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FILED
IN THE OFFICE OF THE
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OCTOBER 31, 2017
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

Marlon Comes,	)	**Supreme Court File No. 20170346**
Petitioner and Appellant,	)	**Ramsey County Civil No. 36-2014-CV-00200**
v.	)	
State of North Dakota,	)	**APPELLANT'S BRIEF**
Respondent and Appellee.	)	

APPEAL FROM THE ORDERS SUMMARILY DISMISSING POST-CONVICTION RELIEF AND DENYING THE MOTION FOR NEW TRIAL IN RAMSEY COUNTY DISTRICT COURT, NORTHEAST JUDICIAL DISTRICT, NORTH DAKOTA, SEPTEMBER 6, 2017, THE HONORABLE DONOVAN FOUGHTY, PRESIDING.

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JURISDICTION

[¶ 1] Appeals shall be allowed from decisions of lower courts to the Supreme Court as may be provided by law. Pursuant to constitutional provisions, the North Dakota legislature enacted Sections 29-28-03 and 29-28-06, N.D.C.C., which provides as follows:

> "An appeal to the Supreme Court provided for in this chapter may be taken as a matter of right. N.D.C.C. § 29-28-03. An appeal may be taken by the defendant from:
>
> 1. A verdict of guilty;
>
> 2. A final judgment of conviction;
>
> 3. An order refusing a motion in arrest of judgment;
>
> 4. An order denying a motion for new trial; or
>
> 5. An order made after judgment affecting any substantial right of the party."
>
> N.D.C.C. § 29-28-06.

STATEMENT OF THE ISSUES

[¶ 2] I. Whether the district court erred by dismissing Marlon Comes's petition for post-conviction relief.

II. Whether the district court erred when it denied Marlon Comes's motion for a new trial.

STATEMENT OF CASE

[¶ 3] This is an appeal from the Ramsey County Orders Denying Marlon Comes's (hereinafter referred to as "Mr. Comes") Motion for a New Trial and Summarily Dismissing his application for post-conviction relief entered by the Honorable Donovan

Foughty, dated July 18, 2017 (Appendix ("A") 49) and September 6, 2017 (Appendix ("A") 58), respectively. On May 10, 2017, Mr. Comes's pro se Application for Post-Conviction relief was filed. On July 13, 2017, Mr. Comes was assigned Attorney Ulysses Jones for his post-conviction proceeding. On July 19, the district court sua sponte filed an Order Summarily Dismissing Mr. Comes post-conviction petition.

[¶4] On August 18, 2017, Attorney Jones filed a Motion for a New Trial and Reconsideration of the original post-conviction petition along with a supporting letter as exhibit A.

[¶ 5] The State filed an Response with an exhibit resisting the Motion for a New Trial on September 1, 2017. Five days later the district court issued an Order denying Mr. Comes's Motion for New Trial and Reconsideration of his post-conviction petition. Mr. Comes now appeals the Order filed on September 6, 2017.

STATEMENT OF FACTS

[¶ 6] On October 18, 1996, Mr. Comes was charged with Murder, a class AA Felony, and Robbery, a class A Felony, in Ramsey County Criminal Case number 36-96-K-05720. Mr. Comes was provided court appointed counsel on this charge. On July 22, 1996, Mr. Comes pleaded guilty to both counts. Mr. Comes was sentenced to life in the custody of the North Dakota Department of Corrections with the possibility of parole for Murder and a concurrent 10 years for Robbery, with 307 days of credit for time already served.

[¶ 7] On May 10, 2017, Mr. Comes's pro se Application for Post-Conviction Relief was filed. The application claims that Mr. Comes shall be subjected to an ex post fact punishment in violation of the United States Constitution Article I, section 10. In his

application, Mr. Comes alleges the following conditions under N.D.C.C. § 29-32.1-03 which qualifies petitioner for post-conviction relief because:

> (a)(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. and,
> (b) An application under this subsection must be filed within two years…or **the effective date of the retroactive application of law**.
>
> N.D.C.C. § 29-32.1-03(a)(3) and (b) *emphasis added*.

