IN THE SUPREME COURT OF IOWA

No. 18-1985

JESUS LOZANO CAMPUZANO,

Plaintiff,

v.

IOWA DISTRICT COURT FOR POLK COUNTY,

Defendant.

ON CERTIORI TO THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE JUDGE FARRELL

PLAINTIFF'S FINAL BRIEF

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CERTIFICATE OF SERVICE

On August 16, 2019, the undersigned certifies that a true copy of the foregoing instrument was served upon the Plaintiff by placing one copy thereof in the United States mail, proper postage attached, addressed to:

Jesus Lozano-Campuzano #6129731
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/s/ Philip B. Mears
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USING THE NORMAL RULES OF STATUTORY CONSTRUCTION THE COURT SHOULD CONCLUDE THAT THE 2016 LEGISLATION REDUCING MANDATORY SENTENCES FOR DEFENDANTS SERVING SENTENCES UNDER 124.401(1)(b) SHOULD APPLY TO LOZANO-CAMPUZANO

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ROUTING STATEMENT

This case involves a case of first impression concerning the interpretation of a sentencing statute passed by the legislature in 2016. That year the legislature passed House File 2064, which reduced certain mandatory minimum sentences for several different crimes.

The mandatory minimum sentences for certain drug offenders, persons convicted of 124.401(1)(b) and (c), were reduced by 50%. The legislature specifically made the change applicable to persons already sentenced for one of those drug offenses.

Lozano-Campuzano had one of those sentences. After the Department of Corrections (DOC) refused to apply the change to him, Lozano-Campuzano filed a Motion to Correct Illegal Sentence. The District Court upheld that decision.

There is no reason identified under Rule 6.1101(2) of the Appellate Rules of Court for the Iowa Supreme Court to retain jurisdiction in this case. The claim involves the application of existing legal principles of statutory construction to that 2016 legislation.

STATEMENT OF THE CASE

Nature of the Case:

Lozano-Campuzano was sentenced for his drug offense in April of 2016. That same year, effective July 1, 2016, the legislature passed House File 2064, which reduced certain drug mandatory minimum sentences. Lozano-Campuzano filed a Motion to Correct Illegal sentence when the Iowa Department of Corrections refused to apply the new statute to his case. Appx. p. 9.

After appointment of counsel on September 11, 2018, a hearing took place before the original sentencing judge, Judge Jeffrey Ferrell.

The facts were not contested. After briefs were submitted Judge Ferrell denied relief. Appx. p.42. Lozano sought to expand the findings, Appx. p. 53. That request was denied. Appx. p. 59.

Lozano then petitioned for a Writ of Certiorari to this court. On December 12, 2018, the court granted the Petition for Certiorari and this appeal has proceeded. Appx. p.62.

Course of Proceeding:

Jesus Lozano-Campuzano was sentenced in Polk County for his drug offense on April 5, 2016. Appx. p. 5.

That same spring the Iowa legislature passed House File 2064, which was enacted into law. It was effective as of July 1, 2016. The bill in a number of ways

reduced the mandatory minimum sentences for certain offenses. Included were certain mandatory minimum drug offenses imposed mandatories under 124.413.

With respect to the reduction in the mandatory minimum sentences for the drug offenses, the legislature specifically provided for retroactive application of some of those changes, reducing certain mandatory minimum sentences already imposed. The legislature identified two exceptions. Neither exception applied to Lozano-Campuzano.

After learning about the legislation, Lozano-Campuzano requested that his mandatory sentence be cut in half under that statute. The DOC refused. Lozano-Campuzano then made a number of pro se efforts to get the sentencing judge to address the issue. Those efforts were unsuccessful.[1]

Lozano obtained counsel who filed a Motion to Correct Illegal Sentence on July 2, 2018. Appx. p.9. The matter was briefed by both sides. A short hearing was held on September 11, 2018. On October 18, 2018, Judge Jeffrey Ferrell, who was the original sentencing judge, denied the motion. Appx. p.42.

Lozano filed a Motion to Reconsider the ruling and or to Amend the findings. Appx. p. 53. On November 15, 2018, Judge Ferrell denied that motion. Appx. p. 59.

[1] No one suggested that any rulings on those pro se efforts should be given preclusive effect.

That same day, November 15, 2018, Lozano-Campuzano filed a Petition for a Writ of Certiorari complaining about the ruling on the Motion to correct illegal sentence. Appx. p. 59.

After that petition was resisted, on December 17, 2018, the Supreme Court granted the petition and this appeal has proceeded. Appx. p. 62.

STATEMENT OF FACTS

The facts of the case are not complicated or contested. The only real fact to be considered is the particular sentence that was imposed on April 5, 2016. Appx. p. 5. The legal question is whether this is a sentence subject to the 50% reduction required by House File 2064.

