20090079

IN THE SUPREME COURT OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

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| State of North Dakota,<br><br>Plaintiff-Appellee,<br><br>vs.<br><br>Elijah Addai,<br><br>Defendant-Appellant. | District Court No. 09-07-K-3316<br>Supreme Court No. 2009-0079 |

APPEAL FROM DISTRICT COURT, COUNTY OF CASS, NORTH DAKOTA
EAST CENTRAL JUDICIAL DISTRICT
THE HONORABLE CYNTHIA ROTHE-SEEGER, PRESIDING

# BRIEF OF APPELANT

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## [ ¶ 3] STATEMENT OF THE ISSUES

I. Whether the initial stop of Elijah Addai was valid.

II. Whether the identification procedure was constitutional.

III. Whether the in-court identifications of Addai were tainted by the initial police identification procedure consisting of a one-person showup.

IV. Whether the defense suffered substantial prejudice by the prosecution's failure to disclose discovery material in a timely way.

V. Whether the trial court committed reversible error by closing the courtroom to the press and public during the trial.

VI. Whether the was sufficient evidence to prove beyond a reasonable doubt that Elijah Addai murdered David Delonias.

## STATEMENT OF THE CASE

**[ ¶ 4]** Appellant appeals from a judgment of conviction from a guilty verdict of first degree murder. The trial before District Judge Cynthia Rothe-Seeger in the District Court of Cass County commenced December 1, 2008, and concluded December 11, 2008, with a jury verdict of guilty.[1] T. 920.

**[¶ 5]** The charge was contained in a one count Information, charging that on or about August 19, 2007, Elijah Addai murdered David Delonais by stabbing him with a knife, a Class AA felony.

**[¶ 6]** As part of the background of this appeal, one of the participant in the altercation and whose knife contained the deceased's DNA, Semereab Tesafaye/7-Up, whose nickname is 7-Up, was never charged with a crime.

**[¶ 7]** On February 17, 2009, Mr. Addai was sentenced to life in prison with the possibility of parole.[2]

**[¶ 8]** A timely notice of appeal was filed and this appeal followed.

## STATEMENT OF THE FACTS

**[ ¶ 9]** This homicide case began at a gathering in a South Fargo apartment, where there was drinking, marijuana smoking, and gambling from the late night of Saturday, August 18, 2007, and continuing into the pre-dawn of August 19, 2007. T 391, 409. About a dozen people were in attendance, including the apartment occupant, the accused, Semereab Tesafaye, also known as 7-Up, and the deceased. T 460, 461-62, 499-500, 504-05, 625.

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[1]Transcript references will be noted as HT for any pre-trial hearing transcript followed by a page number, and the date of the hearing; Trial transcript references will be noted T followed by a page number.

[2] Substitute District Judge Douglas Herman presided at the sentencing hearing as Judge Rothe-Seeger retired.

**[ ¶ 10]** The apartment renter, Cassandra Columbus, hosted the party. T 499. She invited her friends Sara Fick, and Tiffany Londo. Columbus's minor-aged brother, James, was also present. T 376-77. Columbus and Londo invited Elijah Addai, who came to the gathering with his friends, Tesafaye/7-Up, and Mohamed Hossein, whose nickname is Little Mo. T 393. In addition, Mr. Addai's girlfriend, Allison Boutiette, was present. T 377. It should be noted that Mr. Addai is a black man.

**[ ¶ 11]** In addition, Eric Delonais, cousin of the deceased David Delonais, was present. T 390-91. Eric Delonais had developed a relationship with Ms. Londo. T 408. However, Ms. Londo had dated Tesafaye/7-Up as recently as the day before the party. T 409, 464-65, 731.

**[ ¶ 12]** There was significant tension at the party because of the Eric Delonais's and Semereab Tesafaye's/7-Up's relationship with Ms. Londo. T 378-79, 464. Because of the tension, Eric Delonais called his cousin, David Delonais, for backup and support. T 393-94. David Delonais arrived and added to the tension of the gathering. Most of the attendees were drinking alcohol, smoking marijuana, and in the case of the deceased, David Delonais, using methamphetamine. T 369, 391, 409.

**[ ¶ 13]** About 4:30 a.m., Burim Kryeziu arrived with his friend Hamed Zuri and two other men at the invitation of Columbus and Londo. T 463, 480. Besides the tension between Eric Delonais and Tesafaye/7-Up over a woman, there was another source of tension at the party. Kryeziu testified that David Delonais told him twice at the party that Delonais was ready to fight because he didn't like someone. T 465. After a brief stay, Kryeziu left about 5:30 a.m. with his friends, and Eric Delonais followed him

outside. Kryeziu said Eric was seeking a full-time job at Sungold Foods in Fargo, where Kryeziu was a supervisor. T 469.

**[ ¶ 14]** Then, Kryeziu testified, name-calling, shouting, and pushing erupted between David Delonais on one side and Semereab Tesafaye/7-Up and Elijah Addai on the other. T 470, 474. Kryeziu said he saw knives during the struggle. Tesafaye/7-Up had one. T 478. He said he saw that Mr. Addai had a knife. T 475-76. Little Mo may have been a bystander, but that is unclear. T 488. One witness put Little Mo in the affray. Eric Delonais did not get into the fray directly, and at the first sign of mutual combat, Eric ran away. T 478-79.

**[ ¶ 15]** In the mutual combat, Tesafaye/7-Up and David Delonais apparently exchanged knife wounds. The state medical examiner, a forensic pathologist, said that an individual like David Delonais's could run several blocks in his wounded condition. T 367-68. Eric Delonais said he and David were running away from Tesafaye/7-Up and the accused, but Eric Delonais said he tripped in a hole and fell down early in the run and the pair became separated. T 405, 601.

**[ ¶ 16]** Eric Delonais did not see his cousin get stabbed. T 406. However, he did see Tesafaye/7-Up fight with David Delonais, and he saw Tesafaye/7-Up stab David. T 403, 415. Eric Delonais testified that he believed that both Tesafaye/7-Up/ and David Delonais had knives. T 403. Eric Delonais testified that David Delonais stabbed Tesafaye/7-Up in the head. T 401, 415. He also identified David Delonais's knife. T 411-13.

**[ ¶ 17]** Kryeziu retrieved his car but was blocked in by the fight, which included David Delonais, Tesafaye/7-Up, and Mr. Addai. When the group moved away from his

car, Kryeziu drove away and saw nothing further. T 468, 479. At some point Tesafaye/7-Up received a knife wound to his head. T 509-10. James, Cassandra Columbus's younger brother, was told of the fight and went to investigate. T 505. The group came out to watch but no one saw anything. T 517. James told police at the time that he believed Little Mo was involved in the knife fight. T 518. James told police he saw Addai and Little Mo chasing David Delonais but he did not see Tesafaye/7-Up then. T 505. James said he thought he saw a knife in Addai's hand. T 517. James also testified that he did not know if Addai had a knife and said he heard someone, perhaps Addai, say something to the effect of: Let's get them.

**[ ¶ 18]** However, on cross examination, James was impeached on his version of what he said he saw. He was 16-years-old at the time and admitted he was drinking alcohol at the party and he admitted that his statements to police were not accurate. T 515, 517-18.

**[ ¶ 19]** Two carriers for The Forum newspaper, Roz Bolgrean and Mary Albertson, were delivering their route nearby at the time they both heard footsteps and a commotion. T 278, 307. They each saw two males running, a black complected male chasing a lighter complected male. T 278. They saw no knives or other weapons. T 279, 288, 290-92, 296.

**[ ¶ 20]** The running pair got into a struggle close to Albertson. T 307. She said the man being pursued asked her to help him. Bolgrean said she saw the black man, not otherwise identified or described, jump on the man she now knows as David Delonais. T 310. Neither Albertson nor Bolgrean saw Mr. Addai , or anyone else, stab David Delonais. T 325. Neither news carrier saw any weapons or knives. T 288, 290, 292.

