entered on January 7, 2022
Cass County District Court
East Central Judicial District
The Honorable Tristan Van de Streek, Presiding

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

Alexis Madlom, Student Attorney
Certified under N.D. R. Ltd. Practice
by Law Students

Stormy Vickers (ND # 06539)
Vickers Law
808 Third Ave S., Ste. 201
Fargo, ND 58103
Telephone: (701) 365-4884
Vickerslaw.efile@gmail.com
ATTORNEY FOR APPELLANT

<u>TABLE OF CONTENTS</u>		<u>Page</u>
TABLE OF AUTHORITIES.....		3-5
		<u>Paragraph</u>
STATEMENT OF JURISDICTION.....		1
STATEMENT OF THE ISSUES.....		2
STATEMENT OF THE CASE.....		3
ORAL ARGUMENT REQUESTED.....		4
STATEMENT OF THE FACTS.....		5-6
STANDARD OF REVIEW.....		7
LAW AND ARGUMENT.....		8-39
I.	The State violated Mr. Moses’ Constitutional rights to Due Process and Equal Protection.....	8
a.	The State violated Mr. Moses’ right to Due Process.....	8
i.	Mr. Moses was denied his right to Due Process of law when the State failed to provide him notice that It was infringing on his property and liberty right.....	11-19
ii.	Mr. Moses was denied Due Process as North Dakota Century Code §§ 62.1-02-01(1) and 62.1-02-01(2) are unconstitutionally vague.....	20-21
b.	The State violated Mr. Moses’ right to Equal Protection by treating a juvenile adjudication, that did not afford Mr. Moses the same rights of an adult criminal prosecution, as a criminal conviction.....	22-25
II.	Moses’ juvenile adjudication cannot be used by the State to prove the current charge as it is not a criminal conviction, and the Uniform Juvenile Court Act specifically prohibits the use of civil, juvenile adjudications outside of juvenile court.....	26-30
III.	North Dakota Century Code §§ 62.1-02-01(1) and 62.1-02-01(2) are ambiguous and the Rule of Lenity applies.....	31-38
CONCLUSION.....		39
		<u>Page</u>
CERTIFICATE OF COMPLIANCE.....		25

TABLE OF AUTHORITIES

<u>North Dakota</u>	<u>Paragraph Number</u>
<i>City of Belfield v. Kilkenny</i> , 2007 ND 44, 729 N.W.2d 120.....	20
<i>City of Bismarck v. Goodwin</i> , 2022 ND 72, 973 N.W.2d 7.....	1
<i>Combs v. Lund</i> , 2015 ND 10, 858 N.W.2d 311.....	12
<i>Fargo Beverage Co. v. Fargo</i> , 459 N.W.2d 770 (N.D. 1990).....	22
<i>Hennum v. Medina</i> , 402 N.W.2d 327 (N.D. 1987).....	17
<i>In re R.Y.</i> , 189 N.W.2d 644 (N.D. 1971).....	22, 23, 24, 26
<i>In re T.S.</i> , 2011 ND 118, 798 N.W. 649.....	22
<i>Keller v. Keller</i> , 2017 ND 119, 894 N.W.2d 883.....	11
<i>M.H.P. v. M.H.P.</i> , 2013 ND 61, 830 N.W.2d 216.....	26
<i>Simons v. State</i> , 2011 ND 190, 803 N.W.2d 587.....	20
<i>State v. Aguero</i> , 2010 ND 210, 791 N.W.2d 1.....	7
<i>State v. Arot</i> , 2013 ND 182, 838 N.W.2d 409.....	7
<i>State v. Brossart</i> , 1997 ND 119, 565 N.W.2d 752.....	31
<i>State v. Duncan</i> , 2011 ND 85, 796 N.W.2d 672.....	7
<i>State v. Egan</i> , 1999 ND 59, 591 N.W.2d 150.....	10, 17
<i>State v. Ehli</i> , 2003 ND 133, 667 N.W.2d 635.....	10
<i>State v. Hatch</i> , 346 N.W.2d 268 (N.D. 1984).....	10
<i>State v. Laib</i> , 2002 ND 95, 644 N.W.2d 878.....	31
<i>Stoner v. Nash Finch, Inc.</i> , 446 N.W.2d 747 (N.D. 1989).....	20

United State Supreme Court Case Law

<i>Board of Regents v. Roth</i> , 408 U.S. 564, 92 S. Ct. 2701 (1972).....	12
<i>Bruesewitz v. Wyeth LLC</i> , 562 U.S. 223, 131 S. Ct. 1068 (2011).....	33
<i>District of Columbia v. Heller</i> , 554 U.S. 570, 128 S. Ct. 2783 (2008)	11, 12
<i>Kent v. United States</i> , 383 U.S. 541, 554, 562 (1966).....	22
<i>McDonald v. City of Chi.</i> , 561 U.S. 742, 130 S. Ct. 3020 (2010).....	12

