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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

STATE OF NORTH DAKOTA,	)	
Respondent / Appellee,	)	**Supreme Court No. 20170345**
vs.	)	**District Court No. 09-2015-CR-02085**
ASHLEY KENNETH HUNTER,	)	
Petitioner / Appellant.	)	

AMENDED APPELLANT'S BRIEF

Appeal from Criminal Judgment Entered September 5, 2017 by the Cass County District Court, East Central Judicial District, State of North Dakota, The Honorable Norman Anderson presiding.

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[¶ 3] <u>**STATEMENT OF THE ISSUES**</u>

[¶ 4] Whether the district court erred in finding that Mr. Hunter received Miranda Warnings.

[¶ 5] Whether the district court erred in finding that Mr. Hunter gave a valid waiver of his constitutional rights.

[¶ 6] Whether the district court erred in allowing the testimony of Andrea Wallace.

[¶ 7] Whether Judge Anderson's failure to recuse himself violated Mr. Hunter's Fourteenth Amendment due process rights.

[¶ 8] <u>**STATEMENT OF THE CASE**</u>

[¶ 9] Ashley Hunter (hereinafter "Mr. Hunter") appeals from the Criminal Judgment, dated September 5, 2017. (Appellant's App. at 25). Mr. Hunter was convicted of two counts of Murder in violation of N.D.C.C. §§ 12.1-16-01(1)(a), 12.1-16-01(1)(b), and 12.1-32-01(1), and Arson in violation of N.D.C.C. §§ 12.1-21-01 and 12.1-32-01(3) on June 2, 2017. *Id.* Mr. Hunter was then sentenced to life without parole on each count of Murder, and ten years for Arson. *Id.*

[¶ 10] Mr. Hunter filed his notice of appeal on September 18, 2017, pursuant to North Dakota Rule of Appellate Procedure 4. (Appellant's App. At 28). The district court had jurisdiction under N.D.C.C. § 27-05-06 and N.D. Const. art. VI, § 8. This Court has jurisdiction under N.D.C.C. § 29-28-06 and N.D. Const. art. VI, § 2.

[¶ 11] <u>**STATEMENT OF THE FACTS**</u>

[¶ 12] On the afternoon of June 22, 2015, law enforcement arrived at 319 12th Avenue North pursuant to a call reporting that a man in apartment 6 was lying on his bed

and was dead. (Tr. Trial at 387:12-14; 352:11-16; 326:12-25; 333:21). Upon arrival, the body of Clarence Flowers was discovered; he was deceased and had sustained multiple stab wounds. *Id.*

[¶ 13] Late that evening, firefighters responding to a call reporting a possible fire at 1122 12th Street North, found the bludgeoned body of Samuel Traut on the back porch of his home. (Tr. Trial at 688:5-14).

[¶ 14] On or about June 23, 2015, at 6:34 a.m., Mr. Hunter was located and arrested at the location of 1119 University Drive North in Fargo, ND. (Tr. Trial at 795:5-25); *Doc ID #298*. He was subsequently interrogated by Detectives Matthew Ysteboe and Nick Kjonaas. He was questioned at length while suffering from extreme exhaustion and serious mental impairment caused by the intoxication of methamphetamine. (Tr. Trial at 1352:12-20).

[¶ 15] The Defense filed a Motion to Suppress his statement to law enforcement, contending it was given involuntarily and later a Supplement arguing that Mr. Hunter was never given *Miranda* Warnings. *Doc ID #255; Doc ID #318.*. The district court ultimately denied the Motion to Suppress and forbid any further exploration into the issue. (Tr. Trial at 1897:7-8; 852:16-21; 761:14-17); *Doc ID #329.*

[¶ 16] The Defense filed a Motion to Exclude the testimony of Nurse Andrea Wallace, as it would be a clear violation of Mr. Hunter's physician-patient privilege. *Doc ID #323.* After the Defense had submitted the Motion, the district court provided a case which heavily favored the State and was not binding on the district court. The district court later relied on this case to allow the testimony of Ms. Wallace. (Tr. Trial at 1315:4-23).

[¶ 17] At trial, the district court excluded all defense witnesses, rendering the Defense incapable of presenting any information to the jury. (Tr. Trial at 1756:8-10; 1530:14-16; 1756:13-18). Judge Anderson should have recused himself from the case, due to bias against Mr. Hunter. The failure to do so resulted in a violation of Mr. Hunter's due process rights.

[¶ 18] ARGUMENT

[¶ 19] *A. The District Court Erred in Finding that Mr. Hunter Received Miranda Warnings.*

Burden of Proof

[¶ 20] The Supreme Court of the United States made its ruling in *Miranda v. Arizona* to ensure that every defendant is aware of the rights afforded to him by the Constitution of the United States. Any confession obtained by police coercion or compulsion while a defendant is in custody, must be excluded, despite the nature of the compulsion: "It is not admissible to do a great right by doing a little wrong." *Miranda*, 384 U.S. 436, 447; 467 (1966). (emphasis added). It is undisputed that Mr. Hunter was in custody at the time of his interrogation. (Tr. Hr'g. at 121:9).

[¶ 21] It is through this principle that the Court established the *Miranda* warnings, which include statements informing a defendant of his Fifth Amendment rights against self-incrimination and his Sixth-Amendment rights to counsel. *Miranda*, 384 U.S. Along with the requirement that these warnings be implemented at the start of every custodial interrogation, the Court specified that the issuance of proper *Miranda* warnings must never be presumed: "Unless and until such warnings and waiver are demonstrated by the prosecution, no evidence obtained as a result of interrogation can be used against [the

defendant].” *Id*. at 479. The North Dakota Supreme Court also recognizes the prosecution’s burden in regard to *Miranda* warnings. *State v. Newnam*, 409 N.W.2d 79, 84 (1987).

