

IN THE SUPREME COURT OF NORTH DAKOTA

20190023

Lorry Van Chase,	)	
	)	Supreme Court No. 20190023
Petitioner/Appellant	)	
	)	
Vs.	)	District Court No. 40-CV-2016-148
	)	
	)	FILED
State of North Dakota,	)	IN THE OFFICE OF THE
	)	CLERK OF SUPREME COURT
	)	
Respondent/Appellee	)	FEB 20 2019

**STATE OF NORTH DAKOTA**

APPEAL FROM A MEMORANDUM OPINION AND ORDER DENYING Ryle 60(b) Motion. Northeast Judicial District Rolette County, North Dakota THE HONORABLE MICHAEL HURLY

**Brief of Appellant**

Lorry Van Chase  
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Petitioner/Appellant  
In Propria Persona

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## **JURISDICTION**

[¶1] The petitioner timely appealed the final judgment arising out of the ~~Rolette~~ County District Court. The North Dakota Supreme Court has Jurisdiction over the appeal of this matter under N.D. Const. art. VI §6, and N.D.C.C §§ 29-28-06 (1)(2)(4) and (5) and 29-28-03. Final judgment was entered on January 8, 2019.

## **STATEMENT OF THE ISSUES**

[¶2] I. Did the Court err by considering Petitioner's Rule 60(b) motion to be a Post-Conviction Application in order to deny it without the hearing that was requested and required under the North Dakota Rules of Court?

II. Did the District Court err by finding that Petitioner's 60(b) Motion was barred on the grounds of Res Judicata and Misuse of Process?

III. Did the District Court err by finding that no corroborating evidence was presented to support Petitioner's claim that at his attorney directed him to lie?

IV. Did the Court err by finding that Petitioner is bound by the unethical actions of his former counsel?

V. Did the Court err by denying Petitioner's motion under rule 60(b) without appointing counsel as requested?

## STATEMENT OF CASE

### I. NATURE OF THE CASE

[¶3] This is a civil matter on appeal from the *Rolette* County District Court's denial of Petitioner's Rule 60(b) Motion filed in a Post-Conviction Relief action.

### II. DISPOSITION BELOW

[¶4] Trial in the underlying criminal matter was held *Sep. 17, 2014*; Petitioner was sentenced to 40 years incarceration on *Dec. 30, 2014*. Petitioner was represented by attorney *Lynn Boughey*.

[¶5] On *Jan 14, 2015* Petitioner appealed his conviction to the North Dakota Supreme Court. He was again represented by attorney *Lynn Boughey*. The North Dakota Supreme Court affirmed the conviction on *Sep. 15, 2015*.

[¶6] On *Sep. 16, 2016* Petitioner filed an Application for Post-Conviction Relief alleging ineffective assistance of counsel. Petitioner was represented by *Ward Johnson*. An evidentiary hearing was held on *Nov. 16, 2017*, and the District Court subsequently entered an order denying Petitioner's requested relief.

[¶7] A Notice of Appeal was filed on *Feb. 15, 2018* and the denial was appealed to the North Dakota Supreme Court. Petitioner was represented by attorney *Ward Johnson*. The Supreme Court summarily affirmed the District Court's decision pursuant to N.D.R.App.P.35.1(a)(7) due to the failure of Petitioner's attorney to request a transcript of the evidentiary hearing.

[¶8] On *Nov. 2, 2018*, Petitioner filed a Pro Se Motion under Rule 60(b) seeking relief from the District Court's order denying his Application for Post-Conviction

Relief. Additionally, Petitioner requested that counsel be appointed and that oral argument and taking of evidence be scheduled on the motion. Petitioner attempted to secure a date and time for the hearing by contacting the Clerk of Court via letter. No date was ever set, nor was counsel appointed

[¶9] On January 8, 2019 the District Court issued an order denying Petitioner the requested relief.

### **STATEMENT OF FACTS**

[¶10] In the underlying criminal conviction, Petitioner was convicted of Gross Sexual Imposition.

[¶11] Petitioner filed an application for post-conviction relief alleging ineffective assistance of trial counsel. The District Court denied the application after a hearing and Petitioner appealed. The decision of the District Court was summarily affirmed due to the failure of Petitioner's attorney to request a transcript.