Persuasive Precedent Case Law

<i>Blanton v. United States</i> , 94 F.3d 227, 232 (6th Cir. 1996).....	28
<i>Lewis v. St. Louis</i> , 607 F. Supp. 614 (E.D. Mo. 1985).....	12
<i>Mickelson v. Cty. of Ramsey</i> , 823 F.3d 918 (8th Cir. 2016).....	12
<i>Walters v. Wolf</i> , 660 F.3d 307 (8th Cir. 2011).....	12

Constitutional Provisions

U.S. Const. amend. II.....	11
U.S. Const. amend. XIV, § 1.....	8
N.D. Const. art. I, § 1.....	8, 11
N.D. Const. art. I, § 12.....	9
N.D. Const. art. I, § 13.....	23
N.D. Const. art. VI, § 6.....	1

Statutes

N.D.C.C. § 12.1-32-07(3).....	13, 14, 16
N.D.C.C. § 27-20-33.....	6, 16, 21, 23, 27, 30
N.D.C.C. § 27-20-52(1).....	25, 29
N.D.C.C. § 27-20.4-16.....	24
N.D.C.C. § 29-01-06(5).....	23
N.D.C.C. § 29-28-03.....	1
N.D.C.C. § 29-28-06.....	1
N.D.C.C. § 62.1-02-01(1)(b).....	5, 6, 31, 35, 36
N.D.C.C. § 62.1-02-01(2).....	6, 8, 20, 21, 32, 33

Other Authority:

N.D.R.Crim.P. 11(a)(2).....	1
Bouvier Law Dictionary.....	28
Black’s Law Dictionary.....	28

Case References

Case No. 09-2021-CR-229.....	3, 5, 14, 15, 34, 37
Case No. 09-2015-JV-581.....	14, 15, 16

JURISDICTIONAL STATEMENT

1. This Court has jurisdiction under N.D. Const. art. VI, § 6, N.D.C.C. § 29-28-03, N.D.C.C. § 29-28-06, and North Dakota Rule 11 of Criminal Procedure. “An appeal to the supreme court provided for in this chapter may be taken as a matter of right.” N.D.C.C. §29-28-03. A defendant may appeal “[a]n order made after judgment affecting any substantial right of the party.” N.D.C.C. § 29-28-06. Pursuant to North Dakota Rule of Criminal Procedure 11, a defendant may enter a conditional guilty plea with the consent of the prosecuting attorney and the district court. N.D.R.Crim.P. 11(a)(2). A conditional guilty plea reserves the right to have this Court review “an adverse determination of a specified pretrial motion.” *Id.* (see also *City of Bismarck v. Goodwin*, 2022 ND 72, 973 N.W.2d 7).

STATEMENT OF THE ISSUES

2. The issues presented for this appeal are as follows:
- I. The State violated Mr. Moses’ Constitutional rights to Due Process and Equal Protection.
 - a. The State violated Mr. Moses’ right to Due Process.
 - i. Mr. Moses was denied his right to Due Process of law when the State failed to provide him notice that they were infringing on his property and liberty right.
 - ii. Mr. Moses was denied Due Process as North Dakota Century Code §§ 62.1-02-01(1) and 62.1-02-01(2) are unconstitutionally vague.
 - b. The State violated Mr. Moses’ right to Equal Protection by treating a juvenile adjudication, that did not afford Mr. Moses the same rights of an adult criminal prosecution, as a criminal conviction.
 - II. Moses’ juvenile adjudication cannot be used by the State to prove the current charge as it is not a criminal conviction, and the Uniform Juvenile Court Act specifically prohibits the use of a civil, juvenile adjudications outside of juvenile court.
 - III. North Dakota Century Code §§ 62.1-02-01(1) and 62.1-02-01(2) are ambiguous and the Rule of Lenity applies.

STATEMENT OF THE CASE

3. Mr. Moses appeals the decisions of three judicial proceedings held in the East Central Judicial District Court in front of the Honorable Tristan Van de Streek. On July 21, 2022, a preliminary hearing was held where the Court admitted evidence of Mr. Moses' juvenile record over objection from the defense and allowed the record to be used against Mr. Moses. On September 28, 2021, a motion hearing was held where the court denied Mr. Moses' request for the court to strike the mention of the juvenile adjudication from the record and suppress the adjudication from further use. At a hearing held on January 7, 2022, Mr. Moses moved to dismiss the charges against him as a violation of his Due Process rights. Mr. Moses did not receive notice that he was prohibited from possessing a firearm and the statute he was charged under is unconstitutionally vague. The district court denied this motion. Mr. Moses then entered a conditional guilty plea. *Case 09-2021-CR-229*, Indexes 67, 75, 77, 78. Mr. Moses appeals the decisions of the district court.

