

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

State of North Dakota,)	Supreme Court No.: 20190069
)	
Plaintiff/Appellee)	
)	
vs.)	
)	District Court No.:
Chad Vincent Legare,)	25-2018-CR-00027
)	
Defendant/Appellant.)	

BRIEF OF APPELLEE

**ON APPEAL FROM THE CRIMINAL JUDGMENT IN
MCHENRY COUNTY DISTRICT COURT, NORTHEAST JUDICIAL
DISTRICT, NORTH DAKOTA, FEBRUARY 28, 2019,
THE HONORABLE DONOVAN FOUGHTY, PRESIDING**

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[¶1]

III. STATEMENT OF THE ISSUES

[¶2] I. Whether Legare Has a Right to a Direct Appeal of His Criminal Conviction for Attempted Murder Following His Counseled Plea of Guilty.

II. Whether the District Court Denied Mr. Legare His Sixth Amendment Right to Present a Defense.

[¶3]

IV. STATEMENT OF THE CASE

[¶4] The State concurs with Legare’s statement of the case.

[¶5]

V. STATEMENT OF THE FACTS

[¶6] The relevant facts before the trial court were presented in the form of an offer of proof by defense counsel at the motion hearing and an offer of proof by the State at the change of plea hearing herein. See generally, Motion In Limine Transcript, dated October 5, 2018 Pages 5 – 10 (hereinafter MT. Pg.); Change of Plea Transcript, dated November 13, 2018 Pages 11 – 12 (hereinafter CP. Pg.). While the State acknowledged the facts as alleged by the Defendant in support of his motion because the proffered defense was based on a subjective standard, the State did and does take exception to the truth and/or veracity of those factual allegations. [MT. Pg. 10:21-25; Pg. 11: 1-12.]

[¶7] On January 30, 2018, Chad Vincent Legare (hereinafter “Legare”), in Anamoose, North Dakota, entered the home of John Doe, the victim in this case, and thereafter engaged in assault upon John Doe that was the basis for the attempted murder charge herein. [CP. Pg. 11: 17-22]. At the time of the attack, only two people were present in the home, Legare and John Doe. [MT Pg. 5: 20-21.]

[¶8] In support of his motion to admit testimony relevant to the defense of defense of others, Legare offered the factual allegations that:

[¶9] Legare and Jane Doe were in a dating or intimate relationship for a number of months prior to the incident in Anamoose. [MT. Pg. 6: 8 – 11]. Jane Doe was a vulnerable adult with psychological damage. [MT. Pg. 7: 1 – 2]. Jane Doe had relayed to Legare that she had been befriended by John Doe, a priest. [MT Pg. 6: 16-17.] John Doe had also been providing for some of Jane Does necessities of life. [MT Pg. 6: 19-23]. Jane Doe indicated she had been subjected to sexual abuse by John Doe. [MT. Pg. 7: 8 – 9]. Jane Doe had also told Legare that she didn't know how to stop the abuse. [MT. Pg. 8: 1-2].

[¶10] Legare contacted the Fargo Diocese and informed them of the alleged assaults. [MT. Pg. 8: 8 – 13]. The local police department was also informed of the alleged sexual assaults. [MT. Pg. 8: 21 – 22.] Legare believed that nothing was being done by anybody of authority. However, the Minot Police Department had investigated the reports made by Legare of sexual assault, which Jane Doe denied occurred to law enforcement. [MT. Pg. 10: 22 – 24]. Jane Doe also issued a letter to the Diocese indicating nothing had happened between herself and the victim of this case. [MT. Pg. 10: 25; Pg. 11: 1 – 2]. Jane Doe had written letters saying nothing happened or she minimized it. [MT. Pg. 13: 1 – 2].

[¶11] At the change of plea hearing, the State made an offer of proof regarding the facts of the attack itself. On the 30th day of January, 2018, Legare left Alexandria, Minnesota and traveled to Anamoose, North Dakota. [CP. Pg.11: 17 – 19]. Legare arrived in Anamoose before sunrise and gained entry into the dwelling of John Doe. [CP. Pg.11: 20 – 21].