A. The April 5, 2016 sentence

1. Lozano pled guilty to a class B felony, which normally carries 25 years, for a violation of 124.401(1)(b)(7). That subsection applies where the defendant possessed drugs with intent to deliver and the offense involved "more than five grams but not more than five kilograms of methamphetamines…"

2. Lozano had his sentence doubled under 124.401(1)(e), because of a firearm enhancement. That part of the sentence is to some extent what this case is all about. The Minutes of Testimony set out that Lozano Campuzano had been selling methamphetamine for a while. He was stopped for a traffic offense and had approximately two ounces methamphetamine with him. This was the amount

specified in 124.401(1)(b)(7). The Minutes show that the firearm he was "an immediate possession of control of" was back at this house. There was no evidence in the Minutes that he had used the weapon in his drug dealing. Confidential Appendix pg.5.

3. Under 124.401(1)(e), the sentence imposed by124.401(1)(b)(7) is subject to the following enhancement:

> e. A person in the immediate possession or control of a firearm while participating in a violation of this subsection shall be sentenced to two times the term otherwise imposed by law, and no such judgment, sentence, or part thereof shall be deferred or suspended.

3. There were a number of mandatory minimum references in his sentence:

a. Based on 124.413 and 901.10(1) the Defendant was ordered to serve a mandatory one third of the maximum determined sentence.

b. In accordance with 901.10(2), the judge exercised discretion and "reduced by one third" that mandatory one third. That reduction was available since the defendant had pleaded guilty.

c. This gave him a 2/9 mandatory minimum sentence.

B. Calculation of the mandatory minimum sentence

Lozano has a fifty year sentence subject to a one third mandatory which itself was reduced by one third. That makes the mandatory sentence essentially 2/9 of fifty years or 11.11 years.

That mandatory minimum sentence is, in turn, subject to earned time reduction. See 903A.2 (1)(a). A sentence under 124.401(1)(b)(7) is a Category "A" offense. The earned time, which also reduces the mandatory under 124.413, is the faster earned time, which is 2.2 days per day.[2]

As a practical matter, this means that the mandatory 2/9 of the 50 year sentence, which was 11.11 years, when reduced for earned time, calculates to about 5.05 years.

This was the calculation of the IDOC right after Lozano-Campuzano arrived in prison.

The specific calculation of the DOC appeared at Exhibit B submitted with the Appendix before the District Court. Appx. p. 24. This is the time computation sheet that is used for every inmate. It has been used for many years.

[2] Earned time is earned during the time a person serves the sentence. The Department of Corrections and the Board of Parole for release plan purposes calculate the duration of the sentence based on the assumption that the person will get the full amount of earned time. This calculation is sometimes known as the tentative discharge date or TDD.

In this document it shows that the sentence is 50 years. This appears next to the phrase “group duration”, near the top of the page. The mandatory minimum sentence is right below that and is identified as eleven years, one month and nine days.

Near the bottom of the document there is a reference to something called "TDD". This stands for "tentative discharge date". That is the date the computer calculates with a presumption of the inmate getting all earned time possible. The fifty year sentence would be completed in December, 2038. That is about 22.5 years from his arrival date in prison.

There is also something called the "MPD". That is the "minimum parole date". This date is calculated by adding the eleven years, one month and nine days to the date that he entered the prison, plus the ten days credit for jail. The MPD for Lozano-Campuzano is April 30, 2021. Appx. p.24.

C. Overview of drug sentencing prior to July 1, 2016

Before the specifics of the 2016 legislation are discussed it might helpful to understand the general outline of drug sentencing in Iowa, prior to the legislation at issue in this appeal. This section will deal with the classification of the crimes. The following section will address the mandatory minimum sentences that go with particular offenses.

1. General Classification of drug felonies

124.401(1) - Possession with intent to deliver

To understand the different mandatory minimum sentences and recent changes that have been made, it is helpful to understand the basic outline of Chapter 124.401.

The Chapter, titled Prohibited Acts, addresses the penalties for doing certain things with controlled substances.

Subsection 124.401(1) is the provision setting forth the prohibited acts and penalties for, essentially, possession with intent to deliver or the other things that are equate to that possession. Subsections 124.401(2) through (5) have little or no applicability to our case.

Subsection 124.401(1), possession of a controlled substance with intent to deliver, is itself divided into six different subsections. They are "a" through "f." For the most part the first four of those subsections, a, b, c and d, identify the substances and the quantities for that particular sentence.

Subsection 1(a) sets out the drugs and quantities that get you not only a B felony, but also a B felony punished by 50 years rather than the regular 25 years.

Subsection 1(b) sets out the circumstances where possession with intent would get you a regular 25 year B felony.

Indeed in Lozano-Campuzano's case, he pled guilty to an offense under 124.401(1)(b)(7). That subsection prohibited the possession with intent of an amount between 5 grams and 5 kilograms of methamphetamine.

Section 1(c) sets out the circumstances where the punishment will be a C felony.

Section 1(d) sets out the circumstances where it would be an aggravated misdemeanor or a D felony.

Section "e" and "f" provide for enhancements to the punishments set out in "a" through "d."

It is important to understand that as of 2016 the enhancements in "e" and "f" could apply to the sentence imposed for any of the four prior sections, whether that be the aggravated misdemeanor or the 50 year B felony.

Lozano-Campuzano pled to a regular B felony, under 124.401(1)(b). His 25 year sentence was then doubled under Subsection "e". It was doubled because of some connection with a firearm. This led to the 50 year sentence. The Court said the sentence was under 124.401(1)(b) and 124.401(1)(e). Appx. p. 5.