ORAL ARGUMENT

4. Oral argument has been requested to emphasize and clarify Mr. Moses' written arguments on their merits.

STATEMENT OF THE FACTS

5. On December 17, 2015, a civil, juvenile order for adjudication, was entered against Mr. Moses for theft which “**would be** a Class C Felony **if committed by an adult.**” *Id* at Index 32 page 5, Juvenile Findings (emphasis added). Mr. Moses has never been **convicted** of any felony or a violent misdemeanor. On September 12, 2020, Mr. Moses went to Bill's Shooting Range in Fargo, North Dakota where he possessed a firearm. *Id* at Index 1, Information. The State charged Moses with the unlawful possession of a firearm in

violation of N.D.C.C. § 62.1-02-01(1)(b) based upon the aforementioned juvenile adjudication. *Id.*

6. For the Court's convenience:

N.D.C.C. § 62.1-02-01(1)(b) (emphasis added) (in effect at the time of charging):

A person who has been **convicted** anywhere of a felony offense of this or another state or the federal government not provided for in subdivision a or who has been convicted of a class A misdemeanor offense involving violence or intimidation in violation of chapters 12.1-16 through 12.1-25 or an equivalent offense of another state or the federal government **and** the offense was committed while using or possessing a firearm, a dangerous weapon, or, as defined in section 12.1-01-04, a destructive device or an explosive, is prohibited from owning a firearm or having one in possession or under control from the date of conviction and continuing for a period of five years after the date of conviction or the date of release from incarceration, parole, or probation, whichever is latest.

N.D.C.C. § 62.1-02-01(2)(f) (emphasis added) (in effect at the time of charging):

2. For the purposes of this section, "conviction" means a determination that the person committed one of the above-mentioned **crimes upon a verdict of guilt, a plea of guilty, or a plea of nolo contendere** even though:

f. The person committed an offense equivalent to an offense described in subdivision a or b of subsection 1 when that person was subject to juvenile adjudication or proceedings and a determination of a court under chapter 27-20 or of a court of another state or the federal government was made that the person committed the delinquent act or offense.

N.D.C.C. § 27-20-33 (emphasis added) (in effect at the time of charging):

1. An order of disposition or other adjudication in a proceeding under this chapter **is not a conviction of crime and does not impose any civil disability ordinarily resulting from a conviction** or operate to disqualify the child in any civil service application or appointment. A child may not be committed or

transferred to a penal institution or other facility used primarily for the execution of sentences of persons convicted of a crime.

2. The disposition of a child and evidence adduced in a hearing in juvenile court **may not be used against the child in any proceeding in any court other than a juvenile court**, whether before or after reaching majority, except for impeachment or in dispositional proceedings after conviction of a felony for the purposes of a presentence investigation and report.

STANDARD OF REVIEW

7. This Court applies "a de novo standard of review to a claim of a constitutional violation." *State v. Duncan*, 2011 ND 85, ¶ 10, 796 N.W.2d 672, 675 (citing *State v. Aguero*, 2010 ND 210, ¶ 16, 791 N.W.2d 1). This Court will review any questions of law under the de novo standard of review. *State v. Arot*, 2013 ND 182, ¶ 7, 838 N.W.2d 409, 411.

LAW AND ARGUMENT

I. The State violated Mr. Moses' constitutional rights to Due Process and Equal Protection.

a. The State violated Mr. Moses' right to Due Process.

8. Mr. Moses' right to Due Process was violated because Mr. Moses did not receive notice that the State was infringing upon his Constitutional right to possess a firearm and sections 62.1-02-01(1) and (2) of the North Dakota Century Code are unconstitutionally vague. Both the United States and North Dakota Constitution protect a person's right to Due Process. The Due Process Clause in the United States Constitution states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens 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.

U.S. Const. amend. XIV, § 1.

9. The North Dakota State Constitution's Due Process Clause states, "[n]o person shall ... be deprived of life, liberty or property without due process of law." N.D. Const. art. I, § 12.

10. "A person is denied due process when defects in the procedure employed might lead to a denial of justice." *State v. Ehli*, 2003 ND 133, ¶ 10, 667 N.W.2d 635, 637. Due Process has been found to be violated when one does not receive notice that their Constitutional right to life, liberty, or property is being infringed upon. *State v. Egan*, 1999 ND 59, ¶¶ 6 - 7, 591 N.W.2d 150, 152. Due Process is also violated when a statute is vague because it does not define the criminal offense with sufficient definiteness in a way that ordinary people can understand what conduct is prohibited. *State v. Hatch*, 346 N.W.2d 268, 272 (N.D. 1984).

i. Mr. Moses was denied his right to Due Process of law when the State failed to provide him notice that It was infringing on his property and liberty rights.

11. The Second Amendment of the United States Constitution guarantees an individual's right to keep and bear arms. U.S. Const. Amend. II; *District of Columbia v. Heller*, 554 U.S. 570, 595, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008); *Keller v. Keller*, 2017 ND 119, ¶ 12, 894 N.W.2d 883, 886. This right is also protected by the North Dakota's State Constitution. Article 1, Section 1, of the North Dakota Constitution states:

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.

N.D. Const. art. I, § 1 (emphasis added).

