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IN THE  
SUPREME COURT OF NORTH DAKOTA

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STATE OF NORTH DAKOTA,  
Plaintiff and Appellee,

SEP 10 2015

versus.

STATE OF NORTH DAKOTA

MICHAEL M. MCCLARY,  
Defendant and Appellant.

On appeal of District Court's Denial of Motion to Correct  
Illegal Sentence, dated June 1, 2015, the Honorable Jon J.  
Jensen, Presiding

APPELLANT'S BRIEF



Michael Mills McClary, pro se  
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2521 Circle Drive  
Jamestown, ND 58401

**[¶1] TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....¶2

STATEMENT OF THE ISSUES.....¶3

**ISSUE No. 1:** Whether the district court erred in denying defendant's motion to correct illegal sentence, because defendant has yet to be ordered to aftercare during the second five year term of probation....¶4, ¶20

**ISSUE No. 2:** Whether the district court erroneously ruled that the conditions of probation satisfy the requirement that the additional period of probation be imposed in conjunction with a treatment program or aftercare, pursuant to N.D.C.C. §12.1-32-06.1(3)(2003).....¶5, ¶27

**ISSUE No. 3:** Whether Defendant/Appellant's right to counsel was improperly denied, and the District Court failed to hold a hearing on the motion.....¶6, ¶34

STATEMENT OF THE CASE.....¶7

STATEMENT OF THE FACTS.....¶10

STANDARD OF REVIEW.....¶17

LAW AND ARGUMENT.....¶19

CONCLUSION.....¶42

CERTIFICATE OF SERVICE.....¶48

**[¶2] TABLE OF AUTHORITIES**

**North Dakota Cases:**

**paragraph**

State v. Eide, 2012 ND 129, ¶8, 818 N.W.2d 711.....¶18

State v. Gunwall, 522 N.W.2d 183, 185 (N.D. 1994).....¶21

State v. Leverington, 2012 ND 25, 812 N.W.2d 460  
(2012).....¶41

**North Dakota Century Code:**

§12.1-32-06.1(3)(2003).....¶¶1, 5, 14,  
24, 25, 27, 29, 30

§12.1-20-03(2)(a)(pre-August 2005 version).....¶¶8, 11

§12.1-20.....¶23

**North Dakota Constitution:**

Article 1, Section 12.....¶44

**United States Constitution:**

Sixth Amendment.....¶44

**Eighth Circuit Court:**

United States v. Greatwalker, 285, F.3d 727, 729-730  
(8th Cir. 2002).....¶21

**North Dakota Rules of Court:**

Rule 3.2(a)(3).....¶43

**[¶3] STATEMENT OF ISSUES**

**[¶4] ISSUE No. 1:** Whether the district court erred in denying defendant's motion to correct illegal sentence, because defendant has yet to be ordered to aftercare during the second five year term of probation.

**[¶5] ISSUE No. 2:** Whether the district court erroneously ruled that the conditions of probation satisfy the requirement that the additional period of probation be imposed in conjunction with a treatment program or aftercare, pursuant to N.D.C.C. §12.1-32-06.1(3)(2003).

**[¶6] ISSUE No. 3:** Whether Defendant/Appellant's right to counsel was improperly denied, and the District Court failed to hold a hearing on the motion.

**[¶7] STATEMENT OF THE CASE**

**[¶8]** On January 23, 2012, Defendant/Appellant ("Appellant") was sentenced by the Honorable Joel D. Medd, Judge of the District Court to a term of ten (10) years with the North Dakota Department of Corrections and Rehabilitation with three (3) years of this sentence to be suspended, with credit for two-hundred seventy-nine (279) days for previous custody time. This Court further ordered that Appellant was to be placed on supervised probation for a period of ten (10) years from the later of the following dates: (a) release from incarceration; or (b) termination of parole, for the crime of Gross Sexual Imposition, a Class B Felony, in violation of N.D.C.C. Section 12.1-20-03(2)(a)(pre-August 2005 version).

**[¶9]** Appellant filed a Motion to Correct Illegal Sentence on April 23, 2015, claiming that the imposition of a ten-year term of supervised probation is illegal as a matter of law. The Court denied this motion. Petitioner timely filed a Notice of Appeal.