[¶12] Once he was inside, Legare manipulated the lights so they would not work appropriately, and then hid in the darkness. [CP. Pg. 11: 22 – 24]. Later when the victim entered that room and tried to turn on the light, the Defendant attacked. [CP. Pg. 11: 24 – 25].

[¶13] Legare unleashed an assault on the victim, which left the victim bloodied and bruised. [CP. Pg. 12: 1 – 2]. During the attack, Legare located a pair of speaker wires for a computer. Legare wrapped those wires around the neck of the victim and twisted them together, so that the victim could not remove them. This choked the victim to the point of lifelessness. [CP. Pg. 12: 3 – 7]. The victim was left unconscious [MT. Pg. 12: 13].

[¶14] There is no evidence Legare could present to show that Jane Doe was anywhere near the location of the assault. [MT. Pg. 15:13-15].

[¶15] At the conclusion of the motion hearing the trial court found there was no imminent danger to Jane Doe at the time that this alleged assault took place. Jane Doe was not at the facility where the alleged assault took place and if she was not at the facility she was not in imminent danger. There was no immediate danger to Jane Doe. [MT. Pg. 17: 11 – 15].

[¶16] As a result the trial court stated, while discussing the inclusion of instructions, “it’s the Court’s view that you are not allowed that particular instruction because there was no imminent danger to the woman at the time that this alleged assault took place.” [MT. Pg. 17:9-12]. Nowhere in the record is it established that the trial court would have excluded the evidence at trial proffered by Legare at the motion hearing; only that an instruction for defense of others would not be given under the proffered facts. The trial court did not issue a written order on the motion.

[¶17] Thereafter, Legare pled guilty to Attempted Murder. [CP. Pg. 11: 12 – 16]. The plea was not a conditional plea under Rule 11 (a)(2) of the North Dakota Rules of Criminal Procedure. During the change of plea hearing, Legare acknowledged that he would be giving up his right to defend against the charge. [CP. Pg. 9: 22-25].

[¶18] **VI. LAW AND ARGUMENT**

[¶19] Legare argues that he has a right to appeal his conviction following his counseled unconditional plea of guilty to the charge of attempted murder and that the trial court denied his right to present a defense at trial. These arguments are without merit because Legare waived his right to appeal in this case and because the trial court did not deny Legare’s right to present a defense. At most, the district court entered an oral order regarding what jury instructions the district court would not give at trial with the proffered evidence presented at the motion hearing or that certain evidence relevant to a defense of defense of others would not be admissible as the defense was insufficient as a matter of law.

[¶20] A. Legare has no right of appeal.

[¶21] Legare’s right to appeal was waived by his counseled unconditional guilty plea and the errors now claimed by Legare were not adequately preserved for appeal.

[¶22] 1. *Legare waived his right to appeal by unconditionally pleading guilty to the charge of attempted murder.*

[¶23] Legare waived his statutory right to a direct appeal to this Court and can no longer complain of potential errors made by the district court when he entered his unconditional plea of guilty. “When a defendant voluntarily pleads guilty the defendant waives the

right to challenge non-jurisdictional defects that occur prior to the entry of the guilty plea.” *State v. Booth*, 2015 ND 59, ¶ 8, 861 N.W.2d 160.

[¶24] Legare complains on appeal, that the trial court erred by excluding his ability to present evidence related to the defense of defense of others. It is the State’s position that the trial court did not exclude the presentation of any evidence at trial, but simply indicated that an instruction would not be given on the defense of defense of others if the proffered evidence was what was offered at trial, Legare mistakenly frames this appeal around the belief that the district court denied his right to present evidence relevant to the defense. Legare’s entry of a guilty plea waived his right to challenge the district court’s ruling on the admissibility of evidence because even if this was error, it would have been a non-jurisdictional defect. *Bay v. State*, 2003 ND 183, ¶ 15, 672 N.W.2d 270.

[¶25] Legare argues that his right to appeal is protected by the holdings of the Supreme Court in *Class v. United States*, 138 S.Ct. 798 (2018), and *United States v. Broce*, 488 U.S. 563 (1989). This reliance is misplaced. In those cases, the US Supreme Court held that a defendant, following a guilty plea, maintained the right to appeal the district court’s constitutional determination. *See e.g. Broce*, 488 U.S. at 569 (denying the defendant had a right to appeal following a plea of guilty under those circumstances). The *Mena-Blackledge* doctrine discussed in *Class* simply states, “that a guilty plea does not bar a claim on appeal where on the face of the record the court had no power to enter the conviction or impose the sentence.” *Class*, 138 S.Ct. at 804. In this case, the district court made no constitutional determinations; simply determinations regarding jury instructions or the admission of evidence. These determinations were not jurisdictional.

