

**ORIGINAL**

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SUPREME COURT FEB 20 2007

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

20060349

Randal R. Steen,

Applicant-Appellant,

-vs-

State of North Dakota,

Respondent-Appellee.  
.....

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

) Supreme Ct. No. 20060349

FEB 20 2007

) District Ct. No. 08-02-K-1318 STATE OF NORTH DAKOTA  
) SA No. F 55-02-01

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**BRIEF OF RESPONDENT-APPELLEE**

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Appeal from Order Denying Post-Conviction Relief  
Dated December 30, 2006  
Burleigh County District Court  
South Central Judicial District  
The Honorable Donald L. Jorgensen, Presiding

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ISSUES PRESENTED FOR REVIEW

- I. THE TRIAL COURT DID NOT ERR IN DENYING RANDALL R. STEEN'S SECOND APPLICATION FOR POST CONVICTION RELIEF.
- II. INJUNCTIVE RELIEF FOR DISCIPLINARY MEASURES IS NOT AVAILABLE UNDER A POST CONVICTION PROCEEDING.

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STATEMENT OF THE CASE

On or about December 12, 2002, Randall Steen filed an appeal of his convictions for Manufacturing Methamphetamine, Possession of Methamphetamine and two counts of Possession of Drug paraphernalia. Burleigh County Criminal Number 02-K-1113. See, Appendix to Brief of Appellant, p. 2. On or about July 1, 2003, while the appeal on the criminal conviction was pending, Randall Steen filed an Application for Post Conviction Relief. See, Appendix to Brief of Appellant, Pp 2-6. That action was filed as Burleigh County Civil Number 03-C-2185. Id. Steen's Application for Post Conviction Relief was combined with his direct appeal. See, State v. Steen, 2004 ND 228, 690 N.W.2d 239. Both Steen's conviction and denial of his application for post conviction relief were affirmed. See State v. Steen, 2004 ND 228, 690 N.W.2d 239.

On July 24, 2006, Steen filed a subsequent application for post conviction relief. Appendix to Brief of Appellant, Pp. 7-52. The State filed a response on July 31, 2006.

Steen then filed a Motion for Judgment on the Pleadings/Summary Disposition on August 2, 2006. Appendix to Brief of Appellant, p. 3. Appendix of Appellee, Pp. 58-64. The State submitted a response on August 17, 2006. Appendix of Appellee. Pp. 65-67.

On September 19, 2006, Steen filed a Motion for Judgment on the Pleading/Summary Disposition. Appendix to Brief of Appellant, p. 5. Appendix of Appellee, Pp. 68-95. The State submitted a response on September 28, 2006. Appendix of Appellee, Pp. 96-98. On October 2, 2006, the trial court, treating all three filings as an application for post conviction relief, denied the motions and application in their entirety. See, Appendix to Brief of Appellant, Pp 55-56.

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ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN DENYING RANDALL R. STEEN'S SECOND APPLICATION FOR POST CONVICTION RELIEF.

Under N.D.C.C. § 29-32.1-12(1) and (2), an application for post-conviction relief may be denied on the grounds of res judicata and misuse of process. Under N.D.C.C. § 29-32.1-12(1), a claim is res judicata if it was fully and finally determined in a previous proceeding. Under N.D.C.C. § 29-32.1-12(2), misuse of process occurs when the applicant presents a claim for relief that the applicant inexcusably failed to raise in the proceeding leading to conviction or in a previous post-conviction proceeding, or if the applicant files multiple applications containing claims so lacking in factual support or legal basis as to be frivolous. 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. Johnson v. State, 2004 ND 130, 681 N.W.2d 769. Defendants are not entitled to post-conviction relief when their claims are variations of previous claims that have been rejected. Garcia v. State, 2004 ND 81, 678 N.W.2d 568.

