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FEBRUARY 12, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

	)	**Supreme Court File No.**
State of North Dakota,	)	**20190336**
	)	
Plaintiff and Appellee,	)	**Burleigh County No.**
	)	**99-K-CR-01395**
	)	
v.	)	
	)	
	)	
Shawn G. Helmenstein,	)	**APPELLANT'S BRIEF**
	)	
Defendant and Appellant.	)	

Appeal from the amended criminal judgment entered
October 24, 2019 in Burleigh County district court,
south central judicial district,
North Dakota the Honorable James S. Hill, presiding.

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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TABLE OF AUTHORITIES

Cases

Statutes, Rules, Codes

Oral Argument:

Oral argument has been requested to emphasize and clarify the Appellant's written arguments on their merits.

Transcript References:

The Motion Hearing to amended Mr. Helmenstein's judgment was held on August 20, 2019. The transcript of that hearing is referred to as [MH] in this brief.

JURISDICTION

[¶ 1] The Defendant, Shawn Helmenstein, timely appealed the district court's amended criminal judgment. Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provision article VI § 6, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

"An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal 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 judgment;
4. An order denying a motion for new trial; or
5. An order made after judgment affecting any substantial right of the party."

N.D.C.C. § 29-28-06.

STATEMENT OF THE ISSUES

[¶ 2] I. Whether Mr. Helmenstein's sentence was illegal.

II. Whether N.D.C.C. § 12.1-32-09.1 is void for vagueness.

STATEMENT OF CASE

[¶ 3] This is a criminal matter on direct appeal from south central judicial district, Burleigh County Criminal Judgment. This case was before the district court in *State v. Shawn G. Helmenstein*, 8-99-K-01395. The criminal complaint was filed with the court on March 1, 1999. Mr.

Helmenstein was charged with murder, in violation of N.D.C.C. § 12.1-16-01(1), a class AA Felony and robbery, in violation of N.D.C.C. § 12.1-22-01, a class A Felony.

[¶ 4] On December 6, 1999, Mr. Helmenstein had a jury trial. He was convicted of both counts and proceeded to sentencing on February 29, 2000. The district court sentenced Mr. Helmenstein to ND DOCR for life with the possibility of parole and a consecutive ten years for count two, and credit for time previously served on both counts.

[¶ 5] On November 27, 2017 the Clerk of District Court, Michele Bring wrote to Mr. Helmenstein to inform him that based on a statutory change from the last session Mr. Helmenstein's sentence would be altered. Mr. Helmenstein request for a lawyer was filed on December 4, 2017, and he was assigned Attorney Ewell the next day.

[¶ 6] A year and a half later, Mr. Helmenstein moved, and filed a supporting affidavit, to correct his judgment on June 14, 2019. The motion and affidavit were filed with the court on June 25, 2019. Mr. Helmstein told the court he currently had no parole review date, which was a change from his original sentence. Mr. Helmenstein requested that the district court remedy his current sentence so that he would have a scheduled time for review. He attached several documents to his affidavit.

[¶ 7] The State agreed that Mr. Helmenstein's motion should be granted. The State's proposed remedy was to include a life expectance

calculation. Index # 196. On July 5, 2019, Mr. Ewell requested a motion hearing on Mr. Helmstein's behalf. A motion hearing was held on the matter on August 20, 2019. Mr. Ewell started the hearing indicating that he believed his client's position was without merit. The district court ultimately amended the judgment. Mr. Helmenstein timely appealed.

STATEMENT OF FACTS

[¶ 8] Mr. Helmenstein was originally sentenced in accordance with N.D.C.C. § 12.1-32-01(1) which says, "a person found guilty of a class AA felony and who receives a sentence of life imprisonment with parole, shall not be eligible to have that person's sentence considered by the parole board for thirty years, less sentence reduction earned for good conduct, after that person's admission to the penitentiary." 1995 N.D. Sess. Laws ch. 134, § 1. Based on Mr. Helmenstein's conviction for murder, N.D.C.C. § 12.1-16-01, the eighty-five percent rule also applied. Because of the statutory requirements at the time of his sentence, Mr. Helmenstein was "not eligible for release from confinement on any basis until eighty-five percent of the sentence imposed by the court has been served..." N.D.C.C. § 12.1-32-09.1; 1995 N.D. Sess. Laws ch. 136, § 5.

