

**20160174**

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

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SUPREME COURT JUL 29 2016

DISTRICT COURT NO: 08-2015-CV-02059

**Garron Gonzalez,**

**Petitioner and Appellant**

**-vs.-**

**State of North Dakota**

**Respondent and Appellee**

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

**AUG 12 2016**

**STATE OF NORTH DAKOTA**

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**BRIEF OF APPELLANT**

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**APPEAL FROM THE DISTRICT COURT  
OF BURLEIGH COUNTY  
SOUTH CENTRAL JUDICIAL DISTRICT  
THE HONORABLE JAMES S. HILL PRESIDING**

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**STATEMENT OF ISSUES**

- I. Whether the district court abused its discretion in denying Mr. Gonzalez's motion requesting Order to Show Cause And dismissing application for Post Conviction Relief.**

### STATEMENT OF CASE

This is an appeal from the Burleigh County District Court Order denying Garron Gonzalez's (hereinafter referred to as "Garron") Motion to Show Cause and dismissing his application for Post Conviction Relief.

On September 15, 2015 Garron filed an application for Post Conviction Relief in Case No. 08-2013-CV-02334 and 08-2013-CV-02338, Supreme Court No. 20150050 and 20150051.

On September 24, 2015 Attorney John Bruhn (Bruhn) was assigned to said cases which were combined to make new case no.08-2015-CV-02059.

On October 8, 2015 the State responded to the application for Post Conviction Relief. (Index #7) (App. #1)

On October 15, Bruhn requested an extension of time to file brief. (Index#9)

On October 16, 2015 the court gave the order granting request for extension of time to prepare Post Conviction Brief. (Index # 12) (App. 2- 3)

On November 18, 2015 Garron wrote a letter to the court requesting it be forwarded to the public defenders office, (Index #14)

On December 22, 2015 the Court made an Order directing Bruhn to respond to the court and Petitioner. (Index#16) (App 4-5)

On December 31, Bruhn submitted Response to Order Dated December 22, 2015. (Index #17) (App 6-7)

On January 19, 2016 Garron filed a Motion Requesting an Order to Show Cause. (Index #20) (App. 8-11)

On March 8, 2016 The District Court denied Garron's Motion requesting order to show cause and dismissing application for Post Conviction Relief. (Index#26) (App. 12-13)

On April 2, 2016 Garron filed Motion to Reconsider Application for Post Conviction Relief in case # 08-2015-02059. (App.14-17)

On April 12, 2016 the State filed a response to Defendant's Motion to Reconsider Application for Post Conviction Relief. (App. 18-19)

On May 20, 2016 The District Court denied Garron's Motion to Reconsider Application for Post Conviction Relief

#### **STATEMENT OF FACTS**

On September 15, 2015, Garron filed an Application for Post Conviction Relief alleging deficient assistance from appointed Counsel Ben Pulkrabek (Pulkrabek) in direct appeal in Gonzalez v. State, 2015 ND 175 which was affirmed by this court on or around July 1, 2015.

On September 24, 2015 the case was appointed to Bruhn. Upon being appointed to Civil #08-2015-CV-02059, Bruhn never contacted Garron, failed to answer phone calls or respond to any of Garron's letters.

On October 15, 2015 Bruhn requested an extension of time to file the brief in support of Garron's application.

On October 16, 2015 the Court granted Bruhn's request for an extension and gave a deadline of November 16, 2015 which to serve and file the Post Conviction Brief on behalf of the Petitioner.

On October 21 2015, Garron drafted a brief in support of application for Post Conviction relief and forwarded the drafted brief to Bruhn requesting him to review it and advise Garron if anything is erroneous or if any content should be included or excluded. However due to the brief only being a draft copy, the brief was incorrectly titled "Application for Post Conviction Relief". In the Brief Garron claimed that his appointed attorney Pulkrabek wrongfully claimed constitutional violations on direct appeal without the issues ever being addressed in the district court. Garron also claimed that Pulkrabek was negligent by failing to consult or collaborate with him prior to filing his Brief with this court in Supreme Court No's 20150050 and 20150051 (App. 28)

On November 17, 2015 Application for Post Conviction Relief was erroneously filed with the district court in case # 08-2013-CV-02234 (Index #64) and 08-2013-CV-02338 (Index # 60). Garron had mistakenly submitted a Brief entitled "Application for Post Conviction Relief" and incorrectly included the case numbers 02334 and 02338 when it should have been 08-2015-CV-02059 which is both cases combined.

