

20090347 &
20100011

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME Nos. 20090347 & 20100011

State of North Dakota,
Petitioner/Appellee,

Vs.

Mr. Vonnie Darin Darby,
Respondent/Appellant.

APPEAL FROM THE CRIMINAL JUDGMENT & COMMITMENT,
SENTENCE, EVIDENTIARY HEARING AND POST CONVICTION RELIEF
ORDER BY THE CASS COUNTY DISTRICT COURT FOR THE EAST
CENTRAL JUDICIAL DISTRICT THE HONORABLE STEVEN MCCULLOUGH
PRESIDING ON AUGUST 28, 2007, NOVEMBER 30, 2009
(AMENDED) DECEMBER 7, 2009

BRIEF OF THE APPELLANT'S

VONNIE D. DARBY
PRO-SE #25457

North Dakota State Penitentiary
3303 E. Main Avenue
P.O. Box 5521
Bismarck, ND. 58506-5521

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CHAIN-OF-EVENTS-EVIDENCE-ARGUMENTS-FALSE STATEMENTS AND TESTIMONIES, & SUPPORTING AUTHORITY THAT ARE RELEVANT TO THE ABOVE AND BELOW ISSUES AND CLAIMS..... 9

- a. Was the Before Detaining Suspect Question “if ‘We’ Get Him Can You ID Him” ‘coupled’ with the Statements “We Got Him” Moments Prior to Conduction of show-up and Again “We Got Him” Shortly After Show-up, By Both Lead Investigators, Unconstitutional, Impermissibly Suggestive and Irreparable**
- b. Was the Unnecessary and Unlawful Conducting of Show-up Procedure Unreliable, Impermissible and Irreparable Suggestive as to Make ID of Darby Inevitable**
- c. Was the Showing of a 1-person (Darby’s State ID and/or Driver’s License) photo [s] to Witness Before, After or During Show-up Unlawful and Irreparable**
- d. Was the Demanding or Expectation of Witness to Make or attempt to Make Additional Identifications, More Than Once, After the First Attempt Failed And/Or Showed Uncertainty, Unlawful, Impermissibly Suggestive and Irreparable**
- e. Was the Suspect Being Surrounded by 8 Officers and 1 Detective, and Being Haud-Cuffed During the Show-up Unconstitutional, Impermissibly Suggestive and Irreparable**
- f. Was the Pushing of Binoculars on the Witness to assist His Vision Capabilities on ID’ing the Suspect Diring the Show-up Unconstitutional, Impermissibly Suggestive And Irreparable**
- g. Should Law Enforcement Have Conducted a Show-up or Lineup Lawful Procedure Knowing Before Hand That Witness Described Suspect Voice as Being of an Southern Accent, and While Knowing That Suspect’ Ohio & Wiscousin State ID’s Indicated That He Was From Mid-West and Northern States**
- h. Was the “Pushing” Eyewitness to ID Suspect by One or More Methods So Corrupt and Over-the-Top Impermissibly Suggestive That the Procedure and Suspect Suffered From Irreparable Prejudice and Due Process**
- i. Was Show-up Being Conducted After Suspect Invoked His Right to Presence of Counsel Miranda Rights, a Denial of His Miranda and Due Process..... 9**

NATURE OF THE CASE

On March 16, 2007, a jury convicted Petitioner/Appellant, Vonnie D. Darby of the offenses of Burglary, a class B felony, and Simple Assault, a class B misdemeanor for an incident allegedly that happened at UNO's restaurant in Fargo on Oct. 2, 2006. On August 28, 2007, 2007, the Court sentenced Darby to a period of incarceration of 10 Years. Mr. Darby appealed his conviction to the North Dakota Supreme Court. This Court affirmed Darby's conviction *per curiam* in March 2008. Mr. Darby filed a Petition for Post Conviction Relief in June of 2008. Subsequently, he filed an application for a Writ of Habeas Corpus in September of 2008. And in October 2008, Darby submitted two Post Conviction (PC) Supplement Applications. An Evidentiary Hearing on the consolidated matters on June 16 and November 10-12, 2009. On November 30, 2009, the trial court entered its written order, and on December 7, 2009, the trial court amended it's November 30, 2009, order. It done so prior to Darby's Supplement/Reconsideration Motion for Post Conviction Application filed on December 4, 2009. See Register of Action.

STATEMENT OF FACTS

1) On Oct. 2, 2006, Mr. Darby was wrongfully detained, identified (ID'd) and arrested for Class B BURGLARY and Class B SIMPLE ASSAULT;

2) An Information was filed on Oct. 4, 2006, charging Mr. Darby with said charges. "OVER" Darby's objections, the court appointed Monty Mertz to represent Mr. Darby;

3) On Oct. 24, 2006, Darby was coerced into filing a motion for self-representation;

4) On Nov. 9, 2006, the court denied Darby's Motion to Access to Legal Materials; to Have His Friends And Pastor Deliver Legal Materials to Him at The Jail And to Have Mertz Set-up a Photo & In-Court Line-up And Other ID Proceedings, citing Darby's failure to cite any authority while simultaneously denying him access to such authority;

5) On Nov. 30, 2006, Darby 'reluctantly' went forward with Mertz as his attorney for that day's Preliminary Hearing (Prelim), and after being dissatisfied with Mertz 'sell-out' performance and failure to call Darby's requested alibi and the State's witnesses, he renewed his self-representation request;

6) On Dec. 8, 2006, the court granted Darby's Self-Representation request but abused it's discretion in denying Darby's request for substitute or Standby Counsel;

7) On Feb. 21, 2007, a Pretrial Motion Hearing was held regarding varies motions filed by Mr. Darby, pro se;

8) On Feb. 28, 2007, the court denied Darby's following submitted motions; "**Motion to Dismiss Complaint For Failing to Name a Person as Victim**"; Speedy Trial

/Motion to Dismiss Violation; Motion to Dismiss Because the State Failed to Preserve Certain Evidence; ...; Motion to Dismiss Because NDCC § 12.1-02 is unconstitutional, (const'al); **Motion to Suppress Eyewitness Identification of Defendant of Suggestive -ness**; ...; Motion to Suppress Any Mention of Or Dismiss The Complaint Because of Phone Calls Allegedly Monitored By Det. Cruff Violating Miranda Rights; Several Discovery Motions Requesting Dismissal as a Remedy; Motion For Psychological Evaluation; Motion For an Expert Witness; and Motion For Additional Law Books, Specifically, N.D. Pattern Jury Instructions, in its written Order, **just thirteen (13) days prior to trial.**

9) During trial Darby, after the Court had already granted his request for said witness to be sequestered, immediately objected to the State's request and the Court's granting of Det. Cruff being appointed as the State's Case Manager; and submitted to the court his Rule 29 Motion for Acquittal and Lesser Included Offense and Other related Jury Instructions;

10) A jury trial was held on March 13-15, 2007, with Darby appearing pro se. Because of Darby's Pattern Jury Instructions Request being denied, he was prejudiced and alternately wrongfully denied a fair trial, access to the courts and due process defense & rights to effectively research, submit, prepare and object to relevant and critical trial proceeding matters;

11) After the State rested its case, the Court denied Darby's Rule 29 Motion, at 485-87;

12) On March 15, 2007, the jury found Mr. Darby guilty as charged, and on that same day the Court granted Darby's "post-trial" request for Psychological Evaluation,

and Appointment for Sentencing Proceedings Counsel;

13) In April of 2007, the DOC&R conducted a PSI on Darby without counsel being present, and in July 2007, Dr. Benson submitted her report;

14) On August 27, 2007, the Court sentenced Darby to the maximum 30 day and 10 yr imprisonment in State Prison, concurrently;

15) After a timely notice of appeal was filed, the N.D. Supreme Court denied Darby's Direct Appeal in March 2008;

16) As listed on page 1, Darby filed and submitted his PC Relief Application and three Supplements, along with his Writ of Habeas Corpus (Writ) between June 16, 2008 & Dec. 4, 2009. Within and attached to those moving documents are dozens of issues being raised and hundreds of exhibits submitted to the Court as evidence and argument;

17) After Darby acted pro se at the June 16, & Nov. 10-12, 2009, evidentiary hearing, the Court denied Darby's relief requests in-part, at the end of the proceedings and in its later written order, both without considering available and relevant testimony, evidence and controlling authority and rationale;

18) In Dec. 2009, the trial court and the N.D. Commission on Legal Counsel for Indigents (Commission) determined that Darby was eligible, entitled and in need of appointment of appellate counsel and related defense services and assigned Robert Martin to represent Darby on his PC appeal;

19) After Darby submitted const'al questions via letter to the Commission in Jan. 2010, and a petition to the Supreme Court on Feb. 17, 2010, (see petition and accompany documents and appendix in Court's file), and Darby's alleged refusal to meet with Martin

until after copies of the evidentiary hearing transcripts was provided to him, (see Martin's March 4, 2010, letter, and Darby's April 10, 2010, affidavit of good cause, in court's file), Martin interpreted such questions, that was directed to the Commission and Supreme Court, as determination of his duties in Darby's appeal. The Supreme Court in its March 10, and April 14, 2010, order, agreed and allowed Martin to be withdrawn, and done so without appointing Darby a substitute as requested in Darby's affidavit and mandated by cited and applicable authority;

20) After being informed by mail received on April 16, at 8:30pm, Darby was put on notice by this Court that he would have to proceed on appeal pro se and that his brief and appendix was due in 13 days;

21) This Court's April 14, order, also informed Darby that if he does not submit an appeal brief and appendix, that his Fed. 17, petition brief, etc., will be filed as his PC Appeal, despite the fact that Darby made it clear in said petition that it was not his appeal. Darby is quite aware of how important the submitted 'QUESTIONS' in said petition is to the Court and future litigators. Having one's hand-cock on the Case Law will derive from Darby v State that which the connected questions and const'l rights will elicit, which is why said petition was not rejected for simultaneous representation or unavailable applicable Rule/Law. However, such desire to entertain and publish such litigating questions and answers should not be controlling over Darby's Const'l Rights.

