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JULY 24, 2019
STATE OF NORTH DAKOTA

# IN THE SUPREME COURT

# STATE OF NORTH DAKOTA

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| **STATE OF NORTH DAKOTA,**<br><br>**Respondent / Appellee,**<br><br>**vs.**<br><br>**GEORGE LUDORU JOB,**<br><br>**Petitioner / Appellant.** | **Supreme Court No. 20190116**<br><br>**District Court No. 09-08-K-04901** |

# APPELLANT'S BRIEF

**Appeal from Order Denying Defendant's Motion to Withdraw Guilty Plea Entered on April 2, 2019 by Cass County District Court, East Central Judicial District, State of North Dakota, The Honorable Steven E. McCullough Presiding.**

**ORAL ARGUMENTS REQUESTED**

Samuel A. Gereszek (ND Bar ID # 07040)
**BRUDVIK LAW OFFICE P.C.**
308 DeMers Avenue
East Grand Forks, MN 56721
Telephone: (218) 773-6841
Email: sam@brudviklaw.com
**ATTORNEY FOR THE APPELLANT**

## [¶ 1] TABLE OF CONTENTS

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## [¶ 3] STATEMENT OF THE ISSUES

**[¶ 4]** Whether the district court should have permitted George Ludoru Job (hereinafter "Job") to withdraw his guilty plea due to manifest injustice?

## [¶ 5] STATEMENT ON ORAL ARGUMENTS

**[¶ 6]** This case addresses two complex and yet interrelated issues necessary for oral arguments. These issues involve retroactivity of case law in conflict with long-standing jurisprudence. This Court needs to be able inquire from counsel as to any far-reaching implications of a decision made on either, both, or none of the interrelated issues.

## [¶ 7] STATEMENT OF THE CASE

**[¶ 8]** On December 23, 2009, Job plead guilty to Aggravated Assault, in violation of N.D.C.C. § 12.1-17-02. Job was sentenced to one (1) year incarceration, all suspended for a period of five (5) years of supervised probation. A.A. at 11. On November 2, 2010, Job's probation officer filed an 2nd Amended Petition for Revocation of Probation. A.A. at 17. At the probation revocation hearing on November 22, 2010 Job admitted to the 10 allegations contained in the 2nd Amended Petition for Revocation. See Trans. Of Prob. Rev. Hrg., Index # 45, pgs 5-7. After the revocation hearing, the district court revoked Job's probation, and resentenced Job to eighteen (18) months of incarceration. A.A. at 20.

**[¶ 9]** On September 7, 2018, Job, acting pro se, filed a "Petition for Motion to Vacate," essentially requesting to withdraw his guilty plea from 2008. A.A. at 22. The State then responded on September 19, 2018, addressing the issue of withdrawing a guilty plea pursuant to immigration implications and Padilla v.

Kentucky, 559 U.S. 356 (2010). A.A. at 30. Job's, newly court appointed counsel, then filed a reply brief on November 14, 2018, to the State's September 19th response. A.A. at 33.

**[¶ 10]** On March 26, 2019 a hearing was held, testimony was obtained from Job himself, as well as Douglas Nesheim, Job's original attorney on the underlying conviction. See Trans. Mot. Hrg., Mar. 26, 2019. Following the hearing, the district court issued an order, on April 2, 2019, denying Job's motion to withdraw his guilty plea, "[f]or reasons set out on the record…." A.A. at 36, ¶ 1.

**[¶ 11]** Job then filed a timely notice of appeal on November 9, 2019, pursuant to N.D.R.App.P. 4. A.A. at 37. However, due to the amendments to the N.D.R.App.P., effective March 1, 2019, the notice of appeal was incorrect and needed to be amended. A.A. at 38. The amended Notice of Appeal, in compliance with the amendments, was filed on April 15, 2019. 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. § 29-28-06 and N.D. Const. art. VI, § 2.

## [¶ 12] STATEMENT OF THE FACTS

**[¶ 13]** This case is on appeal regarding a request to withdraw a guilty plea. Therefore, the underlying facts and circumstances of the charges are largely irrelevant. The question presented before the district court was whether there was a manifest injustice, which would allow for Job to withdraw his guilty plea. The arguments presented for manifest injustice, did not revolve around the underlying

facts of the charges. Rather, the primary issues revolve around Job being properly 'informed' of the consequences of his decision to plead guilty.

**[¶ 14]** The intertwining and related issues in this case stem around Padilla not being retroactive; then the effect of the non-conforming 'pre-Padilla' era standard carrying over to 'post-Padilla' era in a probation revocation proceeding. This is then compounded wherein, in a jurisdiction like North Dakota, suspended sentences are effectively meaningless.

**[¶ 15]** Therefore, the 'facts' relevant to this appeal are more appropriately contained in the Statement of the Case. Ibid. ¶¶ 8-11. The standard of review in the case at bar is abuse of discretion. See State v. Bates, 2007 ND 15, ¶6, 726 N.W.2d 595 ("'The decision whether a manifest injustice exists for withdrawal of a guilty plea lies within the trial court's discretion and will not be reversed on appeal except for an abuse of discretion'") (quoting State v. Abdullahi, 2000 ND 39, ¶ 7, 607 N.W.2d 561).

