

20150050 -

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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Garron William Gonzalez, )  
 )  
 Petitioner/Appellant, )  
 )  
 v. )  
 )  
 State of North Dakota, )  
 )  
 Respondent/Appellee. )

STATE OF NORTH DAKOTA

Supreme Court Nos. 20150050  
and 20150051

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BRIEF OF AMICUS CURIAE  
NORTH DAKOTA ATTORNEY GENERAL

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APPEAL FROM THE JANUARY 27, 2015, ORDER AND JANUARY 29, 2015,  
ORDERS OF THE BURLEIGH COUNTY DISTRICT COURT, DENYING THE  
PETITIONER/APPELLANT'S APPLICATIONS FOR POST-CONVICTION RELIEF  
IN CASE NOS. 08-2013-CV-02338 AND 08-2013-CV-02334

BURLEIGH COUNTY DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

THE HONORABLE JAMES S. HILL, PRESIDING

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## **[¶2] INTEREST OF AMICUS CURIAE**

[¶3] Under N.D.C.C. § 32-23-11, if a statute is alleged to be unconstitutional, the Attorney General of the State of North Dakota must be served with a copy of the proceeding and is entitled to be heard. The North Dakota Attorney General has an interest in defending the constitutionality of North Dakota statutes and the State's interest in the finality of a criminal judgment of conviction and sentence.

## **[¶4] AMICUS CURIAE STATEMENT OF THE ISSUES**

[¶5] Gonzalez failed to present a constitutional claim in the state trial court. He should not be allowed to present his constitutional claim for the first time on appeal.

[¶6] The two-year limitation period under N.D.C.C. § 29-32.1-01(2) does not violate Gonzalez's constitutional rights.

## **[¶7] SUMMARY OF THE CASE**

[¶8] 1. **Burleigh County District Court Case No. 08-2013-cv-02338.**

[¶9] On October 22, 2013, Gonzalez filed a post-conviction application in the case Gonzalez v. State, Burleigh County District Court Case No. 08-2013-cv-02338. App. II at 1, 4-18. His post-conviction application in that case relates to his criminal conviction in Burleigh County Criminal Case No. 08-03-K-02928. App. II at 1. On January 13, 2004, Gonzalez pled guilty to two counts of Gross Sexual Imposition. App. II at 4. Gonzalez was sentenced on April 16, 2004, to serve five years with the North Dakota Department of Corrections and Rehabilitation on each count. App. II at 5, 50. The criminal judgment was entered on April 23, 2004. App. II at 53. The time for an appeal

expired on May 23, 2004. There was no appeal. Gonzalez has since had his probation revoked. State v. Gonzalez, 2011 ND 143, 799 N.W.2d 402. There is a pending appeal relating to Gonzalez's probation. State v. Gonzalez, Supreme Court No. 20140213.

[¶10] On October 21, 2013, the State responded to Gonzalez's application and requested the state trial court dismiss the petition as untimely. App. II at 19-20. On September 2, 2014, the State filed a motion for summary judgment and brief in support of motion. App. II at 2, Doc. Nos. 25-27. The State asserted Gonzalez's claims were time-barred under N.D.C.C. § 29-32.1-01(2) and also argued Gonzalez did not allege any of the circumstances under N.D.C.C. § 29-32.1-01(3) that would authorize an application after the two-year period. Id. Gonzalez replied to the State's motion and argued the State had failed to plead the affirmative defense that the application was time-barred in its original pleadings and had therefore waived its right to assert the defense. App. II at 31.

[¶11] The state trial court determined the State had affirmatively raised the defense under section 29-32.1-01(2) and concluded Gonzalez's post-conviction application in 08-2013-cv-02338 was untimely. App. II at 50-53.

**[¶12] 2. Burleigh County District Court Case No. 08-2013-cv-02334.**

[¶13] On October 22, 2013, Gonzalez filed a post-conviction application in the case Gonzalez v. State, Burleigh County District Court Case No. 08-2013-cv-02334. App. I at 1, 6-13. His post-conviction application in that case relates to his criminal conviction in Burleigh County Criminal Case No. 08-05-K-00082. App. I at 1. On January 14, 2005, Gonzalez pled guilty to the

class A misdemeanor offense of failure to register. App. I at 7. The time for an appeal expired on about February 14, 2005. There was no appeal.