Nevertheless, the Court not answering the questions and making clear to Darby, the person that person that raised the 'precedent setting' questions, how the related const'l protections pertaining to those questions and Darby's underline appeal issues, not

being entertained prior to Darby's appeal, denies him an opportunity to make meaningful decision and a meaning and effective appeal brief; and therefore places Darby in an procedural exhaustion road block, catch-22 and/or put in a multi-decision decision position to invoking one const'al right to be granted another; **Simmons**, at 976.

Darby raised dozens of const'al issues in his trial court's PC appeal, but because of the Supreme Court's 'cap' on brief filing word & page count, he is forced to abandon some of his const'al issues and/or continue exhaustion on others to the best of his limited pro se and brief drafting skills, and because of such, the Court should be mindful of the potential crunching of the following issues that are set forth as follows:

LAW AND ARGUMENT

ISSUE I THRU XI:

Because the above listed issues and related facts of law, procedures and arguments are so entwined with the chain of facts, evidence, procedure of law, and relevancy to the appellant's showing of innocence, it is necessary and practical, to avoid needless and repetitive coverage and unnecessary quoting, that ISSUES I thru ISSUE XI be consolidated for argument and entertainment.

In such a case, as the underline, relevant facts and evidence of the entire record must be considered when entertaining a appellants 'gross miscarriage of justice', plain error and 'actual innocent' claims. With respect to the above, the Court is now shown the following:

Was The Showup Unnecessary and Unconstitutional

The appellant position is that it was, and as *Coleman v Alabama*, 90 S.Ct. 1999, (1970) at 2000, citing *Stovall v Denno*, 87 S.Ct. at 1972; *Simmons v U.S.*, 88 S.Ct. 967, (1968), & *Foster v California*, 89 S.Ct. 1127,(1969), found, this is a claim that must be determined on the totality of the surrounding circumstances. The **Stovall** court at 1972, stated: ... the record in the present case reveals that the showing of Stovall to Mrs. ... in an immediate hospital confrontation was imperative. The Court of Appeals, stated:

‘Here was the only person in the world who could possibly exonerate Stovall. Her words, and only her words, ‘He is not the man’ could have resulted in freedom for Stovall. The hospital was not far distant from the courthouse and jail. No one knew how long Mrs. ... might live. Faced with the responsibility of identifying (ID’ing) the attacker, with the needed immediate action and with the knowledge that Mrs. ... could not visit the jail, the police followed the only feasible procedure and took Stovall to the hospital . Under these circumstances ...

Despite the relevant circumstances did not result in Stovall’s favor, the rationale and practice of such being applied in Darby’s case will show that such actions and serious concerns was lacking and the results of such de novo circumstances in Darby’s case warrants an immediate exoneration reversal. In Darby’s case the record reflects:

- 1) that the alleged injury to the alleged witness/victim was so minor that he went right back to work immediately right after the alleged assault; see Trial Transcript at 149, and, that the State ‘only’ charged Darby with Simple Assault;
- 2) that the alleged victim/witness had no problem filling out the written statement after the alleged minor waist injury, see TT at 149;
- 3) that the alleged witness/victim sought no medical attention;
- 4) that the alleged witness/victim had two other alleged eyewitness co-workers available for proper constitutional ID proceedings;
- 5) the restaurant not being scheduled to be open for over 2 hours, and there was available staff to fulfill 1, 2, or all 3 eyewitnesses positions temporarily, a Fargo or West Fargo, both Cass Co. Jurisdiction, jails or stations could have been utilized

for a 6-person line-up, or a 6-person photo spread line-up could have been taken to Uno's, both or either, to conduct an lawful and constitutional ID procedure, see TT 157 & 207;

6) that the West Fargo & Fargo jail was only approximately 1-mile from the alleged crime and arrest scene;

7) that attorney Jeff Bredahl, an State Public Defender (PD), who was representing Darby on a pending case at the time, Office was approximately (approx) 1 mile from the arrest scene, and 1 block from the Cass Co. Jail that where Darby was booked;

8) that either of the on location 10 law enforcement officers could have seen if Darby possessed the key to the locked ID'd bicycle chain;

9) that a fingerprint lifting on the bike (alleged flight vehicle), cash box and safe could have been conducted;

10) that State and Federal (Fed) law required that Darby have counsel made available at critical stages;

11) that it was a day time, 8:30a.m., alleged burglary crime, with the 'attempted theft' being the underline 'element', not a serious or fatal, or potential fatal crime as in above and below cited cases;

12) that no weapons were involved;

13) that Darby as Darby had his wallet, ID, etc. in his possession, his form of transportation (bus ticket, see PC Application Exhibit (PCAppEx) #45)) in his possession;

14) that **"investigating" officer[s]** (any or all of the 10 standing around the suspect in-front of the apartment (apt) building), could have sought 'true' admission-ship or neighbor eyewitness information as to the owner of the chain[ed] to the building red bike, from the building residence or 'visitors';

15) that the investigating officers actions prior to and during, the 'detention' of Darby, search for any other suspects had been 'exhausted' and "ceased", therefore the circumstances 'was not' and cannot be determined as any form of immediate necessity to justified the unlawful show-up;

16) that Mark Beauchene, Head PD, Office is only 2 blocks from the Fargo PD Headquarters and both his' and Bredahl's email, phone # & address is publicly listed;

With respect to the above and below (where applicable) the N.D. Supreme Co-

urt (Court or this Court), stated in *In Re R.W.S.*, 728 N.W.2d 326,(ND 2007), at 333:We have held: “our Court looks to decisions of ‘other’ states for guidance, but is not bound by those decisions. In respect to questions involving the U.S. Const., not only does our Court receive guidance from the decisions of the U>S. Supreme Court, but it is bound by those decisions.” Decisions of federal courts other than the U.S. S.Ct., interpreting the U>S. Const. are considered for guidance.

We now bring the this Court’s attention to the following on-point and persuasive authority of such authority to be recognized and applied accordingly to the underline case.

In *Palmer v Peyton*, 359 F2d 199,(4th 1966) (considering **Sanchell**), at 202, stated: ... A State may “not” rely in a criminal prosecution upon evidence secured by ... ; ‘nor’ may it rely on an ID secured by a process in which the search for truth is Made “secondary” to the quest for a conviction. Citing *Rochin v People of Cali.*; 72 S.Ct. 205,(1952); *Malinski v People of NY*, 65 S.Ct. 781,(1945); *Mapp v Ohio*, 81 S.Ct. 1684,(1961); *Leyra v Denno*, 74 S.Ct. 716,(1954 & *State v Ill*, 84 S.Ct. 1758,(1964).The Eighth Circuit in *U>S. v King*, 461 F2d 53, 55, (1972), stated: ... The District of Columbia Circuit Court of Appeals seems to have laid down the most stringent rules relating to 1-to-1 ‘pre-arrest’ confrontations to confirm identity. See *U.S. v Greene*, 429 F2d 193,(1970), Chief Justice, Burger observed in *Bates v U.S.*, 405 F2d1104, 1106, (1968):

“Prudent police work would confine these on-the-spot identifications to situations in which possible doubts as to ID “needed” to be “resolved promptly;” [**absent such need** the “conventional line-up” viewing is **the appropriate procedure**].”

In the underline case, the evidence, facts and circumstances shown above and below, indicates that the Show-up ID did not meet the required ‘resolved promptly’ test, and therefore, the ID procedure was unnecessary, unlawful, denial of due process and the seed-planting poisoning for said and all thereafter identifications.

CHAIN-OF-EVENTS-FACTS-EVIDENCE-ARGUMENTS-FALSE STATEMENTS & TESTIMONIES, AND SUPPORTING AUTHORITY THAT ARE RELEVANT TO THE ABOVE AND BELOW ISSUES AND CLAIMS

Note: For practical, etc. reasons as given on page 9 above, the evidence, points, authority, statements, and arguments set forth below, that are pertaining to the above mentioned, and additional below mentioned Issues, Claims, etc, will have (as SAMPLE: Re: ISSUE I, X, or a., b., c., etc, or two or more of each), at the end or beginning of each evidence, point, authority, statements, and argument. In some cases such may apply to all and noted as such, and in other cases, their application will be self-explanatory and the Court should apply accordingly.

