

IN THE SUPREME COURT  
OF THE STATE OF NORTH DAKOTA

State of North Dakota,	)	
	)	
Plaintiff/Appellee,	)	Supreme Court No. 20190336
	)	
-vs-	)	Burleigh County Case No.
	)	08-99-K-01395
Shawn G. Helmenstein,	)	
	)	
Defendant/Appellant	)	

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**BRIEF OF PLAINTIFF - APPELLEE**  
**STATE OF NORTH DAKOTA**

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APPEAL FROM AMENDED CRIMINAL JUDGMENT ENTERED ON OCTOBER 24,  
2019

Burleigh County District Court  
South Central Judicial District  
The Honorable James Hill, Presiding

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**ISSUES PRESENTED FOR REVIEW**

- [¶1] Whether Helmenstein has the right to appeal.
- [¶2] Whether Helmenstein may raise issues of constitutionality of N.D.C.C. §12.1-32-09.1 in this appeal.
- [¶3] Whether Helmenstein’s sentence was illegal because it violates the ex post facto clause.
- [¶4] Whether N.D.C.C. §12.1-30-09.1 is void-for-vagueness.

## STATEMENT OF FACTS

[¶5] On March 1, 1999, the Burleigh County State’s Attorney’s Office charged the defendant, Shawn Helmenstein (“Helmenstein”), with two criminal counts: 1) Murder, in violation of N.D.C.C. §12.1-16-01(1); and 2) Robbery, in violation of N.D.C.C. §12.1-22-01. Appellant’s Appendix at page 4 (Index #1) (App App’x at p.3 (Index #1)). Helmenstein plead not guilty to both counts and a jury trial was scheduled.

[¶6] On December 6, 1999, a five-day jury trial was held. On December 10, 1999, Helmenstein was convicted on both counts. A criminal judgment was entered on March 1, 2000. *Id.* at p. 9 (Index #169). Helmenstein was sentenced to a term of life imprisonment with the opportunity for parole on count one, murder, and for a term of ten (10) years consecutive to count one on count two, robbery. *Id.*

[¶7] On March 2, 2000, Helmenstein filed a Notice of Appeal. *App App’x* at p. 9 (Index #170). In his appeal, Helmenstein raised the issues that his motion to suppress his confessions was denied as well as the motion for change of venue. The criminal judgment and commitment of the district court was affirmed by this Court and filed with the district court on January 29, 2001. *Id.* at p. 9 (Index #186).

[¶8] On November 27, 2017, Michele Bring, Clerk of the District Court, sent a letter to Helmenstein informing him of a statutory change that may impact Helmenstein’s sentence. *Id.* at p. 9 (Index #191). After receiving this letter Helmenstein wrote a letter to the district court asking for insertion of a life expectancy calculation in his sentence. *Id.* at p. 9 (Index #192). Helmenstein filed a motion to correct his judgment on June 25, 2019. *Id.* at p. 10 (Index #199). Helmenstein also filed an affidavit in support of his motion to

correct sentence, again asking only that he have the life expectancy calculation inserted in his murder sentence. *Id.* at p. 10 (Index # 200).

[¶9] A hearing was held on the motion on August 20, 2019. The district court received post-hearing briefs from the State and the defendant. The defendant filed a brief in support of his motion after the hearing and for the first time made an oblique reference to the constitutionality of N.D.C.C. §12.1-32-09.1, but cited no authorities in support of his thought on the subject. *App App'x.* at p. 10 (Index #212). The district court in its memorandum and order rejected Helmenstein's belated complaints about the constitutionality of N.D.C.C. §12.1-32-09.1 because it had not been raised during the hearing or any time prior thereto, nor had Helmenstein cited any authority whatsoever in support of his casual claim of unconstitutionality. *App App'x.* at p. 10 (Index #215 at ¶26-27). In other words, the constitutional claim was not raised by the defendant in the trial court.

[¶10] The district court filed an amended judgment on October 24, 2019. *App App'x.* at p.10 (Index #217). Helmenstein's sentence was corrected to show his life expectancy so that once 85% of that sentence was complete and the consecutive ten-year sentence imposed on count two has been served, Helmenstein would be eligible for parole. *Id.*

[¶11] On November 7, 2019, Helmenstein's Notice of Appeal was filed in Odyssey. *App App'x* at p. 10 (Index #218). On November 18, 2019, Helmenstein filed an Amended Notice of Appeal. *Id.* at 10 (Index #221).

[¶12] Notwithstanding the defendant's complete failure to raise the issue of the constitutionality of N.D.C.C. §12.1-32-09.1 in the trial court, here on appeal to this Court,

defendant raises two new claims of unconstitutionality based on ex post facto and void for vagueness arguments.

