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

**August 4, 2008**

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State of North Dakota,

Plaintiff-Appellee,

v.

Travis Charles Lium

Defendant-Appellant.

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Supreme Court No. 20080100  
Cass Co. No. 06-K-02064

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**APPEAL FROM ORDER DENYING MOTION TO WITHDRAW GUILTY PLEA  
DISTRICT COURT, CASS COUNTY, NORTH DAKOTA**

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**REPLY BRIEF FOR APPELLANT**

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ALEXANDER F. REICHERT  
(ND ID # 05446)  
218 South Third Street  
Grand Forks, North Dakota 58201  
Telephone No. (701) 787-8802  
Attorney for Defendant-Appellant

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## LAW AND ARGUMENT

**[¶ 1] A. Lium's assertion of innocence and as a defense are fair and just reasons for withdrawal.**

[¶ 2] Appellee urges this Court to reject Defendant's assertion of innocence and of a defense as fair and just reasons for withdrawal of his pleas, relying upon State v. Were, 325 N.W.2d172 (N.D. 1982), and State v. Stai, 335 N.W.2d 798 (N.D. 1983). (Appellee's Brief, ¶ 32-33).

[¶ 3] First, in State v. Lium, 2008 ND 33, ¶ 22, 744 N.W.2d 775 (N.D. 2008), this Court explicitly held that Defendant's assertion of innocence and as a possible defense, "may support a fair and just reason for withdrawal." This Court is certainly of the opinion that Defendant's stated claim of innocence can constitute a fair and just reason for withdrawal. In addition, neither Were nor Stai control in this case, as they involved post-sentencing motions to withdraw plea, where the manifest injustice standard was applicable. In the present case, the motion to withdraw plea was made before sentencing, and the "fair and just" standard applies, which this Court held "involves a lesser showing than is required to establish 'manifest injustice.'" Lium, 2008 ND ¶ 22.

[¶ 4] Appellee argues that Defendant relies "primarily" upon the statements of counsel at the sentencing hearing to support his assertion of a defense, and that those statements should be disregarded. (Appellee's Brief, ¶ 34). The statements made by counsel were simply arguments that Defendant had already asserted in his letter to the district court. (Hr'g Tr. 20:3-15, April 13, 2007.) For instance, Defendant wrote that he "may have suffered permanent damage to my testicles from Koering, *which started prior to any weapon being introduced into the fight.*" (App. at A-13). [emphasis added.] Defendant asserted in his letter that the knife used during the incident did not qualify as a

“dangerous weapon” under N.D.C.C. 62.1-01-01 because the blade was under five inches in length. *Id.* These were assertions by Defendant of possible defenses in this case, which assertions were reiterated by counsel during the sentencing hearing, and should be considered by this Court in determining whether the district court abused its discretion in this case. The district court completely ignored these assertions of possible defenses by Defendant and counsel when it ruled in the order following remand: “No defenses were raised.” (App. at A-23). Such a statement is not supported by the record, and constitutes a clear abuse of judicial discretion.

[¶ 5] Appellee argues that Defendant’s assertion of innocence is undermined by statements in his letter to the Court allegedly admitting his culpability in this case and asking for a reduced sentence. (Appellee’s Brief, ¶ 34-37). Appellee relies upon the following sentence from Defendant’s letter: “The charges I am taking the Alford Plea on are the charges I should have been charged with initially.” (App. at A-12). Appellee ignores the very next sentence in Defendant’s letter: “*I am not admitting these are the charges of which I should ultimately be convicted. I was willing to accept an Alford Plea, so this incubus could be resolved amicably.*” *Id.* [emphasis added.] The clear import of Defendant’s statement is that he was not admitting guilt to these charges, but entered an Alford plea to resolve this case. That is, in fact, the very nature of an Alford plea, whereby a criminal defendant enters a guilty plea while maintaining his innocence. See State v. Bates, 2007 ND 15, ¶ 2 n.1, 726 N.W.2d 595 (N.D. 2007).