2. General Discussion of Mandatory minimum sentences for drug offenses prior to July 1, 2016

For a long time, including at the time of the sentencing for Lozano-Campuzano, Section 124.413 provided the primary mandatory minimum statute for most drug felonies. It said:

> 1. A person sentenced pursuant to section 124.401, subsection 1, paragraph “a”, “b”, “c”, “e”, or “f”, shall not be eligible for parole until the person has served a minimum period of confinement of one-third of the maximum indeterminate sentence prescribed by law.
> 2. This section shall not apply if:
> a. The offense is found to be an accommodation pursuant to section 124.410; or
> b. The controlled substance is marijuana.

As of 2015, and until June 30, 2016, if you had a drug felony under 124.401(1)(a),(b)(c)(e) and (f) you had to serve a mandatory one-third of the sentence. The only exceptions were if the controlled substance was marijuana or if there was some kind of accommodation.

It should be noted that sentences under 124.401(1)(d) were not subject to the mandatory 1/3 provision.

901.10 - Additional Reduction of sentences- one third reduction available with a guilty plea

Code 124.413 imposes the one-third mandatory for most drug felonies. Section 901.10(2), which had been in effect since 2000, provides that the Court, if the Defendant pleads guilty to a provision under 124.401(1) (a) or (b) and the drug was methamphetamines, has the discretion to reduce the mandatory minimum sentence under 124.413 "by up to one-third". That can reduce the 1/3 to as little as 2/9.

This, in fact, is what happened with Lozano-Campuzano. The Court imposed that one-third mandatory under 124.413. The Court then reduced that mandatory one third from 124.413, by one-third. This gave him a two-ninths mandatory sentence.

Other reduction that has no bearing on this case

Section 901.10 provided for additional reduction to the mandatory sentence under 124.413. 901.10(1) provided that, unless the substance was methamphetamines, if the person was being sentenced for the first time under 124.413 the court could reduce the 1/3 by any amount appropriate.

That same section, 901.10(2) for a long time has allowed for an additional reduction below the 2/9 minimum, if the defendant "cooperates" and the prosecutor requests it.

D. 2016 Legislation-House File 2064

In the 2016 Legislative session, the Legislature passed and the Governor signed House File 2064. Appx. p. 25. HF2064 was all about mandatory minimum sentences. The Bill addressed those minimum sentences for three crimes or types of crimes. Those crimes were Robbery in the Second Degree, Child Endangerment, and drug offenders with convictions under 124.401(1). It is the drug offense provisions that are relevant to this case.

You can analyze House File 2064 as having two parts. There is the part that applies to sentences that occur after July 1, 2016. Then there is the part that applied retroactively to sentences before July 1, 2016. Lozano-Campuzano was sentenced before July 1, 2016.[3]

Sentences after July 1, 2016

The part referring to sentences after July 1, 2016 is found in Sections 1, 2 and 6 of HF2064.

The first two sections of the bill addressed Section 124.413. That was the Section imposing a mandatory 1/3 for most drug felonies. That section was amended adding a new section "3". Here was the new section:

> Section 1. Section 124.413, subsection 1, Code 2016, is amended to read as follows:
> 1. ~~A~~ **Except as provided in subsection 3 and sections 901.11 and 901.12, a** person sentenced pursuant to section 124.401, subsection 1, paragraph "a", "b", "c", "e", or "f", shall not be eligible for parole or work release until the person has served a minimum period of confinement of one-third of the maximum indeterminate sentence prescribed by law.

> Sec. 2. Section 124.413, Code 2016, is amended by adding the following new subsection:
> NEW SUBSECTION. 3. A person serving a sentence pursuant to section 124.401, subsection 1, paragraph "b" or "c", shall be denied parole or work release, based upon all the pertinent information as determined by the court under section 901.11, subsection 1, until the person has served between one-half of

[3] Of the three types of crimes, the only reduction retroactively applied was the provision having to do with drug minimums under 124.413.

> the minimum term of confinement prescribed in subsection 1 and the maximum indeterminate sentence prescribed by law.
>
> 2016 Ia. Legis. Serv. Ch. 1104 (H.F. 2064) (WEST)
>
> Section 6 of HF2064 added a new section which became section
>
> 901.11.

901.11(1), the provision about drug offenses provides as follows:

> 901.11. Parole eligibility determination by court—certain drug, child endangerment, and robbery offenses
> 1. At the time of sentencing, the court shall determine when a person convicted under section 124.401, subsection 1, paragraph "b" or "c", shall first become eligible for parole or work release within the parameters described in section 124.413, subsection 3, based upon all the pertinent information including the person's criminal record, a validated risk assessment, and the negative impact the offense has had on the victim or other persons.
>
> 2016 Ia. Legis. Serv. Ch. 1104 (H.F. 2064) (WEST)

Looking at these two provisions together, there does seem to be a little bit of confusion as to how they should be read together.

New section 124.413(3) seems reasonably clear. A person in prison for that type of drug offense should have the mandatory minimum sentence of one half whatever the minimum was set in 124.413. That would suggest that the one third mandatory had become a one sixth mandatory.[4]

[4] Presumably, the additional reduction for pleading guilty is still available.