[¶14] On November 18, 2013, the State responded to Gonzalez's application and requested the state trial court dismiss the petition as untimely. App. I at 20-21. The state trial court denied the State's motion and ordered an evidentiary hearing. App. I at 27-28. On September 2, 2014, the State filed a motion for summary judgment and brief in support of motion. App. I at 2, Doc. Nos. 38-40. The State asserted Gonzalez's claims were time-barred under N.D.C.C. § 29-32.1-01(2) and also argued Gonzalez did not allege any of the circumstances under N.D.C.C. § 29-32.1-01(3) that would authorize an application after the two-year period. *Id.* Gonzalez replied to the State's motion and argued the State had failed to plead the affirmative defense that the application was time-barred in its original pleadings and had therefore waived its right to assert the defense. App. I at 30.

[¶15] The state trial court determined the State had affirmatively raised the defense under section 29-32.1-01(2) and concluded Gonzalez's post-conviction application in 08-2013-cv-02334 was untimely. App. I at 49-51.

#### [¶16] **LAW AND ARGUMENT**

[¶17] **1. Standard of review of constitutional claims.**

[¶18] N.D.C.C. § 29-32.1-01(2) is presumptively constitutional. N.D.C.C. § 1-02-38(1). "The presumption of constitutionality is so strong that a statute will not be declared unconstitutional 'unless its invalidity is, in the judgment of the court, beyond a reasonable doubt.'" MCI Telecomms. Corp. v. Heitkamp, 523



N.W.2d 548, 552 (N.D. 1994) (quoting Menz v. Coyle, 117 N.W.2d 290, 293 (N.D. 1962)).

[¶19] Legislation must be construed so as to preserve its constitutionality. Winkler v. Gilmore & Tatge Mfg. Co., 334 N.W.2d 837, 841 (N.D. 1983). When possible, a court must resolve any doubt as to a statute's constitutionality in favor of its validity. State v. Burr, 1999 ND 143, ¶ 9, 598 N.W.2d 147; In re Craig, 545 N.W.2d 764, 766 (N.D. 1996). Statutes must be construed to avoid constitutional conflicts and, if a statute may be construed two ways, one that renders it of doubtful constitutionality and one that does not, a construction must be adopted that avoids the constitutional conflict. Ash v. Traynor, 1998 ND 112, ¶ 7, 579 N.W.2d 180.

[¶20] Constitutional claims must first be adequately raised in the trial court and supported by authority and reasoned analysis before they may be presented to this Court on appeal. N.D. Guaranteed Student Loan Program v. Voigt, 513 N.W.2d 64, 66 (N.D. 1994). Questions not adequately developed and presented to the trial court are not properly before this Court for review. Id. "This constraint applies with particular force to a constitutional contention." Id. (citing Gange v. Clerk of Burleigh County District Court, 429 N.W.2d 429, 432, n.3 (N.D. 1988)).

**[¶21] 2. The two-year limitation period under N.D.C.C. § 29-32.1-01(2) does not violate Gonzalez's constitutional rights.**

**[¶22] a. The two-year limitation period under N.D.C.C. § 29-32.1-01(2).**

[¶23] "Effective August 1, 2013, N.D.C.C. § 29-32.1-01(2) was amended and reenacted to create a statute akin to a statute of limitations requiring applications

for post-conviction relief to be filed within two years following a conviction. 2013 N.D. Sess. Laws ch. 248, § 1.” Lehman v. State, 2014 ND 103, ¶ 3, 847 N.W.2d 119.

[¶24] Subsection 2 of section 29-32.1-01 provides as follows:

Except as provided in subsection 3, an application for relief under this chapter must be filed within two years of the date the conviction becomes final. A conviction becomes final for purposes of this chapter when:

- a. The time for appeal of the conviction to the North Dakota supreme court expires;
- b. If an appeal was taken to the North Dakota supreme court, the time for petitioning the United States supreme court for review expires; or
- c. If review was sought in the United States supreme court, the date the supreme court issues a final order in the case.