12. “Procedural due process requires fundamental fairness, which, at a minimum, necessitates notice and a meaningful opportunity for a hearing appropriate to the nature of the case.” *Combs v. Lund*, 2015 ND 10, ¶ 7, 858 N.W.2d 311, 313. “Ordinarily, due process requires notice and an opportunity to be heard prior to the deprivation of any of the three protected interests.” *Lewis v. St. Louis*, 607 F. Supp. 614, 616 (E.D. Mo. 1985) (citing *Board of Regents v. Roth*, 408 U.S. 564, 570 n.7, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972)). Possession of a firearm is a protected liberty right under the Second Amendment and the Due Process Clause. *McDonald v. City of Chi.*, 561 U.S. 742, 778, 130 S. Ct. 3020, 3042 (2010) (stating “it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.”); *District of Columbia v. Heller*, 554 U.S. 570, 604; 616-17, 128 S. Ct. 2783, 2804; 2811 (2008) (stating “[a]mong the other defenses to personal liberty should be mentioned the right of the people to keep and bear arms.”). Possession of a firearm is also a property right. *Mickelson v. Cty. of Ramsey*, 823 F.3d 918, 930 (8th Cir. 2016) (stating “Protected property interests range from welfare—the very means by which to live,—to an individual's personal items, such as a handgun and ammunition.”); *Walters v. Wolf*, 660 F.3d 307, 311 (8th Cir. 2011) (stating, “[a]ll parties concede that [defendant’s] interest in his handgun and associated ammunition constitute a valid, constitutionally protected property interest.”). Due process applies to the taking of a person’s constitutional right to possess a firearm and Mr. Moses was entitled to receive notice that his constitutional right was being infringed upon.

13. One way that notice can be given is through conditions of probation. “The court shall provide as an explicit condition of every probation that the defendant may not possess a firearm, destructive device, or other dangerous weapon while the defendant is on probation... .” N.D.C.C. § 12.1-32-07(3). “[T]he court may waive this condition of probation if the defendant has pled guilty to, or has been found guilty of...[certain] misdemeanor or infraction offense[s]...” *Id.*

14. A petition was brought against Mr. Moses in Juvenile Court. *Case No. 09-2015-JV-581*. When Mr. Moses made his first appearance on that petition in the civil, juvenile proceeding, the court played the standard juvenile rights video to inform Mr. Moses of his juvenile rights. *Case No. 09-2021-CR-229*, Index 52. The video explicitly states that the proceedings were juvenile and does not mention any possibility or certainty of Mr. Moses losing his Constitutional right to possess a firearm. *Id.* The video only mentions that juveniles who are put on probation must adhere to the specific conditions for that probation. *Id.* The juvenile rights video is different than the rights video that is played for adults when they are charged with a crime. *Id.* at Index 53, Criminal Court Rights Video. In the adult criminal rights video adults are informed, as directed by N.D.C.C. § 12.1-32-07(3), that a plea or finding of guilt for a felony or violent misdemeanor can result in the loss of the right to possess a firearm. *Id.*

15. Mr. Moses was not provided any information related to his right to possess a firearm nor how it could or would be affected by an admission to the juvenile allegations prior to his admissions. Mr. Moses ultimately admitted the allegations in the civil, juvenile petition and was adjudicated delinquent. *Case No. 09-2015-JV-581*. **He did not plead guilty, was not found guilty, and did not plea nolo contendere to any of the allegations.** After his

adjudication, Mr. Moses was given his judgment paperwork, which again, did not contain any mention of the possibility, let alone certainty, that his right to possess a firearm would be taken away. *Case 09-2021-CR-229* Index 32, Juvenile Findings. Mr. Moses was placed on juvenile probation. *Case No. 09-2015-JV-581*. None of the information related to juvenile probation provided any notice that his right to possess a firearm may have been curtailed.

16. Mr. Moses was not informed that he was unable to possess a firearm at any point before the charge at question herein was brought. The North Dakota Century Code provides that, barring some exceptions for some misdemeanor offenses not applicable here, “[t]he court shall provide as an explicit condition of every probation that the defendant may not possess a firearm... while the defendant is on probation.” N.D.C.C. § 12.1-32-07(3). North Dakota Century Code section 27-20-33 explicitly states a juvenile adjudication is not criminal and not a conviction. The Juvenile Act provides no requirement for notice because it explicitly states that no civil disability can be imposed. As a result, Mr. Moses was never given the explicit statutory condition that he was unable to possess a firearm while on probation. The juvenile Appendix A lists a limited amount of nine probation conditions that a juvenile must follow. *Case No. 09-2015-JV-581*, Index 51, Juvenile Appendix A. None of the conditions indicate a prohibition of firearms. *Id.* If the State intends to treat Mr. Moses as a “felon” who has a “conviction,” the State needed to provide notice of the infringement of his constitutional right during his probation as required by N.D.C.C. §12.1-32-07(3), which was never given. The State is attempting to treat a juvenile like an adult felon but not give the rights afforded to an adult in the federal constitution, the state constitution, or state statutes.

