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[¶ 3] STATEMENT OF THE ISSUES

[¶ 4] Whether the district court erred by violating the North Dakota Rules of Court timelines for motion submissions, responses, and oral argument requests?

[¶ 5] STATEMENT OF THE CASE

[¶ 6] Craig appeals from the district court's Amended Order Denying Motion to Withdraw Guilty Plea, dated September 26, 2018. A.A. at 36. In 2007 Craig plead guilty to Murder and was sentenced to life with the possibility of parole in March 2007. A.A. at 7. Over ten (10) years later (November 27, 2017), Craig received a letter from the Burleigh County Clerk of District Court indicating that his sentence has been impacted by the most recent legislative assembly. A.A. at 9.

[¶ 7] In December 2017, Craig sought court appointed counsel to attack this retroactive impact on his sentence and was approved for counsel. A.A. at 4, Index # 74. As a result, on August 17, 2018 Craig's counsel filed a N.D.R.Ct. 3.2 Notice of Motion, Motion, and Brief in Support of Motion to Withdraw a Guilty Plea, and served such on the Prosecution requesting oral arguments. A.A. at 10-17. On September 14, 2018, after twenty-nine (29) days of no response, no filing, no activity, the district court drafted a letter to the State inquiring whether a response was forthcoming. A.A. at 20.

[¶ 8] Subsequently, on October 4, 2018, another twenty-one (21) days after the district court's letter to the State, the calendar control clerk set a hearing on Craig's motion for October 16, 2018. A.A. at 21. The very next day, October 5, 2018, fifty (50) days after the filing of the motion, the State filed a motion for an extension of response time. A.A. at 22. On October 9, 2018, now fifty-four (54) days after the original filing of Craig's motion, the district court granted the State's motion for an extension of response time. A.A. at 24.

Then, on October 12, 2018, fifty-seven (57) days after the original motion filing date, the State responded. A.A. at 25.

[¶ 9] On October 24, 2018, thirteen (13) days after the State’s response, the district court issued its first of two (2) separate orders denying the motion. A.A. at 29. Two (2) days later, on October 26, 2018, the district court issued an Amended order denying Craig’s motion, with only the last sentence of the ¶ 1 being changed from “[t]he State did not respond...” to “[t]he State resisted...”. A.A. at 33.

[¶ 10] Craig then filed a timely notice of appeal on October 30, 2018, pursuant to N.D.R.App.P. 4. A.A. at 37. The District Court had jurisdiction under N.D.C.C. § 27-05-06 and N.D. Const. art. VI, § 8. The Supreme Court has jurisdiction under N.D.C.C. § 27-02-04 and N.D. Const. art. VI, § 2.

[¶ 11] STATEMENT OF THE FACTS

[¶ 12] For the purposes of this appeal, the facts contained within the underlying brief, response, and orders are irrelevant, as this appeal is one of the district court’s failure to follow the rules of court and the timelines those rules have established. Despite the district court issuing an order on the merits of the briefs set out by the parties, such an order must be deemed moot as the district court did not have authority at that time as one of the parties had requested oral arguments, which was not granted. See N.D.R.Ct. 3.2(a)(3). Therefore, for the purposes of this appeal, Craig shall confine the relevant facts to those contained *ibid.* ¶¶ 6-10, in the Statement of The Case.

[¶ 13] ARGUMENT

[¶ 14] The district court erred by providing an excessive amount of time for the State to respond to Craig’s motion, contrary to the timeline set forth in N.D.R.Ct. 3.2. The

district court erred yet again by denying Craig his oral arguments on his motion, which he validly requested, and pursuant to N.D.R.Ct. 3.2, "...any party who has timely served and filed a brief requests oral argument, the request ***must*** be granted." (emphasis added). Furthermore, the appearance of impropriety has been irreparably fractured due to the district court's action to accommodate the State to the detriment of the Defendant. Thereby, upon remand, a new district judge should be designated.

[¶ 15] As this appeal comes solely from the basis of application of rules and procedure, this appeal is one of a question of law, with no question of facts to be presented. Therefore, this Court reviews the district court's decision *de novo*, since "[q]uestions of law are fully reviewable on appeal...." Greywind v. State, 2004 ND 213, ¶ 5, 689 N.W.2d 390 (citing Peltier v. State, 2003 ND 27, ¶ 6, 657 N.W.2d 238).

[¶ 16] ***The District Court Failed To Hold The State To The Timeline Set Forth In N.D.R.Ct. 3.2.***

[¶ 17] N.D.R.Ct. 3.2(a)(2) provides a very specific timeline for a response brief to a motion filed, and then a reply brief to the response. After a motion is filed pursuant to N.D.R.Ct. 3.2(a)(2), the non-moving party has "14 days after service of a brief within which to serve and file an answer brief..." Then, the "moving party may serve and file a reply brief within seven days after service of the answer brief." *Id.* After that point in time, the matter is considered submitted to the court, unless either party has requested oral arguments, and if oral arguments have been requested, that "request ***must*** be granted." N.D.R.Ct. 3.2(a)(3).