[¶ 9] Mr. Helmenstein's original sentence was for life with the possibility of parole after eighty-five percent of thirty years had been served minus any good time accumulated. Mr. Helmenstein was told by DOCR that he would be eligible for parole review after forty years. MH pp. 4, 6.; Affidavit

pp. 2,5. Eighty-five percent of thirty (30) years is twenty-four (24) years nine (9) months and thirteen (13) days. Therefore, Mr. Helmenstein's original parole review would be in 2040, minus his credit for time already served at sentencing.

[¶ 10] The district court at the motion hearing indicated they were using the table from administrative Rule 51 rather than DOCR's life expectancy calculation, when Mr. Helmenstein was originally sentenced. However, the enabling administration rule, N.D. Sup.Ct. Admin. R. 51, was not enacted until 2005, after Mr. Helmenstein was sentenced. Additionally, the court indicated they would take arguments from both sides as to which table should be used. Mr. Ewell agreed with the court's calculations and Mr. Helmenstein raised a due process issues that the use of life expectancy was discriminatory based on, gender and race. The court ultimately found that Mr. Helmenstein had a life expectancy of 45 years in March of 2000.

LAW AND ARGUMENT

I. Whether Mr. Helmenstein's sentence was illegal.

Standard of Review

[¶ 11] Generally, the district court's decision to amend a judgment will not be reversed on appeal unless there is an abuse of discretion. *State v. Peterson*, 2016 ND 192, ¶ 8, 886 N.W.2d 71. A court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned

determination, or if it misinterprets or misapplies the law. *Id.*; *see also State v. Moos*, 2008 ND 228, ¶ 30, 758 N.W.2d 674. However, "The standard of review for constitutional issues is de novo." *State v. Loughead*, 2007 ND 16, ¶ 7, 726 N.W.2d 859. Additionally, "Statutory interpretation is a question of law, fully reviewable on appeal." *State v. Bearrunner*, 2019 ND 29, ¶ 5, 921 N.W.2d 894. The issue before the court is one of statutory construction and constitutional validity. It is therefore reviewed de novo.

[¶ 12] Because the enabling administration rule, N.D. Sup.Ct. Admin. R. 51, was not enacted until 2005, using it in Mr. Helmenstein's case is an unconstitutional ex post facto application of N.D.C.C. § 12.1-32-09.1 and N.D. Sup.Ct. Admin. R. 51. Article I section 10 of the United States Constitution and Article I section 18 of the North Dakota Constitution prohibits passing any ex post facto law. In *Collins v. Youngblood*, 497 U.S. 37, 41 (1990), the Supreme Court reaffirmed that the ex post facto clause of the Constitution covers laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990) (*citing Calder v. Bull*, 3 Dall. 386, 391-392 (1798) (opinion of Chase, J.); *Beazell v. Ohio*, 269 U.S. 167, 169-170 (1925)).

[¶ 13] Generally, statutes do not retroactively apply unless the Legislature expressly states its intention for the statute to be retroactive. N.D.C.C. § 1-02-10 ("No part of this code is retroactive unless it is expressly declared to be so."); *State v. Rodriguez*, 454 N.W.2d 726, 730, n.3 (N.D. 1990)

(discussing retroactive application of criminal intent statute); *State v. Cummings*, 386 N.W.2d 468, 471-72 (N.D. 1986) (evaluating the retroactive application of ameliorating penal legislation). "A statute is employed retroactively when it is applied to a cause of action that arose prior to the effective date of the statute." Id. at 471 (*quoting Reiling v. Bhattacharyya*, 276 N.W.2d 237, 239 (N.D. 1979)). In this case the retroactive application of Rule 51 has increased Mr. Helmenstein's low-end possibility of parole from roughly 40 years to approximately 45 years. *See Amended Judgment*. This will increase Mr. Helmenstein's degree of punishment by five years in violation on the prohibition of ex post facto clause.

