

**1999 HOUSE JUDICIARY**

**HB 1382**

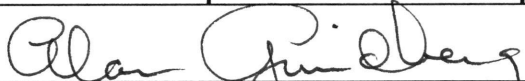
1999 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1382

House Judiciary Committee

Conference Committee

Hearing Date : February 2, 1999

Tape Number	Side A	Side B	Meter #
1	X		0
Committee Clerk Signature 			

Minutes:

REP. HAWKEN: I sponsored this bill at the request of Judge Backes from Fargo. She presented a copy of a letter from Judge Backes on the bill, a copy of which is attached..

JIM GANJE: (S.Ct.) We took a look at this some years ago after a court was criticized for returning bail to the wrong person. This is patterned after a Minnesota law that is working well. If the person on bail is convicted the court may use the bail to pay the fine or restitution. The party posting bail is told this at the time putting it up. This will help some in collecting fines and restitution. There is a huge outstanding deficit for fines and restitution.

COMMITTEE ACTION: February 2, 1999

REP. MAHONEY moved to amend line 11 by striking "upon" and insert "pursuant to". Rep. Hawken seconded and the motion passed on a unanimous voice vote.

Page 2

House Judiciary Committee

Bill/Resolution Number February 2, 1999

Hearing Date February 2, 1999

REP. MAHONEY moved that the committee recommend that the bill DO PASS AS

AMENDED. Rep. Delmore seconded and the motion passed on a roll call vote with 12 ayes, 1

nay and 2 absent. Rep. Meyer was assigned to carry the bill.

Date: 2/2/99  
Roll Call Vote #: 1

1999 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1382

House JUDICIARY Committee

Subcommittee on \_\_\_\_\_  
or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass as Am

Motion Made By Mahamer Seconded By Delmore

Representatives	Yes	No	Representatives	Yes	No
REP. DEKREY	✓		REP. KELSH		
REP. CLEARY	✓		REP. KLEMIN	✓	
REP. DELMORE	✓		REP. KOPPELMAN	✓	
REP. DISRUD	✓		REP. MAHONEY	✓	
REP. FAIRFIELD	✓		REP. MARAGOS	✓	
✓ REP. GORDER			REP. MEYER	✓	
REP. GUNTER		✓	REP. SVEEN	✓	
REP. HAWKEN	✓				

Total Yes 12 No 1

Absent 2

Floor Assignment Ⓢ Meyer

If the vote is on an amendment, briefly indicate intent:



**REPORT OF STANDING COMMITTEE**

**HB 1382: Judiciary Committee (Rep. DeKrey, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 1 NAY, 2 ABSENT AND NOT VOTING). HB 1382 was placed on the Sixth order on the calendar.

Page 1, line 11, replace "upon" with "pursuant to"

Renumber accordingly

**1999 SENATE JUDICIARY**

**HB 1382**

1999 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB1382

Senate Judiciary Committee

Conference Committee

Hearing Date March 10, 1999

Tape Number	Side A	Side B	Meter #
1		x	1208 - 2554
3-16-99 1	x		2300 - 3500
Committee Clerk Signature <i>Jackie Follman</i>			

Minutes:

HB1382 relates to bail as the defendant's property.

SENATOR STENEHJEM opened the hearing on HB1382 at 11:00 A.M.

All were present.

SENATOR STENEHJEM testified in support of HB1382. Representative Hawken introduced this bill at a request of Judge Norman Backes. The Judge believes this bill will help clarify now existing law. The defendant rarely posts his own bail and knowing full well that if it posted by another person, the bail will be returned to the other person. Many times these people are brought into court because they have failed to pay their fines or restitution. Bail being set in the amount of the fine or restitution. It is burdensome upon the Court to be unable to use the posted bail bond for the payment of fines or restitution because it has not been posted by the defendant but by someone else.

SENATOR WATNE asked with this bill, if she mortgaged her house in a bond posting for her son, would that apply and go toward paying the fine and costs.

SENATOR STENEHJEM stated that then maybe she won't like this bill because this is what it does.

SENATOR LYSON asked if the money deposited as bail, are getting into a Constitutional issue.

SENATOR STENEHJEM stated I don't think this bill has anything to do with that. There are some check cases, the bail amount is the amount of the check plus the fee.

SENATOR LYSON stated that people may not post bond because they may lose, are we getting into some issues here.

SENATOR STENEHJEM stated that this law has been in Minnesota for many years and there haven't led to challenges in that area.

This bill may need some amendments.

SENATOR STENEHJEM CLOSED the hearing on HB1382.

**MARCH 16, 1999    TAPE 2, SIDE A**

Jim Gange proposed and explained some amendments. The amendments change the focus of the bill. Amendments attached. These amendments will give the third party the ability to receive their bond money back at the discretion of the judge. The Stregge amendments change HB1275 to bring in more counties to the middle group.

SENATOR WATNE made a motion on Amendments, SENATOR LYSON seconded.

