20080285

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff-Appellee,	)	
	)	
-vs-	)	Supreme Court Case No. 20080285
	)	
Antonio Phillip Stridiron,	)	District Court Case No. 51-07-K-1457
	)	
Defendant-Appellant.	)	

BRIEF OF APPELLANT ANTONIO PHILLIP STRIDIRON

Appeal from the Criminal Judgment of Conviction of November 4, 2008 and the

Amended Criminal Judgment of Conviction of November 6, 2008

In and for the County of Ward, State of North Dakota

Northwest Judicial District

Honorable Douglas L. Mattson, Judge of the District Court, Presiding

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STATEMENT OF THE ISSUES

[¶1] Whether the trial court erred in refusing to allow the jury impaneled herein to consider the confession of Bradley Davis to the murder of Joshua Velasquez as a statement against interest, as was related to Alicia Boyce and proffered by counsel for the Appellant?

[¶2] Whether the trial court erred in determining the preemptory challenge of the only African-American juror in the pool by the State was properly exercised and not racially motivated pursuant to the United States Supreme Court's holding in the case of Batson v. Kentucky, 476 U.S. 79 (1986)?

[¶3] Whether the trial court erred in denying counsel for Appellant's pretrial motion for access to the jury pool for purposes of a public opinion survey and companion motion for a change of venue based upon the pretrial publicity the instant case generated in both the conventional media and in online commentary?

STATEMENT OF THE CASE

[¶4] This matter comes before the Court on appeal of Appellant's Criminal Judgment of Conviction of November 4, 2008 and the Amended Criminal Judgment of Conviction of November 6, 2008, (ROA #348, App. p. 47 and ROA #358, App. p. 51) from a trial held before the Honorable Douglas Mattson, Judge of the District Court in and for Ward County, North Dakota, during the weeks of June 23, 2008 through July 11, 2008 in Minot, North Dakota.

[¶5] Timely Orders for Transcripts and Notices of Appeal, dated November 4, 2008, were filed with the Clerk of the District Court in and for Ward County on November 4, 2008 (ROA #349 & ROA #350, App. p. 10).

[¶6] A variety of scheduling problems necessitated the filing of Motions for Enlargement of Time, dated April 9 and April 27, 2009, which were submitted by Robert W. Martin, ND Bar ID #04636, to the Clerk of the Supreme Court and docketed on the forgoing dates at entries 23 and 29, respectively

STATEMENT OF FACTS

[¶7] On Friday, July 11, 2008, at 3:30 PM, the jury impaneled in the instant case left the courtroom to commence deliberation on the question of who murdered Joshua Velasquez. (Trans. XIV, p. 3137, l. 1-2). They returned at 8:22 PM that same day with the unanimous and polled verdict that Appellant was the person who had shot and killed Joshua Velasquez. (Trans. XIV, p. 3152, l. 7-25).

[¶8] However, the jury did not, as the late, lamented and much-missed Paul Harvey used to exclaim "hear the rest of the story." While the jury had been allowed to hear about Joshua Velasquez's prior sexual relationship with Amy Davis, the wife of Bradley Davis (Trans. XII, p. 2887, l. 15-25), and the subsequent beating that Bradley Davis suffered at the hands of Joshua Velasquez (Trans. XII, p. 2890, l. 1-25), and even had the murder weapon positively identified for them by Rodney Robinson, the State's "star" witness as Bradley Davis' handgun (Trans. VII, p. 1761, l. 4-9)—the jury was not allowed to hear that Bradley Davis had confessed to the murder of Joshua Velasquez.

[¶9] The proffer of that testimony was denied by the trial court, but the entire ***in camera*** substance of the confession is available for this Court's review. (Trans XII, p. 2824 to 2882).

[¶10] With the Court's indulgence, given the length of the Appellant's Brief, the balance of the applicable facts will be found after the affirmations of the trial court's error in each of the subsequent issues below.

ARGUMENT AND AUTHORITIES

[¶11] The trial court erred in refusing to allow the jury impaneled herein to consider the confession of Bradley Davis to the murder of Joshua Velasquez as a statement against interest, as was related to Alicia Boyce and proffered by counsel for the Appellant.

[¶12] The confession of Bradley Davis to the murder of Joshua Velasquez must be considered as an admission against interest pursuant to 804 (b) (3) of the North Dakota Rules of Evidence. The submission under this exception to the hearsay rule was both proper and admissible as the declarant was unavailable to testify, the statement was against his interest, and corroborating circumstances clearly indicated the trustworthiness of the statement. Appellant bore the burden of showing that all of the requirements for the exception are met. **See** United States v. Jackson, 540 F.3d 578, 588 (7th Cir. 2008) and United States v. Robbins, 197 F.3d 829, 838 (7th Cir. 1999).

[¶13] Since North Dakota does not possess extensive case law on this issue, looking to federal cases for an initial analysis of the comparable Rule 804 (b) (3) of the Federal Rules of Evidence is warranted, due to the essential similarity to Rule 804 (b) (3) of the North Dakota Rules of Evidence. **See** N.D. R. Ev. 804 (b) comments on the difference from the federal rule, which provides:

[¶14] "Subdivision (b)(3) differs from the comparable federal rule by excluding from this exception statements made by a codefendant which implicate both the codefendant and the accused. Such statements may not be against interest, and the area is one in which constitutional rights of the defendant may preclude their admission. Rather than proceed on a case-by-case basis, it was decided to preclude admission of such statements entirely."

[¶15] The admission of the proffer in this case turns first upon the fact that Bradley Davis is the named Defendant in Case No. 51-07-K-1802 and in the instant case on a basis of forced joinder by motion of the State. As a criminal defendant in the action, he

has—of course—the right to remain silent as guaranteed by both Article I Section 12 of the Constitution of the State of North Dakota the Fifth Amendment to the Constitution of the United States of America. This constitutional privilege renders Bradley Davis as an unavailable declarant for purposes of the proffer of the confession to the murder of Joshua Velasquez made by him to Alicia Boyce. This brings the matter squarely under the provisions of Rule 804 (b) (3) of the North Dakota Rules of Evidence, to such a degree that the State even noted that the proffer "fit like a glove" at the hearing held on June 17, 2008. That Rule provides, in pertinent part:

[¶16] (b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: (3) Statement Against Interest. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, **or so far tended to subject the declarant to civil or criminal liability** or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement without believing it to be true. **A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement**. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception. (Emphasis added)

[¶17] As was set forth by the Court in the case of State v. Lefthand, 523 N.W.2d 63 (N.D. 1994):