Whether an eyewitness ID is accurate as well as admissible is a question for the ‘finder of fact.’ A miscarriage of justice precludes the development of true facts or results in the admission of false ones, as to result in the fundamentally unjust incarceration of one who is actually innocent, said the Rodriguez v Young, 906 F2d 1153,(7th 1990), at 1154, Court. We are skeptical about equating certainty with reliability. “Determinations of the reliability suggested by a witness’s certainty **after the use of suggestive procedures** are complicated by the possibility that the certainty may reflect the (as in Darby’s case shown below and ‘throughout’) **corrupting effect of the suggestive procedures** [themselves].” U.S. ex rel Kosik v Napoli, 814 F2d 1151,1159,(7th 1987). Also, the most certain witness are **not** invariable the most reliable ones. We consider certainty a relevant factor **but** consider it warily. ... Manson v Brathwaite, 432 U>S. at 131, (The greatest memory loss **occurs within hours after an event**, at 1163; (In Darby’s case the description was given in one case in seconds, and the other in minutes, and instead of having the “**greatest memory loss within hours after the alleged event**” as the rationale in **Manson** expressed, the witness description got ‘greater’ 5 and a half months later),

see TT # 68,86-87, 95, 104-05, 115-19, 124-28 & 167; PCAppEx. 35, 40 & 99.

In combination with, (the **very vague** and ordinary **minimum description** given to 911 (**given seconds after alleged event**): “a ‘big’ black male, riding a red bike, ‘stocking’ hat, winter ‘coat’; and initial investigating interview (**given approx. 10 minutes after alleged**) description to Morris grew to the hat changing to one of a ‘beanie’ hat, winter coat turning into a ‘dark bluish winter”jacket”” and the hat turning into a ‘dark colored’, and the all together addition description of blue jeans, southern accent and 250 pds, see below, and PCAppEx #35 & 99), (with the seconds & minutes later descriptions provided to 911 and Inv. Officer Morris in mind above, it should be pointed out that Vic/Wit. **Ciro Delagarza** under Cross Q: you do take a law officer’s authority seriously, don’t you? A: Yes. Q: if a crime was committed and they ask you **questions**, **‘you intend to give them the “whole” truth’**, right? A: Yes., at TT 104; at 198: Q: But he did ask you to explain **exactly what had occurred**? A: Yes.; at 223, under redirect, Q: When you talked to the officers, did you tell them what you remembered from that day? A: Yes.), we not only have the above statements and sworn testimony regarding his initial 911 and investigation interview feelings, intention and memory accountants and descriptions, we also have in combination of the following addition facts; such as the prejudice, unnecessary, corrupt and over-the-top impermissible behavior (shown below) by law enforcement and the State’s Attorney, that clearly made the show-up and in-court procedure tainted, flawed & fundamentally unfair in the worse degree: **Circumstances Surrounding the Impermissibly Suggestive, Corrupt & Irreparable Unlaw Show-up. ISSUES I, II, III, IV, V, VI, VII, & IX; TT. 89-93, 95, 101, 116,191, 217-21; PCAppEx.35**

Direct: Q. Sometime during your **'initial statements'** to officer Morris did you tell him that you could ID the suspect if they found him? A. Yes. TT. 217. Q. ... A. they called and told us that **"we got him"**, we got the suspect. We need you to ID him. Q. and when you got that call, that was you that they spoke with. A. Yes. TT. 116. Q. And how did you feel about that call, about them having the suspect 'in custody?' A. **"I was excited."** TT. 117. (after the show-up): at 213, Q. ... A. the Detective came he was more like **"we got him"**. TT. 214, Q. ... A. I was just more happy that they caught the suspect. TT. 89: A. they had the defendant sitting on the **stairs**. TT. 91: A. The bicycle was chained up ... next to the **"stairwell"**. TT. 95: A. You were sitting right here on the **"steps"**. Q. So you never seen the defendant **"get off that bike"** or was on the bike or anything. A. **No**. He was **"already in custody"**. You were already sitting there and the **"cops were 'all over'"**. TT. 101: A. The 'cops' were **'really'** ... or were not **"pushing me"** on the bike. **"They"** were asking me about the **"ID of the person."** TT. 184-85: Q. And did you see a picture of the suspect in the vehicle when you went to the scene? A. Yes. Q. Was it the same individual? Yes. TT. 218: Q. How many cops? A. Four uniform cops ... one Det. and where was they posted? A. **"Around the suspect"**. He was on the **'stairs'** but they was **'surrounding him'**? A. Yes. Q. Was he in **"hand-cuffs"**? TT. 219: A. Yes. TT. Q. At what point did Officer Morris show you the photo ID of the suspect? A. after I ID'd him and said, that's him. (TT. 423 Det. Cruff testified that there was 8 law enforcement officers present). TT.220 Q. And before he handed you the binoculars you initially told him ... You couldn't ID him? A. Yeah. TT. 221: Q. And since you felt he had a unique, different type of accent, southern, did you ask the officer could you hear his vo-

ice? A. No. Q. Did either of the officers offer – bring him to the car to let you hear his voice? No. “They” said that “**he did have the ‘application’ with him.** TT. 184: Q. ... A. ... I think the prosecutor. ... When I ‘met with her last week’. ... and then I “**saw the picture of the ‘day that you were arrested’.**” Q. And was that a booking picture? Yes.

The record reflects a huge amount of additional corrupted and over-the-top impermissible “**catastrophic**” suggestiveness conduct and behaviors by the State and investigating Officers as shown above (and below, if during or after addressing additional necessary claims, nevertheless, an concerned eye will see such on its own). But as shown above, for an ‘initial’ description to be submitted within seconds, 911 call: ... a ‘big’ black male ... riding a red bike ... sticking hat, winter coat, PCAppEx 99; and less than 10 minutes later, Morris Report: ... black male, 6’0”, 250pds, dark colored beanie hat, dark colored bluest winter style jacket, blue jeans, riding a red mountain bike, southern accent, TT.95 & PCAppEx 35, then after 5 and a half ‘**months later**’ launch into the above “**multi-level**” corrupted and irreparable impermissible suggestiveness, the intolerable and applicable authority argued must be acknowledged and enforced in the underline case.

The initial descriptions given is ‘shamefully’ less than what the U.S. Supreme Court in **Biggers** has found to be “not enough to have satisfied Proust”. The **Rodriguez** Court, at 1163, stated after considering Rodriguez witness description that which consisted of an age, height, race & shirt color: “That description was certainly not “more than ordinary thorough.” **Biggers**, 409 U.S. at 200, (calling a description which included “approximate **age, height, weight, complexion, skin texture, build,** (‘neither in Darby’s 911 call, and only 2 out of the 6, in Morris’ report’), and voice (not in Darby’s 911 call) “**not**

enough” to have ‘satisfied Proust’ but ... more than ordinary thorough”. Both courts seem to indicate that an ordinary description may or may not, depending on the individual case, be satisfactory, circumstances considered. Here, the initial description[s] fails to meet the ordinary test “**tremendously**”, and considering the corrupted prior to, during, and after Show-up, and State Attorney’s in-office cited and displayed above behaviors and conduct, if the 5 and a half month later in-court ID stills falls short of the ordinary description test, and nevertheless, after all of the unlawfulness, it must be found so tainted and impermissibly suggestive, conducive, flawed, irreparable, lacked sufficient independent reliability, and therefore entitled to reversal.

Cossel v Miller, 229 F3d 649,(7th 2000), at 656: First and perhaps foremost, Cossel does not fit the pre-ID description ... The same can be said in Darby’s case. Out side of the below “not enough” ordinary short list of list that was given to 911, the height and “vague” race description is the only pre-ID description that fit Darby. The absence of the other half of dozen forms of ID descriptions set forth in Biggers rationale ruling cannot be found in Darby’s case, and therefore should be considered in his favor. The fact that the State failed to submit any physical ID’d evidence must have weight in Darby’s favor as well.

U.S. v Domina, 784 F2d 1361,(9th 1984), at 1367: The Supreme Court in a line of cases modified this historical view and established rather stringent requirements for pre-trial ID procedures, the violation of which will not only preclude the admission of evidence of the pretrial ID itself, but may also preclude a later in-court ID that was tainted by the earlier suggestive procedures. Biggers; Coleman v Alabama, 90 S.Ct. 1999,(1970) ; **Foster; Simmons; Stovall; Gilbert and Wade** at 241. ISSUE II-VII; PCAppEx.35.

Court's Pre-trial Suggestive Show-up Ruling and Factors That was Not Available
ISSUE III-IV, VII; TT. 101-02, 116-17, 217, 220-21, & 184.

Two weeks prior to the trial, the district court, in its Feb. 28, 2007, applied this Court's Norrid, 611 N.W.2d 866,(2002), 2-pronged test, and found: "Mr Darby was the only suspect present at the ID and therefore the ID process used by the police was suggestive." However, the court error when it ruled that the "exigent circumstances" under Norrid were met in Darby's case.