[¶26] A valid guilty plea forgoes not only a fair trial, but also other accompanying constitutional guarantees. *United States v. Ruiz*, 536 U. S. 622, 628 – 629 (2002). Rights that are waived by the entry of a valid guilty plea include the privilege against compulsory self-incrimination, the right to a jury trial, and the right to confront accusers, they do not however waive privileges which exist beyond the confines of trial. *Class*, 138 S.Ct. at 805. The ability to challenge the admissibility of evidence is also rendered irrelevant and thereby prevents the defendant from appealing the constitutionality of case related conduct that takes place before the guilty plea. *See e.g. Haring v. Prosise*, 103 S.Ct. 2386 (1983). Legare’s resort to the holdings of *Class* and *Broce* are misplaced and they do not provide Legare with an alternative basis under which to appeal to this Court. The district court had jurisdiction to hear the case and to enter its criminal judgment following Legare’s plea of guilty.

[¶27] Holding that Legare has a statutory right to a direct appeal to this Court under the circumstances of a counseled unconditional guilty plea would make those portions of North Dakota Rule of Criminal Procedure 11 related to conditional pleas of guilty superfluous. Rule 11 (a)(2) provides,

[w]ith the consent of the court and the prosecuting attorney, a defendant may enter a conditional plea of guilty, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. The defendant, any defendant’s attorney, and the prosecuting attorney must consent in writing to a conditional plea filed with the court. If the court accepts the conditional plea, it must enter an order. The resulting judgment must specify it is conditional.

[¶28] The record in this case does not indicate the Legare’s plea was conditional on allowing an appellate court to review the district court’s determinations. Legare’s claim to a right of appeal following his unconditional plea of guilty flies in the face of the

conditions of Rule 11. If the framers of Rule 11 desired to allow for some other avenue for appellate review without the requirement of a trial and following a guilty plea, they could have. They chose not to.

[¶29] For the above reasons, the State respectfully requests that the relief requested in Legare’s appeal be summarily denied and the District Court’s Judgment be summarily affirmed on the grounds Legare lacks the right to appeal this matter following the entry of his unconditional Guilty plea.

[¶30] 2. *Legare has failed to adequately preserve this issue for appeal.*

[¶31] If Legare retains a right to appeal to this Court, he has failed to adequately preserve for appellate review the issue of whether his constitutional right to present a defense has been violated. This matter is first raised on appeal as it has not been raised before the district court. Further, in order to preserve the issue for appellate review, Legare was required to present his proffered evidence at trial so that the district court could reevaluate the proffered evidence in the context of the trial setting.

[¶32] When discussing issues raised for the first time on appeal, this Court has stated:

This Court has repeatedly held that issues not raised or considered in the district court cannot be raised for the first time on appeal, and this Court will not address issues raised for the first time. *Risovi v. Job Service North Dakota*, 2014 ND 60, ¶ 12, 845 N.W.2d 15. The purpose of an appeal is not to give the appellant an opportunity to develop new strategies or theories; rather, the purpose is to review the actions of the district court. *In re Johnson*, 2013 ND 146, ¶ 10, 835 N.W.2d 806. “ ‘The requirement that a party first present an issue to the trial court, as a precondition to raising it on appeal, gives that court a meaningful opportunity to make a correct decision, contributes valuable input to the process, and develops the record for effective review of the decision.’ ” *Id.* (*quoting Spratt v. MDU Res. Group, Inc.*, 2011 ND 94, ¶ 14, 797 N.W.2d 328).

Moe v. State, 2015 ND 93, ¶ 11, 862 N.W.2d 510, 513.

[¶33] The issue of whether the district court’s ruling on providing a jury instruction on the defense of defense of others to jurors at trial or admitting evidence related to that defense denied Legare his right to present a defense was not addressed before the District Court. The District Court did not have an opportunity to address the issue. As a result, this matter has not been adequately preserved for appeal to this Court.

