

20150303

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

State of North Dakota,	)	Supreme Court No.
	)	2015030
Defendant and	)	
Appellee,	)	
	)	
Vs.	)	
	)	
Brian J. Erickstad,	)	District Court No.
	)	2015-CV-00594
Plaintiff and	)	
Appellant.	)	
	)	
	)	

**FILED**  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

JAN 09 2016

Appeal From District Court  
South Central Judicial District  
Burleigh County, North Dakota  
The Honorable Judge David E. Reich, Presiding

STATE OF NORTH DAKOTA

---

**SUPPLEMENTAL BRIEF OF APPELLANT**

---

Brian John Erickstad  
C/O: North Dakota State Penitentiary  
P.O. Box 5521  
Bismarck, ND 58506

## Table of Contents

	<u>Page</u>
Table of Authorities .....	ii
Statement of Issues .....	1
Statement of the Case .....	2
Summary of Argument .....	3
Law and Argument .....	4
Conclusion .....	8

**Table of Authorities**

<b><u>CASES</u></b>	<b><u>PAGE</u></b>
<b><u>Hinton v. Alabama</u></b> , 571 U.S. ___, 134 S. Ct. 1081, 1082, 188 L. Ed. 2d 1 (2014) ...	5
<b><u>J.D.B. v. North Carolina</u></b> , 564 U.S. ___, 131 S. Ct. ___, 180 L. Ed. 398 (2011) .....	6
<b><u>Lafler v. Cooper</u></b> , 566 U.S. ___, 132 S. Ct. 1376, 182 L. Ed. 398 (2012) .....	5
<b><u>Miranda v. Arizona</u></b> , 384 U.S. 436 .....	6
<b><u>State v. Erickstad</u></b> , 2000 ND 202, 620 N.W. 2d 136 .....	4, 6
<b><u>State v. Lewis</u></b> , 291 N.W. 2d 735 .....	7
<b><u>Strickland v. Washington</u></b> , 466 U.S. 668 .....	5
 <b><u>STATUTES</u></b>	
N.D.C.C. 1-01-22 .....	7
N.D.C.C. 1-01-23 .....	7
N.D.C.C. 1-01-24 .....	7
N.D.C.C. 12.1-32-09.1 .....	4, 5
N.D.C.C. 29-32.1-01(2) .....	1, 3, 7, 8
 <b><u>OTHER AUTHORITIES</u></b>	
U.S. Constitutional Amendment IV .....	3, 6
U.S. Constitutional Amendment V .....	3, 7
U.S. Constitutional Amendment VI .....	3, 5

**Statement of Issues**

Whether District Court erred in dismissing appellant's application for post-conviction relief for being untimely and by not recognizing newly discovered evidence that forego N.D.C.C. 29-32.1-01(2) along with Constitutional violations.

## Statement of the Case

**I. Nature of Case:** Brian John Erickstad (Erickstad) is appealing the decision by Judge David E. Reich to dismiss appellant's application for post-conviction relief.

**II. Procedural History:** On September 18, 1998 Erickstad was charged with two counts of Class AA Murder and two counts of Theft of Property. Erickstad was later charged with Conspiracy to Commit Murder and another Theft of Property. Erickstad pled not guilty and went to trial in the South Central Judicial District Court with the Honorable Judge Burt L. Riskedahl presiding on October 11, 1999 to October 18, 1999. Erickstad was convicted on all charges. He was sentenced to life with parole with ten years to run consecutively on February 11, 1999. Erickstad filed a notice to appeal on February 18, 1999 which was later affirmed.

**III. Statement of Facts:** On the evening of September 18, 1998 the bodies of Gordon and Barbara Erickstad were found deceased. Later Erickstad and his friend Robert Lawrence were found in Texas and were returned to North Dakota. On October 18, 1999 Erickstad was convicted on all charges in relation to the deaths of Gordon and Barbara Erickstad.

### **Summary of Argument**

The District Court failed to recognize newly discovered evidence raised by the appellant in his application for post-conviction relief that changed his sentence to one that the sentencing Judge Burt L. Riskedahl never intended.

The District Court failed to recognize newly discovered evidence that shows the trial judge was unaware of the new interpretation of a statute that requires the defendant to serve 85% of his life expectancy. By him not knowing of this statute he unintentionally gave Erickstad approximately 25 more years before he is eligible for parole.

The District Court failed to recognize newly discovered evidence that shows Erickstad's trial counsel fell below the standard of reasonableness by not knowing of a new interpretation of a statute fundamental to his sentence. That violates Erickstad's Sixth Amendment right to have effective assistance of counsel.

The District Court failed to recognize newly discovered evidence that shows detectives interrogated a minor without the consent of his parents which violates Erickstad's Fourth Amendment right to unreasonable search and seizure.

**N.D.C.C. 29-32.1-01(2)** went into effect August 1, 2013. Thirteen years after Erickstad was sentenced. There is nothing in the statute regarding retroactivity. The time for Erickstad to file should begin on August 1, 2013. This violates Erickstad's Fifth Amendment right to due process.

### Law and Argument

At petitioner's sentencing on February 11, 2000 Judge Burt L. Riskedahl told the appellant, "at a minimum you'll have 30 years of incarceration for killing." He also states "you're going to be in your 50's before there can be any consideration of your returning to society." State v. Erickstad 2000 ND 202, 620 N.W.2d 136 Sentencing Transcripts pages 16-17. (App. 4, App. 5) This shows that the judge was unaware of the current interpretation of N.D.C.C. 12.1-32-09.1. If calculated by the statements of the judge and the guidelines the judge intended to use, (App. 3) the appellant would serve a minimum of twenty-five and a half years before being eligible for parole on the life sentence and serve eight and a half years of the ten year sentence. That is a total of thirty-four years. The appellant was 18 when the crime was committed and would be eligible for parole and release from both his sentences in 2032 at 52 years of age.

