

**In the Supreme Court
State of North Dakota**

Cody Atkins,	Appellant	Supreme Court No.: 20220006
vs.		Civil Court No.: 18-2021-CV-01260
State of North Dakota,		
	Appellee.	

On Appeal from an Order Denying Post-Conviction Relief entered on December 13,
2021, and the Finding that Mr. Atkins is a Vexatious Litigant entered on January 6, 2022
Grand Forks District Court
Northeast Central Judicial District
The Honorable Judge John Thelen Presiding

APPELLANT'S BRIEF

Stormy Vickers (ND # 06539)
Vickers Law
808 Third Ave S., Ste. 201
Fargo, ND 58103
Telephone: (701) 365-4884
Vickerslaw.efile@gmail.com
ATTORNEY FOR APPELLANT

Alexis Madlom, Legal Intern
Certified under N.D. R. Ltd. Practice
by Law Students

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Jurisdiction

1. The district court had jurisdiction in this case pursuant to N.D.C.C. § 29-32.1-01. The North Dakota Supreme Court has jurisdiction over this appeal pursuant to N.D.C.C. §§ 29-32.1-14, 29-28-03, 29-28-06 and North Dakota Constitution, article VI § 6.

Statement of the Issues

2. Whether the district court erred in denying Mr. Atkins' application for post-conviction relief because his original plea was not knowing and voluntary.
3. Whether the district court erred in its determination that Mr. Atkins is a vexatious litigant.

Statement of the Case

4. This is an appeal from an Order denying an Application for Post-Conviction relief regarding Mr. Cody Atkins that was entered on December 13, 2021 and from an order finding Mr. Atkins to be a vexatious litigant that was entered on December 15, 2021. Case No. 18-2021-CV-01260 Index 69 and Index 71.

Statement of the Facts

5. Atkins was evaluated at St. Alexius Archway Mental PrimeCare. Case No. 18-2021-CV-01260 Index 58, page 1. He was found to have an extremely low IQ, only six points above mental retardation, with a score of 76. *Id.* at page 6. Evaluators were also concerned regarding the "presence of a developmental disorder," his "borderline intellectual functioning," and his development disorder. *Id.* at 4. He also has pronounced features of ADHD. *Id.* at 1.
6. Mr. Atkins' prior post-conviction proceedings have been summarized by this court as follows:

Atkins pleaded guilty to gross sexual imposition in 2015. This Court affirmed Atkins's criminal judgment. Atkins filed a post-conviction relief application in March 2016 that was dismissed. He filed another application in September 2016, which was dismissed and affirmed on appeal. Atkins also filed post-judgment motions in his criminal case: 1) in July 2017 to reduce his sentence; 2) in November 2017 to dismiss the GSI charge; 3) in February 2018 to "vacate" his guilty plea; and 4) in March 2018 for a new trial. The district court treated the February 2018 and March 2018 motions as a third application for post-conviction relief. We agreed Atkins's motions were an application for post-conviction relief and affirmed the court's denial of Atkins's requests.

Atkins v. State, 2021 ND 83, ¶ 2, 959 N.W.2d 588, 590 (internal citations omitted). Mr. Atkins also filed an application for post-conviction relief in 2020, that was denied. Case No. 18-2020-CV-02006, Index 7. Mr. Atkins then appealed to the North Dakota Supreme Court, where the denial was affirmed. Atkins, 2021 ND 83, ¶ 27.

7. Mr. Atkins filed another petition for post-conviction relief in the above captioned matter on June 30, 2021. Case No. 18-2021-CV-01260, Index 1. A hearing was held on November 12, 2021 where both counsel and Mr. Atkins made arguments for post-conviction relief and the court took the matters under advisement. Case No. 18-2021-CV-01260. On December 15, 2021, the court ordered the denial of Mr. Atkins' post-conviction relief application and on January 6, 2022, the court found that Mr. Atkins was a vexatious litigant. Case No. 18-2021-CV-01260 Index 69 and Index 71.

Standard of Review

8. A district court ruling on a finding of fact that falls under the Uniform Post-Conviction Procedure Act is reviewed under the clearly erroneous standard. N.D.R.Civ.P. Rule 52(a); Hunter v. State, 2020 ND 224, ¶ 11, 949 N.W.2d 841, 844. A finding is not clearly erroneous unless it is shown to be "induced by an erroneous view of the law," "not supported by any evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction a mistake has been made."

Hunter, 2020 ND 224, ¶ 11 (see also Brewer v. State, 2019 ND 69, ¶ 4, 924 N.W.2d 87).

“Questions of law are fully reviewable on appeal of a post-conviction proceeding.” Id.

