

Supreme Court No. 20140181
District Court No. 23-09-K-00147

CRIMINAL

In the Supreme Court State of North Dakota

Kyle T. Mackey

Plaintiff/Appellant,

vs.

State of North Dakota,

Defendant/Appellee,

**Regarding Plaintiff's Appeal from the District Court Order Denying
Motion to Reopen Judgment,
Entered April 4, 2014**

**District Court of the Southeast Judicial District
The Honorable Jay A. Schmitz Presiding**

SUPPLEMENTAL BRIEF OF APPELLEE

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STATEMENT OF THE ISSUES

- I. The District Court did not err when it dismissed Defendant's Post-Conviction Motions because Defendant continues to misuse process and because Defendant failed to present any evidence supporting his arguments.

[¶1] I. The District Court did not err when it dismissed Defendant’s Post-Conviction Motions because Defendant continues to misuse process and because Defendant failed to present any evidence supporting his arguments.

[¶2] Appellant, Kyle Mackey (“Mackey”) shows that he is aware that he should have raised his current claims previously and that his failure to do so constituted the misuse of process that he is now simply renewing. See his November 13, 2014 Supplemental Brief of Appellant, page 3, fifth full paragraph where he quotes U.S. Magistrate Judge Karen K. Klein’s February 28, 2013 Order that stated in part: “However, Mackey fails to recognize that he should have raised his claims in his motion to withdraw his guilty plea, or on appeal of the amended criminal judgment and order denying the motion to withdraw his guilty plea. His claims were barred from review for misuse of process when he filed his state application for post-conviction relief, which constitutes an independent and adequate state law ground.” [Supplemental Appendix of Appellant, page 10]. Anything Mackey wanted to present to the district court should have been done when he motioned to withdraw his guilty plea or on his first appeal where he appealed the amended criminal judgment and order denying the motion to withdraw his guilty plea. Mackey did not then raise the current issues and factual claims. Any subsequent attempt by Mackey to review issues not raised by him in his motion to withdraw his guilty plea or on his first appeal is a renewed misuse of process.

[¶3] Mackey was afforded another chance to present evidence to the district court that he was entitled to post conviction relief when he had a full evidentiary hearing on March 24, 2014. However, Mackey failed to present evidence at that hearing that Mackey wants to argue and present now. The district court heard Mackey’s claims and Mackey

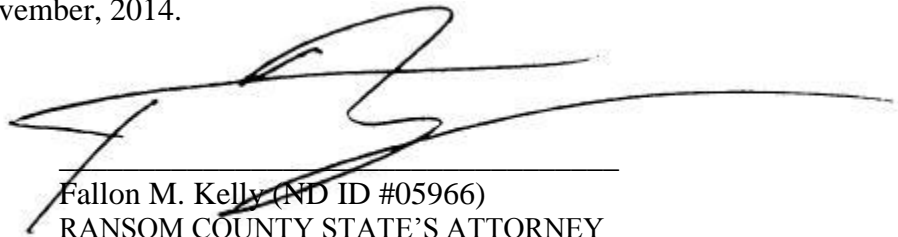
presented evidence at the March 24, 2014 hearing, but Mackey did not present any evidence to support claims that Mackey now raises. Mackey's first post-conviction relief motion was made back on December 15, 2011. [*See, State v. Mackey*, 2012 ND 159 at ¶4, 819 N.W.2d 539]. This current appeal is another misuse of process by Mackey.

[¶4] "Post-conviction proceedings are not intended to allow defendants multiple opportunities to raise the same or similar issues, and the 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." *Jensen v. State*, 2004 ND 200, ¶9, 688 N.W.2d 374, 377.

CONCLUSION

[¶5] Mackey's additional arguments presented in his Supplemental Brief filed herein raise the same issues previously raised and even if new issues were found to be raised, the issues should have been raised previously, thereby amounting to a misuse of process once again. Mackey's prayers for relief on appeal should be denied.

Dated this 26th day of November, 2014.



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RE: STATE OF NORTH DAKOTA VS. KYLE TAFT MACKEY

SUPREME COURT NO.: 20140181
DISTRICT COURT CASE NO.: 23-09-K-00147

STATE OF NORTH DAKOTA)
)ss: **AFFIDAVIT OF ELECTRONIC SERVICE**
 COUNTY OF RANSOM)

Karla J. Ulven, being first duly sworn, does depose and state that she is of legal age and not a party to the above-entitled matter.

On 3rd day of December 2014, Affiant Emailed from Lisbon, North Dakota, a true and correct copy of the following documents:

- 1. Motion for Additional Briefing by Appellee to Respond to Issues Raised by Indigent Appellant's Supplemental Brief in Word format;
- 2. Motion for Additional Briefing by Appellee to Respond to Issues Raised by Indigent Appellant's Supplemental Brief in PDF format;
- 3. Supplemental Brief of Appellee in Word format;
- 4. Supplemental Brief of Appellee in PDF format; and
- 5. Affidavit of Electronic Service.

On: Erin M. Conroy and Clerk of the Supreme Court

EMAIL ADDRESS: erin@fremstadlaw.com
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To the best of Affiant's knowledge, the Email addresses, above given were the actual addresses of the parties intended to be served.



Karla J. Ulven

Subscribed and sworn to before me this 3rd day of December,
 2014.



 Notary Public