[¶12] Petitioner then filed a Motion under Rule 60(b) alleging that at the District Court hearing on Petitioner's application, and in the subsequent appeal to the North Dakota Supreme Court, Petitioner's attorney committed numerous ethical violations. These included: Directing Petitioner to lie at the hearing which confused the issues and made it impossible to obtain relief, failing to order a transcript of the evidentiary hearing which resulted in the denial of Petitioner's appeal, including material in the Supreme Court appendix that was never presented to the District Court, directing Petitioner not to file for Federal Habeas Corpus relief, and directing Petitioner to lie in a proposed motion under N.D.R.Crim.P. 35.

## LAW AND ARGUMENT

### Standard of Review

[¶13] Post-Conviction relief actions are civil in nature and are governed by the North Dakota Rules of Civil Procedure Patten v State, 2008 ND 29 ¶8, 745 N.W.2d 626. Under N.D.R.Civ.P. 60(b), the Court may relieve a party of its obligation under a judgement or order due to mistake, inadvertence, surprise, excusable neglect, fraud, misrepresentation, misconduct, or any other reason justifying relief. Such a motion is timely when filed within one year of the date of entry of judgement. N.D.R.Civ.P. 60(c)(1). The standard of review for motions under 60(b) is abuse of discretion “We will not reverse a Court’s decision on a motion for relief unless the Court abused its discretion in deciding whether the party established sufficient grounds for disturbing the judgement or order...” Palmer v State 2012 ND 237, 824 N.W.2d 406. “A Court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law.” Id. “Whether res judicata or collateral estoppel applies presents a question of law, which is fully reviewable on appeal.” Ungar V. North Dakota State Univ., 2006 ND 185 ¶10, 721 N.W.2d 16. “Res judicata means a valid, existing final judgement from a court of competent jurisdiction is conclusive with regard to claims raised...” Id. At ¶11

**I. Did the Court err by considering Petitioner's Rule 60(b) motion to be a Post-Conviction Application in order to deny it without the hearing that was requested and required under The North Dakota Rules of Court?**

[¶14] On Nov. 2, 2018 Petitioner filed a Motion under N.D.R.Civ.P. 60(b) seeking relief from an order denying his Post-Conviction Relief Application. Petitioner alleged fraud and ethical violations on the part of his attorney Ward Johnson (Johnson). Petitioner requested the taking of evidence and oral argument on the motion and requested on several occasions that the Clerk of Court set a date and time; he also requested appointed counsel. Petitioner is currently incarcerated at the North Dakota State Penitentiary and is prohibited by DOCR policy from calling a Clerk of Court. Therefore, since he was not appointed counsel, the only way for Petitioner to set up a hearing date was to contact the Clerk of Court by mail. Petitioner did so on several occasions and did not receive a reply. Petitioner requested a hearing in his Notice of Motion, Motion, and Brief in Support of Motion.

[¶15] The District Court's order, after stating that Petitioner's motion is timely, then goes on to attempt to convert Petitioner's motion into a post-conviction relief application:

"...] Chase also revisits his interviews with law enforcement, the criminal trial, and the post-conviction hearing and the failings of Boughey & Chase. Chase is trying to circumnavigate the process. The reason is clear because the basic underpinning of Chase's motion directs back to Boughey. Furthermore, the issues Chase presents are a repackaging of the issues that have already been considered in previous proceedings. The only difference is now Johnson is an added focus. This is a misuse of the process and attempts to mask the 60(b) motion for what it really is, a post-conviction relief motion attempt.  
“(Memorandum Opinion and Order, App. P.57 at ¶10, *Emphasis Added*)



[¶16] Further, in its conclusion, the District Court's order states: "Based upon the above reasons, this Court DENIES *Chase's* 60(b) motion on the grounds of res judicata pursuant to N.D.C.C. § 29-32.1-09(1) and as a misuse of process under N.D.C.C. 29-32.1-12(2)(b)" (Memorandum Opinion and Order, App. P.57 at ¶17)