Bolgrean said she did not witness any stabbing. T 325. Albertson said her mind momentarily went blank as the men came in her direction. After blanking out, Albertson said she became aware of Delonais jumping up and down, hopping around asking for her to help him. T 281, 286, 290. 309. Albertson assisted Delonais to the ground, saw a lot of blood, and went for help. T 298. Bolgrean described the "scuffle" as the black man beating him (David Delonais) up or hitting him. T 311. The carriers left together to call 911. T 283.

**[ ¶ 21]** The news carriers saw and flagged down a passing squad car and directed police to where Delonais lay. T 315. The carriers heard statements they attributed to Mr. Addai such as: I'm going to cut you. T 297. Neither the news carriers nor the police know whether Delonais was stabbed in his encounter with Mr. Addai or at an the earlier incident with 7-Up. T 324-25. Significantly, the state conceded it could not prove which knife or what person may have stabbed Delonais. T 453. The state presented no proof of where the stabbing occurred.

**[ ¶ 22]** Police Sgt. Mike Bernier heard radio traffic at about 5:45 a.m. as he drove about a block from the areas where Delonais lay. T 433. The dispatcher said there was a fight in progress. T 432. Bernier said the police dispatcher said only that the incident involved a black male suspect, who was running away on foot. T 433. No other physical description was broadcast. HT 7, 7-14-08.

**[ ¶ 23]** Sgt. Bernier and another police officer saw a nearby vehicle with a black passenger in it. T 446; HT 8, 7-14-08. Bernier, seeing no other black people in the area, stopped the black man. T 436; HT 9, 7-14-08. Bernier admitted on cross examination that he arrested the first black man he saw. T 447. No valid traffic violation

was observed by Sgt. Bernier, who asserted that the car was traveling at "a high rate of speed" perhaps 25 mph. HT 8-9, 25, 7-14-08. Sgt. Bernier said there was "technically" a traffic violation because the vehicle was traveling at a "high rate of speed," testifying that the speed limit in a parking lot is 15 m.p.h. and that he estimated the vehicle was traveling 25 m.p.h. [3] When Bernier saw a black male in a vehicle in the pre dawn hours, it was a half block away. The car was driven by Allison Boutiette and the passenger was Elijah Addai. T 439; HT 10, 18, 7-14-08. The lighting was not "real great" but it was not dark out. HT 21, 7-14-08.

**[ ¶ 24]** Sgt. Bernier said he had no knowledge or even an articulable suspicion that the black male he saw was or had been involved in any criminal conduct. HT 19, 7-14-08. There was no crime being committed since speeding, if it were a valid charge, is an infraction. HT 20, 7-14-08.

**[ ¶ 25]** Mr. Addai was taken from the car, handcuffed and placed in Bernier's squad SUV, a Ford Expedition. HT 11, 20, 7-14-08. Mr. Addai was the first and only black man arrested as a suspect. No other individuals were ever arrested in connection with the homicide.

**[ ¶ 26]** Within an hour after police arrived, and at the clear suggestion of police, the two news carriers traveled in their car to Bernier's location. T 443-44; HT 11-12, 38, 61-62 7-14-08. Sgt. Bernier conducted a "one person" showup. T 327, 447; HT 12, 7-14-08. Sgt. Bernier "asked them (the carriers) if they were comfortable identifying he

[3] Sgt. Bernier's knowledge of the speed laws of Fargo and North Dakota concerning driving in a parking lot was wrong. This Court is urged to take judicial notice of the speed laws set out in the Fargo Municipal Code at City of Fargo Ordinance 8-0502 and the Century Code at N.D.C.C. § 39-09-01, -02, -03. Speed limitations and exceptions.

suspect if I were to get him out of the car and have him face the other way." HT 12, 7-14-08. They agreed hesitantly.

**[ ¶ 27]** While the news carriers stood some distance away, Sgt. Bernier removed Mr. Addai in handcuffs out of his squad. T 447; HT 12-13, 14 7-14-08. Mr. Addai was facing backward, obscuring his face. HT 12-13, 37, 7-14-08. Mr. Addai was then displayed in handcuffs with his back toward the newspaper carriers and from that the carriers made their identification. T 284, 327; HT 12, 36, 7-14-08. Bernier commented that the situation was "odd" because "[t]hey (the news carriers) were kind of hiding behind the vehicle—the various parts of their vehicle trying not to show their faces to the suspect. HT 13, 7-14-08.

**[ ¶ 28]** At no time was Mr. Addai brought directly in front to show them "head on." HT 14, 7-14-08. In fact, Albertson testified at the pretrial motions hearing that her attention was focused on the injured man, David Delonais, and not on his pursuer. HT 39, 7-14-08. Additionally, the black man was only in her view a matter of seconds because it happened so fast. HT 39, 7-14-08.

**[ ¶ 29]** Nevertheless, the carriers said they were positive in their identification of the clothing on a black man. T 284, 287, 318, 326; HT 63, 64, 7-14-08. Sgt. Bernier noted that both the witnesses were "pretty excited" from what they had witnessed and "they were shaken up." HT 22, 7-14-08. Ms. Albertson said the events she witnessed were intensely stressful. HT 37, 7-14-08. The other news carrier, Ms. Bolgrean, said she was "pretty much in shock" as she witnessed the events and that she never saw the man's facial features from approximately 35 to 45 feet away. HT 58, 59 7-14-08.

**[ ¶ 30]** During the pretrial motions hearing, Sgt. Bernier confirmed that his written report of the stop of Mr. Addai omitted that the vehicle in which he was traveling was moving at a high rate of speed. HT 23, 7-14-08.

**[ ¶ 31]** Furthermore, at the time of the vehicle stop, Sgt. Bernier had no other description of the "suspect" from his police dispatcher. Bernier learned later that the "suspect" was wearing a blue jersey, which fact, among other crucial descriptive facts, is omitted from his written report. HT 23, 7-14-08. Bernier agreed that the blue shirt was something he might have learned after the stop of Mr. Addai. HT 24, 7-14-08. It is noteworthy that Eric Delonais also wore a similar blue jersey that night. T 622.

**[ ¶ 32]** The carriers did not identify the lone suspect in custody through facial recognition. T 326. Further, police never conducted a photo line-up or a live line-up procedure for the carriers to try to identify the person they said they saw chasing the deceased. HT 14, 43, 7-14-08. Sgt. Bernier did not conduct a lawful line up of any type and knows of none occurring in the investigation. HT 15, 7-14-08. Bernier also failed to note that Mr. Addai was wearing a white cap or head scarf in his police report. In fact, Sgt. Bernier could not recall Mr. Addai wearing one. HT 15, 7-14-08.

**[ ¶ 33]** Meanwhile, after David Delonais was attended to by police and emergency medical technicians, Tesafaye/7-Up, was found in a pool of blood by several individuals including Little Mo. T 509. Tesafaye/7-Up was in a knife fight with David Delonais. Tesafaye/7-Up was taken by private car to Innovis Hospital, a few blocks away. T 510. An ambulance took David Delonais to the same hospital. Tesafaye/7-Up was treated for a nearly fatal stab wound to the head and recovered. Delonais, whose wounds included one to the chest and one to his kidney area, died at the hospital.

Tesafaye/7-Up's knife, referred to as a "Tanto" bladed knife, was among those recovered by police. T 668, 672.

**[ ¶ 34]** Police recovered Tesafaye/7-Up's Tanto knife on 8-20-07. However, a photo of the knife was not disclosed to the defense until October 28, 2008, more than 14 months after the case was charged. HT 3, 10-29-08. The trial was set to commence in four days but had to be continued as the Court will see based on the state's dilatory disclosure policy and the obvious need to have the substance clearly visible on Tesafaye/7-Up's knife forensically analyzed.

**[ ¶ 35]** Counsel for the accused was in final trial preparations for the case was scheduled to commence November 3, 2008. Incomprehensibly, for the prior 14 months the government never had 7-Up's Tanto knife tested for DNA. However, Thomas Wahl, a DNA expert, was retained by the defense to test 7-Up's knife handle and blade.

**[ ¶ 36]** Wahl, the chief forensic analyst of North Dakota State University's forensic DNA lab, identified blood and tissue on the blade of Tesafaye/7-Up's knife. T 755. Blood and tissue on the blade was David Delonais's, according to Wahl's undisputed DNA testing. T 755, 773-74.