New section 901.11, however, talks about the sentencing court making the determination as to the mandatory minimum sentence "within the parameters described in subsection three". Subsection three, however, seemed to define a specific point that is one sixth. Does that mean the court can reduce the mandatory by less than one sixth? Does the court have the discretion to give the person a longer mandatory? Fortunately, that is an issue for a different case.

Also, we noted that while there might be some ambiguity with regard to sentences after July 1, 2016, there was no ambiguity about sentences prior to July 1, 2016 as is discussed below.

Persons sentenced prior to July 1, 2016

In Section 7 of HF 2064 the legislature was quite specific about when H.F. 2064 would apply to drug offenders already sentenced. It was specific and much more readable.

Here is that Section 7 of HF2064, which now appears as Section 901.12(1) of the Code.

> Sec. 7. NEW SECTION.
> **901.12. Mandatory minimum sentence—parole eligibility—certain earlier drug offenses**
>
> 1. Effective July 1, 2016, and notwithstanding section 124.413, a person whose sentence commenced prior to July 1, 2016, for a conviction under section 124.401, subsection 1, paragraph "b" or "c", who has not previously been convicted of a forcible

> felony, and who does not have a prior conviction under section 124.401, subsection 1, paragraph "a", "b", or "c", shall first be eligible for parole or work release after the person has served one-half of the minimum term of confinement prescribed in section 124.413.
> 2. When the board of parole considers a person for parole or work release pursuant to this section, the board shall consider all pertinent information including the person's criminal record, a validated risk assessment, and the negative impact the offense has had on the victim or other persons.

The new statute applied to everyone already sentenced under 124.401(1)(b) or (c), unless one of two things was true.

(1) the person had a previously been convicted of a forcible felony; or

(2) the person had a prior conviction under 124,401(1) (a), (b) or (c).

You do not have to go back to court to be resentenced. The legislature just cut the mandatory minimum sentences in half, if (1) the person had a sentence under 124,401(1) (a), (b) or (c) and (2) the person was not disqualified based on the prior criminal record.

E. 2017 legislation- Senate File 445

The Senate file 445 is not directly involved in this appeal. It primarily had to do with sentences under 124.401(1)(c). At the same time, ultimately the interpretation of the statute is based on the intent of the legislature. In this case, intent of the legislature, "to reduce drug mandatory minimum sentences" becomes even clearer when you look at both House File 2064 with Senate File 445.

In 2017 the legislature showed it was not done with reducing drug mandatory minimum sentences. In 2017 the legislature enacted Senate File 445 (SF445) which was signed by the governor. That Bill essentially eliminated all mandatory minimum sentences that accompanied the Class C Felonies under 124.401 (1)(c).[5] The legislature amended 124.413(1) by simply striking the reference to 124.401 (1)(c). You would not get the mandatory 1/3 with the C felony.

As to retroactivity the legislature added the following to 902.12:

> 2. Effective July 1, 2017, a person whose sentence commenced prior to July 1, 2017, for a conviction under section 124.401, subsection 1, paragraph "c", shall not be required to serve a minimum term of confinement as prescribed in section 124.413.
>
> 901.12. Minimum sentence--parole or work release eligibility--certain drug offenses, IA ST § 901.12

In summary, this is what can be said about Class C Felonies under 124.401 (1)(c). Prior to 2016, a person with that conviction had to serve a mandatory one-third of the sentence. That mandatory one-third would be reduced further if the person pled guilty or one of the other reduction provisions applied.

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[5] As will be discussed later, the DOC has decided if you are serving a sentence for a drug felony enhanced by subsection (1)(e) such as Lozano Campuzano, you are not subject to the legislation. Presumably persons in prison at the moment or who is looking at a sentence in the future under 124.401(1)(c), enhanced by (1)(e), would still be subject to 124.401(3) with its mandatory minimum sentence.

It should be noted however that you really were not talking about a lot of time for C Felonies. C Felonies not only carry ten years in prison. A mandatory one-third amounted to three and one-third years or 40 months. Those 40 months was then reduced by earned time, reducing the sentence to about 19 months.

In 2016 unless you had a prior forcible felony or prior offense under 124.401 that sentence was apparently cut in half. As of 2017, most mandatory minimum sentences were eliminated for Class C Drug Felonies.

It should be noted however, that there could be some person in the DOC system at the moment, which still has what most of us would think of as a mandatory minimum sentence. If the mandatory had been enhanced by 124.401 (1)(e) or (f) the DOC apparently believes that is not a sentence imposed under 124.401(1)(c). For that reason the legislation presumably might not have affected that person.

F. Lozano's argument to Judge Farrell

Lozano-Campuzano's argument with regard to this section is clear. He was sentenced under 124.401(1)(b) prior to July 1, 2016. He does not have either of the two disqualifying factors found in HF2064. He does not have a prior forcible felony. He does not have a prior drug felony under 1(a), (b), or (c). See Stipulation filed with the District Court. Appx. p.17.

For that reason, his mandatory minimum sentence which was imposed under 124.413, of approximately 11 years, should be cut in half. When earned time is applied, his mandatory should only be about 2.5 years. In fact, he would have finished that mandatory minimum this past October. See Exhibit C. Appx. p.25.

