

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

---

Ricky James Rodriguez,  
Petitioner/Appellant,

vs.

North Dakota State Penitentiary,  
Rodyn Schmalenberger,  
Respondents/Appellees

Supreme Court No. 20130335  
Grand Forks Co. No. 18-2013-CV-01259

---

**APPELLANT'S BRIEF**

---

Appeal from the Order Denying Petition for Writ of Mandamus, entered on October 21, 2013, in the District Court of Grand Forks County, Honorable Lawrence E. Jahnke presiding.

David N. Ogren  
405 Bruce Ave, Ste 101  
Grand Forks ND 58201  
701-795-3910  
gfpublicdefender@nd.gov  
Attorney for Appellant  
N.D. Bar No. 05336

TABLE OF CONTENTS

TABLE OF CONTENTS .....i

TABLE OF AUTHORITIES ..... ii

STATEMENT OF ISSUES PRESENTED FOR REVIEW ..... iii

STATEMENT OF THE CASE ..... ¶¶1-2

    STATEMENT OF THE FACTS ..... ¶¶3-7

STANDARD OF REVIEW.....¶8

JURISDICTIONAL STATEMENT.....¶¶9-10

LAW AND ARGUMENT .....¶¶11-27

    The District Court erred in concluding that Mr.  
    Rodriguez failed to demonstrate a clear legal  
    Right to the be eligible for parole after completing  
    85% of his sentence.....¶¶11-15

CONCLUSION ..... ¶¶28-29

TABLE OF AUTHORITIES

NORTH DAKOTA CONSTITUTION

N.D. Const. art. VI. . . . . ¶6

NORTH DAKOTA STATUTES

N.D.C.C. §1-02-02. . . . . ¶10  
N.D.C.C. §1-02-05. . . . . ¶10  
N.D.C.C. §1-02-07. . . . . ¶10  
N.D.C.C. §12.1-16-01. . . . . ¶9  
N.D.C.C. §12.1-16-02. . . . . ¶9  
N.D.C.C. §12.1-17-02. . . . . ¶9  
N.D.C.C. §12.1-18-01. . . . . ¶9  
N.D.C.C. §12.1-20-03. . . . . ¶9  
N.D.C.C. §12.1-22-01. . . . . ¶9  
N.D.C.C. §12.1-22-02. . . . . ¶9  
N.D.C.C. §12.1-32-01. . . . . ¶9  
N.D.C.C. §12.1-32-09.1. . . . . ¶¶9, 11  
N.D.C.C. § 14-15-19. . . . . ¶22  
N.D.C.C. §27-05-06. . . . . ¶6  
N.D.C.C. §28-27-01. . . . . ¶6  
N.D.C.C. §28-27-02. . . . . ¶6  
Chapter 32-34. . . . . ¶8  
N.D.C.C. § 32-34-01. . . . . ¶6

NORTH DAKOTA CASES

*Falcon v. State*, 1997 ND 200, 570 N.W.2d 719. . . . . ¶10  
*Flattum-Riemers v. Flattum-Riemers*, 1999 ND 146, 598 N.W.2d 499. . . . . ¶12  
*Frank v. Traynor*, 1999 ND 183, 600 N.W.2d 516. . . . . ¶7  
*Gottbreht v. State*, 1999 ND 159, 598 N.W.2d 794. . . . . ¶7  
*Hodous v. Hodous*, 76 N.D. 392, 36 N.W.2d 554 (N.D.1949). . . . . ¶12  
*Krabseth v. Moore*, 1997 ND 224, 571 N.W.2d 146. . . . . ¶7  
*Van Klootwyk v. Arman*, 477 N.W.2d 590 (N.D.1991). . . . . ¶10  
*Wilson v. Kopy*, 2002 ND 179, 653 N.W.2d 68. . . . . ¶7

NORTH DAKOTA RULES

N.D.R.App.P. 4. . . . . ¶6

SECONDARY SOURCES

17 Am.Jur.2d § 147. . . . . ¶12

STATEMENT OF THE ISSUES

- I. Did the District Court err in concluding that Mr. Rodriguez failed to demonstrate a clear legal right to be eligible for parole after completing 85% of his sentence?

## STATEMENT OF THE CASE

¶1 This is an appeal from the Order Denying Petition for Writ of Mandamus, entered by the Grand Forks County District Court. (Register of Actions, Docket 23; Appendix (“App.”) 3-6). On August 22, 2013, a Petition for Writ of Mandamus was filed in District Court, asking the Court to issue a Writ of Mandamus ordering the North Dakota State Penitentiary to recalculate Mr. Rodriguez’s eligibility for parole. (Docket 1; App. 3-6). On September 4, 2013, the Respondents filed a Brief objecting to the Petition for Writ of Mandamus. (Docket 7; App. 8-17).