**[¶10] STATEMENT OF THE FACTS**

[¶11] On January 23, 2012, Defendant/Appellant ("Appellant") was sentenced by the Honorable Joel D. Medd, Judge of the District Court to a term of ten (10) years with the North Dakota Department of Corrections and Rehabilitation with three (3) years of this sentence to be suspended, with credit for two-hundred seventy-nine (279) days for previous custody time. This Court further ordered that Appellant was to be placed on supervised probation for a period of ten (10) years from the later of the following dates: (a) release from incarceration; or (b) termination of parole, for the crime of Gross Sexual Imposition, a Class B Felony, in violation of N.D.C.C. Section 12.1-20-03(2)(a)(pre-August 2005 version). (See, Criminal Judgemnt of Nelson County Case No. 32-2011-CR-00025/0005, App. #18; see also, Complaint, count-V, App. #19-#21).

[¶12] On April 23, 2015, Appellant filed and served a Motion To Correct Illegal Sentence. ("Motion")(See, App.#12). Along with this Motion Appellant filed and served a letter to the Nelson County District Court Clerk, requesting "that a Hearing be held on this action, and that I be appointed counsel at public expense...", (See, App.#9), a Notice Of Motion To Correct Illegal Sentece, (See, App.#10 and #11), a Request For Hearing On Motion To Correct Illegal Sentence, (App.#13), Brief In Support Of Motion To Correct Illegal Sentence, (App. #14, #15 and #16), and a Certificate Of Service (App.#17) which states that the above-mentioned documents were served

upon the State. (See, App.#17).

[¶13] Appellant claimed that the imposition of a ten-year term of supervised probation is illegal as a matter of law. (See, App.#14, #15 and #16).

[¶14] On April 23, 2015, the State of North Dakota, by and through Jayme Tenneson, Nelson County States Attorney ("State") filed a Request For Extension Of Time (See, App.#28) requesting a thirty (30) day extension of time to reply to the Motion. The State requested this extension "to research the 2005 statutes and to prepare any stipulation if it is determined that the sentence is illegal." (See, App.#28 at ¶1, lines 3-5). The District Court granted the extension of time on April 27, 2015. (See, App.#6 at Doc. Id. #47). The State finally filed its Response To Motion To Correct Sentence (See, App.#29 and #30), claiming that "N.D.C.C. §12.1-32-06.1 (3)(2003) gives the court the ability to impose an additional period of probation not to exceed 5 years for a person who has been found guilty of a felony sexual offense if the additional period of probation is in conjunction with an commitment to a sexual offender treatment or aftercare program." (See, App.#29 and #30 at ¶4, lines 4-8). On June 1, 2015, the Honorable Jon J. Jensen, Judge of the District Court ("District Court") issued it's Order Denying Rule 35 Motion To Correct Sentence. (See, App.#31 and #32).

[¶15] On June 11, 2015, Appellant filed and served a Pro Se

Motion For Reconsideration. (See, App.#33 and #34). The State filed and served it's Response To Motion To Reconsider on June 30, 2015. (See, App.#35 and #36). The District Court issued it's Order Denying Reconsideration on July 13, 2015. (See, App.#37).

[¶16] Appellant filed a Notice Of Appeal on July 24, 2015. (See, App.#8). Along with this Notice Of Appeal, Appellant served a letter with the Nelson County Clerk of District Court requesting "the appointment of counsel for this appeal ...". (See, App.#38 at ¶2). This request for counsel went unanswered and Appellant served another letter requesting counsel. (See, App.#39 and #40). Rebecca Nelson, Clerk of District Court, Nelson County, issued a Final Notice Of Denial Of Request For Court-Appointed Counsel, because "Court appointed attorney not required for appeal" (See, App.#41 at ¶2). Appellant files the instant appeal on July 24, 2015. (See, App.#8).

#### [¶17] STANDARD OF REVIEW

[¶18] The standard of review on question of law, such as the denial of a motion pursuant to N.D.R.Crim.P. 35(a)(1) is de novo. (See, State v. Eide, 2012 ND 129, ¶8, 818 N.W.2d 711).

#### [¶19] LAW AND ARGUMENT

[¶20] The District Court erred in denying defendant's motion to correct illegal sentence, because defendant has yet to be ordered to aftercare during the second five year term of probation.

[¶21] Appellant cannot agree to an illegal sentence, nor is the District Court authorized to accept an illegal sentence, even if it is made pursuant to a plea agreement. (See, United States v. Greatwalker, 285 F.3d 727, 729-730 (8th Cir. 2002)). Accordingly, because there was plain error in accepting a plea agreement that called for an illegal sentence, this Court can address this issue, whether or not it was raised by trial counsel. This Court has previously held that correction of an illegal sentence involves a substantial right subject to appeal. (See, State v. Gunwall, 522 N.W.2d 183, 185 (N.D.1994)).