**[ ¶ 37]** Blood on the handle of Tesafaye/7-Up's Tanto bladed knife was Tesafaye/7-Up's, Wahl's DNA testing showed. T 756, 770-72. Significantly, Tesafaye/7-Up's knife had a 6 to 8 inch blade, which was the approximate depth of the lethal stab wound to David Delonais's kidney area.

**[ ¶ 38]** When the defense called Tesafaye/7-Up as a witness,7-Up invoked his right to remain silent at the trial. However, Tesafaye/7-Up admitted the Tanto bladed knife was his in a pre-trial deposition, which the defense was permitted to introduce

before the jury. T 730. The substance of his pre-trial testimony was related to the trial jury through the examination of counsel for the accused. T 728-740.

**[ ¶ 39]** Tesafaye/7-Up also admitted in the pretrial sworn examination that he brought the Tanto bladed knife to the party. T 730. Tesafaye/7-Up's sheath for the Tanto bladed knife was found in his pants, when the pants were taken by police at the hospital. T 661-62. The Tanto bladed knife itself was found by police in the shrubbery outside Innovis Hospital, where Tesafaye/7-Up was treated. T 668-672.

**[ ¶ 40]** The Court should be aware that at least six knives were found in and near the area of mutual combat, a school yard, and near a local business. Those six knives were the subject of testimony during the trial. T 449, 626. One knife was found near Oak Grove School a week after the stabbing by a student who reported it to a teacher. T 705.

**[ ¶ 41]** The government was shown to be selective in what items of evidence were forensically tested. T 584, 592. This had the effect of focusing on a black man to the exclusion of others who may have committed the murder. In fact, the state crime lab director confirmed in her testimony the selective nature of forensic testing. She testified that it was too expensive and too time consuming to test every piece of evidence. T 584. For example, none of the knives tested by the state crime lab could be linked to Mr. Addai by DNA testing.

**[ ¶ 42]** However, blood swabs from his hands, which were easily obtained, were shown by DNA analysis to contain the blood of David Delonais. T 590. How the blood of the deceased got on Addai's hands was never disclosed to the jury. Clearly, the state

had its suspect and was not concerned about the truth. Particularly, since no one, not even Tesafaye/7-Up, saw Mr. Addai stab anyone on August 19, 2007. T 325, 731.

**[ ¶ 43]** David Delonais's knife was tested at the state crime lab and Tesafaye/7-Up's DNA was found in blood on the handle, confirming that Delonais and Tesafaye/7-Up were in mutual knife combat. T 711-12. Yet, Tesafaye/7-Up was never charged by the state with any crime, let alone involvement in a homicide.

**[ ¶ 44]** Police also found a kitchen knife in the parking lot near where Mr. Addai was arrested. David Delonais blood and DNA was found on the 7 to 8 inch blade. T 590. Additionally a partial palm print was found on the same knife, but it did not match Mr. Addai's prints. T 648.

**[ ¶ 45]** The knife found near Oak Grove School close to the combat area was sent to the state crime lab for analysis but no results were received. It is unknown whether the state selectively omitted the Oak Grove knife from forensic testing. T 705-06. Tellingly, that knife's blade was also 7 to 8 inches long, the length required to stab the victim. T 706.

**[ ¶ 46]** Another knife was found in the area of the mutual combat between Tesafaye/7-Up and David Delonais. It was a small steak knife but it bore no blood or fingerprint evidence. T 643.

**[ ¶ 47]** Finally, a knife was found behind the driver's seat in the car in which Mr. Addai was a passenger. The blade on this knife, a small steak-type knife, was 3 to 4 inches long and bore no blood or fingerprint evidence. T 626, 654.

**[ ¶ 48]** Police investigator Charles Sullivan testified that he took only two knives to the autopsy of David Delonais apparently to confirm that those knives could have

made the wound: Delonais's knife and another found near Delonais's body. T 451. Tesafaye/7-Up's Tanto bladed knife was not taken to the autopsy to determine whether its blade fit Delonais's wounds ostensibly because the Tanto knife was not in police hands when the autopsy was performed. T 451-52.

**[ ¶ 49]** Further, the knife found in the car Addai rode in was not taken to the autopsy. Although police had recovered the knife from the car soon after the incident, the 6 to 8 inch bladed kitchen knife remained in the evidence locker in Fargo. T 451.

**[ ¶ 50]** At one point, the prosecutor asked Investigator Sullivan if the state could prove which knife was used to stab David Delonais. Pointedly, Sullivan replied there was no proof of which of three knives with Delonais's blood on them was used. Investigator Sullivan conceded that the police investigation failed to disclose whose hand any of the three knives was in. T 453. Certainly, Tesafay/7-Up was never really considered a suspect.

**[ ¶ 51]** Only Elijah Addai was accused in the homicide of David Delonais. Tesafaye/7-Up was not accused in the murder or of any crime. Little Mo, whose real name is Mohamed Hossein, was not accused in the murder case but did face a charge of tampering with evidence.

**[ ¶ 52]** Little Mo was caught on Innovis Hospital surveillance video, dumping something in the garbage at the hospital as he accompanied Tesafaye/7-Up/7-Up to Innovis for treatment. T 667. Based on his obstructionist conduct, Little Mo was convicted of tampering with evidence for throwing something, perhaps something incriminating of Tesafaye/7-Up's, in an Innovis garbage can. T 685-87, 694-98, 724-25.

The language of the charge in essence was that Little Mo "took a knife laying by a stabbing victim and threw the knife away." T 687.

**[ ¶ 53]** During this phase of the trial, the courtroom was closed to the public. Little Mo's lawyer, Jesse Lange, asserted that the Judgment and Commitment order in Little Mo's case was under seal and therefore in a file marked "restricted" in the Clerk's office. Judge Rothe-Seeger immediately cleared the courtroom of all media and the public. T 688. Only court personnel, jury, parties and their lawyers remained.

**[ ¶ 54]** After Lange's testimony, the trial judge reopened the courtroom. T 700.

**[ ¶ 55]** The state investigated the "restricted" file and reported to the judge that the file for Little Mo should not have been sealed and restricted, passing it off as a Clerk's error. T 702. And the state reported that the restriction on the file had just been removed by the Clerk's office. T 702. Based on that information, the trial judge ordered the restricted file unsealed. T 703. In addition, to try to cure the closure problem, the Court ordered a transcript prepared for the "closed courtroom session" and made it available in the Clerk's office at some future date, since daily transcript was not being prepared.

**[ ¶ 56]** During the closed session, testimony concerning Little Mo's conviction was provided by his lawyer. T 631. Lange reviewed the Innovis Hospital security footage that showed Little Mo tampering with evidence. T 632.

**[ ¶ 57]** As for the impact of the state's dilatory discovery procedure in this case, that issue was the subject of several pre-trial hearings before Judge Rothe-Seeger. Her predecessor on the case, Judge Wade Webb, had been directing the prosecution to comply with the defense discovery request during pretrial hearings dating from February,

2008. Judge Webb's comments became increasingly pointed at the state's slow discovery procedures. HT 12/12/07(60 day continuance because of discovery); HT 2/6/08 (60 day continuance because of delayed disclosure by the state crime lab); HT 5-7, 4/2/08 and HT 4/30/08(Judge Webb set a pretrial motions hearing for July 14, 2008 before his successor judge, Judge Rothe-Seeger).

**[ ¶ 58]** In fact, on April 2, 2008, Judge Webb ordered the state to make full disclosure of its evidence by April 30, 2008. There had been enough delays and exhorted the state to be more diligent. He noted that there had already been lengthy delays because the state failed to be diligent with discovery. Mr. Addai's speedy trial right was being jeopardized and sanctions against the state could be coming. HT 5-8, 4-2-2008.

**[ ¶ 59]** However, the dilatory discovery practices of the state continued after the April 30, 2008 deadline, after the pretrial motions hearing on July 14, 2008, and continued to the eve of the scheduled trial. The late disclosure of discovery material culminated in a hearing before Judge Rothe-Seeger on October 29, 2008. The defense requested the hearing based on the state's untimely disclosure of the above referenced a photo of Tesafaye/7-Up's Tanto knife, which showed possible blood on the blade.