[¶ 6] Defendant further maintained his innocence when he wrote: “I will state again, I had no intentions of murdering anyone;” “I had no intentions of killing or seriously injuring anyone.” (App. at A-15, A-12.) In his subsequent affidavit, Defendant asserted:

“I do not feel I am guilty of the charges I am accused of . . . .” (App. at A-19.) Simply because Defendant asked the Court for leniency in sentencing does not derogate from the clear statements Defendant made asserting his innocence and possible defenses to these charges. Again, the nature of the Alford plea is for a criminal defendant to plead guilty while maintaining his or her innocence and ask for leniency from the court. Thus, Defendant’s statements seeking leniency in sentence should not be used to reject his clear assertions of innocence as a fair and just reason for withdrawal of his plea.

**[¶ 7] B. The involuntary nature of Lium's pleas is a fair and just reason for withdrawal.**

[¶ 8] Appellee argues that Defendant’s plea was voluntary because the district court followed the requirements of N.D.R.Crim.P.11, and “confirmed the Defendant had not been threatened to induce his plea,” at the plea hearing. (Appellee’s Brief, ¶ 43). While “solemn declarations in open court carry a strong presumption of verity,” the United States Supreme Court has held that the barrier of the plea proceeding record is not insurmountable. Blackledge v. Allison, 431 U.S. 63, 74-75, 97 S. Ct. 1621; 52 L. Ed. 2d 136 (1977). The Blackledge Court recognized the “possibility that a defendant's representations at the time his guilty plea was accepted were so much the product of such factors as misunderstanding, *duress*, or misrepresentation by others as to make the guilty plea a constitutionally inadequate basis for imprisonment.” 431 U.S. at 75. In Blackledge, the petitioner alleged his plea was induced by an unkept promise, and “elaborated upon this claim with specific factual allegations,” such as the exact terms of the promise, and when, where, and by whom the promise had been made. The Court held that the critical question was whether these allegations, when viewed against the record of plea hearing were so “palpably incredible,” or “so patently frivolous and false,” as to

warrant summary dismissal of the request to withdraw the plea. Due to the nature of the guilty plea record and the ambiguity in the plea process, the Supreme Court concluded that summary dismissal was improper in that case. 431 U.S. at 76.

[¶ 9] In the present case, Defendant made a specific factual allegation that his attorney threatened to withdraw and leave him without counsel if Defendant did not enter the guilty plea. (App. at A-18-19). The Defendant specified that his attorney's threat took place in the county jail about one hour prior to the guilty plea hearing. (App. at A-18). As in Blackledge, these specific allegations, when viewed against the record of the plea hearing that took place less than an hour after the threat, are not "palpably incredible" or "patently false." The "presumption of verity" of Defendant's subsequent statements during the plea hearing that he had not been threatened is overcome under these circumstances where defense counsel has threatened to withdraw if Defendant did not plead guilty. Heiser v. Ryan, 951 F.2d 559, 562 (3<sup>rd</sup> Cir. 1991)( holding that counsel's threat to withdraw if defendant did not plead guilty is sufficient to rebut the "strong presumption of verity" attached to defendant's statements at the plea hearing that his plea was voluntarily entered and free from coercion); Downton v. Perini, 511 F.Supp. 258, 259 (N.D. Ohio, 1981)(holding that the presumption of truth attaching to defendant's statements in open court that he has not been threatened is overcome when the record demonstrates defense counsel has threatened to withdraw if the defendant does not plead guilty); United States v. Estrada, 849 F.2d 1304, 1306-07 (10<sup>th</sup> Cir. 1988)(holding defendant's denial at the plea hearing of receiving threats was not conclusive on the question of whether the plea was involuntary when counsel threatened to withdraw if defendant did not plead guilty).