¶2 A hearing was held on October 1, 2013, before the Honorable Lawrence E. Jahnke. (See Transcript (“Tr.”)). On October 21, 2013, the Court entered an Order Denying Petition for Writ of Mandamus. (Docket 23; App.21-22). Mr. Rodriguez timely filed his appeal. (Docket 26; App. 23).

## STATEMENT OF FACTS

¶3 On December 17, 2008 Mr. Rodriguez plead guilty to the charge of Aggravated Assault in Grand Forks County case number 18-08-K-00715. Mr. Rodriguez was sentenced to 5 years with 2 years suspended and 3 years of supervised probation. Mr. Rodriguez 's conviction was subject to the 85% rule pursuant to N.D.C.C. § 12.1-32-09.1.

¶4 On July 6, 2012 a Petition for Revocation was filed in and a revocation hearing was held on September 4, 2012. On September 6, 2012 the Court issued an Order for Revocation of Probation resentencing Mr. Rodriguez to 5 years with credit for 3 years, 39 days previously served. (App. 24-26).

¶5 Five years is the equivalent of 1,825 days (5 years x 365 days = 1,825). Eighty-five percent of 1,825 days is 1,551 days (.85 x 1,825 = 1,551.25). The District Court gave Mr. Rodriguez 3 years, 39 days credit for time previously served – or 1,134 days credit. (3 years x 365 days = 1,095 days + 39 days = 1,134 days). As of the date Mr. Rodriguez was re-sentenced on September 6, 2012, Mr. Rodriguez had 417 days to serve before becoming eligible for parole (1,551 days – 1, 134 days = 417 days).

## JURISDICTIONAL STATEMENT

¶6 The district court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. §§ 27-05-06 and 32-34-01. This appeal is timely under N.D.R.App.P. 4(a). This Court has jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. §§ 28-27-01 and 28-27-02.

## STANDARD OF REVIEW

¶7 The party seeking a writ of mandamus bears the burden of demonstrating a clear legal right to the performance of the particular acts sought to be compelled by the writ. *Krabseth v. Moore*, 1997 ND 224, ¶ 6, 571 N.W.2d 146. He must also demonstrate there is no other plain, speedy and adequate remedy in the ordinary course of law. *Wilson v. Kopy*, 2002 ND 179, ¶ 13, 653 N.W.2d 68. Issuance of the writ is left to the sound discretion of the trial court. *Frank v. Traynor*, 1999 ND 183, ¶ 9, 600 N.W.2d 516. This Court will not reverse a trial court's denial of a writ of mandamus absent an abuse of discretion. *Gottbreht v. State*, 1999 ND 159, ¶ 10, 598 N.W.2d 794. The trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner. *Id.*

## ARGUMENT

I. Did the District Court err in concluding that Mr. Rodriguez failed to demonstrate a clear legal right to be eligible for parole after completing 85% of his sentence?

¶8 Mr. Rodriguez brought this action in the District Court in the form of a Petition for Writ of Mandamus. N.D.C.C. Ch. 32-34. The Petition asked the District Court to issue an Order requiring Robyn Schmalenberger, Warden of the North Dakota State Penitentiary, to recalculate Mr. Rodriguez's eligibility for parole, with the 85% rule, from the 5 years Mr. Rodriguez was resentenced to and, further, to give the entire 3 years, 39 days credit for time served the District Court ordered.

¶9 The District Court denied the writ on the basis that the DOC is correctly calculating Mr. Rodriguez's release date. N.D.C.C. § 12.1-32-09.1 provides that:

Any offender who is convicted of a crime in violation of section 12.1-16-01, 12.1-16-02, 12.1-17-02, 12.1-18-01, subdivision a of subsection 1 or subdivision b of subsection 2 of section 12.1-20-03, section 12.1-22-01, subdivision b of subsection 2 of section 12.1-22-02, or an attempt to commit the offenses, 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. 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 subsection have been met.

¶10 Words used in a statute are given their plain, ordinary, and commonly understood meaning unless defined by statute or unless a contrary intention plainly appears. N.D.C.C. § 1-02-02. Statutes are construed as a whole and are harmonized to give meaning to related provisions. N.D.C.C. § 1-02-07. If the language of a statute is clear and unambiguous, "the letter of [the statute] is not to be disregarded under the

pretext of pursuing its spirit.” N.D.C.C. § 1-02-05. In construing statutes, we consider the context of the statutes and the purposes for which they were enacted. *Falcon v. State*, 1997 ND 200, ¶ 9, 570 N.W.2d 719 (citing *Van Klootwyk v. Arman*, 477 N.W.2d 590, 591-92 (N.D.1991).

