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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff-Appellee, vs. Cody Michael Atkins, Defendant-Appellant	Supreme Court No. 20180411 Case No. 18-2014-CR-01844

On appeal from the Order denying the Defendant's motions,
filed October 31, 2018,
Grand Forks County District Court
Northeast Central Judicial District
State of North Dakota
The Honorable John A. Thelen, Presiding

APPELLANT'S BRIEF

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[¶1] **Statement of the Issues**

I. Whether the district court erred by not allowing Mr. Atkins to withdraw his guilty plea in response to inaccurate and coercive statements by his attorney and by the district court's failure to comply with Rule 11.

II. Whether the district court erred by not granting Mr. Atkins a new trial in response to newly discovered evidence.

Statement of the Case

[¶2] This is an appeal from an order denying a motion to withdraw a guilty plea and a motion for a new trial regarding Cody Michael Atkins (hereinafter referred to as "Mr. Atkins"). In 2015, Mr. Atkins pled guilty to a single charge of Gross Sexual Imposition and was sentenced. (Appellant's App. at 1). On February 2, 2018, Mr. Atkins filed a pro se motion to withdraw his guilty plea and vacate the judgment, along with an affidavit in support of the motion. (Appellant's App. at 16 - 17). On March 21, 2018, Mr. Atkins filed a motion for a new trial, along with a brief in support of the motion. (Appellant's App. at 19 - 22). Mr. Atkins was appointed counsel and his attorney submitted a brief in support of the two previously filed motions. (Appellant's App. at 23 - 29). The district court conducted a motion hearing on the two motions. (Appellant's App. at 1). On October 31, 2018, the district court issued an order denying Mr. Atkins' motions. (Appellant's App. at 30). Mr. Atkins now appeals the October 31, 2018, order. (Appellant's App. at 50).

Statement of the Facts

[¶3] In 2014, Mr. Atkins was charged with Gross Sexual Imposition. (Appellant's App. at 1). Mr. Atkins was appointed an attorney. See id. Although it was initially charged as a Class AA Felony, the State amended the charge to a Class A Felony. (Appellant's App. at 8).

[¶4] During the course of the representation, Mr. Atkins and his attorney discussed the decision to plead guilty to the charge. (8/10/18 Motion Hearing Tr. at 6, ln. 20 - 10, ln. 7).

Mr. Atkins did not want to plead guilty to the charge, as he believed that he had a valid defense. (Appellant's App. at 17, ¶ 3). During the course of their discussions, Mr. Atkins' attorney advised him the State was seeking a 30 year prison sentence if he proceeded to trial. Id. Mr. Atkins' attorney advised him, if he were to proceed to trial, he would serve 30 years in prison. (8/10/18 Motion Hearing Tr. at 6, ln. 20 - 10, ln. 7). Based on the statements from his attorney, Mr. Atkins believed that he would be facing the possibility of a 30 year prison sentence, if he proceeded to trial. (8/10/18 Motion Hearing Tr. at 8, ln. 4 - 7).

[¶5] During these discussions, Mr. Atkins' attorney also advised him, on multiple occasions, that he would only need to serve 33 percent of his prison sentence. (Appellant's App. at 17, ¶ 3: 8/10/18 Motion Hearing Tr. at 8, ln. 8 - 21). Mr. Atkins' attorney advised him that because of prison overcrowding, the prison would try to release him as quickly as possible. (8/10/18 Motion Hearing Tr. at 8, ln. 16 - 18). Mr. Atkins understood the statements from his attorney to be a guarantee that he would not serve more than 33 percent of his sentence. (8/10/18 Motion Hearing Tr. at 8, ln. 19 - 21).

[¶6] As a result of these statements by his attorney, Mr. Atkins agreed to plead guilty. (8/10/18 Motion Hearing Tr. at 9, ln. 15 - 10, ln. 7). Had these statements not been made, Mr. Atkins would not have pleaded guilty and instead would have proceeded to trial. See id.