[¶22] Appellant argues that the pre-August 2005 version of N.D.C.C. §12.1-20 does not allow the District Court to impose an initial period of supervised probation of five (5) years to be served after sentencing or incarceration.

[¶23] In the present matter Appellant pled guilty to a class B Felony sexual offense in violation of N.D.C.C. Chapter 12.1-20 and was sentenced by the District Court to an initial period of ten (10) years supervised probation. (See, App.#18). Therefore, Appellant pled guilty to an illegal sentence of five (5) years additional supervised probation, beyond which was allowed as a matter of law.

[¶24] The State argued that the statutory provision in N.D.C.C. §12.1-32-06(3)(2003) provides that a five (5) years period of probation plus up to an additional five (5) years of supervised probation could be imposed, provided that the

additional period of probation was in conjunction with a commitment to a sexual offender treatment or aftercare program. (See, App.#29 and #30). (emphasis added). The District Court agreed with the State and issued it's Order Denying Rule 35 Motion To Correct Sentence, (App.#31), stating that because of the fact that Appellant was ordered to:

"...attend, participate in, cooperate with and successfully follow and complete all sex offender treatment program rules and requirements and admit responsibility for your offense(s) as part of the treatment requirements, you shall attend aftercare if recommended by parole/probation Officer or treatment staff." (emphasis added).

(See, App.#24 at 28).

[¶25] N.D.C.C. §12.1-32-06(3)(2003) provides that any additional period of supervised probation must be "in conjunction with a commitment to a sexual offender treatment or aftercare program." In the present matter there have been no commitment papers or documents issued, filed or served concerning any treatment or aftercare after the initial period of five (5) years probation. Moreover, the District Court erroneously ruled that "the conditions of probation" in App.#24 at 28, "satisfy the requirement that the additional period of probation be imposed in conjunction with a treatment program or aftercare," pursuant to N.D.C.C. §12.1-32-06(3)(2003). The District Court's focus should have been on whether Appellant was required to attend, participate in, cooperate with any recommended sex offender treatment program or aftercare, if recommended by a probation officer or treatment staff, after

Appellant's seven (7) years of incarceration, parole if any and first period of five (5) years of probation.

[¶26] Surely, the District Court does not know what a probation officer or treatment staff would recommend almost twelve (12) years from the date of sentencing, therefore, the additional period of five (5) years supervised probation was not, and could not be ordered in conjunction with any treatment or aftercare program. The additional period of five (5) years supervised probation created an illegal sentence upon Appellant.

[¶27] The District Court erroneously ruled that the conditions of probation satisfy the requirement that the additional period of probation be imposed in conjunction with a treatment program or aftercare, pursuant to N.D.C.C. §12.1-32-06.1 (3)(2003).

[¶28] Appellant was sentenced for an offense that was alleged to be committed in either 2004 or 2005. Appellant alleges that the sentence is an illegal sentence under the statutes prior to the 2005 amendments, because Appellant was sentenced to ten (10) years supervised probation.

[¶29] The District Court and the State both claim that the District Court had the ability to impose an additional period of probation not to exceed five (5) years pursuant to N.D.C.C. §12.1-32-06.1(3)(2003), (See, App. #29 and #30 at ¶4, see also, App. #31), because one of Appellant's conditions for sentence to probation was:

"You shall attend, participate in, cooperate with and successfully follow and complete all sex offender treatment program rules and requirements and admit respon-

sibility for your offense(s) as part of the treatment requirements, you shall attend aftercare if recommended by parole/probation Officer or treatment staff."

(See, App. #24 at 28).

[¶30] The statutory provision in N.D.C.C. §12.1-32-06.1(3) (2003) does not apply to the present matter, because Appellant had not been ordered, required, requested or committed to a sexual offender treatment or aftercare program by his probation officer or treatment staff to begin after his first five (5) years of probation which ends on or about February of 2022.

[¶31] App. #24 at 28, is a condition for a sentence to probation, and basically states that Appellant will "attend, participate in... aftercare if recommended by the parole/probation officer or treatment staff." At no place in App. #24 at 28 does it state that Appellant is ordered, required, requested or committed to an aftercare program.