17. A defendant is entitled to receive notice that their Constitutional right to life, liberty, or property is being infringed upon. *Hennum v. Medina*, 402 N.W.2d 327, 335 (N.D. 1987). The North Dakota Supreme Court has held that even the unenumerated right to have a valid driver's license is a right that is protected by Due Process. *State v. Egan*, 1999 ND 59, ¶¶ 6 - 7, 591 N.W.2d 150, 152. For the State to take suspend a driver's license, this Court held that there must be notice – and that notice must be more than just constructive notice. *Id.*

18. The State failed to notify – constructive, actual, or anything in between – Mr. Moses at any point that his Constitutional right to possess a firearm was taken away. Mr. Moses could not have reasonably known he was unable to possess a firearm because the State did not notify him as required by Due Process, by North Dakota Statute, and as argued *infra* the law did not adequately inform him that he was prohibited from possessing a firearm.

19. When notice is not given to a person that their Constitutional right to life, liberty, or property is taken away, Due Process is violated. Mr. Moses acted in reasonable reliance upon the rights he is afforded in the Federal and State Constitutions. The State failed to notify Mr. Moses that it was abrogating his constitutional right to possess a firearm, which is a violation of Due Process.

ii. Mr. Moses was denied Due Process as North Dakota Century Code §§ 62.1-02-01(1) and 62.1-02-01(2) are unconstitutionally vague.

20. North Dakota Century Code sections 62.1-02-01(1) and 62.1-02-01(2) are unconstitutionally vague. A criminal statute can be void-for-vagueness when the statute is not sufficiently definite under the Due Process clauses of the federal and state constitutions to give a reasonable person adequate warning of the prohibited conduct. *Stoner v. Nash Finch, Inc.*, 446 N.W.2d 747, 755 (N.D. 1989). “All laws **must meet two requirements**

to survive a void-for-vagueness challenge: (1) the law must create minimum guidelines for the reasonable police officer, judge, or jury charged with enforcement of the statute; **and** (2) the law must provide a reasonable person with adequate and fair warning of the proscribed conduct.” *Simons v. State*, 2011 ND 190, ¶ 30, 803 N.W.2d 587, 596 (quoting *City of Belfield v. Kilkenny*, 2007 ND 44, ¶ 10, 729 N.W.2d 120) (emphasis added).

21. In order to survive a constitutional challenge, N.D.C.C. § 62.1-02-01(2) must meet both conditions. Even if the statute meets the first condition, it must also meet the second, and here it fails. North Dakota Century Code section 62.1-02-01(2) does not provide a fair and adequate warning of the conduct that it seeks to prohibit. Subsection two of N.D.C.C. § 62.1-02-01 states, “[f]or the purposes of this section, ‘conviction’ means a determination that the person committed one of the above-mentioned crimes upon a verdict of guilt, a plea of guilty, or a plea of nolo contendere... .” A reasonable person would need to go no further to establish that their juvenile adjudication would not be a “conviction” because a juvenile adjudication does not involve any verdict of guilt. N.D.C.C. § 27-20-33. Additionally, the Juvenile Act clearly and specifically states that a juvenile adjudication is not a conviction. N.D.C.C. § 27-20-33(1). The statute as a whole also does not provide a fair and adequate warning because the statute creates an impossible scenario.

b. The State violated Mr. Moses’ right to equal protection by treating a juvenile adjudication, that did not afford Mr. Moses the same rights of an adult criminal prosecution, as a criminal conviction.

22. The essence of the theory of equal protection is that all people similarly situated should be treated alike. *Fargo Beverage Co. v. Fargo*, 459 N.W.2d 770, 775 (N.D. 1990). Juveniles in juvenile proceedings are not afforded the same protections as adults in criminal proceedings. *In re R.Y.*, 189 N.W.2d at 651. “The United States Supreme Court has long

recognized ... juvenile proceedings are civil in nature and must not conform with all of the requirements of a criminal trial, such proceedings ‘must measure up to the essentials of due process and fair treatment.’” *In re T.S.*, 2011 ND 118, ¶17, 798 N.W. 649, 654, (*quoting Kent v. United States*, 383 U.S. 541, 554, 562 (1966)). If a juvenile is transferred for prosecution in adult criminal court the juvenile will then receive all of the protections of being criminally prosecuted in adult court. *In re R.Y.*, 189 N.W.2d 644 at 645.

23. There are significant differences between the rights of a person accused of a crime and a juvenile who is alleged to have committed delinquent behavior; perhaps the most obvious is the right to a jury trial. The 6th Amendment to the United States Constitution and article I of the North Dakota Constitution guarantees criminal defendant’s the right to trial by jury. U.S. Const. amend. VI; N.D. Const. art. I § 13. A defendant has the right to trial by an impartial jury in all criminal prosecutions. N.D.C.C. § 29-01-06(5). Issues brought in juvenile proceedings are not afforded the constitutional right to a jury because they are civil in nature. N.D.C.C. § 27-20-33. Without the right to a jury trial Due Process for a criminal conviction is impossible. Juvenile court proceedings, unlike criminal proceedings, are not adversarial in nature and such adversarial nature would not be “in harmony with the intents and purposes of the [Juvenile] Act.” *In re R.Y.*, 189 N.W.2d at 653.