[¶7] On March 19, 2015, Mr. Atkins entered an open guilty plea to the Class A Felony charge of Gross Sexual Imposition. (Appellant's App. at 1). Before entering the plea, the Court explained to Mr. Atkins some of the rights that he had as a criminally accused defendant. (3/19/15 Change of Plea Hearing Tr. at 2, ln. 1 - 6, ln. 22). However, at the

change of plea hearing, the district court did not advise Mr. Atkins that he had the right to plead not guilty, or having already so pleaded, to persist in that plea. (3/19/15 Change of Plea Hearing Tr. at 2, ln. 1 - 10, ln. 6). The district court also failed to inquire whether Mr. Atkins willingness to plead guilty was the result of plea discussions between the Mr. Atkins' attorney and the prosecutor. See id. Mr. Atkins entered an open plea of guilty to the charge and sentencing was continued to a later date. (3/19/15 Change of Plea Hearing Tr. at 6, ln. 22 - 8, ln. 3).

[¶8] Mr. Atkins was sentenced on June 29, 2015. See id. During the sentencing hearing, Mr. Atkins informed the district court that he did not commit the charged acts and only admitted to having committed the charged acts to protect a friend of his, Casey Ellis. (6/29/15 Sentencing Hearing Tr. at 4, ln. 13 - 23). In response to these comments, Mr. Atkins attorney stated, "it appears, to me, he's attempting to withdraw a guilty plea, Your Honor." (6/29/15 Sentencing Hearing Tr. at 6, ln. 1 - 2). Mr. Atkins' ultimately did not request to withdraw his guilty plea and the district court proceeded to sentencing. (6/29/15 Sentencing Hearing Tr. at 8, ln. 12 - 9, ln. 3). Mr. Atkins was sentenced to a 20 year term of imprisonment, with 5 years suspended and 10 years of probation. (6/29/15 Sentencing Hearing Tr. at 18, ln. 16 - 19: Appellant's App. at 10).

[¶9] After he was sentenced, Mr. Atkins appealed the criminal judgment. State v. Atkins, 2016 ND 13, ¶ 1, 873 N.W.2d 676. On appeal, Mr. Atkins asked this Court to remand his case with an instruction to the district court permitting Mr. Atkins to withdraw his guilty plea. See id. at ¶ 5. Mr. Atkins argued that he should be permitted to withdraw the guilty plea because he received ineffective assistance of counsel and because the district court

failed to substantially comply with Rule 11 of the Rules of Criminal Procedure. See id. Because Mr. Atkins had not yet moved to withdraw his guilty plea at the district court level, this Court declined to rule on whether the representation provided by Mr. Atkins' attorney or any noncompliance with Rule 11 by the district court would justify withdrawal of the guilty plea. See id. This Court also stated that there was an insufficient record to support a claim of ineffective assistance of counsel, but indicated that Mr. Atkins could pursue such a claim in further proceedings where a more complete record could be made. See id. at ¶ 9. For those reasons, this Court affirmed the criminal judgment. See id. at ¶ 10.

[¶10] After he was sentenced, Mr. Atkins discovered new evidence related to his case. While the case was on appeal, Mr. Atkins was provided with the results of a sexual assault kit by his appellate attorney. (8/10/18 Motion Hearing Tr. at 18, ln. 17 - 18, ln. 9). Mr. Atkins was never provided with a copy of kit results by his trial attorney. (8/10/18 Motion Hearing Tr. at 33, ln. 21 - 34, ln 6). The test kit results showed a lack of evidence to support the allegation that a crime had occurred. (8/10/18 Motion Hearing Tr. at 18, ln. 10 - 15). Had Mr. Atkins known about the evidence at the time of sentencing, he would not have pled guilty to this charge. (8/10/18 Motion Hearing Tr. at 18, ln. 16 - 21).