As the court pointed out, the 2nd prong test is, "whether the ID nevertheless is reliable under the totality of the circumstances." The court however, 'dropped' the ball after listing the 5 **Biggers** factors. State and Federal Case Law has long made it clear that a Court playing lip-service to a rule, law or practice is not the equivalent of the cited authority. Such Courts has also made it clear that failure to make a record that which a viewing Court is relying on is an abuse of discretion and cause for reversal or remand. In such cases, higher courts has also found the record before them to be sufficient and necessary for it to consider and apply the appropriate law, practice or rule. This case warrants such application for the many reasons shown above, below and within the four corners of this brief the entire record.

As it is, or was, the court considered the limited amount of hearsay testimony that Det. Cruff, in part in-hand limited knowledge of, and the only thing of value and relevant on the record and amounts to evidence in such an issue was Cruff's answer to the Q: there haven't been any actual line-ups or photo line-ups utilized in this case? A. No, at 44. And the fact that no line-up or photo had not been utilized was in Darby's suppression re-

quest favor. Because the Court abused its discretion by not correctly applying this court's unnecessarily suggestive, facing imminent death, or exigent circumstances show-up 'inquiry and finding' analysis"factor" test 'properly and thoroughly', in addition to the facts arguments and evidence presented above, the following shall be:

ISSUE XII CONSOLIDATED

On Nov. 9, 2006, the district court, prior to prelim, found that Darby's photo and in-person line-up request was 'unsupported' by authority and therefore lacked merit. And on Nov. 27, 2006, the court also denied Darby's request of the following: 1) Garment to conceal his head & face; 2) Place garment on head before entering courthouse; 3) ... 4) Separation of witnesses (granted); 5) Notify each witness ...; 6) Prevent the witnesses from viewing defendant when he is brought up from the bullpen to enter the courthouse; 7) Have the garment placed on defendant's head before he enters the courtroom; and 8) The court should have each witness give an ID **of the perpetrator 'before'** the defendant's face garment is removed.

The court denied such requests without stating on record its reasons to justify its denial of any of the listed other ID in-court pre-cautions procedures that the court could have taking on its own or invited the State for suggestions. The denial and non-initiative steps requested and available to the State and court as well, later resulted in the State later conducting a 1-photo (with arrest date of underline crime affix) mugshot spread in-office ID with said witnesses, the earlier show-up, in-office, pro se representation, being the only Afro-American in the courtroom and sitting alone at the defense table, all creating a obvious prejudice and conducive suggestive ID procedure on Mr. Darby, therefore being

not independently supported or reliable.

In this case, safeguards should have been clearly implemented by the initiation of the State, the Court or as Darby, acting pro se, attempted; and by not doing so, Darby's in-court ID was made under impermissibly suggestive procedures, a violation of his State and Federal Due Process Protections and the following Case Law authority:

Rule 29, Failure to Name Person as Victim, Poor Vision, Suppression Denial & Tainted In-Court ID Present and Earlier Conducive Procedures

ISSUE II-XIV; PrelimH. 24, 40, 43-44, & TT. ~~133, 102, 136-37, 217, 89-90, 99~~
134,

Turner In Re R.W.S., at 332: The 8th Circuit has concluded that a defendant's claim that a 1st-time in-court ID was made under impermissibly suggestive procedures does implicate the defendant's right to const'l due process and the Biggers & Brathwaite factors apply. U.S. v Murdock, 928 F2d 293, 297,(1991), U.S. v Davis, 103 F3d 660, 669-670,(1996). at 333, In Norrid, we stated that the U.S. Supreme Court, in Stovall held "ID testimony **must** be suppressed if, under the totality of the circumstances, the procedure for ID 'was so unnecessarily suggestive and conducive to irreparable mistaken ID'(as Darby has shown above & below), to constitute a denial of due process."... (quoting Stovall, ...) we noted: Under the Stovall due process test, the determination of the admissibility of an ID involves a 2-pronged analysis of 1) whether the ID procedure is impermissibly suggestive, and 2) if so, whether the ID nevertheless is reliable under the circumstances. We also held the defendant has the burden of proving the ID procedure is impermissibly suggestive, (Darby has also shown such above & below as well), and the **must** then show the ID is reliable under the totality of the circumstances. ... Determining reliability requires the consideration of several factors: " 'The opportunity of the witness to **view** the crimin-

al at the time of the crime, the witness' **degrec** of **attention**, the **accuracy** of his **prior de**-**scription** of the **crime**, the **level** of **certainty demonstrated at the confrontation**, and the time between the crime and the confrontation' " (quoting Biggers, at 199-200.

With respect to the above factors, the witness opportunity to view the suspect at the time of the alleged crime goes as follows: Det. Cruff testified on Nov. 30, 2006, that **Ciro** admitted to him that 'no facial description was given', PH 43; **Ciro** at TT. 208, testified to not given any facial, age or complexion description initially; TT. 89, 99, 152, 153, & 227, **Ciro** admitted "he was not wearing his prescribe glass during the alleged crime", that "his vision was 'fuzzy' at time of alleged crime", he "couldn't really see", his "eye-sight's 'not too good'", "I can't see", & at 142 "he admits to being prescribed glass at the earlier age of 20, and at 141 he admits to not getting an eye check in nearly 10 yrs"; at 152-53, he admitted that "looking at an 8x10 Ex photo of the safe (in the office that he had keys to and been working in and out of for 3 years, inches away from his face), he was unable to identify the safe, in the picture and at his work office, to have 2-doors, 2-handles & 2-combination dials on it", that he "never saw any hair" because of the alleged hat wearing, when 1) his co-work with "no reported or self-admitted testimony" indicates of him, Mr Gomez, to having any vision impairment, testified to his initial description was of the suspect having short black hair, at PCAppEx 42, and 2) Darby's mug-shot of that same morning, including his ID's, showing him to being bald", PCAppEx 43-44; and at 139, **Ciro** stated "**everything was blurred in**". In addition to those factors applying to the 1st test, "view opportunity", they also applies to the "**accuracy** of his **prior description** of the criminal" test, as well as the following: Wit.#1 initial description was

as that of Darby's height & race, but because those is 'well' "below" the ordinary description mention earlier within, his **accuracy** prior description fails out the gate. Nevertheless we also have the fact that his 2nd initial 250 description (if it should even be given any entertainment at all), was 30 to 35 pounds greater than that of Mr. Darby's. A pair of jeans, hat & jacket, is common throughout the Nation, and should be given little to no weight since neither such items was physically submitted into evidence, and the witness vision is too poor to consider as reliable, especially when at 130; after stating: "I was looking down and 'saw the feet'" , he stated at 127: "I don't remember the shoes. Even though 'I saw the shoes,' I don't remember the shoes." And then we have the 'no age' not given description, such failure fails the accuracy test as well. Next we have the 'no facial hair' or 'no facial features' description not given initially as well. Again, without such, the accuracy test must fail. Lastly, we go to the 'black male' "race" description given. No accuracy test passing cannot be found here simply because its too general. A black male description is no more than a race, and because it is a race that consist of multi skin color tones, failure to provide a complexion description is a failure of the accuracy test. See PCAppEx 35, 40, 42, 99, ___ & ___; TT. ___, ___, ___, ___, & PH ___. With admitted testimony as to needing glasses, couldn't see, blurred and fuzzy vision, etc., as cited above, the accuracy test of an 'half blind' witness cannot be satisfied!

As to the witness' "degree of attention", the above can be applied here as well. In addition to the above, the record is nearly 'silent' on that. But just the same we do have the witness stated at 149, A: "When I wrote it down. I don't think "I was paying 'too' much **attention**" ... of my statement. You really can't get no better than that. But for the

record we also have him at 212, Q. When you was being questioned about the different “**occurrences and events**” that happened ‘there at Uno’s’ that day, did you know how critical they was? A. No. Q. Did you ‘have **any concern**’? A. **No!** (end of quote) And in addition to all the above, the ‘degree of attention’ test also fails here, because at 156, the witness testified to the alleged first & second entry, seeking and retrieving of application , attempting steal of cash box from office safe and struggle confrontation over the cash box lasting less than 2 minutes, the degree of attention level can reach no more than zero.

Next we have the ‘level of certainty demonstrated at the confrontation.’ Again, many facts pointed out above applies here as well. We have all the suggestiveness law enforcement conduct with the surrounding of officers around the suspect and being handcuffed during the show-up. We have them placing him by the red bike during such time as well, The fact that he stated he couldn’t make ID at less 2 times, and the “pushing” to making ID on the witness by law enforcement. The before and after statement “we got him” to the witness. The binoculars being used to ‘aid’ his vision and the showing of 1-photo spread. The falsely verbal planting of direct evidence (Uno’s Application) being told to the witness that it was in Darby’s possession, clearly shows that there was not enough of certainty demonstrated at the time of confrontation. The witness testifying at 90: A. “I stared at him for a good 5 minutes just looking at him” (which had to be through the binoculars since he testified to not being able to see face from that distance), also clearly indicates that the “level of certainty demonstration at the confrontation”, has not pass that factor test as well.