[¶32] The District Court in App. #24 at 28, states that Appellant must do what programs his parole/probation officer or treatment staff inform him to do. It does not order, require, request or commit Appellant to any programs in the future.

[¶33] The additional period of five (5) years supervised probation created an illegal sentence upon Appellant.

[¶34] Appellant's right to counsel was improperly denied, and the District Court failed to hold a hearing on the motion.

[¶35] On April 23, 2015, Appellant filed a Motion To Correct Illegal Sentence (See, App. #12). Along with this Motion Appellant filed a letter to the Nelson County Court Clerk, requesting "that a hearing be held on this action, and that I be appointed counsel at public expense...", (See, App. #9 at ¶2). Also on the Motion (App. #12), Appellant requested a hearing on this action, and further requested the appointment of counsel at public expense. (See, App. #12 at ¶2). Also included with the Motion Appellant filed a Request For Hearing On Motin To Correct Illegal Sentence. (See, App. #13).

[¶36] On June 11, 2015, Appellant, further informed the District Court in his Pro Se Motion For Reconsideration that the District Court had failed to rule on Appellant's request for hearing and appointed counsel at public expense. (See, App. #33 at ¶3). The Record is silent as to any requests for a hearing.

[¶37] On July 24, 2015, Appellant filed a copy of Notice Of Appeal (See, App. #8) with the Nelson County District Court Clerk, along with this copy, Appellant served another request for appointment of counsel. (See, App. #38 at ¶2).

[¶38] On August 12, 2015, Appellant again requested the appointment of counsel, (See, App. #39 at ¶1 and ¶2), in

Appellant's Letter to Rebecca Nelson, Clerk of the District Court, Nelson County, Appellant also served a copy of this letter on Deputy Clerk of the Supreme Court, Sarah Erck. (See, App. #39 and #40 at ¶4).

[¶39] Finally on or about August 17, 2015, Appellant received a Final Notice Of Denial Of request For Court-Appointed Counsel, because Rebecca Nelson determined that "Court appointed attorney not required for appeal." (See, App. #41 at ¶1).

[¶40] At no time did Rebecca Nelson or any court personnel send Appellant an Application For Appointed Defense Services, during the entire proceeding in the District Court or in this Court.

[¶41] The District Court erred in denying Appellant's Motion, because Appellant's Motion and Brief included a request for a hearing on the Motion, and Appellant provided proper notice of his request for a hearing and Appellant never waived a hearing on the Motion. (See, State v. Leverington, 2012 ND 25, 812 N.W.2d 460 (2012)).

#### [¶42] CONCLUSION

[¶43] It was an error to deny Appellant's Motion because Appellant sufficiently tried to schedule a hearing under N.D.R.Ct. 3.2(a)(3), and no date was sent or given to Appellant, and Appellant was not given the chance to notice the

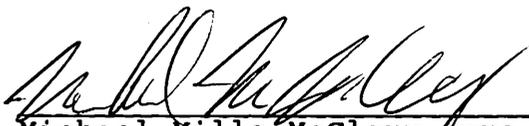
hearing, effectively denying Appellant a chance to present oral argument.

[¶44] Appellant has been denied his Sixth Amendment right to counsel, and even greater protection under Article I, Section 12 of the North Dakota Constitution.

[¶45] It was error in denying Appellant's Motion, because the District Court erroneously ruled that the conditions of probation, which have not begun, satisfied the requirement that the additional period of probation be imposed in conjunction with a treatment program or aftercare.

[¶46] WHEREFORE, Appellant urges this Court to remand this matter to the District court for a hearing with appointed counsel, or for any further relief this Court deems just and equitable.

[¶47] Dated this 7 day of September, 2015.



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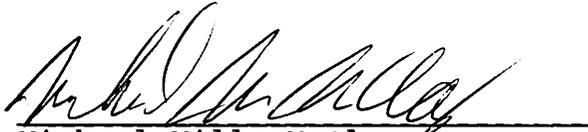
[¶48] CERTIFICATE OF SERVICE

[¶49] I hereby certify that I served, by United States Mail (Prison Mail Box System) true and accurate copies of the

Appellant's Brief and Appellant's Appendix upon the following party:

Jayne Tenneson  
Nelson County States Attorney  
210 B Ave.W., Ste. 301  
Lakota, ND 58344

[¶50] Dated this 7 day of September, 2015.

  
Michael Mills McClary