On or around November 18, 2015 Garron wrote a letter to the Court and requested that the letter be forwarded to the Public Defenders Office. Garron informed the Court of the fact that a Pro Se Brief was submitted due to no contact or correspondence from Bruhn. The Pro Se Brief was filed to meet the November 16, 2015 deadline the Court had given to Bruhn for the Brief to be filed. (App.22, 28).

On December 22, 2015, the Court gave an Order addressed to Bruhn indicating that the Court is in receipt of Garron's letter. The Court stated it shares the same inquiries as Garron as to why Bruhn failed to contact him and file the Post Conviction brief. The Court in its Order directed Bruhn to respond to the Court and Petitioner by January 4, 2016 and explain the reasons for the failures cited in the Petitioners letter. The Court further stated

in its order that a failure to respond would result in a subsequent *order to show cause* and that Bruhn would be directed to appear before the Court.

On December 23, 2015, the very next day after the Court made its order, Bruhn visited Garron at N.D.S.P. (App. 29). This would be the first and only time of any interaction between Bruhn and Garron.

On December 31, 2016, Bruhn filed Response to Order Dated December 22, 2015. In his response, Bruhn summarized events pertaining to probation violations in case # 08-03-K-2928, a case Bruhn was not appointed to, furthermore said case had no bearing to the issues within the application for Post Conviction Relief. Bruhn also stated in his response that he interviewed Garron about the allegations in his complaint and goes on to state that he also interviewed the appellate counsel but failed to give any information of said interview. Bruhn claimed he read the opinion of the N.D. Supreme Court and the underlying offense. Bruhn finally claims that it is his opinion that no issue exists as to Garron's assertion of ineffective assistance of counsel. According to Garron these reasons do not explain why Bruhn failed to contact Garron or respond to any of his letters.

On January 8, 2016 Garron wrote to the clerk of the Burleigh County District Court explaining that a Pro Se Brief in Support of Application for Post Conviction Relief was filed but does not appear to be docketed in the case summary. The clerk indicated it had not been received. It was around this time that Garron first acknowledged that he incorrectly filed the Brief in support of Application for Post Conviction Relief in case no. 08-2015-CV-02059 under Application for Post Conviction Relief in cases 08-2013-CV-02334 (Index # 64) and 08-2013-CV-02338 (Index #60)

On January 19, 2016 Garron filed a Motion Requesting an Order to Show Cause. Garron alleged that Bruhn in his response actually failed to adhere to the courts order, failing to explain why he failed to correspond or visit with Garron and explain why he failed to file the Brief. Garron asserted that any interview transpired after the failure to file the Brief and would not explain the failure to correspond and advise his client. Further, Garron

noted that the appellate counsel should have been interviewed in open court sworn in opposed to behind closed doors in a secret meeting.

On February 22, 2016 Garron wrote to the district court clerk explaining that he incorrectly included the wrong case number in the Brief and also titled the Brief "Application for Post Conviction Relief" when it should have been titled "Post Conviction Brief". (App.30-31).

On March 8, 2016 The District Court denied Garron's motion requesting order to show cause and dismissed the application for Post Conviction relief. In its order, the Court stated that Bruhn stated it was his opinion that there was no issue of ineffective assistance of counsel and that N.D.C.C. § 29-32.1-01 (2) requires an application for Post Conviction relief to be filed within two years of the date a conviction becomes final and that Garron's convictions became final in 2007 which rendered him outside the statute of limitations.

On May 2, 2016 Garron Filed a Motion to Reconsider application for Post Conviction Relief claiming that Bruhn misled the District Court in his response and failed to thoroughly comply with the Courts Order by claiming in his response that he did not file the Brief due to information obtained after he failed to file the Brief (interview of Garron and Appellate Counsel)

On may 12,2016 the State filed its response to Defendant's Motion to Reconsider Application for Post Conviction Relief stating that the Petitioner continues to argue ineffective assistance of counsel which is beyond the statute of limitations and that the defendant has not provided the court with any additional information to justify the late filing of his petition

On May 20, 2016 the court denied Garron's motion to reconsider order dismissing application for Post Conviction Relief stating that Bruhn found no issue of ineffective assistance of counsel as asserted in Garron's application and that his convictions in the underlying cases became final in 2007.