[¶ 14] The Supreme Court in *Lindsey v. Washington*, 301 U.S. 397, 401 (1937), *Miller v. Florida*, 482 U.S. 423 (1987), and *Weaver v. Graham*, 450 U.S. 24 (1981) are analogous to Mr. Helmenstein's situation. Specifically, in *Weaver* and *Miller* the ex post facto clause prohibits states from increasing the measure of punishment by altering the substantive "formula" used to calculate the applicable sentencing range. In *Weaver* a change in the formulation of good-time credit would have retroactively reduced the credits available to prisoners under the new formula. The Supreme Court found that it effectively eliminated the lower end range of the possible prison terms.

[¶ 15] In *Miller*, the court had presumptive sentencing ranges, much like the North Dakota requirement of serving eighty-five percent of thirty (30) years in the present case. The Court further reasoned in *Miller* that the

presumptive sentencing range for certain sexual offenses, under the new law, would have increase the degree of punishment by two (2) to three (3) years. The Court held that the resulting increase in the "quantum of punishment" violated the ex post facto clause. *Miller*, at 433-434. This is case is very similar in that a new interpretation of an existing statute, as well as the passing of an administrative rule, has unconstitutionally increased Mr. Helmenstein's degree of punishment. Therefore, His initial review hearing must be held in accordance with his original sentence, after eighty-five percent of forty (40) years, minus credit for time already completed and any good time given, is served.

II. Whether N.D.C.C. § 12.1-32-09.1 is void for vagueness.

Standard of Review

[¶ 16] A constitutional challenge for vagueness of a statute is reviewed de novo by this court.

> N.D.C.C. § 12.1-32-09.1(1)-(3) reads: "Except as provided under section 12-48.1-02 **and pursuant to rules adopted by the department of corrections and rehabilitation**, an offender who is convicted of a crime in violation of section 12.1-16-01…and who receives a sentence of imprisonment is not eligible for release from confinement on any basis until eighty-five percent of the sentence imposed by the court has been served or the sentence is commuted.
>
> 2. 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.

> 3. 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 subsection have been met.

Emphasis added, N.D.C.C. § 12.1-32-09.1. And Administrative Rule 51 reads:

> In accordance with Article VI, Section 3, of the North Dakota Constitution and N.D.C.C. Section 12.1-32-09.1, the Supreme Court adopts this administrative rule relating to mortality tables in determining the sentence imposed upon certain offenders.
>
> Section 2. Applicable Mortality Table.
> In determining the sentence imposed upon a violent offender in accordance with N.D.C.C. Section 12.1-32-09.1, the trial court shall compute the remaining life expectancy of the offender by reference to Table A (Expectation of life by age, race, and sex) of the United States Life Tables, 2002, included in the National Vital Statistics Reports prepared by the National Center for Health Statistics (Center for Disease Control and Prevention)www.cdc.gov/nchs/products/pubs/pubd/lftbls/life/1966.htm.

[¶ 17] Section 12.1-32-09.1 the term "sentence imposed" means the remaining life expectancy of the offender on the date of sentencing. Additionally, the remaining life expectancy of the offender must be calculated on the date of sentencing. A plain reading of that language indicates that if the sentence was not calculated on the date of sentencing then section 3 would apply, "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 subsection have been met." This would be thirty years minus goodtime credit. Alternatively, the sentencing court, at the time of sentencing, could hold a hearing or request pre-sentencing briefs to establish what an individual's life expectancy is at the time they will be sentenced. Prior to 2005 these are two possible interpretations of section

12.1-32-09.1. These interpretations allow unfettered discretion and result in a facially vague statute.

