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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

DANIEL JOSEPH MYERS,	)	
Petitioner / Appellant,	)	**Supreme Court No. 20160256**
vs.	)	**District Court No. 08-2015-CV-00840**
STATE OF NORTH DAKOTA,	)	
Respondent / Appellee.	)	

APPELLANT'S BRIEF

Appeal from Judgment Dismissing Petitioner's Application for Post-Conviction Relief, Entered on June 29, 2016, by the Burleigh County District Court, South Central Judicial District, State of North Dakota, The Honorable David E. Reich Presiding.

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[¶ 6] Whether the district court abused its discretion by failing to allow the Appellant an evidentiary hearing to present facts, testimony, and evidence in order to properly assess the facts and arguments?

[¶ 7] Whether the district court committed reversible error in denying the Appellant's application for post-conviction relief?

[¶ 8] STATEMENT OF THE CASE

[¶ 9] The Appellant appeals from the district court's order dismissing his application for post-conviction relief on June 29, 2016. (Appellant's Appendix "A.A." at 40.) This post-conviction relief application stems from a previous post-conviction wherein the Appellant's previous attorney failed to raise issues the Appellant wanted addressed. Myers v. State, 2015 ND 54, 861 N.W.2d 172.

[¶ 10] The Appellant is here again from a probation revocation sentence as a result of being on probation for four (4) underlying criminal cases, 08-2011-CR-02739, 08-2012-CR-00335, 08-2012-CR-00638, and 08-2012-CR-00796. (A.A. at 3-17.) The Appellant was originally sentenced on the four cases at two separate occasions. First in case 02739, the Appellant was sentenced to five years, with all five years suspended, and supervised probation for five years on April 27, 2012. (A.A. at 44.) Then, on August 22, 2012, he

was sentenced in cases 00335, 00638, and 00796 to all suspended time and supervised probation for a period of three (3) years. (A.A. at 49-56.)

[¶ 11] On April 22, 2013, the Appellant's probation officer, Darin Ferderer, filed an amended Petition for Revocation of Probation, adding only a fifth allegation to his original petition. (A.A. at 57.) On April 29, 2013, a revocation of probation hearing was held where the Court determined the Appellant had in fact violated conditions of his probation and revoked his probation in all cases. (A.A. at 60, 64, 68, & 69.) As a result, the Court sentenced the Appellant to ten (10) years with the Department of Corrections through a variation of concurrent and consecutive sentences in all four (4) cases on April 30, 2013. (A.A. at 62, 66, 68, & 70.)

[¶ 12] The Appellant appealed all four (4) sentences on June 3, 2013, but motioned to dismiss all appeals in lieu of his Post-Conviction Relief application on August 21, 2013. (A.A. at 21.) The Appellant then submitted his original application for Post-Conviction Relief on August 29, 2013. (A.A. at 18.) After responses by the State and supplemental applications and briefs a Post-Conviction Relief Hearing was held on July 28, 2014, before the Honorable Bruce Haskell. (A.A. at 18.) Upon completion of the hearing and that same day, Judge Haskell issued his Order denying Myers' application. (A.A. at 18.)

[¶ 13] After an appeal, this Court determined the Appellant's primary issue of concern was not adequately raised at the district court and therefore summarily affirmed that denial. Myers, 2015 ND 54, at ¶ 1, 861 N.W.2d 172.

[¶ 14] The Appellant then filed a subsequent Post-Conviction Relief Application determined to properly address his primary issue of concern on April 20, 2015. (A.A. at 1.) The State responded on May 19, 2015, along with a Motion for Summary Disposition.

(A.A. at 25-32.) For brevity, this case was already on appeal before based on a time issue wherein this Court reversed and remanded. Myers v. State, 2016 ND 5, 876 N.W.2d 485. That specific procedural history is not relevant to this particular appeal and will therefore not be referenced.

[¶ 15] Upon remand and after a recusal by Judge Haskell, and assignment of Judge Reich, a new deadline was set for the Appellant's Response to the State's Motion for Summary Disposition. (A.A. at 33.) On March 31, 2016, the Appellant again filed a Response to the State's Motion for Summary Disposition. (A.A. at 34.) On June 29, 2016, the district court issued its order dismissing the Appellant's application for post-conviction relief. (A.A. at 40.)

[¶ 16] The Appellant once again timely filed his notice of appeal on July 14, 2016, pursuant to North Dakota Rule of Appellate Procedure 4. (A.A. at 43.) The District Court had jurisdiction under N.D.C.C. § 27-05-06 and N.D. Const. art. VI, § 8. The Supreme Court has jurisdiction under N.D.C.C. § 29-32.1-14.

[¶ 17] STATEMENT OF THE FACTS

[¶ 18] On April 27, 2012, in case number 08-2011-CR-02739, the Appellant was sentenced to five years with the Department of Corrections, with all five years suspended for a period of five years, during which time, the Appellant was to be on supervised probation. (A.A. at 44.) This sentence was as a result of a guilty plea to an Aggravated Assault-Domestic Violence, a Class C Felony. (A.A. at 44.) At that sentencing hearing, the Court told the Appellant if he violated his conditions of probation he would "get the whole five years (A.A. at 74, lines 22-23.)

