IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff - Appellee, vs. Kathlene Shafer-Imhoff, a/k/a Karin Kathlene Shafer-Imhoff Defendant - Appellant.	))))))))))	Supreme Court No. 20000350 Crim. File No. 08-98-K-2548

APPEAL FROM THE DISTRICT COURT

SOUTH CENTRAL JUDICIAL DISTRICT

BURLEIGH COUNTY, NORTH DAKOTA

THE HONORABLE ROBERT O. WEFALD, PRESIDING

BRIEF OF APPELLANT

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i As a matter of law, the Defendant cannot be punished under §14-14-22.1 because the legislative changes to §14-14 constitute an amendment, rather than a repeal, and consequently there is no applicable savings statute.

ii In the alternative, as a matter of law the Defendant cannot be punished under §14-14-22.1 because the Defendant invoked her right to be sentenced under §14-14.1 as amended. as is her right to elect under §12.1-01-01(3).

iii In the alternative, as a matter of law Ms. Shafer cannot be imprisoned under §14-14-22.1 because §1-02-17 expressly prohibits the same.

iv In the alternative, dismissal of the criminal prosecution is appropriate as prosecution would be contrary to the legislative intent and the federal laws to which our state laws conform.

STATEMENT OF THE CASE

Defendant - Appellant Kathlene Shafer appeals from the judgment and conviction of Removal of Child from State in violation of N.D.C.C. §14-14-22.1. Appendix (hereinafter "A") at 13.

A criminal complaint was executed on July 20, 1998 against Kathleen Shafer-Imhoff a/k/a Karin Kathlene Shafer-Imhoff (hereinafter "Kathlene Shafer") charging her with the crime of Removal of Child from State in violation of N.D.C.C. §14-14-22.1 which is a Class C Felony under N.D.C.C. §12.1-32-01(4).(A. at 5) The criminal complaint was amended on April 27, 1999 to include two counts of the original charge, one for each of Shafer's daughters.(A. at 6)

On September 20th and 21st of 2000 a trial was held in Burleigh County District Court and Shafer was convicted on both counts. On December 13, 2000, Shafer was sentenced into the custody of the North Dakota Department of Corrections to serve eighteen (18) months per count.(A. at 13)

STATEMENT OF THE FACTS

Kathlene Shafer and Lars Imhoff were married for approximately ten years prior to their divorce in 1998. Transcript (hereinafter "T") at 30. Two children, daughters, were born of that marriage.(T. at 30) During the marriage, Shafer was subjected to verbal and physical abuse at the hands of Imhoff.(T. at 93-95) During the pendency of and subsequent to their divorce, Shafer was the victim of a series of attacks, verbal threats and physical assaults. These incidents were perpetrated by unknown individuals and resulted

in bodily injury to Shafer.(T. at 92-103) The attacks escalated in nature and frequency culminating with an attack in July of 1998 in her apartment in north Bismarck. This assault was different than the previous assaults in that, for the first time, her two young daughters were present in the apartment during the attack.(T. at 92-103) Previously the attacks occurred while Shafer was alone, therefore allowing her to believe that these attacks were solely directed at her. However once the attacks occurred in the presence of her daughters, Shafer became concerned that the attacks were indiscriminate and that the safety of her children was at issue. Believing that she needed to remove her daughters from potential harm, Shafer took the children and left the State of North Dakota and thereafter the United States.(T. at 92-103)

Shafer and the children were located by law enforcement in England in March of 1999 and subsequently were returned to Bismarck, North Dakota.(T. at 42) Upon Shafer's return to Bismarck, the attacks and threats resurfaced.(T. at 92-103)

Prior to the commencement of the trial, the State made a motion in limine requesting exclusion of any evidence related to physical assaults or altercations between Shafer and Imhoff, in addition to requesting the exclusion of evidence of any other third-party assault, either prior or subsequent to Shafer leaving the country with the children.(T. at 4-6) The State's motion was opposed by the defense on the basis that such evidence was necessary to rebut the State's intent evidence.(T. at 6-9) The trial court granted the State's motion in limine, commenting that Shafer could testify as to her fear but could specifically not elaborate on the same.(T. at 9-11) An offer of proof was made to the trial court, including the anticipated testimony of a individual who had heard the

abuse of Shafer at the hands of Imhoff, an individual who had heard Shafer being assaulted in her apartment in July of 1998, and providing substantial photographic evidence of the injuries sustained by Shafer in the physical attacks and assaults.(T. at 90-103)

