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JULY 6, 2021
STATE OF NORTH DAKOTA

**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

**State of North Dakota,**

Plaintiff & **Appellant,** **Supreme Court No. 20210065**

**v.**

**Bradley Neilan,**

Defendant & **Appellee.**

*********************************

# BRIEF OF APPELLEE

***ORAL ARGUMENT REQUESTED***

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**Appeal from Rule 35 Order and Amended Criminal Judgment dated 2/12/2021**
**Burleigh County District Court**
**South Central Judicial District**
**Honorable Bobbi Weiler**
**Criminal No. 08-2019-CR-03416**

*********************************

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Issues for Review:

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**II.** If this Court finds the State does have standing, whether the statutory language of N.D.R.Crim.P. Rule 35 is unambiguous and the District Court's actions were correct under the law.

**III.** If this Court finds the State does have standing and N.D.R.Crim.P. Rule 35 is ambiguous, whether the supposed ambiguity in how N.D.R.Crim.P. Rule 35 and Rule 11 interact should be construed in favor of Neilan.

**IV.** Whether the Semler case forecloses the District Court's action in this case.

1. Whether the Semler decision is binding on the District Court or this Court and whether policy reasons argue against its adoption.
2. Whether this Court should consider extrinsic evidence outside of N.D.R.Crim.P. Rule 35.
3. If this Court is inclined to adopt the holding in Semler that a defendant's sentence shall only be reduced in exceptional circumstances, whether the District Court found that exceptional circumstances exist in the present matter.

**V.** If this Court finds the State does have standing, whether the drafters' legislative intent is to permit Courts on their own Motion to reduce sentences within 120 days under N.D.R.Crim.P. Rule 35 after the same court imposed the original sentence under N.D.R.Crim.P. Rule 11.

**VI.** If this Court finds the State does have standing, whether the District Court accepting a binding plea agreement and subsequently reducing Neilan's sentence to probation under N.D.R.Crim.P. Rule 35(b) is an abuse of discretion.

**VII.** If this Court finds the State does have standing and the District Court unilaterally accepting a binding plea agreement and subsequently reducing Neilan's sentence to probation under N.D.R.Crim.P. Rule 35(b) was an abuse of discretion, whether reversal is warranted.

## STATEMENT OF THE CASE

### Nature of the Case

¶ 1. State of North Dakota, Appellant, (State) appeals from a district court Order granting the Court's Motion for Sentence Reduction under N.D.R.Crim.P. Rule 35(b).

### Course of Proceedings

¶ 2. On 11/13/2021, Neilan was charged with Count 1, Possession with Intent to Deliver Marijuana; Count 2, Possession with Intent to Deliver Hashish; and Count 3, Misdemeanor Possession of a Controlled Substance.

¶ 3. In Counts 1 and 2, the State alleged that Neilan possessed a firearm or had a firearm within his immediate reach while committing the offenses, thereby potentially implicating the four-year mandatory minimum prison sentence under NDCC 12.1-32-02.1. The State later amended Count 2 to allege that Neilan possessed with intent to deliver THC rather than hashish.

¶ 4. On 2/9/2021, Neilan appeared at a change of plea hearing. The State informed the district court that, pursuant to a plea agreement, the State would be filing an Amended Information removing the firearm allegations from Counts 1 and 2, thereby removing the minimum mandatory sentence. Counsel for Defendant informed the District Court that the plea was being made pursuant to a plea agreement. The District Court subsequently accepted the plea agreement and stated that it would sentence Neilan to the parties' agreed-upon sentence.

¶ 5. Later that day, the District Court signed an order stating that "the plea agreement of the parties is accepted and the criminal information filed in this case be amended pursuant to the plea agreement of the parties." That order was filed the next day, 2/10/2021.

¶ 6. On 2/10/2021, the District Court signed the judgment imposing the stipulated sentence as part of the plea agreement. Later that day, the District Court filed a Motion under N.D.R.Crim.P. Rule 35(b) to reduce Neilan's sentence from incarceration to probation, giving the State and Defendant one day to respond to the district court's motion to reduce the sentence imposed.