[¶25] Gonzalez’s criminal conviction in Burleigh County Criminal Case No. 08-03-K-02928 became final on May 23, 2004, for purposes of the post-conviction chapter. N.D.C.C. § 29-32.1-01(2)(a). His criminal conviction in Burleigh County Criminal Case No. 08-05-K-00082 became final on February 14, 2005, for purposes of the post-conviction chapter. N.D.C.C. § 29-32.1-01(2)(a).

[¶26] “A statute of limitations defense in a civil proceeding is an affirmative defense. N.D.R.Civ.P. 8(c)(1). Affirmative defenses, including statutes of limitations, are waived if not pleaded.” Lehman, 2014 ND 103, ¶ 8, 847 N.W.2d 119.

[¶27] In Gonzalez v. State, 08-2013-cv-02338, the state trial court found “in the present case, the State did affirmatively assert the defense in its original

response. Specifically, the State asked that Gonzalez's application be dismissed as untimely under N.D.C.C. § 29-32.1-01(2). As a result, the State did not waive the two-year statute of limitations defense." App. II at 52. The state trial court concluded Gonzalez's post-conviction application in 08-2013-cv-02338 was untimely. Id. at 50, 53.

[¶28] In Gonzalez v. State, 08-2013-cv-02334, the state trial court incorporated by reference its findings and analysis in Case No. 08-2013-cv-02338 and found the State had not waived the statute of limitations defense in that case as well. App. I at 50. The state trial court concluded Gonzalez's post-conviction application in 08-2013-cv-02334 was untimely. Id.

[¶29]           **b.       Gonzalez did not present a constitutional challenge to the limitation period under N.D.C.C. § 29-32.1-01(2) to the state trial court.**

[¶30] Gonzalez did not first present the constitutional argument to the trial court that he presents here for this Court's consideration. His response to the State's motion to dismiss his petitions as untimely included the incorrect statement, "the State failed to specifically plead the affirmative defense of statute of limitations in its original pleadings in this matter and therefore has waived its right to assert the affirmative defense at this late date." App. I at 30; App. II at 31. Otherwise, his arguments only went to the merits of the claims in his post-conviction application.

[¶31] "This Court will generally not address an issue on appeal not raised before the district court." Johnson v. State, 2015 ND 7, ¶ 8, 858 N.W.2d 632. "When a party fails to raise an issue before the district court, even a constitutional issue,

we generally will not address the issue on appeal.” In re R.A.S., 2008 ND 185, ¶ 12, 756 N.W.2d 771.

[¶32] Gonzalez’s failure to first adequately develop and present his constitutional claim in the trial court should be fatal to this appeal. Voigt, 513 N.W.2d at 66.

[¶33] c. **Alternatively, Gonzalez does not have a constitutional right to collaterally attack a criminal judgment through post-conviction relief. The State has no obligation to provide him a post-conviction remedy.**

[¶34] Alternatively, and without waiving the argument Gonzalez’s constitutional claim is not properly before this Court, he is not entitled to relief for his constitutional claim regarding the limitation period on the merits.

[¶35] Ordinarily, post-conviction proceedings allow a criminal defendant the opportunity to challenge the legality of a criminal judgment and sentence by presenting claims that could not have been raised in a direct appeal, e.g., claims of ineffective assistance of counsel, DeCoteau v. State, 1998 ND 199, 586 N.W.2d 156; or claims of newly discovered evidence, N.D.C.C. § 29-32.1-01(1)(e); Greywind v. State, 2004 ND 213, 689 N.W.2d 390. Claims that have been determined in a direct appeal cannot be brought in post-conviction proceedings. N.D.C.C. § 29-32.1-12(1); DeCoteau, 1998 ND 199, ¶ 5, 586 N.W.2d 156. Claims that should have been presented and determined in a direct appeal cannot be brought in post-conviction proceedings. N.D.C.C. § 29-32.1-12(2); Everett v. State, 2008 ND 199, ¶ 16, 757 N.W.2d 530.

[¶36] Proceedings for post-conviction relief are civil in nature and are subject to the North Dakota Rules of Civil Procedure. Laib v. State, 2005 ND 187, ¶ 11, 705 N.W.2d 845. "Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself, and it is in fact considered to be civil in nature." Pennsylvania v. Finley, 481 U.S. 551, 556-57 (1987).

