

20100019

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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

Nathan Fehl-Haber, )  
 )  
Petitioner-Appellant, )  
 )  
-vs- )  
 )  
State of North Dakota, ) Supreme Ct. No. 20100019  
 )  
Respondent-Appellee ) District Ct. No. 08-05-K-0981  
..... ) SA File No. F 403-05-05

JUN 09 2010  
STATE OF NORTH DAKOTA

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**BRIEF OF RESPONDENT-APPELLEE**

**APPEAL FROM SECOND POST-CONVICTION**

Burleigh County District Court  
South Central Judicial District  
The Honorable Sonna M. Anderson, Presiding

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**STATEMENT OF THE ISSUES**

The district court did not err in denying the second application for post-conviction relief without an evidentiary hearing.

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**STATEMENT OF THE CASE**

On May 16, 2005, the defendant, Nathan Fehl-Haber (hereinafter Fehl-Haber) was charged with one count of Gross Sexual Imposition, Class A Felony, and one count of Delivery of Alcohol to Minor, a Class A Misdemeanor, by complaint and pled not guilty to the offense.

On November 16-18, 2005, a jury trial was conducted with Fehl-Haber being found guilty of the offense of Gross Sexual Imposition.

Fehl-Haber appealed his conviction and the district court's denial of his motion for new trial. Both were affirmed following appeal. State v. Fehl-Haber (Fehl Haber I), 2007 ND 99, 734 N.W.2d 770; and State v. Fehl-Haber (Fehl Haber II), 2009 ND 128, 776 N.W.2d 232, unpublished disposition 2009 WL 2050963.

The relevant facts and procedural background of this case were developed in that appeal. Additional facts as they relate to each issue shall be brought out in the brief.

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**ARGUMENT**

“Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure.” Laib v. State, 2005 ND 187, ¶ 11, 705 N.W.2d 845. A petitioner for post-conviction relief has the burden of establishing grounds for post-conviction relief. State v. Steen, 2004 ND 228, ¶ 9, 690 N.W.2d 239.

**THE DISTRICT COURT DID NOT ERR IN DENYING THE SECOND APPLICATION FOR POST-CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING.**

The district court did not err when it determined that Fehl-Haber’s argument was without merit, since the issues raised by him were disposed of in his direct appeal and his first post-conviction application. State v. Fehl-Haber (Fehl Haber I), 2007 ND 99, 734 N.W.2d 770; and State v. Fehl-Haber (Fehl Haber II), 2009 ND 128, 776 N.W.2d 232, unpublished disposition 2009 WL 2050963. Post-conviction proceedings are not intended to allow defendants multiple opportunities to raise the same or similar issues, and defendants who inexcusably fail to raise all of their claims in a single post-conviction proceeding misuse the post-conviction process by initiating a subsequent application raising issues that could have been raised in the earlier proceeding. Steen v. State, 2007 ND 123 ¶ 13, 736 N.W.2d 457.

Under the Uniform Post-Conviction Procedure Act (Post-Conviction Act), the State may move for dismissal by either submitting a response via an answer or motion. N.D.C.C. § 29-32.1-06 (2010); and Vandeberg v. State, 2003 ND 71, ¶ 4, 660 N.W.2d 568. This Court has determined that the Post-



1 Conviction Act allows for two types of dismissals, one which is similar to a  
2 motion under the North Dakota Rules of Civil Procedure 12(b)(vi) or (c) and  
3 the other which is akin to a motion under Rule 56 of the North Dakota Rules  
4 of Civil Procedure. Dunn v. State, 2006 ND 26, ¶ 8, 709 N.W.2d 1.

6 **A. The district court had the authority to dismiss Fehl-**  
7 **Haber's application under Rule 12(b), N.D.R.Civ.P.**

8 The Post-Conviction Act provides, in part:

9 The state may move to dismiss an application on the ground  
10 that it is evident from the application that the applicant is not  
11 entitled to post-conviction relief and no purpose would be  
12 served by any further proceedings. In considering the motion,  
the court shall take account of substance regardless of defects  
of form.

13 N.D.C.C. § 29-32.1-06(2) (2010). This language is analogous to a  
14 motion for dismissal for failure to state a claim upon which relief may  
15 be granted and a motion for judgment on the pleadings. N.D.R.Civ.P.  
16 12(b)(vi) & (c); and Johnson v. State, 2005 ND 188, ¶ 9, 705 N.W.2d  
17 830. Under this type of review, the court may rely solely on the  
18 pleadings in granting a summary disposition motion. Id. at ¶¶ 9, 14.  
19 Under a Rule 12(b) analysis, the adverse party has 10 days to respond  
20 to a petition for relief. Id. at ¶14. The trial court should not dismiss a  
21 motion on the pleadings under Rule 12 unless it appears that the  
22 movant can prove no set of facts in support of his claim that would  
23 entitle him relief. Id. at ¶ 20.