¶ 7. On 2/11/2021, the State and Defendant both filed a response.

¶ 8. On 2/12/2021, the District Court entered its Rule 35(b) order reducing Neilan's sentence from prison to probation. An amended criminal judgment was entered on 2/12/2021.

**Disposition in the Court Below**

¶ 9. On 2/12/2021, the Hon. Bobbi Weiler issued an Order granting the Court's Motion for Sentence Reduction.

¶ 10. On 2/26/2021, Notice of Appeal and Notice of Filing the Notice of Appeal by State were entered.

## STATEMENT OF THE FACTS

¶ 11. On 11/13/2019, the State charged Neilan with Count 1, Possession with Intent to Deliver Marijuana; Count 2, Possession with Intent to Deliver Hashish; and Count 3, Misdemeanor Possession of a Controlled Substance.

¶ 12. In Counts 1 and 2, the State alleged that Neilan possessed a firearm or had a firearm within his immediate reach while committing the offenses, thereby potentially implicating the four-year mandatory minimum prison sentence under NDCC 12.1-32-02.1. The State later amended Count 2 to allege that Neilan possessed with intent to deliver THC rather than hashish.

¶ 13. After plea negotiations resulted in a plea agreement, the State and Neilan appeared at a change of plea hearing on 2/9/2021. At that hearing, the District Court confirmed Neilan wanted to change his plea. The State then informed the District Court that, pursuant to a plea agreement between the parties, the State would be filing an Amended Information removing the firearm allegations from Counts 1 and 2, thereby removing the minimum mandatory sentence.

¶ 14. Counsel for Defendant subsequently informed the District Court that Neilan's guilty plea was being made pursuant to a plea agreement. The State then informed the District Court of the parties' agreed-upon sentence. The sentence pursuant to the plea agreement would be four years with all but eighteen months suspended to be followed by a period of unsupervised probation.

¶ 15. On 2/10/2021, the Court filed a Motion and Notice of Rule 35 Reduction of Sentence. (R. at Doc ID# 71).

¶ 16. On 2/11/2021, the State filed a Response to the Court's Rule 35 Motion for Reduction of Sentence. (R. at Doc ID# 72).

¶ 17. On 2/11/2021, Defendant filed a Statement in Support of Court's Rule 35 Motion for Reduction of Sentence. (R. at Doc ID# 75).

¶ 18. On 2/12/2021, the Hon. Bobbi Weiler issued an Order reducing Defendant's sentence to a period of probation. (R. at Doc ID# 77). An Amended Criminal Judgment was subsequently filed with the Court. (R. at Doc ID# 79).

## STANDARD OF REVIEW

¶ 19. This Court applies an abuse-of discretion standard of review for discretionary matters. McDowell v. McDowell, 2003 ND 174, ¶ 27, 670 N.W.2d 876. A motion under N.D.R.Crim.P. Rule 35 is addressed to the discretion of the sentencing court. N.D.R.Crim.P. Rule 35, Explanatory Note.

¶ 20. This Court has held:

> 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 reasonable determination, or if it misinterprets or misapplies the law.

Id. (citation omitted) (quoting State v. Tupa, 2005 ND 25, ¶ 3, 691 N.W.2d 579).

¶ 21. The North Dakota Supreme Court review of a criminal sentence is very limited. State v. Ennis, 464 N.W.2d 378, 382 (N.D. 1990).

¶ 22. Appellate review of a criminal sentence is confined to determining whether the judge acted within the limits prescribed by statute, or substantially relied on an impermissible factor. Peterka v. State, 2015 ND 156, 864 N.W.2d 745.

## LAW AND ARGUMENT

### I. The State lacks standing to appeal the District Court's Order granting the Court's Rule 35(b) Motion for Sentence Reduction.

¶ 23. Before the Supreme Court can consider the merits of an appeal, it must have jurisdiction. City of Grand Forks v. Lamb, 2005 ND 103, 697 N.W.2d 362.