G. District Court Ruling

Judge Jeff Farrell denied the Motion to Correct Illegal Sentence on October 18, 2018. Appx. p. 42. He correctly identified the issue. He set out most of the rules of statutory construction that would seem to apply. He noted that the legislature "clearly intended to reduce the one-third mandatory minimum by half under some circumstances" Appx. p.47. (Ruling page 6).

He concluded that there was some ambiguity as to how to interpret the statute in the context of the overall drug sentencing provisions. Ruling at p. 7; Appx. p.48. He noted that "the Defendant offered a reasonable interpretation that the legislature intended to offer the one-half reduction to Defendants sentenced under b or c even if the enhancement under e and f applied". Ruling p. 7-8; Appx. p.48-49. In the end however Judge Farrell concluded that that the State had a better argument. He accepted the argument that a sentence under 124.401(1)(e) was in some ways different than a sentence under 124.401(1)(b). Ruling p. 9; Appx. p. 50.

Judge Farrell recognized the "valid public policy grounds" for denying a reduction for individuals sentenced with fire arm enhancements. Ruling p. 19; Appx. p. 50.

He also found an example that would produce an absurd result under Lozano-Campuzano's interpretation. He reasoned that under Lozano's argument:

> "those sentenced for Class B and C felonies would receive a one-half reduction in the mandatory minimum even if sentenced under the firearm enhancement. However a person sentenced under Subsection d to an aggravated misdemeanor or Class D felony, and if also sentenced pursuant to the firearm enhancement, would have to serve the one-third mandatory minimum but would not be eligible for the one-half reduction. (citation ommitted) It makes no sense to reduce the mandatory minimum for Defendants convicted at higher offenses but not those convicted of lower offenses" Ruling page 9; Appx. p. 17.

Lozano filed a timely Motion to Amend the findings of Judge Farrell. Appx. P.53.Lozano made a specific response to the Judge's argument about the absurd result. The problem with the Judge's analysis is that the mandatory one-third minimum under 124.413 does not apply to Section 1(d) to begin with. You do not get a mandatory sentence for those level offenses. That is true whether the sentences are enhanced by Subsection "e" or "f" or not.

Lozano also pointed out that what would happen under the DOC reasoning. The DOC position is that a sentence enhanced under "e" essentially exists on its own. Since it is listed under 124.413 it applies even

if the crime by itself has no mandatory. The DOC reasoning would apparently apply after the 2017 Amendment, which had apparently eliminated all mandatories for Class C Felonies. You could still get a mandatory which would not be reduced if you were sentenced under "c" and "e".

Moreover you would get a mandatory minimum if you had a sentence under 1(d), again even though the crime itself had no mandatory minimum.

Judge Farrell denied the Motion for Reconsideration and or to Amend the findings without comment. Appx. p.59.

ARGUMENT

USING THE NORMAL RULES OF STATUTORY CONSTRUCTION THE COURT SHOULD CONCLUDE THAT THE 2016 LEGISLATION REDUCING MANDATORY SENTENCES FOR DEFENDANTS SERVING SENTENCES UNDER 124.401(1)(b) SHOULD APPLY TO LOZANO-CAMPUZANO

Standard of Review:

In *certiorari* cases, review is for errors at law. State v. Iowa Dist. Ct., 812 N.W.2d 1, 2 (Iowa 2012). Review of questions of statutory interpretation is also for correction of error of law. State v.Tarbox, 739 N.W. 2d 850, 852 (Iowa, 2007)

Preservation of Error:

The issue concerning the correct statutory interpretation of HF2064 was presented to the District Court and addressed by Judge Farrell.

A. Summary of argument

The issue before the court is not complicated. Lozano-Campuzano has a drug sentence under 124.401(1)(b) from April, 2016. It has a mandatory minimum sentence imposed by 124.413.

There was an legislation from the Legislature in 2016, that cut in half certain mandatory minimum drug sentences, including sentences under 124.401(1)(b). The legislation specifically said the reduction applied to sentences from prior to July 1, 2016. The question for this appeal is does the new legislation apply to the sentence of Lozano-Campuzano.

The parties' positions can be easily summarized. Lozano-Campuzano says he has a sentence under 124.401(1)(b). HF 2064 said that persons serving a sentence under that subsection should have the mandatory cut in half, with two exceptions. The reduction does not apply if the person had a prior forcible felony or a prior drug felony. Lozano-Campuzano does not have any of those prior convictions. The DOC agrees he is not disqualified under those exceptions in the statute. See Stipulation; Appx. P.17.

Lozano-Campuzano asserts his mandatory sentence should be cut in half.

The State argues that Lozano-Campuzano does not have a sentence under 124.401(1)(b). Rather, he has a sentence under 124.401(1)(e). That, says the State, is a sentence that is not affected by the 2016 Legislation.

The District Court found the State's argument to be more persuasive.

B. General principals of Statutory Construction

This case is all about construing House file 2064. That requires the Court to engage in statutory construction. Several general principles should be understood and recognized before specific arguments are made. Most of these principles were recognized by Judge Farrell.