[¶ 19] In cases 08-2012-CR-00335, 00638, & 00796, before the Appellant changed his plea, he was fully informed as to what the State was going to recommend, prior to the presentence investigation report. (A.A. at 73, lines 19-21.) On August 22, 2012, in cases 00335, 00638, & 00796, the Appellant was sentenced to five years with the Department of Corrections, with all five years suspended for a period of three years, during which time, the Appellant was to be on supervised probation. (A.A. at 49-56.)

[¶ 20] In an effort to avoid confusion, the Appellant will not list out each individual sentence, but simply stated the overarching sentence was five years, with all five years suspended for three years involving two-Class C Felonies, two-Class A Misdemeanors, and one-Class B Misdemeanor. All sentences were maximum allowable time, with all time suspended. The Court did note in the Criminal Judgment in case number 00796 that sentences in case numbers (relevant to this appeal) 00335, 00638, and 00796 were to all run concurrent. (A.A. at 53.) There was no mention in any of the Criminal Judgments on August 22, 2012 whether the Appellant's previous sentence in case, 02739, was to be concurrent or consecutive. Pursuant to statute, "[u]nless the court otherwise orders, when a person serving a term of commitment…for another offense…the shorter term *shall* be merged in the other term. N.D.C.C. § 12.1-32-11(1) (emphasis added). Moreover, the same statute goes on to say terms of "probation or parole *shall* be merged in any new sentence…." Id. (emphasis added). Therefore, by the statute, the Appellant's 2739 probation was *merged* (made concurrent) to that of 00335, 00638, and 00796.

[¶ 21] Eight months later, the Appellant's probation officer filed an Amended Petition for Revocation of Probation. (A.A. at 57.) It should be noted that the "Amended Petition For Revocation of Probation" in Appellant's Appendix is only for case 00335.

There was a petition for revocation filed in each individual case and an amended petition that only added a fifth allegation. The Appellant acknowledges the petitions are all identical in form and substance except for case number and the underlying charge. In an effort to reduce the size of the appendix, only one amended petition was included for reference. The Appellant admitted to and was found guilty of three of the five allegations, the State dismissed one, and failed to prove the fifth. (A.A. at 60, 64, & 69.) As a result, the Court revoked the Appellant's probation and sentenced him as follows (pertinent to this post-conviction appeal):

- 02739; 00335; 00796, (C Felonies) – Five years with Department of Corrections;
- 00796, 00638 (A Misdemeanors) – one year with Department of Corrections
- 00638 (B Misdemeanor) – 30 days

- 02739 concurrent with – 00638 & 00335
- 00638 concurrent with – 00796 (A.A. at 68)
- 00796 consecutive to – 00335, 00638, & 02739

(A.A. at 62, 66, 68, 70.)

[¶ 22] Of note in this compilation or re-sentencing is the error by the district court in hand writing in the 00638 order that the sentence is to run concurrent with 00796 (A.A. at 68); then placing them consecutive in the 00796 typed amended judgment. (A.A. at 71.)

[¶ 23] Although the probation revocation judge was the same as the sentencing judge in the Appellant's cases, this sentence changes the sentencing judge's concurrent sentence order to consecutive sentences. (A.A. at 53 & 71.)

[¶ 24] ARGUMENT

[¶ 25] The district court failed to address the issue presented by the Appellant, which was his "sentence was imposed in violation of the laws of…North Dakota" and his "sentence is not authorized by law." (A.A. at 23, ¶ 7(A)&(B); and 34, ¶4). This district court simply rested its opinion on whether the Appellant was "informed" of the potential ramifications of revocation. This was merely one small diminutive aspect of the Appellant's issues.

[¶ 26] The district court's order is indicative of either a failure to review the record, or a lack of caring to ensure accuracy. Either way, what may be categorized as "clerical errors" show a lack of due diligence on the part of the district court, which could have easily been rectified with a simple evidentiary hearing.

[¶ 27] Moving past the shortcomings contained within the current Order, in reviewing the Appellant's claims, the Court should find the sentence imposed upon the Appellant after his revocation to be illegal and therefore invalid. The United States Supreme Court has long held that in order for a court to have jurisdiction to "set aside" an original sentence and impose an increased sentence, the court must have been granted legislative authority to do four things: revoke probation, revoke suspension of execution of the original sentence, set aside the original sentence, and enter a new judgment for a longer imprisonment. Roberts v. United States, 320 U.S. 264, 266 (1943), N.D.C.C. § 12.1-32-07(6) does not grant authority to a district court to set aside original sentence, nor enter longer term sentences.

[¶ 28] Additionally, a plain reading of North Dakota Century Code Section 12.1-32-07(6) indicates a clear legislative intent to delineate "probation revocation" cases to

those of "suspended execution of sentences." The statute begins discussing what a court can do to a probationer (i.e., modify or enlarge the conditions, revoke, resentence, etc). Then in a new sentence, the statute discusses a new topic "[i]n the case of suspended execution of sentences." See N.D.C.C. § 12.1-32-07(6). In the case at bar, the Appellant's original sentences were "suspended executions" as it is clearly stated in each one of his original criminal judgments. (A.A. at 44, 49, 51, & 52.)