[¶ 18] In the present case at bar, Craig filed his notice of motion, pursuant to N.D.R.Ct. 3.2, motion and brief in support on August 17, 2018. A.A. 10-17. At that point in time, the State had 14 days to respond. However, 29 days after the filing by Craig, on

September 14, 2018, the district court drafted a letter to the State prompting the State for a response to Craig's motion, despite being 15 days past their deadline. A.A. 20. For the next 21 days, the court nor the State take any action whatsoever, until on October 4, 2018, the calendar control clerk set the motion on for oral arguments, pursuant to Craig's request. A.A. 21. The following day, the State motioned for an extension of response time, 36 days past their deadline. A.A. 22. Four days later, the district court granted the State's motion for an extension. A.A. 24. Finally, on October 12, 2018 (57 days after the initial motion was filed and 43 days past their deadline) the State its response. A.A. 25. Subsequent to the State's late response, for whatever reason the motion hearing was cancelled and the district court issued its two order on October 24 and 26, 2018. A.A. 29 & 33.

[¶ 19] The district court here exceeded its authority by ignoring N.D.R.Ct. 3.2's timeline and went out of its way to accommodate the State by first drafting them letter inquiring about a response, after the deadline had past. Then the district court grants an extension to the response time for the State 36 days after the deadline had already come and gone.

[¶ 20] This motion should have been submitted to the Court for an opinion on August 31, 2018, any and all filings past that date should be excluded as untimely.

[¶ 21] **The District Court Failed To Comply With The Oral Argument Provision Of N.D.R.Ct. 3.2(A)(3).**

[¶ 22] In Craig's August notice of motion to withdraw guilty plea, he clearly requested oral arguments on his motion. A.A. 10 (Note: the last sentence in ¶ 1 is bolded and requesting oral arguments). Once a request for oral arguments is made by either party, timely, the court **must** grant that request. N.D.R.Ct. 3.2(a)(3). Oral arguments are not discretionary (i.e. **shall** or **may**), the rule specifically uses the command word of **must**.

¶ 23] For that reason alone, regardless of the timeline argument outline *ibid.* ¶¶ 16-20, this case must be remanded for oral arguments. The district court failed to have authority to issue an opinion/decision without holding the validly requested oral arguments. In fact, the district court went on its own accord and cancelled the motion hearing set by the calendar control clerk, despite the valid request for oral arguments. *See* A.A. 4, between Index #'s 94 – 95, the “CANCELED Per Judge” entry.

¶ 24] **Upon Remand a Different Judge Should be Designated**

¶ 25] “[T]he appearance of impropriety is so important to our judicial system that, in the interest of justice, reversal of a judgment may be required even without any intentional bias or impropriety.” *Sargent County Bank v. Wentworth*, 500 N.W.2d 862, 880 (N.D. 1993) (citing *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988); *Baier v. Hampton*, 440 N.W.2d 712 (N.D. 1989); *Matter of Estate of Risivi*, 429 N.W.2d 404 (N.D. 1988)).

¶ 26] In the case at bar, we have a defendant who was notified ten years after the imposition of his sentence, that “[a] statutory change from the *last* legislative session may impact” his sentence, retroactively. A.A. at 9 (emphasis added). A defendant who filed a valid motion before the district court. A.A. 10-17. A district court that failed to act on that motion timely, but instead prompted the State for a response 14 days after the deadline for a response had lapsed. A.A. at 20. The State, requesting an extension to respond 36 days past their deadline, and 22 days after the district court’s prompting letter. A.A. at 22. Finally, a district court, that issued an order without providing a rule mandated hearing pursuant to the defendant’s request. A.A. at 29 & 33.

[¶ 27] This case presents significant implications of impropriety. A district court that ignores all the applicable rules in order to accommodate one party to the disadvantage of the other party does not convey an unbiased and objective judiciary. Thus, to avoid even the appearance of further impropriety, upon remand, just as this Court did in Wentworth, this case should be assigned to a different district court judge. 500 N.W.2d at 880.

[¶ 28] **CONCLUSION**

[¶ 29] The two separate orders entered by the district court must be vacated due to the district court's blatant disregard to the N.D.R.Ct., as well as the lack of authority to issue such an order, without providing Craig with his right to a hearing and oral arguments on the subject in question.

[¶ 30] Despite the district court's orders being on the merits of the briefs filed, what remains to be discussed or even argued before the district court, is the impact the November 27, 2017 letter will have on Craig's sentence. Whether the impact of that letter improperly has a retroactive impact on Craig's sentence. It should be duly noted, the letter references an enclosed application for court appointed counsel, should the recipient wish to speak with an attorney about the impact this law may or may not have on the individual. A.A. 9.

[¶ 31] Therefore, not only has the district court issued two orders based on incomplete information and in violation of the rules of court, it has issued its orders without the proper analysis into other factors that may impact the "manifest injustice" required to allow a defendant to withdraw a guilty plea. Finally, the district court's violations of the rules were all to the disadvantage of Craig and to the advantage of the State, which portrays a significant appearance of impropriety.

[¶ 32] For the foregoing reasons, Craig respectfully requests this Court vacate the two separate orders issued by the district court, remand this case for an evidentiary hearing in compliance with N.D.R.Ct. 3.2, with instructions that any and all filings after August 31, 2018 (in association with Craig's motion) shall be stricken from the record as untimely, and finally, that on remand, a new hearing judge be designated.

Respectfully submitted this Wednesday, January 9, 2019.

/s/ Samuel A. Gereszek

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