¶ 24. The right of appeal in a criminal case is statutory and is a jurisdictional matter that the Supreme Court will consider *sua sponte*. Id. at ¶ 5 (citing State v. Steen, 2003 ND 116, ¶ 5, 665 N.W.2d 688). If there is no right to appeal, the Supreme Court is without jurisdiction to consider the merits and must dismiss the appeal. Id.

¶ 25. In a criminal action, the State's only right of appeal is expressly granted by statute. State v. Bernsdorf, 2010 ND 123, ¶ 5, 784 N.W.2d 126.

¶ 26. N.D.C.C. § 29-28-07(4), allows the State to appeal from an order made after judgment affecting a substantial right of the State. The issue, then, is whether a "substantial right" of the State is implicated in the context of an Order regarding sentence reduction.

¶ 27. In State v. Rueb, the Court seemed to open the door to the State having a general right to appeal Orders regarding sentence reductions: "We conclude that the district court's modification order of November 29, 1976, as distinguished from the original sentencing judgment, is an order that comes within the provisions of subsection 4 of 29-28-07, NDCC." State v. Rueb, 249 N.W.2d 506, 508–09 (N.D. 1976).

¶ 28. However, after Rueb, the Court in State v. Jefferson Park Books, Inc. clarified its understanding of what "substantial right" of the State was at issue in Rueb, and in so doing effectively curtailed the seemingly general right of appeal granted in Rueb. The Court described that the State does have a substantial right at issue in the context of a Motion for Sentence Reduction but only to the extent that the State must be provided

notice and an opportunity to be heard regarding the Motion. The Jefferson Park Books, Inc. Court elaborated that a "substantial right" in the context of an appeal from an Order regarding sentence reduction "does not relate to the action taken, unless the action taken is not authorized or is not executed pursuant to and under the authority given by Rule 35." This conclusion was premised on the Court's understanding that a reduction of sentence under N.D.R.Crim.P. Rule 35 "is not a right but is basically a matter left to the sound discretion of the trial court after being fully advised on the subject matter and after giving the opposing parties an opportunity to be heard." In sum, Rueb dealt "primarily with procedure in the application and hearing of the reduction as affecting a substantial right and not the validity of the sentence per se." State v. Jefferson Park Books, Inc., 314 N.W.2d 73, 76 (N.D. 1981).

¶ 29. Additionally, the Court has held in numerous previous cases that the *defendant* does not have a substantial right at issue when the sentencing Court denies a Motion for Sentence Reduction: "an order denying a motion for reduction of sentence under N.D.R.Crim.P. 35(b) does not affect a substantial right and is not appealable, and we must dismiss that part of the appeal." Rahn v. State, 2007 ND 121, 736 N.W.2d 488 (citing State v. Halton, 535 N.W.2d 734, 736 (N.D. 1995)). Relating to this, the Jefferson Court held that when a defendant was given a hearing, no substantial right of his has been violated by the Court denying his Motion for Sentence Reduction. State v. Jefferson Park Books, Inc., 314 N.W.2d 73, 76 (N.D. 1981).

¶ 30. In this case, the District Court, subsequent to sentencing Neilan to the sentence contemplated by the parties' Plea Agreement, filed and served upon both the State and Neilan, a Motion under N.D.R.Crim.P. Rule 35(b) to reduce Neilan's sentence from

incarceration to probation, and gave the parties an opportunity to respond. Both the State and the Defendant did in fact respond. (R. at Doc ID# 71).

¶ 31. The District Court subsequently entered a Rule 35(b) Order reducing Neilan's sentence from prison to probation. (R. at Doc ID# 77).

¶ 32. In analyzing whether the State has a substantial right at issue in this case it is instructive to look to Rueb and Jefferson Park Books, Inc.

¶ 33. In Rueb, the State appealed a reduction of sentence that was ordered by the sentencing Court after Defendant motioned the Court and did not serve or otherwise provide notice to the State. Because of this the State was never presented an opportunity to be heard on the issue. On these facts, the Court held that "the district court's modification order… as distinguished from the original sentencing, is an order that comes within… NDCC section 29-28-07(4)." Rueb, 249 N.W.2d 506, 508.

