

THE SUPREME COURT  
STATE OF NORTH DAKOTA  
Supreme Court No. 20200152  
District Court No. 30-2020-CV-00394

Derek Matthew Wisham, )  
 )  
 Plaintiff/Appellant, )  
 )  
 -v.- )  
 )  
 State of North Dakota, )  
 )  
 Respondent/Appellee. )

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**BRIEF OF THE RESPONDENT/APPELLEE**

**\*\*ORAL ARGUMENT REQUESTED\*\***

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RESPONSE TO APPEAL FROM THE ORDER DENYING APPLICATION OF POST  
CONVICTION RELIEF ENTERED APRIL 28, 2020 IN  
MORTON COUNTY DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT, NORTH DAKOTA  
THE HONORABLE DAVID E. REICH, PRESIDING

Allen Kopyy, State Id. #04201  
State's Attorney  
Morton County  
210 2<sup>nd</sup> Ave NW  
Mandan, ND 58554  
Phone: 701.667.3350  
[mortonsa@mortonnd.org](mailto:mortonsa@mortonnd.org)  
*Attorney for Respondent/Appellee*

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### Oral Argument:

Oral argument has been requested to rebut Petitioner’s written arguments on their merits.

## **STATEMENT OF THE ISSUES**

[¶1] I. Whether the district court erred by denying Mr. Wisham’s petition for post-conviction relief for a violation of the statute of limitations.

[¶2] II. Whether the district court erred by applying the doctrine of res judicata and misuse of process to Mr. Wisham’s claims

## **STATEMENT OF THE CASE AND FACTS**

[¶3] Mr. Wisham pleaded guilty to sexual imposition and assault on December 21, 2015, and judgment was entered the following day. *See* Case No. 30-2014-CR-00718. He subsequently applied for post-conviction relief on that case in 30-2016-CV-00631, 30-2017-CV-00233, and 30-2017-CV-00520. In his first case, Mr. Wisham specifically contended that his attorney did not explain to him the consequences of entering a guilty plea. Case No. 30-2016-CV-00631, Index #1. Furthermore, Mr. Wisham wrote to the court to argue the point that his plea was not voluntary because his attorney for the case, Ms. Kiara Kraus, refused to raise the issue that his plea was voluntary. Case No. 30-2016-CV-00631, Index #46. Mr. Wisham also cited denial of effective assistance of counsel in as grounds for post-conviction relief. The court found in that case that Mr. Wisham was unable to meet his burden under *Strickland v. Washington*, and therefore dismissed his application for post-conviction relief. Case No. 30-2016-CV-00631, Index #27 ¶11. This court affirmed the dismissal in *Wisham v. State*, 2017 ND 235, 903 N.W.2d 60.

[¶4] In Mr. Wisham’s second application for post-conviction relief, he raised the issue of an involuntary plea, asserting that his good time was improperly calculated and that his registration requirement is unconstitutional. 30-2017-CV-00233, Index #1. This matter was

summarily dismissed (30-2017-CV-00233, Index #8) and affirmed by the court in *Wisham v. State*, 2017 ND 236, 903 N.W.2d 60.

[¶5] In his third application, Mr. Wisham asserted his plea agreement was “breach[ed]” and that his good time was calculated improperly. 30-2017-CV-00520, Index #1. Again, the court dismissed his claim. 30-2017-CV-00520, Index #18.

[¶6] On March 12, 2020, Mr. Wisham applied for his fourth attempt at post-conviction relief in 30-2020-CV-00394. Index #1. The state answered on March 25, 2020, asserting that the statute of limitations bars recovery, as does the doctrine of res judicata and misuse of process, and requested summary judgment. Index #8. Mr. Wisham was served notice of this motion the same day. Index #9, 10. The court denied Mr. Wisham’s application on the basis offered by the state. Index #11. The court also denied Mr. Wisham’s motion to reconsider. Index #14. Thereafter, Mr. Wisham appealed to this Court.