24  
25 If the State's motion requesting summary dismissal asks a court to go  
26 beyond the pleadings, the motion is no longer to be treated as a Rule 12(b)  
27

1 motion; rather, it is analyzed as a Rule 56 motion under the North Dakota  
2 Rules of Civil Procedure. Johnson v. State, 2005 ND 188 ¶ 15, 705 N.W.2d  
3 830.  
4

5 Here, Fehl-Haber merely provided an application setting forth a  
6 statement for each ground of relief sought. Appellant's Appendix, pp. 62-64.  
7 No exhibits, affidavits, or other documents were submitted by Fehl-Haber  
8 with his brief or following the State's request for summary disposition.  
9 Appellant's Appendix, pp. 1-2. In denying Fehl-Haber's application, the  
10 district court relied only on the pleadings. Appellant's Appendix, pp. 1-2.  
11 Thus, under a Rule 12(b) motion, analogous to North Dakota Century Code §  
12 29-32.1-06(2), the district court had authority to dismiss the petition on the  
13 pleadings and without a hearing.  
14

15 Additionally, Fehl-Haber has failed to argue that the district court  
16 should have applied Rule 56 by way of North Dakota Century Code § 29-  
17 32.1-09(1) rather than Rule 12(b) by way of § 29-32.1-06(2), thereby entitling  
18 him to thirty days to respond to the State's motion. Because Fehl-Haber has  
19 not raised this issue, this Court should treat the district court's decision as a  
20 dismissal of the application similarly to Rule 12(b)(vi) or (c). See Johnson v.  
21 State, 2004 ND 130, ¶ 6, 681 N.W.2d 769 (When an appellant fails to raise  
22 the issue of how many days he should have been afforded to respond to  
23 State's brief, the Court treated the dismissal under Rule 12(b)(vi)). Therefore,  
24 the district court properly dismissed his second post-conviction application  
25 pursuant to Rule 12 (b) and North Dakota Century Code § 29-32.1-06(2).  
26  
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1                   **B. The district court could have also summarily**  
2                   **dismissed the application under Rule 56,**  
3                   **N.D.R.Civ.P.**

4                   The Post-Conviction Act also allows summary disposition that  
5 is parallel to Rule 56 North Dakota Rules of Civil Procedure and  
6 provides in part:

7                   The court may grant a motion by either party for summary  
8 disposition if the application, pleadings, any previous  
9 proceeding, discovery, or other matters of record show that  
10 there is no genuine issue as to any material fact and the moving  
11 party is entitled to a judgment as a matter of law.

12 N.D.C.C. § 29-32.1-09(1) (2010); and Johnson v. State, 2005 ND 188  
13 ¶ 10, 15, 705 N.W.2d 830. When a court is asked to go beyond the  
14 pleadings, it still may summarily dismiss an application for post-  
15 conviction relief if there is no genuine issue of material fact and the  
16 moving party is entitled to judgment as a matter of law. N.D.C.C. §  
17 29-32.1-09(1) (2010); and Wheeler v. State 2008 ND 109, ¶ 5, 750  
18 N.W.2d 446.

19                   The party moving for summary dismissal has the initial burden  
20 of showing there is no genuine issue of material fact. Dunn v. State,  
21 2006 ND 26, ¶ 10, 709 N.W.2d 1 (quoting Mertz v. State, 535 N.W.2d  
22 834, 836 (N.D. 1995)). A genuine issue of material fact exists if  
23 reasonable minds could draw different inferences and reach different  
24 conclusions from the undisputed facts. Vandeberg v. State, 2003 ND  
25 71, ¶ 5, 660 N.W.2d 568. If the party moving for summary dismissal  
26 shows the absence of a genuine material fact issue, the burden then  
27

1 shifts to the responding party to demonstrate the existence of a genuine  
2 issue of material fact. Id. The party opposing the motion may not  
3 merely rely upon the pleadings or upon unsupported, conclusory  
4 allegations, but must present competent admissible evidence by  
5 affidavit or other comparable means which raises an issue of material  
6 fact. Dunn v. State, 2006 ND 26, ¶ 10, 709 N.W.2d 1 (quoting Mertz  
7 v. State, 535 N.W.2d 834, 836 (N.D. 1995)).  
8

