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STATE OF NORTH DAKOTA

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

Cody Michael Atkins

Petitioner- Appellant,

Vs.

State of North Dakota

Respondent- Appellee,

Supreme Court No. 20220006

Case No. 18-2021-cv-1260

On appeal from the Order Denying Application for Post-Conviction Relief

Filed December 10, 2021

Grand Forks County District Court

North East Central Judicial District

State of North Dakota

The Honorable John Thelen, presiding

SUPPLEMENTAL APPELLANT'S BRIEF



Cody Michael Atkins # 41930
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Jamestown, ND 58401

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Statement of the Issues

- 1) Whether the District Court erred in denying Atkins Petition for Post-Conviction Relief;

Statement of the Case

[¶1] Mr. Atkins asserts the Statement of the Case was laid out in the Appellant's Brief.

Statement of the Facts

[¶2] Mr. Atkins argues that the Facts of the Case was laid out in the Appellant's Brief.

Law & Argument

1) Whether the District Court erred in denying Atkins Petition for Post-Conviction Relief;

[¶3] The express purpose of the uniform post-conviction relief procedure act, as codified in N.D.C.C. § ch. 29-32.1, is to furnish a method to develop a complete record to challenge a criminal conviction. *Chisholm v. State*, 2014 ND 125, ¶15. (Quoting *State v. Bender*, 1998 ND 72, ¶20)

[¶4] The Court found that Mr. Atkins claims are barred by res judicata and misuse of process. The Court found that this is in fact variation of previous denied grounds and therefore must be denied. The Court further found that these issues were already addressed in prior post-conviction attempts. It should be noted that the Court wouldn't allow Mr. Atkins to file any evidence in support of his application. See, Tr. p. 18 lines 8-10.

[¶5] Mr. Atkins argues that the district court erred by not allowing any evidence to be presented in open court. See, *Id.* lines 8-10. The Post-Conviction Act specifically states that evidence must be provided in open court. See, 29-32.1-10. This deprived Mr. Atkins to make a full rebuttal to the State in their arguments and to properly make a record for this court and for the federal court. Mr. Atkins specifically told the judge that he would like to call witnesses such as Medical experts, family members of Cody Atkins, Casey Ellis, Ashley Stevens, Mr. Conley and Derik Zimmer. See, *Id.* at pp. 32, 34-36 lines 16-17, 5-6, 5, 15-22. Mr. Atkins argues that

these witnesses would have shown that he is innocent of this alleged crime and Mr. Atkins claimed errors. Mr. Atkins further stated that he would like to call Mr. Morrow to show that he didn't tell Mr. Atkins of the elements of the alleged crime. See, Id. at p. 36 lines 15-22. Mr. Atkins also wanted to submit evidence of criminal information(s) to show that the way the State wrote Mr. Atkins criminal information deprived Mr. Atkins of essential elements of what the State was alleging. Specifically which gives notice to the defendant for the charges that are pending against him; and to enable him to make a defense to the charges. Further Mr. Atkins wanted to submit evidence to specifically show that the state withheld very critical statements of Mr. Atkins alleged victim's mom (Ashley Stevens) who reported this alleged crime, co-defendant (Thomas Pinkney), officer Conley lying which enabled the proceeding to proceed against Atkins. Mr. Atkins argues that with all these errors he would never plead guilty and would go to trial. Mr. Atkins argues that this prejudiced him in a significant way because he was unable to develop a record to fight his unconstitutional criminal conviction. This also denies Mr. Atkins his due process rights because he was unable to make a complete defense to the States defenses, and to support and show how he is entitled to relief, further Mr. Atkins argues that the Court denied clearly established North Dakota Post-Conviction law. Specifically N.D.C.C. § 29-32.1-10, it states that evidence must be submitted on open record which again Atkins was denied. Mr. Atkins will address the affirmative defenses the State raised.