## **LAW AND ARGUMENT**

### **I. The District Court Did Not Err By Denying Mr. Wisham’s Petition For Post-Conviction Relief For Violating The Statute Of Limitations**

#### **Standard of Review**

[¶7] Post-conviction relief applications are governed by the North Dakota Rules of Civil Procedure. *Haag v. State*, 2012 ND 241 ¶ 4, 823 N.W.2d 749, 751. The standard for reviewing a summary denial of a petition is the same as the standard for summary judgment; there must be no genuine issue of material fact, and the party requesting summary disposition is entitled to judgment as a matter of law. *Id.* In *Atkins v. State*, 2017 ND 290, (hereafter *Atkins I*), the Court discussed the Standard of Review for summary dismissal of post-conviction relief cases, citing to Section 29-32.1-09(3) of the North Dakota Century Code:

The court may grant a motion by either party for summary disposition if the application, pleadings, and 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.

*Atkins v. State*, 2017 ND 290, ¶5, 904 N.W.2d 738.

[¶8] The *Atkins* Court continued that the applicant has the burden of establishing grounds for post-conviction relief. *Atkins I* at ¶6 (citing *Chase v. State*, 2017 ND 192, ¶5, 899 N.W.2d 280). Although the *Atkins I* Court cited *Steinbach v. State*, 2003 ND 46, ¶15, 658 N.W.2d 355 in stating that claims of ineffective assistance of counsel are ordinarily unsuited to summary disposition without an evidentiary hearing, the *Atkins I* Court stated that it has “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.” *Atkins I*, at ¶6 (citing *Steinbach v. State*, 2003 ND 46, ¶15, 17, 658 N.W.2d 355).

**Mr. Wisham’s application is not timely and therefore may be summarily dismissed**

[¶9] Under N.D.C.C. § 29-32.1-01(2)(a-b), an application for post-conviction relief must be filed within two years of the date the conviction becomes final. A conviction becomes final when the time for appeal of the conviction to the North Dakota Supreme Court expires. In order to appeal to the North Dakota Supreme Court, a notice of appeal must be filed within 30 days after the entry of judgment. N.D.R.App.P. 4(b)(1)(a). If a petition falls outside of the two year statute of limitations, petitioner’s claim may only persist if one of the following exceptions apply:

- (1) newly discovered 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 he 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)

¶10] The court entered a judgment against Mr. Wisham on the December 22, 2015, and Mr. Wisham did not file an appeal. *See* Case No. 30-2014-CR-00718. Therefore, Mr. Wisham's conviction became final on January 21, 2016. Likewise, the final day to submit a timely appeal under Title 29 was on January 21, 2018. Mr. Wisham brought his motion on March 12, 2020, therefore his motion is not timely. Case No. 30-2020-CV-00394 Index #1.

¶11] Furthermore, no exceptions apply. Mr. Wisham's claims are that his plea agreement was not voluntary, and that he was denied effective assistance of counsel. *Appellant's Brief* ¶16, 17. Neither of these claims relate to new evidence. Likewise Mr. Wisham has not asserted that he suffers any handicap, physical or mental.

¶12] Mr. Wisham's only claim is that *State v. Atkins*, 2019 ND 145, (hereafter *Atkins II*) is retroactively applicable to his claim. *Appellant's Brief* ¶12. Mr. Wisham does not state how this authority retroactively affects his petition, beyond the assertion that the case offers "a new interpretation of how post-conviction relief matters are handled." *Appellant's Brief* ¶12. In fact Mr. Wisham does not even list *Atkins II* in their table of authorities when appealing this case. *See generally, Appellant's Brief.* In *Atkins II*, the appellant appealed the decision of the district court to deny his motion to withdraw a guilty plea and his motion for a new trial. *Atkins II* at ¶3. The court affirmed the district court, and held that (1) appellants may not avoid the procedures for post-conviction relief by filing their motion under a rule of criminal procedure or in their criminal file rather than filing as a new action under post-conviction relief; (2) that failure to raise a claim in a previous post-trial appeal was grounds

to bar a claim for misuse of process; (3) that the appellant's previous claim of ineffective assistance of counsel barred his subsequent claims under the same theory on the grounds of res judicata and misuse of process respectively; and (4) that appellant's offered evidence did not meet the statutory requirements of newly discovered evidence to satisfy grounds for relief. *Atkins II*, 2019 ND 145 ¶ 11, 14, 16, 22.