[¶11] In 2017, Mr. Atkins learned about text messages related to his case, that were in the possession of Charlene Atkins, Mr. Atkins' mother. (8/10/18 Motion Hearing Tr. at 17, ln. 9 - 10: at 30, ln. 13 - 32, ln. 4). The messages were between Charlene Atkins and Casey Ellis, a key witness in the case. (8/10/18 Motion Hearing Tr. at 17, ln. 2 - 10). The text messages showed that Mr. Atkins did not commit the crime and supported an alibi defense. (Appellant's App. at 21).

[¶12] In February, 2018, Mr. Atkins moved to withdraw his guilty plea, based on the statements made by his attorney and the manner in which the district court took his guilty plea. (Appellant's App. at 16 - 17). Mr. Atkins later filed a motion for a new trial, based on newly discovered evidence. (Appellant's App. at 19 - 22). The district court conducted an evidentiary hearing on both motions on August 10, 2018. (Appellant's App. at 1). The district court subsequently issued an order denying both motions and Mr. Atkins has appealed that order. (Appellant's App. at 30, 50).

Law and Argument

[¶13] This is an appeal of an order denying a motion to withdraw a guilty plea and a motion for a new trial. This Court has jurisdiction over this appeal under N.D. Const. art. VI § 6, N.D.C.C. § 29-28-03 and N.D.C.C. § 29-28-06. Subsections 4 and 5 of Section 29-08-06 of the North Dakota Century Code permit a defendant to appeal from: "An order denying a motion for a new trial" and "An order made after judgment affecting any substantial right of the party." Id.

I. The district court erred by not allowing Mr. Atkins to withdraw his guilty plea.

[¶14] Mr. Atkins moved to withdraw his guilty plea, on the basis that his attorney's statements and the manner in which the district court conducted the plea hearing resulted in a guilty plea which was not freely, voluntarily and knowingly made. (Appellant's App. at 16 - 17). The State argued, and the district court ultimately found, that Mr. Atkins' motion to withdraw his guilty plea was be procedurally barred. (Appellant's App. at 36 - 38, 48,

¶ 16 - 20, 45 - 47). Specifically, the district court found that res judicata and misuse of process prohibited Mr. Atkins from withdrawing his guilty plea. (Appellant's App. at 37 - 38, ¶ 19, 20). To support the decision to deny Mr. Atkins' motion to withdraw the guilty plea, the district relied on N.D.C.C. § 29-32.1-12. See id. This Section provides, in part:

> 1. An application for postconviction relief may be denied on the ground that the same claim or claims were fully and finally determined in a previous proceeding.
>
> 2. A court may deny relief on the ground of misuse of process. Process is misused when the applicant:
>
> a. Presents a claim for relief which the applicant inexcusably failed to raise either in a proceeding leading to judgment of conviction and sentence or in a previous postconviction proceeding; or

Id.

[¶15] The district court erred in its determination that Mr. Atkins' motions were procedurally barred as abuse of process or as res judicata, as those are affirmative defenses which apply to civil, post-conviction relief proceedings, but are inapplicable to criminal law motions, filed into a criminal case. The affirmative defenses of misuse of process and res judicata are part of the Uniform Postconviction Procedure Act. N.D.C.C. § 29-32.1-12. Post-conviction relief proceedings under the Uniform Postconviction Procedure Act are civil in nature and are governed by the North Dakota Rules of Civil Procedure. Broadwell v. State, 2014 ND 6, ¶ 5, 841 N.W.2d 750. However, Mr. Atkins' motions were not brought in a separate, civil case under the Uniform Postconviction Procedure Act. Instead, Mr. Atkins' motions were brought in the criminal case. Mr. Atkins' motions, the State's responses, the district court's order and this appeal are all captioned as State v. Cody Atkins

and are part of criminal case filed by the State against Mr. Atkins. (Appellant's App. at 1). Mr. Atkins' motion to withdraw his guilty plea was brought pursuant to Rule 11 of the Rules of Criminal Procedure. See N.D.R.Crim.P. 11(d). Mr. Atkins motion for a new trial was brought pursuant to Rule 33 of the Rules of Criminal Procedure. See N.D.R.Crim.P. 33. As Mr. Atkins has brought these motions in the criminal case, under the Rules of Criminal Procedure, the affirmative defenses that exist as part of the civil, post-conviction relief statute do not apply.