[¶34] Further, if the district court’s order following a hearing on the Defendant’s Motion in Limine prohibited the introduction of evidence at trial, Legare was required to again address the issue at trial to adequately preserve the issue for review by this Court.

This Court has stated:

Several of our past cases have explained the procedural impact of a district court’s ruling on a motion in limine: “The pre-trial exclusion of evidence by a motion in limine, however, is a preliminary order regarding the admissibility of evidence and does not dispense with the need for the proponent of evidence to make an offer of proof at trial so the district court can consider the proffered evidence in the context of other evidence presented during trial.” *Estate of Gassmann*, 2015 ND 188, ¶ 13, 867 N.W.2d 325; see also *Williston Farm Equip., Inc. v. Steiger Tractor, Inc.*, 504 N.W.2d 545, 550 (N.D. 1993) (“However, the exclusion of evidence by a motion in limine does not dispense with the need for the proponent of evidence to make an offer of proof so the trial court can consider the proffered evidence in the context of other evidence presented during trial.”).

State v. Powley, 2019 ND 51, ¶ 9, 923 N.W.2d 123, 127.

[¶35] There was no trial in this case because Legare unconditionally pled guilty to the charge of attempted murder. Legare did not make a proffer of this evidence at trial as required. As a result Legare has waived this alleged error and did not preserve the matter adequately for appeal. The district court did not again get the opportunity to review its determination in the context of trial.

[¶36] For the above reasons, the State respectfully requests that the relief requested in Legare’s appeal be summarily denied and the district court’s Judgment be summarily affirmed on the grounds Legare failed to adequately preserve this issue for appeal.

[¶37] B. The District Court Did Not Violate Legare’s Right to Present A Defense.

[¶38] If this Court concludes that Legare has a right of appeal, and that he has adequately preserved these issues for appeal, the district court did not deny Legare his constitutional right to present a defense as allowed by the 6th Amendment to the United States Constitution.

[¶39] A criminal defendant has a right to present his own witnesses to establish a defense. *Washington v. Texas*, 388 U.S. 14, 19 (1967). The Constitution provides criminal defendants with the general right to present evidence and call witnesses in their own favor. *Pennsylvania v. Ritchie*, 408 U.S. 39, 46 (1987); *Specht v. Patterson*, 386 U.S. 605, 610 (1967). It is well established, however, that these rights are not limitless. “It is axiomatic that a defendant’s right to present a full defense does not entitle him to place before the jury irrelevant or otherwise inadmissible evidence.” *United States v. Anderson*, 872 F.2d 1508, 1519 (11th Cir. 1989). Nor do criminal defendants have the any right to present to the jury a defense that is invalid as a matter of law. *State v. Kleppe*, 2011 ND 141, ¶ 12, 800 N.W.2d 311, 316; *State v. Lehman*, 44 N.D. 572; 175 N.W.736 (1919); *State v. Pfister*, 264 N.W.2d 694, 700 (N.D. 1978); *United States v. Bailey*, 44 U.S. 394, 415-16 (1980); *Anderson*, 872 F.2d at 1519.

[¶40] The district court did not err in excluding a jury instruction on the defense of defense of others, nor would it have erred in excluding evidence relevant to the defense

of others as this proffered defense was invalid as a matter of law. For these reasons, Legare's argument is without merit.

[¶41] 1. *Standard of Review.*

[¶42] While Legare argues that this Court is reviewing a violation of Legare's constitutional right, the real issue, if adequately preserved, is whether the district court correctly ruled that Legare was not entitled to a jury instruction on the defense of defense of others or whether Legare was allowed to admit the proffered evidence related to a defense that was invalid as a matter of law following Legare's offer of proof at the Motion In Limine Hearing. The de novo standard of review, as proffered by Legare in his appeal, is inapplicable to this case.