**[ ¶ 60]** As a result of hearing, Judge Rothe-Seeger ordered the trial continued to permit the defense to have a DNA analysis performed on the knife. Officer Stanger, who recovered the Tanto knife, testified that when he saw the knife, it had dried blood on the blade. T 672. The photo was taken of the knife at the time, but it languished in police custody for 14 months, the length of time Mr. Addai was in pretrial custody.

**[ ¶ 61]** That Tesafaye/7-Up's knife contained blood was not apparent to defense counsel until October 28, 2008, when the photo was first disclosed. The defense

immediately filed a motion to suppress and dismiss based on the eve of trial disclosures from the prosecutor and the lengthy discovery problems. The trial was scheduled to begin in four days, November 3, 2008. Judge Rothe-Seeger lectured the prosecution again about the fundamental unfairness of the state's attorney's discovery procedures.

**[ ¶ 62]** Counsel for the accused maintained that the visible blood on Tesafaye/7 Up's knife "has completely changed our case." HT 8, 10-29-08. He charged that the state was "willful in the way that they've been reckless in getting the evidence." HT 10, 10-29-08. As a result, the state was "depriving Mr. Addai of his constitutional rights of due process and discovery." HT 11, 10-29-08. Counsel asserted that the state ignored its obligations under discovery rules and case law, putting the defense at an unfair disadvantage. HT 14, 10-29-08. In addition, Judge Webb's and Rothe-Seeger's directions to make full, timely disclosure had been flouted.

**[ ¶ 63]** The defense maintained the photo contained exculpatory evidence that was withheld until the eve of the trial. The state conceded that it was lax in turning over required evidence. HT 20-21, 10-29-08.

**[ ¶ 64]** The matter of testing the knife to learn what, if any, DNA evidence it contained emerged only when the photo of the knife was delivered to counsel's office the day before the hearing. HT 24-25, 10-29-08.

**[ ¶ 65]** Judge Rothe-Seeger was clearly concerned, and commented that at least twice and perhaps more times "the state has been warned and strongly advised by the Court to cooperate with discovery…." HT 26, 10-29-08. Judge Rothe-Seeger noted that, "you can call these circumstances unfortunate…the worst of coincidences, *but it's beyond*

*anything I've ever seen in a case of this magnitude…beyond anything I've seen before."* HT 27, 10-29-08. (Emphasis supplied).

**[ ¶ 66]** The trial judge said there was no excuse and the state's misconduct has cast a cloud over the criminal justice system "And I'm putting it nicely." HT 27, 10-29-08. She said the state's cavalier conduct "certainly prejudices Mr. Addai's ability to get effective assistance of counsel, a speedy trial, and to have his constitutional rights protected." HT 27, 10-29-08. She called it "shameful." HT 28, 10-29-08. However, the judge declined to dismiss the prosecution as requested by the accused. HT 29, 10-29-08. Based on the tardy disclosure of discovery material, the judge ordered it suppressed. HT 34-35, 10-29-08. The judge continued the trial from November 3, 2008 until December 1, 2008, to permit the defense to engage a DNA expert and have the Tanto bladed knife analyzed. HT 35-36, 10-29-08.

**[ ¶ 67]** Since this Court should consider the trial judge's ruling that the stop of Mr. Addai and his showup identification were permissible, a brief recitation follows of expert testimony from the motions hearing held July 14, 2008. Dr. Roy Malpass, a professor of experimental psychology and director of the Eyewitness Identification Research Laboratory at the University of Texas at El Paso, was, with the state's stipulation, the expert witness. HT 70-71, 72-73, 7-14-08.

**[ ¶ 68]** Dr. Malpass, with nearly 40 years of specializing in eyewitness identification, said there was no basis for the newspaper carriers to make their showup identification of Mr. Addai. HT 72, 7-14-08. His opinion, which stood unrebutted, was based on several factors, including, most significantly, that the news carriers were never

shown the suspect's face. In fact, he noted that the one-person showup was manipulated by police "so that they could not see his (the suspect's) face." HT 72 7-14-08.

**[ ¶ 69]** Dr. Malpass testified that the identification was held "under darkened conditions, darkened from full daylight" where the witnesses only "got a glimpse of a black man" through the shaded area of the back of a police vehicle. HT 78, 7-14-08. He said the conditions made it "difficult" for a witness to extract very much identifying information about a person. HT 73, 7-14-08. In addition, Dr. Malpass pointed out that one witness "claimed she didn't look at him (the suspect) in the face…didn't get a good look…didn't take the opportunity to get a look." HT 73-74, 7-14-08.

**[ ¶ 70]** Furthermore, the expert concluded that the identification was unreliable because it involved cross racial elements. He published an early, perhaps the first, scientific study on the subject in 1969. HT 74, 7-14-08. Dr. Malpass said the literature on cross racial identifications shows that there are approximately 50 per cent more errors of identification, or false identifications, compared with same race identifications. HT 74-75, 7-14-08.

**[ ¶ 71]** Dr. Malpass also said the reliability of the carriers's identification were unreliable because of Mr. Addai's dark skin and lighting conditions. His features would appear much less distinctly even to a witness who took the opportunity to view his face. HT 75, 7-14-08. Further, Dr. Malpass testified that an accurate identification is complicated when the viewers are under "higher stress levels" because stress interferes with memory for faces. The chaotic conditions of the encounter by the witnesses certainly heightened their stress levels. HT 77, 7-14-08. He also discussed a psychological concept called "attention blur." Attention blur divides a witness's cognitive resources for

gaining information about a face because the witness spends time and visual attention on something else, a weapon for example. HT 77, 7-14-08. Also complicating Ms. Bolgrean's "eyewitness identification" was the distraction she experienced by being concerned for her friend. Ms. Albertson admitted she froze up in the chaos of the incident. HT 78, 7-14-08.

**[ ¶ 72]** The final component of the unreliability of eyewitness identification is the "certainty judgment" of the witnesses as they are given feedback by police. The witnesses's confidence level is reinforced and inflated by picking out the "right" person that "is similar to the police's decision about who is the offender." HT 78, 7-14-08.

**[ ¶ 73]** The circumstances of the showup identification, including that the suspect was the only suspect in custody of police, was in handcuffs, was taken from a police vehicle, and was displayed by a uniformed police officer "clearly is suggestive." HT 79, 7-14-08. Dr. Malpass said that seeing the accused in a courtroom, as the news carriers did during the pretrial hearing, would contribute to the inflation of the witnesses's confidence in their identification and influence their ability to make identification in court. HT 80, 7-14-08. Media coverage would also inflate their confidence. HT 80, 7-14-08. The trial judge denied the defense motion to nullify the stop, the showup identification and any later identification by the news carriers in court.

## JURISDICTIONAL STATEMENT

**[ ¶ 74]** The district court had jurisdiction over this case pursuant to N.D. Const. art. VI, § 8, N.D.C.C. §§ 27-05-06 (4), and 40-18-19, and N.D.R.Crim.P. 37. This Court has jurisdiction over this appeal under N.D. Const. art. VI, § 6, N.D.C.C. §§ 29-28-06 (1), and 29-28-06 (2). This appeal is timely under N.D.R.App.P. 26.

## LAW AND ARGUMENT

**[ ¶ 75]** By way of an initial summary, there several interconnected bases for this appeal:

1. The trial judge's determination that the initial police stop of Elijah Addai was lawful ignoring that it was based impermissibly on Mr. Addai's race alone;

2. The non-standard one person showup identification procedure used by police was constitutionally invalid.

3. The in-court identifications of Elijah Addai were tainted by earlier unlawful identification procedures, involving the one person showup;

4. The defense suffered substantial prejudice by the prosecution's misconduct in failing to disclose discovery material in a timely way despite repeated warnings from the District Courts;

5. The trial Court committed reversible error by closing the courtroom to the press and public without lawful cause, and

6. There was insufficient evidence to prove beyond a reasonable doubt that Elijah Addai murdered David Delonais.

**[ ¶ 76]** At the outset, it should be emphasized that the issues discussed in this brief are connected and interrelated. Thus, the interplay of the unlawful stop of Mr. Addai, the tainted showup identification evidence, the government's pattern of withholding discovery materials that radically impacted the defense, and insufficient evidence created setting for and an atmosphere of fundamental unfairness that denied the accused due process and a fair trial.