Lastly, we have the “time between the crime and the confrontation” factor. With respect to all of the above factors being failed with flying colors, this factor should be of little concern, but nevertheless, we have State witness Bachmeier at 252, testifying to it being 60 minutes from when the first arrival of officer Morris, that they heard of the arrest. Morris said it took him 10 minutes after getting the dispatch call to arrive at Uno’s the first time. And then you have the travel time that it took for him to pick up the witness from the arrest scene, back to Uno’s, and back to the show-up scene. So approximately one and a half hours to the confrontation time. In respect to the **Biggers**, cited in **Turner**’s case, the Appellant has ‘clearly’ shown that the ‘entire’ record shows State did not pass the “reliable under the totality of the circumstances” factors test, and that the Court erred in its pre-trial rulings. The **Manson**, Court, at 111, stated: “a show-up ID should be admissible unless the prosecutor can justify his failure to use a “more reliable ID procedure.” There’s no justification for failure to use a more reliable ID procedure in this case. Justice Stevens, also at 11, quoting **Kirby** wrote: Indeed, the ALI ..., frowns upon the use of a show-up or the ‘display of **only a single photograph**’. Again, the court cannot play lip-service to what it should consider, the record must show its reasons, and failure to do any of the requirements amounts to an abuse of discretion, and the remedy is reversal.

With the above in mind and relevant to in-court ID being tainted by the show-up and in-office single (booking photo, with arrest date on it), ID, we now respectfully turn to more detail on the issues of the in-court ID proceedings and the trial court error in allowing such, the denial of Darby’s in-court safety guard pre-caution request, the preju-

dice of such, and the denial of Darby's Rule 29 Motion for Acquittal, supporting law.

This Court in **Turner** at 334, wrote: In *U.S. v Davis*, 103 F3d 660, (1996) the 8th Circuit Court of Appeals ... the defendant contented that the 1st-time in-court ID was made under "an impermissibly suggestive procedure because Davis was the only African-American male seated at the defense counsel's table, and the only other African male individual present was a man in the back of the courtroom." The court noted that the defendant "made a specific objection to the racial composition of the courtroom and required that he 'not be seated at the counsel table during the ID procedures'." The Court held: We agree With the **Ninth Circuit Court of Appeals** assessment that 'there is no const'al entitlement to an in-court line-up or other particular methods of lessening the suggestiveness of in-court ID, such as seating the defendant elsewhere in the room. "**These are matters within the discretion of the court.**" We now move to the question of if the trial court in Darby's case abused its discretion. The facts pointed out above clearly shows that there was an extreme need for such requested procedures in Darby's pro se, only black male in the courtroom and at the defense table, (courtroom video and any member of the jury or jury pool, will support such if denied by State or Court), and all tainted and suggestive circumstances prior to trial day as also cited above and need not be reiterated. This Court in **Turner** at 336 stated: We recognize the potential for suggestiveness in an initial in-court ID. The in-court ID's of Richard were suggestive because he was the only Native American male in the courtroom, the only individual in hand-cuffs, and was sitting alone with his attorney at the defense table. Richard never requested, however, procedures at trial

that “may have **lessened** the suggestiveness of the in-court identifications. Darby however, **did!** And Darby’s request for such ‘lessening’ in-court suggestive ID procedures was clearly warranted times 100 of the above detailed cases.

After the State rested its case, the court ‘mildly’ entertained and denied Darby’s Rule 29 written Motion for Acquittal. The coverage went as follows: TT. 486, State: ... The testimony that’s been presented ... the State has clearly met its burden. At this point there is ‘proof beyond a reasonable doubt.’ ... Court: Well, the proof beyond a reasonable doubt standard “**isn’t**” the standard that we judge the Rule 29 motion at this point in time. TT. 487, Court: We use a “**much lesser standard.**” The State is entitled to all reasonable inferences. Clearly the State has with all reasonable inferences met the burden that it needs to meet to survive a Rule 29 motion for a judgment of acquittal. Therefore the motion is denied.

As the evidence is shown above and will additionally show below, the court in its “reasonable **inferences**” findings, (again, the court’s failure to elaborate on record with specifics, by its self, warrants reversal), and failure to **preserve** its ruling, or **revisit** it, until/after Darby presented his alibi defense was both, an abuse of discretion and a fundamentally miscarriage of justice, for it, and the State, to ignore the supporting evidence and facts of record as shown above, and below, direct evidence that clearly shows the alleged crimes was 1) concocted, 2) if not concocted, committed by someone other than Darby, (an inside botched job or one of the numerous visiting service workers on the grounds), and 3) that it was not, and could not of been, beyond a reasonable inference or reasonable doubt, committed by Mr. Darby. The evidence was/is not sufficient to sustain

the verdict of guilt!

This court in *City of Mandan v Thompson*, 453 N.W.2d 827,(1990), stated: "... We look only to the evidence most favorable to the verdict and the reasonable inferences there from to determine if there is substantial evidence to warrant a conviction." In the underline, we have the evidence 'slipping out', (but clear as elementary), from the own horses mouth. The Court went on to state: When reviewing a finding of guilt based on circumstantial evidence, (as underline, : no arrest on scene, no fingerprints, no planted Uno's application or other property found on suspect, or no surveillance footage evidence), the role of an appellate court is to review the record to determine "if there is **competent evidence**" that allowed the trier of fact to draw an inference reasonably tending to prove **guilt and fairly warranting a conviction**. Such 'competent evidence or **fairly ...**' findings fall 'overwhelming short' here.

This Court also stated: In deciding a motion for judgment of acquittal, the district court, upon reviewing the evidence most favorable to the prosecution, "must deny motion if there is substantial evidence upon which a reasonable mind could find guilt beyond a reasonable doubt." On appeal, to successfully challenge the sufficiency of the evidence, the defendant must show the evidence, when viewed in the light most favorable to the verdict, permits no reasonable inference of guilt. Lastly, this Court stated: When ruling on a Rule 29, the district court must assume the truth of the evidence supporting the State's case and then decide whether a reasonable person would be justified in concluding from this evidence that all elements of the crime have been established beyond a "reason

able doubt.” To grant a judgment of acquittal a district court must find the evidence is insufficient to sustain a conviction of the offenses charged State v Delaney, 601 N.D. 2d 573,(ND 1999). (end of quote)

In respect to the underline crime elements, the evidence fails to establish beyond a reasonable doubt as follows: 1) the Class C burglary portion elements that the State alleged, attempted theft, because the evidence shows that the alleged suspect entered with the intentions on seeking employment, see all of States witnesses & investigators written reports, statements & testimonies; and that because the entire record cited above & below indicates that Wit.#1 credibility is shot at every level and proceedings, which makes it difficult for a reasonable minded person to believe that there he took the total walk down the ends of the L-shaped hallway with the applicant both final exiting doors, not close or lock either one after “finding” the applicant creepy and scooping the establishment, or 2) that he stood still long enough back in the hallway and watched him walk across the threshold of the exiting door, and in either case turned around, not only felt the needed precaution to close or the either of the 2 exit doors, but walk straight pass the ‘opened’ office door which he testified to the ‘open’ safe being in open view for the suspect to view when he passed office both coming an going. Like Judge Judy says, if it don’t makes sense, it isn’t true!, 3) with respect to 1 & 2, there could not have been no 2nd entry or laying-and-wait element when the witness testified to the time of application request, walk to area near co-worker, run to get application from front office, bring application back to applicant, telling him to bring back when open or finish, walk toward to exit (however far), going back to the kitchen to have a short talk with his co-workers and then going back to lock office

door, and finally the alleged cash box scuffle, yelling for Pete and the final exiting, “all” taken place **within 2 minutes**. See TT. 156. It just don’t add up. If part of that long list didn’t happen it has to be the complete first exiting. That seems to be the logical longest time consuming activity of them all. Again, if it doesn’t make sense, its not true. And where there’s a “gray” issue such as this, it must go in the defendant’s favor. Plus it is not far-fetch that the Officers and/or the Prosecutor planted that “cross-the-threshold” element in the witness’s brain after the above shown record shows the many different times and methods they used in their show-up and 1-photo in-office and police car suggestive ID procedures. TT. 525. The witness was to sure of the threshold crossing and the 2-minute time frame does allow it. 4) Witness testified to not having the authority to override a rule and decision put in place by the owner or higher-up manager. Therefore, the Uno’s classified ad, dated September 27, 2006, see PCAppEx 58, which invited applicant in premises for available employment positions, without given a time to apply, entrance door, phone # to call to make an appointment, but, and ‘only’ saying: Apply at: 1660 13th Ave., W. Fargo, therefore, the applicant was privileged ‘to enter’. 5) Also, there not being any forms of signs at or near said door to inform a potential customer or applicant of the store hours or usage of said door, evenmoreso when it was left wide open, may be a considering factor. With respect to the above, an misdemeanor attempted theft is the on appropriate potential charge. And then we have the Class B element test. 6) This element the State relies on the alleged victim being assaulted to the degree of an misdemeanor. This element fails for the following reasons: a) the alleged assault was not **proven** to be ‘**intentional**’. The alleged victim described the alleged waist to waist contact to