[¶ 22] When addressing a silent record, the Court in *Miranda v. Arizona* stated:

> In dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given. Nor can a knowing and intelligent waiver of rights be assumed on a silent record.

Miranda, 384 U.S. at 498. The Court noted that for Westover, one of the three defendants addressed in *Miranda v. Arizona*, there was nothing in the record to indicate that he was ever given any warning pertaining to his rights. *Id*. at 495. An investigative agent testified that he told Westover that he did not have to make a statement, that any statement he made could be used against him, and that he had the right to see an attorney. *Id*. Westover’s conviction was reversed, as the record was silent to constitutional warnings, as well as silent on any valid waiver of those rights. *Id*. The mere testimony of the officer at trial, that he had administered warnings, was insufficient. *Id*.

[¶ 23] In *Haynes v. Washington*, the Defendant provided a written and signed confession, but his conviction was overturned. *Haynes v. State of Wash.*, 373 U.S. 503, 503 (1963). The Court, although receiving the written confession, relied on the significant fact that there was “no indication in the record that prior to signing the written confession, or even thereafter, Haynes was advised by authorities of his right to remain silent, warned that his answers might be used against him, or told of his rights respecting consultation with an attorney.” *Id*. at 510-11.

[¶ 24] Prior to the Motion Hearing held on April 26, 2017, there was no indication in the record that Mr. Hunter had been afforded proper *Miranda* warnings at any time prior

to his custodial interrogation on June 23, 2015. At the Motion Hearing, Detective Nick Kjonaas testified that he, although not having included it in his standard report, issued *Miranda* warnings to Ashley Hunter at the scene of his arrest, while Mr. Hunter was seated in Officer Wes Libner's squad car. (Tr. Hr'g. at 41:10-19).

[¶ 25] Detective Kjonaas's testimony that he simply closed the squad car door after issuing *Miranda* warnings to Mr. Hunter, and did not communicate any further, is in direct contrast to the Affidavit signed on July 1, 2015 by his partner Detective Matthew Ysteboe. (Tr. Hr'g. at 41:23-25); *Doc ID #320.* In his affidavit, Detective Ysteboe states that Mr. Hunter was "given his *Miranda* warning *and he agreed to speak with your affiant and Detective Kjonaas*." *Id.* (emphasis added). At the Motion Hearing, Detective Ysteboe indicated that he was not on the scene himself and did not issue *Miranda* warnings to Mr. Hunter. *Doc ID# 308* at 87:17-18. When asked by the district court to detail his recitation of warnings to Mr. Hunter, Detective Kjonaas insisted that he opened the door, stated the warnings from memory, and closed the door with no response from Mr. Hunter and no further communication. *Id* at 70:10-12. He specifically did not ask Mr. Hunter if he understood his rights, and did not inform him of the reason for his arrest. *Id* at 72:23-73:4.

[¶ 26] It has been clearly established that the mere testimony of one officer, claiming to have provided constitutional warnings to a defendant, is insufficient to meet the burden that rests on the prosecution. *Miranda*, 384 U.S. at 495; *Haynes*, 373 U.S. at 510-11. If Detective Kjonaas had recorded his issuance of *Miranda* warnings in his report, if he had ensured that the squad car camera was on, if he had issued another set of warnings in the interrogation room on camera, or even simply had a reliable on-scene witness to his alleged delivery of Mr. Hunter's *Miranda* warnings, the evidence may have been sufficient.

Not only is Detective Kjonaas's testimony at the Motion Hearing the only indication of alleged *Miranda* warnings, it is unsupported and in direct contrast to evidence provided by law enforcement regarding the events surrounding Mr. Hunter's arrest.

[¶ 27] It is undisputed that the time of Ashley Hunter's arrest was 6:34 a.m. on the morning of June 23, 2015. (Tr. Hr'g. at 56:13). According to the Fargo Police Department Crime Scene Entry Roster for the location of the fire, 1122 12th Street North in Fargo, ND, Detective Kjonaas was signed in as the lead investigator on the scene starting at 1:15 a.m., and was still signed in at that scene at the time he alleges to have been present on the scene at 1119 University Drive North issuing *Miranda* warnings to Mr. Hunter. *Doc ID #320.* His name is absent on the Crime Scene Entry Roster for the location of Mr. Hunter's arrest at 1119 University Drive North. *Doc ID# 321*. Detective Kjonaas simply cannot be in two places at once.

[¶ 28] When this issue was raised at the Motion Hearing, Detective Kjonaas stated that he did not ever enter the house at that address, and that is the likely reason that his name is not on the roster. (Tr. Hr'g. at 68:4-6). However, the roster from the location of the arrest marks the presence of multiple officers that were at the location, but never entered the crime scene; Detective Kjonaas is absent among this group, as well. *Doc ID# 321*. When confronted with this discrepancy, the State asked Detective Kjonaas whether or not he considered the squad car that Mr. Hunter was in, and the sidewalk he was allegedly standing on when issuing *Miranda* warnings, to be part of the crime scene. (Tr. Hr'g. at 63:5-18). He indicated that he did not consider that area to be part of the crime scene and that would rectify the absence of his name on the crime scene roster. *Id*.

