

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Sergei Isaac Scot Carlson,	)	
	)	
Petitioner and Appellant,	)	Supreme Court No. 20170252
vs.	)	District Court No. 09-2016-CV-03127
	)	
State of North Dakota,	)	
	)	
Respondent and Appellee.	)	

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**APPELLEE’S BRIEF**

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Appeal from the June 12, 2017, Order for Summary Dismissal of  
Post-Conviction Application  
Cass County District Court, East Central Judicial District  
the Honorable John C. Irby, Presiding

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**[¶3] STATEMENT OF ISSUE**

[¶4] I. Whether the district court correctly granted the State's motion for summary dismissal of Carlson's application for post-conviction relief based on untimeliness under N.D.C.C. § 29-32.1-01(2).

## [¶5] FACTS

[¶6] On July 14, 2007, Fargo Police Officers were dispatched to a residence in Fargo on a report of a 16-year-old female lying in her bed not breathing. (Transcript of Change of Plea Hearing, Sept. 15, 2008 “Tr. Plea” at 6:18-21.) She was pronounced dead at the scene. (Tr. Plea 6:22-3.) The medical examiner determined the cause of death as suffocation and/or strangulation. (Tr. Plea 7:13-4.) The victim’s mother and her adopted brother, Sergei Isaac Scott Carlson (Carlson), were the only people home at the time of the victim’s death. (Tr. Plea 6:23-5.)

[¶7] Detectives learned that on the evening of July 13, 2007, Carlson had been downstairs watching television. (Tr. Plea 7:16-7.) When the victim arrived home, she spoke briefly with Carlson and proceeded to her bedroom. (Tr. Plea 7:19-20.) Later that evening, Carlson crept into the victim’s bedroom and strangled her with his hands, placing a pillow over her face to muffle her sounds. (Tr. Plea 7:20-3.) After strangling her, Carlson had sexual contact with her body. (Tr. Plea 7:23-5.)

## [¶8] PROCEDURAL HISTORY

[¶9] Carlson, who was fifteen (15) years old at the time, was initially charged in juvenile court and subsequently the case was transferred to adult court. On September 25, 2007, the State charged Carlson with murder, a class AA felony, and deviate sexual act, a class A misdemeanor. (Appendix of Appellant (App.) at B.) The district court appointed attorney Mark Beauchene to represent Carlson. (Tr. Plea 2:8-9.) On September 15, 2008, Carlson pled guilty to both charges. (Tr. Plea 4:1-15.) On October 23, 2008, the district court sentenced Carlson to life imprisonment with the possibility of parole. (Transcript of Sentencing, Oct. 23, 2008 (Tr. Sentencing), 19:15-22.) Carlson did not appeal his conviction nor has he previously petitioned for post-conviction relief.

[¶10] On October, 27, 2017, Carlson filed an Application for Post-Conviction Relief under N.D.C.C. Chapter 29-32.1. (Appendix of Appellee (App. 2) at 3-17.) In it, Carlson claims:

1. His guilty plea was not voluntary.
2. His confession was coerced.
3. His conviction was obtained by a violation of the privilege against self-incrimination.
4. The prosecution failed to disclose evidence favorable to him.

(App. 2 at 4.) The State filed a motion for summary dismissal based on the untimeliness of the application for post-conviction relief specifically asserting the application should be barred by the two-year statute of limitations under N.D.C.C. § 29-32.1-01. (App. 2 at 18.) The State further asserted Carlson failed to raise

any genuine issues of material fact, and the State was entitled to judgment as a matter of law. (App. 2 at 18.)

[¶11] On June 8, 2017, Carlson, through his court-appointed attorney Kerry Rosenquist and the State, filed a stipulation asking the district court to rule on the “timeliness” issue without further hearing and, if necessary, set an evidentiary hearing. (App. 2 at 24-25.) The parties were aware there were a number of family members who planned to attend any evidentiary hearing including Carlson’s adoptive father who was travelling from out of state. (App. 2 at 24-25.)

[¶12] On June 12, 2017, having considered the underlying criminal case as well as the filings in the post-conviction relief action, the district court ordered Carlson’s post-conviction relief application dismissed as untimely. (App. at D, page 1.) Attorney Rosenquist filed a notice of appeal on behalf of Carlson on July 6, 2017. (App. at E.) On Aug. 7, 2017, attorney Homer McMillan, II, was appointed to represent Carlson in this appeal. (App. 2 at 2.)

[¶13] In his appeal, Carlson claims the district court erred in denying his application for post-conviction relief as untimely. The State disagrees concluding the district court correctly dismissed the application based on the two-year statute of limitations under N.D.C.C. § 29-32.1-01(2).