[¶ 18] Also conflict within the statute, N.D.C.C. § 12.1-32-09.1, occurred in this case. Mr. Helmenstein's life expectancy was calculated by DOCR after the date of his sentencing, but retrospectively to that date by DOCR. Now the trial court has retroactively applied Administrative Rule 51. Stating at the motion hearing:

> "But if you take the mortality tables and you go back to the year 2000 and you go through Administrative 51 and you go back through the data, there's a number, and that's where I came up with as well. So it changes. It looked, to me, like the number would be, life mortality as of March 2000, to be 53.4; 85 percent of that is 46.39. Now, there might be a slight difference. What I was going to propose to Counsel is to tell me what they believe the correct calculation is, because that is what we'll use." MH p. 7.

It is this type of uncertainty and unfettered discretion that requires vague statutes to be void, as they produce unjust results, such as increasing an individual's punishment retroactively.

[¶ 19] The Fifth Amendment provides that "[n]o person shall…be deprived of life, liberty, or property, without due process of law." The Supreme Court has established that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357–358 (1983). The prohibition of vagueness in criminal statutes "is a well-recognized requirement, consonant alike with

ordinary notions of fair play and the settled rules of law," and a statute that ignores it "violates the first essential of due process." *Connally v. General Constr. Co.*, 269 U.S. 385 (1926). These principles apply not only to statutes defining elements of crimes, but also to statutes setting sentences. *United States v. Batchelder*, 442 U.S. 114, 123 (1979). The district court discussed with the State and Mr. Ewell which of the life expectancy tables and ages to use during the motion hearing on August 20, 2019. That discussion between the court and the parties demonstratively shows the inherent confusion with the tables that were authorized by Rule 51, a rule that does not apply to Mr. Helmenstein. Section 12.1-32-09.1 is unconstitutionally vague and therefore void.

[¶ 20] "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined" on an as-applied basis. *United States v. Mazurie*, 419 U.S. 544, 550 (1975). "Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk." *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988). Thus, in a due process vagueness case, we will hold that a law is facially invalid "only if the enactment is impermissibly vague in all of its applications." *Hoffman Estates v. The Flipside*, 455 U.S., 489, 494 – 495 (1982); *see also Chapman v. United States*, 500 U.S., 453, 467 (1991). In this case the law is unconstitutionally vague as it was applied to Mr.

Helmenstein as it invites arbitrary and inconsistent enforcement, however, if the court also applies Rule 51 the tables that are used are facially vague as there is unfettered discretion that violates the basic notions of due process. Therefore, the law is void for vagueness and must not apply to Mr. Helmenstein.

CONCLUSION

[¶ 21] WHEREFORE the Defendant respectfully requests the Court to reverse the judgment of the trial court and requests this court find that the application of section 12.1-32-09.1 and Administrative Rule 51 are unconstitutionally vague facially and as applied and therefore void. Mr. Helmenstein should therefore be sentenced to the standard 30 years minus any good-time earned, alternatively, his sentence should be restored to the original calculation from the DOCR of 39.865 years for parole eligibility on count one.

Dated this 12th day of February, 2020

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IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,	)	**Supreme Court File No. 20190336**
Plaintiff and Appellee,	)	**Burleigh Co. Criminal No. 08-99-K-1395**
v.	)	
Shawn Helmenstein,	)	**CERTIFICATE OF COMPLIANCE**
Defendant and Appellant.	)	

[¶ 1] This Appellant's Brief complies with the page limit of 38 set forth in Rule 32(a)(8)(A) of the North Dakota Rules of Appellate Procedure.

Dated: February 12, 2020.

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IN THE SUPREME COURT OF NORTH DAKOTA

State of North Dakota,	)	**Supreme Court File No. 20190336**
Plaintiff and Appellee,	)	**Burleigh Co. Criminal No. 08-99-K-1395**
v.	)	
Shawn Helmenstein,	)	**CERTIFICATE OF SERVICE**
Defendant and Appellant.	)	

[1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief with Certificate of Compliance
Appellant's Appendix

And that said copies were served upon:

Julie Lawyer, State's Attorney, bc08@nd.gov

by electronically filing said documents via email. Also served upon:

Shawn Helmenstein #21068
c/o ND DOCR
3100 E Railroad Ave
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by placing a true and correct copy of said items in a sealed envelope with USPS.

Dated: February 12, 2020.

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