[¶ 29] However, earlier in his testimony, Detective Kjonaas indicates that in order to know what was specifically identified as the crime scene, you would have to "ask the securing officer." (Tr. Hr'g. at 54:18-19). The prosecution alleges that Detective Kjonaas's understanding that the house was the official crime scene is why he did not "go around looking for a crime scene roster." *Id* at 63:19-20. This seems to be an attempt to indicate that, had Detective Kjonaas considered the sidewalk and the squad car holding Mr. Hunter to be "on scene," he would have found the crime scene roster and signed in. *Id*. However, the rosters are completed by the Securing Officer, as Detective Kjonaas noted in his testimony, and for the location of the arrest, this was Officer Wes Libner. *Doc ID# 321.*

[¶ 30] It is blatant from the log, completed for this crime scene, that the securing officer considered the entire location, including the squad vehicles, the sidewalk, and the yard to be the official scene to log officers' entrances and exits. *Doc ID# 321.* Officer Libner himself is marked on scene the very second he arrives in his squad car, which is the car that Mr. Hunter was later placed in subsequent to his arrest. *Id*; (Tr. Hr'g. at 23:22-23).

[¶ 31] Additionally, all of the subsequent arriving officers were "on scene" at the time they arrive in their vehicles. *Id*. If the house itself had been the only area considered "on scene," many of the officers on the roster would not be listed, and many of the times listed would be significantly altered. *Id*. Specifically, if the house was the only area considered "on scene," the arrest itself would not be included in the time on the roster; it is included. *Id*. Additionally, the squad car footage begins at 6:53 a.m., and Mr. Hunter is placed under arrest at 6:34 a.m. Mr. Hunter was not in the squad car for the majority of this nineteen minute gap. At 6:34 a.m. Officer Libner arrives, Officer Durr and Libner draw their guns, command Mr. Hunter to the ground and cuff him. *Doc ID #322.* Officer Libner

then has a conversation with Mr. Hunter in which they discuss Mr. Hunter's contention that he was "being drugged all night." *Id*. Then, officers conduct a full pat down search of Mr. Hunter, which requires them to empty all of his pockets of so many items that "they were falling out" of his clothing. *Id*. In order to keep all of these items together, Officer Libner had to bag the items and carry them to his squad car. *Id*. It was not until that moment that Mr. Hunter was escorted to the squad vehicle. *Id*. This pat down and subsequent collection of evidence was all conducted in the short gap between the noted arrival of Officer Durr and Officer Libner at 6:34 a.m. and the start of the squad car video at 6:53 a.m. Former Officer Libner testified at trial that the squad camera video started immediately after seating Mr. Hunter in the back of the squad vehicle, explaining why he is seated and finishing a conversation at the start of the video.

[¶ 32] The law is clear that the burden of proving proper administration of *Miranda* warnings is on the prosecution, as well as the burden of proving any subsequent knowing and intelligent waiver of Fifth and Sixth Amendment rights. *Miranda*, 384 U.S. at 479; *Newnam*, 409 N.W.2d at 84. The State did not present any evidence, other than the testimony of Detective Kjonaas, that Mr. Hunter ever received *Miranda* warnings subsequent to his arrest or prior to his custodial interrogation on June 23, 2015. According to the Supreme Court of the United States, the Court *shall not presume warnings exist on a record that is silent to their issuance*. *Miranda*, 384 U.S. at 498 (emphasis added).

[¶ 33] The district court did just that, and presumed the existence of *Miranda* warnings in the immediate case. Testimony from Wes Libner at trial confirmed that Detective Kjonaas was never on the scene and therefore could not have issued the warnings to Mr. Hunter. (Tr. Trial at 827:8-21; 832:2-16). Once this massive law enforcement

mistake was glaringly clear, the trial court reasoned that there may have been a few minutes in which Wes Libner was potentially away from his squad car, and that deems it possible that Mr. Hunter received *Miranda* warnings. (Tr. Trial at 852:6-7) (emphasis added).

Miranda Warning Requirements

[¶ 34] The district court only held that it was possible that Mr. Hunter received *Miranda* warnings. (Tr. Trial at 852:6-7). In addition to the fact that the burden requires far more than a finding of possibility, the statements should have been suppressed on the grounds that: 1) any *Miranda* warnings allegedly issued were not proper and did not meet the effective safeguard requirements established in *Miranda v. Arizona*, and 2) the prosecution cannot prove that Mr. Hunter made a knowing and voluntary waiver of his Fifth and Sixth Amendment rights. *Miranda*, 384 U.S.

[¶ 35] The purpose of the requirements laid out in *Miranda v. Arizona* was to establish that "unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." *Miranda*, 384 U.S. at 458. This is primarily due to the coercive and compulsive atmosphere of incommunicado custodial interrogation settings, such as the setting for Mr. Hunter's custodial interrogation on June 23, 2015. *Id*; (Tr. Trial at 44:1-21). *Miranda v. Arizona* was a decision resulting from the appeals of three defendants: "In each of the cases, the defendant was thrust into an unfamiliar atmosphere." *Miranda*, 384 U.S. at 457. The Court established that the proper safeguards are necessary in the setting of a custodial interrogation due to the "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he

would not otherwise do so freely." *Id.* at 467; *Bram v. United States*, 168 U.S. 532, 549 (1897).

[¶ 36] Throughout the opinion issued for *Miranda v. Arizona*, the Court reiterates many times that the most effective way of combating the overbearing atmosphere of custodial interrogation, is to require administration of warnings at the outset of the interrogation itself. *Miranda*, 384 U.S. at 445, 457, 465, 467, 469, 477, 483, 485, and 496. (emphasis added). The issuance of *Miranda* warnings at the outset of the custodial interrogation must be demonstrated, not inferred or presumed, by the State: "The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at 444. (emphasis added).