Discussion. Motion carried.    6 - 0 - 0

Page 3

Senate Judiciary Committee

Bill/Resolution Number HB1382

Hearing Date March 10, 1999

SENATOR LYSON made a motion for DO PASS AS AMENDED, SENATOR WATNE

seconded. Discussion. Motion carried. 6 - 0 - 0

SENATOR STENEHJEM will carry the bill.

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1382

Page 1, line 2, after " property " insert " ; to amend and reenact subsections 3 and 4 of section 27-05.2-02 of the North Dakota Century Code as created by section 50 of House Bill No. 1275, as approved by the fifty-sixth legislative assembly, relating to options for state funding of clerk of district court services ; and to amend and reenact section 29-22-31 of the North Dakota Century Code, relating to refund of bail money "

Page 1, after line 3, insert:

**"SECTION 1. AMENDMENT.** If House Bill No. 1275 becomes effective, subsections 3 and 4 of section 27-05.2-02 of the North Dakota Century Code as created by section 50 of House Bill No. 1275, as approved by the fifty-sixth legislative assembly, are amended and reenacted as follows:

3. In a county in which the supreme court determines that at least ~~two~~ five full-time employees are necessary to provide adequate clerk of district court services, the elected clerk of district court and clerk of court staff designated by the supreme court shall become employees of the state judicial system if the board of county commissioners consents to the transition after consultation with the elected clerk. This subsection applies upon receipt by the supreme court of a resolution adopted by the board of county commissioners indicating its consent. Any equipment, including technology related equipment, and furnishings in the control and custody of the clerk of district court on the date the clerk becomes a state employee must remain in the control and custody of the clerk until the state court administrator determines the items are no longer needed. The clerk, upon becoming a state employee, shall receive a salary in an amount not less than the salary received as a county employee and shall remain an employee of the state judicial system until the clerk retires, resigns, or the term for which the clerk was initially elected expires, whichever occurs earlier. Thereafter, the clerk of district court must be appointed in the manner provided by supreme court rule. The bond for the clerk of district court must be set by the supreme court. If the board of county commissioners does not consent to the clerk and designated staff becoming employees of the state judicial system, the county must provide clerk of district court services at its own expense in accordance with subsection 2.
4. In a county in which the supreme court determines that one or more, but less than ~~two~~ five, full-time employees are necessary to provide clerk of district court services, the elected clerk of district court and clerk of court staff designated by the supreme court shall become employees of the state judicial system in the manner described in subsection 3. If the board of county commissioners does not consent to the clerk and designated staff becoming employees of the state judicial system, the county may provide clerk of district court services at its own expenses under subsection 2 or the supreme court may provide funding for clerk of district court services in accordance with an agreement under subsection 6."

Page 1, underscore lines 6 through 15

Page 1, line 6, replace " Moneys " with " Except as otherwise provided in this section, moneys "

Page 1, line 7, after the underscored period insert “ If bail moneys are deposited by a third person, the person must be notified at the time of deposit that the moneys may be paid to the defendant upon final disposition of the case or applied to any fine, cost, or restitution imposed on the defendant. The person may direct, subject to further order of the judge, that the deposited moneys be released to that person upon final disposition of the case. “

Page 1, line 11, after “ direction “ insert “ or, unless otherwise ordered by the judge, as directed by a person who deposited moneys on behalf of the defendant “

Page 1, after line 15, insert :

“**SECTION 3. AMENDMENT.** Section 29-22-31 of the North Dakota Century Code is amended and reenacted as follows:

**29-22-31. Verdict of guilty --- Procedure.** If a general verdict is rendered against the defendant, or a special verdict is given, ~~he~~ the defendant must be remanded, if in custody, or, if ~~he~~ the defendant is at large on bail, ~~he~~ the defendant may be committed to the proper officer of the county to await judgment of the court upon the verdict. When committed, ~~his~~ the defendant's bail is exonerated, or if money is deposited instead of bail, it must be refunded ~~to the defendant~~ in accordance with section 2 of this Act.”

Renumber accordingly





Date: 3-16-99  
Roll Call Vote #: 2

1999 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. HB 1382

Senate Judiciary Committee

Subcommittee on \_\_\_\_\_  
or  
 Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do Pass AS Amended

Motion Made By Senator Lyson Seconded By Senator Watne

Senators	Yes	No	Senators	Yes	No
Senator Wayne Stenehjem	X				
Senator Darlene Watne	X				
Senator Stanley Lyson	X				
Senator John Traynor	X				
Senator Dennis Bercier	X				
Senator Caroloyne Nelson	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Stenehjem

REPORT OF STANDING COMMITTEE

HB 1382, as engrossed: Judiciary Committee (Sen. W. Stenehjem, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1382 was placed on the Sixth order on the calendar.