Subsequent to submitting the case to the jury for deliberations, the jury submitted questions on intent and indicated that they were at an impasse. These issues were addressed by the trial court and the jury was advised as to questions.(T. at 120-218) At the end of the day of trial on September 20, 2000, the trial court advised the jury that the trial would break for the day and additionally that the trial court was invoking North Dakota Rule of Court 6.9 and would require counsel to re-argue close as it related to the issue of intent.(T. at 128-134)

Defense counsel objected to the invocation of North Dakota Rule of Court 6.9 as there was no indication by the jury that deliberations had again reached an impasse. Defense counsel further requested that appropriate instruction and outlined in the explanatory note be published to the jury.(T. at 135-140) These and other objections were overruled.(T. at 140-142) Counsel thereafter re-argued close on the intent issue. (T. at 144-152) The jury subsequently returned a verdict of guilty on both counts.(T. at 154-155)

ARGUMENT

I WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT EXCLUDED EVIDENCE THAT THE DEFENDANT WAS THE VICTIM OF ASSAULTS AND ATTACKS PRIOR TO LEAVING THE STATE WITH HER

CHILDREN?

This is a specific intent crime. The State is required to prove beyond a reasonable doubt that it was Shafer's intention to deny Imhoff's custody rights. It has been well established that a crime is a specific intent crime if it's definition requires the prosecutor to prove that Shafer acted with the specific intent to bring about a particular unlawful end. Here, proof of the crime required a showing by the prosecution that it was the specific intent of Shafer to deny Imhoff's custody rights when she took her children from the State.

Oftentimes, the only means by which the prosecutor can establish specific intent is to bring in evidence of extrinsic acts. Case law is riddled with courts allowing the prosecution to bring in evidence of such acts to establish intent. Some of the many examples include evidence of prior attacks on the victim (See e.g. Russey v. State, 912 S.W. 2d 420 (Ark. 1995). Wilkins v. State, 466 S.E. 2d 592 (Ga. 1996)) or that the accused had similar relationships with other victims (See State v. Rainer, 411 N.W. 2d 490 (Minn. 1987)). In Estelle v. McGuire, 502 U.S. 62, 112 S.Ct.. 475 (1991), the U.S. Supreme Court ruled that the prosecution could bring in evidence of relevant extrinsic acts even where the defense had not openly contested the element of intent. In United States v. McRae, 593 F.2d 700 (CA5 Tex 1979), the prosecution was allowed to admit evidence of defendant's intimate relations with women after his wife's death to rebut testimony by the defendant that he was devoted to, and loved her and experienced intense grief after her death. This evidence was allowed to disprove defendant's defense of accident and prove defendant's state of mind when he shot his wife. In yet another case it

was held that defendant should have been allowed to present evidence of the common practice of unauthorized uses of government property to support his defense to an embezzlement charge based on his intent to use the property as a gift rather than for his own use. See United States v. Sheffield, 992 F.2d 1164 (CA 11 Ga 1993).

In this case, the defense conceded that intent was in fact the only issue which was being contested. The defense, in contesting the issue of intent sought to present relevant evidence which went directly to Shafer's mental state, and accordingly her intent, at the time she took her children and violated the custody order. This evidence, as proffered, included evidence that defendant had been abused by Imhoff, resulting in her fearing for her safety and the safety of her children, and evidence that Shafer had been assaulted by unidentified assailants on several occasions, the most recent of which was immediately prior to Shafer taking her children and departing from the State. This evidence, including testimony of third parties and photographic evidence of the results of the assaults, struck at the very core of the intent element.(T. at 92-103) Indeed, if the intent of Shafer was to take her children out of harms way, and a jury had found such evidence to be credible, this intent would have expunged her of the element which resulted in her being found guilty.

