

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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<b>State of North Dakota,</b>	*	
	*	
Plaintiff/Appellee,	*	
	*	
<b>v.</b>	*	<b>Supreme Court No. 201600342</b>
	*	
<b>Adam Schnellbach,</b>	*	
	*	
Defendant/Appellant.	*	

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APPEAL OF CRIMINAL JUDGMENT  
DATED SEPTEMBER 16, 2016  
WALSH COUNTY DISTRICT COURT FILE 50-2015-CR-00325  
NORTHEAST JUDICIAL DISTRICT  
THE HONORABLE M. RICHARD GEIGER, PRESIDING

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**BRIEF OF APPELLEE**

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Barbara L. Whelan  
Walsh County State's Attorney  
North Dakota Bar No. 05039  
Walsh County Courthouse  
600 Cooper Avenue – 2<sup>nd</sup> Floor  
Grafton, North Dakota 58237  
Telephone: (701) 352-1300  
Facsimile: (701) 352-1104  
Service Email: [walhsa@nd.gov](mailto:walhsa@nd.gov)

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## **ISSUES PRESENTED FOR REVIEW**

- I. The District Court correctly considered the sentencing factors, and therefore its sentencing decisions were proper.
- II. The sentences imposed by the District Court did not exceed the statutory sentencing range, and therefore they are lawful and appropriate.

## **STATEMENT OF THE CASE**

[¶1] In October, 2015, Adam Schnellbach (hereinafter “Schnellbach”) was charged with numerous felony offenses in the Walsh County District Court. In May, 2016, a “Psychological Evaluation” prepared by the North Dakota State Hospital was filed with the Court, determining that Schnellbach was fit to proceed and that he did not lack criminal responsibility for the offenses charged.

[¶2] Shortly thereafter, Schnellbach, with the assistance of counsel, entered into a written plea agreement which called for him to plead guilty to three of the charges, and in exchange the State dismissed four other felony charges. The written plea agreement specified that it was an “open” plea, and that sentencing would take place following a pre-sentence investigation. At the May 18, 2016, hearing where the plea agreement was filed with the Court, Schnellbach entered his guilty pleas pursuant to the terms of the written plea agreement. The Court accepted the guilty pleas and proceeded to order a pre-sentence investigation in compliance with the written plea agreement.

[¶3] The pre-sentence investigation was filed with the Court and served upon the parties in August, 2016. A sentencing hearing was held in September,

2016. Schnellbach was sentenced by the Court for the three charges to which he had previously pled guilty. Within a matter of days, Schnellbach filed this appeal.

### **STATEMENT OF FACTS**

[¶4] The State does not believe that there are any facts in dispute. The record in this case is clear. Schnellbach was charged with seven offenses involving sexual assaults and exploitation of two prepubescent males. The charges were:

**Count 1:** Gross Sexual Imposition by engaging in a sexual act with 4-year-old John Doe #1, a Class AA Felony;

**Count 2:** Gross Sexual Imposition by engaging in a sexual act with 4-year-old John Doe #1, a Class AA Felony;

**Count 3:** Gross Sexual Imposition by engaging in a sexual act with 4-year-old John Doe #1, a Class AA Felony;

**Count 4:** Gross Sexual Imposition by engaging in sexual contact with 8-year-old John Doe #2, a Class A Felony;

**Count 5:** Producing a Sexual Performance by a Minor because of production of a photograph showing sexual conduct of 8-year-old John Doe #2, a Class C Felony;

**Count 6:** Producing a Sexual Performance by a Minor because of production of a photograph showing sexual conduct of 8-year old John Doe #2, a Class C Felony; and

**Count 7:** Producing a Sexual Performance by a Minor because of production of a photograph showing sexual conduct of 8-year-old John Doe #2, a Class C Felony. (Doc ID# 13)

¶5 Schnellbach applied for and received counsel. (Doc ID# 6, 7, 8, 15 & 17).<sup>1</sup> Counsel sought an evaluation of Schnellbach to address issues of mental competency and criminal responsibility. (Doc ID# 28) The Court ordered the evaluation. (Doc ID# 31) The evaluation was completed by Dr. Alexander at the North Dakota State Hospital. (Doc ID# 36) Dr. Alexander indicated no concerns with Schnellbach's mental competency nor his criminal responsibility. (Doc ID# 36, pp. 8-9)

