

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

State of North Dakota,

Plaintiff/Appellee,

v.

Supreme Court No. 20140344

Michael Dale Filkowski,

Defendant/Appellant.

\*\*\*\*\*

PETITION FOR REHEARING

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Appeal from Criminal Judgment

McKenzie County District Court  
Northwest Judicial District  
Honorable Robin A. Schmidt  
McKenzie County Case No. 27 2013 CR 01349

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## PETITION FOR REHEARING

[¶1] Michael Dale Filkowski, defendant and appellant, files this petition for rehearing contending the Court has overlooked or misapprehended law and fact.

### Question

[¶2] Is the Court's ruling, that the burden shifted to Filkowski to disprove Eder's status as the director's designee, unconstitutional?

### Argument

[¶3] Filkowski contends that the Court's peremptory ruling, of prima facie evidence and burden shifting to him, is "abhorrent to the criminal law." See McCormick, Evidence § 342 (2<sup>nd</sup> ed. 1972). The burden of production and the burden of persuasion should be with the prosecution and should not shift to the defendant.

[¶4] Filkowski understands the requirements of N.D.C.C. § 39-20-07(5) are not an element of the crime. However, this evidentiary short-cut for the prosecution uses the word, "shown". The prosecution has the burden of showing the requirements of subsection 5 for this evidentiary short-cut. The prosecution has this burden of production.

[¶5] The court appears to acknowledge that the evidence in the record fails to show Eder as a designee for subsection 5. The Court holds it

is the existence of N.D.C.C. § 54-12-24 which shifts the burden to Filkowski to disprove Eder as a designee under subsection 5.

[¶6] However, N.D.C.C. § 54-12-24 has “no rational connection” to the requirements of subsection 5. See McCormick, Evidence § 344 (2<sup>nd</sup> ed. 1972). Section 54-12-24 does not “rationally tend to prove” the requirements of subsection 5. McCormick, *supra*, discussing Leary v. United States, 395 U.S. 6 (1969).

[¶7] If the Court’s preemptory ruling, that of prima facie evidence and burden shifting to the defendant, were a statutorily created ruling, it would be regarded as irrational or arbitrary, and hence unconstitutional. See McCormick, *supra*.

[¶8] Here, the State failed to meet its burden of “showing” the requirements of N.D.C.C. 39-20-07(5). N.D.C.C. § 54-12-24 does not provide a rational connection to subsection 5 which would support shifting the burden to this criminal defendant to disprove Eder’s status as the director’s designee.

#### Conclusion

[¶9] Because N.D.C.C. § 54-12-24 has no rational connection to the requirements of N.D.C.C. § 39-20-07(5), it is unconstitutional to hold that the burden shifts to the criminal defendant in this case to disprove Eder’s

status as the director's designee.

[¶10] Filkowski respectfully requests this Court to grant this petition for rehearing.

Dated: August 21, 2015.

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### CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2015, the following document:

Petition for Rehearing

was emailed to the Clerk of the North Dakota Supreme Court @ [supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov) in Microsoft Word format and in PDF format, with a copy emailed to the following:

McKenzie County State's Attorney's Office @ [mcsa@co.mckenzie.nd.us](mailto:mcsa@co.mckenzie.nd.us)

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