[¶ 37] The three defendants relevant to *Miranda v. Arizona* were each interrogated in settings similar to Mr. Hunter, and "in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice." *Miranda*, 384 U.S. at 457. (emphasis added). In *each and every one* of those cases, the defendant even signed a paragraph stating that the confession was made voluntarily. *Id.* at 456; *Id.* at 492. In each of these cases, the Supreme Court determined that the lack of warnings at the outset of the interview was sufficient enough to outweigh the written statements of voluntariness. *Id.* (emphasis added). Similarly, in *Escobedo v. Illinois*, the Supreme Court of the United States overturned the defendant's conviction because police had not advised [him] of his constitutional privilege

to remain silent at the outset of the interrogation. *Escobedo v. Illinois*, 378 U.S. 478, 499 (1964). (emphasis added).

[¶ 38] Even if, *arguendo*, Detective Kjonaas did in fact issue *Miranda* warnings to Mr. Hunter while he was being detained in the squad car, he did not issue any *Miranda* warnings at the outset of the custodial interrogation, and contends that "nothing is missing from the video" of the custodial interrogation. (Tr. Hr'g. at 57:23-25; 49:7-8). (emphasis added). In his testimony at the Motion Hearing, Detective Kjonaas notes that the plan was always to interview Mr. Hunter at the police department. *Id*. at 42:3-4. Yet, with the thirty years of law enforcement experience between Detective Kjonaas and Detective Ysteboe, and an agency policy to do so, it was not ensured that something as fundamental as *Miranda* warnings were conducted at the outset of the recorded interview. *Id.* at 33:12-14; 74:8-10.

[¶ 39] This oversight is serious, given the clarity provided by the Supreme Court of the United States that "at the outset, if a person in custody is to be subjected to interrogation, he must first be informed in clear and unequivocal terms that he has the right to remain silent […] Such a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere." *Miranda*, 384 U.S. at 468. (emphasis added). It is redundant in the opinion of the Court in *Miranda v. Arizona* that "A warning at the time of the interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time." *Id*. at 469. (emphasis added).

[¶ 40] The Supreme Court in *Miranda v. Arizona* also explicitly requires that the Defendant must be afforded an "opportunity to exercise these rights throughout the interrogation." *Miranda*, 384 U.S. at 479. The continuous and ongoing ability to exercise

constitutional rights is as pertinent to the Supreme Court as the requirement that the warnings be afforded at the outset of the interrogation: Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end. A mere warning given by the interrogators is not alone sufficient to accomplish that end. *Id.* at 469. Not only was Mr. Hunter not afforded *Miranda* warnings at the time of his interrogation, he certainly was not informed in any way that he had the right to invoke his Fifth and Sixth Amendment rights at any time.

[¶ 41] In *State v. Newnam*, the Supreme Court of North Dakota affirmed the conviction of a defendant who asserted that his confession was involuntary. However, this defendant was given *Miranda* rights ten times throughout the course of the law enforcement investigation. *Newnam*, 409 N.W.2d at 81. Nine of those times he signed a written acknowledgement that he understood his rights, and a written waiver of those rights. *Id*. Once he even reviewed, corrected, and signed a written transcript of his statement to law enforcement. *Id*. Investigators in this case successfully issued *Miranda* warnings at the outset of each interrogation, as well as ensured the defendant had an ongoing understanding of his right to invoke his constitutional rights at any time. *Id*. Additionally, officers in this case went beyond the requirements and issued *Miranda* warnings even when the defendant was not in custody and was explicitly informed that he was "free to leave at any time." *Id*.

[¶ 42] Similarly, in *State v. Helmenstein*, the Supreme Court of North Dakota affirmed the conviction of a defendant asserting that his statements to law enforcement

violated his constitutional rights. However, the defendant in this case was issued *Miranda* warnings at the outset of his interview, which was not a custodial interrogation, but rather an interview in his home in the presence of his family. *State v. Helmenstein*, 2000 ND 223, ¶9, 620 N.W.2d 581, 584. Although *Miranda* requirements did not apply, as he was not in custody, the defendant was afforded "ample opportunity to exercise his constitutional right to refuse to answer questions of police, and to seek the advice of legal counsel if he so desired." *Id*. at 21.

[¶ 43] In the immediate case, the State did not prove that Mr. Hunter ever received *Miranda* warnings. However, even if this Court were to disagree, the requirements under *Miranda v. Arizona* were still not sufficiently met, as Mr. Hunter was afforded no warning at the outset of his custodial interrogation, nor any assurance of his continuous and ongoing right to invoke his constitutional rights at any time throughout the interrogation.

Hearsay is Not Corroborating Evidence

[¶ 44] The district court asserted that Detective Kjonaas's testimony was corroborated by Detective Ysteboe's testimony; this is incorrect. *Doc ID # 329* at ¶19. At the Motion Hearing, Detective Ysteboe indicated that he was not on the scene himself and therefore did not witness or observe an issuance of *Miranda* warnings by Detective Kjonaas. (Tr. Hr'g. at 87:17-18). He also stated that he did not himself issue *Miranda* warnings to Mr. Hunter at any time. *Id*.