The issues, or variation of issues, raised by Steen in this proceeding were either raised in previous proceedings or, if not raised previously, Steen has offered no excuse or justification for failing to raise those claims in prior proceedings. Thus, the trial court properly concluded those issues were either fully and finally determined in previous proceedings and are res judicata, or constitute a misuse of process, because to the extent that this application differs in any relevant aspects, Steen has offered no excuse or justification for failing to raise those claims in prior

1 proceedings. See, Appendix to Brief of Appellant, Pp 55-56.

2 Steen nevertheless claims res judicata does not apply to this case because  
3 res judicata and misuse of process apply only in cases where the judgment is not  
4 void. The basis for this position appears to be a challenge to the sufficiency of  
5 evidence. Steen has provided not justification or excuse for his failure to raise this  
6 issue in his direct appeal. Steen has cited no persuasive authority to support his  
7 claim, and our law does not support his claim. See, Johnson v. State, 2005 ND  
8 APP 8, 700 N.W.2d 723 (issues that could have been addressed on direct appeal  
9 or in prior post conviction proceedings, constituted misuse of process, absent any  
10 excuse or justification for failure to raise claims); Jenson v. State, 2004 ND 200,  
11 688 N.W.2d 374 (successive post-conviction petitions that raised issues that could  
12 have been addressed on direct appeal or in prior post-conviction proceedings  
13 constituted misuse of process, absent any excuse or justification for failure to raise  
14 claims in prior proceedings).

15  
16 II. INJUNCTIVE RELIEF FOR DISCIPLINARY MEASURES IS NOT  
17 AVAILABLE UNDER A POST CONVICTION PROCEEDING.

18 Steen's second issue stems from the trial court's denial of his request for  
19 injunctive relief seeking to enjoin internal measures at the DOCR. See, Appendix  
20 to Brief of Appellant, Pp 55-56. The trial court denied Steen's request as it did not  
21 fall with the relief allowed under N.D.C.C., Chapter 29-32.1. See, Appendix to  
22 Brief of Appellant, Pp 55-56.

23 N.D.C.C., § 29-32.1-01(2) specifically provides that "[a] proceeding under  
24 this chapter is not available to provide relief from disciplinary measures,  
25 custodial treatment, or other violations of civil rights to a convicted person  
26 occurring after the imposition of sentence." In a recent mandamus proceeding  
27 before this Court, Ruben Larson v. Timothy Schuetzle, et al. Supreme Court Case



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No. 20060058, Larson made substantially the same argument. This Court, in an unpublished order, and based on Shaw v. Murphy, 532 U.S. 223 (2001), denied Larson any relief. Thus, Steen may not seek injunctive relief against the DOCR as part of any post-conviction proceedings under N.D.C.C., Chapter 29-32.1.

CONCLUSION

Based upon the foregoing, the State of North Dakota respectfully requests that this Court AFFIRM the order of the trial court.

Dated this 20<sup>th</sup> day of February, 2006.



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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Randall R. Steen, ) AFFIDAVIT OF MAILING  
Applicant-Appellant, )  
-vs- ) Supreme Ct. No. 20060349  
State of North Dakota, )  
Respondent-Appellee. ) District Ct. No. 08-02-K-1113  
..... ) SA. No. F 55-02-01  
STATE OF NORTH DAKOTA )  
COUNTY OF BURLEIGH )ss

Kim Bless, being first duly sworn, depose and say that I am a United States citizen over 21 years old, and on the date of February 20, 2007, I deposited in a sealed envelope a true copy of the attached:

- 1. Brief of Respondent-Appellee
- 2. Appendix of Respondent-Appellee
- 2. Affidavit of Mailing

in the United States mail at Bismarck, North Dakota, postage prepaid, addressed to:

Randal R. Steen  
ND State Penitentiary  
PO Box 5521  
Bismarck, ND 58506-5521

which address is the last known address of the addressee.

*Kim Bless*  
\_\_\_\_\_  
Kim Bless

Subscribed and sworn to before me this 20th day of February, 2007.

*Gwen Tardif*  
\_\_\_\_\_  
Gwen Tardif, Notary Public  
Burleigh County, North Dakota  
My Commission Expires: 5-23-2009