[¶18] The trial court denied testimony tendered on Lefthand's behalf Lefthand's private detective was to testify on statements Charles Bush allegedly made to a third party concerning Christensen's murder. According to the private detective, in the offer of proof, Bush told the third party that he was the person responsible for Christensen's death. The third party allegedly related these statements to the private detective. The State objected to the testimony as inadmissible hearsay. The trial court denied the private detective's testimony, holding the statements could not be introduced as impeachment evidence against Bush. Lefthand claims the testimony should have been admitted. The evidence is a classic example of hearsay within hearsay. Under Rule 805, N.D.R.Ev., hearsay is not excluded if each part of the combined statements

> (Bush to the third party, the third party to the private detective) conforms with an exception to the hearsay rule. **The alleged statements by Bush to the third party were potentially against Bush's criminal interest, so this hearsay is analyzed under Rule 804(b)(3), N.D.R.Ev. Rule 804(b)(3) has three requirements:(1) the declarant must be unavailable to testify at trial, (2) the statement, at the time of its making, must subject the declarant to criminal liability such that a reasonable person would not have made the statement without believing it to be true, and (3) a statement tending to expose the declarant to criminal liability and offering to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement**. Rule 804(b)(3), N.D.R.Ev., **see** United States v. Seabolt, 958 F.2d 231, 233 (8th Cir. 1992), cert. denied, U.S., 113 S.Ct. 1411, 122 L.Ed.2d 782 (1993). (Emphasis added).

[¶19] As indicated above, the first prong of the test of admissibility of the proffer is met by operation of Bradley Davis' constitutional right to remain silent. Absent his taking the witness stand at trial herein, prior to Appellant's case-in-chief, he remains unavailable.

[¶20] Likewise, the second prong of the test is easily met. The proffer of the confession to the murder of Joshua Velasquez made by Bradley Davis to Alicia Boyce is a statement tending to expose the declarant to criminal liability and exculpating the Appellant on the charge of murder which was pending before the trial court. **See** Jackson, ***supra.***

[¶21] That brings us to the third prong of the test based upon the "corroborating circumstances" and the required "clear indication of trustworthiness" of the circumstances in relation to the proffer. While the trial court did, in fact, accept the position of counsel insofar as the nature of the proffer was concerned—a Rule 804 (b) (3) analysis was applied—and declined to accept counsel for Bradley Davis' position that he should be allowed to use the Fifth Amendment right to remain silent as both a sword and an shield—it ultimately concluded that the proffer of Bradley Davis'

confession to the murder of Joshua Velasquez would not be allowed. (Order, ROA #148, App. p. 55 and Order, ROA #171, App. p. 66).

[¶22] As an initial matter on this point, counsel contends that the language of the Rule does not establish a burden on the proffer of "clear and convincing evidence". The clarity referred to under the provisions of Rule 804 (b) (3) of the North Dakota Rules of Evidence is in reference to a consideration of the presence of corroborating factors, not to the weight or credibility of, or an evidentiary standard applicable to, those factors. Consider the following language from the Lefthand case, as it appears at 523 N.W. 2d 69. "Finally, **there was no corroborating circumstances of trustworthiness set forth by Lefthand.** The questionableness of the last two requirements, **coupled with the undisputed availability of Bush for trial**, clearly support the trial court's exclusion of Bush's statements." (Emphasis added). What was clearly compelling and controlling for this Court in the Lefthand case, ***supra***, was a dearth of corroborating circumstances. In short, no specific corroboration was offered in support of the Rule 804 (b) (3) proffer.

[¶23] This same problem was further, and more recently, addressed by the Court's holdings in relation to a child hearsay proffer in a sexual abuse case, pursuant to Rule 803 (24) (a) of the North Dakota Rules of Evidence. In State v. Hirschkom, 2002 ND 36, 640 N.W.2d 439, this Court stated with regard to the procedural aspect of the proffer:

> [¶24] Although witness testimony is often given at hearings conducted under the child-hearsay rule, **courts have ruled a determination that a witness's testimony contains sufficient indicia of reliability and guarantees of trustworthiness can be made without a hearing at which witnesses testify**. See Juvenile Court, 937 P.2d at 761; People v. Guajardo, 636 N.E.2d 863, 871 (Ill. App. 1994); State v. Nelson, 725 P.2d 1353, 1355 (Utah 1986).

> Consequently, in People v. Bowers, 801 P.2d 511, 520 (Colo. 1990), the Colorado Supreme Court ruled a trial court's determination on reliability may be supported solely by a prosecutor's offer of proof. See also People v. Moss, 630 N.E.2d 850, 856 (Ill. App. 1993). We conclude the hearing in this case was **not objectionable because the State proceeded with an oral offer of proof, rather than with witness testimony or sworn affidavits**. Id. at 12. (Emphasis added).

[¶25] If a hearsay proffer by the State may be met under the above standards, likewise the trial court was free to consider a proffer by the defense by the same methodology—an oral offer of proof by counsel, rather than through live witness testimony or sworn affidavits. However, it was not the methodology of the proffer by the State which resulted in the overturning of the conviction of the defendant in Hirschkorn, ***supra***; it was the failure of the lower court to specify which of the enumerated factors of "trustworthiness" it relied upon in admitting the hearsay proffer against the defendant.

[¶26] Under N.D.R.Ev. 803 (24)(a), the child's hearsay statements are not admissible unless the trial court finds that "the time, content, and circumstances of the statement provide sufficient guarantees of trustworthiness." Factors to consider include spontaneity and consistent repetition, the mental state of the declarant, the use of terminology unexpected of a child of similar age, and a lack of a motive to fabricate. Messner, 1998 ND 151,1115, 583 N.W.2d 109. **A trial court must make explicit findings as to what evidence it relied upon regarding the factors and explain its reasons for either admitting or excluding the testimony so a defendant can be assured the required appraisal has been made, and so this Court can properly perform its appellate review function**. State v. Matsamas, 808 P.2d 1048, 1051 (Utah 1991); Nelson, 725 P.2d at 1356 n.3; see also State v. Reed, 21 P.3d 137, 142 (Or. App. 2001). Although written findings are preferred, duly recorded oral findings satisfy the requirements of the child-hearsay rule. Bowers, 801 P.2d at 518; State v. Seale, 853 P.2d 862, 871 (Utah 1993). Id at 1131. (Emphasis added).

[¶27] Counsel is well aware that there is no similar body of case law or specified instances of "trustworthiness" neatly itemized in Rule 804 (b) (3) of the North Dakota Rules of Evidence for the Court to consider in the instant case. However, we at least

now have a methodology of the proffer for the Court to consider as well as a distinct absence of any elevated standard of evidentiary proof—clear and convincing or otherwise.