[¶ 45] Detective Ysteboe's testimony was that the only way he "knew" Mr. Hunter had received *Miranda* warnings, was that Detective Kjonaas told him he had issued them. *Id*. Not only does this fall squarely into the definition of hearsay, it is inconsistent. In his affidavit, Detective Ysteboe states that Mr. Hunter was "given his *Miranda* warning

and he agreed to speak with your affiant and Detective Kjonaas." *Id.* (emphasis added). However, when Detective Kjonaas was asked to detail his recitation of the warnings to the district court, he insisted that he opened the door, stated the warnings from memory, and closed the door with no response from Mr. Hunter and no further communication. *Id*. at 70:10-12. (emphasis added). Given that Detective Kjonaas testified *verbatim* that Mr. Hunter did not respond at all after receiving warnings, any statement included in affidavits or charging summaries by Detective Ysteboe, contending that Mr. Hunter agreed to be interviewed, can only be contributed to the inclusion of standard language as opposed to an actual representation of what occurred at a scene he was not present at. (Tr. Hr'g. at 87:17-18). Characterizing this hearsay as corroboration would set a precedent implying that if Mr. Hunter had taken the stand at trial and said he did not commit the crimes charged against him, and then another person were to take the stand and stated that "Mr. Hunter told me he did not commit the crimes charged against him," that would be considered corroboration and the contention that Mr. Hunter did not commit the crimes charged against him must then be considered factual.

[¶ 46] In *Miranda v. Arizona*, the Court addressed a case in which the only evidence of warnings being issued was the testimony of an investigative agent. *Miranda*, 384 U.S. at 495. The United States Supreme Court overturned this defendant's conviction as there was no evidence to corroborate the word of this officer, and his testimony that he did was insufficient alone to meet the ***State's burden***. *Id*. (emphasis added). The same occurred in *Haynes v. Washington*, even with the existence of a written and signed confession by the Defendant. *Haynes*, 373 U.S. at 510-11.

[¶ 47] The North Dakota Supreme Court has explicitly forbidden this. *See State v. Miller*, 510 N.W.2d 638, 644 (1994); and *State v. Roth*, 2004 ND 23, ¶13, 674 N.W.2d 495, 500. In order for verbal testimony to be considered corroboration of another verbal testimony, it must include an element of visual confirmation or observance. *Id*. If Detective Ysteboe had actually <u>seen</u> Detective Kjonaas approach Officer Libner's car at the alleged time, open the door to speak with Mr. Hunter, and then close the door, his testimony that Detective Kjonaas issued the *Miranda* warnings could <u>then, and only then</u> be considered actual corroboration. *Id*. (emphasis added). Detective Ysteboe explicitly states that he was not on the scene and that the only indication he had that Mr. Hunter received *Miranda* was the word of Detective Kjonaas in the crime scene bus. *Doc ID # 329* at ¶19.

[¶ 48] Even with the hearsay testimony of Detective Ysteboe, the unequivocal fact is that the State has only presented the word of one officer and the Supreme Court of the United States says that is not sufficient to meet the <u>***burden that rests on the State***</u>.

[¶ 49] The district court held that the fact that Mr. Hunter contends that he did not receive *Miranda* warnings is irrelevant. (Tr. Trial at 761:23-25). However, because the State did not meet its burden, United States case law prohibits the use of any statements stemming from the custodial interrogation until they have done so, making the issue extremely relevant: "Unless and until such warnings and waiver are demonstrated by the prosecution, <u>*no evidence obtained as a result of interrogation can be used against him*</u>." *Miranda*, 384 U.S. at 479 (emphasis added).

[¶ 50] ***B. The District Court Erred in Finding that Mr. Hunter Gave a Valid Waiver of his Constitutional Rights.***

[¶ 51] Both the issuance of *Miranda* warnings <u>and</u> a knowing and intelligent waiver of those constitutional rights must be proven by the prosecution. *Miranda*, 384 U.S.

at 479. (emphasis added). Both the Supreme Court of the United States and the Supreme Court of North Dakota have held that the test for whether or not a waiver of Fifth or Sixth Amendment rights is voluntary in custodial interrogation, is a totality of the circumstances surrounding the making of the statement. *Miranda*, 384 U.S. at 462; *Newnam*, 409 N.W.2d at 83; *Colorado v. Spring*, 479 U.S. 564, 570 (1987).

[¶ 52] Many factors play into a totality of the circumstances analysis in regard to a waiver, not the least of which is actual knowledge of what exactly is being waived: "The mere fact that [the Defendant] signed a statement which contained a typed-in clause stating that he had 'full-knowledge' of his 'legal rights' does not approach the knowing and intelligent waiver required to relinquish constitutional rights." *Miranda*, 384 U.S. at 492. Without first being afforded sufficient *Miranda* warnings, a valid waiver of those rights is impossible. *Id*.

[¶ 53] Additionally, a Defendant's knowledge of why he is being questioned is a factor to be considered under the totality of the circumstances. In *Colorado v. Spring*, the Supreme Court of the United States determined that the suspect's unawareness of "all the crimes about which he may be questioned" is not sufficient alone to render the interrogation unconstitutional and demand its suppression. *Spring*, 479 U.S. at 566. However, in order to truly consider a waiver of constitutional rights knowing and intelligent, a Defendant's understanding of the charges against him, or reason for suspicion of him, are a factor to be considered in the totality of the circumstances. *Id.* at 570. The Defendant in *Colorado v. Spring* was afforded clear and sufficient *Miranda* warnings, not only on the scene of his arrest after being informed of the charge against him, but also at the outset of his interrogation at the police station. *Colorado*, at 853. He was also informed at that time that

he had the right to stop questioning at any time and subsequently signed a written waiver of his rights. *Id*. at 854. Agents prepared a summary of his interview, which he read, edited, and signed. *Id*. In his case, a lack of definition in what exactly he would be questioned on was not enough to overcome the evidence that he received proper *Miranda* warnings and gave a valid waiver of those rights, when considered under the totality of the circumstances. *Id*. at 856.