9       Even if this Court determines that a Rule 56 analysis was the  
10 appropriate basis for review, the outcome would be the same. Fehl-Haber  
11 failed to raise a genuine issue of material fact. Appellant's Appendix pp. 62-  
12 62; and Appellant's Response pp. 1-2. The issues Fehl-Haber currently  
13 asserts have already been raised and disposed of on his direct appeal, first  
14 post-conviction application, and his appeal of the district court's order  
15 denying his first post-conviction relief. Fehl Haber I, 2007 ND 99, 734  
16 N.W.2d 770; and Fehl-Haber II, 2009 ND 128, 776 N.W.2d 232, unpublished  
17 disposition 2009 WL 2050963. Thus, Fehl-Haber has not raised an issue of  
18 material fact in his second post-conviction application.  
19

20       Additionally, Fehl-Haber argues that the statute governing post-  
21 conviction applications does not require him to provide supporting evidentiary  
22 matter. Appellant Brief pp. 5-9. While this may be true with regards to Fehl-  
23 Haber's initial burden under the Post-Conviction Act, his argument is  
24 incomplete, because the State put Fehl-Haber on his proof when they moved  
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1 for summary dismissal. Henke v. State, 2009 ND 117, ¶ 9, 767 N.W.2d 881  
2 (citing State v. Bender, 1998 ND 72, ¶ 20, 576 N.W.2d 210).  
3

4 A petitioner must support his or her application with evidence if the  
5 State moves for summary dismissal. Id. For Fehl-Haber to proceed, he was  
6 required to properly respond to the motion and provide proof of his claim. Id.;  
7 and Appellant's Appendix pp. 1-2. Fehl-Haber failed to do so. Appellant's  
8 Appendix, pp. 1-2, 62-65; and Appellant's Response pp.1-3. Fehl-Haber's  
9 application and response to the State's motion provided only conclusory  
10 statements which were not accompanied by any evidentiary support.  
11 Appellant's Appendix pp. 62-64; and Appellant's Response pp. 1-2.  
12

13 Therefore, Fehl-Haber is mistaken in believing that he was not  
14 required to provide evidentiary support of his claim and he was entitled to an  
15 evidentiary hearing. Having put Fehl-Haber on his proof, his failure to  
16 appropriately respond was fatal. See, Dunn v. State, 2006 ND 26, ¶ 12, 709  
17 N.W.2d 1 (Petitioner's failure to appropriately respond was fatal and district  
18 court's dismissal of the action was appropriate). For the reasons stated above,  
19 the district court could have also dismissed the second post-conviction  
20 application under a Rule 56 analysis.  
21

22 Finally, regardless of whether this Court applies N.D.C.C. § 29-32.1-  
23 06(2) or § 29-32.1-09(1), Fehl-Haber is not entitled to post-conviction relief.  
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1                   **C.     Res judicata and misuse of process bars Fehl-Haber from**  
2                   **re-litigating the same claims.**

3                   An application for post-conviction relief may be denied under  
4                   N.D.C.C. § 29-32.1-12 on grounds of res judicata or misuse of process. Relief  
5                   may be denied as res judicata under N.D.C.C. § 29-32.1-12(1) if the same  
6                   claim or claims were “fully and finally determined in a previous proceeding.”  
7                   Under N.D.C.C. § 29-32.1-12(2), misuse of process occurs when a post-  
8                   conviction relief applicant “[p]resents a claim for relief which the applicant  
9                   inexcusably failed to raise either in a proceeding leading to judgment of  
10                  conviction and sentence or in a previous post conviction proceeding,” or if the  
11                  applicant “[f]iles multiple applications containing a claim so lacking in factual  
12                  support or legal basis as to be frivolous.” See, e.g., Jensen v. State, 2004 ND  
13                  200, ¶ 9, 688 N.W.2d 374.  
14                  200, ¶ 9, 688 N.W.2d 374.

15                  Again “[p]ost-conviction proceedings are not intended to allow  
16                  defendants multiple opportunities to raise the same or similar issues.” Id.  
17                  (citing, Johnson v. State, 2004 ND 130, ¶ 13, 681 N.W.2d 769). This Court  
18                  has explained that “[d]efendants are not entitled to post-conviction relief when  
19                  their claims are merely variations of previous claims that have been rejected.”  
20                  Id. (citing, Garcia v. State, 2004 ND 81, ¶ 22, 678 N.W.2d 568).  
21                  Id. (citing, Garcia v. State, 2004 ND 81, ¶ 22, 678 N.W.2d 568).  
22                  Id. (citing, Garcia v. State, 2004 ND 81, ¶ 22, 678 N.W.2d 568).