from no more than an attempt to break free of the grip that said alleged victim had on his waists. The State's Information submitted to the jury states: "... the defendant inflicted or attempted to inflict bodily injury", bodily injury that the statute refers to amounts to more than the level of misdemeanor assault, and again, the 'twist' from out of the grip contact was not an "attempt" to inflict bodily injury. The intent language of 12.1-22-02, should not be taken out of contents. Also, the testimony from the witness stating to the suspect "get out of here", and also saying the suspect "walked" out of the building, clearly shows that there was no flight from the scene element. As far as the "later" reporting of a push taken place, that carries little weight when it was not submitted in his initial 911 call and his co-worker testified at 299, that he witnessed the cash box struggle, and at 302 A."I seen like a little bit of a tussle, yeah, but "not no hitting" (there goes the waist assault out the window also), really. ... "I didn't see the individual 'physically push Ciro". U. S. v Saunders, 973 F2d 1354,(7th 1992), "We must accept the evidence unless it is contrary to the laws of nature, U.S. v Harty, 930 F2d 1257, 1266, (7th 1991); and b) there can be no class "B" element when the evidence shows a) that the alleged "named" victim, see PCAppEx (between #34 & 35) (WFPD Officer's Narrative, naming Uno's Chicago Grill as the victim under #1 isle, and naming Ciro Delagarza, under #2 isle as the assault victim) was not a natural person, only a property owner or presentative can be named as a victim, and b) because Mr Ciro Delagarza was "fired" by the time of the trial, which clearly shows no longer concerned him as a represented of theirs, and c) through Mr Delagarza's own testimony at TT. 138, that he broke his employers 'training rules & policies' when he took the actions of attempting to take back the alleged cash box from the

alleged suspect and thereafter committing an assault on the suspect by physically grabbing him and trying to false imprison him. In taken such actions and violating his employer's rules and policies, Mr. Delagarza was no longer acted as an employee of Uno's Chicago Grill. For all the above, see TT. 75, 81-83, 121, 138, 149, **151** & 156; PCAppEx 35, 37 & 99. With those facts that can not be disputed and the fact that the State did not amend its Information as to renaming one of the other 2 co-workers or Uno's natural owner, etc, there was no legal definition of the Class C or B Burglary crime in the underline. With respect to the above facts of record and admission testimony of Mr. Delagarza, there also cannot legally be an crime of Simple Assault. Mr. Delagarza was on another man's property, his employer, and trying to prevent an alleged crime that he knew before hand, by rules of his employer and the owner of such property, that if such an action was to take place, it was their instructions for him to not interfere. His actions cannot be **now** claimed as an Public Citizen act, because the evidence or testimony does not support such , he was on another man's property that basically relinquish such property, for at least that moment, and Darby's due process and fair trial rights would be in violation. The above 4 pages or so applies to the below "improperly prosecuted" claim as well and need not be reiterated. Such facts, evidence, or lack thereof, and facts of record, shows the evidence the alleged crime's" does not meet the element test. We now move to the 'lack of element' part of this case that shows Mr. Vonine Darin Darby's "**complete**" 'innocence' and shows the Officers-of-the-Court in this matter was clearly wrong for prosecuting and allowing this case to go to trial and before the jury for deliberations.

Fingerprint dusting would of prevent from such a long unjust prosecution, app-

...
eal and wrongfully convicted and incarceration that Mr. Darby was and continue to be subjected to, had such a minor procedure been utilized. See TT. 189-191, 203 & 207. Darby had an 'full-proof' alibi, and had initial pre-trial (from initial appearance through Preliminary Hearing, less than 60 days time frame), safeguarded alibi witnesses freshly in-mind time frame accounts, during representation, and investigator Det. Cruff Miranda rights Ear-hustling on Darby's jail calls to his alibi witnesses, see PCAppEx 47, 48, and below, which led to neither him, Officers Morris and Jorgensen, neither of the 3, inserting a **"time of arrest on their Report's"** Due Process violation as well. Darby's alibi time frame establishment would have been better presented later. Nevertheless, the record shows the following:

TT. 428, State: Did you ask these **individuals'** about whether or not "they" had 'seen' Mr. Darby on Oct. 2, 2006? Cruff: Yes. State: Did "these" individual's' remember seeing Mr. Darby on that **"particular day"**? **Cruff : Yes, 'they' did remember.** Q. Can they give you a general timeframe of when they saw him? A. Mr. Olson stated he came to work at 6, sometime between 6 & 9. Ms Fraley ... between 7 & 9. TT. 488: Q. Your full name? A. Norma Dean **Olson**. Could you tell us where you work? Kroll's Diner on 45th, ... 489: Cook. 504: Q. Would you give us your name? A. Dee Ann Fraley. Q. And where were you employed at? A. Kroll's Diner. Q. And you was employed there at the time of Oct. 2, last year? A. Yes. Q. And what was your position there? I'm a waitress. 505: Do you remember the day in question? Somewhat. Q. ... An investigator did come out and speak with you about the matter back in October? A. Yep. Q. And what did you discuss with him? A. That I remember Vonnie coming In and ordering breakfast. I'm not sure exact times, but I **"know he was in there"** and

Had something to eat. 506: Q. What time did you arrive to work that day? A. 6 a.m. Q. That was a **Monday, correct? A. I do believe so.** Q. Monday's a busy day for you guys? A. Yes, they actually are. Q. So you believe he entered and had a meal and exited between **8 & 9? A. Yep.** 518: And do you know that Oct. 2nd, was on a Monday? A. **Yes.** 511 (Witness Fraley estimates Darby being in there 17, 18 minutes); 513, State: When was the first time that you talked to somebody about Oct. 2, 2006? Fraley: I had gotten a '**call from Vonnie**', actually, on the phone when I was at 'work.' Q. And do you remember when 'that was?' 514: A. It was probably a "week" or so later. **Kroll's Phone Call Transcripts**, PCAppEx 47: Darby: ... This is Vonnie ... Chris: Okay. Darby: Okay, well I was in there the "other day." I forgot the waitress name, I think it's Deanna. ... I was there on , ... on a morning last week. Chris: Okay. Darby: On the 2nd, Oct. the 2nd, see, but I didn't get my receipt, I need that, does your receipt print out the day and time of purchase? ... Chris: Don will have to go in and ... we don't keep them. (Phone disconnects). PCAppEx 48: Good morning, Kroll's on 45th Deanne speaking. Vonnie: Hey how you doing? This is Vonnie. Deanne: Good. Vonnie: See, um, you just talked to that investigator about a minute ago or so? Deanne: Yeah. Vonnie: Yeah, uh, I don't know, if I need you to go to Court, it may be next month (referring to Prelim Hearing, which appointed counsel Mertz failed to call either witnesses to), or the month after, but I just hoping I can get you and Norm to just say what you remember? Deanne: ... I know you "**were in here**, but I can't remember exact times. (times of between 8 & 9, for 18 minutes was testified to at trial as shown above), Vonnie: May I speak to Norm? ... Norm: Yeah. Vonnie: Well, you served me, you're the one that cooked my meal. Norm: **Right, I know you were here**, that's all

I know ... Vonnie: ... What's your last name? Norm: Olson. After all that confirmation of record, the State continued prosecution, and on top of that, told the jury at 524/526 that such establishment was not shown. We now move on to evidence that shows the alleged Victim/witness Mr. Delagarza being 'fired' the next month indicates that his breaking his employer's rules, supports that the alleged crime may have never occurred or that it was he or a friend of his that attempted to do so.

State, 61: During your period of employment there in Oct. of 2006, what was your title? Ciro: Kitchen manager. Darby: You was working there on Oct. 2nd; how far thereafter did you leave Uno's as far as your discontinue of 'employment' there? Ciro: I got **"fired"** at the end of November. Q. What did you get fired for? A. "No" reason. 121: How long had you worked at Uno's? A. For 3 years. 158: A. I did have a 'key' to the restaurant and "office" door. 110-112: (admits he got 'hired when it was a 'brand new' store). 121: A. ... been there for 3 years. Here's an employee that had been there since the restaurant was brand new and gets fired the following month, after doing what he considered as doing an horrific crime stopper act, for his employer, **fired**, for no reason, which is suspicious enough, but then you have the fact that he was in a higher position than the other 2 witnesses, and had been there for over 2 and an half years longer than they, but he is the one out of the "3" to be let go for "no reason." If it don't make sense or logic, it isn't true! Its an issue because of the fact that it shows his employer firing him shortly after the alleged crime that although he asserts was committed by someone else, his prior employer firing him indicates they was disappointed with some un-appropriate behavior, which may have been criminal. TV Judge Judy has approximately 40 years in dealing with

witnesses, and her conclusion, as others, not only experts, but the common reasonable person as well, here, would be, if it don't make sense, it isn't the truth, or logical as well, in this case. See TT. 264, 280 & _____.

The Supreme Court in *Glasser v U.S.*, 315 U.S. 60,(1942), that “[t]he verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it.” *Id.* At 80. However, the Eighth Circuit state’s that reversal must be granted if no reasonable jury could have concluded beyond a reasonable doubt that Mr Darby was guilty of the charged offense. See *U.S. v Young-Bey*, 893 F2d 178, 181, (8th 1990).