Page 1, line 2, after "property" insert "; to amend and reenact subsections 3 and 4 of section 27-05.2-02 of the North Dakota Century Code as created by section 50 of House Bill No. 1275, as approved by the fifty-sixth legislative assembly, relating to options for state funding of clerk of district court services; and to amend and reenact section 29-22-31 of the North Dakota Century Code, relating to refund of bail money"

Page 1, after line 3, insert:

**"SECTION 1. AMENDMENT.** If House Bill No. 1275 becomes effective, subsections 3 and 4 of section 27-05.2-02 of the North Dakota Century Code, as created by section 50 of House Bill No. 1275, as approved by the fifty-sixth legislative assembly, are amended and reenacted as follows:

3. In a county in which the supreme court determines that at least ~~two~~ five full-time employees are necessary to provide adequate clerk of district court services, the elected clerk of district court and clerk of court staff designated by the supreme court shall become employees of the state judicial system if the board of county commissioners consents to the transition after consultation with the elected clerk. This subsection applies upon receipt by the supreme court of a resolution adopted by the board of county commissioners indicating its consent. Any equipment, including ~~technology-related~~ technology-related equipment, and furnishings in the control and custody of the clerk of district court on the date the clerk becomes a state employee must remain in the control and custody of the clerk until the state court administrator determines the items are no longer needed. The clerk, upon becoming a state employee, shall receive a salary in an amount not less than the salary received as a county employee and shall remain an employee of the state judicial system until the clerk retires, resigns, or the term for which the clerk was initially elected expires, whichever occurs earlier. Thereafter, the clerk of district court must be appointed in the manner provided by supreme court rule. The bond for the clerk of district court must be set by the supreme court. If the board of county commissioners does not consent to the clerk and designated staff becoming employees of the state judicial system, the county must provide clerk of district court services at its own expense in accordance with subsection 2.
4. In a county in which the supreme court determines that one or more, but less than ~~two~~ five, full-time employees are necessary to provide clerk of district court services, the elected clerk of district court and clerk of court staff designated by the supreme court shall become employees of the state judicial system in the manner described in subsection 3. If the board of county commissioners does not consent to the clerk and designated staff becoming employees of the state judicial system, the county may provide clerk of district court services at its own expenses under subsection 2 or the supreme court may provide funding for clerk of district court services in accordance with an agreement under subsection 6."

Page 1, line 6, underscore "**Bail - Defendant's property.**", replace "Moneys" with "Except as otherwise provided in this section, moneys", and underscore "deposited as bail are the property of the"

Page 1, line 7, underscore "defendant, whether deposited by the defendant or by a third person on the defendant's behalf." and insert immediately thereafter "If bail moneys are deposited by a third person, the person must be notified at the time of deposit that the

moneys may be paid to the defendant upon final disposition of the case or applied to any fine, cost, or restitution imposed on the defendant. The person may direct, subject to further order of the judge, that the deposited moneys be released to that person upon final disposition of the case."

Page 1, underscore lines 8 through 10

Page 1, line 11, underscore "be paid to the defendant or pursuant to the defendant's written direction" and insert immediately thereafter "or, unless otherwise ordered by the judge, as directed by a person who deposited moneys on behalf of the defendant" and underscore ". In the case of a"

Page 1, underscore lines 12 through 15

Page 1, after line 15, insert:

**"SECTION 3. AMENDMENT.** Section 29-22-31 of the North Dakota Century Code is amended and reenacted as follows:

**29-22-31. Verdict of guilty - Procedure.** If a general verdict is rendered against the defendant, or a special verdict is given, ~~he~~ the defendant must be remanded, if in custody, or, if ~~he~~ the defendant is at large on bail, ~~he~~ may be committed to the proper officer of the county to await the judgment of the court upon the verdict. When committed, ~~his~~ the defendant's bail is exonerated, or if money is deposited instead of bail, it must be refunded ~~to the defendant~~ in accordance with section 2 of this Act."

Renumber accordingly

**1999 TESTIMONY**

**HB 1382**



Eloise M. Haaland  
Administrative Assistant

Gladys M. Schmitt  
Calendar Control Clerk

## State of North Dakota

DISTRICT COURT  
EAST CENTRAL JUDICIAL DISTRICT  
CASS COUNTY COURTHOUSE  
BOX 2806  
FARGO, NORTH DAKOTA 58108  
(701) 241-5680  
TDD 239-6784

Honorable Norman J. Backes  
Presiding District Judge

Honorable Georgia Dawson  
District Judge

Honorable Ralph R. Erickson  
District Judge

Honorable Lawrence A. Leclerc  
District Judge

Honorable Michael O. McGuire  
District Judge

Honorable Frank L. Racek  
District Judge

Honorable Cynthia Rothe-Seeger  
District Judge

January 28, 1999

Rep. Kathy Hawken  
North Dakota State Capitol  
600 East Boulevard Avenue  
Bismarck, ND 58505

Dear Representative Hawken:

I offer the following comments in support of House Bill No. 1382. First of all, I believe the enactment of House Bill No. 1382 would be helpful in clarifying now existing law. Section 29-22-31 of the North Dakota Century Code and Rule 46(h) of the North Dakota Rules of Criminal Procedure relate to bail bonds. A recent Supreme Court case (1997) is helpful in providing insight into the problem. I am including a copy of that case with this letter for your information.