As a general matter, Court decisions are full of the statement that the "goal of statutory construction is to determine legislative intent" State v. Tarbox 739 N.W 2d 850 (Iowa 2007).

However, a Court, as an initial matter, must look at the actual language of the statute. If the statute is clear, free of ambiguity, there is no need to go any further. Kruck v. Needles, 259 Iowa 470, 476, 144 N.W.2d 296, 300 (1966); State v. Snyder, 634 N.W.2d 613, 615 (Iowa 2001).

In this particular case, the first step in the analysis will be whether the statute is ambiguous. State v. Iowa District Court, 889 N.W. 2d 467,471 (Iowa 2017).

Whether something is ambiguous in turn is determined by looking at the language of the statute. If the statute is unambiguous then it will be enforced. The Iowa Supreme Court has repeatedly stated that a statute is ambiguous "if reasonable minds could differ or be uncertain as to the meaning of the statute" Mall Real Estate L.L.C. v. City of Hamburg, 818 N.W. 2d 190,198 (Iowa 2012). Here is what the Supreme Court said in Office of Consumer Advocate v. Iowa Utilities Bd., 744 N.W.2d 640, 643–44 (Iowa,2008):

> When a statute or rule is plain and its meaning is clear, the rules of statutory construction do not permit courts to search for meaning beyond its express terms. *State v. Snyder*, 634 N.W.2d 613, 615 (Iowa 2001). Courts generally presume words contained in a statute or rule are used in their ordinary and usual sense with the meaning commonly attributed to them. *Am. Home Prods. Corp. v. Iowa State Bd. of Tax Review*, 302 N.W.2d 140, 142–43 (Iowa 1981). Moreover, courts construe a term according to its accepted usage when a statute does not define it. *Id.* Courts only resort to rules of statutory construction when the explicit terms of a statute or rule are ambiguous. *City of Waukee v. City Dev. Bd.*, 590 N.W.2d 712, 717 (Iowa 1999). A statute or rule is ambiguous if reasonable minds could differ or be uncertain as to the meaning of the statute. *Carolan v. Hill*, 553 N.W.2d 882, 887 (Iowa 1996). Office of Consumer Advocate v. Iowa Utilities Bd., 744 N.W.2d 640, 643–44 (Iowa 2008)

If the statute is found to be ambiguous then the rules of statutory construction and interpretation would apply. Holiday Inns Franchising Inc v.

Branstad, 537 NW2d 724, 728 (Iowa 1995) Those rules are found in various court decisions and are also articulated in Iowa Code Section 4.6.

A major considerations identified at least in part Section 4.6 is the "object of the legislation". This has sometimes been referred to as the "spirit" of the statute. Holiday Inns Franchising Inc v. Branstad, 537 NW2d 724, 728 (Iowa 1995)

> Legislative intent is ascertained not only from the language used but also from "the statute's 'subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations.'
> State v. McCullah, 787 N.W.2d 90, 94–95 (Iowa 2010)

When the question is the construction of a criminal statute, the overriding principle is the recognition that criminal statutes are strictly construed with doubts resolved in the accused favor. State v. Tarbox 739 N.W. 2d 850, 853 (Iowa 2007); State v. Hagen, 840 N.W. 2d 140,146 (Iowa 2013).

Finally as Judge Farrell pointed out, any construction that results in an absurd result should be disfavored. "It is universally accepted that where statutory terms are ambiguous, courts should interpret the statute in a reasonable fashion to avoid absurd results." Brakke v. Iowa Department of Natural Resources, 897 N.W.2d 522, 534 (Iowa, 2017)

C. The reduction in the mandatory sentence required by House file 2054 should apply to Lozano-Campuzano as the statute is not ambiguous.

The first step in determining statutory interpretation is to decide whether the statute is ambiguous. If the plain language of the statute is sufficient, that is it. Only if reasonable minds could differ or are uncertain as to the meaning of the statute do you have to even get to statutory construction.

In this case, the Legislature in HF 2064 provided as follows:

> Effective July 1, 2016, and notwithstanding section 124.413, a person whose sentence commenced prior to July 1, 2016, for a conviction under section 124.401, subsection 1, paragraph "b", who has not previously been convicted of a forcible felony, and who does not have a prior conviction under section 124.401, subsection 1, paragraph "a", "b", or "c", shall first be eligible for parole or work release after the person has served one-half of the minimum term of confinement prescribed in section 124.413.
>
> This provision now appears in the Code as 901.12(1).

The statute unambiguous provides that persons previously convicted of either 124.401(1)(b) or (c) should have the mandatory under 124.413 cut in half. There were only two exceptions. Did the defendant have (1)(a) prior forcible felony or (2) a prior drug felony under 124.401(1)(a), (b), or (c)?

This statute is not ambiguous. The only question should be whether he was sentenced under 124.401(1)(b). He was. He was sentenced under 1(b) and that sentence was enhanced. He still was sentenced under (1)(b).

The parties agree that neither exclusion applies in the statute applies. Therefore, Lozano-Campuzano should have his mandatory minimum sentence cut in half.

The State's argument, which to some extent was accepted by Judge Farrell is that Lozano does not really have a sentence under 124.401 (1)(b). Instead he has a sentence under 124.401(1)(e).