¶6 Schnellbach, with the assistance of his attorney, entered into a written plea agreement with the State of North Dakota. (Doc ID# 37). The terms of the written plea agreement called for Schnellbach to plead guilty to Count 1, GSI against John Doe #1, a Class AA Felony. (Doc ID# 37, ¶3a) The plea agreement also called for Schnellbach to plead guilty to Count 4, GSI against John Doe #2, a Class A Felony. (Doc ID# 37, ¶3d) Finally, the plea agreement called for Schnellbach to plead guilty to Count 5, for producing child pornography of John Doe #2, which is classified as a C Felony. (Doc ID# 37, ¶3e)

¶7 In exchange, the State of North Dakota dismissed Counts 2 and 3, which both were GSI against John Doe #1, and each a Class AA Felony. (Doc ID# 37, ¶3b & c) The State also dismissed Counts 6 and 7, which were charges of producing child pornography involving John Doe #2, and each of those a Class C Felony. (Doc ID# 37, ¶3f & g)

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<sup>1</sup> Doc ID# refers to the document identified in the Register of Actions for Case No. 50-2015-CR-325, and certified as part of the Clerk of Court's record in this case. The Register of Actions is found in Schnellbach's Appendix at pp. 42-45.

[¶8] The terms of the written plea agreement were very specific with regard to the issue of sentencing. In paragraph 3, subparagraph h, the document states:

*This is an "open plea" meaning that ADAM LEE SCHNELLBACH is pleading guilty in exchange for the dismissal of the other counts. The parties acknowledge that a pre-sentence investigation and risk assessment will be ordered by the Court, and that after receipt of that report a sentencing hearing will be scheduled and the parties will be allowed to present evidence and/or argument at the sentencing hearing regarding their positions on an appropriate disposition. Nevertheless, ADAM LEE SCHNELLBACH acknowledges that this is an "open plea" and that the issue of sentencing ultimately rests with the District Court. (Doc ID# 37, ¶3h)*

[¶9] On May 18, 2016, the parties appeared before Judge Geiger to present the written plea agreement. (Doc ID# 63) At that time Judge Geiger established that Schnellbach was not under the influence of anything that would affect his ability to understand the proceedings. (Doc ID# 63, p. 3) Judge Geiger spent considerable time reviewing the charges and the penalties that Schnellbach was facing. (Doc ID# 63, pp. 6-8) Judge Geiger spent significant time going through the specific terms of the written plea agreement. (Doc ID# 63, 5-10) Judge Geiger took specific steps to ensure that Schnellbach understood that this was an "open" plea and that after he pled guilty to the charges pursuant to the plea agreement, he could not withdraw his guilty pleas. (Doc ID# 63, pp. 8-9) Judge Geiger was very careful to impress upon Schnellbach that sentencing would take place after a pre-sentence investigation was filed with the Court, and after hearing argument from the State of North Dakota and from Schnellbach's counsel. (Doc ID# 63, p. 10) Notably, Judge

Geiger made certain that Schnellbach understood that the ultimate decision regarding sentencing would be made by Judge Geiger at the sentencing hearing. (Doc ID# 63, p. 9)

[¶10] After going through these steps to ensure that Schnellbach was knowingly, voluntarily, and with the advice of counsel, agreeing to the terms set out in the written plea agreement, Judge Geiger proceeded to take guilty pleas from Schnellbach. (Doc ID# 63, pp. 12-22) Schnellbach entered a guilty plea to Counts 1, 4 and 5, pursuant to the written plea agreement. (Doc ID# 63, pp. 12-13) The Judge, after listening to the representations of counsel regarding the evidence, and upon obtaining Schnellbach's agreement thereto, accepted the guilty pleas as entered. (Doc ID# 63, pp.14-22)

[¶11] Almost immediately thereafter the Court entered an Order directing that a pre-sentence investigation be conducted. (Doc ID# 39). In August, 2016, the pre-sentence investigation was served on the parties and filed with the Court. (Doc ID# 44 & 45)

[¶12] Schnellbach and his attorney appeared before Judge Geiger September 15, 2016, for the purpose of sentencing. (App 1-2)<sup>2</sup> The Court again went through a litany of questions with Schnellbach, particularly about his prior pleas of guilty, based upon statements contained in Schnellbach's pre-sentence investigation. (App 7-9) Both parties presented arguments to the Court regarding the type of and length of sentence that Schnellbach should receive. (App 12-18) Schnellbach personally addressed the Court. (App 18-21)

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<sup>2</sup> The abbreviation "App" followed by numbers refers to page numbers in the Appendix filed by Schnellbach.