¶ 34. Jefferson Park Books, Inc. clarified the decision in Rueb, and emphasized the fact that Rueb, in so far as it concerned the right of the State to appeal an Order reducing a sentence, was primarily concerned with the "substantial right" to be heard on the issue, not with the action eventually and actually taken by the Court. Jefferson Park Books, Inc., 314 N.W.2d 73, 76. The Jefferson Park Books, Inc. Court specifically stated that Rueb was, in fact, "concerned primarily with procedure" and did not deal with the "validity of the sentence per se." Id. at 76. The Jefferson Park Books, Inc. Court contrasted the situation in Rueb – where the State was not given an opportunity to be heard – to the case then in front of the Court, where the Defendant was given a hearing: "In Rueb, supra, the trial court, without giving or requiring notice to be given to the State, entertained and disposed of an application for reduction of sentence and as such

it affected a substantial right of the State. However, in the instant case the defendant was not only given an opportunity to be heard but was actually heard and, therefore, no substantial right of the defendant was affected in this respect." Id at 76.

¶ 35. None of the issues that were present in Rueb which justified the State's appeal in that case are present in the instant case. The State and Defendant were both provided notice by the Court that the Court was going to be considering a *sua sponte* Motion for Sentence Reduction. The Court gave the parties an opportunity to make arguments regarding why such a reduction was or was not appropriate. The parties both availed themselves of this opportunity, with both the State and the Defendant filing briefs on the issue. The State does not allege that there was any actual procedural irregularity, lack of notice, or otherwise lack of an opportunity to be heard on the issue at hand. This means that under the Rueb and Jefferson Parks Books, Inc. cases' holdings, the State's substantial rights are not in this case implicated, and the State does not have a right to appeal.

¶ 36. This outcome, beyond being legally correct, makes intuitive sense when considered in light of the Court's previous holdings in cases in which defendants have appealed a Court's ruling on a Motion for Sentence Reduction. As noted above, the Court has in numerous cases held that a defendant does not have a right to appeal a denial of his Motion for Sentence Reduction. *See* Rahn v. State, 2007 ND 121, 736 N.W.2d 488, State v. Halton, 535 N.W.2d 734, 736 (N.D. 1995). If the Court believes the actual person whose freedom is at issue in a Motion for Sentence Reduction does not have a right to appeal the outcome of that process, it is hardly fair that the State, comparatively disinterested, would, in contrast, be permitted to appeal on the outcome of such

Motions. Indeed, should the Court permit the State's appeal in this case to move forward, it would be opening the floodgates to both parties having the ability to appeal in any case in which they were aggrieved by the outcome of the sentence reduction process. The correct outcome here is to continue with the Court's holding in Jefferson Park Books, Inc. that a sentencing Court's rulings on sentence reduction are "basically a matter left to the sound discretion of the trial court after being fully advised on the subject matter and after giving the opposing parties an opportunity to be heard." Jefferson Park Books, Inc., 314 N.W.2d 73, 76.

## II. If this Court finds the State does have standing, the statutory language of N.D.R.Crim.P. Rule 35 is unambiguous and the District Court's actions were correct under the law.

¶ 37. Construction of a criminal statute is a question of law, fully reviewable by the appellate court. The court's primary goal in interpreting statutes is to ascertain the Legislature's intentions. In ascertaining legislative intent, the court first looks to the statutory language and gives the language its plain, ordinary, and commonly understood meaning. State v. Laib, 2002 ND 95, 644 N.W.2d 878.

¶ 38. The court interprets statutes to give meaning and effect to every word, phrase, and sentence, and does not adopt a construction which would render part of the statute mere surplusage. Id. *See* Trinity Medical Center, Inc. v. Holum, 544 N.W.2d 148 (N.D. 1996) (statutes must be read to give effect to all of their provisions, so that no part of statute is inoperative or superfluous).

¶ 39. Under N.D. R. Crim. P. Rule 35(b)(1)(A), the sentencing court may reduce a sentence within 120 days after the court imposes sentence. Further, on a party's motion or on its own, and with notice to the parties, the court may grant a sentence reduction.