As a practical matter, however, House Bill 1382 will legitimize what is already a widely used procedure. The courts deal constantly with persons who are fully aware of how the system works, and the defendant himself rarely, if ever, posts his own bail knowing full well that if posted by another person, the bail will be returned to the person posting the bail. Many times these persons are brought into court simply because they have failed to pay the fines or restitution, the bail being set at the amount of the fines and restitution. It is burdensome upon the courts to find that they are unable to use the posted bail bond for the payment of fines or restitution because it has not been posted by the defendant.

Cass County and the City of Fargo have now made it a condition of bail by the person who posts it that the bail may be applied to any

Rep. Kathy Hawken  
January 28, 1999  
Page Two

finer or costs that the defendant may have at the conclusion of the case. I am including with this correspondence copies of bail authorization and bond notice presently being used.

Finally, the present system has created many administrative problems for the clerk's office inasmuch as the persons posting the bail often do not leave telephone numbers or addresses and many hours are spent attempting to return the posted money upon exoneration or conviction.

The bill presently before you is modeled after a Minnesota statute, and I am unaware that Minnesota has had any problems with this particular statute. I and the Judges of the East Central Judicial District urge its passage.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Norman J. Backes", enclosed within a large, irregular oval scribble.

Norman J. Backes  
Presiding Judge  
East Central Judicial District

NJB:km  
Enclosures

\*217 570 N.W.2d 217

1997 ND 212

STATE of North Dakota, Plaintiff and Appellee,  
v.

Earl L. OWENS, Defendant and Appellant.

Criminal Nos. 970194-970195.  
Supreme Court of North Dakota.  
Nov. 6, 1997.

Defendant filed postconviction motion for return of bond money. The District Court, **Burleigh County**, South Central Judicial District, Thomas J. Schneider, J., denied motion, and defendant appealed. The Supreme Court, Neumann, J., held that: (1) order denying motion was appealable, and (2) defendant was entitled to return of bond money despite payment to wife.

Reversed.

## 1. CRIMINAL LAW ☞ 1026

110 ----

110XXIV Review

110XXIV(D) Right of Review

110k1025 Right of Defendant to Review

110k1026 In general.

N.D. 1997.

Defendant's property interest in \$500 bond and his possible deprivation of that property constituted "substantial right," giving defendant right to appeal district court's order denying defendant's motion for return of bond. NDCC 29-28-06, subd. 5.

## 2. CRIMINAL LAW ☞ 1004

110 ----

110XXIV Review

110XXIV(A) Nature and Form of Remedy

110k1004 Nature and scope of remedy in  
general.

N.D. 1997.

Right of appeal is statutory and is jurisdictional matter.

## 3. CRIMINAL LAW ☞ 1005

110 ----

110XXIV Review

110XXIV(A) Nature and Form of Remedy

110k1005 Constitutional and statutory  
provisions.

N.D. 1997.

While right to appeal is purely statutory, statutes conferring right to appeal must be liberally construed, and in determining appealability it is not the label which controls but, rather, the effect.

## 4. CRIMINAL LAW ☞ 1026

110 ----

110XXIV Review

110XXIV(D) Right of Review

110k1025 Right of Defendant to Review

110k1026 In general.

N.D. 1997.

Notice and opportunity to be heard are not the only elements affecting or constituting a substantial right as would give defendant right to appeal. NDCC 29-28-06, subd. 5.

## 5. CRIMINAL LAW ☞ 1158(1)

110 ----

110XXIV Review

110XXIV(O) Questions of Fact and Findings

110k1158 In General

110k1158(1) In general.

N.D. 1997.

Standard of review for factual findings is clearly erroneous standard.

## 6. CRIMINAL LAW ☞ 1158(1)

110 ----

110XXIV Review

110XXIV(O) Questions of Fact and Findings

110k1158 In General

110k1158(1) In general.

N.D. 1997.

Finding of fact is "clearly erroneous" if after review of record, reviewing court is convinced that definite mistake has been made.

See publication Words and Phrases for other judicial constructions and definitions.

## 7. CRIMINAL LAW ☞ 1134(3)

110 ----

110XXIV Review

110XXIV(L) Scope of Review in General

110k1134 Scope and Extent in General

110k1134(3) Questions considered in general.

N.D. 1997.

Challenge to district court's order denying defendant's motion for return of bond, which was returned to defendant's wife who held receipt, presented mixed questions of law and fact, and was therefore fully reviewable.

## 8. CRIMINAL LAW ☞ 1134(3)

110 ----

110XXIV Review

110XXIV(L) Scope of Review in General

110k1134 Scope and Extent in General

110k1134(3) Questions considered in general.

N.D. 1997.

While appellate court defers to district court's findings of fact, questions of law are fully reviewable.

## 9. CRIMINAL LAW ☞ 1134(3)

110 ----

110XXIV Review

110XXIV(L) Scope of Review in General

110k1134 Scope and Extent in General

110k1134(3) Questions considered in general.