Depriving Shafer of the right to present evidence of the surrounding circumstances which impacted her state of mind and intent entirely stripped her of any opportunity to adequately defend herself. It is essential that the Shafer be allowed to present evidence as to her surrounding circumstances at the time that she left with the children. At a minimum, to exclude evidence of the physical assault and attack that

occurred moments before Shafer took her children does not allow the jury to infer her intent from all of the surrounding circumstances.

The Court in it's ruling excluding evidence of the assaults allowed the appellant to comment on her fears, her concerns, her intents, but in so ruling the trial court specifically ruled that Shafer could not present any evidence on the basis or reason for her fears, concerns or intent.(T. at 15-16) This ruling allowed the jury to hear that Shafer was fearful for the safety of her children but precluded the defense from providing the jury with any reasoning as to why defendant would have such fears. As anyone involved with the judicial system knows, it is not the mere assertion of innocence which provides a justifiable and believable grounds for a defense which the jury can understand and believe, but rather the basis and reason behind the assertion of innocence. A mere statement by Shafer herein that her intent was to keep her children safe without being able to present evidence that there was a reason she felt her children were not safe is no defense at all. The events leading up to Shafer's leaving, including the fact that she was subjected to abuse and assaults, the most recent of which had occurred in the presence of her children, are essential in explaining her intent. Her repeated subjection to physical attacks and her responses to these show her intent.

> The state of mind of a person, like the state or condition of the body, is a fact to be proved like any other fact when it is relevant to an issue in a case. The courts, of course, cannot ascertain thoughts that have no outward manifestations, and the state of a person's mind, his or her knowledge, or belief, and intent must be inferred from the person's statements and actions. Where it becomes material to show the mental operation of a person or to ascertain the reasons or influences which have induced certain action or conduct on his part, either they may be shown by accompanying circumstances, or, it is generally held, the person may testify directly about them, even though such testimony may partake in some

degree of the nature of a conclusion.

29 Am. Jur 2d Evidence, §556 (Citations omitted).

Intent is a state of mind. Prosecutors are allowed to establish the state of mind of the accused by introducing extrinsic evidence. It is essential to due process rights and the ability of a defendant to defend themselves to be able to present evidence which is relevant to a defendant's state of mind when intent is an issue. It is up to the jury, not the court, to determine if such evidence is credible. It has been held that defendants in criminal cases may introduce evidence of specific acts to demonstrate that they lacked the intent to commit the crime at issue. 29 Am Jur 2d Evidence §437 (citations omitted). The introduction of evidence of specific acts of abuse at the hands of Imhoff and assaults by unknown assailants is the only way Shafer could establish that her intent was not to deny Imhoff custody of his children but rather to take the children to a place of safety. This evidence was relevant and it was an abuse of discretion not to have been allowed by the trial court.

II WHETHER THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT REQUIRED PARTIES TO RE-ARGUE CLOSE BEFORE THE JURY INFORMED THE TRIAL COURT THAT IT HAD REACHED AN IMPASSE?

Jury deliberations began at approximately 3:12 p.m. on September 20, 2000.(T. at 119) At approximately 4:37 p.m. the jury sent two questions to the trial court both centering on the issue of "intent".(T. at 120) Thereafter at 5:20 p.m. the jury sent a note

to the trial court advising that they could not come to a unanimous decision. The trial court provided the jury with some commentary and an additional jury instruction as outlined in State v. Champagne, 198 N.W.2d 218. (N.D.1972).(T. at 121-123) At 7:44 p.m. the jury sent the trial court an additional three questions regarding "intent".(T. at 124) At 9:08 p.m. the trial court recessed for the day after advising the jury and counsel that the parties would re-argue close on the issue of "intent".(T. at 128-134) The defense objection to re-arguing close prior to a further indication of impasse was overruled.(T. at 135-138)

The jury had been advised in accordance with Champagne and they had returned to deliberations without any further statements as to impasse. The trial court erred when it required the parties to re-argue close prior to any further jury indication that they were at impasse. The jury was focused on intent, which was the sole issue in the trial. Their focus was appropriate and their concern was appropriate. The trial court had no way of knowing how deliberations were proceeding since the 5:20 p.m. impasse message. It was improper and in error to require re-argument. Until such time as the laws of this state allow the judge and attorneys to go into the juror's thought process, we must rely upon the messages provided by the jury, the trial court must not guess what is occurring in deliberations.