[¶17] The Court attempts to use the statutes governing Post-Conviction Relief Applications to summarily deny Petitioner's Rule 60(b) motion, this is an abuse of discretion. Here, the Court has acted in an arbitrary manner and misapplies the law. There is no basis in case law to support such a conversion. Post-Conviction relief is civil in nature and thus is subject to the rules of civil procedure, including N.D.R.Civ.P. 60(b). This Court has previously heard cases where an appellant has filed a 60(b) motion in a Post-Conviction relief action, i.e. Palmer v State, 2012 ND 247, 824 N.W.2d 406. In these cases the District Court ruled on the merits of the Rule 60(b) motion, rather than trying to create a new post-conviction action. The District Court fails to explain how Petitioner can have two post-conviction actions in the same file number. The District Court presented no justification for its novel theory that one may file for post-conviction relief from a post-conviction relief judgement. This position is simply untenable, as a post-conviction relief action is a collateral attack on a criminal conviction. N.D.C.C. § 29-32.1 is clear in this respect. The United States Supreme Court has ruled on the treatment of Rule 60(b) motions in similar situations. Our Rule 60(b) is based on Fed.R.Civ.P.60(b). A Federal Habeas Corpus Proceeding under 28 U.S.C. § 2254 is similar to a post-conviction proceeding under N.D.C.C. 29-32.1. In Gonzalez v Crosby the United States Supreme Court addressed the question of whether a Rule 60(b) motion

would constitute a second or successive petitions, and thus be subject to the additional requirements of the Anti-Terrorism and Effective Death Penalty Act (AEDPA).

“We hold that a Rule 60(b)(6) Motion in a § 2254 case is not to be treated as a successive petition if it does not assert, or reassert claims for error in the movant’s state conviction.” Gonzalez v Crosby, 545 U.S. 528, 162 L.Ed.2d 480, 125 S.Ct 2641, 2651 (2005).

[¶18] The District Court did not follow the rules of civil procedure in this matter, and misapplied N.D.C.C. § 29-32.1. Additionally, the District Court ruled prior to holding a hearing and oral argument on the motion. As previously stated, Petitioner repeatedly requested argument and requested the Clerk of Court set a date and time. Motions are governed by N.D.R.Ct.3.2 which requires that oral argument be held if requested. “If any party who has timely served and filed a brief requests oral argument, the request must be granted.” (N.D.R.Ct.3.2(a)(3) *Emphasis Added*) The District Court has clearly abused its discretion. However, to the extent the Court wishes to address the issues of res judicata and misuse of process, they will be fully addressed below.

**II. Did the District Court err by finding that Petitioner’s 60(b) Motion was barred on the grounds of Res judicata and Misuse of Process?**

[¶19] The District Court’s Order claims that Petitioner’s 60(b) Motion is barred by res judicata. “*Chase’s* 60(b) motion is not proper because he has already appealed this Court’s order, which was affirmed, and therefore bars his motion on the grounds of res judicata.” (Memorandum Opinion and Order, App.P.57 at ¶17)

[¶20] The text of N.D.R.Civ.P.60(b) does not prohibit making the motion after an appeal has been taken. “Leave to make the motion need not be obtained from the

appellate court unless an appeal from the judgement is actually pending before that Court.” N.D.R.Civ.P. 60(c)(3). Further, the claims made by Petitioner in his Rule 60(b) motion were claims of fraud and ethical violations committed by his post-conviction attorney, who also represented Petitioner on appeal. These issues were not raised on appeal, nor is it logical that they would have been, attorney *Johnson* would not raise fraud and ethics claims against himself.

“Res judicata, or claim preclusion, prevents litigation of claims that were raised, or could have been raised, in prior actions between the same parties or their privies.” “[R]es judicata means a valid, existing final judgement from a Court of competent jurisdiction is conclusive with regard to claims raised, or those that could have been raised and determined, as to their parties and their privies in all other actions.” Holkesvig v Grove 2014 ND 57, 844 N.W.2d 557 quoting Ungar v North Dakota State Univ., 2006 ND 185, ¶10, 721 N.W.2d 16.

The doctrine of res judicata cannot apply to Petitioner’s Rule 60(b) motion.

[¶21] The District Court also claims that Petitioner’s motion is barred by misuse of process:

“Furthermore, the issues *Chase* presents are a repackaging of the issues that have already been considered in previous proceedings. The only difference is now *Johnson*: is an added focus. This is a misuse of the process and attempts to mask the 60(b) motion for what it really is, a post-conviction relief motion attempt. “(Memorandum Opinion and Order, App. P.57 at ¶10, *Emphasis Added*)

The District Court appears to misunderstand the purpose of Petitioner’s arguments regarding his prior counsel, attorney *Bouhey*. Petitioner does not attempt to repackage or re-litigate any of the issues regarding attorney *Bouhey*. Rather, he presents the arguments to show how the evidentiary hearing should have gone but for the fraud and unethical actions of Attorney *Johnson*. Petitioner was required to show not only that attorney *Johnson* acted unethically and committed fraud while representing

him, but that the outcome of the hearing would have been different. Since attorney *Johnson* directed Petitioner to lie at the evidentiary hearing, the explanation required a more in depth look at what transpired. The requirement of a meritorious underlying argument was discussed by this Court in Palmer v State, 2012 ND 237 824 N.W.2d 406. While the specific claim in Palmer is mistake, inadvertence, or excusable neglect, the principle still applies. In his concurring opinion Chief Justice VandeWalle stated:

“However, in this instance, had there been a substantive argument submitted on the merits of the Petition for post-conviction relief, I would reverse.” Id. At ¶11.