> An abuse of discretion under N.D.R.Crim.P. 32(d) occurs when the court's legal discretion is not exercised in the interest of justice. The trial court must exercise its sound discretion in determining whether a "manifest injustice" or a "fair and just reason" to withdraw a guilty plea exists. (internal citations omitted)

Bates, 2007 ND 15, at ¶6, 726 N.W.2d 595 (citing Froistad v. State, 2002 ND 52, ¶ 9, 641 N.W.2d 86; Abdi v. State, 2000 ND 64, ¶ 10, 608 N.W.2d 292; Abdullahi, 2000 ND 39, at ¶ 7, 607 N.W.2d 561; State v. Dalman, 520 N.W.2d 860, 862 (N.D.1994)).

## [¶ 16] ARGUMENT

**[¶ 17]** It becomes important to place into context the Rule 11 plea agreement that Job entered into, in 2008. At the sentencing hearing on December

23, 2008, a plea agreement was presented to the court, which was subsequently accepted, and Job was sentenced accordingly. See Index # 44, Trans. First App. & Sent. Hrg., pg. 10, ln. 2-7. This sentence, applied to the relevant federal immigration regulation (hereinafter "INS Stat."), provides for a non-deportable sentence. Specifically, "[a]s used in this chapter…[t]he term aggravated felony means…a crime of violence…for which the term of imprisonment at least one year…." 18 U.S.C. § 1101(a)(43)(F). This was the reading of the relevant definition since September 30, 1996. Pub. L. 104-208, §321(a)(3); §322(a)(2)(A). In 1996, the INS Stat. was modified as follows:

> Pre-1996: a crime of violence…for which the term of imprisonment *imposed (regardless of any suspension of imprisonment) is at least 5 years*.
>
> Post-1996: a crime of violence…for which the term of imprisonment *at least 1 year*.

Pub. L. 104-208, §321(a)(3); §322(a)(2)(A)

**[¶ 18]** This modification resulted in suspended time being a very important aspect of any immigration implicated plea agreement, as the previous reading counted suspended time in the overall calculation. In the post-1996 reading, the primary point of concern was the amount of actual *incarceration* time the defendant faced. Thus, this plea agreement wherein the "time hanging over the Job's head" was that magical year or less, made this a non-deportable plea agreement.

**[¶ 19]** All of this happened in December 2008, and thus a pre-Padilla era case, effectively makes any advice to Job on immigration consequences moot, because Padilla, as correctly noted by the State, is not retroactive. Chaidez v. United States, 568 U.S. 342, 358 (2013). However, the probation revocation

hearing falls into a post-Padilla era, and it is here, in the probation revocation hearing where the mandatory deportation sentence is triggered.

**[¶ 20]** Herein lies the most basic, and fundamental flaw of North Dakota's approach to probation revocation matters. Since State v. Gefroh, probation revocation courts have been free to impose any sentence which was available at the time of sentencing, regardless of any bargained for agreement, or bargained for exchange. 458 N.W.2d 479 (N.D. 1990). This approach makes suspended sentences in North Dakota irrelevant. Further, this approach, in the context of the INS Stat. makes every single felony plea agreement, a deportable agreement, as there is no "finality" to the sentence, until the period of probation has expired.

**[¶ 21]** As Gefroh contended in 1990, "a defendant has a legitimate expectation in the finality of his sentence, then that sentence may not be subsequently increased without violated the double jeopardy clause of the fifth amendment to the United States Constitution." United States v. Fogel, 264 App. D.C. 292, F.2d 77 (D.C.Cir. 1987). This expectation of finality cannot be more expectant, than in the context of the INS Stat., in that the amount of incarceration time (i.e. time hanging over the defendant's head) makes an immigrant deportable, or non-deportable.

**[¶ 22]** Contrary to Gefroh, here Job does not concede that he knew, or should have known, that his sentence could be later increased. See Gefroh, 458 N.W.2d at 482. First, a review of the transcripts provides the following admonitions:

> THE COURT: If you are currently on probation and you are convicted of a crime, it possible that your

> probation will be revoked and you could be resentenced for that crime.

Index # 44, Trans. First App. & Sent. Hrg., pg. 7, ln. 2-5

> THE COURT: So in compliance with the Rule 11 agreement here, the defendant shall be committed to the custody of the North Dakota Department of Corrections for a term of one year. That sentence will be suspended for a period of 5 years, during which the defendant will be placed on supervised probation. The conditions of supervised probation are all those contained in Appendix A.

Index # 44, Trans. First App. & Sent. Hrg., pg. 10, ln. 2-9.

**[¶ 23]** As this was Job's first appearance and sentencing, this is the only place he was advised, by the court, regarding the ramifications of a potential probation revocation. The court failed to reference, either in the initial group admonitions, and then during the individual exchange with Job, to inform him that the one year of suspended time was irrelevant. The more accurate sentence imposed was 5 years, all suspended. This is because, at no time, did Job face a "maximum" of one year.