#### [¶14] **STANDARD OF REVIEW**

[¶15] “Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure.” Johnson v. State, 2015 ND 7, ¶ 4, 858 N.W.2d 632 (quoting Kineslla v. State, 2013 ND 238, ¶ 4, 840 N.W.2d 625).

“A district court may summarily dismiss an application for post-conviction relief if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” Lehman v. State, 2014 ND 103, ¶ 4, 847 N.W. 2d 119 (quoting Kinsella at ¶ 4). “Questions of law are fully reviewable on appeal of a post-conviction proceeding.” Lehman at ¶ 4 (quoting Haag v. State, 2012 ND 241, ¶ 4, 823 N.W.2d 749.)

[¶16] The Court's review of a district court's summary dismissal of a post-conviction relief application is well established:

This Court reviews an appeal from a summary denial of post-conviction relief as it reviews an appeal from a summary judgment. The party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of a post-conviction proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact. Although we have stated claims of ineffective assistance of counsel are ordinarily unsuited to summary disposition without an evidentiary hearing, we have upheld summary denials of post-conviction relief when the applicants were put to their proof, and summary disposition occurred after the applicants then failed to provide some evidentiary support for their allegations. Section 29–32.1–09(3), N.D.C.C., provides: “The court may grant a motion by either party for summary disposition if the application, pleadings, any previous proceeding, discovery, or other matters of record show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.”

Johnson v. State at ¶ 4 (quoting Murphy v. State, 2014 ND 84, ¶ 4, 845 N.W.2d 327.) “A trial court’s findings of fact . . . will not be disturbed on appeal unless they are clearly erroneous under N.D.R.Civ.P 52(a).” Lehman at ¶ 5 (quoting Wright v. State, 2005 ND 217, ¶ 9, 707 N.W.2d 242.



## [¶17] LAW AND ARGUMENT

[¶18] **I. The district court correctly granted the State’s motion for summary dismissal of Carlson’s application for post-conviction relief based on untimeliness under N.D.C.C. § 29-32.1-01(2).**

[¶19] In this appeal, Carlson argues the district court abused its discretion in summarily dismissing his application for post-conviction relief based in “timeliness.” Under N.D.C.C. § 29-32.1-01(2), “[e]xcept as provided on subsection 3, an application for relief under this chapter must be filed within two years of the date the conviction becomes final.” Further, “[t]he conviction becomes final when:

- a. The time for appeal of the conviction to [this Court] expires;
- b. If an appeal was taken to [this Court], the time for petitioning to the United States supreme court for review expires; or
- c. If review was sought in the United States supreme court, the date the supreme court issues a final order in the case.”

Murphy v. State, 2014 ND 84, ¶ 5. In this case, there was no appeal taken. The conviction became final in November 2008. This statute providing for a two-year statute of limitations became effective August 1, 2013. Riak v. State, 2015 ND 120, ¶ 10, 863 N.W.2d 894.

[¶20] There is no dispute the statute providing for a two-year statute of limitations applies to Carlson. First, Carlson doesn’t raise this issue. Second, in Murphy v. State this Court made clear an application for post-conviction relief filed after the statute’s effective date and more than two years after the conviction became final is untimely. Murphy v. State, 2014 ND 84, ¶ 6, 845 N.W.2d 327

(finding petitioner's application untimely where he filed the application Sept. 19, 2013, and his conviction became final on Nov. 11, 2005). Carlson filed the petition on October 27, 2017. His conviction became final in November 2008, therefore, Carlson's Application for Post-Conviction Relief is untimely unless one of the exceptions under N.D.C.C. § 29-32.1-01(3) applies.

[¶21] Under N.D.C.C. § 29-32.1-01(3), the two-year statute of limitations does not apply in the following circumstances:

1. The petition alleges the existence of newly discovered evidence, including DNA evidence, which if proved and reviewed in light of the evidence as a whole, would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted;
2. The petitioner establishes that the petitioner suffered from a physical disability or mental disease that precluded timely assertion of the application for relief; or
3. The petitioner asserts a new interpretation of federal or state constitutional or statutory law by either the United States supreme court or a North Dakota appellate court and the petitioner establishes that the interpretation is retroactively applicable to the petitioner's case.

N.D.C.C. § 29-32.1-01(3)(a). See also Lehman v. State, 2014 ND 103, ¶ 6. If one of the exceptions in subsection 3 applies, the petition for relief must be filed "within two years of the date the petitioner discovers or reasonably should have discovered the existence of the new evidence, the disability or disease ceases, or the effective date of the retroactive application of law." N.D.C.C. § 29-32.1-01(3)(b).

