

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

Cody Michael Atkins

Petitioner- Appellant,

Vs.

State of North Dakota

Respondent- Appellee,

Supreme Court No. 202000172

Case No. 18-2018-cv-2604

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

Filed November 15, 2018

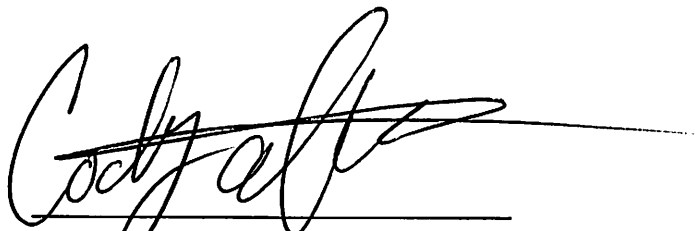
Grand Forks County District Court

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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Statement of the Issues

1. Whether Atkins has a Statutory right to Effective Counsel in Post-Conviction Relief?
2. Whether Atkins Raised a Genuine Issue Warranting an Evidentiary Hearing?
3. Whether Atkins Showed Excusable Neglect or a Justifiable Excuse For Noncompliance With N.D.C.C. § 29-32.1?

Statement of the Case

[¶1] Atkins asserts the Statement of the Case has been properly laid out in Appellant's Brief.

Statement of the Facts

[¶2] Atkins asserts the facts has been properly laid out in Appellant's Brief.

Law & Argument

1. Whether Atkins Has a Statutory Right to Effective Counsel in Post-Conviction Relief?

[¶3] "Generally, there is no right to counsel in civil matters. However the legislature has authorized the appointment of counsel in some limited matter." Cody v. Cody, 2019 ND 14, ¶ 18, 921 N.W.2d 679. Cody deals with parental termination, However in State v. T.L. "The Statutory right to court-appointed counsel in a parental termination proceeding is much like that in a post-conviction relief proceeding." 2008 ND 131, ¶29, 751 N.W.2d 677.

[¶4] In Johnson v. State, the Supreme Court of North Dakota looked at claims of Ineffective Assistance of Post-Conviction Counsel, which states "Ineffective assistance of counsel claims are governed by the standard set forth in Strickland v. Washington, 466 U.S. 668, 688, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). However, in Coleman v. Thompson, 501 U.S. 722, 752, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991), the Supreme Court ruled, because "there is no constitutional right to an attorney in state post-conviction proceedings," "a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." Based on Coleman, several courts have ruled claims of ineffective assistance of post-conviction counsel simply cannot be raised in an application for post-conviction relief, even in jurisdictions that afford a statutory right to counsel in post-conviction relief proceedings. See, e.g., State v. Hunt, 262 Neb. 648, 634 N.W.2d 475, 480 (Neb. 2001); State v. Stewart, 242 Neb. 712, 496 N.W.2d 524, 529 (Neb. 1993); Bejarano v. Warden, 112 Nev. 1466, 929 P.2d 922, 925 (Nev. 1996); House v. State, 911 S.W.2d 705, 712 (Tenn. 1995); Ex parte Graves, 70 S.W.3d 103, 117 (Tex. Crim. App. 2002). Some courts have concluded claims of ineffective assistance of post-conviction counsel are still cognizable in a post-conviction proceeding, but those courts apply a lesser standard than the standard set forth in Strickland. See Grinols v. State, 10 P.3d 600, 619-20 (Alaska App. 2000); Baum v. State, 533 N.E.2d 1200, 1201 (Ind. 1989). "The logic behind such a

rule is that if counsel for post-conviction proceedings, as well as trial and direct appeal, must meet the same standards, then claims of ineffective assistance of counsel in the immediate prior proceeding may be raised ad infinitum." Bejarano, 929 P.2d at 925.

Other courts have continued to apply the Strickland standard in situations where, under a statute, it is either discretionary or mandatory that counsel be appointed for post-conviction proceedings. See, e.g., *People v. Hickey*, 914 P.2d 377, 379 (Colo. App. 1995); *Lozada v. Warden*, 223 Conn. 834, 613 A.2d 818, 821 (Conn. 1992); *Stovall v. State*, 144 Md. App. 711, 800 A.2d 31, 38 (Md. App. 2002); *Jackson v. Weber*, 2001 SD 136, 637 N.W.2d 19, 23 (S.D. 2001). Although these cases acknowledge *Coleman*, the typical reasoning for applying Strickland is that "it would be absurd to have the right to appointed counsel who is not required to be competent," and a statute providing for appointment of counsel "would be meaningless if it did not embody a requirement that counsel be effective as well as merely present." *Lozada*, 613 A.2d at 821 (quoting *United States v. Wren*, 682 F. Supp. 1237, 1241-42 (S.D. Ga. 1988)).