N.D. 1997.

Mixed questions of law and fact are fully reviewable on appeal.

## 10. BAIL ☞ 96

49 ----

49II In Criminal Prosecutions

49k96 Disposition of proceeds.

N.D. 1997.

Defendant incarcerated at state penitentiary was entitled to return of bond money, and state did not satisfy its obligation to return money to him when it paid money to defendant's wife, where defendant paid money for bond, bond receipt showed only his name as apparent payor, and bond was no longer required. Rules Crim.Proc., Rule 46(h); NDCC 29-22-31.

\*218 Earl L. Owens, pro se.

Bruce A. Romanick, Assistant State's Attorney, Bismarck, for plaintiff and appellee.

NEUMANN, Justice.

[¶ 1] Earl L. Owens appeals from the district court's denial of his motion for return of bond. We reverse.

[¶ 2] In July 1995, Earl Owens was arrested on a warrant and was released after posting bond of five hundred dollars. In January 1996, Owens was arrested again and held in custody on unrelated charges. On January 30, 1996, while Owens was in custody in the county jail, Owens' wife, Ann Owens, appeared at the clerk of court's office.

Mrs. Owens presented a computer-generated piece of paper that apparently serves as the original bond receipt in **Burleigh County**, and requested return of the money. The clerk refunded Owens' five hundred dollar bond to Ann Owens.

[¶ 3] On April 10, 1996, Owens was convicted and subsequently sentenced to the state penitentiary. In April 1997, Owens moved for return of the bond. Owens claimed the clerk of district court erred in refunding his bond money to his wife without his consent or knowledge, because the bond was registered in his name. The State resisted. The court denied the motion, ruling the bond had been returned to Ann Owens as required by Rule 46(h), NDRCrimP. (FN1)

[¶ 4] Owens appeals from the denial of the motion.

[1] [¶ 5] We are first asked to decide whether the district court's order is appealable. If the order is appealable, we must decide whether the district court erred in denying Owens' motion for return of bond.

## I

[2] [3] [¶ 6] "The right of appeal in this state is statutory and is a jurisdictional matter." *Bland v. Commission on Medical Competency*, 557 N.W.2d 379, 384 (N.D.1996) (quoting *Raboin v. North Dakota Dep't. of Human Serv.*, 552 N.W.2d 329, 331 (N.D.1996)). We must have jurisdiction to consider the merits of an appeal and, if there is no right to appeal, we must dismiss. *Id.* The right to appeal in criminal cases is governed under NDCC chapter 29-28. In this case, involving a criminal defendant, "[a]n appeal may be taken by the defendant from: ... [a]n order made after judgment affecting any substantial right of the party." NDCC § 29-28-06(5). "[W]hile the right to appeal is purely statutory, statutes conferring the right to appeal must be liberally construed, and that in determining appealability it is not the label which controls but, rather, the effect." *State v. Jelliff*, 251 N.W.2d 1, 4 (N.D.1977) (allowing appeal of an order dismissing a criminal complaint under NDCC § 29-28-07(1)).

[4] [¶ 7] The State argues the return of bond money does not affect a substantial right, and is therefore outside of § 29-28-06, making the judge's ruling unappealable. The State, relying on *State v. Jefferson Park Books, Inc.*, 314 N.W.2d 73



(N.D.1981), asserts the only statutory requirements for a \*219 "substantial right" are the right to notice and the opportunity to be heard. In *Jefferson Park*, we held a criminal defendant who had been given notice and an opportunity to be heard in a motion for reduction of sentence under Rule 35, NDRCrimP, had not been deprived of any substantial right. *Id.* at 76. While the State is correct that Owens had an opportunity to be heard, we do not agree that notice and the opportunity to be heard are the only elements affecting or constituting a substantial right.

[¶ 8] We have recognized other substantial rights in criminal and civil proceedings. (FN2) For example, in criminal cases, correction of an illegal sentence under Rule 35(a), NDRCrimP, involves a substantial right, making an order denying a motion brought under Rule 35(a) appealable by a criminal defendant. *State v. Nace*, 371 N.W.2d 129, 131 (N.D.1985). (FN3) However, a motion for reduction of a sentence under Rule 35(b) is not a "substantial right" as contemplated by NDCC § 29-28-06. *Jefferson Park*, 314 N.W.2d at 76.

[¶ 9] *Agricultural Bond & Credit Corp. v. Courtenay Farmers Coop. Ass'n, et al.*, 66 N.D. 122, 262 N.W. 453 (1935), held an order affected a substantial right and was appealable in a case in which the trial court denied a motion to restore grain storage receipts into the court's custody. In *Agricultural Bond*, on an action to foreclose on liens, the trial court ordered the deposit of storage receipts with the clerk of court. *Id.*, 262 N.W. at 454. For some unstated reason, the clerk of court delivered the storage receipts to one of the attorneys in the case. *Id.* The attorney refused to return the receipts, and instead sold the grain. *Id.* A motion was brought to require the receipts to be re-deposited, but the judge denied the motion. *Id.* at 455.