[¶ 29] Therefore, in the Appellant's underlying cases and sentences, the probation revocation judge was limited on the "time" he could impose on the Appellant, to that of the "sentence previously imposed." N.D.C.C. § 12.1-32-07(6). That "time" in the Appellant's case was all concurrent time, not consecutive. (A.A. at 53.) Any other "sentencing alternatives" available under North Dakota Century Code Section 12.1-32-02 were open to the Appellant's probation revocation judge; but the Appellant's "time" was sealed by his sentencing judge and the last sentence in North Dakota Century Code Section 12.1-32-07(6).

[¶ 30] Moreover, reviewing courts have limited themselves in their ability to review and overturn other courts' decisions and rulings through "standards of review." The purpose behind "standards of review" is that trier of fact courts are in a superior position than appellate or reviewing courts to assess the credibility of witnesses and weigh evidence first hand. State v. Genre, 2006 ND 77, ¶ 12, 172 N.W.2d 624. Yet, the North Dakota Century Code permits a probation revocation court to "modify or enlarge the conditions of probation" and even re-sentence a probationer to "any other sentence" without any "deference" to the sentencing court, only "good cause" is required. See N.D.C.C. § 12.1-32-07(6). In some cases, like in the Appellant's case, the probation revocation judge and

the sentencing judge may be one in the same, but that is not a requirement, nor is it always the case.

[¶ 31] Therefore, probation revocation judges should be limited on their ability to "add" or "modify" a sentencing judge's order. Just like reviewing courts recognize they are not in the same position with regard to the evidence and witnesses as the trial courts, probation revocation courts are clearly not in the same position as sentencing courts. Probation revocation courts can be called into a case years after a defendant has been sentenced by a sentencing court. It can result in a different judge, different prosecutor, different defense attorney, different time and place, yet for some reason, the Court allows a probation revocation court complete autonomy in which to operate with absolutely no required deference whatsoever to the sentencing court.

[¶ 32] Because of the clear construction of the statute, the obvious contrast in execution to that statute by courts, and counterintuitive autonomy in which we allow probation revocation courts to operate, the Appellant's post-conviction relief must be granted. It must be granted for the purpose of illegal sentence, and remanded to the district court with instructions on the proper deference owed to sentencing courts, and an outlined delineation and definition of a "probation modification." a "suspended execution of sentences," and lack of authority to "set aside judgments" as referenced in North Dakota Century Code Section 12.1-32-07(6).

[¶ 33] The current interpretation of N.D.C.C. § 12.1-32-07(6) almost induces a form of prosecutorial misconduct and ethical violations for all attorneys involved in the process of plea negotiations where suspended time will be imposed. Prosecutors offering a deal with suspended time, knowing that the suspended time is meaningless, and defense

attorneys conveying an offer to a defendant with suspended time, knowing it is meaningless. These are just two examples that could possibly trigger a N.D.R. Prof. Conduct 4.1 violation involving the knowing conveyance of a falsehood under the current interpretation of N.D.C.C. § 12.1-32-07(6).

[¶ 34] Additionally, the issue raised here by the Appellant is not one of double jeopardy, nor is it an issue that has been raised before on this subject, which does not trigger the doctrine of legislative acquiescence. In the alternative, the doctrine of legislative acquiescence does not by itself override the compelling consideration of statutory construction, nor the Constitutional violation of one's Due Process. Courts have a duty to analyze statutes to ensure one's Constitutional rights are protected.

[¶ 35] Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure. McMorrow v. State, 516 N.W.2d 282, 283 (N.D. 1994); Varnson v. Satran, 368 N.W.2d 533, 536 (N.D. 1985). "This court applies the 'clearly erroneous' standard set forth in Rule 52(a), N.D.R.Civ.P., when reviewing a trial court's findings of fact on an appeal from a final judgment or order under the Uniform Post-Conviction Procedure Act.

[¶ 36] This Court's Standard of Review for post-conviction relief proceedings has been clearly established:

> A trial court's findings of fact in a post-conviction proceeding will not be disturbed on appeal unless clearly erroneous under N.D.R.Civ.P. 52(a). A finding is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made. Questions of law are fully reviewable on appeal of a post-conviction proceeding."

Broadwell v. State, 2014 ND 6, ¶ 5, 841 N.W.2d 750 (internal citations and quotations omitted).

[¶ 37] ***A. The District Court Failed To Address The Appellant's Issues And Failed To Properly Review The Case File Before Issuing Its Order.***

[¶ 38] It should be duly noted, the only issue the district court addressed was whether the Appellant had misused the process by failing to raise the instant ground for relief in his previous post-conviction relief, and has failed to provide an excuse for that error. However, the district court incorrectly recited the Appellant's position in reaching its conclusion in the "Law and Decision" section of the Order. The district court held that the Appellant contended he raised the issue of "understanding of the maximum sentence he could receive in his prior application for post-conviction relief." (A.A. at 41.)

[¶ 39] This is an inaccurate recitation of the Appellant's position. In Appellant's application and subsequent response, the issue to be addressed is clearly articulated as his "sentence was imposed in violation of the laws of…North Dakota" and his "sentence is not authorized by law." (A.A. at 23, ¶ 7(A)&(B); and 34, ¶4.) The district court failed to properly address the issue before it when making its decision.