N.D.R.Crim.P. Rule 35(b)(2). (Emphasis added). Changing a sentence from a sentence of incarceration to a grant of probation is a permissible sentence reduction. (Emphasis added).

¶ 40. Here, Neilan plead guilty pursuant to a binding plea agreement to the amended charges of Possession with Intent to Deliver Marijuana and THC on 2/9/2021. The Court accepted this binding plea agreement and sentenced Neilan accordingly. Following the imposition of this sentence, the District Court, on the Court's own Motion, gave the parties notice that it would consider arguments regarding a sentence reduction. The parties then both filed responses. The District Court considered these responses and determined, in the Court's discretion, and as permitted by Rule 35, to reduce Neilan's sentence.

¶ 41. Nothing in this chain of occurrences is prohibited by the law or the Rules. It is a basic rule of law and constitutional principle that what is not prohibited is permitted. The Court has repeatedly recognized that in interpreting statutes, the Court is look to the plain language of the statute at issue and give it its ordinary meaning. Laib, 2002 ND 95, 644 N.W.2d 878. The State concedes as much in its Brief: "…the plain language of Rule 35(b) appears to allow the district court authority to unilaterally reduce a sentence at any time within the times specified in the rule…" (Br. of Appellant). Defendant would submit that the Rule does not *appear* to permit this, but in fact *does*. Leaving that aside, the State in its Brief relies on foreign and federal case law to try and create a new rule that the District Court should be prohibited from doing what was done in this case in all but "exceptional circumstances." The State argues this new rule is necessary in order to "harmonize" Rule 11 and Rule 35. This suggests that there is

somehow some kind of ambiguity as to how these Rules are to be interpreted, when in fact there is no ambiguity and the District Court's actions are permissible per the language of Rule 35 and are not prohibited by Rule 11.

## III. If this Court finds the State does have standing and N.D.R.Crim.P. Rule 35 is ambiguous, the supposed ambiguity in how N.D.R.Crim.P. Rule 35 and Rule 11 interact should be construed in favor of Neilan.

¶ 42. The court construes ambiguous criminal statutes against the government and in favor of the defendant. State v. Laib, 2002 ND 95, 644 N.W.2d 878.

¶ 43. The "rule of lenity," which requires ambiguous criminal statutes to be construed in defendant's favor, serves as an aid for resolving an ambiguity; it is not to be used to beget one. Id.

¶ 44. Criminal statues are strictly construed against the government and in favor of the accused. State v. Rambousek, 479 N.W.2d 832, 834 (N.D. 1992)

¶ 45. If there is ambiguity in the interaction between N.D.R.Crim.P. Rule 35 and Rule 11, it is to be interpreted in favor of the defendant, not the State. Interpreting any ambiguity in the Rules in favor of defendants obtains the result that Courts should be given the discretion to reduce sentences which are found to be overly punitive, whether these sentences are imposed as part of plea agreements or not.

## IV. The Semler case does not and should not be ruled to foreclose the District Court's actions in this case.

### 1. The Semler decision is not binding on the District Court or this Court and policy reasons argue against its adoption.

¶ 46. Although case law from other jurisdictions is often found to be persuasive, it is not always of assistance in interpreting [...] statutes, since interpretation of state's statutes is specific to its statutes and legislative purposes. Nesdahl Surveying & Engineering,

P.C. v. Ackerland Corp., 507 N.W.2d 686 (N.D. 1993).

¶ 47. Significant policy reasons argue for the Court not adopting the Semler holding. U.S. v. Semler, 883 F.2d 832, 835 (1989). The Semler decision was adopted in 1989. This was a time when crime rates were significantly higher, and when criminal justice decision makers were much more inclined towards aggressively punishing criminal offenders. That is a significant contrast to today. Even before the COVID 19 pandemic, North Dakota had been shifting to a model focused more on rehabilitation and treatment of criminal offenders, with an associated de-emphasizing of punitive sentencing. COVID 19 has only accelerated this trend. The Court does not need to adopt the Semler decision because it is not binding. The Court should avoid adopting the Semler decision as this would have the effect of being seriously regressive with respect to the progress North Dakota has made in transitioning to a more equitable and less punitive criminal justice system.