[¶37] There is no constitutional obligation to provide post-conviction relief. "It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review of his conviction. States have no obligation to provide this avenue of relief[.]" Id. at 557. "Accordingly, the opportunity to collaterally attack constitutional violations occurring during the conviction process is not a fundamental right entitled to heightened due process protection." Burford v. State, 845 S.W.2d 204, 207 (Tenn. 1992).

[¶38] Moreover, it is clear that the State has a legitimate interest in preventing the litigation of stale or fraudulent claims. Jimenez v. Weinberger, 417 U.S. 628, 636, 94 S.Ct. 2496, 2501, 41 L.Ed.2d 363, 370 (1974). It is also clear that a state may erect reasonable procedural requirements for triggering the right to an adjudication, such as statutes of limitations, and a state may terminate a claim for failure to comply with a reasonable procedural rule without violating due process rights. Logan v. Zimmerman Brush Co., 455 U.S. 422, 437, 102 S.Ct. 1148, 1158, 71 L.Ed.2d 265, 279 (1982).

Burford, 845 S.W.2d at 208.

[¶39] The following written testimony was presented to the Senate Judiciary Committee on Senate Bill 2227, in which the limitation amendments to N.D.C.C. § 29-32.1-01 were enacted: "The goal is not to preclude truly meritorious claims. The goal is to cut off repetitive, stale, and meritless claims that chew up the time

and resources of prosecutors, indigent defense counsel, and the courts.” Hearing on S.B. 2227 Before the Senate Comm. on the Judiciary, 2013 N.D. Leg. (Feb. 5) (Statement of Justice Dale Sandstrom). “In some cases, post-conviction relief proceedings are filed years or even decades after the alleged error. As time passes, it becomes increasingly difficult to establish what happened or why it happened years ago. This is the same rationale for statutes of limitations in other kinds of proceedings.” Id.

[¶40] The amendments to § 29-32.1-01 also include the following due process safety valves in N.D.C.C. § 29-32.1-01(3) for legitimate claims that might otherwise be time-barred under subsection 2: (1) if there is newly discovered evidence, including DNA evidence, that would establish actual innocence; (2) if the post-conviction petitioner suffered from a physical disability or mental disease that precluded submitting a timely post-conviction application; and (3) if there has been a new interpretation of federal or state constitutional or statutory law by either the United States Supreme Court or the North Dakota Supreme Court that applies retroactively to the post-conviction petitioner's case. An application under subsection 3 must be filed within two years after the date the petitioner discovered, or reasonably should have discovered, the existence of the new evidence, the disability or disease ceases, or the effective date of the retroactive application of law. Gonzalez has never asserted any of the provisions of subsection 3 of section 29-32.1-01 apply to the claims in his post-conviction applications.

[¶41] Another safety valve relates to the correction of illegal sentences. While an underlying conviction may not be collaterally attacked by way of a motion under Rule 35(a)(1), N.D.R.Crim.P., see State v. Ertelt, 1997 ND 15, ¶ 6, 558 N.W.2d 860, an illegal sentence may be reviewed and corrected, if necessary, at any time under Rule 35(a)(1).

[¶42] [I]n certain circumstances, due process prohibits the strict application of the post-conviction statute of limitations to bar a petitioner's claim when the grounds for relief, whether legal or factual, arise after the "final action of the highest state appellate court to which an appeal is taken"—or, in other words, when the grounds arise after the point at which the limitations period would normally have begun to run. In applying the Burford rule to specific factual situations, courts should utilize a three-step process: (1) determine when the limitations period would normally have begun to run; (2) determine whether the grounds for relief actually arose after the limitations period would normally have commenced; and (3) if the grounds are "later-arising," determine if, under the facts of the case, a strict application of the limitations period would effectively deny the petitioner a reasonable opportunity to present the claim. In making this final determination, courts should carefully weigh the petitioner's liberty interest in "collaterally attacking constitutional violations occurring during the conviction process," Burford, 845 S.W.2d at 207, against the State's interest in preventing the litigation of "stale and fraudulent claims." Id. at 208.