[¶ 40] Moreover, the district court inaccurately recounted facts when making its decision. First, in paragraph 3, the district court states that the Appellant's sentence after the probation revocation was for -02739 "to run consecutive to a five-year sentence on the three later cases." (A.A. at 40.) This is an erroneous recitation of the sentence that was imposed. The only "consecutive" sentence upon the revocation was that of -00796; which was a complete restructuring of the original sentence imposed by Judge Haskell in 2013. This error by the district court can be thought of as "clerical," but it shows either a complete misunderstanding of the case or a rushed decision with little to no research. Either way,

this "clerical error" sets the stage for this entire appeal, the Appellant's case was not taken seriously in the district court, and his issues were not even considered.

[¶ 41] In paragraph 8 of its Order, the district court cited the previous district court's order from the Appellant's previous post-conviction relief application. (A.A. at 42.) The district court recounted, "Attorney Balaban testified at the hearing on the application that he had informed Mr. Myers that the Court could impose any sentence the Court wished to, including consecutive sentences. Therefore, the Court finds that Mr. Myer's was adequately informed that he could be sentence[d] to consecutive sentence." (A.A. at 42.) However, had the district court adequately reviewed the previous record it would have been discovered that Attorney Balaban did *not* actually testify to that. In fact, when asked the question directly Attorney Balaban's response was, "I don't recall if I spoke with him specifically about that…." (A.A. 72, ln. 13-14.) Moreover, had the district court properly reviewed the record it would have noticed the "notification" to the Appellant of the ramifications of his violations of probation, in writing, is the "imposition of any suspended sentence or penalty." (A.A. at 51, #8.)

[¶ 42] In a three-page order dismissing an application for post-conviction relief regarding the sentence imposed on the Appellant, the district court managed to: 1.) erroneously recite the sentence the Appellant was sentenced to, and, 2.) misquote the Appellant's attorney's recount of his advice to the Appellant. This order is purely indicative of the care and diligence this case was given in the district court. The first time around, the Appellant was not given time to respond, the second time around, the district court simply failed to review the case and dismissed his action. On the sheer facet of failure

to properly give the Appellant his due diligence and access to the court, like any other citizen alone, this case should be reversed and remanded.

[¶ 43] However, the Appellant is going to request this Court take this case slightly further than simply reversing and remanding. The issues this Appellant has been trying to raise for over two years now, rest solely in the purview of law and the interpretation of that law. This Court can address this issue without need for a fuller record on appeal. The law behind this injustice can be addressed by this Court in this case. This Court can, and has, addressed an issue not raised by the district court or by either party on its own accord. See City of Grand Forks v. Jacobsen, 2016 ND 173 ¶ 10, __N.W.2d __. The Appellant now asks that this Court to do the same and address the injustice of law interpretation here and now.

[¶ 44] ***B. The Present Application For Post-Conviction Relief Is Not A Misuse Of Process.***

[¶ 45] The Appellant did in fact raise this claim in his previous post-conviction application, however, this Court asserted it was raised "for the first time on appeal." Myers v. State, 2015 ND 54 ¶ 1, 861 N.W.2d 172. However, in the district court's previous Order denying the Appellant's post-conviction relief application, the Court acknowledged it "neglected to address on the record Mr. Myers additional ground for relief, that he understood the maximum sentence he could receive…." (A.A. at 85.) This issue was viewed as "ancillary" to the district court and therefore was not fully addressed or reviewed. Thereby opening the door for the Appellant to fully address this issue on a subsequent Post-Conviction Relief.

[¶ 46] Moreover, Appellant asserts that he specifically requested his prior post-conviction attorney to address this issue in more detail. However, his prior attorney

pursued a different approach contrary to the Appellant's wishes, therefore not fully addressing this specific issue for proper review by the district court, nor by this Court. This is further evidenced by Appellant's own hand written supplemental brief for amended petition in his previous post-conviction relief. (A.A. at 80.) The Appellant even has correspondence between himself and his prior attorney where he discusses this issue and he was informed that his attorney would not pursue this particular claim. However, this evidence was never admitted into evidence, due to the lack of an evidentiary hearing afforded to the Appellant.

[¶ 47] Finally, should this Court determine this issue was not raised in the Appellant's previous application, Appellant asserts, the "excuse" for not properly raising the issue is lack of understanding the legal process and representation that failed to address his primary issue of concern. Appellant asks this Court to take judicial notice of his previous application (A.A. at 75.) Appellant asserted in that application, his guilty pleas were unlawfully induced and he was not afforded effective assistance of counsel. Id.

[¶ 48] Through thorough communication with the Appellant the undersigned is confident the Appellant lacked the understanding of the procedural process of filing and arguing additional grounds beyond those which his previous attorney was willing to pursue. This lack of understanding led to a communication barrier between the Appellant and his previous post-conviction relief attorney. The undersigned has now represented the Appellant on the previous post-conviction relief appeal and the current matter before this Court for nearly two years. Communication and understanding has developed over that time and the Appellant truly believed he had communicated this issue properly to his

previous attorney, which is further evidenced by the letter from Appellant's previous attorney.

[¶ 49] This Court has upheld district court's denial of a post-conviction relief for misuse of process where the "petitioner present[ed] no *excuse* for the failure to raise the issue earlier." McMorrow v. State, 537 N.W.2d 365 (N.D. 1995) (emphasis added) (see also State v. Johnson, 1997 ND 235, ¶ 15, 571 N.W.2d 372, holding "[b]ecause Johnson *inexcusably* failed to raise all his claims about the legality of his consecutive probationary sentences in a single post-conviction proceeding, we conclude he has misused the post-conviction process…."; Woehlhoff v. State, 531 N.W.2d 566 (N.D. 1995) (finding all of the contentions raised on appeal had been decided before, so that "the trial court's summary denial post-conviction relief was correct).