**2. N.D.R.Crim.P. Rule 35 is unambiguous, therefore, considering extrinsic evidence outside of N.D.R.Crim.P. Rule 35 is inappropriate.**

¶ 48. When ascertaining legislative intent, the court looks first to the language; if the language of a statute is clear and unambiguous, the letter of the statute cannot be disregarded under the pretext of pursuing its spirit, but if a statute's language is ambiguous or of doubtful meaning, the court *may* consider extrinsic aids, including legislative history, along with the language of the statute, to ascertain legislative intent. Kenmare Educ. Ass'n v. Kenmare Public School Dist. No. 28, 717 N.W.2d 606 (N.D. 2006).

¶ 49. In U.S. v. Semler, 883 F.2d 832, 835 (1989), the court describes its understanding that the legislative history of Federal Rules of Criminal Procedure [Rule] 11(e)(3) shows

that Congress wished to preclude a district court from accepting a plea agreement which provided for a specific sentence and then imposing a more lenient sentence than that provided for in the plea agreement.

¶ 50. Under current North Dakota case law as outlined in Kenmare, courts *may* consider extrinsic aids if a statute's language or meaning is ambiguous or of doubtful meaning.

¶ 51. The Court in Semler considers extrinsic evidence regarding congressional intent and record at the time the law was being passed. This reliance on extrinsic evidence is not necessary or appropriate under North Dakota case law as described in Kenmare Educ. Ass'n. It is not necessary because the language of N.D.R.Crim.P. Rule 11 and 35(b) is clear and unambiguous and does permit a court to modify a sentence on its own motion and at its discretion. Therefore it is improper for the State to rely on Semler, the court in which reached its conclusions by improperly (under North Dakota law) relying on extrinsic evidence.

**3. Even if this Court is inclined to adopt the holding in Semler that a defendant's sentence shall only be reduced upon exceptional circumstances when such reduction follows the acceptance of a binding plea agreement, the District Court's Order Granting Motion for Sentence Reduction does indicate the District Court does believe exceptional circumstances do exist in this case.**

¶ 52. The State argues that other than in cases with exceptional circumstances, the district court's acceptance of a plea agreement of the type described in N.D.R.Crim.P. Rule 11(c)(1)(C) should preclude the district court from thereafter unilaterally reducing Neilan's sentence under N.D.R.Crim.P. Rule 35(b). (Br. of Appellant at ¶ 20).

¶ 53. Here, the District Court examined numerous factors that weighed in favor of granting the Court's Rule 35 Reduction of Sentence: (A) Defendant is thirty years old; (B) Defendant's lack of criminal history; (C) Defendant's compliance of his bond with no

violations for a period of fifteen months; (D) Defendant's employment; (E) Defendant's medical issues that make him high risk of complications of contracting COVID-19; (F) no victims in the Defendant's charges; (G) no risk to the public by the Defendant; (H) Defendant's charges are for Marijuana and THC; (I) consistency in the Criminal Justice System; (J) no need for dependency treatment and the Defendant can be rehabilitated; (K) Defendant's conduct is unlikely to recur; and (L) Defendant took responsibility for his action and apologized. (R. at Doc ID# 77 at ¶10).

¶ 54. Further, the District Court explained that when the Court asked the State of North Dakota why it was requesting prison after review of some of the factors above, the State of North Dakota stated that it was punitive and that Defendant's possession of a firearm requires some punishment. (R. at Doc ID# 77 at ¶11).

¶ 55. The Court also found it significant that the Defendant will have a felony record for the rest of his life, which is a punitive measure as many Defendants are offered by the state's attorney and sentenced to a deferred or misdemeanor disposition for their first felony drug offense, including intent to deliver, especially for marijuana and THC. The District Court further stated that Defendant is not a risk to the community and has been a lawful citizen before these charges and since these charges, and that Defendant has been rehabilitated in the community and is unlikely to reoffend leaving the only purpose for a prison sentence to be punitive which the District Court did not find that as appropriate in this case. (R. at Doc ID# 77 at ¶13).