If you look at the Sentencing Order however the reality is apparent. Lozano was sentenced for a violation of 124.401(1)(b)(7). That was the drug offense he was convicted for. The conviction and sentence under 124.401(1)(b) however was enhanced from the regular 25 year sentence, because of the fact that there was a firearm in the vicinity.

One is reminded of other sections in the Code where a sentence or even a category of sentences can be enhanced. The usual sentence for a Class D Felony is an indeterminate term not to exceed five years. That length of sentence however can be enhanced if the person is a habitual offender, a person with two prior felonies. See Section 902.8. Under those circumstances the sentence for a Class D Felony is 15 years.[6]

What is important is that just because the sentence for D Felony has been enhanced, the sentence is still for a D Felony. An example is found in looking a

[6] The same of course would be true for a C Felony as well. The normal sentence for a C Felony is 10 years. As a habitual however the penalty for a C Felony is 15 years.

903B, the Chapter discussing “special sentences” of certain sex offenders. In determining whether someone has a Special Sentence of 10 years or lifetime, the question is whether someone has a Class C or higher. A D felon, enhanced to 15 years is still a Class D Felony. The person would get only a ten year special sentence.

The lesson here is that enhancement of the sentence does not change the fact that the person was sentenced as a D Felon or as a person with the B felony under 124.401(1)(b).

D. General Legislative intent favors Lozano-Campuzano

All statutory construction on some level comes down to the interpretation of legislative intent. In this case, the 2016 legislation, HF 2064 was all about reducing mandatory minimum sentences. The Legislature made clear its intent to reduce drug sentences imposed under Section 124.413(1). When interpreting the legislation, the Court should give the reading that is consistent with the overall legislative intent to reduce drug offenses under those drug offenses.

The overall intent of HF2064 was to reduce mandatory minimum sentences for drug offenses. That can be thought of as essentially the "spirit" of the legislative enactments in 2016 and 2017. This spirit appears to some extent in the mandatory minimums changes for drug offenses nationally. Those changes nationally resulted in the first step in a comprehensive federal sentencing reform

which took place in the otherwise deadlocked United States Congress in late 2018. See 128 Yale Law Journal Forum, "The Effort to Reform the Federal Criminal Justice System" (available at https://www.yalelawjournal.org/forum/the-effort-to-reform-the-federal-criminal-justice-system.

E. The States argument for an additional exception for enhancement under (1)(e) should be rejected, based on the fact that the two exceptions are already identified.

There is a Rule of construction with the fancy name of "*expressio unius est exclusio alterious*."

As the Iowa Supreme Court said, "this rule recognizes that legislative intent is expressed by omission as well as by inclusion and the expressed mention of one thing implies the exclusion of others not so mentioned." Kucera v. Baldazo, 745 N.W. 2d 481, 487 (Iowa, 2008)

The Legislature in HF 2064 identified the two exceptions they wanted to make as to retroactive application of the reduction in drug minimum sentences. They identified the two disqualifications for individuals with sentences under (1)(b). A construction that adds a third exclusion runs contrary to this particular statutory construction argument.

F. Under the rule of "lenity," the Court should adopt Defendant's interpretation of the statute.

HF 2064 is a criminal statute. Any ambiguity should be resolved in favor of the Defendant. The Iowa Supreme Court has said

> We construe criminal statutes strictly and resolve doubts in favor of the accused. State v. Lindell, 828 N.W. 2d 1, 12 (Iowa 2013).

Here is what the Court said about that rule of construction in State v. Hearn, 797 N.W.2d 577, 585 (Iowa 2011)

> The rule of lenity requires that ambiguous statutes imposing criminal liability be strictly construed in favor of the defendant. Originally conceived to mitigate the extension of the death penalty to many criminal acts in England, the modern purposes of the rule of lenity include providing fair notice that conduct is subject to criminal sanction, preventing inconsistent and arbitrary enforcement of the criminal law, and promoting separation of powers by ensuring that crimes are created by the legislature, not the courts. *See* John Calvin Jefferies, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 Va. L.Rev. 189, 198–201 (1985); *see also* Livingston Hall, *Strict or Liberal Construction of Penal Statutes*, 48 Harv. L.Rev. 748, 756–760 (1935). It is sometimes said that the rule of lenity is rooted in a "generic bias in favor of liberty," Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 Sup.Ct. Rev. 345, 349 (1994) [hereinafter Kahan], or, as Chief Justice John Marshall stated years ago, "the tenderness of the law for the rights of individuals," *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37, 42 (1820). It has also been maintained that the rule of lenity is necessary to promote democratic responsiveness in the establishment of crimes. Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L.Rev. 885, 922 (2004) [hereinafter Price].
>
> State v. Hearn, 797 N.W.2d 577, 585 (Iowa,2011)

Judge Farrell suggested there is ambiguity because Lozano-Campuzano was sentenced under both 1(b) and 1(e). Since this statute is a criminal sentencing statute, the rule of construction that favors resolving ambiguity in favor of the Defendant would apply.

G. Specific response to Judge Ferrell

Judge Farrell identified a number of reasons why he concluded that the State's position should prevail despite the apparent logic he saw in Lozano-Campuzano's position. Here are the reasons that he identified as supporting the State's position.

