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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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IN THE OFFICE OF THE
CLERK OF SUPREME COURT

FEB 4 1999

STATE OF NORTH DAKOTA

State of North Dakota,	)	
Plaintiff and Appellee,	)	
-vs-	)	Supreme Court No. 980360
Paul E. Palmer,	)	
Defendant and Appellant.	)	

* * * * * * * * * * * * * * * * *

BRIEF OF AMICUS CURIAE

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APPEAL FROM ORDER DENYING MOTION TO
CORRECT AN ILLEGAL SENTENCE DATED
NOVEMBER 2, 1998, OF WILLIAMS COUNTY,
HONORABLE DAVID W. NELSON, PRESIDING

* *

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INTEREST OF AMICUS CURIAE

The Attorney General of the state of North Dakota has an interest in this appeal as an amicus curiae. Issues raised by the Appellant, Paul Palmer, pertaining to the constitutionality of N.D.C.C. § 12.1-32-07(6) have an impact on potential sentencing procedures regarding revocation of probation in North Dakota state courts. Pursuant to N.D.C.C. § 32-23-11, the Attorney General may be heard in these appellate proceedings. As an amicus curiae, the Attorney General limits her arguments to issue 2 raised by Palmer.

ARGUMENT

I. PALMER FAILED TO PROPERLY RAISE THE ISSUE OF THE CONSTITUTIONALITY OF N.D.C.C. § 12.1-32-07(6) IN THE TRIAL COURT.

Upon review of the record on file with the Supreme Court, it does not appear that Palmer challenged the constitutionality of the statute in question in the trial court. The question of whether a statute violates a constitutional provision is a question of law and the statute will be upheld unless its challenger has demonstrated the statute's constitutional infirmity. Best Products Company Inc. v. Spaeth, 461 N.W.2d 91, 96 (N.D. 1990). An act of the Legislature is presumed to be correct and valid and any doubt as to its constitutionality must, where possible, be resolved in favor of its validity. Because of the strong presumption of constitutionality, one who attacks a statute on a constitutional ground must bring up his heavy artillery or forego the attack entirely. So. Valley Grain Dealers

Ass'n v. Brd of Cty Comm'rs of Richland Cty, 257 N.W.2d 425, 434 (N.D. 1977). See State v. Mertz, 514 N.W.2d 662 (N.D. 1994) (court would not consider alleged equal protection violation where defendant failed to raise alleged constitutional error in trial court); State v. Tweed, 491 N.W.2d 412 (N.D. 1992) (mention of confusing language of statute in closing argument to jury was not enough to raise the issue below); State v. Miller, 388 N.W.2d 522 (N.D. 1986) (court refused to address issue of constitutionality of disorderly conduct statute where, for tactical reasons, defendant failed to raise the issue to the trial court).

This Court has set forth the standard many times that it will not address an issue on appeal, even a constitutional issue, unless that issue has been sufficiently raised in the court below. City of Bismarck v. Nassif, 449 N.W.2d 789, 792 (N.D. 1989). The exception to the rule is that of "obvious error" under Rule 52(b) of the North Dakota Rules of Criminal Procedure. As this Court analyzed in State v. Miller, supra, Palmer has not met this exception. Therefore, the issue of the constitutionality of N.D.C.C. § 12.1-32-07(6) is not properly before this Court.

II. N.D.C.C. § 12.1-32-07(6) IS NOT UNCONSTITUTIONALLY VAGUE.

Palmer contends that the statute in question must be vague and ambiguous because there have been several challenges to the statute over the years. If such were the standard, this country would long ago have done away with the words "unreasonable searches and seizures" found in the Fourth Amendment to the United

States Constitution. This is not the appropriate standard to measure whether a statute is unconstitutionally vague.

This Court has previously set forth the two requirements for a criminal statute to survive a vagueness challenge:

> (1) that the statute provide adequate warnings as to the conduct proscribed, and (2) that the statute establish minimal guidelines to govern law enforcement.

State v. Tweed, supra at 419, citing State v. Johnson, 417 N.W.2d 365, 368 (N.D. 1987). Palmer attempts to fashion an argument that the statute in question violates both requirements. However, this is not a situation where a statute which proscribes certain conduct is being challenged and therefore analysis under the first requirement is not appropriate.

Relating to the second requirement, the Supreme Court of the United States has set forth basic due process standards:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. . . . A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 2294 (1972). Therefore, if a statute were so vague as to require judges to interpret and administer in a way which leads to arbitrary and discriminatory application, such a statute may run afoul of the Constitution. However, the statute in question is not such a statute. Palmer argues that "not all of the judges in North Dakota resentence defendants to longer terms upon revocation. There is no consistency in the application of this subsection." The statute does not require all judges to resentence defendants to longer terms upon revocation. The statute allows the judge the discretion to determine whether such an enlargement of sentence is appropriate under the circumstances. This Court on many occasions has indicated that sentences within the minimum and maximum statutory limits are within the discretion of the trial court and will not be set aside unless the sentence exceeds the statutory limit or the trial court substantially relied upon an impermissible sentencing factor. State v. Jacobson, 419 N.W.2d 899, 903 (N.D. 1988); State v. Hass, 268 N.W.2d 456, 464 (N.D. 1978).