Further, Justice Sandstrom concurring specifically:

“Because Palmer has made no showing of a meritorious argument on post-conviction relief, I would affirm. For relief under N.D.R.Civ.P.60(b), Palmer needed to show not only mistake, inadvertence, or excusable neglect, but also evidence that would have precluded summary disposition of the motion for post-conviction relief...Palmer has never made a showing of a meritorious argument precluding summary disposition of his motion for post-conviction relief. Because the defect was apparent on the face of Palmer’s filing for relief under N.D.R.Civ.P. 60(b), I would have summarily affirmed the District Court in Palmer’s most recent prior appeal.” Id. at ¶13-14.

[¶22] What the District Court claims is a repackaging of issues relating to trial attorney *Bozhey* is merely Petitioner complying with the precedent of this Court and showing that but for attorney *Johnson*’s unethical actions he would have a meritorious argument in his Post-Conviction Relief application. Petitioner could not have raised the claims of unethical actions of attorney *Johnson* in prior proceedings. He is not barred by misuse of process from bringing a claim in a motion under Rule 60(b).

**III. Did the District Court err by finding that no corroborating evidence was presented to support Petitioner's claim that at his attorney directed him to lie?**

[¶23] In its order denying Petitioner the requested relief, the District Court states:

“This Court will address the grounds *Chase* has against *Johnson*. The first ground is that *Johnson* instructed him to lie. No corroborating evidence has been presented showing the unethical actions of *Johnson*. In fact, this is the exact same allegation *Chase* made against *Boyshey*. Now, this Court is suspect of the original allegation directed against *Boyshey* since it is highly unlikely that two attorney's representing the same individual are guilty of the same unethical behavior.” (Memorandum and Order, App.P.57 at ¶14).

[¶24] The claim that no corroborating evidence was presented is untrue. In addition to Petitioner's sworn allegations in his Brief in Support of Motion under Rule 60(b) for Relief from Judgement, he presented the affidavit of *Sean Kovalerich* to support his claim. This is precisely the reason Petitioner repeatedly requested oral argument and taking of evidence on the motion. Both Petitioner and *Kovalerich* would have testified in support of the claim that attorney *Johnson* directed Petitioner to lie. It is an abuse of discretion for the District Court to claim that no evidence was presented when an Affidavit was submitted and the District Court refused to schedule a hearing where corroborative testimony would have been presented.

**IV. Did the Court err by finding that Petitioner is bound by the unethical actions of his former counsel?**

[¶25] In its order, the District Court stated:

“This Court will also not comment upon how *Johnson* presented his case at the post-conviction hearing. However, ‘[u]nder long-standing agency principles, it is recognized a client is bound by the actions and inactions of that client's attorney

which occur in the scope of the attorney's authority.' Dvorak v Dvorak, 2007 ND 79, ¶18, 732 N.W.2d 698, referencing Carrier Creek Drainage Dist. V LandOne, L.L.C., 712 N.W.2d 168, 173 (Mich. App. 2005). Whatever actions Pulkrabek did or didn't do, Petitioner is bound by those actions."(Memorandum and Order, App. P.57 at ¶16).

[¶26] Petitioner's objections related not to how attorney Johnson presented his case at the post-conviction hearing, but to the numerous unethical actions. The specific objection, that attorney Johnson's actions so distorted Petitioner's claim that it became impossible to obtain relief, was in reference to attorney Johnson directing Petitioner to lie at the hearing. Attorney Johnson also committed many other ethical and procedural errors which were addressed in Petitioner's Rule 60(b) motion. These included, failing to request a transcript of the evidentiary hearing on appeal, including material in the Supreme Court Appendix on appeal that was not presented to the District Court, and directing Petitioner to lie in a proposed N.D.R.Crim.P.35 motion.