## I. The trial judge erroneously determined that the initial police stop of Elijah Addai was lawful ignoring that it was based impermissibly on Mr. Addai's race alone.

**[ ¶ 77]** This issue is at the headwaters of the interrelated issues that require reversal of Mr. Addai's conviction and a new trial. The initial stop and arrest of the accused were based solely on his race. Race alone is an unconstitutional basis for an investigative stop.

**[ ¶ 78]** The trial court's contrary determination that the stop was reasonable under the circumstances of this case should be reversed. The judge's conclusion was forced under the notion that the police were trying to freeze a crime scene. The notion is unsupported by the evidence and applicable law. Under the judge's analysis, the crime scene was a substantial portion of Fargo's southwest side.

**[ ¶ 79]** Based on Brendlin v. California, 551 U.S. 249 (2007), this Court can review the trial court's approval of the stop, and whether the stop was lawful is a matter of law. Under Brendlin the rule is that in a traffic stop a passenger in the vehicle has the same Fourth Amendment protection as the driver because both have been seized. Police still should have a reasonable and articulable suspicion that a crime is afoot with a nexus to the suspect. Being a black man does not suffice for reasonable and articulable suspicion. But for his race no stop would have been made.

**[ ¶ 80]** Sgt. Bernier lacked the required reasonable and articulable suspicion to stop Mr. Addai or the car he was traveling in. Bernier's testimony revealed that the sole basis was that Mr. Addai was a black man. Police had no other description, of a "suspect" and no notion that Mr. Addai had committed a crime. (*see* U.S. v Declerck, 135 Fed. Appx. 167 (10th Cir. 2005)).

**[ ¶ 81]** Additionally, Bernier knew from the police dispatcher that a black man, not otherwise described with any specificity, was seen on foot leaving the area. Bernier learned later that a crime was reported in the area. Bernier saw a car from a half a block away with a black passenger. Bernier testified that the black passenger was acting stressed because he was rocking back and forth. Lastly, Bernier testified that the car was traveling at a "high rate of speed." On cross examination, Bernier estimated the car's speed at 25 m.p.h.

**[ ¶ 82]** The Court should conclude that none of these things amounted to a reasonable or articulable suspicion to stop the car. Each of the factors analyzed by the trial court will be addressed in turn, but first the erroneous high rate of speed notion should be dispelled.

**[ ¶ 83]** Sgt. Bernier's knowledge of speed limits in parking lots was erroneous, amounting to a handy ruse to make the stop. Absent the ruse, Mr. Addai's race is the sole basis for Bernier's stop. It is appropriate that this Court take judicial notice of Fargo Ordinance 8-0502(A), which establishes the speed limit for parking lots at 25 m.p.h.

**[ ¶ 84]** Sgt. Bernier, an experienced traffic enforcement officer, simply guessed at the speed, having taken no traffic radar reading and having performed no close pursuit to monitor the vehicle's speed. Bernier's guess to the speed of the car was 25 MPH, the speed limit. The officer's guess at the speed of the car fails as a reasonable and articulable suspicion to make the stop. (*see* State v. Oliver, 2006 ND 241 at ¶ 6, 724 N.W. 2d 114; Whren v. U.S., 517 U.S. 806, 809-10 (1996) (even pretextual traffic violations provide a lawful basis for an investigatory vehicle stop), and State v. Loh, 2000 ND 188 ¶ 10, 618 N.W. 2d 447.) Bernier witnessed no traffic violation. The car

was stopped because it contained a black passenger, period. At best the car may have been moving at 25 m.p.h., which is clearly not a violation of any traffic regulation.

**[ ¶ 85]** There was no traffic violation, no violation of law, and with that any notion evaporated that Bernier had a reasonable and articulable suspicion.

**[ ¶ 86]** The conduct of Sgt. Bernier amounted to selective enforcement of the law, which is barred under the Fourth Amendment. The Supreme Court of the United States has held that such a basis—race alone—is a Constitutionally prohibited reason for a police stop. U.S v. Brignoni-Pronce, 422 U.S. 873, 885-86 (1975); (*see also* Whren v. US. 517 U.S. 806, 814 (1996)).

**[ ¶ 87]** As for the report to the police dispatcher, this Court has determined that "just as mere presence at the scene of a crime is insufficient to support a warrantless search, it is axiomatic that presence at or near the scene of a crime, does not give rise to reasonable suspicion of criminal activity." State v. Torkelsen, 2006 ND 152, ¶ 15, 718 N.W. 2d 22.

**[ ¶ 88]** To assert that because the accused is a black person, his Constitutional protection is like any person's, is unconstitutional. Torkelsen nullifies Bernier's stop of the first black person he encountered.

**[ ¶ 89]** Further, it is wholly unreasonable to use the freeze-the-scene theory to justify the stop. This was not a crime scene in an apartment or even in an apartment building. The "scene" encompassed the whole outdoors. The trial court loosely determined the area where the alleged crime took place as anywhere within an undefined and unspecific radius. That conclusion cannot stand.

**[ ¶ 90]** Being in "the vicinity of a crime" is not the legal standard but that is the standard the trial court improperly imposed. Dragnet tactics are unlawful, particularly the dragnet tactic of arresting the first and only black man the police saw. Those factors, even in combination, do not result in a reasonable and articulable suspicion. Bernier tried to cover his misconduct by cloaking the action in a traffic stop. As the Court should conclude, Bernier was not justified. He operated on a hunch and nothing more.

**[ ¶ 91]** Finally, Sgt. Bernier testified that he perceived that the black man was "under a great deal of stress…[or] having a hard time breathing and his body was violently rocking back and forth." Nervousness in no way equates to reasonable and articulable suspicion for a stop. As this Court found in State v. Fields, "[n]ervousness alone is not enough to establish reasonable and articulable suspicions." State v. Fields, 2003 ND 81 at ¶ 21, 662 N.W. 2d 242.

**[ ¶ 92]** Absent the proffered reasons for the stop, the only remaining basis was that Mr. Addai is black. Torkelsen and Fields exclude mere presence in the vicinity of a crime and nervousness of an individual do not rise to the standard of a reasonable and articulable suspicion. The Constitution's Fourteenth Amendment Equal Protection clause prohibits using Mr. Addai's race as a factor for stopping the vehicle. Thus, Sgt. Bernier's hunch made unlawful the vehicle stop and detention of Mr. Addai.

**[ ¶ 93]** The trial Court's notion of freezing the scene ignores the Fourth Amendment's reach. Under the judge's view the "scene" was undefined and likely encompassed a whole South Fargo neighborhood of many square blocks. The trial court's decision cannot stand in the face of Sgt. Bernier's hunch. Bernier could not articulate

any reason for the stop except that the car contained a black man who was acting nervously.

**[ ¶ 94]** This was nothing more than a selective investigative procedure since it was not based on anything but race. Sgt. Bernier could not have made the inference that stopping the nervous black man was based on the existence of "a reasonable possibility of [Mr. Addai] being involved in criminal activity. City of Devils Lake v. Lawrence, 2002 ND 31 ¶ 11, 639 N.W. 2d 466. There is no requirement that a full blown dragnet should be employed to void the stop. The impermissible tactics of the police were fundamentally unfair and a denial of due process of law. The procedure used amounted to a one person dragnet based on race.

**[ ¶ 95]** None of the six factors from case law set out by the trial judge is supported by the evidence offered at the motions hearing. The trial judge misunderstood the evidence presented when she assumed that police were seeking a black male, who had left the scene of a stabbing on foot. At the time Sgt. Bernier made the stop, he did not have information connecting the black man to a stabbing. All Bernier knew was that a fight was reported.