[¶ 10] The *Agricultural Bond* Court in discussing the appealability of this case stated: "appeal lies ... from a final order affecting a substantial right, made in special proceedings or upon summary application in an action after judgment." *Id.* at 457 (relying on Laws Wis. 1895, c. 212, subd. 2). "An order refusing to set aside a judgment is a final order affecting a substantial right made upon a summary application after judgment, and as such is appealable to the Supreme Court notwithstanding the judgment is less than one hundred dollars." *Id.*; *cf. Smith v. Barnes County*, 32 N.D. 4, 152 N.W. 674 (1915)

(allowing appeal of an unauthorized forfeiture of cash bail of five hundred dollars).

[¶ 11] As in *Agricultural Bond*, Owens deposited something of value with the clerk of court that may have been wrongfully paid out. We hold Owens' property interest in the five hundred dollars bond, and his possible deprivation of that property constitutes a substantial right. Therefore, the district court's order is appealable.

## II

[5] [6] [¶ 12] Next we must decide whether the district court erred in denying Owens' motion for return of bond. This court has not addressed the standard of review for an appeal from an order denying motion on return of bond. The standard of review for factual findings is the clearly erroneous standard. *Cf. State v. Toepke*, 485 N.W.2d 792, 794 (N.D.1992) (applying a clearly erroneous standard to findings of fact in a revocation of \*220 probation proceeding). A finding of fact is clearly erroneous if after a review of the record, the reviewing court is convinced that a definite mistake has been made. *Id.*

[7] [8] [9] [¶ 13] While we defer to the district court's findings of fact, questions of law are fully reviewable. *State v. Kenner*, 1997 ND 1, ¶ 7, 559 N.W.2d 538. When there are mixed questions of law and fact, the question is fully reviewable on appeal. *State v. Foster*, 1997 ND 8, ¶ 18, 560 N.W.2d 194; *State v. Skaro*, 474 N.W.2d 711, 716 (N.D.1991). The district court's order denying Owens' motion presents mixed questions of law and fact, and is therefore fully reviewable.

## III

[¶ 14] In reviewing the district court's decision, we apply NDCC § 29-22-31 and Rule 46(h), NDRCrimP. Section 29-22-31, NDCC, provides: "When committed, [the defendant's] bail is exonerated, or if money is deposited instead of bail, it must be refunded to the defendant." (FN4) Rule 46(h) NDRCrimP, states: "Exoneration. If the condition of the bond has been satisfied or the forfeiture thereof has been set aside or remitted, the court shall exonerate the obligor and release any bail."

[¶ 15] The State argues the clerk acted

appropriately under Rule 46(h), NDRCrimP, when she returned the money to Owens' wife who held the receipt. (FN5) The district court's order denying Owens' motion stated:

"Rule 46(h) of the North Dakota Rules of Criminal Procedure provides for release of **bail** upon satisfaction of bond conditions.

In this case, the **Clerk of Court** did return the **bail** to the person holding the receipt for the **bail**, Ann Owens, wife of the defendant. Therefore, the **bail** has been returned as required by Rule 46(h)."

[10] [¶ 16] A review of the record shows Owens presented to the District Court a prima facie case entitling him to return of his bond money. First, Owens presented unrefuted evidence that he had paid the money for his bond, and that the bond receipt showed only his name as apparent payor. Second, Owens established he was entitled to exoneration of the bond under Rule 46(h), because he was incarcerated at the State Penitentiary, and bond was no longer required.

[¶ 17] The State has failed to present any evidence showing Owens was not entitled to the money. In its response to Owens' motion for return of bond, the State argued Rule 46(h) of the Rules of Criminal Procedure is the only authority for return of bond. The State asserted, "there are no statutes which require that the bond money be returned only to the person who posted the bond." The State's position is in error; § 29-22-31 NDCC clearly applies when the defendant himself has deposited the money. (FN6)

\*221. [¶ 18] During oral argument on appeal, the State conceded that proper procedures in the **clerk of court's** office were not followed, and have since been changed. For example, nowhere on the receipt did it explicitly state who paid the money. The receipt merely stated:

"**BAIL FOR: OWENS, EARL L.**

**FOR: BOND ON SELF**

**EARL OWENS."**

There was no signature or other verification by the clerk's office on the receipt showing who received the money at the clerk's office. In addition, the

money was not appropriately deposited. (FN7) The cash for the bond was put in an envelope and placed in a safe. The cash was later given to Ann Owens when she produced the receipt.

[¶ 19] After reviewing the record, it is clear the district court erred in denying Owens' motion for return of bond. Owens presented a prima facie case, unrefuted by the State, that the money should be returned to him.

[¶ 20] Reversed.

[¶ 21] VANDE WALLE, C.J., and MARING, MESCHKE and SANDSTROM, JJ., concur.

FN1. The State later charged Ann Owens with theft of property for taking the bond money.