[¶43] This Court has stated:

This Court reviews a trial court's decision on a motion in limine for an abuse of discretion. *State v. Buchholz*, 2006 ND 227, ¶ 7, 723 N.W.2d 534. A trial court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner. *Id.* In discussing a trial court's rulings on the inclusion of jury instructions this court has stated: We review jury instructions as a whole to determine whether they fairly and adequately advise the jury of the applicable law." *State v. Zottnick*, 2011 ND 84, ¶ 6, 796 N.W.2d 666. A defendant is entitled to a jury instruction on a defense if the evidence creates a reasonable doubt about an element of the offense. *Id.* We view the evidence in the light most favorable to the defendant to determine whether sufficient evidence exists to support a jury instruction. *Id.* A trial court may refuse to give a jury instruction that is irrelevant or inapplicable, but errs if it refuses to instruct the jury on an issue adequately raised by the defendant. *Id.*

Kleppe, 2011 ND 141, ¶ 12, 800 N.W.2d at 316.

[¶44] The trial Court did not err in concluding Legare did not have the defense of others defense available to him. The District Court did not err by ruling it would not instruct a jury on that defense nor by excluding evidence at trial that was only relevant to such a defense.

[¶45] 2. *The District Court did not prohibit Legare from presenting any evidence at trial.*

[¶46] Following the motion in limine hearing, the district court stated: “it’s the Court’s view that you are not allowed that particular instruction because there was no imminent danger to the woman at the time that this alleged assault took place.” [MT. Pg. 17:9-12]. Nowhere in the record is it established that the trial court would have excluded the evidence at trial proffered by Legare at the motion hearing; only that an instruction for defense of others would not be given under the proffered facts.

[¶47] By its terms, the district court’s ruling did not prohibit the defendant from offering any testimony at trial. The district court simply indicated that if that was the evidence, Legare would not be entitled to an instruction. The district court found that the defense of others defense Legare sought to use was inapplicable under the law for those reasons more specifically detailed below. If there had been a jury in this case, they would not have been allowed to consider the defense of defense of others unless different or additional evidence was presented at trial in relation to that defense.

[¶48] As a result of the defense of defense of others not being available to Legare, the district court did not err in ruling he would not give a defense of others instruction at trial under the facts presented. A defendant is only allowed jury instructions when there is some evidence that can be admitted to support the defense. Here the court found Legare was unable to produce any evidence showing immediacy of danger to Jane Doe as required to support a defense of defense of others.

[¶49] 3. *Even if the district Court’s order prohibited Legare from presenting evidence of the defense of defense of others at trial, it was not in violation of Legare’s 6th Amendment Right to present a defense.*

[¶50] If the district court’s oral order prohibited Legare from presenting evidence at trial it was not error as the evidence would be irrelevant as it would not tend to prove the defense of defense of others. *Anderson*, 872 F.2d at 1519.

[¶51] In this case, Legare seeks to admit evidence that he claims is relevant to a legal defense of defense of others to justify or excuse his actions in attacking John Doe and strangling him with a wire to the point of unconsciousness. In North Dakota, “[a] person is justified in using force upon another person in order to defend anyone else if: 1. [t]he person defended would be justified in defending himself; and 2. [t]he person coming to the defense has not, by provocation or otherwise, forfeited the right of self-defense.” N.D.C.C. § 12.1-05-04. In making this, determination is necessary to examine whether the person Legare asserts he was defending, Jane Doe, the alleged female victim of John Doe who was approximately forty-five mile away at the time of the attack, was justified in defending herself at the time of the attack on John Doe.

[¶52] “A person is justified in using force upon another person to defend himself against danger of *imminent* unlawful bodily injury, sexual assault, or detention by such other person.” N.D.C.C. § 12.1-05-03(Emphasis Added). However, “[a]cts cannot be regarded as having been done in self-defense where the force is employed after the necessity therefor has ceased to exist.” *State v. Graber*, 77 N.D. 645, 44 N.W.2d 796, 802 (1950). Further, the use of force is subject to limits. “An individual is not justified in using more force than is necessary and appropriate under the circumstances.”