[¶ 54] In *State v. Newnam*, this Court upheld the Defendant's conviction. *Newnam,* 409 U.S. at 82. In this case, the Defendant was immediately informed that he was suspected for burglary. *Id.* Similarly, in *State v. Roquette*, this Court upheld the conviction. However, in that case, the Defendant was immediately shown the warrant for his arrest after being issued valid *Miranda* warnings. *State v. Roquette*, 290 N.W.2d 260, 263 (N.D. 1980). Roquette also signed a statement within one hour of his arrest acknowledging that he understood his rights. *Id*. at 264.

[¶ 55] Mr. Hunter was never afforded *Miranda* warnings. Even if the court were to find that he was "read" the words of *Miranda*, there is no evidence that he understood them, nor that he was ever informed of what he was under arrest for or of what he was suspected. *Id*.

[¶ 56] Another factor to consider when determining if a waiver is knowing and intelligent, is an understanding of who is conducting the interrogation: "Warnings serve to make the individual more acutely aware that he is not in the presence of persons acting solely in his interest." *Miranda*, 384 U.S. at 469. One of the Defendants being heard in *Miranda v. Arizona*, was never warned of any of his rights specifically by the detective and

assistant district attorney that conducted the interrogations; this was a major factor in the reversal of his conviction. *Id*. at 494.

[¶ 57] Mr. Hunter was never informed of who the detectives were and what their role was in his questioning. *Doc ID #320.* In the custodial interrogation, Detectives Kjonaas and Ysteboe enter, after roughly thirty minutes of Mr. Hunter sitting in isolation, and begin questioning without any introduction. *Id*. Neither Detective ever informs Mr. Hunter of their status, employer, purpose, or even their name. *Id*. Detective Ysteboe tells Mr. Hunter that he is there for the purposes of helping him. *Id*. It is not until the end of the interrogation, when Mr. Hunter asks, that he is informed that he is speaking with detectives. *Id*. With no valid warning at the outset of the interview and no indication as to the identity of his interrogators, a valid knowing and intelligent waiver from Mr. Hunter was impossible.

[¶ 58] As in any type of agreement, the mental state of the Defendant is a massive factor in the voluntariness of any statement or waiver and must be considered under the totality of the circumstances. *Roquette*, 290 N.W.2d at 254. In *State v. Roquette*, the Supreme Court of North Dakota considered the intoxication of the Defendant to determine whether or not he was sufficiently impaired to warrant the waiver of his constitutional rights invalid. *Id*. at 264. In that case, the Court did not find that the minimal ingestion of marijuana by the Defendant, prior to the interrogation, rendered him significantly impaired. *Id*.

[¶ 59] Mr. Hunter expressed numerous times in the squad vehicle and throughout the entire custodial interrogation that he had ingested copious amounts of methamphetamine within hours of the arrest. (Tr. Trial at 1352:12-20). Multiple times he requests medical attention and was ignored. *Id.* At one point he even admits to Detectives

Kjonaas and Ysteboe that he had ingested an amount of methamphetamine with the intention of overdosing to commit suicide, within 24 hours of the interrogation. *Id.*

[¶ 60] In their testimony at the Motion Hearing, both Detective Ysteboe and Detective Kjonaas indicate that they believed the Defendant to be unaffected by any chemical substance at the time of his interrogation. (Tr. Hr'g. at 80:17-20). Yet Mr. Hunter was sent, by law enforcement, to the Emergency Room subsequent to his interrogation to be medically cleared due to suspected methamphetamine use. *Id*. at 105:12-14. While in this hospital, Mr. Hunter was experiencing severe auditory and visual hallucinations. (Tr. Trial at 1352:12-20). Not only did he require special watch for self-harm and suicide upon release from the hospital, the physician who eventually cleared him for booking at the jail specifically described Mr. Hunter's state as "psychotic." *Doc ID# 299*. Recent methamphetamine use, to the point of intended overdose, combined with a psychosis diagnosis from a physician, surpass the impairment of the Defendant in *State v. Roquette* by a significant amount and should carry great weight in determining whether the totality of the circumstances imply that Mr. Hunter had the capacity to issue any valid waiver of constitutional rights. *Roquette*, 290 N.W.2d at 264.

[¶ 61] While almost any factor may be considered in a totality of the circumstances analysis in regard to voluntary waiver, the Defendant's prior experience with the criminal justice system may not: "No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead." *Miranda*, 384 U.S. at 472. The Court's decision to preclude this type of evidence from the balancing test is based in the knowledge that the interrogation setting can be equally as coercive to any individual: It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations,

whether implied or expressly stated, that the interrogation will continue until a confession is obtained or that silence in the face of accusation is itself damning and will bode ill when presented to a jury. *Id*. at 468. Any evidence of Mr. Hunter's prior interactions with the justice system does not in any way factor into the totality of the circumstances to allow any circumvention of the explicit requirements for both warnings and waivers established by *Miranda v. Arizona*. On this issue, the district court explicitly chose to disregard the ruling of the United States Supreme Court. *Doc ID # 329* at ¶24.

[¶ 62] ***C. The District Court Erred in Allowing the Testimony of Andrea Wallace.***

[¶ 63] This Court has established that violation of physician-patient privilege is a violation of a constitutional right. *State v. Moore*, 52 N.D. 633, 204 N.W. 341 (1924). North Dakota statute requires that a waiver of physician-patient privilege must be voluntary. N.D.R.Ev. 510(a).

[¶ 64] The district court referred Mr. Hunter and the State to *United States of America v. Bishop*, a Sixth Circuit decision originating in district court in Michigan. *United States v. Bishop*, 149 F.3d 1185 (6th Cir. 1998). It should be noted that this authority is not binding on the Cass County District Court nor the State of North Dakota. This is relevant primarily due to vast differences in statutory law addressing waiver of physician-patient privilege.