We have applied the Strickland standard to claims of ineffective assistance of post-conviction counsel, see *Berlin v. State*, 2000 ND 206, PP6-10, 619 N.W.2d 623, and we conclude the reasoning given by courts which apply Strickland to assess the performance of post-conviction {681 N.W.2d 777} counsel is persuasive." 2008 ND 130, ¶15-17, 681 N.W.2d 769.

[¶5] There has been reforms in North Dakota Century Code § 29-32.1. In 2013 legislature enacted 29-32.1-09(2) in which states "The court, on its own motion, may dismiss any grounds of an application which alleges ineffective assistance of post-conviction counsel. An applicant may not claim constitutionally ineffective assistance of postconviction counsel in proceedings under this chapter." (Emphasis added), not only may dismiss permissive but the second part is a limiting factor to constitutional claims. The Supreme Court in *Hamilton v. State*, 2017 ND 54, ¶26, 890 N.W.2d 810, stated "Hamilton has a statutory right to counsel in petitioning for post-conviction relief. Whether a constitutional right at trial or a statutory right when petitioning for post-conviction relief, the right to counsel is a substantial right." (Justice Tufte concurring).

[¶6] Atkins would like to address the issue of if this Court would allow people to argue Ineffective Assistance of Post-Conviction Counsel as a statutory right, it would not flood the Courts. First Courts can dismiss meritless

applications, second the applicant must show competent evidence of where and how the attorney is ineffective and how that would change the outcome of the proceeding.

2. Whether Atkins Raised a Genuine Issue Warranting an Evidentiary Hearing?

[¶7] Generally, an applicant has the burden of establishing grounds for post-conviction relief. *Chase v. State*, 2017 ND 192, ¶ 5, 899 N.W.2d 280. Atkins filed an application for post-conviction relief on November 15, 2018. See Appellant App. at 1. The State filed an Answer to Atkins application putting Atkins to his proof and asking the Court to dismiss on the basis of misuse of process and re3s judicata pursuant to 29-32.1-12(1)(2). The Court denied the Application of December 7, 2018. After an appeal, the Supreme Court allowed Atkins to respond to the State's Motion and Atkins filed many exhibits and supplemental response.

[¶8] The North Dakota Supreme Court has stated "A petitioner is not required to provide evidentiary support for his petition until he has been given notice he is being put to his proof." *Ude v. State*, 2009 ND 71, ¶8, 764 N.W.2d 419. Atkins was put to his proof on December 3, 2018, Atkins filed many exhibits and even an affidavit in support of his application. In *Steinbach* "a petitioner is only entitled to an evidentiary hearing if there is some competent admissible evidence to support petitioners claims." 2003 ND 46, ¶17, 658 N.W.2d 355. Therefore since admissible and competent evidence was filed, Atkins should have been entitled to an evidentiary hearing pursuant to *Steinbach* and the many other cases law.

3. Whether Atkins Showed Excusable Neglect or a Justifiable Excuse For Noncompliance With N.D.C.C. § 29-32.1?

[¶9] In *Atkins v. State*, the Supreme Court stated "the applicant shall show good cause for noncompliance with a statute or rule." 2019 ND 146, ¶6, 928 N.W.2d 438. In Atkins Brief in response to the states Motion Atkins raised the issue of Newly Discovered Evidence, and submitted multiple exhibits (See, Index 33-47) at the hearing on November 8, 2019, Atkins made more reasons for noncompliance for not following the rule or statute, in which Atkins argued the State's Motion was meritless and that his prior attorneys in post-conviction efforts have been summarily dismissed without a merit based determination and that such counsels were ineffective. (See, tr.pp. 4-10). In his Motion to reconsider Atkins he has a statutory right to post-conviction counsel and that it's a substantial right therefore he can argue that his counsels were ineffective and had a conflict of interest.

[¶10] On June 5, 2020 at the Motion hearing, Atkins counsel argued the fact that Mr. O'Day didn't file a brief on Atkins behalf, and did nothing in which deprived Atkins of due process right to be heard. Atkins further argued that Mr. O'Day admitted that there was a lack of communication. (See, Index #43) Atkins further argued that O'Day blamed Atkins and the Court on why he didn't file a brief. Id. Atkins argued that O'Day as an attorney could look at the docket to see what was filed so he could be up to date and meet any deadlines.