[¶ 50] However, in the case at bar, the Appellant did in fact raise this issue before, but it was inadequately addressed at the district court level and was therefore unable to be properly addressed by this Court. In the alternative, the Appellant offers a justifiable excuse in that he attempted to communicate this issue to his prior attorney but was unable to do so through a lack of understanding and a communication barrier, as it has been the Appellant's intent all along to address the legality of his extended sentence following a revocation of probation and not merely the "understanding" of the sentence.

[¶ 51] ***C. Summary Disposition Was Inappropriate In The Present Case, Without At The Very Least, An Evidentiary Hearing.***

[¶ 52] The State's Motion for Summary Disposition rests on misuse of process and does not in any way "put the Appellant on his proof." North Dakota case law requires that when a post-conviction relief applicant is put to his or her proof, he or she must supplement the application with affidavits or other evidence. Henke v. State, 2009 ND 117, ¶ 11, 767

N.W.2d 881 (citing Ude v. State, 2009 ND 71, ¶ 8, 764 N.W.2d 419) (requiring a petitioner present competent admissible evidence after being put to his or her proof). In Delvo v. State, this Court found summary disposition appropriate because Delvo did not supplement her application. 2010 ND 78, ¶ 13, 782 N.W.2d 72. Conversely, in the present case, the State has not put the Appellant on his proof. Additionally, the standard process for post-conviction relief proceedings in every jurisdiction, in which the undersigned has represented clients, is for the State to allow appointed counsel to supplement an application after due diligence and research, or at the very least open communications, before a motion for summary disposition is filed.

[¶ 53] Typically, the undersigned has had conversations with the State's Attorney's office in the jurisdiction where a post-conviction relief is filed. This conversation most often leads to a stipulated scheduling order, giving appointed counsel specified time to supplement and thereby extending the State's "response" time to 14-30 days *after* the supplement is filed. Therefore, the Court is presented with a full, complete, coherent argument, as opposed to piecemealed filings.

[¶ 54] In Wheeler v. State, the "district court dismissed Wheeler's application without an evidentiary hearing upon grounds including misuse of process, [the Court] conclude [sic] Wheeler's failure to present any competent evidence in response to the State's motion to dismiss was the appropriate grounds for dismissal of his application for post-conviction relief." Wheeler v. State, 2008 ND 109, ¶ 12, 750 N.W.2d 446. Unlike Wheeler, the Appellant here answered the State's claim's in their motion for summary disposition. The Appellant offered the district court a justifiable excuse for being afforded another post-conviction relief.

[¶ 55] The State has not questioned any evidence the Appellant has, nor has the State put the Appellant on his proof. Instead, the district court simply dismissed the Appellant's application without so-much-as an evidentiary hearing where testimony could have been elicited and exhibits offered.

[¶ 56] Moreover, as previously noted, the dismissal here is based on a completely erroneous view of the case, the evidence, and the facts. The district court erroneously cited the underlying record with regard to the sentence imposed and misquoted the Appellant's underlying counsel's testimony at the previous post-conviction relief hearing.

[¶ 57] ***D. The North Dakota Century Code Does Not Provide The Requisite Authority To District Courts To Set Aside Original Sentences And Enter New Judgments.***

[¶ 58] Dating back to 1943, the United States Supreme Court analyzed this concept of resentencing individuals after a revocation of probation. See Roberts v. United States, 320 U.S. 264 (1943). Granted, a majority of the analysis in Roberts and its progeny, both federal and state, address the question of double jeopardy, the Appellant does not raise double jeopardy. The Appellant points this Court's attention to the clear outline of a four-part test to ascertain a district court's authority to increase an original judgment after a revocation of probation. Id. at 266-68.

[¶ 59] The United States Supreme Court articulated, in order to determine a district court's authority to increase a sentence, the legislature must grant it authority to, "do four things: revoke probation; revoke suspension of execution of the original sentence; set aside the original sentence; and enter a new judgment for a longer imprisonment." Id. At 266. It is not necessary to compare word for word federal law to state law, but simply review the North Dakota Century Code which purports to provide the district courts this authority:

> The court, upon notice to the probationer and with good cause, may modify or enlarge the conditions of probation at any time prior to the expiration or termination of the period for which the probation remains conditional. If the defendant violates a condition of probation at any time before the expiration or termination of the period, the court may continue the defendant on the existing probation, with or without modifying or enlarging the conditions, or may revoke the probation and impose any other sentence that was available under section 12.1-32-02 or 12.1-32-09 at the time of initial sentencing or deferment. In the case of suspended execution of sentence, the court may revoke the probation and cause the defendant to suffer the penalty of the sentence previously imposed upon the defendant.