[¶22] In his brief, Carlson appears to argue his petition falls under an

exception because Carlson “was suffering from significant mental illness at the time of his guilty plea.” (Brief of Appellant “Brief” at § iv.) He describes himself as an “individual tortured by physical and mental adversaries and opponents.” (Brief at 1.) He further discusses his life in a Russian orphanage where he “suffered mental, physical, and sexual abuse.” (Brief at 2.) Carlson describes ultimately being adopted into a family in the USA where he alleges an “abusive father,” “social isolation,” and an addiction to “computer pornography.” (Brief at 2.)

[¶23] Under N.D.C.C. § 29-32.1-01(3)(a)(2), the court may consider an application for post-conviction relief after the two-year statute of limitations has expired if the “petitioner establishes that the petitioner suffered from a . . . mental disease that precluded timely assertion of the application for relief.” N.D.C.C. § 29-32.1-01(3)(a)(2); Murphy v. State, 2014 ND at ¶ 5. In its order dismissing Carlson’s application as untimely, the district court could not “find the mental disease exception to the two-year limitation in § 29-32.1-01(2)(a).” (App at 4.) The district court continued, “Carlson admitted to being aware of psychological assessments showing ‘extreme emotional disturbance’ prior to entering a plea of guilty.” (App. at 2.) Carlson persisted in pleading guilty when asked by the district court if that was his intent notwithstanding the assessments. (App. at 2.) See also Tr. Plea 8: 9-19 (discussing the psychological assessments prior to plea). At sentencing, the State discussed Carlson’s upbringing in Russia. (Tr. Sentencing 7:4-10.) Carlson’s attorney “detailed Carlson’s upbringing, emotional state, and

psychological examinations.” (Tr. Sentencing 10:1-23.) At sentencing, Carlson’s attorney described Carlson’s upbringing in Russia as “alarming at best” and went on to talk about the chaotic, neglectful, unstable, and abusive environment Carlson lived in when he was in Russia. (Tr. Sentencing 10: 1-5.) Judge John Irby, who presided over each and every material hearing in Carlson’s case, found “[a]ny mental disease was well known to all parties. . . and did not prevent Carlson from knowingly and voluntarily pleading guilty to both charges.” (App. at 3.) The district court continued “Carlson has submitted nothing to show how the alleged abuse in Russia led to a mental disease [that] prevented him from filing, nor has he submitted evidence to show when the mental disease ended.” (App. at 3-4.) Indeed, Carlson’s mental health issues from childhood did not prevent him from filing an application for post-conviction relief as evidenced by the fact that, on October 27, 2017, he did just that.

[¶24] Carlson also argues his status as a juvenile at the time of his offense and subsequent sentencing prevented him from making adult decisions after his conviction became final. (Brief at 5-6.) The criminal law understands the importance to treating juveniles different than adults. See In Interest of M.D.N., 493 N.W.2d 680 (N.D. 1992) (recognizing the juvenile justice system “incorporates the view that juveniles are less culpable than adults, have less judgment, character or fully-formed identities than adults” with an emphasis in rehabilitation over punishment.). However, nowhere in the statute prescribing a two-year statute of limitations is there a blanket exception for juveniles. Even if,

in this case, Carlson’s status as a juvenile prevented him from making application for post-conviction relief, that status would have changed in May 2010. (App. 2 at 6 (indicating Carlson’s year of birth as 1992).) Even calculating from the day he became an adult in 2010, Carlson’s application is still untimely.

[¶25] **CONCLUSION**

[¶26] All of the assertions made by Carlson regarding a “mental disease” were known to all parties and the district court throughout the case and certainly well-known at sentencing. The district court correctly found Carlson has not provided any evidence of a mental disease that precluded him from filing an application in a timely manner. The district court properly found the application for post-conviction relief was untimely under N.D.C.C. § 29-32.1-01(2) and none of the exception under N.D.C.C. § 29-32.1-01(3) apply. For these reasons the State respectfully requests this Court affirm the district court’s order dismissing Carlson’s petition for post-conviction relief.

[¶27] Dated this 12<sup>th</sup> day of February 2018.

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[¶28] **CERTIFICATE OF SERVICE**

[¶29] A true and correct copy of the foregoing document was sent by e-mail on the 2<sup>nd</sup> day of February 2018, to: Homer McMillan II, at [minotpublicdefender@nd.gov](mailto:minotpublicdefender@nd.gov).

Tracy J. Peters

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