[¶16] N.D.C.C. § 29-32.1-12(3) illustrates the point. This subsection provides, "Res judicata and misuse of process are affirmative defenses to be pleaded by the state." N.D.C.C. § 29-32.1-12(3). Civil Procedure Rule 7(a) states that the only pleadings that are allowed as part of a civil case are the Complaint, the Answer and, if permitted by the Court, a reply to the Answer. N.D.R.Civ.P. 7(a). Under this statute and rule, the State is required to plead the affirmative defenses in its Answer. Of course, the affirmative defenses of misuse of process and res judicata were not pleaded by the State in the State's Answer, because the State never provided an Answer. (Appellant's App. at 1). The State never provided an Answer, because there was never an Application for Post-Conviction Relief and there was never an Application, because this is not a civil case under the Uniform Postconviction Procedure Act. Instead, there were motions filed in the criminal case, brought under the Criminal Rules of Procedure. The Rules of Criminal Procedure "govern the practice and procedure in all criminal proceedings in the district courts." N.D.R.Crim.P 1(a). Mr. Atkins' claims are brought under Rules 11 and 33 of the Rules of Criminal Procedure, which permits these motions to be brought. As such, Mr. Atkins motions were procedurally permitted, not

procedurally barred as the district court found.

[¶17] As Mr. Atkins motions were not procedurally barred, the analysis turns to the merits of his claims. Mr. Atkins moved to withdraw his guilty plea and filed an affidavit in support of the motion. (Appellant's App. at 16 - 17). Rule 11 allows the withdrawal of a guilty plea after sentencing when it is necessary to correct a manifest injustice. N.D.R.Crim.P. 11(d). State v. Yost, 2018 ND 157, ¶ 6, 914 N.W.2d 508. The district court's decision regarding the withdrawal of the guilty plea is reviewed under the abuse of discretion standard. See id. (quoting State v. Bates, 2007 ND 15, ¶ 6, 726 N.W.2d 595). A district court abuses its discretion when the district court's "legal discretion is not exercised in the interests of justice." Id.

[¶18] A manifest injustice exists in this case, as Mr. Atkins' plea was not freely, voluntarily and knowingly made, because of inaccurate information by his attorney, which induced Mr. Atkins to plead guilty. Mr. Atkins' attorney assured him on multiple occasions that he would only serve 33 percent of his prison sentence. (Appellant's App. at 17, ¶ 3: 8/10/18 Motion Hearing Tr. at 8, ln. 8 - 21). This statement was misleading. Mr. Atkins' attorney could not quantify the amount of time that Mr. Atkins would spend in prison before he would be granted parole. The granting (or denial) of parole is subject to the parole board and is granted when "the board is convinced the inmate will conform to the terms and conditions of parole the board or the department of corrections and rehabilitation may establish for the inmate." N.D.C.C. § 12-59-07. To serve less than the entire term of imprisonment required by the criminal judgment requires the review and approval of the parole board. For Mr. Atkins' attorney to advise him that the maximum amount he would serve was 33 percent of

his sentence completely overlooks the parole board's process and was misleading.