N.D.C.C. § 12.1-32-07(6)

[¶ 60] It is clear that the first two, revoke the probation and suspension of sentence, are expressly granted. It is equally clear, that the power to set aside the original sentence is not expressly outlined, and therefore must be inferred, just as in Roberts. The United States Supreme Court in Roberts reasoned:

> If then the power to set aside and increase the prison term of the original sentence is to be inferred…it must be drawn from the clause which empowers the court after revocation of the probation and the suspension of sentence to "impose any sentence which might originally have been imposed." It is undisputed in the instant case that the court could originally have imposed a three-year sentence. Therefore the existence of power to set aside the first judgment in order to increase the sentence would be a perfectly logical inference from the clause if it stood alone, because two valid sentences for the same conviction *cannot coexist*. But the clause cannot be read in isolation; it must be read in the context of the entire Act. And in the absence of compelling language we should not read into it an inferred grant of power which necessarily would bring it into irreconcilable conflict with other provisions of the Act.

Id. at 267 (emphasis added).

[¶ 61] Moreover, the North Dakota Century Code, goes on in the last sentence to state, "[i]n the case of suspended execution of sentence, the court may revoke the probation

and cause the defendant to suffer the penalty of the sentence previously imposed upon the defendant." N.D.C.C. § 12.1-32-07(6). Just as the United States Supreme Court stated in Roberts a "clause cannot be read in isolation; it must be read in context of the entire Act." In North Dakota, we cannot ignore the last sentence of N.D.C.C. § 12.1-32-07(6), or read it in isolation. To do so, leaves that last sentence meaningless and without any value whatsoever. This Court has a long history of holding that "[w]e construe statutes in a way which does not render them meaningless because we presume the Legislature acts with purpose and does not perform idle acts." Hiltner v. Owners Ins. Co., 2016 ND 45, ¶25, 876 N.W.2d 460 (citing Meier v. N.D. Dep't of Human Servs., 2012 ND 134, ¶ 10, 818 N.W.2d 774) (see also N.D.C.C. § 1-02-38(2)).

[¶ 62] As the United States Supreme Court held in Roberts, the legislature must provide the authority for courts to do "four things." In the present situation, just as in Roberts, over 70 years ago, the legislature has not expressly provided the authority to a probation revocation court to set aside an original sentence, and such an inference cannot be made by reading the statute in its entirety and not in isolation.

[¶ 63] ***E. The "Time" That May Be Imposed On A Defendant During A Probation Revocation Hearing Involving A "Suspended Execution Of Sentence" Is Limited To The "Time Suspended" By The Original Sentencing Judge.***

[¶ 64] The primary issue before this Court in this case is the historical interpretation of N.D.C.C. § 12.1-32-07(6). This Court has clearly set forth judicial statutory interpretation:

> [W]e first look to the plain language of the statute and give each word of the statute its ordinary meaning. When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. If, however, the statute is ambiguous or if adherence to the strict letter of the statute would lead to an

> absurd or ludicrous result, a court may resort to extrinsic aids, such as legislative history, to interpret the statute. A statute is ambiguous if it is susceptible to meanings that are different, but rational. We presume the legislature did not intend an absurd or ludicrous result or unjust consequences, and we construe statutes in a practical manner, giving consideration to the context of the statutes and the purpose for which they were enacted

State v. Fasteen, 2007 ND 162, ¶ 8, 740 N.W.2d 60 (internal citations omitted).

[¶ 65] The statute at question in this case reads as follows:

> The court, upon notice to the probationer and with good cause, may modify or enlarge the conditions of probation at any time prior to the expiration or termination of the period for which the probation remains conditional. If the defendant violates a condition of probation at any time before the expiration or termination of the period, the court may continue the defendant on the existing probation, with or without modifying or enlarging the conditions, or may revoke the probation and impose any other sentence that was available under section 12.1-32-02 or 12.1-32-09 at the time of initial sentencing or deferment. In the case of suspended execution of sentence, the court may revoke the probation and cause the defendant to suffer the penalty of the sentence previously imposed upon the defendant.

N.D.C.C. § 12.1-32-07(6).

[¶ 66] Reading the statute plainly, giving ordinary meaning to each word, the legislature is allowing a probation revocation judge to impose any sentence which was available at the original time of sentencing under N.D.C.C. §§ 12.1-32-02 and 12.1-32-09 to a defendant that was "sentenced" or whose sentence was "deferred." The Appellant's sentences were all "suspended executions," we, therefore, look to the last sentence in the statute, specifically, "[i]n the case of suspended executions of sentence, the court may revoke the probation and cause the defendant to suffer the penalty of the sentence previously imposed upon the defendant." N.D.C.C. § 12.1-32-07(6). In the Appellant's

case, the "previously imposed" sentence was for everything to run concurrently. (A.A. at 53 & N.D.C.C. § 12.1-32-11(1).) Therefore, not only was Judge Haskell statutorily unauthorized to subsequently change a suspended execution of sentence; but Judge Haskell also mislead the Appellant during his sentencing hearing by saying "if you violate, you're going to get the whole five years,". (A.A. at 74, line 22-23.)

[¶ 67] Admittedly, this Court has ruled on this issue in the past and stated a district court is authorized to "increase the length of [a] sentence imposed, but suspended, upon…revocation of his probation." State v. Gefroh, 458 N.W.2d 479, 489 (N.D. 1990). This Court reached that conclusion in 1990 through analyzing "legislative intent" of the 1989 Legislative Assembly. Id. That analysis bypassed the first statutory construction interpretation, "plain language." Reading the plain language here, the statute refers to "sentencing" or "deferment" and "suspended execution of sentence." N.D.C.C. § 12.1-32-07(6). These are three distinctly different sentences. See generally N.D.C.C. § 12.1-32. In reading the statute on its face, it specifically refers to three separate types of sentences and how a probation revocation judge may deal with each.