[¶28] Moreover, if this proffer is viewed as an affirmative defense—and it must be admitted that evidence indicating a person other than the accused committed the crime sounds an awful lot like an affirmative defense when offered by Appellant—statutory authority exists for the proposition that the trial court should have exercised its "gate keeping" function at the lowest of the three (3) trial evidentiary standards, i.e. a preponderance of the evidence. Section 12.1-01-03 (3) of the North Dakota Century Code explicitly states that: ..."[s]ubsection 1 does not apply to any defense which is explicitly designated an "affirmative defense". An affirmative defense **must be proved by the defendant by a preponderance of evidence**." (Emphasis added).

[¶29] This rationale is also in line with the provisions of Rule 102 of the North Dakota Rules of Evidence, which states: "These rules shall be construed to secure **fairness in administration**, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence, **to the end that the truth may be ascertained and proceedings justly determined**. (Emphasis added). It would hardly be construing the Rules of Evidence fairly or promoting the just determination of the proceedings to impose a higher evidentiary burden on the proffer for the defense than mandated by statue for an affirmative defense.

[¶30] We now have the methodology—the oral proffer by counsel without live witnesses or affidavits. We now have the evidentiary standard—a proffer that rises to the level of a preponderance of the evidence, or at least is supported by "corroborating

circumstances" that clearly indicate trustworthiness to the level of that standard. What we do not have is the neat itemized list available under other Rules of Evidence or a body of case law to consider just what constitutes "trustworthiness" of the "corroborating circumstances" in the context of a Rule 804 (b) (3).

[¶31] Perhaps it was this lack of specificity that lead the trial court into a parsing of "corroborating circumstances" as opposed to "corroborating evidence" vis-à-vis the statement of Alicia Boyce regarding the confession of Bradley Davis to the murder of Joshua Velasquez in relation to counsel's theory of the case, creating a verbal trashcan into which the vast majority of the defense proffer at the status conference on June 17, 2008, was swept into without a backwards glance. The trial court started out its analysis by contending the "motive to fabricate" was an issue, but that jaundiced eye was cast on the credibility of Alicia Boyce, not on the statement being proffered—the confession of Bradley Davis to the murder of Joshua Velasquez. (Order, ROA #148, App. p. 55).

[¶32] The United States Supreme Court has stated, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." Chambers v. Mississippi, 410 U.S. 284, 302 (1973). In Chambers, the Court reversed a conviction where the declarant had confessed to three different people that he, and not the defendant, had murdered the victim. However, the trial court did not let any of the three people testify about the declarant's statements. **Id. at** 302. The Court stated that because the statements in that case had assurances of trustworthiness, "the hearsay rule may not be applied mechanistically to defeat the ends of justice." **Id.** On the other hand, as long as limitations on the admission of evidence are not "'arbitrary or

disproportionate to the purposes they are designed to serve,' limitations on the admissibility of evidence do not violate a defendant's right to present a defense." Evans v. Verdini, 466 F.3d 141, 148 (1st Cir. 2006) (quoting Rock v. Arkansas, 483 U.S. 44, 56 (1987)). The trial court's decision in disregarding the vast majority of the defense proffer as "corroborating evidence" for Appellant's theory of the case was the essence of an "arbitrary and disproportionate" act, taken as it was upon the trial court's arbitrary "word game" designation of the proffer as "corroborating evidence" as opposed to "corroborating circumstances" for the Rule 804 (b) (3) analysis.

[¶33] Counsel had the "formidable burden" of establishing the corroboration of the hearsay testimony. United States v. Lowe, 65 F.3d 1137, 1146 (4th Cir. 1995) (citing United States v. Bumpass, 60 F.3d 1099, 1102 (4th Cir. 1995)). Further, an appellate court under the preceding authority will not reverse a trial court's corroboration determination unless the trial court abused its discretion. Lowe, 65 F.3d at 1146. Additionally, the State of North Dakota adds another hurdle, i.e., proving a prejudicial error. **See** N.D. R. Ev. 103. However, a "formidable burden" is not an evidentiary standard, and moreover this "formidable burden" was properly and fully shouldered in the instant case by counsel, pursuant to the six (6) factors outlined by the federal authority cited above. Also, few items of evidence—or rather, the exclusion thereof—could be considered more prejudicial vis-à-vis a murder trial than the confession of another person to the heinous act. Consider the implications of the following assessment under federal law:

> [¶34] (1) whether the declarant had at the time of making the statement pled guilty or was still exposed to prosecution for making the statement, (2) the declarant's motive in making the statement and whether there was a reason for the declarant to lie, (3) whether the declarant repeated the statement and did so

> consistently, (4) the party or parties to whom the statement was made, (5) the relationship of the declarant with the accused, and (6) the nature and strength of independent evidence relevant to the conduct in question. United States v. Lowe, 65 F.3d 1137, 1146 (4th Cir. 1995) (quoting United States v. Bumpass, 60 F.3d 1099, 1102 (4th Cir. 1995)).

[¶35] Once again, the essential error of the trial court was not only in ignoring the vast majority of the defense proffer as "corroborating evidence" rather than "corroborating circumstances", but in focusing its initial concerns regarding credibility on Alicia Boyce, rather than on Bradley Davis. In short—it was a matter of attacking the messenger, rather than considering the message. Under factor (1), Bradley Davis was never charged for the murder of Joshua Velasquez—that dubious distinction was laid by the State solely at the feet of Appellant, who was—as a point of fact—already under arrest and in pretrial detention for that crime when the confession was made. Bradley Davis was still exposed to prosecution in his own right, so factor (1) favored admission of the confession to the jury for its consideration as the trier of fact.

[¶36] For consideration of factor (2)—where is Bradley Davis' motivation to lie about his murdering Joshua Velasquez? What does he gain by confessing to the murder of another human being? Again, this Court should note that it was on this point that the trial court's analysis foundered—in the shoals of looking at the messenger, rather than the message. Absent motivation to lie about the confession, factor (2) favored admission of the confession to the jury for its consideration as the trier of fact. For consideration of factor (3), the confession was apparently made only one (1) time—but the subsequent actions of Bradley Davis speak far louder that dozens of repetitions would. The confession, coupled with the other corroborating

circumstances, would indicate factor (3) favored admission of the confession to the jury for its consideration as the trier of fact.