[¶6] This Court has stated on multiple occasions that “[T]he doctrine should apply as fairness and justice require, and should not be applied so rigidly to defeat the ends of justice or to work in injustice.” *Riverwood v. Standard Oil Co.*, 2007 ND 36, ¶14; See also, *Fettig v. Fettig*, 2019 ND 261, ¶ 16. It should be noted that it is clear from the record that Mr. Atkins hasn't had effective assistance of his post-conviction counsel. Mr. Atkins argues that he has a letter from

Mr. O'Day stating that he lacked communication and that it's the Courts fault for why a brief wasn't filed. (See, Case No. 18-2018-cv-2604, Index # 43). Mr. Hartl had a conflict in Mr. Atkins case because he was related to Mr. Atkins judge. (See, Id. at 44) As Mr. Atkins stated many times he asked Hartl to get off his case because of the conflict. Mr. Atkins argues that Ms. Gorham had a conflict of interest in Atkins case. The Grand Forks Public Defenders office filed a Motion for reassignment in Atkins original case. (See, Case No. 18-2014-cr-1844, index # 23) Mr. Atkins through his due diligence found that Ms. Ahrendt in that specific office represented Atkins alleged victim's family in case no., 18-2014-jv-66. Mr. Atkins was also given Mr. Craig, Mr. Craig filed a Motion to withdraw due to a lawyer-client breakdown. See, Case no. 18-2018-cv-2604 (index 134-138) Mr. Atkins hasn't had an opportunity to bring these attorney's to the stand to show why and how they violated the professional conduct standards and why there was an issue with Mr. Atkins. This is a very unusual case, where Mr. Atkins has had conflict attorney(s), or just straight ineffective and admitted in letters to Mr. Atkins. As this court can note this has probably never happened in North Dakota.

[¶7] Mr. Atkins argues that he shown excusable neglect or a justifiable excuse for why these issues were not raised in an earlier proceeding.

[¶8] Mr. Atkins asks this Honorable Court to notice obvious error in his case. The Supreme Court's power to notice obvious error is exercised cautiously and only in exceptional situations where the defendant suffered serious injustice. State v. Berg, 2015 ND 61, ¶13. To establish obvious error, the defendant must show (1) error; (2) that is plain; (3) affects substantial rights. See, Id.

[¶9] In North Dakota Rule 11 requires the Court to address the defendant personally in open court to ascertain that "the plea is made voluntary with understanding of the nature of the charge

and the consequences of the plea” See, N.D.R.Crim.P. 11. In *McCarthy v. United States*, 394 U.S. 459 (1967), the Supreme Court sought to resolve any doubts about the effect of less complete compliance with Rule 11, when it declared that “prejudice inheres in a failure to comply with Rule 11.” Id. at 471. “That any noncompliance with Rule 11 is reversible error” Id. at 469 n. 9, a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew.

[¶10] The United States’ Supreme Court further held that “An indictment ‘contains the elements of the offense intended to be charged. It is elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or statute, ‘includes generic terms, it is not sufficient that an indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, it must descend to particulars. AN indictment not framed to apprise him *** is defective, although it may follow the language of the statute, it is not sufficient to set forth the offence in the words of the statute, unless those words themselves full, directly, and expressly, without uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished’”. *Russell v. US*, 369 U.S.749, 764-65.

[¶11] In North Dakota the “Element of an offense” means:

- a. The forbidden conduct;
- b. The attendant circumstances specified in the definition and grading of the offense;
- c. The required culpability;
- d. Any required result; and
- e. The nonexistence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue. See, 12.1-01-03

It is very clear in *Atkins* case, *Atkins* was never told of the culpability by the record made, because the District Court denied Mr. *Atkins* the opportunity to present evidence Mr.

Atkins was unable to present Mr. Morrow's testimony to show he never told Atkins of the elements.

[¶12] Mr. Atkins further argues that the charging document is defective. In the Information reads as follows:

That on or about September 2013, within the county of Grand Forks in the State of North Dakota, one Cody Michael Atkins, did commit the crime of Gross Sexual Imposition, in violations of sections 12.1-20-03(1)(d), 12.1-20-03(3)(b), 12.1-32-01(2) of the North Dakota Century Code, a class A felony, by then and there engaging in a sexual act with another less than 15 years old. To wit: that Cody Michael Atkins did engage in a sexual act with Jane Doe, a 2 year old female. This taking place at redacted. Tr.pp. 11-12, lines 23-25, 1-9, See also 18-2014-cr-1844, Index # 2,46

Mr. Atkins further argues that the factual basis doesn't put forth the true nature of the offense either. The colloquy goes as follows:

Ms. Larson: In September 2013, specifically September 14, 2013, the defendant, his co-defendant, Mr. Pinkney, and a third party were in the home of a two year old child. The third party was providing childcare this was at (redacted in Grand Forks. During that time, Mr. Atkins held the 2 year old child down, and his co-defendant placed a tampon inside the child's vagina. Subsequently, the defendant also placed his finger in the child's vagina while the child was screaming. And the defendant admitted to this. See, tr.p. at _____ lines _____