**[¶ 24]** The bargained for exchange plea agreement was for a one-year suspended sentence, pursuant to the Plea Agreement. See Index # 4, Rule 11 Plea Agreement. Thus, binding the court to suspending all time, or outright rejecting the agreement, without allowing Job the opportunity to withdraw his plea. Therefore, the imposition of "one-year" of incarceration was not an option at the time of original sentencing (absent Job's option to withdraw his plea), and the "one-year" of suspended time meant nothing at the time of probation revocation. Leaving but one logical conclusion, suspending any amount of time, short of the

maximum possible sentence in North Dakota, is a waste of ink on the paper it's written, a waste of breath in the court that it's spoken, and propaganda perpetrated for the sole purpose of giving defendant's a false sense of finality to elicit a guilty plea.

**[¶ 25]** Since the district court here imposed a sentence that triggers mandatory deportation in a post-Padilla era, based on a bargained for plea agreement sentence, from a pre-Padilla era, which would not have triggered mandatory deportation proceedings, this Court is now left with a very complicated and complex inquiry. Padilla is not retroactive, making original proceedings in 2008 not subject its analysis. However, the policy of the State of North Dakota to render suspended time irrelevant, has afford a district court to impose Padilla violative sentence in the post-Padilla era we currently reside.

## [¶ 26] CONCLUSION

**[¶ 27]** Herein lies the predicament at the end of the day. For over twenty-nine years, through caselaw and legislative acquiescence, it has been an enduring dogma to turn a blind eye to the policy that renders suspended time irrelevant. This policy has now created a time warp pulling a case, which *was* not subject to U.S. Supreme Court jurisprudence, into a timeframe which *it must be* subject to U.S. Supreme Court jurisprudence. To correct the manifest injustice left in the wake of the district court's post-Padilla sentence imposed in the case at bar, the answer is not an easy one. Simply remanding to the probation revocation proceeding is insufficient. Rather, what is needed is one of two options. Permit Job to return to the 2008 plea hearing, and allow him to withdraw his guilty plea, effectively

rendering Padilla retroactive, in this one limited circumstance. In the alternative, remand to the probation revocation proceeding, with instruction that will once and for all rectify the 29-year enduring dogma of rendering sentences irrelevant.

**[¶ 28]** For the foregoing reasons, Job respectfully requests this Court vacate the district court's probation revocation order of November 29, 2010. Remand with instructions that suspended time now carries with it, a promise of finality, because "[i]n the case of suspended execution of sentence, the court may revoke the probation and cause the defendant to suffer the penalty of the sentence previously imposed upon the defendant." N.D.C.C. 12.1-32-07(6).

Respectfully submitted this Wednesday, July 24, 2019.

*/s/ Samuel A. Gereszek*

Samuel A. Gereszek (ND Bar ID # 07040)
**BRUDVIK LAW OFFICE P.C.**
308 DeMers Avenue
East Grand Forks, MN 56721
Telephone: (218) 773-6841
Email: sam@brudviklaw.com
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| | ) | **09-08-K-04901** |
| **Appellant.** | ) | |

**N.D.R.App.P. 32(e)**
**CERTIFICATE OF COMPLIANCE**

[¶1] **COMES NOW** Samuel A. Gereszek, attorney for the Appellant, GEORGE LUDORU JOB, and preparer of documents filed in association with the above captioned case on this day.

[¶2] Pursuant to N.D.R.App.P. 32(e) the documents filed on this day comply with the North Dakota Rules of Appellate Procedure as follows:

a. Appellant's Brief – Word count = 2,406; Page Count = 12 (N.D.R.App.P 32(a)(8))

b. Appellant's Appendix – (N.D.R.App.P.25(a))

[¶3] This Certificate of Compliance is drafted to ensure the filings on this day are in compliance with the rules and specifically pursuant to N.D.R.App.P. 32(e).

Dated this Wednesday, July 24, 2019.

*/s/ Samuel A. Gereszek*

Samuel A. Gereszek (ND Bar ID # 07040)
**BRUDVIK LAW OFFICE P.C.**
308 DeMers Avenue
East Grand Forks, MN 56721
Telephone: (218) 773-6841
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| | ) | |
| **Petitioner / 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 format);*
2. *Appellant's Appendix; and,*
3. *Certificate of Compliance.*

On the following:

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| **Clerk of the Supreme Court**<br>**North Dakota Supreme Court** | **Kimberlee Jo Hegvik**<br>**Attorney for Appellee** | George Job<br>2169 60th Avenue S.<br>Fargo, ND 58104 |
| supclerkofcourt@ndcourts.gov | sa-defense-notices@casscountynd.gov | Served via U.S. Mail |

All done by Electronic Filing pursuant to N.D. Sup. Ct. Admin. Order 14.

Dated this Wednesday, July 24, 2019.

**BRUDVIK LAW OFFICE P.C.**

*/s/ Samuel A. Gereszek*

**Samuel A. Gereszek (ND Bar ID # 07040)**
Brudvik Law Office P.C.
308 DeMers Avenue
East Grand Forks, MN 56721
Telephone: (218) 773-6841
sam@brudviklaw.com
Attorney for Petitioner/Appellant