¶ 56. The District Court emphasized that in issuing its Order, its goal was justice, fairness, and consistency, and that, after further review of the case, reviewing all factors in N.D.C.C. § 12.1-32-04, the factors mentioned above, and in the interest of justice, it

believed that Defendant's sentence was unduly harsh. (R. at Doc ID# 77 at ¶12-13).

¶ 57. Therefore, even if this Court adopts the holding in Semler requiring that exceptional circumstances must exist for a court to reduce under Rule 35 a sentence imposed as part of a binding plea agreement, the District Court's Order does in fact show that the District Court believed there were a number of exceptional circumstances which existed in this case which justified a reduction in Defendant's sentence.

## V. As evidenced by legislative history, the drafters' intent is to permit Courts on their own Motion to reduce sentences within 120 days under N.D.R.Crim.P. Rule 35 after the same court imposed the original sentence under N.D.R.Crim.P. Rule 11.

¶ 58. When ascertaining legislative intent, the court looks first to the language; if the language of a statute is clear and unambiguous, the letter of the statute cannot be disregarded under the pretext of pursuing its spirit, but if a statute's language is ambiguous or of doubtful meaning, the court *may* consider extrinsic aids, including legislative history, along with the language of the statute, to ascertain legislative intent. Kenmare Educ. Ass'n v. Kenmare Public School Dist. No. 28, 717 N.W.2d 606, (N.D. 2006).

¶ 59. Here, the State argues that the amendment to Rule 11 was significant in that it eliminated the ability of Courts to amend sentences downward at the time of accepting a plea agreement. However, this is less significant than the State argues, as Rule 35 at the time of the amendment permitted Courts on their own Motion to reduce sentences. Thus, if the drafters of the amendment to Rule 11 had wanted to prohibit Courts from modifying the terms of plea agreements after they had been imposed, they very easily could have simply inserted language into Rule 11 or Rule 35 clearly prohibiting what the District Court did in this case. The fact that the drafters did not do that indicates

that they were not opposed to the kind of action taken by the District Court in this case.

## VI. If this Court finds the State does have standing, the District Court accepting a binding plea agreement and subsequently reducing Neilan's sentence to probation under N.D.R.Crim.P. Rule 35(b) was not an abuse of discretion.

¶ 60. Under N.D. R. Crim. P. Rule 35(b)(1)(A), the sentencing court may reduce a sentence within 120 days after the court imposes sentence. Further, on a party's motion or on its own, and with notice to the parties, the court may grant a sentence reduction. N.D.R.Crim.P. Rule 35(b)(2). (Emphasis added). Changing a sentence from a sentence of incarceration to a grant of probation is a permissible sentence reduction. If the sentencing court grants a sentence reduction, it must state its reasons for the reduction in writing. N.D.R.Crim.P. Rule 35(b)(2).

¶ 61. A motion under the rule is essentially a plea for leniency and presupposes a valid conviction. Rule 35 presupposes a valid conviction only for purposes of a hearing on that motion and does not preclude an appeal by a defendant from the conviction. A motion under this rule is addressed to the discretion of the sentencing court and may be granted if the court decides that the sentence originally imposed was unduly severe. N.D.R.Crim.P. Rule 35, Explanatory Note. (Emphasis added).

¶ 62. This Court applies an abuse-of discretion standard of review for discretionary matters. McDowell v. McDowell, 2003 ND 174, ¶ 27, 670 N.W.2d 876. A motion under N.D.R.Crim.P. Rule 35 is addressed to the discretion of the sentencing court. N.D.R.Crim.P. Rule 35, Explanatory Note.

¶ 63. This Court has held:

> 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 reasonable determination, or if it misinterprets or misapplies the law.

Id. (citation omitted) (quoting State v. Tupa, 2005 ND 25, ¶ 3, 691 N.W.2d 579).