¶13] On the record, Judge Geiger reviewed the sentencing factors delineated at N.D.C.C. § 12.1-32-04. (App 33-36) Ultimately, Judge Geiger sentenced Schnellbach to a significant term of incarceration with the North Dakota Department of Corrections. (App 46-50)

- A. For Count 1: 40 years, to serve 16 years, with credit for time served;
- B. For Count 4: 20 years consecutive to Count 1, to serve 6 years, with credit for time already served; and
- C. For Count 5: 5 years concurrent to Count 4, with credit for time served, and the remainder suspended.

¶14] The criminal judgment also called for a significant length of supervised probation after release from incarceration pursuant to conditions contained in an Appendix A, and assessed the standard fees in a criminal case. (App 21-30, 49-50)

## **ARGUMENT**

***I. The District Court correctly considered the sentencing factors, and therefore its sentencing decisions were proper.***

A. The standard of review

¶15] The standard for reviewing a criminal sentence, as set forth in State v. Corman, 2009 ND 85, ¶15, 765 N.W.2d 530, is as follows:

***A trial judge is allowed the widest range of discretion in fixing a criminal sentence; this court has no power to review the discretion of the sentencing court in fixing a term of imprisonment within the range authorized by statute. Appellate review of a criminal sentence is generally confined to whether the [district] court acted within the sentencing limits prescribed by statute, or***

***substantially relied upon an impermissible factor. Statutory interpretation, however, is a question of law fully reviewable on appeal. State v. Shafer-Imhoff, 2001 ND 146, ¶29, 632 N.W.2d 825 (internal citations and quotation omitted); see State v. Ennis, 464 N.W.2d 378, 382 (N.D. 1990) (holding trial judge has widest possible range of discretion in fixing sentences). [emphasis supplied]***

B. The sentencing factors

¶16] The sentencing factors are found in the North Dakota Century Code at § 12.1-32-04, and are properly recited in Schnellbach's brief at paragraph 5. It is also evident that the District Court was aware of and considered these sentencing factors when determining the sentence to impose upon Schnellbach.

(App 30-36)

¶17] Schnellbach argues that the Court wrongfully weighed factor 14. Factor 14 gives the sentencing court the opportunity to consider whether or not the criminal defendant cooperated with law enforcement and, if so, to presumably consider that as a mitigating circumstance. Interestingly, the District Court determined that it did not even consider factor 14. (App 36, L19-20)

¶18] Still, Schnellbach insists that since he voluntarily entered guilty pleas, this should have been weighed in his favor. Unfortunately, North Dakota law on this issue is clear. A guilty plea by a defendant is not to be considered as "cooperation" for sentencing purposes. State v. Bell, 540 N.W.2d 599 (N.D. 1995)

¶19] Schnellbach also argues that due to his health issues, factors 11 and 12, taken in conjunction with each other, were improperly considered by

Judge Geiger. These two factors ask the Court to consider whether imprisonment would create undue hardship to Schnellbach, and to consider whether he is in poor health. Schnellbach represents to this Court that he has ongoing health issues from a brain injury, that he needs testosterone injections, and he has memory issues.

[¶20] The District Court obviously did consider factors 11 and 12; but simply did not believe Schnellbach's health issues are as severe as Schellbach believes they are. Judge Geiger acknowledged that Schnellbach has multiple medical concerns, but ultimately concluded that, "those can be addressed in prison while you are incarcerated and while on probation, so I don't see that as one that would mitigate given all of the other factors . . . I am not prepared to say you are in such poor health that incarceration is not an available alternative for dispositions . . ." (App 36, L5-17)

[¶21] Judge Geiger's determinations regarding factors 11 and 12 fall squarely within his discretionary authority. Schnellbach's disagreement with the sentencing court does not constitute an abuse of discretion, and certainly does not provide the Supreme Court with the authority to second-guess how the sentencing court viewed these factors.