**[ ¶ 96]** Sgt. Bernier had no physical description except that a black man was seen leaving on foot. The description of the blue jersey-type shirt came later. Thus, there was no evidence from which the trial judge could infer that Sgt. Bernier connected the dots leading to Mr. Addai. She simply put the trial court's imprimatur on police misconduct. The stop under all of the circumstances was unlawful. This case should be reversed and a new trial ordered.

## II. The one person showup identification procedure used by police was Constitutionally invalid.

**[ ¶ 97]** In combination with the unlawful stop, the identifications based on the color of the jersey-type shirt and black skin of Mr. Addai also were flawed and fundamentally unfair. A one-person showup under all of the circumstances of this case was suspect and was clearly an impermissibly suggestive identification procedure.

**[ ¶ 98]** In Stovall v. Denno, 388 U.S. 293, 302 (1967), the Supreme Court of the United States recognized that a defendant has a due process right to have the trial court exclude identification testimony that results from unnecessarily suggestive procedures that may lead to an irreparably mistaken identification. Neil v. Biggers, 409 U.S. 188, 192 (1972) (the showup identification should have indicia of reliability to pass shoulder under the Due Process clause).

**[ ¶ 99]** Thus, Stovall established the standards for judging eyewitness identifications. Biggers explained the standards and focused on the reliability of the identification. Judge Rothe-Seeger erred in ruling that the identifications were reliable and admissible. They were unreliable based on the lack of opportunity for Albertson and Bolgrean to see and identify the face of Mr. Addai, and from the unnecessarily suggestive procedures employed by Sgt. Bernier.

**[ ¶ 100]** As Dr. Malpass testified, the literature on the unreliability of eyewitness identifications shows that it is extremely inaccurate. For example, as the defense expert at the motions hearing on 7-14-08 testified, cross cultural identifications (whites identifying blacks) have an error rate of approximately 50 per cent. HT 74-75, 7-14-08. Two white women, who were admittedly under stress and under less than optimum lighting conditions, were thrust into a one-person showup identification procedure involving a black "suspect," who was in custody. The showup was conducted by a

uniformed police officer who removed Mr. Addai from his police truck in handcuffs and faced him away from the women. These women said they identified Mr. Addai from his blue jersey-type shirt and his skin color, black. They did not identify him by his facial appearance. The essence of their identification was of clothing and his black complexion. The circumstances scream impermissible suggestiveness and unreliability.

**[ ¶ 101]** Wholly absent were any indicia of the reliability of the showup identifications by two apparently hyper white women, who feared confronting the handcuffed black man. S*ee* Clark v. Caspari, 274 F.3d 507. 511 (8th Cir. 2001) (identification impermissibly suggestive because defendant viewed by witnesses while handcuffed and surrounded by armed police officers with no other suspects present); Abdur Raheem v. Kelly**,** 257 F.3d 122, 140-42 (2nd Cir. 2001) (due process violation because the defendant was identified in a suggestive lineup on the basis of his coat without other indicia of reliability); U.S. v. Rogers, 387 F.3d 925, 938-39 (7th Cir. 2004) (due process violation when cosuspect identified defendant after sharing jail cell), and Marsden v. Moore, 847 F.2d 1536, 1545-46 (11th Cir. 1988) (due process violation because defendant was the only male in a photo array and the totality of the circumstances did not support witness reliability).

**[ ¶ 102]** As outlined in Biggers**,** courts use a two part analysis to assess the admissibility of identification testimony. Initially, the accused should establish that the identification procedure was impermissibly suggestive. Then the court considers whether the testimony was reliable using the five factors from Biggers, 409 U.S. at 199-200, namely: 1. the witness's opportunity to view the defendant at the time of the crime; 2. the witness's degree of attention at the time of the crime; 3. the accuracy of the witness's

description prior to the identification; 4 the witness's level of certainty when identifying the defendant at the confrontation, and 5. the length of time elapsed between the crime and the confrontation.

**[ ¶ 103]** There is no question that the identification procedure used by Sgt. Bernier was impermissibly suggestive. How the trial Court approved the identification procedure was legal legerdemain and cannot stand. Sgt. Bernier used an inherently suggestive one-person showup with two white women identifying some clothing and skin. It could just as well have been any black man dressed like Mr. Addai. Furthermore, there was no effort to have a head on confrontation to see if the witnesses recognized the accused's face.

**[ ¶ 104]** A review of the facts supporting the five factors from Biggers does nothing to validate the reliability of the identification. In the final analysis, the identifications were impermissibly suggestive and, thus, tainted and unusable.

**[ ¶ 105]** As to factor 1. the witness's opportunity to view the defendant at the time of the crime: The two news carriers had only a fleeting opportunity to see the black man chasing David Delonais. The black man the witnesses saw was described as running away fast. T 278; HT 39, 7-14-08. The trial record contains no description by the news carriers to police of the black man's facial appearance other than skin color. This was a cross-cultural identification, whites attempting to identify a black man. The failure rate or misidentification rate for cross-cultural identifications is approximately 50 per cent. HT 74-75. 7-14-08. The incident they observed involved traumatic events. One witness, Albertson, said she went blank, she froze. T 280. Bolgrean estimated that she was approximately 40 to 50 feet away from the person she identified. T 321. She said her

concern was for Albertson and so her attention admittedly was diverted. T 309. Albertson said the black man ran away fast. HT 39, 7-14-08. During the showup, the witnesses picked out the only person in custody, not by recognizing his face but by his race and clothing. In fact, the news carriers did not make a "head on" view of the black man, but viewed him only from his back. T 326; HT 12-13, 37, 7-14-08. Thus, under Factor 1 the identification fails to pass muster on any level. The most that could be said is that the witnesses identified skin color and some clothing. T 326-27. The low light level at 5:30 to 5:45 a.m. diminished whatever limited opportunity either witness had to view the black man.

**[ ¶ 106]** Factor 2., the witness's degree of attention at the time of the crime: From their testimony, the news carriers paid attention to race and clothing color. Fundamental fairness under the Constitution and applicable case law do not condone a one-person showup in the circumstances of this case. Clearly, they paid only minimal attention because of the traumatic events they saw. This inference is underscored by neither witness saying she recognized the black man's face. Thus, the identifications fail to gain support from Factor 2.

**[ ¶ 107]** Factor 3., the accuracy of the witness's description prior to the identification: The record is devoid of any description of the features of the black man. The police dispatcher gave Sgt. Bernier no details except a black man on foot. The witnesses supplied police with no physical description, description of his face, or any distinctive characteristics of his face or build. Thus, this factor is unsupported by the evidence and the trial judge's flawed analysis.

**[ ¶ 108]** Factor 4., the witness's level of certainty when identifying the defendant at the confrontation: As has been demonstrated, the witnesses were certain only that they were identifying a black man in certain clothing. The witnesses claimed absolute certainty but their claims were hyperbole at best based on their lack of opportunity to observe the accused, their admitted diverted attention with one of them going blank, their failure to give any details about the body and face of individual they saw briefly in the midst of chaos. The claims of absolute certainty are not rationally based. They identified a black man because he was a black man. Further, there was no confrontation. They viewed Mr. Addai facing away from them. Without more substance than a mere assertion, the level of certainty does not make the identifications valid and reliable. The identifications fail on reliability under Factor 4.

**[ ¶ 109]** Factor 5., the length of time elapsed between the crime and the confrontation: Both news carriers said the elapsed time was under an hour. T 443-44; HT 11-12, 38, 61-62 7-14-08. With the failure to pass muster on the earlier factors, the identifications are not salvageable based on the short amount of time. They still identified a black man and some clothing, not his face. It is evident from all of the circumstances, that the police procedure was fatally flawed. The effect was unfair because it depended on race alone.

**III. The in court identifications of Elijah Addai were tainted by earlier unlawful identification procedures, involving the one person showup.**

**[ ¶ 110]** The point of seeking to invalidate the pretrial identifications was to prevent inadmissible evidence from being presented to the jury. Since the pretrial identification procedure was flawed later identification in court was erroneous.