[¶ 10] Appellee further argues that Defendant's allegation of his attorney's threat was weak and equivocal. (Appellee's Brief, ¶ 44). Contrary to Appellee's assertion, Defendant specifically articulated his attorney's threat: "But for the threats of my attorney to cease his representation of me, I would never have agreed to enter into a guilty plea in open court." (App. at A-19.) Defendant also stated in his affidavit that he was scared "I would be left to defend myself in the charges facing me if I did not comply with my attorney's wishes." (App. at A-18). Defendant was also specific as to the timing of the threat, which was one hour prior to his change of plea hearing. (App. at A-18). Defendant's allegation of his attorney's threat to withdraw if he did not plead guilty was specific and unequivocal, and constitutes coercion that rendered the Defendant's subsequent Alford pleas involuntary. The involuntary nature of Defendant's plea is a fair and just reason for withdrawal of the plea. U.S. v. Brewster, 137 F.3d 853, 857 (5th Cir. 1998).

[¶ 11] Appellee argues that there is a contradiction between Defendant's assertion of his fear of being forced to represent himself, and the statement in his letter that he may want to represent himself. (Appellee's Brief, ¶ 45). Defendant's statements are not contradictory when viewed in the context of what transpired in this case. At the time Defendant's attorney threatened to withdraw if Defendant did not plead guilty, Defendant asserted that he feared he "would be left to defend myself in the charges facing me if I did not comply with my attorney's wishes." (App. at A-18). Defendant then stated that he subsequently learned he was not required to submit to this threat, and could have obtained substitute counsel. (App. at A-19). After learning this fact, Defendant communicated his desire for new counsel and to withdraw his plea in the letter to the

district court: “I want to rescind my plea. I would also like a new attorney appointed as my counsel or legal advisor. I may want to represent myself.” (App. at A-15). Defendant wanted to withdraw his plea with a new attorney representing him as trial counsel or in the capacity as a legal advisor or stand-by counsel. Thus, there is no contradiction between Defendant’s assertion that he feared he would be forced to defend himself alone if he did not submit to counsel’s threat, and, upon learning he could have obtained substitute counsel, his request to withdraw his plea and have another attorney appointed to represent him or act as stand-by counsel.

[¶ 12] Appellee also argues that Defendant’s “expressed wish to avoid greater penalty” in the written plea agreement, and his “familiarity with the criminal justice system” helps to show the district court acted within its discretion in denying Defendant’s motion to withdraw plea. (Appellee’s Brief, ¶ 47-48).

[¶ 13] First, the record demonstrates that the written plea agreement was presented to Defendant one hour before the plea hearing, and was signed under threat that counsel would withdraw if Defendant did not sign the agreement. Thus, whatever language was contained in the plea agreement cannot overcome the fact that Defendant signed the agreement under the coercion of his counsel’s threat to withdraw. The case law holds that a plea entered under such circumstances is involuntary. In Commonwealth v. Forbes, 450 Pa. 185, 299 A.2d 268 (1973), the Pennsylvania Supreme Court held that defendant’s abandonment of his pre-sentence motion to withdraw plea due to counsel’s threat to withdraw if he pursued the motion rendered defendant’s plea involuntary and constituted a “fair and just reason” to allow defendant to withdraw his plea.

[¶ 14] Second, the argument that Defendant’s “familiarity” with the criminal justice system is a factor demonstrating his plea was voluntary was not a factor relied upon by the district court below and has been advanced by Appellee for the first time on appeal. “Matters raised for the first time on appeal will not be considered by this Court.” State v. Jones, 418 N.W.2d 782, 783 (N.D. 1988). Defendant’s prior contact with the criminal justice system does not render voluntary a plea that was coerced by counsel’s threat to withdraw. The district court abused its discretion in failing to find that Defendant’s involuntary plea, which was entered only after counsel threatened to withdraw if Defendant did not plead guilty, was a fair and just reason allowing Defendant to withdraw his plea.