[¶37] It is upon factor (4) that the trial court's concern regarding the credibility of Alicia Boyce has tangential application—the party to whom the statement was made. The controlling factor of the analysis, that Alicia Boyce was described as "best friends" with Sonia Delzer and had waited eight months—according to the trial court—to come forth with this confession, is only reached based upon its mischaracterization of the vast majority of the defense proffer as "corroborating evidence" rather than "corroborating circumstances" for the Rule 804 (b) (3) analysis. When the defense proffer is considered as "corroborating circumstances", even giving the relationship between Sonia Delzer and Alicia Boyce such weight that it undermines the messenger's credibility—**it is still only one factor out of six.** Not only did the trial court abuse its discretion by mischaracterizing the vast majority of the defense proffer, it made a call on credibility to do so that far exceeded its "gate keeping" function and entered territory that was the province of the jury as determining the credibility of a witness—something that the trial court removed by the "word game" described above. If factor (4) had been given neutral weight with the other six (6) factors in a Rule 804 (b) (3) analysis, with the proper entity determining the credibility of Alicia Boyce, then that factor would still have favored admission of the confession to the jury for its consideration as the trier of fact **and the determiner of credibility.**

[¶38] For consideration of factor (5)—Bradley Davis and Appellant were neighbors and friends for a number of months before the murder of Joshua Velasquez. The

record reflects that Appellant and Sonia Delzer had resided the Bradley and Amy Davis for a matter of weeks until the second unity of the duplex located in Eastwood Park, in Minot, North Dakota. This would hardly demonstrate the level of a relationship where the declarant of the statement—Bradley Davis—would make a confession to the murder of Joshua Velasquez to try to remove the onus of being a murderer from Appellant. Counsel submits that a roommate and friend would be unlikely to be willing to suffer the consequences of life imprisonment without possibility of parole. That type of focus would be much more properly placed upon the relationship of parent and child or spouse to spouse. Since the relationship would not be weighted in the latter fashion—factor (5) favored admission of the confession to the jury for its consideration as the trier of fact.

[¶39] For consideration of factor (6)—this is the factor that essentially repudiates the actions of the trial court in mischaracterizing the vast majority of the defense proffer as being merely "corroborating evidence" rather "corroborating circumstances" for the Rule 804 (b) (3) analysis—that particular factor **is based upon "the nature and strength of independent evidence relevant to the conduct in question".** Counsel submits that the trial court specifically disregarded such independent relevant evidence of the confession of Bradley Davis to the murder of Joshua Velasquez by arbitrarily ruling that "evidence" didn't equal "circumstances" for its analysis, and in giving improper and undue weight to the credibility question of Alicia Boyce, rather than putting the focus on where it belonged—the confession and actions of Bradley Davis, and the physical evidence corroborating the circumstances of that confession. When all of the defense proffer—including the

independent relevant evidence—is properly characterized, and not arbitrarily designated "corroborating evidence" and placed outside of the scope of consideration of the Rule 804 (b) (3) analysis, factor (6) favored admission of the confession to the jury for its consideration as the trier of fact.

[¶40] Further consider the holding the court in United States v. Lopez, 777 F.2d 543 (10th Cir. 1985) where the lower court was reversed on a case where it did not allow a hearsay statement when the codefendant, in a drug conspiracy case, admitted he was the one who owned the drugs, not the defendant, and the statement was corroborated by the codefendant's fingerprints being on the box where the drugs were found, while the defendant's fingerprints were not on the boxes. **See also** United States v. Atkins, 558 F.2d 133, 135 (3d Cir. 1977), where the appellate court reversed the conviction where trial court concentrated **more on reliability of witness instead of corroborating evidence**. The focus should not turn on the credibility of the messenger, which is—at best—only one of the six (6) factors set forth above. The case law clear supports the admission of the confession through the proffer made on June 17, 2008, to the jury for its consideration as the trier of fact.

[¶41] As the transcript of the June 17, 2008 status conference demonstrates, and as is shown by the trial court's extensive findings regarding the substance of the defense proffer, ample 'corroborating circumstances" were offered and mischaracterized as "corroborating evidence". (Order, ROA #148, App. p. 55). Even conceding the conflicting statements of Charles Price and the dismissal of Sonia Delzer's requested protection orders from Bradley Davis, the following items of the proffer clearly favored submission of the

confession of Bradley Davis to the jury as the trier of fact, pursuant to the holdings and rationales of the cases set forth above.

[¶42] 1. Corroboration by State's own expert witness and physical evidence supporting her opinion—gunshot residue indicating discharge of firearm was found on Bradley Davis' hand shortly after the homicide, despite the presence of blood as an insulator and the subsequent washing of Davis after the murder. While the State contended that the amount was lesser than that found on Appellant—this does not change the fact of the presence of gunshot residue corroboration, and is an argument targeted toward the weight of the evidence, and is therefore within the sole province of the jury—not the "gate keeping" function of the trial court. This is also the sole point of the proffer that the trial court found to be a corroborating circumstance, but not one that "clearly indicate the trustworthiness of [Boyce's] statement." (Order, ROA #148, App. p. 63).

[¶43] 2. Corroboration by other physical evidence—Bradley Davis was found in the home of Antonio Stridiron shortly after the murder, as per testimony received at the preliminary hearing on August 30, 2007, reflecting the oddity of Bradley Davis hiding out at another person's house after the murder, a house where he had left numerous articles of clothing. The firearm used in the homicide was also found in the home—upon a consent search granted by Antonio Stridiron and Sonia Delzer. While the State contended the clothing was left there as part of the "marriage tradition", once again—this does not change the fact of the presence of the clothing corroboration, and is an argument targeted toward the weight of the evidence, and is therefore within the sole province of the jury—not the "gate keeping" function of the trial court. This circumstance was deemed "corroborating evidence" of counsel's case, and specifically found by the trial court not to be a

"corroborating circumstances that clearly indicate the trustworthiness of Ms. Boyce's statement." (Order, ROA #148, App. p. 60). Once again, the trial court was not only arbitrarily mischaracterizing the proffer; it was placing the focus on the messenger, rather than the message.

[¶44] 3. Corroboration by motive and eyewitness statements/identification—Amy Davis, when she was Amy Hancock, had a sexual relationship with Joshua Velasquez as late as December of 2006/January of 2007. When their relationship was terminated by her involvement with Bradley Davis, a confrontation ensued at a local bar then known as the "101", at which time Bradley Davis engaged in a fight with Joshua Velasquez and was humiliated and physically beaten badly by him—to the point of having his head pounded into the ground—all in front of the eyes of Amy Davis. Further, while the statement of Charles Price reflects the bad blood that this quite literally caused between Joshua Velasquez and Bradley Davis, this narrative itself comes from Alicia Boyce, who observed all of this with her own eyes—an eyewitness statement/identification of these events—which were preserved for review by this Court in the formal proffer of Alicia Boyce's testimony taken outside of the presence of the jury impaneled herein, (Trans. XII, pp. 2824 to 2864), as well as in her continuing testimony before the jury (Trans. XII, pp. 2882 to 2902). The State argued that there may be some bias or credibility issue, based upon a friendship—but this does not change the fact of the presence of eyewitness corroboration, and is an argument targeted toward the weight of the evidence, as well as its credibility, and is therefore within the sole province of the jury—not the "gate keeping" function of the trial court. Again, this circumstance was deemed "corroborating evidence" of counsel's case, and specifically found by the trial court not to be a "corroborating circumstances that

clearly indicate the trustworthiness of Ms. Boyce's statement." (Order, ROA #148, App. p. 61). Once again, the trial court was not only arbitrarily mischaracterizing the proffer; it was placing the focus on the messenger, rather than the message.