Sands v. State, 903 S.W.2d 297, 301 (Tenn. 1995).

[¶43] Gonzalez filed one application for post-conviction relief after two revocations of probation and more than nine years after his conviction for gross sexual imposition was final. He filed his second application for post-conviction relief more than eight years after his conviction for his sex offender registration violation became final. Gonzalez does not assert any of the exceptions under N.D.C.C. § 29-32.1-01(3) apply.

[¶44] Gonzalez's two applications represent the "repetitive, stale, and meritless claims that chew up the time and resources of prosecutors, indigent defense counsel, and the courts" when there is no federal or state constitutional right to present the claims in a collateral proceeding. He has had more than reasonable time and opportunity to present his claims before the effective date of the amendments to N.D.C.C. § 29-32.1-01(2) creating a two-year limitation period. He did not explain in the trial court, and he does not explain here, what circumstances prevented him from bringing his two post-conviction applications within a time period more proximate to his judgment of convictions. Due process does not require waiver of the statute of limitations for Gonzalez's two post-conviction applications.

**[¶45] d. This Court does not need to reach Gonzalez's claim N.D.C.C. § 29-32.1-01(2) is unconstitutional.**

[¶46] This Court does not need to reach Gonzalez's constitutional claim because he did not first present it to the trial court and preserve it for appeal. This Court may also decline to reach Gonzalez's constitutional claim on other grounds. "[C]ourts should 'refrain from deciding constitutional questions if they can decide a dispute on other grounds.'" State v. Waters, 542 N.W.2d 742, 745 (N.D. 1996) (quoting Little v. Graff, 507 N.W.2d 55, 59 (N.D. 1993)).

[¶47] "A statute is not regarded as operating retroactively because of the mere fact that it relates to antecedent events." Lehman, 2014 ND 103, ¶ 11, 847 N.W.2d 119. "Generally, courts 'apply the law in effect at the time that it renders its decision unless doing so would result in manifest injustice, or there is statutory



direction or legislative history to the contrary.” Id. In some instances of newly enacted statutes of limitations, some courts have recognized there should be a grace period for preexisting claims.

[¶48] The Anti-terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) imposed a one-year limitation period on habeas corpus petitions filed by state prisoners challenging their state court convictions in the federal courts. See 28 U.S.C. § 2244(d)(1). The federal courts reasoned that the one-year limitation period should not be applied retroactively to prisoners’ claims that arose before April 24, 1996, the effective date of AEDPA, and so the federal courts determined Section 2244(d) did not bar claims filed within one year after April 24, 1996. In other words, the federal courts allowed a one-year grace period. See, e.g., Brown v. Angelone, 150 F.3d 370, 374 (4th Cir. 1998); Burns v. Morton, 134 F.3d 109, 110 (3rd Cir. 1998). The Second Circuit, on the other hand, allowed a “reasonable time” after the AEDPA effective date. Peterson v. Demskie, 107 F.3d 92, 93 (2nd Cir. 1997).

[¶49] The state of Kansas, for example, has also taken the same approach as the federal courts. The state of Kansas had enacted a one-year statute of limitations, K.S.A. 2010 Supp. 22-3210(e)(1), which became effective April 16, 2009. State v. Benavides, 263 P.3d 863, 864 (Kan. App. 2011). The Kansas Court of Appeals allowed a grace period after the effective date of the one-year statute of limitations to bring pre-existing claims. Id. at 867.

[¶50] Even if this Court allowed a grace period for Gonzalez, N.D.C.C. § 29-32.1-09 allows the Court to deny a meritless application on its own motion.

The State had also alleged it is evident from his petitions he is not entitled to the relief requested and no purpose would be served by any further proceedings. App. I at 29; App. II at 30.

[¶51] Gonzalez's claims in Case No. 08-2013-cv-02338 may be summarized to the effect his trial counsel, and the trial court, failed to advise him when he pled guilty to the two counts of gross sexual imposition that if his probation was revoked, he could be resentenced to the remainder of the sentence available to the court. App. I at 31; App. II at 32.