[¶19] In addition to the misleading statement regarding the likelihood of parole, Mr. Atkins' attorney advised him that the State was seeking a 30 year prison sentence if he proceeded to trial. (Appellant's App. at 17, ¶ 3). Mr. Atkins' attorney advised him that if he were to proceed to trial, he would serve 30 years. (8/10/18 Motion Hearing Tr. at 6, ln. 20 - 10, ln. 7). These statements are problematic in two ways. First, these statements misstate the law. Mr. Atkins was charged with a Class A Felony, for which the maximum length of imprisonment is 20 years, not 30 years. See N.D.C.C. § 12.1-32-01(2). Second, these statements are unduly coercive. To suggest that the State is seeking a 30 year prison sentence and that if he proceeded to trial, Mr. Atkins would serve 30 years, when the maximum sentence allowed by law is 20 years, unduly influenced Mr. Atkins into pleading guilty, when he believed that he had a valid defense. (Appellant's App. at 17, ¶ 3). An attorney must correctly advise his or her client about the law, not pressure the client into pleading guilty by overstating the worst case scenario. As discussed in State v. Bates, "When determining the validity of a guilty plea, the longstanding test is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." State v. Bates, 2007 ND 15, ¶ 14, 726 N.W.2d 595. When the defendant is not properly advised of the potential risks regarding the alternative courses of action, the plea cannot be a voluntary and intelligent choice among these alternatives. When the defendant is advised the maximum penalty if he were to proceed to trial is 10 years longer than the maximum permitted by law, the plea is coerced, not an informed decision. Under the circumstances, the inaccurate and coercive statements of Mr. Atkins' counsel resulted in a

plea that was not freely, voluntarily and knowingly made. This represents a manifest injustice which necessitates the withdrawal of the guilty plea.

[¶20] In addition to the statements by his attorney, Mr. Atkins was improperly induced to plead guilty by the district court's failure to comply with the Rule 11 requirements for the proper taking of a guilty plea. Criminal Procedure Rule 11 governs pleas and provides the proper procedural framework for the acceptance of a guilty plea. State v. Wallace, 2018 ND 225, ¶ 6, 918 N.W.2d 64. Rule 11(b) states that the district court may not accept a guilty plea, without first personally addressing the defendant and informing the defendant of and determining that the defendant understands certain rights. N.D.R.Crim.P. 11(b). The Rule 11 requirement to advise the defendant of these rights "is mandatory and binding upon the court." Wallace, at ¶ 7. In addition to other advice required by the Rule, the district court must inform the defendant of the right to plead not guilty, or having so pleaded, to persist in that plea. N.D.R.Crim.P. 11(b)(1)(A). The district court must also inquire whether the defendant's willingness to plead guilty is the result of discussions between the prosecuting attorney and the defendant or the defendant's attorney. N.D.R.Crim.P. 11(b)(2).

[¶21] The district court failed to advise the defendant of the right to persist in a plea of not guilty, as required by Rule 11. See N.D.R.Crim.P. 11(b)(1)(A). At the time Mr. Atkins was pleading guilty, the district court's plea colloquy advised Mr. Atkins of some of his rights, but did not advise him of the right to enter a plea of guilty and to persist in that plea. (3/19/15 Change of Plea Hearing Tr. at 2, ln. 1 - 10, ln. 6). The right to enter a plea of not guilty and to persist in such a plea is the single most important right in the criminal justice system. All of the other rights discussed in Rule 11 flow from the initial right to plead not

guilty and to require the government to prove the case against the accused at trial. While it may seem obvious to those within the system, it is imperative to explain such a right to the criminally accused defendant who may be unfamiliar with the process or these rights. That is why it is included as the first right in the list of rights that the district court is required to explain to the defendant, by Rule 11 and the caselaw of this Court. Despite the importance of this cornerstone right, the district court failed to advise Mr. Atkins of his right to persist in his previously entered plea of not guilty.