¶ 64. The North Dakota Supreme Court review of a criminal sentence is very limited. State v. Ennis, 464 N.W.2d 378, 382 (N.D. 1990).

¶ 65. Appellate review of a criminal sentence is confined to determine whether the judge acted within the limits prescribed by statute, or substantially relied on an impermissible factor. Peterka v. State, 2015 ND 156, 864 N.W.2d 745.

¶ 66. A sentence reduction "is not a right but is basically a matter left to the sound discretion of the trial court after being fully advised on the subject matter and after giving the opposing parties an opportunity to be heard." Jefferson Park Books, Inc., 314 N.W.2d 73, 76.

¶ 67. Here, the State argues the District Court's actions in this case were an abuse of discretion. That is not the case.

¶ 68. The Court, on the Court's own Motion, entered a notice that it was considering a reduction of sentence for Neilan. The Court gave an opportunity to the State and Neilan to both be heard. The State and Neilan both, in fact, filed briefs on the issue. The Court considered these arguments and ruled in favor of a sentence reduction. The District Court's Order on the matter is thoughtful and deals with the circumstances surrounding Neilan's sentencing. The Court considered a number of factors that justified a lower sentence for Neilan. The Court also made clear that the Court was not aware of any legal authority that would prevent the Court from providing Neilan a lower sentence, which would indicate the Court did significant legal research

regarding the issue prior to ruling.

¶ 69. All of this is evidence that the District Court's Order was not arbitrary, capricious, or otherwise unreasoning, and that in ordering a lower sentence for Neilan, the Court was operating within the sound discretion permitted by the Jefferson Park Books, Inc. decision.

**VII. If this Court finds the state does have standing and the District Court unilaterally accepting a binding plea agreement and subsequently reducing Neilan's sentence to probation under N.D.R.Crim.P. Rule 35(b) was an abuse of discretion, reversal is not warranted.**

¶ 70. If the appeal is taken by the State, the supreme court cannot reverse the judgment or modify it so as to increase the punishment, but may affirm it, and shall point out any errors in the proceedings or in the measure of punishment, and its opinion is obligatory on the district court as the correct exposition of the law. N.D.C.C. § 29-28-35.

¶ 71. Here, should this Court find the District Court abused the Court's discretion in reducing Neilan's sentence to a term of probation, reversal or modification so as to increase the punishment is not permitted under the law and Neilan's amended sentence should remain as is.

## CONCLUSION

¶ 72. WHEREFORE, the Appellee, Bradley Neilan, by and through his attorneys, Sand Law, PLLC, respectfully requests that this Court affirm the District Court's Order granting reduction of sentence.

## REQUEST FOR ORAL ARGUMENT

¶ 73. WHEREFORE, the Appellee, Bradley Neilan, by and through his attorneys, Sand Law, PLLC, respectfully requests an oral argument on this matter as permitted pursuant to N.D.R.App.P. 28(h).

¶ 74. Oral argument would be helpful to the Court and allow the parties to answer any questions the Justices may have concerning the issues presented in this appeal.

## CERTIFICATE OF COMPLIANCE

¶ 75. I certify that the above brief complies with all type-volume limitations as set forth in the North Dakota Rules of Appellate Procedure.

¶ 76. I further certify that the attached Brief of Appellee complies with N.D.R.App.P. 32 in that the brief contains 27 pages, and was prepared using Microsoft Office Word, Times New Roman font, size 12.

## CERTIFICATE OF SERVICE

¶ 77. I certify that service was accomplished on 7/6/2021, via Odyssey Electronic Filing, upon:

a. Clerk of the North Dakota Supreme Court;

i. 600 East Boulevard Avenue, Bismarck, ND 58505-0530; and

ii. SupClerkofCourt@ndcourts.gov.

b. Burleigh County State's Attorney's Office;

i. 514 E. Thayer Ave., Bismarck, ND 58501;

ii. Dennis H. Ingold, dingold@nd.gov, bc08@nd.gov; and

iii. Jamie Schaible, Law Clerk.

¶ 78. They were served with true and correct copies of the following documents:

a. Appellee's Brief; and

b. Appellee's Appendix.

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