¶11 N.D.C.C. § 12.1-32-09.1 is unambiguous and should be given its plain and ordinary meaning. Any offender who is convicted of a crime for which the 85% rule applies, they “...[are] 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...” In this case, the District Court resentenced Mr. Rodriguez to 1,825 days imprisonment. Taking into consideration N.D.C.C. § 12.1-32-09.1, Mr. Rodriguez should be eligible for parole when 85% of his sentence has been completed which is 1,134 days.

¶12 In the District Court, Respondents argued that out of the 3 years (3 years x 365 days = 1,095 days) Mr. Rodriguez was originally sentenced to the actual time Mr. Rodriguez was confined was 985 days, or 110 days less than the total 1,095 day sentence. However, this is not what the District Court ordered in the revocation proceedings. The District Court’s Order for Revocation of Probation, the District Court clearly gave Mr. Rodriguez 3 years, 39 days credit for time previously served – or 1,134 days credit. This Court has held:

[w]here a court has issued an order, even if erroneous, the party to whom the order was issued must obey it as long as it remains in force or until it is reversed, modified or set aside on appeal, and the failure to obey such an order is punishable as contempt of court. *Hodous v. Hodous*, 76 N.D. 392, 36 N.W.2d 554, 559 (N.D.1949); *see also* 17 Am.Jur.2d § 147 (stating “[a]n alleged contemnor who feels that an order is erroneous has an adequate remedy to have it reviewed by way of appeal, and absent a stay, is required to comply promptly with the order pending appeal.”). In *Hodous*, 36 N.W.2d at 559, the trial court ordered the defendant pay sums for support, suit money and attorney’s fees. The order was erroneous with respect to one of the amounts, but valid to the other

two. *Id.* As in the present case, the defendant failed to challenge the order until he was ordered to show cause why he should not be held in contempt. *Id.* We concluded the defendant could be held guilty of contempt for ignoring and failing to comply with the order even though a portion of it was invalid. *Id.* (stating a party to whom an order is directed must obey the order as long as it remains in force and until the order has been set aside by the court that made it or upon appeal).

*Flattum-Riemers v. Flattum-Riemers*, 598 N.W.2d 499, 1999 ND 146, ¶ 11.

¶13 If the North Dakota State Penitentiary disagreed with the District Court's calculations, the appropriate remedy is to go back to the District Court and ask for the order to be modified. The North Dakota State Penitentiary cannot disregard a Court's order and instead use its own numbers for calculating credit for time served.

#### CONCLUSION

¶14 For all the foregoing reasons, Mr. Rodriguez respectfully requests this Court to reverse the District Court's Order Denying Petition for Writ of Mandamus and that this case be remanded and that the District Court issue a Writ of Mandamus ordering that the Warden of the North Dakota State Penitentiary, Robyn Schmalenberger, recalculate Mr. Rodriguez's eligibility for parole, with the 85% rule, from the 5 years Mr. Rodriguez was resentedenced to serve with credit for the 3 years, 39 days previously served.

Submitted this 16th day of December, 2013.

David N. Ogren  
ND Attorney No. 05336  
Attorney for Appellant  
405 Bruce Ave, Ste 101  
Grand Forks ND 58201  
701-795-3910  
gfpublicdefender@nd.gov

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

---

Ricky Rodriguez,  
Petitioner/Appellant

vs.

North Dakota State Penitentiary,  
Robyn Schmalenberger, Warden,  
Respondent.

## AFFIDAVIT OF SERVICE

Supreme Court No. 20130335  
Grand Forks Co. No. 18-2013-CV-01259

---

The undersigned, being of legal age, being first duly sworn deposes and says that on the 16<sup>th</sup> day of December, 2013, she served true copies of the following documents:

Appellant's Brief  
Appellant's Appendix

And that said copies were served upon:

Ken Sorenson  
Assistant Attorney General  
Email: [ksorenso@nd.gov](mailto:ksorenso@nd.gov)

by email, and that said copies were served upon:

Ricky Rodriguez  
c/o James River Correctional Center  
2521 Circle Dr  
Jamestown ND 58401Dated this 16<sup>th</sup> day of December, 2013.

---

Holly BickerSubscribe and sworn to before me this 16<sup>th</sup> day of  
December, 2013.

---

Notary Public  
County of Grand Forks  
State of North Dakota