Actual language used

At page 8 of his ruling, Judge Farrell said the legislature did not "strike the inclusion of section "e" from section 124.413(1) at the time they changed the law." Judge Farrell thought that would have been where they would have struck section "e" if they meant to do that. Ruling p. 8; Appx. p.49.

Response

In HF 2064 the Section making the reduction retroactive was Section 7 of the bill. This section now appears as 901.12. In the language of that section omitted subsection "e."

Moreover the legislation did not intend to eliminate the enhancement under "e" from all prior mandatory minimum sentences. The reduction was not available for someone already sentenced who had either a prior drug felony or a prior forcible felony.

Absurd result

One of those reasons supporting the State's position, as set out at page 9, was that Judge Farrell found the Defendant's argument would lead to "an absurd result." Specifically, the judge found that under the Lozano-Campuzano's argument, defendants with enhanced B and C felonies would get the one-half reduction, but defendants with enhanced D felonies or aggravated misdemeanors under 124.401(d), would not get the reduction. Ruling p. 9; Appx. p.50.

Response

There is a real problem with Judge Farrell's analysis. Section 124.413, as it currently exists and as it existed in 2015, is the section that imposes the one-third mandatory for drug offenses. It is that one-third mandatory from which all other reductions to mandatories flow. That mandatory is then subject to any enhancements under "e" and "f."

The 1/3 mandatory under 124.413, however, **does not apply at all** to subsection "d," where the D felony and aggravated misdemeanor drug offenses are found. There is no mandatory minimum sentence for those D felonies and

aggravated misdemeanors. That is true whether those sentences are enhanced by subsections "e" of "f." For that reason, the absurd result identified by the Court does not exist.

The State's position, adopted by Judge Farrell, now leads to an absurd result

If anything, the interpretation from the State produces an absurd result. In 2017, the legislature expressed a clear intent to do away with mandatory minimum sentences for those people convicted of the C felonies under subsection 1(c). Judge Farrell, in the ruling in this case, noted that at page 10. Ruling p. 10; Appx. p. 51. The State's theory as applied to Lozano-Campuzano, is that someone sentenced under subsection "b" and "e" gets his mandatory sentence under "e."

This would lead to the conclusion that someone currently sentenced for a C felony, which had been enhanced by a firearm, would still have a mandatory minimum sentence. This would be the case even after the legislature clearly intended to eliminate all mandatory minimum sentences for all C drug felonies.

By this same analysis persons with the D felony, enhanced by (1)(e) have that mandatory minimum sentence, even though "d" does not appear in 124.413.

This State's interpretation in this case is contrary to the clear legislative intent, leading to an absurd result.

H. Let us keep it simple

Maybe we have all been approaching this from the wrong direction. Maybe the simplest approach is best.

Everybody agrees that subsection "e" is not a standalone charge. It is simply an enhancement. It doubles whatever you get under the "a," "b," "c," or "d" provisions.

That doubling applies to the maximum sentence and to whatever mandatory sentence you got under "a," "b," "c," or "d." If you are sentenced to a 25 year sentence with a 2/9 mandatory, under "e" that entire thing is doubled. The 5.5 year minimum is doubled to 11 years. Essentially, the mandatory sentence is doubled just like the maximum sentence.

At the same time, if there is no mandatory, when that number you get when it is doubled is still zero. The mandatory minimum sentence for the C felony is now 0. When doubled under "e" you still get 0.

Doubling gets you zero if no mandatory sentence is given.

Lozano got a 25 year sentence with a 2/9 mandatory. HF2064 cut that in half. That calculation gives a mandatory minimum and a maximum. Both of the lengths of those sentences are then doubled by "e." (None of this considers the additional effect of earned time.)

The end result, however, is that Lozano is due to have his minimum sentence end by around October 10, 2018.

CONCLUSION

This appeal presents an issue of statutory construction. Lozano-Campuzano was sentenced in April, 2016. He was sentenced under 124.401(1)(b) and given a mandatory minimum sentence.

In 2016, the Legislature enacted a statute, HF 2064, which went into effect on July 1, 2016. That statute specifically said it applied retroactively to persons already sentenced. The new legislation cut in half a good number of the mandatory minimum sentences imposed under 124.401(1). The legislature said the new statute should apply retroactively to convictions under 124.401(1)(b). They set out two exceptions where the reduction would not apply.

The State and the lower court agreed that neither of the exceptions applied to Lozano-Campuzano.

The statute is unambiguous. This Court should direct the IDOC to give him that further reduction in sentence required by the new statute.

Even it the rules of construction are considered this Court should find the new statute does apply to Lozano-Campuzano. The Iowa Department of Corrections should reduce his mandatory minimum sentence by one half.

RESPECTFULLY SUBMITTED,

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REQUEST TO BE HEARD IN ORAL ARGUMENT

The Appellant hereby requests to be heard in oral argument in connection with this appeal.

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ATTORNEY'S CERTIFICATE OF COSTS

I, Philip B. Mears, Attorney for the Appellant, hereby certify that the cost of preparing the foregoing Appellant's Final Brief was $4.60.

RESPECTFULLY SUBMITTED,

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