In North Dakota. These include (1) Intentionally; (2) Knowingly; (3) Recklessly; (4) Negligently; (5) Willfully. See, 12.1-02-02. There is nothing in North Dakota law that states that engaged is a culpability. It should be further noted that Mr. Atkins suffers from mental problems. See, Appellant Appendix at _____. This Court made it clear that the culpability in Gross Sexual Imposition is willfully. "This Court held that both a culpable mens rea and actus reus are generally required for an offense to occur." State v. Gaddie, 2022 ND 44. 12.20-03 states [a] person who engages 'in a sexual act or sexual contact is guilty of the offense.' It does not specify a culpability level for the conduct. Therefore the jury must find a person's actions are willful. Id. at ¶26.

[¶13] As the record is clear Mr. Atkins was given mixed signals in this case. Mr. Atkins was told this was a non-violent crime. See, Preliminary Hearing tr., p. 3, Lines 15; Arraignment tr. p. 4 lines 25. (See, 18-2014-cr-1844, index #91, 93) At other points he was told it was violent crime. See, Bond hearing tr.p. 11, lines 2 (See, 18-2014-cr-1844, Index # 86) In the State's filings the State keeps stating that Mr. Atkins held a child down while a sexual act was committed this seems to be them trying to allege violence.(See, Any, State filings) There is two different set of elements from force and non-force. This is not giving Mr. Atkins full notice of his crime because the State don't even know what is going on. It seems like the prosecution, defense counsel, and the court didn't know what was going on in this case.

[¶14] The State's sole argument is the fact that by providing an information to the defendant that is sufficient. However the State over looks two big issues. First if the Information doesn't provide the essential elements then that's not sufficient. Second if the defendant has a mental condition like Mr. Atkins from understanding the information then that's not sufficient. The States argument is wholly without merit, and should not be considered.

[¶15] This prejudiced Mr. Atkins deeply. This deprived Mr. Atkins from not making an informed decision to plead guilty.

[¶16] Mr. Atkins hasn't had the oppuranity to plead anew yet because of the errors by the Court and his counsel in the initial proceedings. As this Court is aware Mr. Atkins has a Medical report from the State's Doctor and there was not marks or bruises, the hymen is in contact so if the State is alleging force like it seems like that. Mr. Atkins is innocent of the crime from the State's own doctor, and other witnesses. Further if the State is alleging no force, Mr. Atkins is still innocent because there is no evidence against Mr. Atkins except his own statement which Mr. Atkins has stated to this Court and the District Court is coerced in which Mr. Atkins will

suppress when the time is right. Again Mr. Atkins has medical experts to show that no crime was committed. Mr. Atkins can prove threw the States own evidence so there is no way Mr. Atkins if informed properly would have ever plead guilty. This is a disgrace of our judicial system to allow an innocent man to sit in prison, be given misinformation so he'd pled guilty. Our judicial system is supposed to protect the innocent not make them sit in prison for 20 years.

[¶17] Mr. Atkins would like to address a couple of things. This Court has specifically wrote on peoples charging documents. In State v. Flatt, 2007 ND 98, ¶2, This Court wrote “The Criminal information provided in pertinent part:

‘Lucas Nathaniel Flatt, did commit the crime of Gross Sexual Imposition, a class A felony, in violation of N.D.C.C. § 12.1-20-03(1)(d), a crime that was committed as follow, to wit:

Count 1 (Gross Sexual Imposition)

That on or about December 27th, 2004, in Griggs County, the defendant, Luaus Nathaniel Flatt did willfully engage in a sexual act with another, or cause another to engage in a sexual act, when the victim was less than 15 years old, to wit: Lucas Nathaniel Flatt did willfully engage in a sexual act with Jane Doe, consisting of sexual contact between his penis and Jane Doe’s vulva, when Jane Doe was fourteen (14) years old.”

To further support Atkins position this Court has further held that in jury instructions of Gross Sexual Imposition is as follows.

“That on three separate occasions in Walsh County, North Dakota, while the other person was approximately 8 years of age, the defendant willfully engaged in a sexual act with that person, Jane Doe, at the time of the alleged offense, Jane Doe was less than fifteen (15) years of age.” See, State v. Martinez, 2015 ND 173, ¶13.