III WHETHER THE TRIAL COURT ERRED WHEN IT FAILED TO GIVE THE REQUESTED JURY INSTRUCTION PRIOR TO INVOKING NORTH DAKOTA RULE OF COURT 6.9 AND IN THE INFORMAL INSTRUCTIONS

OR COMMENTARY PROVIDED TO THE JURY?

Error is the appropriate standard of review for jury instructions See State v. Marshall, 531 N.W.2d 284 (N.D. 1995); see also State v. Sievers, 543 N.W.2d 491 (N.D. 1996). A trial court abuses its discretion when it acts in an arbitrary or capricious [**4] manner, or misapplies or misinterprets the law. Filler v. Bragg, 1997 N.D. 24, P9, 559 NW2d 225.

When the trial court advised that counsel was to re-argue close on the issue of intent pursuant to North Dakota Rules of Court 6.9, in addition to an objection to re-arguing close premised on no further indication of impasse by the jury, the defense requested that the following instruction, which is suggested in the explanatory note of Rule 6.9. be provided to the jury:

> This instruction is offered to help your deliberations, not to force you to reach a verdict.
>
> You may wish to identify areas of agreement and areas of disagreement. You may then wish to discuss the law and evidence as they relate to the areas of disagreement.
>
> If you still have disagreement, you may wish to identify for the court and counsel which issues or questions of law or fact you would like counsel or the court to assist you with. If you elect this option, please list in writing the issues where further assistance might help bring about a verdict.
>
> I do not wish or intend to force a verdict. We are merely trying to be responsive to your apparent need for help. If it is reasonably probable that you could reach a verdict as a result of this procedure, it would be wise to give it a try.

Explanatory note below N.D.R.Ct. 6.9(T. at 135-137)

The trial court clearly gave the jurors the message that they must make a decision

and that impasse was not an option. The trial court advised the jury that a verdict must be reached, to "get in there and decide this one way or the other" and that the trial court had eight days set aside and implied that it would require the jury sit for that long if they were unable to reach a verdict.(T. at 121-123, 129-134) These comments from the trial court are an error in as much as they are considered informal jury instructions and the comments are further an abuse of discretion in as much they misinterpret or misapply the proper method for dealing with impasse as outlined in State v. Champagne, 198 N.W.2d 218. (N.D. 1972) and the guidance provided by the explanatory note following North Dakota Rule of Court 6.9.

The jury needs to clearly understand that an impasse is a permissible result if their convictions lead them to that result. The jury needs to clearly understand that the trial court is not there to force a verdict and care must additionally be taken not to place focus on the minority position in the jury. The requested jury instruction relative to North Dakota Rule of Court 6.9 should have been given as it directly addresses this issue. The trial court should not have commented on the necessity of a verdict or the lengths to which it would go to ensure a verdict.

IV WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE FAILING TO FOLLOW THE APPROPRIATE SENTENCING OPTIONS?

Shafer was prosecuted under the Uniform Child Custody Jurisdiction Act

(hereinafter "UCCJA") which was codified in 1969 by the North Dakota legislature at N.D.C.C. §14-14. A penalty provision, §14-14-22.1, was added by amendment in 1979. It is this penalty provision under which the Ms. Shafer was prosecuted.

The most intriguing part of this case is that §14-14, including the penalty provision in §14-14-22.1, was either amended or repealed in 1999 and replaced with the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter "UCCJEA") codified at N.D.C.C. §14-14.1 and became effective as of August 1, 1999. However, the UCCJEA. as well as it's codification at §14-14.1, does not contain a penalty provision.