[¶ 65] In *United States v. Bishop*, the court held that statements defendant made to his nurse and psychiatrist were admissible, and that he had waived his privilege to this information when he gave an earlier statement of the same information to law enforcement agents. *United States v. Bishop*, 149 F.3d 1185 (6th Cir. 1998). Not only is this decision

not of binding value in Cass County or North Dakota, it is blatantly and fundamentally distinguishable from Mr. Hunter's case.

[¶ 66] Bishop was questioned by law enforcement while in his own residence at an adult home; he was not in police custody. *Id*. Mr. Hunter was held in custodial interrogation for just under four hours. *Id*. Before speaking with Bishop, the law enforcement agents obtained permission from Bishop's psychiatrist, who established that Bishop would be able to understand and coherently participate in the interview. *Id*. The doctor described Bishop's mood that day as "lucid and calm." *Id*. It is apparent throughout Mr. Hunter's custodial interrogation that he is neither lucid nor calm.

[¶ 67] Like Mr. Hunter, Bishop began his statement with a denial of guilt and later confessed to a murder. *Id*. However, Bishop was taking part in a voluntary interview in his own residence and upon completion of the statement he agreed to make a written statement of his confession. *Id*. He eventually gave additional details and signed a subsequent statement of his confession. *Id.* Mr. Hunter's story about who committed the murders is entirely incoherent. He has never signed a written confession, and has maintained his innocence since June 23, 2015.

[¶ 68] After signing the second written confession after a voluntary statement, Bishop signed a written waiver of his constitutional rights. *Id*. It was after this written waiver that Bishop made incriminating statements to his psychiatric nurse. *Id*.

[¶ 69] The timing of events in each case is similar, Michigan statute explicitly allows the disclosure of privileged information if the defendant raises his own medical condition as an element to his defense. M.C.L.A. 330.1750(2)(a). Bishop did not simply raise his psychological and medical conditions in order to combat the voluntariness of his

confession, he also wished to attack the element of intent in his murder charge and the fact that the jury had only been instructed on 1st Degree Murder and not on Manslaughter due to this dispute on the level of intent. *Id*. That court was able to find that his statement was voluntary and could not be considered coerced pursuant to any mental impairment. *Id*. This burden was easily met by the fact that the defendant's own psychiatric doctor cleared him and confirmed his competence and coherence prior to Bishop's voluntary, non-custodial interview in his own residence. *Id*.

[¶ 70] Mr. Hunter has never attempted to raise his mental condition or any other medical condition as an element of his defense. Furthermore, even if he had, Mr. Hunter is on trial in North Dakota and Rule 510 of the North Dakota Rules of Evidence is solidly distinguishable than the Michigan statute that is relevant in *United States v. Bishop*. N.D.R.Ev. 510. North Dakota law clearly references disclosures made subsequent to the interaction with a medical professional, thus attaching the privilege to the relationship as opposed to the mere content of the confidential communication. *Id.*

[¶ 71] N.D.R.Ev. 510(b) also states explicitly that a waiver of privilege cannot be made via disclosure or consent to disclosure unless the patient has first had an opportunity to claim the privilege. N.D.R.Ev. 510. Mr. Hunter could not have had this opportunity, as the privilege did not yet exist. Furthermore, Andrea Wallace's disclosure of Mr. Hunter's medical communication was made without providing Mr. Hunter an opportunity to claim the privilege, as her disclosure was made without his knowledge.

[¶ 72] Despite the numerous reasons Mr. Hunter could not have provide a voluntary waiver of his privilege, and the fact that the privilege cannot be waived prior to its establishment, the district court chose to rely on the non-binding authority it chose to

provide after research, and utilize that alone to allow the testimony of Nurse Andrea Wallace. (Tr. Trial at 1315:4-23).

[¶ 73] ***D. Judge Anderson's Failure to Recuse Himself Violated Mr. Hunter's Fourteenth Amendment Due Process Rights.***

[¶ 74] A judge must avoid impropriety and any appearance of impropriety at all times. *Farm Credit Bank v. Brakke*, 512 N.W.2d 718, 720 (N.D. 1994). The test for any appearance of impropriety is reasonableness, adverse rulings alone are insufficient. *Id.* At 721. When impropriety is found, recusal is required. *Id.* At 720. On April 7, 2017, the Defense filed a Demand for Change of Judge, which was denied. *Doc ID #253.* Mr. Hunter believed that Judge Anderson's preconceived notions about him would affect the trial. *Id*. This bias on the part of Judge Anderson, not only affected the rulings throughout the trial, but barred Mr. Hunter's team entire ability to present a defense. (Tr. Trial at 1756:13-17).

[¶ 75] As outlined above, the crux of the case against Mr. Hunter relied on a statement he gave to law enforcement. The Defense intended to call an expert on the subject of false confessions, not to specifically prove that this confession was indeed false, but to provide the jury with helpful information about a complicated and often misunderstood field, in order to aid them in their decision. Judge Anderson excluded the witness, and did so based on his own personal beliefs about the field: "I question whether there's anything—a science of false confessions in the first place. Only rarely can a confession be determined to be false." (Tr. Trial at 1898:3-6; 1902:13). Furthermore, he expressed the belief that "so-called false confessions" do not happen at all. *Id.* at 1898:18-23. He also went so far as to decide for himself that the confession was not false, as Mr. Hunter did not strike him as "the kind of person who can be easily prodded into admitting anything." *Id.* at 1900.19-21.

