

Supreme Court No. 20150113, 20150114 + 20150115

20150113

SUPREME COURT OF NORTH DAKOTA

20150115

LeRoy K. Wheeler,

Defendant / Appellant,

vs

State of North Dakota,

Plaintiff / Appellee.

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT

DEC 11 2015

STATE OF NORTH DAKOTA

APPEAL FROM DISMISSAL OF POSTCONVICTION RELIEF  
FROM NORTHEAST CENTRAL JUDICIAL DISTRICT

PETITION FOR REHEARING

LeRoy K. Wheeler

P.O. Box 5521

Bismarck, N.D.

58506

Comes now the appellant, LeRoy K. Wheeler (Wheeler) pro-se, hereby requests of this Honorable Court to rehear its decision rendered down in this case on December 1, 2015, on points of law and fact it may have overlooked or misapprehended pursuant to N.D.R. App. P. Rule 40. Wheeler shows the Court as follows:

1). First, Wheeler points out that he is unlearned in the law and is doing the best he can to prove to the Court that he deserves relief. See Estelle v. Gamble 429 US 97, 106 (1976) (A pro-se complaint however inartfully pleaded must be held to less stringent standards than formal pleadings drafted by lawyers, and can only be dismissed for failure to state a claim if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Haines v. Kerner 404 US 519, 520 (1972)).

The amendment of NDCC 29-32.1-01, was said to be made effective on August 1, 2013, but contained no retroactive language. See Appellants Brief (App. Br.) [P]. Prisoners access to law materials are limited and that which is available is only updated 4 times per year. Wheeler's initial filing pertaining to this present postconviction application was filed on August 18, 2013, and it would not be possible for Wheeler to know of the amended statute prior to his filing and therefore, he should be entitled to equitable tolling in his case. See the letter of Supplemental Authorities filed on August 17, 2015, and also Christeson v. Reper 190 LED 2d 763, 768 (2015) (Federal habeas corpus petitioner whose appointed attorney's missed filing deadline held entitled to substitute counsel under

18 USC § 3599 (e) to argue for equitable tolling... Whether Horwitz and Butts had currently "abandoned" Christeson is beside the point: Even if they were actively representing him in some matters, their conflict prevented them from representing him in this particular matter...). If Christeson's attorneys were entitled to equitable tolling, as they were continuing in representing him, then deadline to file habeas was missed by miscalculation, then for the reasons above Wheeler should also be entitled to equitable tolling because no one knew a new statute of limitations would be inserted where there was none before. See App. Br. [P2]. It should also be considered, that if the trial court had not interfered in Wheeler's ability to obtain these affidavits from the jurors on his prior criminal record, see Appellants Appendix p.23, then this claim would have been completed long ago. It is also beyond doubt that due to the responses the trial court rendered down toward Wheeler that he could not depend on the trial court to subpoena the affidavits from the jurors allowed by law, R.D.R. Ev. 606(b) + N.D.R. Crim P. 17(c). Thus, showing it is not the fault of Wheeler for any delay. See also Carey v. Saffold 536 US 214, 217 (2002) (on federal habeas)

2). This Court overlooked the federal law claims on the ex post facto violations of this retroactive application of NOCC 29-32.1 in Wheeler's case, see App. Br. [P3-4], because even the N.D. Constitution Art. 1 sec. 23 "The state of North Dakota is an inseparable part of the American Union and the Constitution of the U.S. is the supreme law of the land." Under this view, Wheeler's case should not be ignored, and every law has exceptions, and Wheeler should be entitled to an exception because this retroactive application is a fundamentally unfair practice and not in the interests of justice. Pro-se litigants should be entitled to notice

on such a blanket exclusion from judicial review, designed to harm, not to promote justice. See App. Br. [P2].

3). IF this Court still is not convinced to grant Wheeler an opportunity to subpoena the newly discovered evidence he is seeking, (those affidavits from the jurors), then Wheeler requests this Court Order the Appointment of Counsel, either directly or by remand, to make what the courts call legal nicety, Counsel's argument, so the Court can respect Counsel's point of view from one who is trained in the law, mostly because this state is in violation of the U.S. Supreme Courts precedent on appellate review in criminal cases as said in Smith v. Robbins 528 US 259 (2000) (States held free to adopt procedures for determining whether indigent's direct appeal is frivolous, other than procedures set forth in Anders v. California 386 US 738 (1967), so long as procedures adequately safeguard defendant's 14<sup>th</sup> Amendment right to appellate counsel...). Wheeler was not provided counsel on his direct appeal, and this court ruled his appeal frivolous. See Petition to Rehear or direct appeal.

### CONCLUSION

The decision should be reconsidered on the issue of time barred of NDCC 29-37.1-01 and reverse or appoint counsel for a more professional appeal.

Le Roy H. Wheeler

CERTIFICATE OF SERVICE

I, the undersigned, DO HEREBY CERTIFY that a true and correct copy of the foregoing PETITION TO REHEAR has been furnished by mail on Mark J. McCarthy assistant State Attorney, P.O. Box 5607 Grand Forks, N.D. ~~58206~~ 58206 -5607, on this 10<sup>th</sup> day of December, 2015. First class postage has been prepaid and has been placed into the institutional mail box on this date.

LeRoy K. Wheeler

LeRoy K. Wheeler

Appellant Pro-se

P.O. Box 5521

Bismarck, N.D.

58506