[¶13] None of these holdings affect how Mr. Wisham's post-conviction relief matter should be "handled" as Mr. Wisham asserts. If the first holding retroactively applies to Mr. Wisham's application for post-conviction relief, it will not grant him relief. Here, Mr. Wisham has properly designated his petition as a request for post-conviction relief, therefore the court need not apply this holding to the case at hand. Likewise, the second holding is of no help to Mr. Wisham, if anything it will be authority that is contrary to his petition. The third holding is unhelpful to Mr. Wisham for the same reason as the second. The fourth holding does not apply to this case as Mr. Wisham does not offer new evidence to assert his innocence. Therefore, *Atkins II* does not establish a new interpretation of state law which is applicable to Mr. Wisham's case. Therefore no exception applies, and Mr. Wisham's application is barred by the statute of limitations set forth in N.D.C.C. § 29-32.1-01(2)(a-b).

#### **The court properly entered a summary disposition**

[¶14] The court has properly entered a summary disposition under N.D.C.C. § 29-32.1-09. The statute provides that a court may "on its own motion . . . enter a judgment denying a meritless application on any and all issues raised in the application before any response by the state." *Id.* In *Ourada v. State*, 2019 ND 10, the court held that a court may enter a summary disposition after the state has filed in response only if due process of notice and an opportunity to be heard is provided. *Id.* at ¶ 6. In that case, this court found that because the



state's motion for summary dismissal was not accompanied by proper notice, the court could not properly dismiss the case. *Id.* Conversely, if an appellant is provided notice of the state's motion to dismiss, and is provided 14 days to respond to that motion, the court may properly dismiss the motion Under § 29-32.1-09. *Atkins v. State*, 2019 ND 146 ¶ 5-6 (hereafter, *Atkins III*). In *Atkins III* this Court noted that the judgment was entered only four days later, indicating that the appellant had not been given an adequate time to respond to the state's motion. *Id.* at ¶3, 6.

[¶15] Mr. Wisham asserts that because the summary disposition was entered after the state responded, it lacked the authority to summarily dismiss the matter. *Appellant's Brief* ¶11, 19. Mr. Wisham's argument rests on the assertion that the court may not enter a summary disposition because the state has responded. *Id.* at ¶19. This misunderstands the holdings in *Ourada* and *Atkins III*. These cases clearly demonstrate that the court may grant a summary disposition provided there is notice and an opportunity to be heard, specifically, the appellant must be given 14 days to respond. Here, Mr. Wisham was duly served with notice that the state had filed an answer and that the state had motioned for summary judgment on the 25<sup>th</sup> of March, 2020. 30-2020-CV-00394, Index #9, 10. Judgment was entered 33 days later on the 28<sup>th</sup> of April 2020, meaning that Mr. Wisham could have responded to the state's motion at any time prior to the judgment. 30-2020-CV-00394, Index #11. Therefore, the requirements of due process are met in this case and Mr. Wisham's reliance on *Ourada* is improper.

[¶16] Therefore, the material facts are that Mr. Wisham was required to file his motion for post-conviction relief no later than January 21<sup>st</sup>, 2016. Mr. Wisham's filing on March 21, 2020, is well beyond that deadline. Furthermore, the state properly motioned for dismissal,

and Mr. Wisham was provided both notice and an opportunity to be heard, therefore the state was entitled to judgment as a matter of law. Therefore the district court's dismissal of this case should be affirmed.

## **II. The District Court Did not Err By Applying the Doctrine of Res Judicata and Misuse of Process**

[¶17] Even if this court determines that the two year statute of limitations need not apply, the district court never the less was correct in dismissing the claim on the grounds of res judicata and misuse of process. The court has properly determined that Mr. Wisham's motion was improper due to Res judicata and misuse of process. Under N.D.C.C. § 29-32.1-12(1), applications for post-conviction relief may be denied if "the same claims were fully and finally determined in a previous proceeding." Under § 29-32.1-12(2), misuse of process occurs when an applicant "presents a claim for relief which the applicant inexcusably failed to raise either in a proceeding leading to the judgment of conviction and sentence or in a previous post-conviction relief proceeding." The court has explained:

Post-conviction proceedings are not intended to allow defendants multiple opportunities to raise the same or similar issues, and defendants who inexcusably fail to raise all of their claims in a single post-conviction proceeding misuse the postconviction process by initiating a subsequent application raising issues that could have been raised in the earlier proceeding.