**[ ¶ 111]** This is a classic case of an impermissibly suggestive identification compounded with the trial court permitting identification of the accused at the trial. *See* U.S. v. Eltayib, 88 F.3d 157, 167 (2nd Cir. 1996) (identification unreliable because witness viewed suspect's face for only a few moments at a distance of 35-40 feet while standing on a ship's deck at night). The two news carrier witnesses never identified the accused by his face let alone viewing his face for a "few moments." *See also* U.S. v. Rogers, 387 F.3d 925, 938 (7th Cir. 2004) (identification unreliable because witness viewed defendant at unspecified proximity and possibly had an obstructed view). The news carriers wanted nothing to do with a "head on" view of the accused in the showup, choosing instead to view him from the back from the cover of their vehicle as Sgt. Bernier recounted the "odd" behavior of the women. HT 14, 7-14-08; HT 13, 7-14-08. *And see* Tomlin v. Myers, 30 F.3d 1235, 1241 (9th Cir. 1994) (identification unreliable because witness viewed suspect in the dark, from the side, while agitated and only for a moment), and Marsden v. Moore, 847 F.2d 1536, 1546 (11th Cir. 1988) (identification unreliable because witness had only two brief glimpses of suspect and neither glimpse was from the front).

**[ ¶ 112]** Mr. Addai's one-person showup combines all the unreliability of Eltayib, Marsden, Tomlin, and Rogers.

**[ ¶ 113]** While it is clear that a jury has the ultimate responsibility to determine the reliability of eyewitness identifications, the reliability and admissibility should be established before the issue gets before the jury. *See* Watkins v. Sowders, 449 U.S. 341, 347 (1981) (determinations of reliability are usually entrusted to the jury). *See also*

Abdur Raheem v. Kelly, 257 F.3d 122, 133 (2nd Cir. 2001) (jury determines "reliability of properly admitted eyewitness identification").

**[ ¶ 114]** But if, as here, the pretrial identification procedure was defective, any in court identification evidence compounds the defects to the substantial prejudice of the accused. *See* Foster v California, 394 U.S. 440, 443 n.2 (1969) (dictum) (while jury's role is to determine the reliability of properly admitted identification testimony, "in some cases the procedures leading to an eyewitness identification may be so defective as to make the identification constitutionally inadmissible as a matter of law").

**[ ¶ 115]** Thus, for these reasons this Court should reverse this case and order a new trial.

**IV. The defense suffered substantial prejudice by the prosecution's misconduct in failing to disclose discovery material in a timely way despite repeated warning from the District Courts.**

**[ ¶ 116]** Two judges of the District Court in Fargo were assigned to the pretrial and trial phases of this case. The accused was arrested on August 19, 2007. His initial appearance was held in August, 2007, following Mr. Addai's arrest before Judge Wade Webb. Judge Webb, who was initially assigned to the case, held a number of pretrial hearings, all involving procedural and scheduling matters. There were unconscionable delays by the prosecution in disclosing evidence under Rule 16 of the North Dakota Rules of Criminal Procedure and relevant case law including Brady v. Maryland, 373 U.S. 83 (1963).

**[ ¶ 117]** This case presents a clear picture of negligence on the part of the prosecution regarding timely disclosure of discovery to the defense. The disclosure of a crucial photograph four days before the trial was scheduled to begin illustrates the

negligence of the prosecution. It had the effect of undermining the defense although the material eventually was disclosed by the government.

**[ ¶ 118]** There were repeated warnings by both Judge Webb and Judge Rothe-Seeger for the state to conclude its discovery and disclosure procedures. The state claimed it was doing the best it could but was still making critical disclosures to the defense in late October, 2008, more than 14 months after Mr. Addai was charged.

**[ ¶ 119]** The spirit of the Brady case is to ensure fundamental fairness to the accused. While it is obvious that the violation in Brady was aimed at the prosecutor hiding evidence until the trial concluded, here the effect was to cripple the accused in obtaining a fair trial. The forensic examination of Tesafaye/7-Up's knife was done at the eleventh hour. For 14 months, the government successfully deflected the focus away from Tesafaye/7-Up as an obvious participant, if not the sole actor, in the death of David Delonais. The result was the conviction of Mr. Addai in Tesafaye/7-Up's place. To say that the government's strategy worked is understatement. The government's conduct was reckless/willful.

**[ ¶ 120]** Clearly, the state compromised the ability of the accused to conduct an adequate pretrial investigation of the facts. The information withheld negatively impacted Mr. Addai's ability to have a fair trial. It is self-evident that the information withheld for 14 months by the government was material to the accused's guilt or punishment.

**[ ¶ 121]** The defense request for potential exculpatory evidence was filed with the clerk's office shortly after Mr. Addai was accused. The state's delay irreparably harmed the accused. It makes no difference whether the state's intention was willful or inadvertent. *See* Strickler v. Greene**,** 527 U.S. 263, 281-282 (1999). Earlier disclosure of

the Tanto knife photograph would likely have put the case in a different light, undermining the confidence in the jury's verdict. *See* Kyles v. Whitley, 514 U.S. 419, 435 (1995). Tying his hands is not fundamental fairness. There is a reasonable probability that the outcome would have been different based on timely disclosure of the photo of the Tanto bladed knife. Under these circumstances and the far from overwhelming evidence presented, a new trial should be ordered. [4]

**V. The trial Court committed reversible error by closing the courtroom to the press and public without lawful cause.**

**[ ¶ 122]** The Sixth Amendment requires that the trial of a criminal case be open to the public. The federal right is applicable to the states based on In re Oliver, 333 U.S. 257, 273 (1948). This case does not involve information that would compromise a secret government's agent's identity, sources or methods, where closure may be appropriate. *See* U.S. v. Lucas, 932 F.2d 1210, 1217 (8th Cir. 1991). Further, the closure of the courtroom was not inadvertent but was an affirmative act of the trial judge, misguided and wrong. *See* Gonzalez v. Quinones, 211 F.3d 735, 738 (2nd Cir. 2000).

**[ ¶ 123]** In Mr. Addai's case, a portion of the trial was closed to the public without a factual or legal basis, violating his right to a public trial. The purposeful closure of the proceedings, without a hearing of any type, undermined the public's confidence in the criminal justice system and undercut the right of the accused to have an open trial with the public and media present. *See* Press-Enterprise Co. v. Superior Court (Press-Enterprise I), 464 U.S. 501 (1984). None of the four conditions set out in Press-Enterprise I was met. Press-Enterprise I, 464 U.S. 502 at 510-11.

[4] As a subset of the withheld evidence, the Court should note that the 14 month delay in bring the case to trial was based on the dilatory discovery practices of the state. Even the inadvertent conduct of the state resulted in Mr. Addai's constitutional right to a speedy trial to be compromised. He would never have agreed to all the continuances but for the dilatory discovery and disclosure pattern.

**[ ¶ 124]** Granted the closure was brief, but it was not based on considerations of the Sixth Amendment and deprived the accused of fundamental fairness by interfering with his right to a public venue in which to be tried. This closure of the courtroom was problematic at the outset because it was based solely on misinformation about a restricted file that might be referred to during the testimony of lawyer/witness Jesse Lange. T 688. After the closure and exclusion of media representatives and the public, further information developed that the Clerk's Office file was marked "restricted" when the file was determined to have been mislabeled. T 702-703.

**[ ¶ 125]** The closure of the courtroom to the public and press, however brief and unfortunate, impacted on his guaranteed right to a speedy and public trial. Thus, Mr. Addai's right was violated. In combination with the other arguments on appeal, the totality of the circumstances warrant a reversal and an order for a new trial.

**VI. There was insufficient evidence to prove beyond a reasonable doubt that Elijah Addai murdered David Delonais**

**[ ¶ 126]** Appellant properly moved for acquittal under N.D.R. Crim. P. 29, preserving sufficiency of the evidence for review by this Court. T 629. *See* State v. Steen, 2000 ND 152, ¶16, 615 N.W.2d 555.