[¶45] Appellant was on trial for the most serious offense there is—the murder of another human being. The jury that convicted him in a little less than five (5) hours did so without hearing this essential, relevant piece of exculpatory evidence, access to which was denied by the arbitrary mischaracterization and improper and misplaced analysis of the trial court.

[¶46] The trial court erred in determining the preemptory challenge of the only African-American juror in the pool by the State was properly exercised and not racially motivated pursuant to the United States Supreme Court's holding in the case of Batson v. Kentucky, 476 U.S. 79 (1986).

[¶47] Potential juror # 56, Melody Brown, was passed on for cause by the State and by both counsel for the Appellant and for Bradley Davis, but then struck by use of a preemptory challenge by the State. Ms. Brown had previously been selected by the Ward County State's Attorney to serve as a juror on another matter several years before her appearance, and was the only African-American juror in the venire. Based upon those facts, counsel for the Appellant requested that the jury venire be excused so that a Batson, ***supra,*** objection could be made and considered by the trial court ***in camera.*** The request was granted, and the State offered as a basis for their strike that she had misstated her prior service on the questionnaire. That was quickly refuted by counsel for the Appellant, (App. p. 31), and the State had also offered that Ms. Brown was late for reporting for her service on the first day of the consideration of the venire, but neglected to indicate during its attempted grasp at this particular "straw" that Ms. Brown had called in and advised the trial court that her reason for being late the one time, and one time only, was that she had

forgotten her glasses and needed them to see. (Trans. Volume II-A, p. 526, l. 5-8). One would hope that someone who is called for jury service would like to have good enough vision to see not only the exhibits, but the demeanor of the witnesses taking the stand.

[¶48] The State, when first commenting on Ms. Brown's prior jury service involving a Caucasian defendant, indicated that "I accept the verdict of that case. I don't have a problem with that." (App. p. 29, l. 1-7). However, after taking that position, the State went on to essentially argue that the not guilty verdict was of some concern to it—so much so that it was considering using a preemptory challenge on another juror who had previously found yet another defendant—race unknown—not guilty in federal court. The State also contended that he had "observed her when she came in. She was reading a book, while you were talking to the jury here, when we first came back. I have some concerns about that." (App. p. 30, l. 6-25).

[¶49] To answer the hypothetical question the State poses on line six (6) on page 36 of the Appendix—it is worth very little. The fact that a potential juror was reading a book for an unspecified amount of time during the introductory comments of the trial court, and not during the instruction phase or during the questioning of counsel once again only serves to demonstrate how far afield the State was willing to go to go in its desperate attempt to find a race-neutral reason to support its preemptory strike. Likewise, the State argued that Ms. Brown answered a question with a question—but it was pointed out by counsel for the Appellant that she was far from the only potential juror to do so, nor was she the only potential juror to arrive late for the proceedings. (App. p. 34, l. 23-25; p. 35, l. 1-15).

[¶50] The next area the State attempted to use for justification of the preemptory strike turned on the classification of offenses regarding the homicide charge in the instant case and the negligent homicide charge that Ms. Brown had previously served on as a juror. This, too, fell by the wayside after retraction by the State and the ruling of the trial court. (App. p. 34, l. 12-25; p. 35, l. 4-10).

[¶51] Section 29-17-30 of the North Dakota Century Code provides the basis for peremptory challenges involving a jury trial in North Dakota. To use these objections, "no reason need be given." The right to exclude a juror for any reason is limited by Batson v. Kentucky, ***supra***, which held that, "purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." 476 U.S. 79, 86 (1986).

[¶52] This standard has been specifically adopted by this Court for the State of North Dakota. In City of Mandan v. Fern, 501 N.W.2d 739, 743 (N.D. 1993) it was stated that:

> [¶53] In Batson, the United States Supreme Court held that the equal protection clause of the fourteenth amendment prohibits a prosecutor from peremptorily striking a juror solely on the basis of race. The Court reasoned that equal protection principles forbid racially discriminatory peremptory strikes because racial discrimination during jury selection harms the excluded jurors, undermines public confidence in the judicial system and stimulates community prejudice. Batson, supra, 476 U.S. at 87, 106 S.Ct. at 1718.
>
> [¶54] Purposeful or deliberate exclusion of African-Americans from the jury on account of race through a prosecutor's use of peremptory challenges was first held to violate the equal protection clause in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). **No examination of the prosecutor's reasons for the exercise of peremptory challenges in any given case was required or permitted; proof of purposeful discrimination was to be derived from examining peremptory challenges over a series of cases**. Swain, supra, 380 U.S. at 222, 85 S.Ct. at 837. The burden was onerous. An inference of purposeful discrimination would be raised only when there was evidence that a prosecutor, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes . . .

with the result that no Negroes ever serve on petit juries. . . ." Swain, supra, 380 U.S. at 223, 85 S.Ct. at 837. (Emphasis added).

[¶55] It is interesting to note that the State attempted to cloak its preemptory strike in the rationale of Swain, ***supra***, almost as a default position, in referring to his prior election of keeping a African-American juror on "a case here a number of months ago, State v. Hurt. You [the trial court] tried that case as well. I was the prosecutor in that case. The Defendant was an African-American. There was an African American on that jury, that I left, who was the foreman, in fact, of that case. So, I submit all of this criteria to you…" (App. p. 31, l. 4-9). Using an inverse of racially-motivated preemptory strike, especially one prior example, was rendered defunct as a racially-motivated strike itself. It is not about the numbers, as this Court went on to state:

[¶56] In Batson, the Court overruled Swain's unforgiving evidentiary burden because it was "inconsistent with standards that have been developed since Swain for assessing a prima facie case under the Equal Protection Clause." Batson, supra, 476 U.S. at 93, 106 S.Ct. at 1721. It held that a defendant may establish a prima facie case of purposeful racial discrimination during jury selection **based solely on the facts of that particular defendant's case .** (Emphasis added)

[¶57] It is not a question of prior performance, pro or con—it turns solely on the analysis of the facts of Appellant's case. The Court went on to state:

[¶58] "[T]he defendant first must **show that he is a member of a cognizable racial group**, Castaneda v. Partida, [430 U.S. 482, 494, 97 S.Ct. 1272, 1280, 51 L.Ed.2d 498 (1977)], and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, **as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate**.' Avery v. Georgia, [345 U.S. 559, 562, 73 S.Ct. 891, 892, 97 L.Ed. 1244 (1953)]. Finally, the defendant must **show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination**." Batson, supra, 476 U.S. at 96, 106 S.Ct. at 1723. (Emphasis added).