*Atkins II* at ¶ 12. For example, in *Atkins II*, when the appellant failed to pursue a claim of ineffective assistance of counsel, only to raise the claim again in a new post-conviction relief application, this court found that his claim was barred by res judicata, and to the extent that his claim differed from his prior claim, misuse of process. *Id* at ¶ 16.

[¶18] Here, Mr. Wisham asserts two grounds for post-conviction relief, the first being a lack of a voluntary guilty plea, and the second being ineffective assistance of counsel.

*Appellant's Brief* ¶16, 17. Both of these claims have been raised in previous proceedings and are therefore barred under res judicata and/or misuse of process.

**Mr. Wisham's Assertion That His Plea Was Involuntary Is Barred By Res Judicata  
And Misuse Of Process**

[¶19] Mr. Wisham's basis for an involuntary plea rests on ten assertions: (1) that there was a "breach of contract" with regard to his plea agreement; (2) that he did not agree to the denial of probation; (3) he did not receive a proper calculation of good time; (4) he did not agree to sex offender registration; (5) that his plea is improperly listed as gross sexual imposition; (6) that he would not have entered an Alford plea had he known the consequences of that plea; (7) that his attorney did not explain the punishment and requisite burdens of proof upon the state; (8) that he has been subject to excessive treatment contrary to his plea agreement; (9) his treatment is additional punishment; and (10) his rights have not been restored, violating due process. *Appellant's Brief*, ¶16. Taken together, these assertions mean that Mr. Wisham's plea was not voluntary, so says the appellant. *Id.*

[¶20] Still, Mr. Wisham has previously asserted his plea was not voluntary in 30-2016-CV-00631. Mr. Wisham specifically contended that his attorney did not explain to him the consequences of entering a guilty plea. 30-2016-CV-00631, Index #1. Indeed, in that case, Mr. Wisham wrote to the court to argue the point that his plea was not voluntary because his attorney for the case, Ms. Kiara Kraus, refused to raise the issue that his plea was voluntary. 30-2016-CV-00631, Index #46. The case was dismissed, and the dismissal was affirmed by this court in *Wisham v. State*, 2017 ND 235. Mr. Wisham raised the issue of an involuntary plea again in 30-2017-CV-00233, asserting that his good time was improperly calculated and that his registration requirement is unconstitutional. 30-2017-CV-00233, Index #1. This matter was summarily dismissed and affirmed by the court in *Wisham v. State*, 2017 ND 236.

Furthermore, while not specifically citing lack of a voluntary plea, Mr. Wisham previously asserted his plea agreement was “breach[ed]” in 30-2017-CV-00520 and that his good time was calculated improperly. 30-2017-CV-00520, Index #1. Again, the court dismissed his claim. Therefore, assertions (1), (3), (6), (7), and (8) were specifically addressed by the court, and dismissed, barring them for further consideration under res judicata. Likewise, the remaining assertions relate to the voluntariness of his plea according to Mr. Wisham and therefore should have been raised in 30-2016-CV-00631, 30-2017-CV-00233, or 30-2017-CV-00520. Because Mr. Wisham offered no reason for failing to raise these issues, they are likewise barred as misuse of process. Therefore, Mr. Wisham’s claim of an involuntary plea is barred by res judicata and to the extent that his claims differ from his prior claims, misuse of process.