[¶11] The North Dakota Supreme Court has dealt with an issue similar in Moore, where counsel doesn't file a brief on part of the applicant. The Court stated the record is insufficient to determine if his counsel was ineffective or if Moore's Application was without merit. The Court further noted claims of Ineffective assistance of post-conviction counsel should ordinarily not be suited for summary dismissal and a hearing would be required as a proper record can be made. 2013 ND 214, 839 N.W.2d 834.

[¶12] Atkins counsel further argued Mr. Hartl only filed a brief asserting procedural history and recited Atkins conclusionary statements. (See June 5, 2020, tr. p. 7 lines 10-19. Atkins when he addressed the court argued he submitted his prison legal mail records, and that he has to sign for all legal mail and that Hartl never sent Atkins the state's Motion for Summary Dismissal. Id. at p. 22 lines 10-25. Atkins in his pro se brief for reconsideration Atkins further argued that Mr. Hartl took on his case when Hartl had a conflict, because his aunt was the judge in the matter. Atkins filed a letter from Hartl which states Lolita G. Hartl Romanick is his aunt and he sees no conflict, Atkins wrote Hartl to get him off his case. Ms. Romanick recused herself off the case later down the road, Atkins believes she saw a conflict of interest.

[¶13] Atkins argues the Commission rules and the rules of professional conduct prohibits Attorney's from taking on a case if there's conflict of interest. Atkins further argues that by Hartl not sending the State's Motion to him that prohibited him properly being able to overcome the State's Motions so a hearing could be held so Atkins could present evidence.

[¶14] Mr. Atkins argued that Ms. Gorham should have not accepted representation of Atkins case due to a huge conflict of interest. (See Id. at p. 8, lines 14-25). Atkins counsel further argued Ms. Gorham was ineffective because she didn't call witness' except Atkins, she should have called alibi witnesses, Tyler J Morrow. Gorham didn't file any evidence to corroborate Atkins. Atkins signed a release of information per gorhams request for psychological records which weren't produced. Id. at p.9 lines 11-22. These records shows important things such as Atkins mental

capacity which is very low, his comprehension problems, that he can be taken advantage of. This would be critical to his case.


[¶15] North Dakota Rules of Professional Conduct 1.7 (c)(2) states “A lawyer shall not represent a client if the representation of that client might be adversely affected by the lawyer’s responsibilities to another client or to a third party, or by the lawyer’s own interest, unless: the client consents after consultation” in the comment section of the rule specifically that “the consent must be in writing after consultation.” In this case it would adversely affected a former client which is Atkins alleged victim. Atkins asserts this should be heard by the court so it can be settled. This hearing is being used against Mr. Atkins but it was a fair hearing based on the fact of the conflict of interest and the ineffectiveness of Gorham.

[¶16] Atkins argues that the outcome would be different. First with O’Day, if O’Day would communicated with Atkins and would have requested discovery and put a response together to support Atkins contentions he would have gotten a proper hearing on his claims. Second is William Hartl in which Atkins argues Mr. Hartl never filed a described brief. Hartl only filed a brief alleging Atkins mere allegations, nothing to support the application. Hartl further never sent Atkins the State’s Motion to Summarily Dismissal as the record show if Atkins receives something the State files Atkins always responds even with counsel so this does support Atkins position. Third Gorham should have never undertook representation of Atkins. she was ineffective by not talking to the court about the right against self-incrimination and further by not calling witnesses if theses witnesses would have been called it would have been found that Atkins was at home with his grandfather and mom and further Thomas and Casey were with her mom and dad with Jane Doe, and lastly that Mr. Morrow would have to explain to the Court his representation of Atkins and a record could have been made and with all this together would have set Atkins in a good place and the Court would have most likely found that Atkins never acknowledge his right against self-incrimination and that Atkins wasn’t at the place of the alleged incident. Further that Morrow was ineffective.

Conclusion

[¶17] Mr. Atkins asks this Honorable Court to extend the law, and to find that Atkins did present a justifiable excuse and excusable neglect in which would entitle him to an evidentiary hearing

Submitted this on 31 day of October, 2020



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CODY MICHAEL ATKINS,

Petitioner/Appellant,

vs.

STATE OF NORTH DAKOTA,

Respondent/Appellee.

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) **ACKNOWLEDGMENT OF SERVICE**
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) **District Court No. 18-2018-CV-02604**
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) **Sup. Court No. 20200172**
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CODY MICHAEL ATKINS,)	
)	
)	
Petitioner/Appellant,)	CERTIFICATE OF SERVICE
vs.)	
)	District Court No. 18-2018-CV-02604
STATE OF NORTH DAKOTA,)	
)	Sup. Court No. 20200172
Respondent/Appellee.)	
)	

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