In short, the North Dakota legislature has amended or repealed a criminal act statute so as to remove the penalty provision. Of import to this argument. it is noted that the Defendant was found guilty of violating §14-14-22.1 by removing her children from the State of North Dakota sometime in July of 1998. prior to the amendment of the statute. This development. as well as a review of the legislative intent of the UCCJA. the UCCJEA and specifically the penalty provision, clearly outlines the reasons why the criminal charges against Defendant should be dismissed in their entirety or alternatively why the sentencing of the Defendant was an abuse of discretion.

i <u>As a matter of law, the Defendant cannot be punished under §14-14-22.1 because the legislative changes to §14-14 constitute an amendment, rather than a repeal, and consequently there is no applicable savings statute</u>.

The North Dakota Supreme Court in <u>Kittelson v. Havener</u>, 239 N.W.2d 803 (N.D.

1976) stated that "it becomes quite apparent that §1-02-17, NDCC, addresses itself to situations where there is an outright repeal without replacement" and the Court expressed a "serious reservation whether or not the provisions of this section apply to the instances where a statute was repealed and replaced by another Act even though the substituted Act differed somewhat from the repealed statute". Id. at 806. The Court reaffirmed this position in State v. Cummings, 386 N.W.2d 468, 470 (N.D. 1986).

As stated above, the Uniform Child Custody Jurisdiction Act (hereinafter "UCCJA") was codified in 1969 by the North Dakota legislature at N.D.C.C. §14-14. Subsequently, was amended in 1999 and made to conform with the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter "UCCJEA") codified at N.D.C.C. §14-14.1. This is undoubtedly the type of amendment that the North Dakota Supreme Court felt was outside the purview of the savings statue found at §1-02-17, NDCC.

As there is no applicable savings statute, the common law doctrine of abatement is applicable and holds that a repeal or amendment of a penal statute bars further prosecutions for violations of the statute which occurred before its repeal or amendment and abates all pending prosecutions which had not reached final judgment. Cummings at 470.

Therefore, Shafer asserts that her prosecution and conviction under §14-14 is improper and requests that the conviction be set aside. In the alternative, Shafer asserts that her sentencing under §14-14 was improper.

ii In the alternative, as a matter of law the Defendant cannot be punished

under §14-14-22.1 because the Defendant invoked her right to be sentenced under §14-14.1 as amended, as is her right to elect under §12.1-01-01(3).

If the Court chooses to reject Shafer's position that the savings statute found at §1-02-17, NDCC, does not apply to this matter, as Shafer has exercised her right under §12.1-01-01(3), NDCC, to be sentenced under the provisions of the §14-14.1. the amended statute. Cummings addresses the applicability of §12.1-01-01(3) to prosecutions for statutes outside of Title 12.1, NDCC. and concluded that an ameliorating amendment to a criminal statute is reflective of the legislature's determination that the lesser punishment is the appropriate penalty for the offense. Id. at 472.

As §14-14.1 does not contain a penalty provision, sentencing of any nature is inappropriate and Shafer should be released from further proceedings.

iii In the alternative, as a matter of law the Defendant cannot be imprisoned under §14-14-22.1 because §1-02-17 expressly prohibits the same.

If the Court chooses not to accept either of the above options which Shafer asserts are appropriate, then the following review of §1-02-17, NDCC, is offered.

The Rules of Interpretation dealing with the effect of repealed statutes states that

> "The repeal of any statute by the legislative assembly, or by the people through an initiated law, does not have the effect of releasing or extinguishing any penalty, fine, liability,

> or forfeiture incurred under such statute, but as to cases tried before, or subsequent to, the repeal of such statute, it has the effect of extinguishing any jail or prison sentence that may be, or that has been, imposed by reason of said law, unless the repealing act provides expressly that the penalties of imprisonment shall remain in force as to crimes committed in violation of such law prior to its repeal. In other respects, such act shall remain in force only for the purpose of the enforcement of such fine, penalty, or forfeiture." N.D.C.C. §1-02-17.

The black letter law and plain language reading of §1-02-17 leaves no doubt that Shafer cannot be imprisoned or jailed under §14-14, including the penalty provision codified at §14-14-22.1, because these statutes were amended in 1999 and their replacement did not include a penalty provision.