[¶ 76] When allowing the manipulated photograph of the random toolkit into evidence, Judge Anderson reasoned that due to the fact that there may be an inference that the hammer came from the toolbox, the photograph was relevant. (Tr. Trial at 1839:3-9). This logic is the precise reason the photograph should <u>not</u> have been admitted, as there is only a mere inference of connectivity to the actual murder weapon.

[¶ 77] When deciding to allow the testimony of Nurse Wallace, it was clear that the communication was during the course of treatment and thus falls under physician-patient privilege, which would mandate exclusion of her testimony. Judge Anderson, knowing this, sought out to find a case that would provide any justification to rule against Mr. Hunter. He had his clerk provide each party with a copy of a non-binding case, with entirely different laws, and then utilized that case only to allow the testimony. (Tr. Trial at 1315:4-23). His holding went against all North Dakota laws on physician-patient privilege: "The Statement Mr. Hunter made to law enforcement a valid waiver, and at that point anything he says along the same lines to medical personnel after that statement has lost its character as being a confidential communication." *Id.* at 1316:3-7.

[¶ 78] The largest point of contention with Judge Anderson was the issue of *Miranda* Warnings. He continued to berate the Defense for discussing the issue at trial instead of at the earlier suppression hearing. (Tr. Trial at 760:22-23.) However, the Defense only became aware of the issues surrounding *Miranda* Warnings through the testimony presented at the suppression hearing. *Id.* at 866:8-17.

[¶ 79] From Judge Anderson's statements regarding *Miranda* Warnings, it is clear that he does not comprehend the content of the warnings, and the significance of whether or not Mr. Hunter received them: "You're saying on behalf of Mr. Hunter that he wasn't

given a *Miranda* Warning so he couldn't have relied on it anyway. Relying on a Miranda warning may have some relevance to whether it's voluntary or not, but how is it an issue in this case at this point?" (Tr. Trial at 760:11-5). This statement by the district court is nonsensical; relying on a *Miranda* Warning would result in remaining silent, or calling an attorney, neither of which occurred in this case. Furthermore, whether or not the warnings were given is perhaps the <u>largest</u> issue in this case, as the lack of them would mandate exclusion of the entire statement to law enforcement. Judge Anderson seemed to not understand this: "Unless you show me something that says, you know, whether *Miranda* Warning was given or not is somehow relevant, you're not going to be allowed to go into that." *Id.* at 761:14-17; 761:23-25.

[¶ 80] While arguing about the significance of this issue, Judge Anderson explained that he rested his decision on this massive issue solely on his personal reading of the detective's nonverbal signals: "When Detective Kjonaas testified, I'm looking at him and I asked him, Tell me exactly what happened, and I wanted him to look at me so that I could size him up. I didn't see him fidgeting. I didn't see him looking away. I didn't see him squirming in his seat. I didn't see him sweating. My impression was that he was telling the truth." (Tr. Trial at 851:21-852:3).

[¶ 81] It was clear throughout the trial that Judge Anderson, when facing a decision that could favor Mr. Hunter significantly, would go out of his way with personal research or expounding upon his personal beliefs, to ensure there was a justification to rule against the Defense. While the jury is the ultimate trier of fact, Judge Anderson exercised massive control over the Defense's ability to present anything to the jury to counter the allegations against Mr. Hunter, thus depriving him of his due process rights.

[¶ 82] CONCLUSION

[¶ 83] For all of the foregoing reasons, it is unequivocal that Mr. Hunter did not receive a fair trial, and therefore his due process rights pursuant to the Fourteenth Amendment were seriously violated. Therefore, Mr. Hunter's conviction should be vacated, or in the alternative, should be reversed and remanded to the district court for a new trial.

Respectfully submitted this Tuesday, January 30, 2018.

/s/ Anna K. Dearth

Anna K. Dearth
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IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Appellee,	)	**Supreme Court No.: 20170345**
	)	
vs.	)	**District Court No.: 09-2015-CR-02085**
	)	
	)	
Ashley Kenneth Hunter,	)	
	)	
Appellant.	)	

CERTIFICATE OF SERVICE

I, Samuel A. Gereszek, attorney for the Petitioner / Appellant, and officer of the court, hereby certify that I served a true and correct copy of the following:

1. *Amended Appellant's Brief (.pdf and Word formats);*

On the following:

Clerk of the Supreme Court **North Dakota Supreme Court**	**Tristan Van de Streek** **Attorney for Respondent – Appellee**	Ashley K. Hunter #032619 P.O. Box 5521 Bismarck, ND 58506
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All done by Electronic Filing pursuant to N.D. Sup. Ct. Admin. Order 14.

Dated this Monday, January 29, 2018.

HAMMARBACK & SCHEVING, P.L.C.

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IN THE SUPREME COURT

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State of North Dakota,	)	
	)	
Appellee,	)	**Supreme Court No.: 20170345**
	)	
vs.	)	**District Court No.: 09-2015-CR-02085**
	)	
	)	
Ashley Kenneth Hunter,	)	
	)	
Appellant.	)	

CERTIFICATE OF SERVICE

I, Samuel A. Gereszek, attorney for the Petitioner / Appellant, and officer of the court, hereby certify that I served a true and correct copy of the following:

1. *Appellant's Brief (.pdf and Word formats);*
2. *Appellant's Appendix*

On the following:

Clerk of the Supreme Court **North Dakota Supreme Court**	**Tristan Van de Streek** **Attorney for Respondent – Appellee**	Ashley K. Hunter #032619 P.O. Box 5521 Bismarck, ND 58506
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Dated this Tuesday, January 23, 2018.

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