[¶ 8] Mr. Comes original sentence was for life with the possibility of parole after 85% of 30 years had been served. A3, Exs. C & F. Mr. Comes would, by that calculation, be allowed to have a parole hearing in June of 2021, if no good time was given to him prior to that date. Mr. Comes believes that he will not receive a parole hearing until August of 2041, in violation of his constitutional rights. A3, Exs. A & G, See also N.D.Sup.Ct.Admin R. 51.

[¶ 9] The district court ultimately denied Mr. Comes's Motion for New Trial and Reconsideration of his post-conviction petition. Mr. Comes now timely appeals the Order filed on September 6, 2017.

LAW AND ARGUMENT

I. Whether the district court erred by dismissing Marlon Comes's petition for post-conviction relief.

Standard of Review

[¶ 10] The district court denied Mr. Comes's motion for post-conviction relief (A49) because the court believed Mr. Comes's application was not timely. This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6 and N.D.C.C. § 29-32.1-14. North Dakota Century Code Section 29-32.1-14 provides, "A final judgment entered under

this chapter may be reviewed by the supreme court of this state upon appeal as provided by rule of the supreme court." Id.

[¶ 11] "Post-conviction relief proceedings are civil in nature and are governed by the North Dakota Rules of Civil Procedure." Delvo v. State, 2010 ND 78, ¶ 10, 782 N.W.2d 72. The district court summarily dismissed Mr. Comes's application for post-conviction relief sua sponte. (A 49). The Uniform Post-Conviction Procedure Act lists four instances where the court may summarily dismiss a post-conviction petition, timeliness is not an enumerated reason for sua sponte summary dismissal. N.D.C.C. § 29-32.1-09. The district court erred by summarily dismissing Mr. Comes's petition without a motion to do so from the respondent. The Respondent, not having moved to challenge the timeliness of Mr. Comes's application, waved that issue. Additionally, because the court summarily dismissed the petition on its own accord, the petitioner had no meaningful opportunity to respond. The district court's sua sponte summary dismissal was therefore a reversible error.

[¶ 12] Alternatively, the standard of review for this appeal is analogous to an appeal from a motion for summary judgment. Delvo at ¶ 10. "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." Id. (quoting Berlin v. State, 2005 ND 110, ¶ 6, 698 N.W.2d 266).

[¶ 13] The district court's dismissal of Mr. Comes's application for post-conviction relief is reversible error. Because the statutory change of N.D.C.C. § 12.1-32-09.1 and, more importantly, subsequent application of N.D.Sup.Ct.Admin R. 51 (Rule 51) to Mr. Comes has not yet occurred, Mr. Comes's time has not yet expired. The court erred

because N.D.C.C. § 29-32.1-03(b) specifically states that the petition "must be filed within two years…or the effective date of the retroactive application of law." The retroactive application of Rule 51 in this case will occur in June of 2021, therefore Mr. Comes's time has not run and the district court committed a reversible error.

[¶ 14] In Collins v. Youngblood, 497 U.S. 37, 41 (1990), the Supreme Court reaffirmed that the ex post-facto Clause of the Constitution covers laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." Collins v. Youngblood, 497 U.S. 37, 43 (1990) (citing Calder v. Bull, 3 Dall. 386, 391-392 (1798) (opinion of Chase, J.); Beazell v. Ohio, 269 U.S. 167, 169-170 (1925)). The district court, in its Order, relies on California Dep't of Corrections v. Morales however the facts of that case are easily distinguishable from Mr. Comes's case. In Morales, the even the Supreme Court explains the difference between the facts in Morales and their previous decisions. The Court in Morales found that the only change the law made was that,

> "it introduced the possibility that after the initial parole hearing, the Board would not have to hold another hearing the very next year, or the year after that, if it found no reasonable probability that respondent would be deemed suitable for parole in the interim period."
>
> California Dep't of Corrections v. Morales, (93-1462), 514 U.S. 499 (1995).