[¶22] At the time that the district court took Mr. Atkins plea, the district court also failed to inquire into whether Mr. Atkins guilty plea was the result of discussions between the prosecutor and Mr. Atkins' attorney. (3/19/15 Change of Plea Hearing Tr. at 2, ln. 1 - 10, ln. 6). The district court was required to ensure the plea was voluntarily, by personally addressing the defendant and specifically by inquiring whether the willingness to plead guilty was the result plea discussions between the prosecutor and the defendant's attorney. N.D.R.Crim.P. 11(b)(2). Understanding whether the plea is the result of plea discussions is critical to the district court's determination that a plea is freely and voluntarily made. It is especially troublesome when it is coupled with the out of court statements by Mr. Atkins' attorney that the State was seeking a 30 year prison term if Mr. Atkins were to proceed to trial. (Appellant's App. at 17, ¶ 3: 8/10/18 Motion Hearing Tr. at 6, ln. 20 - 10, ln. 7). This sort of statement is exactly the type of out of court statement that Rule 11(b)(2) would uncover, had the district court complied with the rule. However, the district court did not ask whether the plea was the result of discussions between the prosecutor and Mr. Atkins' attorney. Had the district court made such an inquiry, this misstatement of the law would

have been uncovered and could have been corrected by the district court, before Mr. Atkins pled guilty. However, the district court cannot correct a misstatement or misunderstanding of the law, without first making the mandatory inquiry, as required by N.D.R.Crim.P. 11(b)(2). This Court could not have made it clearer, when it held that the requirement to advise the defendant is "mandatory and binding" on the district courts. State v. Wallace, 2018 ND 225, ¶ 7, 918 N.W.2d 64. The district court's failure to adequately advise the defendant, along with the inaccurate and unduly coercive statements by Mr. Atkins attorney resulted in a guilty plea which was not freely, voluntarily and knowingly made. The facts represent a manifest injustice, under which Mr. Atkins should be permitted to withdraw his guilty plea. As a result, this Court is urged to reverse the district court's order and remand this case with instructions to allow Mr. Atkins to withdraw his guilty plea and proceed to trial.

II. The district court erred by not granting Mr. Atkins a new trial in response to newly discovered evidence.

[¶23] Mr. Atkins also filed a motion for a new trial. (Appellant's App. at 19). Rule 33 of the Rules of Criminal Procedure permits a trial court to vacate any judgment and grant a new trial, on a defendant's motion, if the interests of justice so require. N.D.R.Crim.P. 33(a). A motion for a new trial can be based on newly discovered evidence. N.D.R.Crim.P. 33(b). A district court's decision regarding a motion for a new trial based upon newly discovered evidence is reviewed under the abuse of discretion standard. State v. Steinbach, 1998 ND 18, ¶ 22, 575 N.W.2d 193.

[¶24] This Court has created a four-part test for reviewing a motion for a new trial based on newly discovered evidence. "To prevail on a motion for a new trial on the ground of newly discovered evidence, the defendant must show (1) the evidence was discovered after trial, (2) the failure to learn about the evidence at the time of trial was not the result of the defendant's lack of diligence, (3) the newly discovered evidence is material to the issues at trial, and (4) the weight and quality of the newly discovered evidence would likely result in an acquittal." Steinbach, at ¶ 22. In support of his motion for a new trial, Mr. Atkins' brief sets forth four pieces of newly discovered evidence, which "would prove his innocence" and would satisfy each and every element of the newly discovered evidence test. (Appellant's App. at 21). Those items include text messages from Mr. Atkins' mother to Casey Ellis and the results of the sexual assault test kit.

[¶25] The first and second prongs of the newly discovered evidence test relate to the timing of the discovery of the evidence. Steinbach, at ¶ 22. The evidence must have been discovered after trial and the failure to discover the evidence before that time must not have been the result of the defendant's lack of diligence. See id. In this case, Mr. Atkins' trial attorney never provided him with a copy of the results of the sexual assault kit. (8/10/18 Motion Hearing Tr. at 33, ln. 21 - 34, ln. 6). Mr. Atkins did not receive the results, until he was provided with the results, by his appellate attorney. (8/10/18 Motion Hearing Tr. at 18, ln. 17 - 18, ln. 9). Mr. Atkins expected his trial attorney to provide him with the discovery in his case. It was reasonable for Mr. Atkins to rely upon his trial attorney to provide him with the discovery in his case. Mr. Atkins was not aware of the kit results of because of his attorney's failure to provide it to him, not a lack of his own due diligence.