Next we have the most disturbing, “beyond”, the phrase “lack of” evidence, element of evidence test, ‘totally’ showing of the wrong person, Mr. Darby, being wrongfully (initial stop & shop-up procedures shown earlier applies to detention & arrest), tried, convicted and imprisoned! The testimony below, coming from the horses mouth himself, is “crystal clear” that when the truth is in “one’s” subconscious, in the heat of cross-examination, by skilled expert or layman, the suppressed and hidden “truth” will “burst out”, as so the record reflects.

Out the gate the State witness Mr. Delagarza alleged that the alleged offenses had been committed by ‘one’ person and that that person was Mr. Darby. But the record above and below shows that 1) there was no such ‘one’ person, or 2) that that person wasn’t Mr. Darby, or 3) that it was committed by ‘two’ or more “different” person’s, possibly one of the ‘visiting’ water service guys, and/or 4) that it was “**someone that the witness already knew.**” The record reflects:

At 63, Delagarza: That day they had “some people”

working on the water heaters so they “left the doors open **so they could run in and out.**” At 142-143, Delagarza: ... Now at first I thought it was actually another employee that was with us. We had another guy “**at work that - -**” (caught himself). At 69, Delagarza: “**They**” walked in and ... At 71, Delagarza: And then “**they**” **asked for an application.** At 167, Delagarza: I didn’t want “**them**” to fill - - I just said fill it out and bring ... At 205, Delagarza: I think what happened though is “**they**” **heard my keys** coming toward the office. Lastly, at 140, Delagarza: “**Like him**” I was a ‘**foot ball player.**’ It went from being one person, to two or more, and then to someone that he remembered playing foot ball with prior to October 2nd, 2006. At 69, State: Had you ever seen that person “**before that day, October 2, 2006?**” Delagarza: “**No**”. If he never seen the defendant prior to the date of alleged crime, then the ‘foot ball’ comparison memory had to be of someone he “**already knew.**”

As discussed thoroughly, as a factual matter and a legal matter. Mr. Darby did not commit the offenses under the criminal laws of North Dakota. Therefore, he could “**not**” Properly be convicted of violations of section 12.1-22-02(1) or (2); or of 12.1-17-01(1)(a) , NDCC, and therefore his “**sought and entitled**” **remedy** is “outright exoneration” reversal! The above is also supportive of the following:

ISSUE XIII: CONSOLIDATED

In closing argument, the State Attorney made a series of prejudicial remarks that substantially affected Darby’s rights. She falsely ranted, at 524, “ ‘all’ the witnesses called by the State indicates that this did occur” ... and “ ‘every’ witness told you that’s where “it” happened,” when the State’s investigating officers could only testify to hearsay

evidence, and witness Bachmeier testified to **“not”** witnesses the alleged “portion” of the alleged crimes. She also falsely ranted “Mr. Darby also **told** you that after the defendant got the application and left the re-entered the business ...” knowing full well that he never took the stand or the court had not legally found his examination to be a form of testimony, at 525, and at 526: “Also there is no alibi witness here. ... **“Neither”** one of them could say it was **“Oct. 2, 2006”**, and **“neither”** one of them could say that this was at the **“time”** that this crime was committed”, when the testimony shows the **‘contrary!’**”

**ISSUE XIV:
COURT’S DENIAL TO DISMISS THE STATE’S COMPLAINT
/INFORMATION FOR FAILING TO NAME A PERSON ON
THE BURGLARY CHARGE WAS IN ERROR**

As partially argued earlier, the State’s initial, despite the Court’s Feb. 28, 2007, Order, charging document, be it Complaint or Information, (in the State of N.D., they are one of the same), failure to name a person, as clearly expressed in Section 29-05-01(5), or amend said document prior to trial, amounts to improper prosecution, waiver of prosecution, denial of Due Process, Confrontation & Fair Trial Clauses.

As shown earlier, see PCAppEx #(between 34 & 35, WFPD Officer’s Narrative, Report #062010; and Information between #1 & 2), the State named a “structure”, Uno’s Chicago Grill, as the Victim. This is plain error (obvious), NDR Crim P Rule 52, on its face. In addition to that, the Court’s reasoning for denial, even if it had merit at the time of decision, the State’s failure to amend the Charging document prior to trial, by removing Mr. Delagarza, and naming one of his co-workers, witness Gomez or Bachmeier, or the true owner, etc., as the Victim, made the prosecution improper nevertheless,

and denying Darby said State & Federal Constitutional Rights.

After admitting to both Officers, and throughout trial, 136-37, etc., to trying to stop the alleged crime in process, cash box, Mr. Delagarza, at 138, stated: "I wanted to stop the robber. But - - because we're **"trained"** to just let robbers do what they're suppose to do. If they're robbing you, "you're supposed to 'let them do whatever'," but **"I didn't"** want that to happen. And admitting to getting **"fired"**, see **TT 102, he, by "admitted violation"** of his "employers", the true owner, rules, and shortly after getting **'fired'**, was "no" longer, by the time of trial date, any 'form' of Victim in regards to the Uno's property. Movant's conviction and sentence are void because Counts 1 & 2, to which he pleaded guilty, are jurisdictionally defective ... U.S. v Tunstall, 456 F. S. 2d 940, (SD Ohio 2006). Corpus Juris Secundum, Indictment & Information Statute 110, As an element of the identification and definition of the offense, it is usually necessary to name the owner of the property affected, Manson v State, 349 So 2d 67,(Ala.), People v Smith, 174 NE 828,(Ill), an averment that he committed the offense against certain property, without stating whose, is defective. State v Beckwith, 198 A. 739, (Me.), Where it is necessary to allege the ownership of property, it **"must"** be laid in a person, corporation, or other entity **"capable of owning property"**. People v Smith.

ISSUE XV : THE DISTRICT COURT'S FAILURE TO MAKE EXPLICIT FINDINGS ON A SERIES RAISED GROUNDS FOR CONTINUED EXHAUSTION PROPOSES, TO NOT ENTERTAIN SUPPLEMENT/ RECONSIDERATION POST-CONVICTION APPLICATIONS AND FOR DENYING THE GROUDS THAT IT DID ENTERTAIN, ORDER WAS IN ERROR

After an lengthy June 16, 2009, and November 10-12, 2009, Evidentiary Hearing

involving six attorney's and dozens of raised Constitutional State and Federal claims regarding pretrial representation, pretrial motions, Rule 16, Brady, Miranda, Jury Trial Instructions, Prosecutorial & Law Enforcement Misconduct, Right to Counsel, Sentencing Representation, Direct Appeal, Due Process, Equal Rights, Speedy Trial, Fair Trial, Right to Bail, Confrontation and a host of other issues in many forms of said Rights, the Court denied Darby's PC Relief Motion. Many issues raised cannot be raised in this Petition because, although Darby was allowed and advised by Chapter 29-32.____, and related State & Federal Case Law, to raise or waive all known of issue in his appeal, the North Dakota Supreme Court limitation Rule 32(7), NDR App.P. closes the door on such continued pursuit, when North Dakota Case Law also instructs litigants to argue their issues effectively. After doing such with the above raised issues, Darby is forced to set aside his other issues. It's like giving up one const'al right to have another. Without enough yardage, the Appellant cannot meet this court's rule rationale in Goulet, 593 N.W.2d 345,(1999), Judges are not "expected to be psychics, with the ability to divine a party's true intentions. ...the parties have the primary duty to bring to the court's attention the proper rules of law applicable to a case. An appellate court can decline to address issues inadequately briefed; State v Pettit, 492 N.W. 2d 633,(1992 Wis), Spearman v Greer, 592 F.S. 69,(Ill 1984) briefs must be effectively, articulately and meaningfully.

The appellant done such in the above argued issues, but the 50 page limitation cap will not allow him to do so with other preserved issues. Therefore, if the court does not grant Darby's outright reversal remedy requested on any of the within issues, he requests that the court 1) remand the issues that was a blanket application by the district co-

urt's order rationale that all actions taken by his other counsel were trial tactics, for not making specific findings as to what those actions were or how they could be fairly characterized as trial tactics, or 2) allow Darby a 2nd & 3rd PC appeal, on preserved issues, if need be, prior to, or after his timely filed and exhausted of claims in the federal courts, after the ruling on this brief, if Darby is not successful in the underline appeal. With that being part of Darby's "alternative" relief request, he now addresses his ineffective appellate claims regarding attorney David Orgen.

Before it was Orgen's turn to be called to the stand, the unfair trial proceedings of the court continuously barking at pro se Darby for his unprofessional courtroom skills and protocol during his examination of the first 3 attorneys, but allowing each of the 3 attorneys to raise there voices at him, call him stupid and continually to go outside of the irrelevant and limited hearing propose issues, combined, was successful in getting Darby to throw in the towel. The remaining 2 was not called by Darby, however, he informed the Court and State that they could question his witnesses, Nov. 12, 2009, T.65. They both refused the offer, despite the fact that they both had asked dozens of questions to Mr Darby's prior called witnesses, and a fair hearing on all issue and ineffective claims required their Officers-of-the-court pursuit in ends of justice process duties. U.S. v Manko, 979 F2d 900,(2d 1992) The District Judge took an active role in the trial of this case, asking numerous and probing questions of witnesses. Such conduct is unquestionably proper - indeed, "often required – in extremely complex cases, (Darby's was one of such). U.S. v 860 F2d 521, 527,(2d 1988), U.S. v DiTommaso, 817 F2d 201, 221,(2d 1987).

