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SUPREME COURT MAR 18 2021**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**

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**Cody Michael Atkins****Petitioner- Appellant,****Vs.****State of North Dakota****Respondent- Appellee,**

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**Supreme Court No. 202000172****Case No. 18-2018-cv-2604**

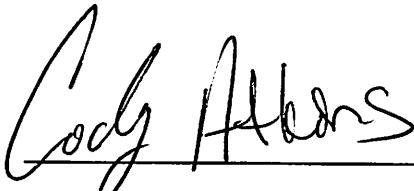
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**On appeal from the Order Denying Application for Post-Conviction Relief, and Motion for  
Reconsideration****Filed November 15, 2018, January 6, 2020****Grand Forks County District Court****North East Central Judicial District****State of North Dakota****The Honorable John Thelen, presiding**

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**PETITION FOR REHEARING**

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

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### Statement of the Issues

- 1) Whether the District Court erred by concluding the claims raised by Atkins are procedurally barred by res judicata or abuse of process, allowing summary disposition?
- 2) Whether the district court erred by concluding that Atkins has either raised the same claims in prior post-conviction proceedings, or that he failed to show good cause or excusable neglect for not having previously raised issues that would be newly discovered evidence in this post-conviction relief effort.
- 3) Whether Atkins has a statutory right to post-conviction and does that counsel have to be effective.

### Statement of the Case

[¶1] Atkins asserts the Statement of the Case has been properly laid out in the Supreme Court's opinion.

### Statement of the Facts

[¶2] Atkins asserts the facts has been properly laid out in the Supreme Court's opinion

### Law & Argument

[¶3] The Court found that they didn't have Jurisdiction to address Atkins application that was filed in November 2018. As pointed out by this Court "certain post judgement motions, including a Motion under Rule 60(b) can toll the time for appeal if the motion is served and filed no later than 28 days after the entry of judgement. (See, Opinion ¶ 7) Atkins would like to note that he did file this Motion within the 28 day requirement. Larson v. Larson, 2002 ND 196, ¶7. This Court further found that Rule 60(b) doesn't toll the time to file an appeal in a post-conviction proceeding. Id. Mr. Atkins has researched this issue and he couldn't find a case or law that supports this conclusion and if this court knows one, Atkins asks that it be superseded.

[¶4] Mr. Atkins argues the plain language of the statute clearly states "If a party files with the clerk of district court any of the following motions under the North Dakota Rules of Civil procedure, However titled, and does so within the time allowed by those rules, the full time to file an appeal runs for all parties from service of notice of the entry of the order disposing of the last such remaining motion;" See, N.D.R.App.P. 4(3)(a). The language of the statute doesn't indicate that post-conviction is excluded in this. Actually case law of this Court contradicts this

conclusion. See, Waslaski v. State, 2013 ND 70; Greywind v. State, 2015 ND 231; Eagleman v. State, 2016 ND 54. “We treat motion for reconsideration as either motion to alter judgement or amend judgement under N.D.R.Civ.P. 59(j) or as a Motion for relief from judgement or order under N.D.R. Civ.P.60(b)” Eagleman v. State, 2016 ND 54 ¶19 (quoting Greywind v. State, 2015 ND 231 ¶11) This Court has noted that it is for tolling reasons. Rule 4 specifically states both rules listed will toll the time as long as the motion is timely. The Court in Larson held that “an untimely motion does not all the running of the time for filing the notice of appeal under N.D.R.App.P. P. 4. Larson v. Larson, 2002 ND 186, ¶7. The time to file such Motion is 28 days. In the instant case judgement was entered on December 19, 2019, Atkins filed his Motion to reconsider on January 6, 2020, which does fall within the 28 day requirement. Since judgement was entered on June 9, 2020, Atkins would have 60 days to file such appeal, in which he filed on July 2, 2020. This Court has jurisdiction of both.

[¶ 5] Atkins argues that the Supreme Court misunderstood Atkins argument dealing with the ineffectiveness of his post-conviction counsel (in hereafter “PCR Counsel”). Atkins is not arguing that he has a constutional right to PCR Counsel, but that he has a statutory right to PCR Counsel under § 29-32.1-05 and if the Court grants such they are required to be effective.

[¶6] The interpretation of a statute is a question of law, fully reviewable on appellate court. Aanenson v. Bastien, 438 N.W.2d 151 (N.D. 1989). The primary purpose of statutory construction is to ascertain the intent of the legislature. Flermoen v. North Dakota workers’ compensation Bureau, 4701 N.W.2d 220 (N.D. 1991). Mr. Atkins argues legislature didn’t intend for counsel to do nothing for a person in a post-conviction proceeding.