[¶ 15] **C. Ineffective assistance of counsel is a fair and just reason for withdrawal.**

[¶ 16] Appellee argues that Defendant failed to appropriately raise the ineffective assistance argument below and cannot raise it on appeal. (Appellee’s Brief, ¶ 50). To the contrary, Defendant asserted in his letter that “the attorneys handling this case have been atrocious” and he “was not confident in my attorneys’ preparation for trial, since they never came to visit me on the specifics of my case.” (App. at A-15.) Accordingly, Defendant asked that his plea be withdrawn and new counsel appointed. Id. In addition, Defendant asserted in his affidavit that he first saw the plea agreement one hour prior the change of plea hearing, and but for the threats of his attorney to cease representation, Defendant would have never agreed to enter a guilty plea. (App. at A-18-19.) These allegations by Defendant sufficiently raised the argument of ineffective assistance of counsel. Furthermore, this Court has repeatedly reviewed claims of ineffective assistance of counsel for the first time on appeal, and reviewed the record to determine if counsel

was plainly defective. State v. Fischer, 2008 ND 32, ¶ 17, 744 N.W.2d 760 (N.D. 2008); State v. Bates, 2007 ND 15, ¶ 19, 726 N.W.2d 595 (N.D. 2007); State v. Schweitzer, 2007 ND 122, ¶ 25, 735 N.W.2d 873 (N.D. 2007); State v. Roberson, 1998 ND App 15, ¶ 9, 586 N.W.2d 687 (N.D. 1998).

[¶ 17] Appellee asserts that counsel's threat to withdraw is not credible; consequently, Defendant has not demonstrated ineffective assistance of counsel. (Appellee's Brief, 52). Contrary to Appellee's assertion, the Defendant raised specific factual allegations concerning the content of counsel's threat to withdraw and the precise timing of the threat. (App. at A-18-19). These allegations have not been refuted by Appellee at any stage of these proceedings. Counsel's threat to withdraw is plainly below the standard of effective assistance of counsel because counsel had a duty to ensure that Defendant's plea was voluntary, and that, but for this threat, Defendant would not have pled guilty and would have proceeded to trial. Thus, both prongs of an ineffective assistance of counsel claim have been established in this case, and constitute a fair and just reason to allow Defendant to withdraw his plea. The district court abused its discretion in failing to allow Defendant to withdraw his plea due to ineffective assistance of counsel.

**CONCLUSION**

[¶ 18] The district court abused its discretion in denying Defendant's motion to withdraw his Alford pleas because there are fair and just reasons allowing him to withdraw his plea. This Court should vacate the judgment of the district court, and remand this case with instructions allowing Defendant to withdraw his Alford pleas and proceed to trial.

Dated this 4<sup>th</sup> day of August, 2008.

**REICHERT LAW OFFICE**

/s/ Alexander F. Reichert  
**ALEXANDER F. REICHERT**  
**(ND ID #05546)**  
Attorney I.D. No. 0316799  
218 South Third Street  
Grand Forks, ND 58201  
(701) 787-8802  
Attorney for Defendant-Appellant

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**AMENDED AFFIDAVIT OF FILING AND SERVICE BY E-MAIL**

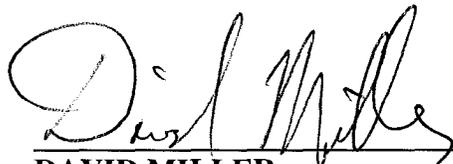
David Miller being first duly sworn, deposes and says that on the 18<sup>th</sup> day of June, 2008, he filed by email the attached Appendix according to the N.D. Sup. Ct. Admin. Order 14 upon:

[supclerkofcourt@ndcourts.com](mailto:supclerkofcourt@ndcourts.com)

David Miller, being first duly sworn, deposes and says that on the 18<sup>th</sup> day of June, 2008, he served by email the attached Appendix as required by N.D. Sup. Ct. Admin. Order 14(D)(1), in Adobe PDF Format (document formatting and page numbering may be slightly different than Word), upon:

Reid Brady  
Assistant State's Attorney  
[bradyr@co.cass.nd.us](mailto:bradyr@co.cass.nd.us)

Dated this 18<sup>th</sup> day of June, 2008.

  
\_\_\_\_\_  
DAVID MILLER

SUBSCRIBED AND SWORN to before me this 18<sup>th</sup> day of June, 2008.

  
\_\_\_\_\_  
Notary Public, State of North Dakota

(SEAL)