[¶59] Appellant is African-American. One need look no further than the responses of those potential members of the venire who were stricken on the basis of racial prejudice, over the objection of the State, to support that fact. (Trans. Volume I, p. 119, l. 2-19 and Volume II-A, p. 447, l. 1-25, p. 448, l. 1-25). Racial considerations were evident throughout the case, and the State's attempt to rehabilitate the above-referenced members of the venire, coupled with the examination of Melody Brown that the Court will find ***in toto*** in Transcript Volume II-A, pp. 521-531—a very brief, yet revealing read—it becomes painfully clear that all three of the above prongs necessary to establish the ***prima facie*** Batson challenge have been met. Thus the burden shifts to the State, as indicated below:

> [¶60] Once the defendant makes a prima facie showing, the burden shifts to the prosecution **to come forward and articulate a race-neutral explanation for the challenges related to the particular case to be tried**. Batson, supra, 476 U.S. at 97-98, 106 S.Ct. at 1723-1724. A mere denial that the prosecutor had a discriminatory motive will not suffice; "**the prosecutor must give a 'clear and reasonably specific' explanation of . . . 'legitimate reasons' for exercising the challenges.**" Batson, supra, 476 U.S. at 98 n.20, 106 S.Ct. at 1724 n.20 [quoting Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258, 101 S.Ct. 1089, 1096, 67 L.Ed.2d 207 (1981)]. (Emphasis added).

[¶61] There is nothing clear or reasonably specific about articulating a position with one breath and abandoning it with the next. First stating the acceptance of the verdict rendered in the case that Ms. Brown had prior service on, and then attempting to indicate that the previous not guilty verdict, as well as that of another Caucasian potential juror, who was providently struck by counsel for Bradley Davis, cannot now form the race-neutral explanation a few moments later. This shows disorganized and nigh frantic thinking associated with the equally flimsy excuses of being late for getting one's glasses and momentary inattention during the trial court's introductory comment. Again, the ten

(10) pages of the Transcript Volume II-A, pp. 521-531 serve to give the lie to these attempts to hide a racially-motivated preemptive strike.

[¶62] Yet where is the trial court in all of this? What are the specific steps required to address the Batson challenge, and did the trial court properly exercise the same before concluding that the preemptory strike was proper? The answers to these questions are set forth below:

[¶63] "Because the trial court's findings 'largely will turn on evaluation of credibility,' those findings will not be set aside on appeal unless they are clearly erroneous." City of Mandan v. Fern, 501 N.W.2d 739, 749 (N.D. 1993) (quoting Batson v. Kentucky, 476 U.S. 79 (1986)) (citation omitted). "[T]he best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge." Snyder v. Louisiana, 128 S. Ct. 1203, 1208 (2008) (quoting Hernandez v. New York, 500 U.S. 352, 365 (1991)).

[¶64] "Under Batson, the defendant establishes a prima facie case of race discrimination by first showing that the peremptory challenge was exercised against a member of a constitutionally cognizable group. Next, the defendant must demonstrate that this fact 'and any other relevant circumstances raise an inference' that the prosecutor's use of the peremptory challenges was based on group membership." City of Mandan v. Fern, 501 N.W.2d 739, 748 (N.D. 1993) (quoting Batson v. Kentucky, 476 U.S. 79, 96 (1986)).

[¶65] In a case of more recent vintage than Fern, ***supra***, the United States Supreme Court noted that "[a] defendant satisfies the requirements of Batson's first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." Johnson v. California, 545 U.S. 162, 170 (2005). In the instant case, the State's peremptory strike removed the only African-American in the venire that was to be sitting in judgment of two (2) African-Americans. Melody Brown had been previously selected by the State to serve on a jury of a Caucasian defendant. Even if this Court determines that this was not enough to establish the ***prima facie*** case—the question becomes moot once the trial court had issued a ruling on the question of intentional discrimination. **See** Hernandez

v. New York, 500 U.S. 352, 359 (1991) (holding "[o]nce a prosecutor has offered a race-neutral explanation . . . and the trial court has ruled on the ultimate question of intentional discrimination . . . whether the defendant had made a prima facie showing becomes moot.").

[¶66] Essentially, it comes down to the third question of whether or not the trial court properly addressed the Batson challenge—which is also the third step of the analysis. In the third and final step of the analysis, the United States Supreme Court indicated that the trial court must decide "whether the defendant has shown purposeful discrimination." Snyder v. Louisiana, 128 S. Ct. 1203, 1212 (2008) (quoting Miller-El v. Dredtke, 545 U.S. 231, 277 (2005)). "[T]he critical question at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." Miller-El v. Cockrell, 537 U.S. 322, 338-39 (2003). "In circumstances where the government's reason is fantastic or inconsistent with its treatment of similar non-minority jurors, we [the court] may have a basis for reversal." United States v. Williams, 264 F.3d 561, 572 (5th Cir. 2001).

[¶67] The justifications set forth by the State are not persuasive, and while it is not fantastic to say that a potential juror may have shown some momentary inattentiveness over the course of a three-day selection process, or even have been late on one of those days, it is most definitely inconsistent to apply those criticisms to the sole African-American member of the venire, but ignore or minimize the self-same “flaws” in Caucasian members of the panel. The entire exchange between the trial court and counsel on this issue is set forth in the Appendix, running from page thirty-four (34) to page fifty-one (51)—again, a very easy read and worth the Court’s time to determine not

only the positions of counsel but the "stream of consciousness" approach of the trial court in addressing the Batson challenge.

[¶68] It seems the cases in which the courts are most likely to find discrimination are those where a juror of a minority group is struck and the reason that is stated can apply equally to a person in a different racial group who was not struck**. See** United States v. Williamson, 533 F.3d 269, 275 (5th Cir. 2008) (finding pretextual discrimination where the prosecution struck a African-American juror for admitting connection to drugs but did not strike Caucasian jurors had admitted similar connections); People v. Collins, 187 P.3d 1178 (Colo. Ct. App. 2008) (finding racial pretext where the named reason for the peremptory strike of a African-American juror was that she was a nurse while Caucasian nurses remained on the jury). In Snyder v. Louisiana, ***supra,*** the United States Supreme Court reversed and remanded a case where it found the prosecutor's reasons offered for the striking of a African-American juror—that the juror was nervous and might have been concerned about the trial impacting the juror's student teaching obligations—were pretext for discrimination. In that case, there was nothing on the record to indicate the trial court gave credit to the prosecution's claim that the juror was nervous. Further, there were Caucasian jurors who had more compelling obligations that would prevent them from being able to serve on the jury. Similarly, in the instant case, both of the reasons the State offered applied to other potential jurors. Some Caucasian jurors were also late, and some Caucasian jurors were inattentive, but they were not struck.