The State argued in response to this issue raised in Shafer's motion to dismiss and motions regarding sentencing options, that §1-02-17 unconstitutionally infringes upon the governor's exclusive authority to grant pardons, reprieves and commutations and cites Ex parte Chambers, 285 N.W. 862 (N.D. 1939) as supportive of that position. The trial court agreed with the State's position and allowed the full range of sentencing options to apply, ultimately sentencing Shafer to a term of imprisonment.

The North Dakota Supreme Court in Chambers specifically states that it does not address the issue with which we are presently dealing and further the Court's ruling is

narrowly defined. Id. at 864.

Chambers dealt with a individual convicted of liquor trafficking and sentenced to prison in 1937. The crime of which Chambers was convicted was committed on November 27, 1935 and the liquor trafficking law was repealed on November 3, 1936. However, the savings statute (Section 7316, Comp. Laws of N.D) allowed for the penalty and punishment to remain in force as it was subsequent to the repeal. Two years after conviction and imprisonment, the legislature amended and re-enacted the savings statute, Section 7316, Comp. Laws of N.D (later codified as §1-02-17) as it reads today. Chambers made application for writ of habeas corpus which was denied as the Court held that in as much as Section 7316, Comp. Laws of N.D (later codified as §1-02-17) "attempts to extinguish the sentences to imprisonment of persons against whom judgment of conviction had been had in the trial court prior to the effective date of such act" the same conflicts with the governor's authority to grant pardons and "to that extent is invalid". Id. at 865.

Chambers is not controlling of the sentencing issue before this Court for several reasons. First, the Chambers court dealt with the after conviction repeal and re-enactment of a savings statute not the criminal statute under which the defendant was convicted. We are dealing the amendment to a criminal statute. Second, the Chambers court specifically decides a very narrow issue that is tailored to the context of the Chamber factual pattern and explicitly limits the scope of that decision and does not decide the question.

This savings statute was enacted to deal with the effects of the common law doctrine of abatement. Of interest, is that the amendment to the savings statute was

brought by the legislature and approved by the governor as an emergency measure. It is an accepted rule of statutory construction that the Legislature is presumed to act with knowledge of existing law. It must be presumed by the Court that the legislature, in amending §14-14, including the penalty provision in §14-14-22.1, had in mind the provisions of §1-02-17 and the same must be read into and deemed a part of the new statue by necessary implication. Snodgrass v. French, 155 NW 687 (1915). If the position of the State and trial court is to be accepted on this issue than Shafer argues it must be presumed that the governor in approving this amendment agreed to pardon individuals such as Shafer and as such the terms of the saving statute apply.

iv In the alternative, dismissal of the criminal prosecution is appropriate as prosecution would be contrary to the legislative intent and the federal laws to which our state laws conform.

The below review of the legislative history shows that the legislature never intended §14-14-22.1 to punish but rather to be simply a vehicle to allow for the return of the children and return of this matter to it's proper venue - the civil family court. The legislative intent of N.D.C.C. Chapter §14-14 was to ensure the return of children, not to provide criminal sanctions upon non-custodial parents.

The repealed UCCJA allowed the State to bring criminal charges against any person who intentionally removed a child from the State with the intention to "deny another person's rights under an existing custody decree." N.D.C.C. §14-14-22.1. A person found guilty of such an action was deemed to have committed a class C felony. It

is important to take into consideration the intent of the legislature which enacted the statutes when looking to apply them. See generally State v. Cummings, 386 N.W.2d 468 (N.D. 1986). The interpretation of statutes is a question of law fully reviewable by this Court, id., and our primary objective is to ascertain the intent of the legislature by looking at the language of the statute itself and giving it its plain, ordinary [**3] and commonly understood meaning. Production Credit Ass'n of Minot v. Lund, 389 N.W.2d 585 (N.D. 1986); Moser v. Wilhelm, 200 N.W.2d 840 (N.D. 1980). However, consideration should be [*592] given to the context of the statutes and the purposes for which they were enacted. Moser at 847.