This is newly discovered evidence because until September of 2014 that was the sentence the appellant thought he was serving. Not until September of 2014, when the appellant received a letter from the parole board, (App. 1) did he learn of the current interpretation of N.D.C.C. 12.1-32-09.1 and learn he is not eligible for parole until February of 2047.

The petitioner argues that the attorney representing him at the sentencing hearing was also unaware of the current interpretation N.D.C.C. 12.1-32-09.1 because the appellant was told by attorney that he would be eligible for parole after serving thirty years, plus less for goodtime, twenty-five and a half years. He also did not correct the

judge during his statement at the sentencing hearing on how long before the appellant would be eligible for parole.

The standards set by Strickland v. Washington, 466 U.S. 668 states that appellant 1) must show counsel's performance fell below an objective standard of reasonableness. And 2) the petitioner must show the performance did prejudice him such that the outcome of the proceeding would have been different. The appellant has met both of these criteria.

In Hinton v. Alabama, 571 U.S. \_\_\_, 134 S. Ct. 1081, 1082, 188 L. Ed. 2d 1 (2014) the court finds that an attorney's ignorance of a point of law that is fundamental to his case combine with basic research on that point is a quintessential example of unreasonable performance. The appellant has met this by showing his attorney did not know of the new interpretation of N.D.C.C. 12.1-32-09.1. The second standard was met from comparing the sentence the judge thought he gave the appellant to the actual sentence he is serving, stated by the parole board's letter of review. If the judge would have known of the current interpretation of N.D.C.C. 12.1-32-09.1. it is likely that the judge would have given a different sentence. One similar to the one given but in numbers with an extended probationary period.

According to Lafler v. Cooper, 566 U.S. \_\_\_, 132 S. Ct. 1376, 182 L. Ed. 398 (2012), a right to effective assistance of counsel exists during sentencing in both non capitol and capitol cases.

The appellant wishes to make aware that the denial of effective counsel violates his right to the Sixth Amendment of the Constitution.

The appellant argues that the detectives interrogated a minor who was in custody without the consent of the minor's parents. (**App. 2**) This is newly discovered evidence because it was learned of in 2014. In the State's Answer to Application for Post-Conviction Relief the State argues that the parents only need to be notified if the minor is a suspect and this minor was not a suspect.

Appellant cites J.D.B. v. North Carolina, 564 U.S. \_\_\_, 131 S. Ct. \_\_\_, 180 L. Ed. 398 (2011). J.D.B. finds 1) that interrogations that occur while a suspect is in police custody, however, heighten the risk that statements obtained are not the product of the suspects' free choice. 2) by its very nature, custodial police interrogations entail "inherently compelling pressures." 3) in the Miranda context, Miranda v. Arizona, 384 U.S. 436, because the measures protect the individual against coercive nature of custodial interrogation, they are required only where there has been such a restriction of a person's freedom as to render him "in custody". 4) whether a suspect is "in custody" is an objective inquiry. First, what were the circumstances? Second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave?

According to appellant's trial transcripts, State v. Erickstad, 2000 ND 202, 620 N.W. 2d 136 Trial Transcripts pages 383-384, (**App. 6, App. 7**) the minor testifies that he was arrested by detectives and taken to the police station. This would have made him a "suspect" and "in custody" and his parents should have been notified. The statements he gave, through an illegal interrogation, produced numerous pieces of evidence, used at trial, seen and heard by the jury, and ultimately used to convict the appellant.

This illegal collection of evidence violates the appellant's Fourth Amendment right of the Constitution protecting him from illegal search and seizure.

The appellant was sentenced on February 11, 2000 and **N.D.C.C. 29-32.1-01(2)** was not law until August 1, 2013, over thirteen years after Erickstad was sentenced.

Pursuant to **N.D.C.C. 1-01-22** notice shall be either actual or constructive.

Pursuant to **N.D.C.C. 1-01-23**, actual notice shall consist of express information of fact. **N.D.C.C. 29-32.1-01(2)** did not become effective until August 1, 2013; therefore the statute of limitations cannot begin to run until such a date. Appellant file his Application for Post-Conviction Relief on March 19, 2015. That is within two years of the date **N.D.C.C. 29-32.1-01(2)** passed.

Pursuant to **1-01-24** constructive notice means notice imputed by the law to a person not having actual notice. Since **N.D.C.C. 29-32.1-01(2)** did not exist prior to August 1, 2013, there cannot be constructive notice nor actual notice until such a time as the new statute became law.

This failure to give notice violates the appellant's Fifth Amendment right of the Constitution of due process.

The appellant acknowledges that this should have been discussed previously in the Plaintiff's Reply but the first two attorneys appointed to the appellant by the court refused to mention any of it. In **State v. Lewis**, 291 N.W. 2d 735, the court finds if court appointed counsel believes an appeal is without merit the trial counsel must appoint another attorney to handle the appeal, with the knowledge that in some instances an attorney may have to appeal a case he or she feels is without merit. In such an instance,

court appointed counsel must fulfill the ethical duty to the client and pursue an appeal with full diligence.

### **Conclusion**

In conclusion, because Erickstad's attorney and judge residing over the case were not properly informed of basic laws at the time of sentencing and newly discovered evidence that provided evidence used to convict the appellant was illegally obtained, along with N.D.C.C. 29-32.1-01(2) was not law in February of 2000 therefore it should not apply to appellant, the appellant requests this appeal be given back to District Court and requests an evidentiary hearing.