[¶69] Given the record before it—Appendix pages thirty-four (34) through fifty-one (51)—and the rambling approach used by the trial court which ignored the inconsistent application of pretextual complaints to Melody Brown by the State in search of a race-

neutral rationale while allowing the same to pass without comment for Caucasian members of the venire—in reaching its "stream of consciousness" decision that the preemptory strike was proper, clear error was committed by the trial court under the standards and rationales of the above cases. The Batson challenge was properly made as the preemptory strike was racially motivated.

[¶70] The trial court erred in denying counsel for Appellant's pretrial motion for access to the jury pool for purposes of a public opinion survey and companion motion for a change of venue based upon the pretrial publicity the instant case generated in both the conventional media and in online commentary.

[¶71] A consulting firm was retained by counsel for the Appellant and engaged for the purpose of establishing and conducting a survey to assess the potential impact of the conventional and online media in Ward County as a result of the intensive coverage of the instant case. This survey appears with counsel's attached motion for the same in the Appendix at page 90, pursuant to Rule 30 (a) (2) of the North Dakota Rules of Appellate Procedure. This motion, as well as the companion motion for change of venue, were both denied by the trial court. (App. pp. 13-15 and pp. 16-25. The outright denial of the motion for access to the jury pool and the request for completion of survey was taken contrary to the provisions that allow courts may look to "public opinion surveys or opinion testimony offered by individuals" to determine whether change of venue is necessary. ABA Standards for Criminal Justice, Fair Trial & Free Press § 8-3.3(b) (3d ed. 1992).

[¶72] This Court has suggested documentation beyond pretrial publicity needs to be shown in order to prevail on a change of venue motion. **See** State v. Helmenstein, 2000 ND 223, 620 N.W.2d 581; State v. Erickstad, 2000 ND 202, 9, 620 N.W.2d 136, 140 (denying change of venue motion where the defendants "[did not] submit qualified public opinion surveys, other opinion testimony, or any other evidence demonstrating community

bias caused by the media coverage"); State v. Austin, 520 N.W.2d 564, 567 (the defendant must present evidence such as "qualified public opinion surveys" or "opinion testimony" offered by individuals, or must rely upon "the court's own evaluation of the nature, frequency, and timing of the material involved") (quoting Olson v. North Dakota Dist. Ct., 271 N.W.2d 574, 579) (quoting ABA Standards Relating to Fair Trial and Free Press § 8-3.2 (c) (1966)). Counsel for Appellant had requested early access to the jury pool to conduct such a survey of potential jurors in order to enable him to be able to support his motion for a change of venue with evidence of media impact on impartiality. Further, counsel had informed the trial court that all costs associated with said survey—both in the compilation of the data and postage—would be absorbed by the North Dakota Public Defender's Office, and present no financial drain upon the trial court's coffers. (App. p. 77). In light of the above and foregoing cases, it seems that since the Court has repeatedly suggested a survey or poll is necessary to support the change of venue motion and show the jury pool has been affected by the media, the trial judge should have granted Counsel's motion for early access to the jury pool in order to complete a media survey.

[¶73] Instead, the trial court determined that the use of juror questionnaires and voir dire at trial would "…suffice to determine any bias or prejudice of prospective jurors." (App. p. 15). Rule 21(a) of the North Dakota Rules of Criminal Procedure states, in pertinent part:

[¶74] (a) For Prejudice in the County. Upon the defendant's motion, the court must transfer the proceeding against the defendant to another county if the court is satisfied that **so great a prejudice against the defendant exists in the transferring county that the defendant cannot obtain a fair and impartial trial there**. (Emphasis added).

[¶75] A defendant seeking change of venue on the basis of pretrial publicity and community bias "bears the burden of demonstrating a reasonable likelihood of prejudice so

pervasive that a fair and impartial jury could not be found." State v. Austin, 520 N.W.2d 564, 566 (N.D. 1994); State v. Engel, 289 N.W.2d 204, 207 (N.D. 1980). The ultimate question for the court in a change of venue motion is whether selection of a fair and impartial jury is impossible in the county of original venue. State v. Erickstad, 2000 ND 202, 620 N.W.2d 136, 139. This Court in Austin, ***supra,* at** 566, identified eight factors to assist trial courts in ruling on change of venue motions. The factors are: (1) whether publicity was recent, widespread, and highly damaging to the defendant; (2) whether the prosecution was responsible for dissemination of the objectionable material; (3) the extent of inconvenience to the prosecution; (4) whether a substantially better panel could be sworn elsewhere; (5) the nature and gravity of the offense; (6) the size of the community; (7) the defendant's status in the community; and (8) the popularity and prominence of the victim. State v. Ellis, 2000 ND 177, ¶ 12, 617 N.W.2d 472, 474; State v. Purdy, 491 N.W.2d 402, 406-07 (N.D. 1992); Houle v. North Dakota Dist. Ct., 293 N.W.2d 872, 873 (N.D. 1980); Olson v. North Dakota Dist. Ct., 271 N.W.2d 574, 580 (N.D. 1978).

[¶76] Appearing in the Appendix are four (4) exhibits marked consecutively as A, B, C, D and E which were entered into evidence for the consideration of the trial court at the motions hearing held on January 18, 2008. (App. pp. 86-123). Consider first the petition, marked as Exhibit E (App. p. 124). This petition was not only circulated in community of Minot, North Dakota, where the bulk of the jury pool for this case was residing, by simple operation of population density. While this petition was not being circulated by the State or the local media—indeed, it appears to be directed at Mr. John Van Grinsven, personally—the Court should note that the petition does not only seek "justice" for Joshua Velasquez, but demands the conviction of Appellant. Beneath the

photograph of Joshua Velasquez appears the information that "[j]osh was shot multiple times by Antonio Stridiron as he lay injured and defense less [sic]. In brief, the petition assumes the guilt of the Appellant, specifies the manner in which he supposedly shot the decedent and demands his conviction for the crime—all without the determination of the facts before a court of law and in the crucible of cross examination. The petition has a return address for collation and circulation in the State of California—the decedent's home state—and was presumably being circulated in the community of Minot by family members and friends of the decedent. Analysis of this particular exhibit under the Austin, ***supra***, factors would indicate that the publicity was recent, widespread, and highly damaging to the Appellant to within just a few weeks of the motion for change of venue and the companion motion for access to the jury pool to conduct a survey. While the State was not responsible for this publicity—it is targeted at the State's Attorney by name and includes alleged details of the incident as statements of fact.