**Mr. Wisham’s *Strickland* Claim Is Also Barred By Res Judicata And Misuse Of Process**

[¶21] Mr. Wisham’s *Strickland* claim is also barred by res judicata and and/ or misuse of process. Mr. Wisham’s claim to ineffective assistance of counsel will be limited in this instance to his counsel in his original case, because “an applicant may not claim constitutionally ineffective assistance of postconviction counsel in proceedings under this chapter.” §29-32.1-09(2). Furthermore, Mr. Wisham previously cited denial of effective assistance of counsel in 30-2017-CV-00631 as grounds for post-conviction relief. 30-2017-CV-00631, Index #1. The Court found in that case that Mr. Wisham was unable to meet his burden under *Strickland v. Washington*, and therefore dismissed his application for post-conviction relief. Case No. 30-2016-CV-00631, Index #27 ¶11. This Court affirmed the dismissal in *Wisham v. State*, 2017 ND 235. Therefore, Mr. Wisham’s claim as to ineffective assistance of counsel is barred under the doctrine of res judicata. Any issues he did not raise

in 30-2017-CV-00631 that he desires to raise now must be accompanied by an explanation as to why he did not raise them in his initial application. Mr. Wisham has provided no reasons, therefore, any remaining claims he may have should be barred by misuse of process. [¶22] Therefore, the material facts are that Mr. Wisham has previously raised issues of involuntary pleas and ineffective assistance of counsel. Furthermore, the state properly motioned for dismissal on those grounds, therefore the state was entitled to judgment as a matter of law. Therefore the district court's dismissal of this case should be affirmed.

### CONCLUSION

[¶23] WHEREFORE, the State respectfully requests that this Court affirm the district court's order denying Mr. Wisham's application for post-conviction relief.

Dated this 6<sup>th</sup> day of August, 2020.

/s/Allen Kopyy

Allen Kopyy, State Id. #04201

Morton County State's Attorney

210 2<sup>nd</sup> Ave NW

Mandan, ND 58554

Phone: 701.667.3350

E-serve: mortonsa@mortonnd.org

*Attorney for Respondent/Appellee*

**CERTIFICATE OF COMPLIANCE**

[¶24] The undersigned certifies that the Appellee’s Brief contains twenty-four (24) pages consisting of the cover page through the conclusion and signature block, thereby complying with the page limits outlined in North Dakota Rules of Appellate Procedure Rule 32(a)(8)(A).

Dated this 6<sup>th</sup> day of August, 2020.

/s/Allen Kopyy

Allen Kopyy, State Id. #04201

Morton County State’s Attorney

210 2<sup>nd</sup> Ave NW

Mandan, ND 58554

Phone: 701.667.3350

E-serve: mortonsa@mortonnd.org

*Attorney for Respondent/Appellee*

THE SUPREME COURT  
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Derek Matthew Wisham, )  
 )  
Plaintiff/Appellant, )  
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State of North Dakota, )  
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Respondent/Appellee. )

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**CERTIFICATE OF SERVICE**

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[¶1] The undersigned hereby certifies that on the 4th day of August, 2020, a true and correct copy of the **BRIEF OF THE APPELLEE (corrected)** in PDF was filed with the Clerk of the North Dakota Supreme Court with a copy served upon the Petitioner/Defendant/Appellant by electronic mail to his counsel of record, Kiara Kraus-Parr to her email address: [service@kpmwlaw.com](mailto:service@kpmwlaw.com) .

Dated the 4th day of August, 2020.

/s/ Gabrielle J. Goter  
Gabrielle J. Goter, ID #06595  
Assistant Morton County State's Attorney  
210 2<sup>nd</sup> Ave. NW  
Mandan, ND 58554  
Phone: 701.667.3350  
E-serve: [mortonsa@mortonnd.org](mailto:mortonsa@mortonnd.org)

THE SUPREME COURT  
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**CERTIFICATE OF SERVICE**

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[¶1] The undersigned hereby certifies that on the 6th day of August, 2020, a true and correct copy of the **BRIEF OF THE APPELLEE (corrected)** in PDF was filed with the Clerk of the North Dakota Supreme Court with a copy served upon the Petitioner/Defendant/Appellant by electronic mail to his counsel of record, Kiara Kraus-Parr to her email address: [service@kpmwlaw.com](mailto:service@kpmwlaw.com) .

Dated the 6<sup>th</sup> day of August, 2020.

/s/ Gabrielle J. Goter  
Gabrielle J. Goter, ID #06595  
Assistant Morton County State's Attorney  
210 2<sup>nd</sup> Ave. NW  
Mandan, ND 58554  
Phone: 701.667.3350  
E-serve: [mortonsa@mortonnd.org](mailto:mortonsa@mortonnd.org)