9. A district court order finding a litigant to be vexatious is reviewed by the North Dakota Supreme Court for an abuse of discretion. Smith v. Erickson, 2019 ND 48, ¶ 15, 923 N.W.2d 503, 507. “A court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination.” In re Hirsch, 2017 ND 291, ¶ 8, 904 N.W.2d 740, 743-44.

Law and Argument

10. An appeal to the supreme court provided for in this chapter may be taken as a matter of right. N.D.C.C. 29-28-03. Mr. Atkins was denied post-conviction relief and declared a vexatious litigant by the district court. Mr. Atkins appeals these findings.

I. The district court erred in denying Mr. Atkins’ application for post-conviction relief because his original plea was not knowing and voluntary.

11. A post-conviction proceeding may be filed in many instances, including when a person is convicted and sentenced for a crime if, “the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error available before July 1, 1985, under any common law, statutory or other writ, motion, proceeding, or remedy.” N.D. Cent. Code § 29-32.1-01(1)(h).

12. Relief must be sought within two years of the date the conviction becomes final unless:

- 1) The petition alleges the existence of newly discovered evidence, including DNA evidence, which if proved and reviewed in light of the evidence as a whole, would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted;

- 2) The petitioner establishes that the petitioner suffered from a physical disability or mental disease that precluded timely assertion of the application for relief; or
- 3) The petitioner asserts a new interpretation of federal or state constitutional or statutory law by either the United States supreme court or a North Dakota appellate court and the petitioner establishes that the interpretation is retroactively applicable to the petitioner's case.

N.D. Cent. Code § 29-32.1-01(3)(a).

13. If an exception to the time limit is applicable, the "application under this subsection must be filed within two years of the date the petitioner discovers or reasonably should have discovered the existence of the new evidence, the disability or disease ceases, or the effective date of the retroactive application of law." N.D. Cent. Code § 29-32.1-01(3)(b).

14. Mr. Atkins argues that he is not barred by the time barrier because he suffers from a mental disease that precludes timeliness. Mr. Atkins was evaluated and found to have an extremely low IQ, only six points above mental retardation, with a score of 76. Case No. 18-2021-CV-01260 Index 58, page 6. Evaluators were also concerned regarding an indication of a learning disability, finding that the overall impression was one of borderline intellectual functioning. Id. at 4. He also has pronounced features of ADHD. Id. All of these factors cause Atkins to have a significant learning impairment. Id. Although this mental condition is not new, it has not ceased, and it still continues to affect Mr. Atkins.

15. Mr. Atkins argues that he is entitled to relief because his guilty plea was not knowing, intentional, and voluntary. A guilty plea "must be entered knowingly, intelligently, and voluntarily to be valid." Peltier v. State, 2015 ND 35, ¶ 14, 859 N.W.2d 381. Under N.D.R.Crim.P. 11(b)(1), "the court is required to address the defendant personally in open court, informing the defendant of his rights and determining whether

the defendant understands those rights." State v. Hoehn, 2019 ND 222, ¶ 18, 932 N.W.2d 553, 559 (quoting State v. Pixler, 2010 ND 105, ¶ 8, 783 N.W.2d 9).

16. Mr. Atkins argues that under United States Supreme Court Case law, Henderson v. Morgan, his plea was involuntary because he was not aware of the culpability of the offense. The court in Henderson held that a defendant must be given adequate notice of the crime they are charged with to ensure that their plea is voluntary, and it does not violate due process. Henderson v. Morgan, 426 U.S. 637, 644, 96 S. Ct. 2253, 2262-63 (1976). When a defendant is not informed of the intent requirement for the crime charged against him, a plea will be involuntary as there is a due process violation. Id.

17. In the instant case, Mr. Atkins is arguing that his due process rights were violated because he was not given adequate notice of the offense he was charged with. Mr. Atkins argues that he was never instructed the offense he was charged with is a strict liability offense and therefore he was not given adequate notice of the offense. Due to this violation, Mr. Atkins plea was not voluntary, and he asks that this court allow him to withdraw his guilty plea in order for Mr. Atkins to have a trial.

II. The district court erred in its determination that Mr. Atkins is a vexatious litigant.

18. A “vexatious litigant” is, “a person who habitually, persistently, and without reasonable grounds engages in conduct that:

- (1) serves primarily to harass or maliciously injure another party in litigation;
- (2) is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law;
- (3) is imposed solely for delay;
- (4) hinders the effective administration of justice;
- (5) imposes an unacceptable burden on judicial personnel and resources; or
- (6) impedes the normal and essential functioning of the judicial process.

N.D. Sup. Ct. Admin. R., 58(2)(b).


19. A presiding judge has the discretion to “enter a pre-filing order prohibiting a vexatious litigant from filing any new litigation or any new documents in existing litigation in the courts of this state as a self-represented party without first obtaining leave of a judge of the court in the district where the litigation is proposed to be filed.” In re Hirsch, 2017 ND 291, ¶ 5.