[¶77] Also, with respect to the consideration of action by the State—it was the lead investigator on the homicide case, Sgt. Jason Sundbakken, who not only was in contact with the family of the decedent regarding the case, but had assisted in the formulation and direction of the petition that appears as Exhibit E, as was revealed during his cross-examination at the motions hearing held on January 18, 2008. (Motions Hearing Transcript, p. 57-60).

[¶78] With respect to the nature and gravity of the offense—it doesn't get any graver. The Appellant was charged with a homicide by allegedly repeatedly shooting the decedent after the culmination of the repeated and bloody slashing of the victim by Bradley Davis. As for the Appellant's status in the community—it was low, as he was not a person of any

particular prominence. The popularity and prominence of the victim, Joshua Velasquez, is another matter entirely, at least insofar as the news media is concerned as he was repeatedly referred to as a former Minot State University football player and student, as is shown in the exhibits referenced above and discussed below.

[¶79] Also consider the online interest generated by the posted stories on the KXNet.com website as reflected in Exhibits A, B, and C, which appear at pages 95 through 99 of the Appendix, which were, again, submitted to the trial court at the motions hearing held on January 18, 2008. Those exhibits reflect over 50,000 views in Minot of the twelve online news stories that appeared just on KXNet.com website in the months prior to the motions date. More significantly, Exhibits B and C provided a graphic map of the two earliest weeks of the "news life" of the instant case, demonstrating the vast majority of visits to the stories occurred in Minot to the amount of 12,722 out of a statewide total of 30,455 views in 47 cities. Exhibit C, covering the second week, saw a slight reduction to 11,465 views in Minot in the same 47 cities. The second page of each of the exhibits referred to demonstrate greatly reduced activity in several other cities that would have been capable of hosting the requested change of venue—most notably Fargo, Grand Forks, Jamestown or Dickinson.

[¶80] KXMCTV has hosted online discussion forums where the public can comment on the case, specifically on Appellant and his involvement and, at the time, alleged guilt. The majority of comments made in these forums referred to a prejudgment of guilt for the Appellant, as is reflected in Exhibit D (App. pp. 91-123), even though, at the time of much of the commentary, the Appellant had not even had the preliminary hearing held on August 30, 2007. Comments also discuss the poster's personal knowledge of Appellant and his

personality along with personal knowledge of and relationships with the victim of the crime, including references to Joshua Velasquez's criminal record that appear to have escaped the mainstream media—or were ignored due to the fact that the death of a MSU football player makes a better story than the death of a drug dealer. There are even a few comments posted by individuals who claim to have special knowledge of the case gained through relationships with local and state law enforcement officials. Some of the most extensive and hateful comments purport to be posted by members of the victim's family. **See** Exhibit D.

[¶81] These public forums were open venues for the jury pool to demonstrate their prejudice and pre-trial judgments of the Appellant. One might reasonably conclude that the negative discussion forums, run by local media outlets, clearly show that the pre-trial publicity concerning this case is creating an environment prejudicial to the Appellant. While the comments posted are not authored by members of the media outlets, the media outlet is still responsible for posting these comments, disseminating then far and wide and allowing the public to see them and draw inferences of guilt from them.

[¶82] Analysis of this particular exhibit under the Austin, ***supra***, factors would indicate that the publicity is, again, recent, widespread, and highly damaging to the Appellant. The State is not responsible for this publicity, but again there are allegations of the incident as statements of fact. With respect to the nature and gravity of the offense, the level of intensity is reflected to an even greater degree with the virulent running of emotions and opinions reflected in Exhibit D. As for the Appellant's status in the community, again—it is low, as he was not a person of any particular prominence. The popularity and

prominence of the victim, Joshua Velasquez, is another matter entirely, given the level of support he enjoys in the discussion forum.

[¶83] When considering pre-trial publicity, the Court has stated, in the case of State v. Houle, 293 N.W.2d at 874 (ND 1980):

> [¶84] Publicity per se is not necessarily prejudicial or damaging to a criminal defendant…[Before] a change of venue because of pretrial publicity is proper, **it must be shown that the publicity was in fact prejudicial to the defendant. It is therefore not the quantity of the media coverage which controls a change of venue motion, but rather the likelihood that any degree of adversity toward the defendant which was caused by that publicity will prevent him from receiving a fair trial. . . .** The testimony . . . showed that the reports were all either factual accounts of the incidents which surrounded the alleged murder and the apprehension of the defendant or statements of the various legal proceedings and their outcome in this case. **Thus, the information in the challenged news reports was much the same as would be given any prospective juror when the criminal complaint was read and the opening argument of counsel made**. (Emphasis added).

[¶85] In short, this Court found, in addressing pre-trial publicity above, found the information published was factual and would be no different from information that would be provided to potential jurors. The instant case is clearly distinguishable from Houle in that the comments posted in these public forums are not regulated or checked for factual content. They are merely published on the Internet for an unknown number of people to view. These comments do not necessarily consist of factual information "much the same as would be given any prospective juror." **Id**. Because of this fact, these forums may be especially prejudicial to the defendant when considering the emotionally intensive and hateful nature of the majority of statements.

[¶86] The Court stated further, "just as knowledge gained by jurors from common gossip will not automatically disqualify a juror," State v. Olson, 290 N.W.2d 664 (N.D. 1980), "generalities about small town gossip do not sufficiently support a motion for change of venue." Breding, 526 N.W.2d at 468. **See** State v. Engel, 289 N.W.2d 204 (N.D. 1980).

Minot is one of the four (4) largest cities in North Dakota. Ward is not a "rural, sparsely-populated county." Further, the Internet discussion forums amount to more than just small town gossip. These forums allow for individuals to anonymously post any message they might want to publish about Appellant and the then-alleged murder. Whereas one might argue that small town community gossip is talk heard in the café or the grocery store, these forums provide for an audience of a large number of people. These comments are not just generalities about the Appellant, the victim, and the murder. Many of these comments are very specific, where the author portrays him or herself as having inside knowledge of the facts of the investigation, the arrest, and culpability of the Appellant. **See** Exhibit D.

[¶87] Counsel acknowledges that the change of venue is based upon the discretion of the trial court, and that when the standard of review upon appeal is a deferential "abuse of discretion" by the trial court. However, given the widespread dissemination of negative commentary in the instant case and the "catch-22" nature of the denial of the motion for access to the jury pool, the decision of the trial court in the instant case constituted an abuse of discretion.

CONCLUSION

[¶88] For all of the above and foregoing reasons, counsel requests this matter be remanded for a new trial.

Respectfully submitted this 28th day of May, 2009.

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ATTORNEY'S CERTIFICATE OF SERVICE

[¶89] The undersigned hereby certifies that a true and correct copy of the foregoing document was on the 28th day of May, 2009, electronically filed with and served upon:

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