As it was, the court was in error for outright denying Darby's ineffectiveness cl-

aims on Mr Orgen without considering the submitted exhibits that Darby filed with his PC Application[s] and the record that, both contained relevant documentary evidence. A trial court's finding of fact on documentary evidence is governed by this rule. Peterson Mechanical, Inc, v Nereson, 466 N.W.2d 568,(ND 1991). The explanatory note now makes it clear that subdivision (a) of this rule governs appellate review of factual findings based upon **documentary** evidence as well as live testimony. Hanson v Williams Co., 452 N.W.2d 313,(ND 1990).

The District Court's Amended PC order was dated Dec. 7, 2009. Darby's Supplement/Reconsideration PC Application was filed Dec. 4, 2009, see Register of Action. Darby's said document consisted of 2 pages and very detailed coverage multi page letters from Orgen, dated Jan. 4, & Jan. 11, 2008, expressing his "at the moment" reasons for not raising Darby's Rule 29 and other concerned appeal issues of Darby's.(oh, there was other exhibits attached as well) The court abused its discretion for not entertaining such relevant "at the moment" decision reasoning evidence. Such is better than an 2 year old faded memory. A lot of questions put to counsels that did take the stand went unanswered due to lack of memory or unavailable documentation anyway.

Failure of trial court to make finding of fact on matter pertinent to the outcome of case was erroneous and Supreme Court had power to determine the facts which trial court failed to find. Kovash v Transwestern, Inc, 197 N.W.2d 629,(1992 ND). Section 29-32.1-07 Amended & Supplemental Pleadings: 1. The Court may make appropriate Orders allowing amendment of the application or **any** pleading or motion, or extending the time for filing any pleading. Cannot get no clearer!

Section 29-32.1-11. Findings of fact – Conclusions of law – Order: 1. The Court “**shall**” make “explicit findings” on material questions of fact and “state expressly” its conclusions of law relating to “each issue” presented. **Kovash**, ... a fair assessment of attorney performance requires ..., and to evaluate the conduct from counsel’s perspective “at the time” ... (or was it the **Strickland v Washington** Court?)

Although State & Federal case law has long ago stated, appellant counsel need not Advance every argument, regardless of merit, the extended part of that rationale, is that They should raise the most likely and obvious ones that are likely to prevail over the lesser ones. An appellant claiming his **innocence**, with the record and evidence to support it, and that has properly preserved a Rule 29 appeal, as shown above, would be clearly the priority issue one to raise. There are many meaningful personal and professional satisfactions that comes with an innocent man being exonerated verse come technical reversal. Darby’s other issues now argued, has just as much obvious likelihood of success then the “Det. Testifying as an expert witness”, “access to the Court’s” & “illegal sentence” 3 issues that he raised in a “10” page brief. Jail-house lawyers does better than that. Ten page argument. Mr Orgen may have succeeded in obtaining his ‘show-up’ fees, but his performance clearly does not meet the **Strickland or Cronic test, at 2045**: Thus, the adversarial process protected by the 6th Amendment requires that the accused have counsel acting in the role of an advocate. This Court’s 1-page Per Curiam March 20, 2008, Order supports Darby’s claim. The 6th Amendment recognizes the right to the assistance of counsel because it envisions counsel’s playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by attor-

ney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair. **Strickland** 2063. Orgen representation was deficient performance and prejudice to Darby's defense and exoneration from wrongfully convicted promptly pursued rights.

During the June 16, 2008, hearing, Mertz, being the sell-out, good for nothing, Double-crossing snake of a "P D" that he is, falsely accused Mr Darby of admitting to him that he had committed the crime, at 79. In the underline case, Darby didn't falsely confess to the cops and he plead "not" guilty at arraignment, and tore up the prosecutor's plea recommendation and mailed it back to him and S.A. Regarding his 7, prior to this wrongfully convicted 8th imprisonment, and the multi count WI, Mich., Ky. and previous N.D., combined and in between conviction since 1980, he has admitted and pleaded guilty approximately 3 dozen times. Has never went to trial, until now. After invoking his Miranda rights here to law enforcement and desperately trying to contact and establish his alibi while fresh in witnesses mind, he would admit to an PD that he had in open court during his "initial" appearance to objected to being represented by him during rotation of appointment of Counsel week. They had arugments & conflicts from day one until Darby fired him, and filed an Complaint against him. If it doesn't make sense, it isn't true!

He was also angry about spending all day in court on ineffective assistance of counsel claims. Of course Darby would have called himself to the stand to swear to such alleged confession not being true, but since the Court, the ruling Judge in the matter, at 97, stated: The fact – whether you admit it or not to me doesn't matter "in this case." I mean, it could be recorded on stone tablets for me. It doesn't matter. The only issue in

this case ... It doesn't go to that standard. ...

The court assured him "it" would not be used against him in the underline matter , with the judge assurance there was no need to take the stand. But the court showed it's True colors in its written ruling at 6, "In fact, in light of the admissions made to Mr. Mertz by Mr Darby that Mr Darby had, indeed, committed the crime, (in bold print). The Court was in error for such, amounting to a violation of Darby's Due Process, Access to The Court, Confrontation & Right to a Fair Trial Const'al rights, and in finding Mertz not ineffective.

ISSUE XVI : OBVIOUS PLAIN ERROR

If the trial court's ruling is found to have merit in the performance of Orgen to not be ineffective in any of the issues raised , be it the clearly denial of due process & violation of all the other const'al rights that been denied to Darby since the wrongful detention, arrest, show-up ID, etc., that he has obviously suffered from, and because the evidence is clear that he was wrongfully convicted and a reasonable jury could have found him guilty; in the name of Miscarriage of Justice and total innocence, the plain error Rule must apply.

Allen at 162: In our review of trial court error, are guided by Rule 52, which defines "harmless" & "obvious" error. ..., while we must consider errors objected to ... and errors "so fundamental that a new trial or other relief must be granted "even though the action was not objected to at the time" (obvious error).

We must consider the entire record and the probable effect of the actions alleged to be error on light of all the evidence in order to determine whether substantial rights were affected. U.S. v Vonn, 122 S.Ct. 1043,(220). This standard gives us discretion to correct a forfeited trial error if that error was obvious or **plain**, effect ed defendant's substantial rights, and seriously affected the fairness, integrity, or public reputation of judicial proceedings. U.S. v Cotton, 122 S.Ct. 1781,(2002), Johnson v U.S., 117 S.Ct. 1544,(1997).

U.S. v Edwards, 342 F3d 168,(2d 2003) at : ... Although the 6th Amendment issue was not raised in the district court, on appeal, appellant has maintained that we sh

...
ould excuse this failure because ... at 182: because defendant failed to do so,
we review the 6th Amend. Claim for plain error. **Cotton** at 535 U.S. 631-32.

North Dakota adopted the FRC P 52(b) and the Supreme Court's **Cotton's** formula test as well, so assumed. However the case may be, when reviewing the entire case as suggested, it would be fundamental unjust for this Court to not find said Rule applicable.

ISSUE XVII : BAIL PENDING APPEAL WRIT OF HABEAS CORPUS

This is a bail pending appeal writ, and not an claimed illegal incarceration writ as the trial court misconstrued. And because the court failed to apply the correct Rule of application as was **argued** in Darby's initial & appeal Reconsideration "BAIL MOTIONS", as set forth in this Court's : Lesmeister, 288 N.W.2d 57; Bergeron, 334 N.W.2d; Engel, 284 N.W.2d 303; & Larson, 271 N.W.2d 1, decisions, and the trial court maliciously held /sat on Darby's Great Writ petition for 18 months before submitting its abuse of discretion decision, the Court should find that it conceded with all relevant factors. The Court should also be mindful that rotating Judge Steven Marquart, non-prejudice, on March 19, 2008, after reviewing the record and over the State's objection granted Darby a Stay. In doing so, the non bias Court, as this Court should find, found that Darby's record of no prior bail jumping convictions, had been found indigent numerous times by the court throughout his entire incarceration, & even moreso here, has pass the likelihood of success on appeal and would suffer from irreparable harm if Writ not granted with a recognizance bond as the Marquart Court did. Conditions is also an option. Darby is entitled to bail pursuant to above cited authority, Ch.28-27; 32-22; Sec. 29-32.1-02, Rule 8, NDR App; ND R Crim P 46(d) & Lewis 291 N.W.2d 735. Because Writ is expected to be speedy, Darby request that it is entertained independently & speedy.

CONCLUSION RELIEF SOUGHT

With respect to all within raised issues, the appellant request that he receive an "OUTRIGHT EXONERATION" reversal or as alternative, as the court find appropriate.

Vonnie Darby
May 3rd, 2010