Some 50 years ago, the Supreme Court of the United States was asked to conclude that a criminal statute did not meet the test of definiteness required under the due process clause because two Arkansas courts had allegedly differed in construing the statute. Cole v. State of Arkansas, 338 U.S. 345, 70 S.Ct. 172, 94 L.Ed. 155 (1949). The Court did not have before it circumstances under which it could conclude that the courts were differing in interpretation and indicated:

> Since we cannot assume that the two courts were at odds in their interpretation of the statute, we find it unnecessary to explore the question as to whether such discrepancy, if it existed, would constitute a basis for concluding that the constitutional standards have not been achieved.

Id. at 354, 70 S.Ct. at 176. In the case at hand, Palmer has fallen far short in the fire power of his constitutional attack as he has failed to set forth any facts or circumstances on which this Court could find that the district courts in the state of North Dakota are subjectively interpreting this statute in an arbitrary and discriminatory manner. Thus, his constitutional challenge must fail.

In addition to the language of the statute itself, many courts have recognized that in evaluating a vagueness challenge, a court may look to prior judicial interpretations. See New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (conduct to be prohibited must be adequately defined by the applicable state law, as written or authoritatively construed); United States v. J.H.H., 22 F.3d 821 (8th Cir. 1994) (in analyzing whether a particular statute is impermissibly vague, courts must look to both the statutory language and prior judicial interpretations); Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982), cert. denied, 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815 (1983) (in evaluating a vagueness challenge to a state law, federal court

is required to consider the law in light of the state court's interpretation of it); United States v. Broncheau, 597 F.2d 1260 (9th Cir. 1979), cert. denied, 444 U.S. 859, 100 S.Ct. 123, 62 L.Ed.2d 80 (1979) (if judicial explication makes a statute clear so that fair notice is afforded, vagueness may not be imputed). In the case at hand, as Appellee, State of North Dakota, so aptly sets forth in its brief, this Court has visited the issue of the language in question several times, most recently in State v. Klein, 1998 N.D. 182, and State v. Lindgren, 483 N.W.2d 777 (N.D. 1992). If Palmer's argument is that the judges of the state of North Dakota are unsure as to the interpretation of the language in question, these cases make it very clear. The Third Circuit Court of Appeals has recognized that reasonable persons are assumed to be aware of judicial constructions of statutes. Pringle v. Court of Common Pleas, 778 F.2d 998, 1001 (3rd Cir. 1985). The Attorney General urges this Court to adopt the same standard.

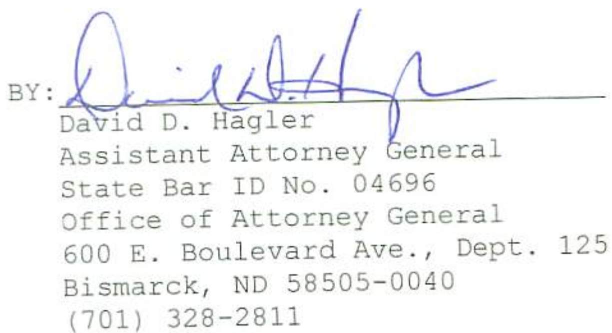
CONCLUSION

Palmer has failed to adequately preserve the issue of the constitutionality of N.D.C.C. § 12.1-32-07(6) by failing to raise the issue in the trial court. Palmer has failed to meet the obvious error standard of North Dakota Rule of Criminal Procedure 52(b). This Court has previously explicitly interpreted the language in question. Neither Palmer nor Judge Nelson had any basis to be confused. For the reasons set forth above, the Attorney General, as amicus curiae, respectfully requests that

this Court uphold the constitutionality of N.D.C.C. § 12.1-32-07(6).

Dated this 4th day of February, 1999.

State of North Dakota
Heidi Heitkamp
Attorney General



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State of North Dakota, Plaintiff and Appellee, -vs- Paul E. Palmer, Defendant and Appellant.	)	AFFIDAVIT OF SERVICE BY MAIL Supreme Court No. 980360

. . . .

STATE OF NORTH DAKOTA)
) ss
COUNTY OF BURLEIGH)

Peggy Graf states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 4th day of February, 1999, I served the attached BRIEF OF AMICUS CURIAE upon Laura L. Gray and Paul E. Palmer by placing true and correct copies thereof in envelopes addressed as follows:

MS LAURA L GRAY
WILLIAMS COUNTY ASSISTANT
STATES ATTORNEY
PO BOX 2047
WILLISTON ND 58802-2047

MR PAUL E PALMER
PO BOX 5521
BISMARCK ND 58506-5521

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Peggy Graf
Peggy Graf

Subscribed and sworn to before me this 4th day of February, 1999.

Vanessa K Kroshus
NOTARY PUBLIC

VANESSA K. KROSHUS
Notary Public, BURLEIGH CO., ND
My Commission Expires JUNE 12, 2002