[¶52] Rule 11 of the North Dakota Rules of Criminal Procedure has no requirement about advising a defendant of the consequences of revocation of probation; instead, the rule requires the trial court to advise the defendant of the maximum possible penalty, including imprisonment, fine, and mandatory fee. Rule 11(b)(1)(G), N.D.R.Crim.P. Gonzalez does not allege he was not advised of the maximum penalties. Gonzalez acknowledges Padilla v. Kentucky, 559 U.S. 356 (2010), has not been extended to the consequences of a probation violation, and he quotes from a 3rd Circuit case, Parry v. Rosemeyer, 64 F.3d 110 (3rd Cir. 1995), that "[a] sentence of imprisonment upon revocation of probation is not generated by the plea but by the defendant's own unwillingness or inability to conform to the restrictions imposed as part of probation." App. I at 34; App. II at 35.

[¶53] This Court has advised that the trial court's failure to advise a defendant of the application of the 85% statute, N.D.C.C. § 12.1-32-09.1, does not render the guilty plea invalid, State v. Raulston, 2005 ND 212, 707 N.W.2d 464, and it is not

ineffective for defense counsel not to advise a defendant of the application of the 85% statute. Sambursky v. State, 2008 ND 133, 751 N.W.2d 247.

[¶54] Gonzalez is not entitled to relief for the claims in Case No. 08-2013-cv-02338 and no purpose would be served by any further proceedings.

[¶55] Gonzalez's claims in Case No. 08-2013-cv-02334 may be summarized to the effect there was a group advisory and he does not feel the trial court personally addressed him the way he thought he should have been addressed eight years later regarding his plea of guilty to the class A misdemeanor offense of violating his sex offender registration requirements; therefore, his plea to the offense was not knowing and voluntary. App. I at 31; App. II at 32. The trial court described the offense and explained the maximum and minimum penalties. App. I at 12, II. 7-22. Gonzalez advised the trial court he understood the charges and punishments. Id. at II. 22-25; 13, I. 1. He told the trial court he did not have any question about his rights. Id. at II. 2-5. The court established a factual basis for the registration violation on the record – he was not living with his grandma, but was living with somebody else at a different address. Gonzalez agreed with the trial court's summary. Id. at II. 15-22.

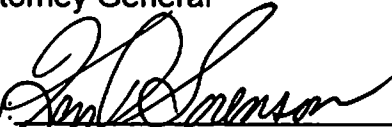
[¶56] Gonzalez is not entitled to relief for the claims in Case No. 08-2013-cv-02334 and no purpose would be served by any further proceedings.

#### **[¶57] CONCLUSION**

[¶58] For the above reasons, this Court should uphold the constitutionality of N.D.C.C. § 29-32.1-01(2) and affirm the orders of the state trial court denying Gonzalez's post-conviction applications.

Dated this 28th day of April, 2015.

State of North Dakota  
Wayne Stenehjem  
Attorney General

By: \_\_\_\_\_

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Amicus Curiae

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Garron William Gonzalez, )  
 )  
 Petitioner/Appellant, ) AFFIDAVIT OF SERVICE  
 ) BY MAIL  
 v. )  
 ) Supreme Court Nos. 20150050  
 State of North Dakota, ) and 20150051  
 )  
 Respondent/Appellee. )

.....  
STATE OF NORTH DAKOTA )  
 ) ss.  
COUNTY OF BURLEIGH )

Peggy A. Brunelle states under oath as follows:

[¶1] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶2] I am of legal age and on the 28th day of April, 2015, I served the attached BRIEF OF AMICUS CURIAE upon Benjamin C. Pulkrabek and Julie A. Lawyer by placing true and correct copies thereof in envelopes addressed as follows:

MR BENJAMIN C PULKRABEK  
ATTORNEY AT LAW  
402 1ST ST NW  
MANDAN ND 58554

MS JULIE A LAWYER  
BURLEIGH COUNTY ASSISTANT STATES ATTORNEY  
514 E THAYER AVE  
BISMARCK ND 58501

and depositing the same, with postage prepaid, in the United States mail at  
Bismarck, North Dakota.

Peggy A. Brunelle  
Peggy A. Brunelle

Subscribed and sworn to before me  
this 28<sup>th</sup> day of April, 2015.

Vanessa K. Kroshus  
NOTARY PUBLIC