FN2. We have held an order compelling blood tests affected a family's substantial rights in a civil case. *B.H. v. K.D., et al.*, 506 N.W.2d 368, 372 (N.D.1993) (exercising original supervisory jurisdiction to protect substantial family rights, even though a Rule 54(b), NDRCivP, certification was lacking). We have also recognized a final order affecting a substantial right made in special proceedings is appealable, concluding an order denying a motion to intervene is appealable. *Wyatt v. R.D. Werner Co.*, 524 N.W.2d 579, 580 (N.D.1994). Likewise, we have recognized a substantial right was affected when there was a determination that a suit could not be maintained as a class action, because both the right to be represented and the right to share expense of litigation should be viewed as substantial. *Rogelstad v. Farmers Union Grain Term. Ass'n*, 224 N.W.2d 544, 547-48 (N.D.1974). The authority of a judge to act in a case has been held to affect the substantial rights of the state. *State v. Hunt*, 293 N.W.2d 419, 422 (N.D.1980).

FN3. The holding in *Nace* has been superseded in part by legislation, see NDCC 12.1-32-06.1, but its holding about challenging an illegal sentence is still sound. *DeCoteau v. State*, 504 N.W.2d 552, 556 (N.D.1993).

FN4. Section 29-22-31 has been in effect, unamended, since territorial days. C.Crim. P. 1877 § 410. The statute has its source in the California Penal Code of 1872, section 1166, which was nearly identical. In 1935, California

amended its statute to allow for the return of bail money to the person who deposited it on behalf of the defendant. Cal.Penal Code § 1166.

FN5. The appellee's brief argued that because Mrs. Owens was in possession of the original receipt, she was entitled to receive the \$500. The appellee further argued on brief, "that it is as likely as not, that the defendant's wife, at the time she received the \$500, was the defendant's assignee and entitled to receive the \$500."

There is nothing in the record or the law supporting this argument. A receipt for bond or bail is not a negotiable instrument under the U.C.C., and cannot be considered bearer paper. § 41-03-04 NDCC. Mrs. Owens' possession of the receipt is not proof that she has a right to receive refund of the bail. Even if it is possible to assign the money deposited as bail, there is no proof an assignment was made.

FN6. Statutes and case law regarding return of deposited bail vary from state to state. Some jurisdictions require money deposited in lieu of bail to be returned to the defendant. *See, e.g. Hassan v. Earll*, 61 Mont. 389, 202 P. 581, 582 (1921) (holding exoneration of bail entitles the defendant to return of money deposited by him); *White v. Ordille*, 229 N.C. 490, 50 S.E.2d 499, 502 (1948) (stating that if the defendant performs conditions of recognizance, the cash deposit is returnable to him).

However, other jurisdictions hold the money deposited is returnable to the person who made the deposit. *See, e.g. Campbell v. Board of County Comm'rs*, 97 Kan. 68, 154 P. 257, 258 (1916) (returning bail money to the person who made the deposit); *Isbell v. Bay Circuit Judge*, 215 Mich. 364, 183 N.W. 721, 723 (1921) (returning the money to the person who made the deposit, where that person was undisputed); *Mundell v. Wells*, 181 Cal. 398, 184 P. 666, 668 (1919) (stating the court should inquire as to who is entitled to the money in equity and good conscience).

We need not decide whether bond money must be returned only to the defendant under § 29-22-31 NDCC, because it is undisputed Earl Owens deposited the money on his own behalf.

\*221\_ FN7. The clerk of court should have deposited the money in a trust fund with the county treasurer as is required under § 11-22-01, which provides:

"Any and all funds, other than fees and taxes, received by any sheriff, clerk of the district court, or public administrator by virtue of the office may be paid over and delivered to the treasurer of the county. Upon the delivery of the money to the treasurer, the officer depositing the same shall be absolved from all liability for the safekeeping of the funds."

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### BOND ENVELOPE

COURT: (X) CASS COUNTY ( ) WEST FARGO ( ) CASSELTON  
( ) OTHER \_\_\_\_\_

DATE 10-2-98 TIME 2332 OFFICER 3553

DEFENDANT NAME Matthew Strom PHONE 772-7432

ADDRESS 2350 30th Ave S. #603

CITY Grand Forks STATE ND ZIP —

OFFENSE(S)	WARRANT/CITATION-(W/C)	BOND AMOUNT	TYPE *
1. <u>MIP</u>	( )	\$ <u>100<sup>00</sup></u>	(B)
2. _____	( )	\$ _____	( )
3. _____	( )	\$ _____	( )
4. _____	( )	\$ _____	( )
5. _____	( )	\$ _____	( )

\* BOND TYPES A-CASH B-CASH AND PR C-BAIL BOND D-PR ONLY

APPEARANCE DATE 10-16-98 TIME 8:30

ARREST DATE 10-2-98 ARRESTING AGENCY CCSO

BOND POSTED BY Matt Swanson PHONE# 280-2894

ADDRESS 1018 College St.