**STATEMENT OF THE FACTS**  
**ARGUMENT**

**I. WHETHER HELMENSTEIN HAS THE RIGHT TO APPEAL.**

[¶13] The Court has stated that, “[t]he right of appeal in this state is governed solely by statute, and if there is no statutory basis to hear an appeal we must take notice of the lack of jurisdiction and dismiss the appeal.” In re A.B., 2005 ND 216, ¶5, 707 N.W.2d 75. As stated in N.D.C.C. §29-28-06, an appeal to the Supreme Court may be taken by the defendant from:

1. A verdict of guilty;
2. A final judgment of conviction;
3. An order refusing a motion in arrest of the judgment;
4. An order denying a motion for a new trial; or
5. An order made after judgment affecting any substantial right of the party.

[¶14] Helmenstein does not specifically state which ground he is appealing on. The State assumes he is appealing under N.D.C.C. §29-28-06(5).

**II. WHETHER HELMENSTEIN MAY RAISE ISSUES OF CONSTITUTIONALITY OF N.D.C.C. §12.1-32-09.1 IN THIS APPEAL.**

[¶15] In Helmenstein’s brief he raises issues two issues that were not raised in the trial court. First, whether N.D.C.C. §12.1-32-09.1 is unconstitutional because it violates the ex post facto clause. Secondly, whether N.D.C.C. §12.1-32-09.1 is unconstitutional under the void for vagueness doctrine. Neither argument was raised or argued in the trial court, nor were these constitutional concerns ever mentioned by Helmenstein in the trial court.

[¶16] This Court has said that “[i]t is well-settled that issues not raised in the district court may not be raised for the first time on appeal:

‘The purpose of an appeal is to review the actions of the trial court, not to grant the appellant an opportunity to develop and expound upon new

strategies or theories.’ Beeter v. Sawyer Disposal LLC, 2009 ND 153, ¶20, 771 N.W.2d 282 (citations omitted) “The requirement that a party ‘first present an issue to the trial court’ as a precondition to raising it on appeal, gives the court a meaningful opportunity to make a correct decision, contributes valuable input to the process and develops the record for effective review of the decision.” Id. at ¶20 (citations omitted). “It is fundamentally unfair to fault the trial court for failing to rule correctly on an issue that was never given the opportunity to consider.” Davis v. Enget, 2010 ND 34, ¶10, 779 N.W.2d 126. (citations omitted) Accordingly, “issues or contentions not raised...in the district court cannot be raised for the first time on appeal.” Beeter, at ¶20.

Paulson v. Paulson, 2011 ND 159, ¶9, 801 N.W.2d 746.

[¶17] Helmenstein has never raised his present arguments with the trial court. Helmenstein’s appeal should be dismissed based on the facts that none of his constitutional issues were raised in the trial court. See, State v. Tweed, 491 N.W.2d 412, (ND 1992) and State v. Miller, 388 N.W.2d 522 (ND 1986). However, for the sake of argument only, making no concession as to whether constitutional issues should be addressed in this appeal, the State now goes on to argue those constitutional issues in the event this Court elects to address those heretofore unraised issues in this appeal.

### **III. WHETHER HELMENSTEIN’S SENTENCE WAS ILLEGAL BECAUSE IT VIOLATES THE EX POST FACTO CLAUSE.**

[¶18] Helmenstein argues his sentence was illegal because it was an unconstitutional ex post facto application of N.D.C.C. §12.1-32-09.1. However, in State v. Jensen, 33 N.W.2d 686, 693-694 (N.D. 1983), this Court has defined an ex post facto law as:

“1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2. Every law that aggravates a crime, or makes it greater than it was, when committed. 3. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4. Every law that alters the legal rules of evidence and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender.”

[¶19] None of these conditions for application of the ex post facto doctrine apply in this case. Helmenstein's sentence was not increased. He was sentenced in 2000 to life in prison with possibility of parole on count one and to serve ten (10) consecutive years on count two. Those sentences remain unchanged.

[¶20] N.D.C.C. §12.1-32-09.1 was amended in 1997 to include the following provision: "In the case of an offender who is sentenced to a term of life imprisonment with opportunity for parole under subsection 1 of section 12.1-32-01, the term "sentence imposed" means the remaining life expectancy of the offender on the date of sentencing. The remaining life expectancy of the offender must be calculated on the date of sentencing, computed by reference to a recognized mortality table as established by rule by the supreme court. Notwithstanding this section, an offender sentenced under subsection 1 of section 12.1-32-01 may not be eligible for parole until the requirements of that section have been met." Therefore, at all times material to this case, the murder, the trial, the sentencing, N.D.C.C. §12.1-16.01(1) classified murder as a class AA felony for which the maximum sentence that could be imposed under N.D.C.C. §12.1-32.01(1) was life imprisonment, with or without possibility of parole. At all times material to this action, N.D.C.C. §12.1-32-09.1 provided a mechanism for calculating an earliest possible parole application date for a defendant convicted of murder. The life expectancy calculation was not inserted in the judgment at the time of sentencing because the mechanism for making that calculation was not in effect until 2005 with the enactment of N.D. Sup.Ct. Admin. Rule 51. Reading all of the provisions of N.D.C.C. §12.1-32-09.1 together, the life expectancy calculation can only be made by the trial court and no one else.