24. An additional difference between criminal adult proceedings and civil juvenile proceedings is that in a juvenile proceeding, “all evidence helpful in determining the questions presented ... may be received by the court and relied upon to the extent of its probative value even though not otherwise competent in the hearing on the petition,” and sources of any confidential information do not have to be disclosed. N.D.C.C. § 27-20.4-

16. The North Dakota Supreme Court has consistently held that since juvenile matters are civil in nature, and they are meant to be treated differently than criminal adult matters, the juvenile matters do not receive the same constitutional protections as criminal matters. *In re R.Y.*, 189 N.W.2d at 651.

25. The plain language of the Juvenile Act indicates it is civil nature. The State may choose to remove cases from the civil, juvenile court and bring them to criminal court for prosecution. N.D.C.C. § 27-20-52(1). If the juvenile case is moved to criminal court, the juvenile is entitled to all rights for a criminal prosecution under the law. The State did not transfer Mr. Moses' juvenile case to criminal court, he was not given the same rights as he would have in a criminal prosecution, and therefore the State did not obtain a criminal conviction of guilt – they obtained a civil juvenile adjudication of delinquency. The legislature and district court are attempting to overlook the difference between protections that are not given in juvenile court and protections that are mandatory in order to obtain a criminal conviction. This interpretation of this law violates Equal Protection as it allows a juvenile to be treated as having a conviction without affording the juvenile the rights associated with criminal court. This allows the State to bypass the more difficult process of obtaining a criminal conviction by lessening the rights of the juvenile “defendant”. During his juvenile proceedings, Mr. Moses was not afforded the rights that he would have received if the case would be in criminal court. Treating a juvenile adjudication as the equivalent of a criminal conviction violates Equal Protection.

II. Moses' juvenile adjudication cannot be used by the State to prove the current charge as it is not a criminal conviction, and the Uniform Juvenile Court Act specifically prohibits the use of civil, juvenile adjudications outside of juvenile court.

26. Juvenile court is civil in nature and a juvenile adjudication is not a criminal conviction. *In re R.Y.*, 189 N.W.2d 644, 650 (N.D. 1971). “The juvenile court law is not intended to operate as a criminal statute, and it should not be so construed.” *Id.* Juvenile court is focused on treatment and rehabilitation, not criminal punishment. *M.H.P. v. M.H.P.*, 2013 ND 61, ¶ 9, 830 N.W.2d 216, 219.

27. The Uniform Juvenile Court Act states that “[a]n order of disposition or other adjudication in a proceeding under this chapter is **not a conviction of crime and does not impose any civil disability ordinarily resulting from a conviction** or operate to disqualify the child in any civil service application or appointment... [t]he disposition of a child and evidence adduced in a hearing in juvenile court **may not be used against him in any proceeding in any court other than a juvenile court.**” N.D.C.C. § 27-20-33 (emphasis added).

28. Bouvier Law Dictionary defines a civil disability as “the loss of a civil right by either judicial decree or legislative decree, or as a statutory function ancillary to a finding of guilt for certain crimes.” *Bouvier Law Dictionary (Civil Disability)*. Black’s Law Dictionary defines “civil disability” as: the condition of a person who has had a legal right or privilege revoked as a result of a criminal conviction.” *Black’s Law Dictionary (Civil Disability)*. The loss of a person’s constitutional right to bear a firearm is one example of a civil disability that occurs when an adult is convicted of a crime. *Blanton v. United States*, 94 F.3d 227, 232 (6th Cir. 1996). The Juvenile Act specifically excludes civil juvenile adjudications from any imposition of a civil disability, such as the loss of the right to a firearm.

29. The Juvenile Act seeks to limit the use of civil juvenile records by severely limiting who may access the records. N.D.C.C. § 27-20-52(1) states:

Unless a charge of delinquency is transferred for criminal prosecution under section 27-20-34, the interest of national security requires, or the court otherwise orders in the interest of the child, the law enforcement and correctional facility records and files of a child alleged or found to be delinquent, unruly, or deprived are not open to public inspection.

Id. The Juvenile Act does list certain exceptions to this rule, which are that the charge may be inspected by the juvenile court, counsel for a party to the proceeding, the officers of public institutions that the child is committed to, law enforcement officers of other jurisdictions when it is necessary for them to discharge their duties, for a presentencing report or dispositional proceeding in criminal cases, a parole board, the governor, the pardon advisory board, the professional staff of the uniform crime victims compensation program when needed to discharge their duties, or a designee of the school in which the child is or wishes to be enrolled in. *Id.*

30. The Juvenile Act is clear that a charge in juvenile court is not criminal and barring few exceptions, cannot be used against the person. N.D.C.C § 27-20-33. Mr. Moses has a prior civil, juvenile adjudication. No exception listed in the Juvenile Act allows law enforcement to give the information of a juvenile adjudication to the prosecution or the district court, no exception allows the court to use a juvenile adjudication of delinquency as a prior conviction of a crime, no exception allows the public present in an open courtroom to hear of the juvenile adjudication, and no exception allows a jury to review the juvenile adjudication.