[¶27] A client is not bound by the actions of his attorney when those actions do not occur within the scope of the attorney's authority. An attorney does not act within the scope of his authority when he acts in violation of ethical and procedural rules; particularly actions which could have resulted in the imposition of sanctions. The District Court has the power to grant relief from those unethical actions which harmed Petitioner's case.

“Rule 60(b)(6) is a grand reservoir of equitable power.’ Harrell v. DCS Equip. Leasing Corp., 951 F.2d 1453, 1458 (5<sup>th</sup> Cir. 1992) [Omitted], and it affords Courts the discretion and power ‘to vacate judgements whenever such action is appropriate to accomplish justice.’ Gonzalez, 545 U.S. 542, 125 S.Ct. 2641 [Omitted]” Phelps v Alameda, 569 F.3d 1120 (CA 9, 2009)

[¶28] The District Court abused its discretion in finding that Petitioner was bound by the unethical actions of his attorney.

**V. Did the Court err by denying Petitioner's motion under rule 60(b) without appointing counsel as requested?**

[¶29] This Court reviews the denial of appointed counsel under an abuse of discretion standard, Bell v State, 2001 ND 188, 636 N.W.2d 438.

[¶30] Simultaneously with his Motion under Rule 60(b), Petitioner requested appointed counsel and submitted an Application for Indigent Defense Services. Petitioner had previously fired his privately retained counsel attorney *Johnson*. Petitioner explained to the Court that *Johnson's* services were paid for by a friend and that he himself was indigent and unable to pay for counsel to represent him. Attorney *Johnson's* continued representation was necessarily in conflict with the claims raised in the Rule 60(b) motion, The District Court acknowledges that Petitioner applied for appointed counsel but the Court did not take any action on the request. "Petitioner has also requested appointed counsel. Id. at ¶23 (Memorandum and Order, App.P.57 at ¶5).

[¶31] Petitioner's motion under Rule 60(b) is a continuation of his post-conviction relief action and was filed in the same case. Petitioner did not request appointed counsel for his initial application or appeal; however after the unethical actions of attorney *Johnson* it became necessary to request counsel. In discussing when counsel should be appointed, this court has held that:

"...trial courts would be well advised to appoint counsel for most indigent applicants seeking post-conviction relief for the first time and only in 'exceptional' circumstances should counsel not be appointed." Bell v State, 2001 ND 188, 636 N.W.2d 438.

[¶32] Petitioner should have been appointed counsel and the Court abused its discretion by failing to grant the request.

### Conclusion

[¶33] The District Court abused its discretion in this matter by considering Petitioner's Rule 60(b) motion to be a post-conviction application and denying it without the required hearing. Additionally, the Court abused its discretion by finding that the motion was barred by res judicata and misuse of process, and by finding that there was no corroborating evidence presented. Petitioner requests that this Court reverse the decision and remand this matter back to the District Court with an order to hold a hearing and appoint counsel.

Dated this the 19<sup>th</sup> day of February, 2019

*Lorry Van Chase*

Lorry Van Chase  
#40685  
Plaintiff/Appellant  
In Propria Persona  
North Dakota State Penitentiary  
P.O. Box 5521  
Bismarck, ND 58506



IN THE SUPREME COURT OF NORTH DAKOTA

Lorry Van Chase	)	
	)	Supreme Court No. 20190023
Petitioner/Appellant	)	
	)	
Vs.	)	District Court No. 40-CV-2016-148
	)	
State of North Dakota,	)	
	)	<b>Affidavit of Service by Mail</b>
Respondent/Appellee	)	

[¶1] Lorry Van Chase, being duly sworn, deposes and states that he is of legal age and that on the 19<sup>th</sup> day of February 2019, he served the **Appellant's Brief** and **Appendix** in Supreme Court No. 20190023 by mail directed to the following persons and addresses by placing them in the U.S. Mail at the North Dakota State Penitentiary with postage prepaid.

Ryan Thompson  
States Attorney  
P.O. Box 1079  
Rolla, ND 58367

Subscribed and sworn to before me this 19<sup>th</sup> day of February 2019

Lorry Van Chase

Lorry Van Chase #40685  
North Dakota State Penitentiary  
P.O. Box 5521  
Bismarck, ND 58506  
Petitioner/Appellant  
In Propria Persona

\_\_\_\_\_  
Notary Public 

ERIC HASBY  
Notary Public  
State of North Dakota  
My Commission Expires July 5, 2022