CITY Fargo STATE ND ZIP \_\_\_\_\_

REMARKS \_\_\_\_\_

X

**BAIL AUTHORIZATION**

CITY OF FARGO V. ERIN SATTLER

I authorize the Fargo Municipal Court to apply the bail to any fine(s) imposed and/or refund the bail to the defendant.

*[Signature]*  
Signature

9-10-98  
Date

         Bail must be refunded to me upon conclusion of the case or upon release of the bail by the Judge.

Signature

Date

KEVIN OSTBY  
Legibly print your name and address

513 7 ST E.  
WEST FARGO ND 58078

PROPOSED

BOND NOTICE

I/we understand that we are posting bond to guarantee the attendance of the named defendant at all future scheduled court appearances and that the defendant may need to appear on more than one occasion.

I/we also state:

- 1. The money posted is the property of the defendant.
- 2. The money posted is the property of the person posting the bond, and (check all that apply):
  - A. The bond may be applied to any fines or costs that the defendant may incur at the conclusion of the case.
  - B. The bond at the end of the case may be refunded to the defendant if the defendant is exonerated.
  - C. The bond is to be returned to the person posting the bond. The name and address is as follows:

X Randy [Signature]  
X Randy [Signature]  
X Randy [Signature]

I agree that I must notify the Clerk of District Court of any change of address. If the Clerk attempts to refund the bond and it is not deliverable to me at the above address, I agree the bond will be refunded to the defendant or used to pay the defendant's fines and costs, if any.

I/we agree to the above.

X Randy [Signature]  
Person Posting Bond

\_\_\_\_\_  
Defendant



629.51 [Repealed, 1979 c 233 s 42]

629.52 [Repealed, 1979 c 233 s 42]

**629.53 PROVIDING RELEASE ON BAIL; COMMITMENT.**

A person charged with a criminal offense may be released with or without bail in accordance with rule 6.02 of the rules of criminal procedure. Money bail is the property of the accused, whether deposited by that person or by a third person on the accused's behalf. When money bail is accepted by a judge, that judge shall order it to be deposited with the court administrator. The court administrator shall retain it until the final disposition of the case and the final order of the court disposing of the case. Upon release, the amount released must be paid to the accused personally or upon that person's written order. In case of conviction, the judge may order the money bail deposit to be applied to any fine or restitution imposed on the defendant by the court and, if the fine or restitution is less than the deposit, order the balance to be paid to the defendant. Money bail deposited with the court or any officer of it is exempt from garnishment or levy under attachment or execution.

*History: (10588) RL s 5247; 1983 c 359 s 138; 1985 c 265 art 10 s 1; 1986 c 444; 1Sp1986 c 3 art 1 s 82; 1988 c 669 s 2*

**629.531 ELECTRONIC MONITORING AS A CONDITION OF PRETRIAL RELEASE.**

If a court orders electronic monitoring as a condition of pretrial release, it may not use the electronic monitoring as a determining factor in deciding what the appropriate level of the defendant's money bail or appearance bond should be.

*History: 1992 c 571 art 6 s 23*

**629.54 REQUIRING A WITNESS TO RECOGNIZE.**

When a person charged with a criminal offense is admitted to bail or committed by the judge, the judge shall also bind by recognizance any witnesses against the accused whom the judge considers material, to appear and testify at any trial or hearing in which the accused is scheduled to appear. If the judge is satisfied that there is good reason to believe that a witness will not perform the conditions of the witness' recognizance unless other security is given, the judge may order the witness to enter into a recognizance for the witness' appearance, with sureties as the judge considers necessary. Except in case of murder in the first degree, arson where human life is destroyed, and cruel abuse of children, the judge may not commit any witness who offers to recognize, without sureties, for the witness' appearance.

*History: (10589) RL s 5248; 1983 c 359 s 139; 1985 c 265 art 10 s 1; 1986 c 444*

**629.55 REQUIRING COMMITMENT OF WITNESSES WHO REFUSE TO RECOGNIZE.**

If a witness is required to recognize, with or without sureties, and refuses to do so, the judge shall commit that witness until the witness complies with the order, or is otherwise discharged according to law. During confinement a person held as a witness must receive the compensation the court before whom the case is pending directs, not exceeding regular witness fees in criminal cases as provided in section 357.24. When a minor is a material witness, any other person may recognize for the appearance of the minor as a witness, or the judge may take recognizance of the minor as a witness in a sum of not more than \$50. The recognizance is valid and binding in law notwithstanding the disability of the minor.

*History: (10590) RL s 5249; 1981 c 31 s 20; 1983 c 359 s 140; 1985 c 265 art 10 s*

*1*

629.56 [Repealed, 1983 c 359 s 151]

629.57 [Repealed, 1979 c 233 s 42]

**629.58 PROCEEDINGS REQUIRED WHEN A PERSON UNDER BOND DEFAULTS; PAYING BOND TO COURT.**

When a person in a criminal prosecution is under bond (1) to appear and answer, (2) to prosecute an appeal, or (3) to testify in court, and fails to perform the conditions of the bond,