[¶21] Helmenstein argues that the NDDOCR calculated him being able to see the parole board after he serves 40 years. However, according to the Motion Hearing Transcript page 6 lines 1-9 (MH Trans 6:1-9), that was not his actual life expectancy at the time of sentencing and the district court noted that there was nothing in the records that would show who came up with that number, how it was calculated, and where they got it from. The trial court's calculation is based on scrupulous application of N.D.C.C. §12.1-32-09.1 and N.D. Sup.Ct. Admin. Rule 51. The DOOCR calculation was not and so was never legal or binding under N.D.C.C. §12.1-32-09.1. Nothing has changed in Helmenstein's sentence other than Helmenstein is now able to be determine when he first legally becomes eligible for parole for murder, which is exactly what he wanted when he filed his initial letter and motion. Helmenstein's real complaint is his parole eligibility date as it is not as early as he had hoped. However, the legal life expectancy calculation must be made only by the trial court. Calculations by anyone else do not have any consequence to this case. Moreover, insertion of the life expectancy calculation in Helmenstein's life sentence for murder is merely a "relevant incident to a regulation of a present situation" and not an ex post facto violation. State v. Burr, 1999 ND 143, ¶24, 598 N.W.2d 147 (citing State v. Manning, 532 N.W.2d 244 (Minn.Ct.App. 1995)).

#### **IV. WHETHER N.D.C.C. §12.1-32-09.1 IS VOID-FOR-VAGUENSS**

[¶22] In In re Maedche, 2010 ND 171, ¶14, 788 N.W.2d 331, the Court indicated that in order for a statute to be upheld over a claim of unconstitutional vagueness it has to meet two requirements:

“(1) the law must create minimum guidelines for the reasonable police officer, judge, or jury charged with enforcement of the statute; and (2) the law must provide a reasonable person with adequate and fair warning of the proscribed conduct.” City of Belfield v. Kilkenny, 2007 ND 44, ¶10, 729

N.W.2d 120. We use the “reasonable person” standard in reviewing a statute to determine whether these two dictates are satisfied. Id. A law is void for vagueness if “it either forbids or requires ‘the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.’” State v. Tibor, 373 N.W.2d 877, 880 (ND 1985) (quoting Connally v. General Constr. Co., 269 U.S. 385, 391 [146 S.Ct. 126, 70 L.Ed. 322] (1926)). We review de novo a claimed violation of a constitutional right.

The statutes at issue here meet these requirements. In State v. Comes, 2019 ND 290, 936 N.W.2d 114, this Court examined the interplay between N.D.C.C. §12.1-32-09.1 and N.D. Sup.Ct. Admin. Rule 51 and found that the two legal provisions are not ambiguous and can be reconciled and harmonized. Id., at ¶9. Therefore, the Court rejected arguments that these provisions are unconstitutionally vague.

### CONCLUSION

¶23 For these reasons, the State respectfully requests that this Court affirm the district court’s Amended Judgment.

RESPECTFULLY SUBMITTED:

Dated this 12<sup>th</sup> day of March, 2020.

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**CERTIFICATE OF COMPLIANCE**

[¶ 1] COMES NOW Wayne Goter of Bismarck, North Dakota, and hereby certifies that the attached Brief of the Appellee is in compliance with Rule 32(a)(8)(A), North Dakota Rules of Appellate Procedure.

[¶ 2] The number of pages in the principal Brief, excluding any addenda, is twelve (12) pages, according to the page count of the filed electronic document.

Dated this 12<sup>th</sup> day of March, 2020.

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STATE OF NORTH DAKOTA )  
) ss  
COUNTY OF BURLEIGH )

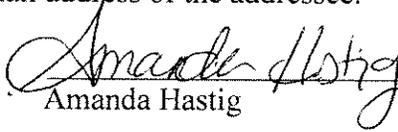
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2. Certificate of Compliance
3. Affidavit of Service

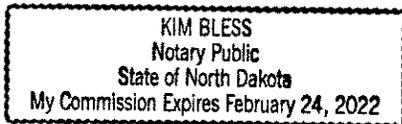
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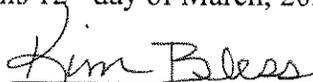
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Amanda Hastig

Subscribed and sworn to before me this 12<sup>th</sup> day of March, 2020.



  
Notary Public,  
Burleigh County, North Dakota