

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

**FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT**

**OCT 28 2002**

State of North Dakota, )  
)  
)  
Plaintiff/Appellee, )  
)  
-vs- )  
)  
Michael Verne Jones, )  
)  
Defendant/Appellant.)

**SUPREME COURT NO. 20020118 OF NORTH DAKOTA  
DISTRICT COURT NO. 01-K-3187**

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**REPLY BRIEF OF DEFENDANT/APPELLANT  
MICHAEL VERNE JONES**

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**APPEAL FROM CRIMINAL JUDGMENT AND COMMITMENT  
ENTERED ON MAY 9, 2002  
IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA  
THE HONORABLE NORMAN J. BACKES**

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## **Argument**

### **I. The Trial Court erred by not allowing Michael Jones to withdraw the waiver of his Preliminary hearing.**

The State correctly points out that no transcript was prepared of Mr. Jones' appearance at his preliminary hearing. No transcript was prepared because it would tell this Court nothing. The transcript would add nothing to the Clerk's docket entry on the subject. (Docket No. 20, Appendix 2). Mr. Jones readily concedes that he acknowledged his right to a preliminary hearing and waived that right on November 29, 2001. However, Mr. Jones' claim is that this waiver was made based upon inadequate, virtually non-existent advice. He was advised to waive his right to a preliminary hearing by an attorney who withdrew shortly thereafter, claiming a conflict of interest. (Docket No. 21). The attorney's claim of a conflict occurred only a few days after the waiver of the preliminary hearing, and was the very next court event in the record.

Mr. Jones filed his pre-trial motions, supported by a brief, placing the State on proper notice that he was seeking to withdraw his waiver of the preliminary hearing. (Docket No. 28). In its response, the State asserted that Mr. Jones' attorney at the time "apparently thought waiving the preliminary hearing was the most appropriate way to proceed." (Docket No. 30). However, the State did not submit an affidavit or the attorney as a witness at the motion hearing. (04-03-02 Tr.) Mr. Jones related what occurred between he and his first attorney in this prosecution in his chronology. (Docket 44; Appendix 20; also 04-03-02 Tr. At 34-37)

Therefore, the State presented no evidence in rebuttal to Mr. Jones'

testimony and evidence regarding the waiver of his preliminary hearing. The waiver of his preliminary hearing was based upon almost nonexistent advice from an attorney who had a conflict of interest. The right to a preliminary hearing is rendered meaningless if a waiver is allowed to stand under these circumstances. The prejudice to Mr. Jones is that he was not allowed to “test” the State’s evidence at least to some degree at that critical stage of the proceedings.

**II. The Trial Court erred by not dismissing the charges against Michael Jones due to official misconduct.**

**A. Defendant’s Exhibit 1 and 2 are part of the record.**

At page 16 of the State’s brief, the following statement appears: “As a threshold matter, the Defendant relies on two documents which are not part of the record.” The State is referring to Defendant’s Exhibits 1 and 2. (Docket Nos. 43 and 44; App. pages 14-22). The State evidently does not understand what the term “record” or “record on appeal” means. These two documents are unquestionably part of the “record.” What the State could argue is that the matters therein should not be considered because objections to their introduction into evidence were sustained. (04-03-02 Tr. at 31-32). The documents were marked, offered, filed, and entered into the Clerk’s docket. (Docket Nos. 43 and 44). **N.D.R. App.P. Rule 10(a)** (Defines composition of record on appeal.)

Thus, the State’s argument at pages 16-18 is based upon a fundamental misunderstanding of what constitutes the “record on appeal.”

## **B. Prosecution Misconduct**

### **1. Dismissing and refiling charges.**

The state points out in its brief at page 19 that the first case against Mr. Jones was dismissed because an "essential witness was unavailable." (04-03-02 Tr. 38). That "essential witness" was not called to testify by the State at either the motion hearing or during the trial of this matter. (See 04-03-02 Tr. at Index page 3 and Trial Transcript at Index page 3). That person was special agent Derek Hill. (Appellee's Appendix 5). If Agent Hill was so essential to the State's case, why were they actually able to proceed to a jury trial and obtain a conviction without him? There is no basis for the state's assertion that he was an essential witness. Therefore, their entire reason for dismissing the charges against Mr. Jones and refiling them is suspect.

### **2. The firearms and *State v. Faleide*, 2002 ND 152.**

This Court should be aware that the attorneys in this case at trial were the same as in Mr. Faleide's case. The undersigned attorney was Mr. Faleide's trial attorney, and objected to the forfeiture of his guns as a condition of his sentence, and argued that the forfeiture statutes must be adhered to. (See trial transcript herein at 104-105.) Co-counsel for the State, in this case, Brett Shasky, had made the request for the forfeiture of Mr. Faleide's firearms. Mr. Faleide had pleaded guilty to having a concealed weapon and a loaded weapon in his vehicle. Those were the crimes he was charged with, and this Court ruled that forfeiture as a condition of probation was not appropriate. ***State v. Faleide*, 2002 ND 152.** In this

case, it would be even more inappropriate, because Mr. Jones was not charged with anything relating to a firearm violation. Mr. Jones had a valid concealed weapon permit at the time of his arrest. Firearms were not part of the search warrant, and Mr. Burris virtually conceded that his basis for seizing the weapon was thin at best. (04-03-02 Tr. 21-22). Mr. Jones complained about the taking of his firearms in a letter to Birch Burdick. (App. 14).

The request to forfeit Mr. Jones' firearms illustrates very well the State's posture throughout this case. They were trying to somehow justify their extreme actions by continuing to paint Mr. Jones as a dangerous individual. It appears that the State thinks if a position is stated strenuously enough and repeated often enough it lends credibility to their position. Mr. Jones' home was raided by the entire Red River Valley SWAT team in full combat regalia. (Appendix 16). They claimed they were investigating a dangerous trafficker in black tar heroin. They found nothing to support their assumptions. As reflected by the law cited in Mr. Jones' primary brief, cases have been dismissed for relatively less egregious conduct by police or prosecutors than what occurred in this case.

## Conclusion

The remedy is to reverse the conviction and order the charges dismissed with prejudice.

Respectfully submitted this 28th day of October, 2002.



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**RE: State of North Dakota, Plaintiff and Appellee vs. Michael Verne Jones, Defendant and Appellant  
Supreme Court No. 20020118  
Cass County Civil No. 09-01-K-3187**

**CERTIFICATE OF SERVICE BY MAIL**

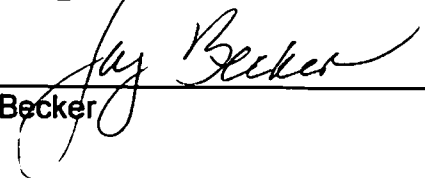
I, Joy Becker, affiant, do hereby certify that, on the 28th day of October, 2002, I served the Reply Brief of Defendant/Appellant upon the following, by placing true and correct copies in envelopes addressed as follows:

Ms. Penny Miller  
Clerk of the Supreme Court  
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and depositing the same, with postage prepaid, in the United States Mails at Fargo, North Dakota.

Dated this 28<sup>th</sup> day of October, 2002.

  
\_\_\_\_\_  
Joy Becker

Subscribed and sworn to before me this 28<sup>th</sup> day of October, 2002.

  
\_\_\_\_\_  
Notary Public

**MONTY G. MERTZ**  
Notary Public, State of North Dakota  
My Commission Expires Aug. 12, 2003  
STATE OF NORTH DAKOTA  
NOTARY PUBLIC SEAL