III. North Dakota Century Code §§ 62.1-02-01(1) and 62.1-02-01(2) are ambiguous and the Rule of Lenity applies.

31. The rule of lenity "requires ambiguous criminal statutes to be construed in a defendant's favor." *State v. Laib*, 2002 ND 95, ¶ 15, 644 N.W.2d 878. An ambiguous statute is one of doubtful meaning. *State v. Brossart*, 1997 ND 119, ¶ 14, 565 N.W.2d 752, 756. N.D.C.C. § 62.1-02-01(1)(b) states,

A person who has been **convicted** anywhere of a felony offense of this or another state or the federal government not provided for in subdivision a or who has been convicted of a class A misdemeanor offense involving violence or intimidation in violation of chapters 12.1-16 through 12.1-25 or an equivalent offense of another state or the federal government **and** the offense was committed while using or possessing a firearm, a dangerous weapon, or, as defined in section 12.1-01-04, a destructive device or an explosive, is prohibited from owning a firearm or having one in possession or under control from the date of conviction and continuing for a period of five years after the date of conviction or the date of release from incarceration, parole, or probation, whichever is latest.

N.D.C.C. § 62.1-02-01(1)(b) (emphasis added).

32. North Dakota Century Code section 62.1-02-01(2)(f) states,

For the purposes of this section, "**conviction**" means a **determination that the person committed one of the above-mentioned crimes upon a verdict of guilt, a plea of guilty, or a plea of nolo contendere** even though:

(f) The person committed an offense equivalent to an offense described in subdivision a or b of subsection 1 when that person was subject to juvenile adjudication or proceedings and a determination of a court under chapter 27-20.4 or of a court of another state or the federal government was made that the person committed the delinquent act or offense.

(emphasis added). The statute specifically states that it is referring to a "conviction," resulting from a verdict or plea of guilty or nolo contendere. *Id.* Verdicts or pleas involving guilt are criminal in nature. Juvenile cases are civil in nature, which require no pleas or findings of guilt; rather they require admissions and civil findings of delinquency. North

Dakota Century Code section 62.1-02-01(2)(f) attempts to equivocate civil juvenile proceedings with criminal adult proceedings by attempting to punish a person who has received a juvenile adjudication as a criminal. The precedent requirement that the person committed a “[crime] upon a verdict of guilty, a plea of guilty, or a plea of nolo contendere” for a juvenile adjudication can never be met. N.D.C.C. 62.1-02-01(2).

33. The statute is also ambiguous by use of the language “even though.” There are two clauses to N.D.C.C. § 62.1-02-01(2)(f), the independent clause and the concessive subordinate clause. The independent clause is, “[f]or the purposes of this section, ‘conviction’ means a determination that the person committed one of the above-mentioned crimes upon a verdict of guilt, a plea of guilty, or a plea of nolo contendere...” and the concessive subordinate clause is, “even though: [t]he person committed an offense equivalent to an offense described in subdivision a or b of subsection 1 when that person was subject to juvenile adjudication or proceedings and a determination of a court under chapter 27-20.4 or of a court of another state or the federal government was made that the person committed the delinquent act or offense.” N.D.C.C. § 62.1-02-01(2)(f); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 231-32, 131 S. Ct. 1068, 1075 (2011). The two clauses cannot be read together as they create an impossible result – a finding of guilt stemming from a civil juvenile adjudication. Since the two clauses cannot be read together, they are independent ideas, and “linking independent ideas is the job of a coordinating junction like ‘and,’ not a subordinating junction like ‘even though.’” *Bruesewitz*, 562 U.S. 223 at 231-32. Grammatically, the reader of N.D.C.C. 62.1-02-01(2) in a case where the individual at question has not entered a plea of guilt or been found guilty, should never proceed to subsection (f) for the concessive subordinate clause contained therein. This creates an

ambiguity in the statute as a result the statute must be construed in Mr. Moses' favor – 62.1-02-01(2) requires a prior criminal conviction, not a civil adjudication.

34. North Dakota Century Code section 62.1-02-01(1)(a) makes it illegal for individuals to possess a firearm if they have been convicted of a felony in chapters 12.1-16 through 12.1-25 that involves violence or intimidation. North Dakota Century Code section 62.1-02-01(1)(c) and (d) make it illegal for other persons, not relevant to this case, to possess a firearm. North Dakota Century Code section, 62.1-02-01(1)(b) is the subsection referenced in the information filed by the state in this case. *Case No. 09-2021-CR-229*, Index 1.

35. North Dakota Century Code section 62.1-02-01(1)(b) is a one-hundred-and-thirty-word (130) sentence that is comprised of three “or” clauses and one “and” clause. These clauses are not separated by any commas, and it is therefore impossible for the reader to determine if the “and” clause applies to each of the “or” clauses; or if the “and” clause only applies to the “or” clause that immediately proceeds the “and.” A visual description is helpful. North Dakota Century Code section 62.1-02-01(1)(b) can be separated as follows:

- b. A person who has been convicted anywhere of a felony offense of this or another state or the federal government not provided for in subdivision a or who has been convicted of a class A misdemeanor offense involving violence or intimidation in violation of chapters 12.1-16 through 12.1-25 or an equivalent offense of another state or the federal government and the offense was committed while using or possessing a firearm, a dangerous weapon, or, as defined in section 12.1-01-04, a destructive device or an explosive, is prohibited from owning a firearm or having one in possession or under control from the date of conviction and continuing for a period of five years after the date of conviction or the date of release from incarceration, parole, or probation, whichever is latest.