Atkins argues that if this Court would look at many different cases out there in North Dakota the state uses the words “willfully engaged” that’s because they are putting the defendant on true notice of their charges.

[¶18] In regard to the Brady Violation/ Rule 16 violation. Mr. Atkins argues that the voluntariness of guilty plea can be challenged on Brady grounds. *White v. United States*, 858 F.2d 416, 422 (8th Cir 1988).

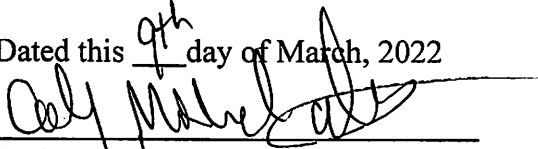
[¶19] In regards to Brady since the Court didn't allow Mr. Atkins to present evidence. Atkins asks this Court to remand to allow evidence to be presented since the State put Atkins to his proof. See, Tr. p. 25, lines 17-25. The Honorable Sotomayor in *Bernard v. United States*, 141 S.Ct 504, she states [Bernard] should have a chance to present his claims to the court. This should be the same approach to be applied here. This is very critical and should not be treated softly. Mr. Atkins told the Court that the State withheld critical evidence of the alleged victim's mother. See, tr. p. 14 lines 14-17. Mr. Atkins argues that if the Court would have allowed for these statements to be presented to the court, and testimony thereof then it would show that Mr. Atkins would have definitely not have pled guilty. Mr. Atkins also argued that the police department destroyed critical evidence which consisted of police notes. Mr. Atkins did produce a letter of the Grand Forks Police Department stating that they don't have these notes. Mr. Atkins argues that he has video to prove that Mr. Conley had the notes and since the police are stating they don't have them then this is intentional destruction of critical evidence. Ms. Ellis states that Mr. Conley wouldn't allow her to say specific things and this court is aware what is in police notes. All this should be allows to be presented to the court.

CONCLUSION

[¶19] Mr. Atkins asks this honorable Court to notice an obvious error/ reversible error as Mr. Atkins laid out in ¶ 8-17. Mr. Atkins asks that either this Court reverse the whole criminal case back to the district court to allow Mr. Atkins to plead anew or to reverse and remand back to the district court with instructions to allow Mr. Atkins to plead anew.

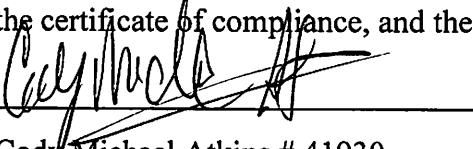
[¶20] If this Court doesn't notice the obvious error, Atkins asks that this Court to find that the district court erred in find that Mr. Atkins is barred by res judicata and misuse of process and that the Court should allow for evidence to be presented on the defective information and Brady/Rule 16 violation.

Dated this 9th day of March, 2022


Cody Michael Atkins #41930
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CERTIFICATE OF COMPLIANCE

[¶21] The undersigned hereby certifies, in compliance with N.D.R.App.P. 24, that this Supplemental Brief of Appellant was prepared with proportional typeface, 12-point font, and the total number of pages in the above Brief, including the table of contents, the table of authorities, the certificate of compliance, and the certificate of service is 14 pages.


Cody Michael Atkins # 41930
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Jamestown, ND 58401

CERTIFICATE OF SERVICE BY MAIL

[¶22] The undersigned hereby certifies that he is of legal age and discretion as to be competent to serve papers.

That on March, 9, 2022, he served, by United States mail system mailed a copy of the following:

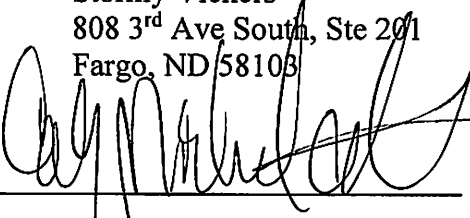
State's Attorney
124 South 4th Street, 2nd floor
Grand Forks, ND 58203

and

Clerk of Supreme Court
600 East Boulevard Ave
Bismarck, ND 58505

And

Stormy Vickers
808 3rd Ave South, Ste 201
Fargo, ND 58103

A handwritten signature in black ink, appearing to read 'Stormy Vickers', written over a horizontal line.

Cody Michael Atkins # 41930
2521 Circle Drive
Jamestown, ND 58401