

**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

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<b>STATE OF NORTH DAKOTA,</b>	)	
	)	
<b>Respondent / Appellee,</b>	)	<b>Supreme Court No. 20170094</b>
	)	
<b>vs.</b>	)	<b>District Court No.</b>
	)	<b>08-2011-CR-02739</b>
<b>DANIEL JOSEPH MYERS,</b>	)	
	)	
<b>Petitioner / Appellant.</b>	)	

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**APPELLANT’S BRIEF**

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**Appeal from Order Denying Appellant’s Motion to Correct Sentence Entered on February 24, 2017, by the Burleigh County District Court, South Central Judicial District, State of North Dakota, The Honorable Bruce B. Haskell Presiding.**

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**[¶ 3] STATEMENT OF THE ISSUE**

[¶ 4] Whether the district court abused its discretion in denying Daniel Joseph Myers' (hereinafter "Appellant) Motion to Correct his Sentence?

**[¶ 5] STATEMENT OF THE CASE**

[¶ 6] The Appellant appeals from the district court's order denying his motion to correct his sentence on February 24, 2017. (Appellant's Appendix "A.A." at 20.) The Appellant was originally sentenced, in 2012, to 5 years with the North Dakota Department of Corrections, with all 5 years suspended for 5 years of supervised probation for a plea of guilty to Aggravated Assault, C Felony. (A.A. at 5.) In March of 2013, a petition to revoke probation was filed and then amended in April of 2013. (A.A. at 7.) On April 24, 2013, a Probation Revocation hearing was held and the Appellant was resentenced to 5 years with the North Dakota Department of Corrections. (A.A. at 11.) Both the original judgment and the amended judgment (see A.A. at 5 & 11) are silent on the applicability of the 85% service requirement under N.D.C.C. § 12.1-32-09.1.

[¶ 7] In 2015, the Legislative Assembly changed the Aggravated Assault century code, thereby making only B Felony Aggravated Assault susceptible to the 85% requirement under N.D.C.C. 12.1-32-09.1. Therefore, the Appellant motioned the district court, on February 10, 2017, to specify one way or the other, that the 85% does or does not apply in his case. (A.A. at 15.) On February 15, 2017, the State responded. (A.A. at 18.) On February 24, 2017, the district court issued its order denying the Appellant's motion. (A.A. at 20.)

[¶ 8] The Appellant timely filed his notice of appeal on March 16, 2017, pursuant to North Dakota Rule of Appellate Procedure 4. (A.A. at 21.) 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. § 27-02-04 and N.D. Const. art. VI, § 2.

**[¶ 9] STATEMENT OF THE FACTS**

[¶ 10] On April 27, 2012, 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 5.) This sentence was a result of a guilty plea to an Aggravated Assault-Domestic Violence, a Class C Felony.

[¶ 11] Eleven months later, the Appellant's probation officer filed an Amended Petition for Revocation of Probation. (A.A. at 7.) There was a petition for revocation filed and an amended petition that only added a fifth allegation. 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 13.) As a result, the Court revoked the Appellant's probation and sentenced him to five years with the North Dakota Department of Corrections, but was silent on the issue of the applicability of the N.D.C.C. 12.1-32-09.1, the so called "85% rule." (A.A. at 11.)

**[¶ 12] ARGUMENT**

[¶ 13] The district court abused its discretion by misinterpreting and misapplying the law in the case at bar. The Appellant is entitled to an amended judgment retroactively applying the newly enacted N.D.C.C. § 12.1-32-09.1 due to the ameliorating effect of the amended law. "A district court's decision to amend a judgment is subject to sound judgment and will not be reversed on appeal unless there is an abuse of discretion." State v. Peterson, 2016 ND 192, ¶ 8, 886 N.W.2d 71 (citing State v. Rueb, 249 N.W.2d 506,

511-12 (N.D. 1976)). "A district court abuses its discretion if it acts in an arbitrary, unreasonable, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned determination, or if it misinterprets or misapplies the law." State v. Moos, 2008 ND 228, ¶ 30, 758 N.W.2d 674.

[¶ 14] The Appellant motioned the district court under N.D.R.Crim.P. 35(a)(2) to correct the judgment in the Appellant's case because of a technical or clear error, that being the silence of the applicability of N.D.C.C. § 12.1-32-09.1. This Court has noted:

[T]he Department of Correction's policy required either specific reference to N.D.C.C. § 12.1-22-02(2)(b) or some other indication that the eighty-five percent service requirement of N.D.C.C. § 12.1-32-09.1 applied to Peterson's sentence to appear on the criminal judgment before the Department would apply the eighty-five percent service requirement to a sentence.

Peterson, 2016 ND 192, at ¶ 4, 886 N.W.2d 71.

[¶ 15] Thus, under this reasoning, there needs to be "some other indication that the eighty-five percent service requirement of N.D.C.C. § 12.1-32-09.1 applie[s]" to the Appellant's sentence in the case at bar, however, the Appellant's judgments are all silent on this service requirement. (A.A. at 5 & 11.) There can be no question that the Appellant's crime does not trigger the eighty-five-service requirement under N.D.C.C. § 12.1-32-09.1 today. The Defendant was charged with and plead guilty to Aggravated Assault in violation of N.D.C.C. § 12.1-17-02(1) – the Class C Felony provision of Aggravated Assault. (A.A. at 1.) Under current North Dakota law:

[P]ursuant to rules adopted by the department of corrections and rehabilitation, an offender who is convicted of a crime in violation of...subsection 2 of section 12.1-17-02...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.

N.D.C.C. § 12.1-32-09.1

[¶ 16] Under current law, only the B Felony, “subsection 2 of section 12.1-17-02” triggers the eighty-five percent service requirement. The State argued to the district court the original judgment need not have specified the eighty-five percent language, because the entire statute in 2013 fell under eighty-five percent. However, the State, and the district court failed to take notice of the change that befell N.D.C.C. 12-17-02 in the same Legislative Assembly. (A.A. at 22.) Admittedly, N.D.C.C. § 12.1-32-09.1 was amended after the Appellant’s conviction, so was N.D.C.C. § 12.1-17-02, which created the delineation that 12.1-32-09.1 had to rectify through an amendment as well. As this Court has stated in Peterson, the Department of Correction’s policy requires a criminal judgment specify that the eighty-five percent service requirement is mandated before the “Department would apply the eighty-five percent service requirement....” 2016 ND 192, at ¶ 4, 886 N.W.2d 71. Therefore, the silence of this on the Appellant’s judgement is an error that needs to be rectified.

[¶ 17] Generally speaking, no statutory provision retroactively applies unless the legislature expressly manifests a contrary intention. N.D.C.C. § 1-02-10. However, this Court has carved out exceptions, specifically, “laws which confer a **benefit** are **often excepted** from the general rule against retroactive application.” Smith v. Baumgartner, 2003 ND 120, ¶11, 665 N.W.2d 12 (emphasis added). The Legislature’s amendment of § 12.1-32-09.1 and § 12.1-17-02 to delineating B Felony and C Felony Aggravated Assaults from the 85% service requirement is a **benefit** conferred upon certain sentenced individuals. Therefore, the Appellant here is entitled to the retroactive applicability of

the newly enacted N.D.C.C. § 12.1-32-09.1 to his C Felony conviction from 2012 and his 2013 sentence.

**[¶ 18] CONCLUSION**

**[¶ 19]** For the foregoing reasons, The Appellant respectfully requests this Court reverse and remand the district court's order denying the Appellant's motion to correct the judgment.

Dated this Monday, April 24, 2017.

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