## LAW AND ARGUMENT

This court has jurisdiction over this appeal under Art. VI, § 6, N.D. Const, N.D.C.C. §§ 29-28-03 and 29-28-06.

### FAILED TO RESPOND TO AND ADDRESS GARRON'S BRIEF

Neither the State nor the Court responded to Garron's Brief in support of application for Post Conviction Relief. Although the Pro Se brief was titled incorrectly along with the original civil no's 08-2013-CV-02234 and 08-2013-CV-02238, it was still submitted and docketed and a letter was written to the clerk of court indicating the error. Upon examination of the submitted Brief, the contents clearly reveal that it was the Brief in support of the application for case # 08-2015-CV-02059 which is 08-2013-CV-02234 and 08-2013-CV-02238 combined. The Brief was originally a draft which was sent to Bruhn to review and submit to the court. Once Bruhn failed to file the Brief by the November 16, 2015 deadline, Garron then submitted the unfinalized Brief to meet the deadline which is the reason for the wrong case number and title. The State along with the Court overlooked Garron's arguments within the Brief and failed to respond and address Garron's arguments which prejudiced him by never having a scheduled evidentiary hearing to address his issues and arguments.

### ABUSE OF DISCRETION

The Court erred in denying Garron's Motion Requesting Order to Show Cause when Bruhn failed to adhere to the courts order dated December 22, 2015. Bruhn failed to submit the Brief that was sent to him by Garron.<sup>1</sup> Upon the court demanding a response as to why Bruhn failed to file a Brief in behalf of the Petitioner, Bruhn in his response claimed:

1. He interviewed Garron- Bruhn interviewed Garron only after he failed to file the Brief and had gotten issued with a court order. *This does not explain why he failed to file the Brief before the Court Order.*
  2. Interviewed Appellate Counsel- Upon visiting Garron, Bruhn did not make Garron privy to any information pertaining to a meeting with the Appellate Counsel, so it is to be assumed that the alleged meeting occurred after the Courts Order and meeting with Garron. Bruhn failed to mention what was discussed and even neglected to mention Counsel by name. *This does not explain why he failed to file the Brief before the Court Order.*
- A) Bruhn failed to respond to the petitioner as per the Courts Order.
- B) Bruhn failed to explain the reasons for failing to correspond or visit with Garron as per the court's order furthermore; he failed to explain why he did not file the Brief given to him by Garron.
- C) Bruhn failed to explain why he felt no issue existed as to Garron's assertions within the Brief submitted to Bruhn.

The Court abused it's discretion in denying Garron's Motion requesting an Order to Show Cause. Bruhn simply did not adhere to the Courts Order requesting why he has not contacted or corresponded with Garron therefore the Courts denial of Garron's motion requesting an Order to Show Cause was clearly erroneous. "The standard of review in a Post Conviction Proceeding is the clearly erroneous standard. "The district courts finding of fact in a Post Conviction Proceeding will not be disturbed on appeal unless they are clearly erroneous under N.D.R. Civ. P., Rule 52 (a)." Odom v. State, 2010 ND 65 ¶ 10, 780 N.W. 2d 666."

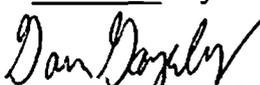
### STATUTE OF LIMITATIONS

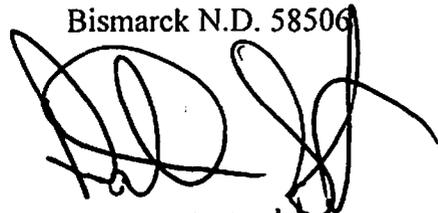
In its denial of Garron's Motion, the Court claimed that Garron's underlying convictions became final in 2007 and therefore his application is outside the statute of limitations. This is clearly erroneous as the application submitted was in regards to appointed counsels actions in direct appeal which was affirmed by this court on or around July 1, 2015 in Gonzalez v. State, 2015 ND 175. Since the application for Post Conviction Relief was submitted on or around September 15, 2015 and was in regards to a direct appeal matter, the application in itself does not fall outside the statute of limitations.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Order denying Garron's application for Post Conviction relief be reversed and that this case be remanded to the district court with the Order allowing Garron to resubmit his brief that was erroneously filed and never addressed by the State or the Court.

Respectfully submitted this 28 day of July, 2016

  
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7-28-16

PATRICK SCHATZ  
Notary Public  
State of North Dakota  
My Commission Expires January 1, 2021