In reviewing the legislative history behind the enactment of the UCCJA and the classifying the offense as a class C felony, the intent was not to actually prosecute the person who committed such an offense. Because all of the states had not enacted the UCCJA the legislators sought to ensure cooperation of other states in returning the children to North Dakota. In order to ensure cooperation, it was concluded that the best way to accomplish such cooperation was to adapt the law so that the non-states would extradite the parent and return the children. Accordingly, the violation of a custody order was classified as a Class C felony. This is clearly indicated by a review of the legislative history. A copy of the legislative history relative to §14-14 and §14-14.1 was attached to Shafer's motion to dismiss and represents the legislative action in 1969, 1979 and 1999, respectively.(A. at 16-38)

While the UCCJA in general was enacted in 1969, the criminal provisions of such section were not enacted until 1979. During discussions on House Bill 1054, which was

the basis for N.D.C.C. §14-14-22.1, the penal section of such chapter, there was extensive concern about making the violation of a custody decree a felony. John Olson, representing the Association of States Attorneys of North Dakota, in fact opposed the bill and discussed his concerns that the intent of the bill, which was to be more conducive to the extradition process, would not be effective for the child, commenting that "he doesn't feel anyone is going to get fired up enough to go after a parent who has taken a child because the parent loves the child". House Judiciary Committee minutes on House Bill 1054, January 10, 1979.(A. at 25) Representative Richie, opined that it should not be a felony charge when the effort is to only get a child back, to which Representative Conmy responded that what was needed was "a vehicle to get law enforcement people in other areas to look for [the] child". House Judiciary Committee minutes on House Bill 1054, January 10, 1979.(A. at 25-26) An additional key factor taken into consideration by the House Judiciary in recommending passage of the bill was a letter written by Senator Lashkowitz to Representative Winkjer in which she writes:

> I sincerely believe the only way to correct and stop the despicable practice of 'child snatching'...is to make such conduct a felony so as to enable the State of North Dakota to initiate extradition proceedings to another state compelling the return of the child in question by a non-custodial parent."

January 5, 1979 Letter , Shelly Lashkowitz.(A. at 28-30) The legislative history further provides as follows:

> In most states, kidnaping of a child by one of the parents is not treated as a

crime. Additionally, many states do not have to recognize the custody decrees of other states. Twenty states, including North Dakota, have passed the Uniform Child Custody Jurisdiction Act which generally promises respect for custody terms worked out in other states. That still leaves 30 states where custody decree recognition will not necessarily occur. Most states, however, will extradite a person to a state where the person is charged with a felony. The committee therefore recommends making it a Class C felony to remove a child from the state in violation of a custody decree.

1979 Legislative Council - Criminal Justice Violation of Custody Decree.(A. at 24)

The aforementioned legislative history unquestionably indicates that N.D.C.C. §14-14-22.1 was not passed to criminally prosecute non-custodial parents, but rather as a vehicle to get the parties who violate custody orders and the children who are taken out of state back into the state by methods of extradition. The only way to do that, as the legislature deemed in 1979, was to make this a Class C Felony, whereby other states would extradite such persons. This is exactly what occurred and what was used in the instant matter to get the return of Shafer and the children. The statute's only purpose has been accomplished and the criminal matter should be dismissed, consistent with the legislative intent of the statute.

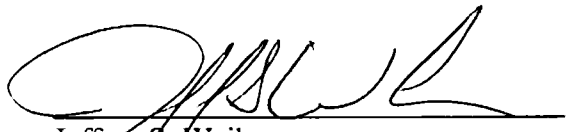
CONCLUSION

Based on the aforementioned law and reasoning discussed in Parts I, II and III,

Defendant - Appellant respectfully requests that the Supreme Court reverse the trial court's decisions and remand the matter for new trial.

Based on the aforementioned law and reasoning presented in Part IV, including its sub-parts, Defendant - Appellant respectfully requests that the Supreme Court dismiss the criminal proceedings against Defendant - Appellant. In the alternative, the Defendant - Appellant respectfully request that the Supreme Court reverse the trial court's sentencing decisions and remand the matter to the trial court for sentencing in accordance with the law.

Dated this 5th day of March, 2001.



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