20. Mr. Atkins argues that he is not a vexatious litigant because he had reasonable grounds and a good faith argument to file the documentation in his cases.


Conclusion

21. Therefore, Mr. Atkins asks this court to reverse the district court’s decision to deny his post-conviction relief and the order finding that he is a vexatious litigant.

Dated: 3/9/22


Stormy Vickers (ND # 06539)
Vickers Law
808 Third Ave S., Ste. 201
Fargo, ND 58103
Telephone: (701) 365-4884
Vickerslaw.efile@gmail.com
ATTORNEY FOR APPELLANT

Dated: 3/9/22



Alexis Madlom, Legal Intern
Certified under N.D. R. Ltd. Practice
by Law Students

**In the Supreme Court
State of North Dakota**


Cody Atkins,	Appellant	Supreme Court No.: 20220006
vs.		Civil Court No.: 18-2021-CV-01260
State of North Dakota,	Appellee.	Certificate of Compliance

1. Pursuant to N.D.R.App.P.32(a)(8)(A), the undersigned attorney certifies this brief complies with the 38-page limitation.

Dated: 3-8-22


Stormy Vickers (ND # 06539)
Vickers Law
808 Third Ave S., Ste. 201
Fargo, ND 58103
Telephone: (701) 365-4884
Vickerslaw.efile@gmail.com
ATTORNEY FOR APPELLANT

Dated: 3-8-2022


Alexis Madlom, Legal Intern
Certified under N.D. R. Ltd. Practice
by Law Students

**In the Supreme Court
State of North Dakota**

Cody Atkins,	Appellant	Supreme Court No.: 20220006
vs.		Civil Court No.: 18-2021-CV-01260
State of North Dakota,	Appellee.	Declaration of Service

1. The undersigned declarant hereby certifies that he is of legal age, not a party to the above-captioned matter, and that on March 8, 2022, a copy of the following documents:

- a. Appellant's Brief
- b. Certificate of Compliance
- c. Declaration of Service

were electronically served with Odyssey upon the following:

Justine Soraya Hesselbart – attorney for the State
sasupportstaff@gfcounty.org

and were served by first-class mail upon:

Cody Michael Atkins #41930
c/o JRCC
2521 Circle Drive
Jamestown, ND 58401

2. To the best of the declarant's knowledge the above address is the actual address of the party intended to be served.

3. I declare under penalty of perjury of the law of North Dakota that the foregoing is true and correct.

Dated: March 8, 2022



Stormy Vickers (ND # 06539)
Vickers Law
808 Third Ave S., Ste. 201
Fargo, ND 58103
Telephone: (701) 365-4884
Vickerslaw.efile@gmail.com
ATTORNEY FOR APPELLANT

**In the Supreme Court
State of North Dakota**

Cody Atkins,		Supreme Court No.: 20220006
	Appellant	
vs.		Civil Court No.: 18-2021-CV-01260
State of North Dakota,		Declaration of Service
	Appellee.	

1. The undersigned declarant hereby certifies that he is of legal age, not a party to the above-captioned matter, and that on March 9, 2022, a copy of the following documents:

a. Brief - Corrected

were electronically served with Odyssey upon the following:

Justine Soraya Hesselbart – attorney for the State
sasupportstaff@gfcounty.org


and were served by first-class mail upon:

Cody Michael Atkins #41930
c/o JRCC
2521 Circle Drive
Jamestown, ND 58401

2. To the best of the declarant's knowledge the above address is the actual address of the party intended to be served.

3. I declare under penalty of perjury of the law of North Dakota that the foregoing is true and correct.

Dated: March 9, 2022




Stormy Vickers (ND # 06539)
Vickers Law
808 Third Ave S., Ste. 201
Fargo, ND 58103
Telephone: (701) 365-4884
Vickerslaw.efile@gmail.com
ATTORNEY FOR APPELLANT

**In the Supreme Court
State of North Dakota**

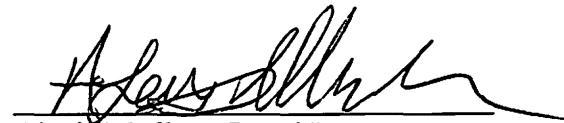
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State of North Dakota,		Certificate of Compliance
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1. Pursuant to N.D.R.App.P.32(a)(8)(A), the undersigned attorney certifies this brief complies with the 38-page limitation.

Dated: 3/9/22


Stormy Vickers (ND # 06539)
Vickers Law
808 Third Ave S., Ste. 201
Fargo, ND 58103
Telephone: (701) 365-4884
Vickerslaw.efile@gmail.com
ATTORNEY FOR APPELLANT

Dated: 3/9/22


Alexis Madlom, Legal Intern
Certified under N.D. R. Ltd. Practice
by Law Students