**[ ¶ 127]** The standard of review for insufficiency of the evidence is set out in State v. Wegley, 2008 ND 4, ¶25, 744 N.W.2d 284, as follows:

> When a defendant challenges the sufficiency of the evidence to support a conviction, the defendant should show that the evidence when viewed in the light most favorable to the verdict reveals no reasonable inference of guilt. State v. Igou, 2005 ND 16, ¶ 5, 691 N.W. 2d 213. On appeal, we review the record to determine if there is competent evidence allowing the jury to draw an inference reasonably tending to prove guilt and fairly warranting a conviction. Id. A conviction rests upon insufficient evidence only when no rational fact finder could have found the defendant guilty beyond a reasonable doubt after viewing the evidence in a light most

> favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor. Id.

*See also* State v. Noorlun, 2005 ND 189, ¶ 20, 705 N.W.2d 819, which said in part:

> In considering a sufficiency of the evidence claim, we do not weigh conflicting evidence, or judge the credibility of witnesses. State v. Klose, 2003 ND 39, ¶ 19, 657 N.W.2d 276. A verdict based on circumstantial evidence carries the same presumption of correctness as other verdicts. State v. Steinbach, 1998 ND 18, ¶ 16, 575 N.W.2d 193. A conviction may be justified on circumstantial evidence alone if the circumstantial evidence has such probative force as to enable the trier of fact to find the defendant guilty beyond a reasonable doubt. Id. Moreover, a jury may find a defendant guilty even though evidence exists which, if believed, could lead to a not guilty verdict. State v. Wilson, 2004 ND 51, ¶ 9, 676 N.W.2d 98.

**[ ¶ 128]** A careful review of the record demonstrates that the state failed to prove murder beyond a reasonable doubt with sufficient and competent, substantial evidence on which to fairly base the jury's verdict. While it is self-apparent that intent may be proven by circumstantial evidence, it cannot be proven by inviting the jury to speculate and engage in guess work. Speculation and guesswork were precisely what the state offered. The state did not connect the dots to describe the events involved in this case. Not only was Mr. Addai not proven guilty of the murder beyond a reasonable doubt but was not proven to have stabbed David Delonais at all.

**[ ¶ 129]** No witness saw Mr. Addai stab the victim. The state conceded it could not prove which person may have held which of the six or more knives used to stab David Delonais. T 453**.** The state relied on witness assumptions, conjecture, and unwarranted inferences. So called eyewitnesses never saw Mr. Addai's face but based their identification on some clothing and his race, black. T 284, 287, 318; HT 63,64, 7-14-08. In fact, Eric Delonais also wore a blue colored shirt. T 622. There was no "head on" identification HT 14, 7-14-08.

**[ ¶ 130]** Furthermore, the eyewitness identification was fatally flawed and baseless. The eyewitness expert testified that several factors negatively impact on a reliable identification. Dr. Malpass testified that among the variables that cause eyewitnesses to make unreliable identification are:

1. The stress on the news carriers viewing a chaotic event;

2. The brief encounter, never observing the black man's face;

3. The cross-racial identification in this case because cross-racial identifications have a failure rate of approximately 50 percent;

4. the darkened lighting conditions combined with the lone suspect race and viewing him from the back, facing away from the news carriers, and

5. The distraction experienced by Albertson, who froze and went blank, and Bolgrean, who was concerned about her friend.

**[ ¶ 131]** Based largely on the news carriers's eyewitness identifications, Mr. Addai was the exclusive focus of the state's efforts. The state apparently ignored Tesafaye/7-Up as a suspect. Clearly, the state has discretion to make charging decisions. However, the state either purposely or inadvertently, and it does matter which, created an uneven and, therefore, unfair playing field based on its discovery procedures. Inadvertence or purposefulness should not enter the discussion because the effect of the misconduct is the same in substance, form and effect.

**[ ¶ 132]** It is self-apparent that the state withheld from the defense a photograph of Tesafaye/7-Up's knife that showed blood on the blade. Finally, on the eve of the scheduled trial, 14 months after the stabbing, disclosure was made. The significance of the disclosure should be apparent to this Court. No one but the prosecutor can say for

certain but the knife photo did not support the state's theory of the case. It can be concluded that the state did not want to test the Tanto bladed knife for DNA because the prosecution suspected the DNA on the blade and other parts of the knife would establish mutual combat between 7-Up and the victim.

**[ ¶ 133]** The state's adherence to the notion that only one person could have committed the homicide shows lack of proper investigation by police. In support of the state's inept investigation of the murder case, the prosecution failed to have Tesafaye/7-Up's Tanto knife examined for whose DNA, if anyone's, was on the blade of the knife.

**[ ¶ 134]** The state hid behind false considerations of economy of time and money for its failure to do a thorough investigation, including forensic testing for evidence on the knives recovered. But this is a first degree murder case and should have been treated by the state as such.

**[ ¶ 135]** Incomprehensibly, Tesafaye/7-Up's knife was never sent to the state crime lab for forensic inspection. That task fell to the defense. A defense expert analyzed the substances on the knife and found David Delonais's DNA on the blade and 7-Up's DNA on the handle, on the eve of trial.

**[ ¶ 136]** The state's conduct regarding the Tesafaye/7-Up knife underscores that the state did not want to learn the truth. The state's blindness amounts to improper methods calculated a producing a conviction, apparently at any cost. The state can strike hard blows but not foul ones. *See* Berger v. U.S. 295 U.S. 78, 88 (1935). The state's shameful conduct on critical discovery items, despite repeated but apparently empty warnings from two separate judges, amounts to a denial of due process because of the

state's methods infected the trial with unfairness. The actions and inactions of the state make out a pattern of prosecutorial misconduct that should not be ignored by this Court.

**[ ¶ 137]** In fact, the jury had an alternate likely perpetrator in Tesafaye/7-Up. 7-Up's knife contained the victim's DNA on the blade along with 7-Up's own on the knife's handle. The knife was of the correct length to have made the stab wounds. Further, the victim's knife contained 7-Up's DNA. The evidence showed that 7-Up and the victim engaged in mutual combat with knives. The defense attempted to develop the truth of what happened but the development was stunted by the prosecution's imperious tactics involving dilatory discovery and disclosure.

**[ ¶ 138]** As for Mr. Addai's involvement, the evidence showed that he chased down the victim, knocking him to the ground and perhaps punching or hitting the victim. T 311. The witnesses who claimed to see parts of what happened are unanimous in their testimony: none saw Elijah Addai stab anyone. T 324-25. Key witnesses saw Mr. Addai but saw no knives or weapons. T 279, 288, 290-92, 296.

**[ ¶ 139]** The state's key witnesses, the newspaper carriers, saw no knives and saw no stabbing of the victim by Mr. Addai or anyone else.

**[ ¶ 140]** Eric Delonais testified he saw 7-Up and David Delonais in a knife fight. T 403. Eric Delonais did not see anyone stab his cousin. T 406. But he did see his cousin stab 7-Up in the head. T 401, 415. Additionally, Eric Delonais identified David Delonais's knife, which bore the DNA of the victim and of 7-Up. Thus, the victim likely was fatally stabbed by 7-Up or Little Mo and was simply pursued by Mr. Addai after he saw David Delonais stab 7-Up in the head and run away. Delonais could have run some

distance and been active for some time after he was stabbed. T 367-68. Albertson saw the victim jumping up and down and hopping around.

**[ ¶ 141]** That is not proof beyond a reasonable doubt that the accused intentionally committed the stabbing. Insufficiency of the evidence combined with the other errors and defects in the development and presentation of this case demand a reversal of the jury's verdict and an order for a new trial.

## CONCLUSION

**[ ¶ 142]** Appellant requests that this Court reverse his conviction for first degree murder based on the facts, law, and argument set out above, and order the case remanded for a new trial, or remand with order for judgment of acquittal.

Dated this the 9th day of July, 2009.

___/s/_____
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## [¶ 143] CERTIFICATE OF SERVICE

A copy of this document and the Appendix to Brief of Appellant in pdf format were e-filed with the North Dakota Supreme Court and served upon Leah Viste, pursuant to Administrative Order 14 on the 10th day of July, 2009. Specifically, this document and the Appendix to Brief of Appellant were electronically filed and served as follows:

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_____/s/_____
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