[¶ 68] Under this Court's interpretation of this statute in Gefroh, the implication is that suspended sentences are pointless and serve no purpose. Since probation revocation judges are not bound in any way, shape, or form to a sentencing judge's findings and judgments, sentencing judges need never impose "suspended sentences" because probation revocation judges are boundless under the Gefroh decision. More importantly, under Gefroh, the last sentence in N.D.C.C. § 12.1-32-07(6) is meaningless. If a probation revocation judge is boundless and can impose any sentence he/she wishes, changing the terms from concurrent to consecutive, adding years, etc.; then the last sentence is

completely meaningless. As articulated previously, this Court has long held, the legislature cannot be presumed to enact meaningless statutes or "perform idle acts." Hiltner, 2016 ND 45, at ¶25, 876 N.W.2d 460; See also N.D.C.C. § 1-02-38. Yet, Gefroh violates this basic principle on its face.

[¶ 69] Analyzing each distinctly different sentence and its relation to probation revocation would most effectively illustrate the error in the Gefroh analysis. A deferred imposition of sentence is a sentence where a court has yet to impose a sentence upon the defendant for a defined period of time, during which time the court must place the defendant on probation. N.D.C.C. § 12.1-32-02(4). This type of sentence most clearly fits into a category where a probation revocation judge needs autonomy to impose "any sentence available at the time of sentencing," as no sentence was ever actually imposed.

[¶ 70] A "sentenced" individual has already served his sentence and is released early from incarceration on probation, or a portion of his sentence (i.e. fines, evaluation, etc.) has yet to be concluded. Again, a probation revocation judge in this case would need autonomy to impose "any sentence available at the time of sentencing," as this defendant has no "sentence" to serve.

[¶ 71] N.D.R.Crim.P. 32(f)(3)(B) explains that if a Court determines a probationer violated conditions of probation, the Court may "revoke an order suspending a sentence or an order suspending the imposition of sentence; or continue probation on the same or different conditions." This rule, additionally, states "subject to limitations imposed by law…." N.D.R.Crim.P. 32(f)(3)(B). The operative word being "limitations," which indicates the rule is the outside limits on the Court's authority, and the law can narrow the authority but cannot expand such authority. This stands in stark contrast to Gefroh and its

progeny's interpretation of N.D.C.C. § 12.1-32-07(6), which essentially allows courts unlimited authority to act after conditions of probation are determined to have been violated.

[¶ 72] Once a court revokes an order suspending a sentence, that sentence now needs to be served. Likewise, once a court revokes an order suspending the ***imposition of a*** sentence, a sentence must thus be ***imposed***. In the former, the sentence has already been imposed, but suspended and need only be served. In the latter, the court reserved the right to impose any sentence.

[¶ 73] Finally, the "suspended sentence" defendant has a set value of time the sentencing judge imposed as a "threat" to keep the defendant on the "right path." This "suspended sentence" time was established by the sentencing judge after argument, mitigating factors, and weight of evidence was all considered. Allowing a probation revocation judge complete autonomy from the sentencing judge's carefully considered and informed decision, nullifies the purpose and design of suspended sentences as a whole.

[¶ 74] Further evidence of this concept can be seen from this Court's reference to the Roberts decision pre-Gefroh. This Court cited Roberts in 1987 referencing the concept of suspended executions of sentences in that "the defendant leaves the court with knowledge that a *fixed sentence for a definite term of imprisonment* hangs over him…." State v. Siegel, 404 N.W.2d 469, 471 (N.D. 1987) (emphasis added). This concept of a fixed sentence for a definite term of imprisonment is not a new concept, in fact it existed pre-Grefroh. Grefroh's central concept was that the legislature amended a section of law by "adding a sentence drawn, without substantial change, from former" section of law, thereby "impliedly adopted our construction of those sections." Gefroh, at 484. By this

logic, the legislature adopted Siegel's construction as well, defining a suspended execution of sentence as a "fixed sentence for a definite term of imprisonment."

[¶ 75] For the sheer logic of statutory interpretation, the Appellant's original "suspended time" could not have been extended by the probation revocation judge and is therefore an illegally imposed sentence.

[¶ 76] ***F. Current Allowance To Resentence To Greater Sentences Permits A Form Of Prosecutorial Misconduct, Attorney Ethical Conundrums, And Psychological Manipulation.***

[¶ 77] The current interpretation, wherein a probation revocation judge may impose a greater sentence, almost encourages a very specific type of, what the Appellant will call, prosecutorial misconduct. In order to charge out an offense, all that is needed is probable cause. See N.D.R.Crim.P. 5.1. Should a prosecutor have a case that passes muster for probable cause, but knows that he will fail to meet the beyond a reasonable doubt standard, and has a defendant who has a history of probationary troubles, the prosecutor can offer an exceptional plea agreement knowing that a probation revocation is a lesser burden and his offer has no value.