[¶ 15] The Court found that because the California amendment had no effect on the standards for fixing a prisoner's initial date of "eligibility" for parole, or for determining his "suitability" for parole it was not an ex post-facto application of law. Conversely, the Supreme Court in Lindsey v. Washington, 301 U.S. 397, 401 (1937), Miller v. Florida, 482 U.S. 423 (1987), and Weaver v. Graham, 450 U.S. 24 (1981) are more analogous to Mr. Comes's situation. Specifically, in Weaver and Miller the ex post-facto clause prohibits the States from increasing the measure of punishment by altering the

substantive "formula" used to calculate the applicable sentencing range. In Weaver a change in the formulation of good-time credit would have retroactively reduced the credits available to prisoners under the new formula. The Supreme Court found that it effectively eliminated the lower end range of the possible prison terms. In Miller, the court had presumptive sentencing ranges, much like the North Dakota requirement of serving 85% of 30 years in the present case. The Court further reasoned in Miller that the presumptive sentencing range for certain sexual offenses under the new law would have increase by two (2) to three (3) years. The Court held that the resulting increase in the "quantum of punishment" violated the ex post-facto clause. Miller, at 433-434. The facts of Miller are very similar to those before the Court currently with the biggest difference being the formula change for Mr. Comes's presumptive sentence didn't add a couple of years, but 20 years to his presumptive sentence. Therefore, Mr. Comes's barred parole review in 2021, because of the new presumptive sentence formulation, is a violation of the ex post-facto clause. Therefore, Mr. Comes post-conviction application should be granted correcting the ex post-facto violation.

II. Whether the district court erred when it denied Marlon Comes's motion for a new trial.

[¶ 16] N.D.R.Crim.P. 33 (Rule 33) states that "on the defendant's motion, the court may vacate any judgment and grant a new trial to that defendant if the interest of justice so requires." Rule 33 further explains the basis on which a new trial motion may be made. "Any motion for a new trial…may be made on the file, exhibits, and minutes of the court." Although Mr. Comes did not have a trial his plea was based on the laws for

sentencing, presumptive sentencing included, in 1996. If the lower court refuses to apply those laws and thereby increase the punishment of Mr. Comes, the interest of justice would require the removal of Mr. Comes's plea under N.D.R.Crim.P. 11(d)(2) to correct a manifest injustice. The only way to correct that manifest injustice, short of granting Mr. Comes his parole hearing in 2021, would be to have a trial on the merits of the case.

CONCLUSION

[¶ 17] WHEREFORE, Mr. Comes respectfully requests that the district court's order dismissing his petition be reversed and his application for post-conviction be granted. Alternatively, Mr. Comes requests that the district court's order denying his motion for a new trial be reversed.

Dated this 31st day of October, 2017

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	)	**36-2014-CV-00200**
	)	
v.	)	
	)	
	)	
State of North Dakota,	)	**CERTIFICATE OF SERVICE**
	)	
Respondent and Appellee.	)	

[¶ 1] The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief
Appellant's Appendix

And that said copies were served upon:

Kari Agotness, Ramsey County State's Attorney,
ramseysa@nd.gov

by efile.

Dated this 31st day of October, 2017

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	)	
v.	)	
	)	
State of North Dakota,	)	**CERTIFICATE OF SERVICE**
	)	
Respondent/Appellee.	)	

The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Appendix-table of contents

And that said copies were served upon:

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v.	)	
	)	
State of North Dakota,	)	**CERTIFICATE OF SERVICE**
	)	
Respondent/Appellee.	)	

The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

Appellant's Brief & Appendix

And that said copies were served upon:

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Dated: November 3, 2017 KRAUS-PARR LAW

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