36. North Dakota Century Code section 62.1-02-01(1)(b) could require the “and” clause: “and the offense was committed while using or possessing a firearm, a dangerous weapon, or ... a destructive devise or an explosive” to attach to all three proceeding clauses:

62.1-02-01(1)(b)

A person who has been convicted anywhere of a felony offense of this or another state or the federal government not provided for in subdivision a and the offense was committed while using or possessing a firearm, a dangerous weapon, or, as defined in section 12.1-01-04, a destructive device or an explosive

or who has been convicted of a class A misdemeanor offense involving violence or intimidation in violation of chapters 12.1-16 through 12.1-25 and the offense was committed while using or possessing a firearm, a dangerous weapon, or, as defined in section 12.1-01-04, a destructive device or an explosive

or an equivalent offense of another state or the federal government and the offense was committed while using or possessing a firearm, a dangerous weapon, or, as defined in section 12.1-01-04, a destructive device or an explosive

37. Pursuant to this interpretation of the North Dakota Century Code section 62.1-02-01, Mr. Moses is not prohibited because he has not been convicted (or adjudicated) of an offense while using a firearm or possessing a firearm, a dangerous weapon, a destructive device or an explosive. *Case 09-2021-CR-229*, Index 32 page 5, Juvenile Findings.

38. The other interpretation is that the “and” clause: “and the offense was committed while using or possessing a firearm, a dangerous weapon, or ... a destructive device or an explosive” only applies to the “or” clause that immediately proceeds: “or an equivalent offense of another state or the federal government” This interpretation creates an equal protection violation by only criminalizing equivalent offenses that are committed when using or possessing a firearm, a dangerous weapon, a destructive device or an explosive. At a minimum, the possibility of interpreting the statute in two different ways creates an ambiguity and the ambiguity must be resolved in the favor of Mr. Moses.

Conclusion

39. Mr. Moses’ Constitutional rights to Due Process and Equal Protection were violated, the district court improperly used the prior juvenile adjudication in criminal court,

and the charging statute is ambiguous. Therefore, justice requires that Mr. Moses' conviction be overturned by this Court.

Dated: June 6, 2022

/s/ Alexis Madlom
Alexis Madlom, Student Attorney
Certified under N.D. R. Ltd. Practice by Law
Students

Dated: June 6, 2022

/s/ Stormy Vickers
Stormy Vickers (ND # 06539)
Vickers Law
808 Third Ave S., Ste. 201
Fargo, ND 58103
Telephone: (701) 365-4884
Vickerslaw.efile@gmail.com
ATTORNEY FOR DEFENDANT

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

Kengi Moses,	Appellant	Supreme Court No.: 20220101 District Court No.: 09-2021-CR-229
v.		CERTIFICATE OF COMPLIANCE
State of North Dakota	Appellee.	

1. Under Rule 32(a)(8)(A) and Rule 32(d) of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 25 pages.

Dated: June 6, 2022

/s/ Alexis Madlom
Alexis Madlom, Student Attorney
Certified under N.D. R. Ltd. Practice by Law
Students

Dated: June 6, 2022

/s/ Stormy Vickers
Stormy Vickers (ND # 06539)
Vickers Law
808 Third Ave S., Ste. 201
Fargo, ND 58103
Telephone: (701) 365-4884
Vickerslaw.efile@gmail.com
ATTORNEY FOR DEFENDANT

**IN THE SUPREME COURT
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Kengi Moses,

Appellant

v.

State of North Dakota

Appellee.

Supreme Court No.: 20220101

District Court No.: 09-2021-CR-229

DECLARATION OF SERVICE

DECLARATION OF SERVICE

1. The undersigned declarant hereby certifies that he is of legal age, not a party to the above-captioned matter, and that on June 6, 2022, a copy of the following documents:

Notice of Student Attorney Authorization

Appellant's Brief

Declaration of Service

were filed electronically with the North Dakota Supreme Court Clerk and served via email upon the following:

SheraLynn Ternes
sa-defense-notices@casscountynynd.gov
Attorney for Appellee

were mailed by first class mail to the following:

Kengi Moses
732 3rd St N.
Fargo, ND 58102

2. To the best of the declarant's knowledge, the above address is the actual address of the party intended to be served.
3. I declare under penalty of perjury of the laws of North Dakota that the foregoing is true and correct.

Dated: June 6, 2022

/s/ Stormy Vickers

Stormy Vickers (ND # 06539)

808 Third Ave S., Ste. 201

Fargo, ND 58103

Vickerslaw.efile@gmail.com

ATTORNEY FOR DEFENDANT