[¶7] 29-32.1-09(2) came in a reform in 2013. See, Senate bill 2227, based on many of the United State Supreme Court cases, one in particular was Coleman v. Thompson, 501 U.S. 722,

752, 11 S.Ct, 2546, 115 L.Ed 2d 640 ([t]here is no constitutional right to counsel in state post-conviction proceedings.) It is very clear legislature intended that no person can constitutionally claim ineffective assistance of PCR Counsel. The Second part of 29-32.1-09(2) is a limiting factor to just constitutional claims. To further this argument I ask one question? Why would a state have a statute providing for counsel but not a remedy for the person who has valid claims of ineffective assistance of PCR Counsel? There would be no reason to have such statute, by not receiving effective counsel deprives a person of due process for fighting their case. In keeping this in mind legislature left the door open for statutory claims. In 2017, Justice Tufte did in fact support this conclusion by stating "Hamilton has a statutory right to counsel in petitioning for post-conviction relief. Whether a constitutional right at trial or a statutory right on a petition for post-conviction relief, the right to counsel is a "substantial right ["]" See, Hamilton v. State, 2017 ND 54, ¶26. This Court has addressed that the standard to be met is Strickland. Johnson v. State, 2004 ND 130 ¶17. The Court reasoned that claims of this sort is cognizable because "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." Johnson at ¶16. This would not flood the Court because a person would have to submit competent and admissible evidence. Atkins v. State, 2017 ND 290. Legislature has authorized the judges to dismiss meritless applications. 29-32.1-09(1). Atkins would like to note that before a judge can dismiss on their own, they must give notice to the applicant to show support for their application. Riak v. State, 2015 ND 120, 863 NW2d 894.

[¶8] Atkins asks this court to rehear this issue because its ruling is creating an injustice. This ruling it's saying that any attorney will not be held to any standard, they are allowed to do

nothing for the applicant and the applicant can't do nothing about it. This Court has stated that no person can be hybrid counsel. I'M 100% that legislature didn't intend for this to happen. One may argue that if such behavior happens they can write to the discipline board however that doesn't change a person's case.

[¶9] In the instant case Mr. Atkins did produce some very convincing evidence that would raise a substantial issue, that he was denied effective assistance of PCR Counsel, per his statutory right. Atkins provided a letter from Patrick O'Day which showed the lack of communication, and blamed Atkins and the Court on why he didn't file a brief. Atkins filed many complaints on Hartl and Atkins submitted a legal records to show that he didn't receive the State's Motion, and that Atkins filed with the district court about inappropriate comments Hartl made. Gorham had a conflict of interest with Atkins case and is on record at document 23 in Case # 18-2014-cr-1844, and that Gorham didn't submit evidence to corroborate Atkins contentions or even call any witness' even though Atkins did ask. Atkins argues all this prejudiced him for many reasons, such as being denied of a full evidentiary hearing with all witnesses, evidence, and a fair judgement. There should be a hearing on this issue so record can be made.

[¶10] Atkins would like to address this Court didn't address his newly discovered evidence claim. The district court found that Atkins newly discovered evidence claim was barred by misuse of process. Atkins argues that he was never given an evidentiary hearing to show how this meets the 4 prong test.

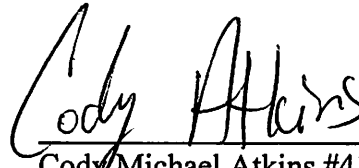
### CONCLUSION

[¶11] Atkins asks this court to grant a rehearing, to interpret legislature's intent on 29-32.1-09(2) and determine if Atkins deserves a hearing on if he was denied his statutory right to



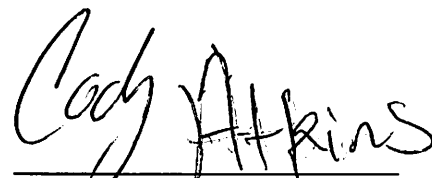
effective assistance of PCR Counsel and on his newly discovered evidence, and if this Atkins filed a timely Notice of appeal for his original application for post-conviction relief.

Submitted this on 15<sup>th</sup> day of March, 2021

  
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Jamestown, ND 58401

CERTIFICATE OF COMPLIANCE

[¶12] The undersigned certifies, in compliance with N.D.R.App.P. 32. That this Petition for Rehearing was prepared with proportional typeface, 12- point font, and the total number of pages in the above petition for rehearing, including table of contents, table of authorities, certificate of compliance and certificate of service is 10 pages.

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

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Cody Michael Atkins	)	
Petitioner- Appellant,	)	
	)	CERTIFICATE OF SERVICE
Vs.	)	
	)	Supreme Court No. 202000172
	)	
State of North Dakota	)	Grand Forks Case No. 18-2020-cv-2006
-Respondent- Appellee,	)	
	)	

[¶1] The undersigned Petitioner- Appellant hereby deposes and say that he served a true and correct copy of the following documents.

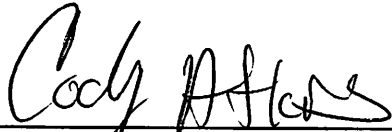
- Petition for Rehearing

By placing such documents in a postage pre-paid and sealed envelope addressed as follows:

Clerk of Court  
600 East Boulevard Ave.  
Bismarck ND 58501

State's Attorney's Office  
124 South 4<sup>th</sup> Street, 2<sup>nd</sup> Floor  
Grand Forks, ND 58203

And then placing such described envelope in the James River Correctional Center's internal Mail System (United States Mail), this 15<sup>th</sup> day of March, 2021



Cody Michael Atkins #41930  
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Jamestown, ND 58401