[¶26] Similarly, the text messages were not discovered until 2017, after Mr. Atkins had already been convicted. (8/10/18 Motion Hearing Tr. at 17, ln. 9 - 10: at 30, ln. 13 - 32, ln. 4). It was not until Mr. Atkins launched his own investigation that he learned that his mother had evidence that was relevant to the case. See id. Again, Mr. Atkins had a reasonable expectation that his attorney would actively and reasonably investigate the case. Mr. Atkins could not have anticipated that his attorney would not conduct a reasonable investigation into the case. Under the circumstances, the evidence was discovered after trial and the failure to learn of the evidence before trial was not as a result of a lack of diligence on the part of Mr. Atkins. As a result, the sexual assault kit evidence and the text messages meet the first two prongs of the newly discovered evidence test.

[¶27] The third and fourth prongs of the newly discovered evidence test relate to importance of the evidence. Steinbach, at ¶ 22. The evidence must be material to the issue of the trial and strong enough that it would likely result in an acquittal. See id. In this case, the results of the sexual assault kit showed a lack of evidence to support the allegation that a crime had occurred. (8/10/18 Motion Hearing Tr. at 18, ln. 10 - 15). "The Sexual Assault Kit report shows no residua, either acute or chronic of sexual abuse; show some strange anxiety but cooperative; no disclosure of injury or deformity; that no one witnessed the alleged sexual assault; and, that the mother of the alleged victim has a history of depression." (Appellant's App. at 44, ¶ 37). The text messages contained statements from Casey Ellis, a key witness in the case, and the statements showed that Mr. Atkins did not commit the crime and would have supported an alibi defense. (8/10/18 Motion Hearing Tr. at 17, ln. 2 - 10: Appellant's App. at 21). Specifically, in the messages, Casey Ellis stated: (a) "I know

[c]ody and [t]om didn[']t do it" (the alleged acts); (b) she knew Mr. Atkins was not present that day; (c) she knew more information about what happened that night; and (d) she knew why the mother of the victim had pressed charges. (Appellant's App. at 44, ¶ 37). The results of the testing and the text messages were material, as they relate to exact allegations of criminal behavior. The sexual assault kit report casts doubt on whether a crime occurred. In the text messages, a key witness states that Mr. Atkins did not commit the crime and was not present at the time the crime was alleged to have occurred. These messages corroborate the defense that a crime did not occur, support an alibi defense and would provide a fuller explanation of what happened and Mr. Atkins' innocence. Under the circumstances, the test results and the text message are material and are of the weight and quality that, if presented to a jury, would likely result in an acquittal. Under the circumstances, the third and fourth prongs of the newly discovered evidence test were met. Because the newly discovered evidence satisfies the four-part test and casts serious doubts on Mr. Atkins' conviction, the interests of justice require that Mr. Atkins' conviction be vacated and that he be granted a new trial.

Conclusion

[¶28] For the foregoing reasons, Mr. Atkins respectfully requests that the district court's Order be reversed and remanded for further proceedings.

Dated this 28th day of January, 2019.

/s/ Scott O. Diamond

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff-Appellee, vs. Cody Michael Atkins, Defendant-Appellant	Supreme Court No. 20180411 Case No. 18-2014-CR-01844 **Certificate of Service**

[¶1] I hereby certify that on the 28th day of January, 2019, the following documents:

1. Appellant's Brief;
2. Appellant's Appendix; and
3. Certificate of Service.

were served, via email, upon the following individual:

Email: sasupportstaff@gfcounty.org
Meredith Huseby Larson
Grand Forks County State's Attorney Office

and were served, via first class mail, upon the Defendant-Appellant, as follows:

Cody Michael Atkins
c/o James River Correctional Center
2521 Circle Drive
Jamestown, ND 58401

Dated this 18th day of January, 2018.

/s/ Scott O. Diamond

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