23                  Fehl-Haber is trying to re-litigate issues that have already been  
24                  adjudicated. Appellant’s Appendix pp. 29-61. Fehl-Haber argues that the  
25                  State failed to disclose evidence regarding K.L.S.’s sexual history. Appellant  
26                  Brief pp. 6-7. This exact issue, however, was addressed in Fehl-Haber’s  
27                  Brief pp. 6-7. This exact issue, however, was addressed in Fehl-Haber’s

1 direct appeal and first post-conviction application. Fehl-Haber I, 2007 ND 99,  
2 734 N.W.2d 770; and Fehl-Haber II, 2009 ND 128, 776 N.W.2d 232,  
3 unpublished disposition 2009 WL 2050963. The district court's order  
4 regarding the first post-conviction application stated that:

6 The victim's sexual history either prior to or subsequent to  
7 May 13, 2005 is not relevant at trial, as the GSI [gross sexual  
8 imposition] occurred without her knowledge or consent.  
9 Whether she was chaste or promiscuous in the normal course  
of her life, the victim's sexual history is not relevant as she  
was unconscious at the time.

10 (Appellant's Appendix. p. 52).

11 That application for relief was not only disposed of by the district  
12 court, but this Court affirmed the district court's order denying post-  
13 conviction relief. Fehl-Haber I, 2007 ND 99, 734 N.W.2d 770.

15 In Fehl-Haber I, this Court addressed Fehl-Haber's claims that there  
16 was a discovery violation for failing to disclose evidence regarding prior  
17 allegation, and the prior allegation was relevant to the victim's credibility.  
18 2007 ND 99, ¶ 21, 734 N.W.2d 770. This Court determined, contrary to Fehl-  
19 Haber's assertions, the evidence regarding K.L.S.'s sexual history was not  
20 material or exculpatory. Id. at ¶ 23. Nor did the alleged new evidence in this  
21 case warrant a new trial. Id. Fehl-Haber acknowledged he deposed K.L.S.  
22 prior to the trial. Id. at ¶ 23. This Court concluded Fehl-Haber had not  
23 demonstrated that this alleged new evidence would provide any new evidence  
24 not already available to him by deposition, which would be admissible under  
25 N.D. R. Evid. 412. Id. Therefore, Fehl-Haber has not established that his  
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1 alleged evidence was material or likely to result in an acquittal, and the district  
2 court did not abuse its discretion in denying Fehl-Haber's motion. Id.  
3

4 Further, in Fehl-Haber II, this Court affirmed the district court's  
5 decision denying Fehl-Haber's first post-conviction application in which he  
6 claimed ineffective assistance of counsel and that the State withheld  
7 information from him. Fehl-Haber II, 2009 ND 128, 776 N.W.2d 232,  
8 unpublished disposition 2009 WL 2050963.

9 In Fehl-Haber's current post-conviction application and response to  
10 the State's motion, he is arguing that this newly obtained evidence shows  
11 "that K.L.S. has a history of G.S.I cases against a number of individuals and  
12 that this Court should grant this Post Conviction Relief." (Appellant's  
13 Response p. 2; See also, Appellant Appendix pp. 62-64). This, again, is the  
14 exact same argument Fehl-Haber presented in his direct appeal and first post-  
15 conviction application. Fehl-Haber I, 2007 ND 99, 734 N.W.2d 770; and  
16 Fehl-Haber II, 2009 ND 128, 776 N.W.2d 232, unpublished disposition 2009  
17 WL 2050963.  
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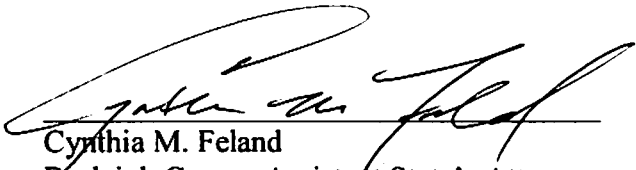
19 This Court must come to the conclusion that Fehl-Haber has failed to  
20 present an issue that has not already been adjudicated. In Fehl-Haber's  
21 second post-conviction application and response to the State's motion, he  
22 regurgitates what has already been decided by the district court and affirmed  
23 by this Court in his first post-conviction application. Appellant Appendix pp.  
24 29- 64; and Appellant Response pp.1-3. This Court has determined that "a  
25 defendant is not entitled to post-conviction relief if the contentions raised are  
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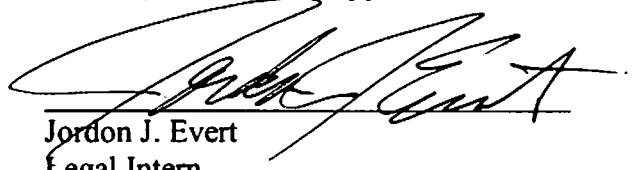
1 simply variations of previous arguments.” St. Clare v. State, 2002 ND 10, ¶  
2 13, 638 N.W.2d 39. Therefore, the district court did not err when it  
3 summarily dismissed Fehl-Haber’s second post-conviction application.  
4

5 **CONCLUSION**

6 Based upon the foregoing, the State requests that the district court’s  
7 order denying post conviction relief be affirmed.

8 Dated this 9<sup>th</sup> day of June, 2010.

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