N.D.C.C. § 12.1-05-07. In this case, not only did Legare use force, he used deadly force. Legare strangled John Doe into unconsciousness after beating him and left him lying in a pool of blood. Deadly force is defined as: “force which a person uses with the intent of causing, or which he knows creates a substantial risk of causing, death or serious bodily injury.” N.D.C.C. § 12.1-05-12. Deadly force is only justified:

[w]hen used in lawful self-defense, or in lawful defense of others, if such force is necessary to protect the actor or anyone else against death, serious bodily injury, or the commission of a felony involving violence. The use of deadly force is not justified if it can be avoided, with safety to the actor and others, by retreat or other conduct involving minimal interference with the freedom of the individual menaced. An individual seeking to protect another individual must, before using deadly force, try to cause the other individual to retreat, or otherwise comply with the requirements of this provision, if safety can be obtained thereby.

N.D.C.C 12.1-05-07(2).

[¶53] In discussing these principals, this Court has stated:

before it can be said that the use of deadly force is ‘necessary’ to protect the actor against death or serious injury, it must first be the case that the actor cannot retreat from the assailant with safety to himself and others. In short, the use of deadly force is not necessary (and therefore not justified) within the meaning of our law of self-defense unless the actor has no safe avenue of retreat.

State v. Leidholm, 334 N.W.2d 811, 820 (N.D. 1983). “A person defending himself from an attack becomes liable as an aggressor where the force employed is in excess of that which the law will tolerate in a given case for defensive purposes, and for the use of such excessive force he is liable” *Graber*, 44 N.W.2d at 802.

[¶54] An “accused’s action are to be viewed from the standpoint of a person whose mental and physical characteristics are like the accused’s and who sees what the accused sees and knows what the accused knows,” *Leidholm*, 334 N.W.2d at 818. We must look at the facts as alleged by Legare and accept them as true for the purpose of determining

the validity of the defense. Even under Legare's belief of the facts as established above, he is not entitled to present evidence relating to the defense of defense of others because there was no danger of imminent unlawful bodily injury, sexual assault, or detention by such other person to the female and even if there was, he was not entitled to use deadly force as the female and himself could have, and were, safely retreated.

[¶55] The district found that the person Legare was allegedly defending was not at the scene of the incident in Anamoose. There were only two people present, Legare and his victim, John Doe. The district court found Jane Doe was in no imminent danger and that the defense of defense of others was unavailable to Legare. The district court would not have abused its discretion in not admitting the proffered evidence at trial because it was not relevant to a valid defense.

[¶56] When Legare attacked the victim, any immediacy of danger to Jane Doe had terminated. Likewise, so did her right of self-defense and Legare's legal ability to defend her. From the time that right of defense terminated, if it ever existed, Legare thenceforward was not acting on the principal of defense but, became the most persistent aggressor. See *Lehman*, 175 N.W. at 740. To have admitted evidence of these prior alleged actions that fail to give rise to a valid defense, "would make a mockery of law and justice." *Id.* at 741. The district court would not have abused its discretion in omitting this proffered testimony at trial.

[¶57] **VII. CONCLUSION**

[¶58] For the forgoing reasons, the State respectfully requests that this Court affirm the district court's Criminal Judgment concluding that Legare has waived his right to appeal,

that he claimed error was not adequately preserved for appeal, and the district court did not deny Legare the right to present a defense.

Dated this 7th day of August, 2019.

/s/Joshua E. Frey

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[¶59]

VIII. CERTIFICATE OF COMPLIANCE

[¶60] I, Joshua E. Frey, the undersigned attorney hereby certifies that the Brief of Appellee is in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure and the Appellee Brief contains 19 pages, 20 pages including the Certificate of Compliance.

Dated this 7th day of August, 2019.

/s/Joshua E. Frey

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

State of North Dakota,)	Supreme Court No.
)	20190069
Plaintiff/Appellee)	
)	
vs.)	
)	District Court No:
Chad Vincent Legare,)	25-2018-CR-00027
)	
Defendant/Appellant.)	

CERTIFICATE OF SERVICE

¶1 I, Joshua E. Frey, do hereby certify that on August 7, 2019, I served the following document(s):

- 1) Brief of Appellee

on the Appellant herein, Chad Vincent Legare, by and through his attorney of record, Kiara Kraus-Parr, by emailing pursuant to North Dakota Rule of Appellate Procedure 25 to:

service@kpmwlaw.com

and filed the same with the Clerk of the Supreme Court by email to:

supclerkofcourt@ndcourts.gov

Dated this 7th day of August, 2019.

/s/Joshua E. Frey

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