***II. The sentences imposed by the District Court did not exceed the statutory sentencing range, and therefore they are lawful and appropriate.***

[¶22] Schnellbach pled guilty and was sentenced to an AA Felony; an A Felony; and a C Felony. The maximum sentences of imprisonment for each of

those offenses per N.D.C.C. § 12.1-32-01, are, respectively: life imprisonment without parole; twenty years' imprisonment; and five years' imprisonment.

Moreover, there is a minimum mandatory sentence of not less than 5 years' imprisonment for the AA Felony conviction, per N.D.C.C. § 12.1-20-03(3)(a).

[¶23] The sentences imposed upon Schnellbach do not fall outside of those statutory guidelines. Judge Geiger sentenced Schnellbach to considerably less than life imprisonment on the AA Felony by giving him a sentence of 40 years. Likewise, Judge Geiger's sentence of 20 years on the A Felony did not exceed the statutory minimum; nor did his sentence of 5 years on the C Felony.

[¶24] The long-standing rule of law within North Dakota is as follows: "A sentence within the minimum and maximum statutory limits is within the discretion of the trial court, and will not be set aside unless it exceeds the statutory limit or unless the trial court substantially relied on an impermissible sentencing factor." State v. Garcia, 1997 ND 60, ¶53, 561 N.W.2d 599 (1997). This Court has remained faithful to that tenet: "A district court judge is allowed the widest range of discretion in sentencing." State v. Loughead, 2007 ND 16, ¶14, 726 N.W.2d 859, citing State v. Murchison, 2004 ND 193, ¶15, 687 N.W.2d 725. See also State v. Skarsgard, 2007 ND 160, ¶25, 739 N.W.2d 786.

[¶25] In this case, Judge Geiger spoke from the bench regarding his decision making process. Not only did he address the statutory sentencing factors, Judge Geiger commented on the seriousness of any sexual crime against a child and the concept of deterrence in sentencing. (App 31) Significantly, Judge Geiger also recognized that the societal implications from

these types of crimes are significant. The District Court's statements from the bench reflect Judge Geiger's understanding that sexual offenders against children present a particularly serious disruption to the peace, tranquility and safety of all citizens of North Dakota. (App 31)

[¶26] The record evidences the District Court's thorough understanding of the sentencing parameters and the sentencing factors. Judge Geiger's sentences do not fall outside of the statutory limits, nor do they reflect impermissible reliance on sentencing factors. His sentencing decision clearly was within his authority as the sentencing judge in this case.

### **CONCLUSION**

[¶27] Schnellbach has, in all matters, failed to raise any substantive claims to justify setting aside the sentences imposed by Judge Geiger. For these reasons, the State respectfully requests that the North Dakota Supreme Court AFFIRM the sentencing decision of the District Court.

[¶28] Dated this 13<sup>th</sup> day of March, 2013.

Respectfully submitted,



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Barbara L. Whelan  
Walsh County State's Attorney.  
North Dakota State Bar No. 05039  
Walsh County Courthouse  
600 Cooper Avenue – 2<sup>nd</sup> Floor  
Grafton, North Dakota 58237  
Service Email: walhsa@nd.gov

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v.

Supreme Court No. 20160342

Adam Schnellbach,  
  
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CERTIFICATE OF SERVICE

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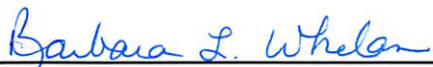
[1] Barbara L. Whelan, Walsh County State’s Attorney, hereby certifies that on the 13<sup>th</sup> day of March, 2017, she served a copy of the following documents:

- Brief of Appellee, and
- Certificate of Service

upon the attorney for the Appellant, Stuart J. Askew, by sending an electronic copy to him at his email address shown on the North Dakota Supreme Court website: [stuart@polarcomm.com](mailto:stuart@polarcomm.com).

[2] Dated this 13<sup>th</sup> day of March, 2017.

Respectfully submitted:

  
 \_\_\_\_\_  
 Barbara L. Whelan  
 ND Bar No. 05039  
 Walsh County State’s Attorney  
 Service email: walhsa@nd.gov