[¶ 78] This can create a paradoxical outcome in any defendant's case. Just as in the Appellant's case, he was placed on supervised probation with 5 years of incarceration hanging over his head. He committed no new charges, but violated the terms of his supervised probation. The result was that he is now sentenced to 10 years of incarceration. Yet, for some reason, the Appellant, with no new criminal activity, who was only warranted 5 years before, is now warranted double the sentence.

[¶ 79] This paradoxical interpretation carries on into day to day operations and the North Dakota Rules of Professional Conduct. A prosecutor can offer a significantly low

sentence to "hang over" a defendant's head, knowing it is a meaningless gesture, because it holds no significance in a probation revocation matter whatsoever. In these circumstances, it is not considered a "false statement," but one could argue a violation of N.D.R. Prof. Conduct 4.1, wherein all prosecutors and defense attorneys should know that suspended time in North Dakota currently is meaningless. Thus, by telling the Appellant here that 5 years will be suspended, both the prosecutor and defense attorney were knowingly conveying a falsehood to the defendant, because that time was meaningless and was virtually unenforceable.

[¶ 80] ***G. Legislative Acquiescence Is Inapplicable In The Present Case And Is Merely An Aid In Statutory Interpretation And Not The End-All Where Injustice Is At Issue.***

[¶ 81] It needs to be duly noted, the challenges of Gefroh, its progeny and N.D.C.C. § 12.1-32-07(6)'s authority to resentence probation revocationer's to a greater sentence center around "double jeopardy." See State v. Ennis, 464 N.W.2d 378 (N.D. 1990); State v. Kensmoe, 2001 ND 190, 636 N.W.2d 183; State v. Causer, 2004 ND 75, 678 N.W.2d 552; Peltier v. State, 2003 ND 27, 657 N.W.2d 238. The Appellant here does not raise such an issue, the Appellant here raises an issue this Court has not yet addressed, in that, on its face the North Dakota Century Code does not permit a suspended execution of sentence to be set aside and a new judgment be entered upon revocation of probation. Therefore, legislative acquiescence should not apply to the issue presented here.

[¶ 82] Should this Court disagree, the reliance on the Doctrine of Legislative Acquiescence alone does not by itself override the compelling consideration of statutory construction, nor the Constitutional violation of one's Due Process. See generally State v. Burleigh County, 212 N.W. 217 (N.D. 1927) ("Where a statute is susceptible of two

constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, it is the *duty* of courts to adopt the latter construction.") (emphasis added).

[¶ 83] This doctrine of legislative acquiescence is merely an aid "in statutory interpretation and can be overridden by more compelling considerations." State ex rel. Clayburgh v. American West Community Promotions, Inc., 2002 ND 98, ¶12, 645 N.W.2d 196. It is the duty of the judicial branch to stand above politics and remain blind to the plaintiff, defendant, petitioner, respondent, appellant, and/or appellee, and review issues for their legal ramification and remain that check and balance to overreaching executive or oppressive legislative branches.

[¶ 84] The voices of the those affected by this interpretation are the probationer's who have been revoked and resentenced to a harsher sentence. Presumably felons, most likely a history within the court system (i.e., those who cannot and do not vote). Oddly reminiscent of days past where a subset of the American populace was "by statute" equal, but by affect downtrodden and kept "separate but equal." It took the action of a brave court to look past the doctrine of legislative acquiescence and override the legislature's lack of action for good and compelling reasons.

[¶ 85] It has been argued and articulated, suspended time is meant to hold a level of "fear of specified jail time" over a probationer so as to ensure his/her compliance with the probation conditions. Then, if the probationer fails to comply, that fear was ineffective and therefore, a "punishment" should be inflicted with a potentially harsher sentence, and "anything available at the time of sentencing." If this were meant to be the truth, then the probationer would have known from the moment of sentencing, the "fear of specified jail

time" was always the maximum possible sentence to all charges run consecutively. Thus the "suspended time of specified jail time" was meaningless and useless. We cannot continue to believe the legislature meant to contradict itself within a statute, and leave a complete sentence useless and meaningless.

[¶ 86] CONCLUSION

[¶ 87] For the foregoing reasons, The Appellant respectfully requests this Court reverse and remand the district court's order dismissing the Appellant's application for post-conviction relief. Additionally, that this Court address fully the long standing injustice regarding probation revocation resentencing with those probationers under a "suspended sentence."

Dated this Friday, September 16, 2016.

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IN THE SUPREME COURT

FOR THE STATE OF NORTH DAKOTA

Danny Joseph Myers,	)	
	)	
Appellant,	)	**Supreme Court No.: 20160256**
	)	
vs.	)	**District Court No.: 08-2015-CV-00840**
	)	
	)	
State of North Dakota,	)	
	)	
Appellee.	)	

CERTIFICATE OF SERVICE

I, Samuel A. Gereszek, attorney for the Petitioner / Appellant, and officer of the court, hereby certify that I served a true and correct copy of the following:

1. *Appellant's Brief (.pdf & Microsoft Word);*
2. *Appellant's Appendix (.pdf)*

On the following:

Clerk of the Supreme Court **North Dakota Supreme Court**	**Brian Lee Johnson** **Attorney for Respondent – Appellee**	**Mr. Daniel Myers #21695** **P.O. Box 5521** **Bismarck, ND 58506**
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Dated this Friday, September 16, 2016.

HAMMARBACK & SCHEVING, P.L.C.

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