

20200266

FILED  
IN THE OFFICE OF THE  
CLERK OF SUPREME COURT  
OCTOBER 20, 2020  
STATE OF NORTH DAKOTA

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Cody Michael Atkins

Petitioner- Appellant,

Vs.

State of North Dakota

Respondent- Appellee,

Supreme Court No. 20200266

Case No. 18-2020-cv-2006

On appeal from the Order Denying Application for Post-Conviction Relief

Filed September 29, 2020,

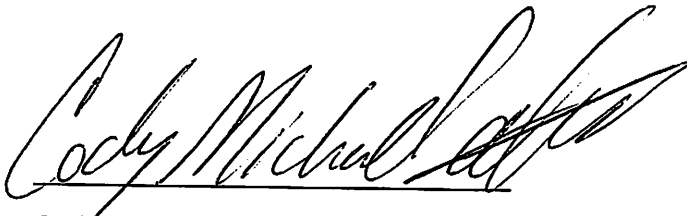
Grand Forks County District Court

North East Central Judicial District

State of North Dakota

The Honorable John Thelen, presiding

APPELLANT'S BRIEF



Cody Michael Atkins # 41930  
2521 Circle Drive  
Jamestown, ND 58401

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**[¶1] Statement of the Issues:**

1. Whether the District Court erred in denying Atkins Application for Post-Conviction Relief.
2. Whether the District Court erred by not giving Atkins Notice that his Application is being dismissed

### **Statement of the Case**

[¶2] This is an appeal from an Order denying an Application for Post-Conviction regarding Cody Michael Atkins (hereinafter referred to as “Mr. Atkins”). On September 17, 2020 Atkins filed a pro se Application for Post-Conviction Relief. See. Appellant App. at 1. The State never filed an answer, on September 29, 2020, the Court entered an Order denying Atkins Application for Post-Conviction Relief. Atkins filed an appeal on October 5, 2020.

### **Statement of the Facts**

[¶3] Mr. Atkins plead guilty to gross sexual imposition and Judgement was entered on June 29, 2015. Mr. Atkins appealed the Criminal Judgement to the North Dakota Supreme Court, the Court affirmed the Criminal Judgement. *State v. Atkins*, 2016 ND 13, 873 N.W.2d 676.

[¶4] Mr. Atkins filed his first post-conviction relief on March 23, 2016, case 18-2016-cv-559. Mr. Atkins petition was dismissed by the Court on July 1, 2016. Atkins didn't appeal.

[¶5] Mr. Atkins filed his second post-conviction on September 21, 2016, case 18-2016-cv-1909. The State filed an answer, Atkins filed a supplemental brief and the state filed for summary dismissal which was granted. Atkins appealed in which the Supreme Court affirmed. *Atkins v. State*, 2017 ND 290.

[¶6] Mr. Atkins filed a Motion to Vacate Judgement and Withdraw Plea on February 5, 2018. After extensive briefing a hearing was held on August 10, 2018. The District Court denied the Motions on October 31, 2018 and Atkins appealed in which the Supreme Court affirmed the decision. *State v. Atkins*, 2019 ND 145.

[¶7] On November 2018 Atkins filed another application for post-Conviction, the State filed an answer on December 4, 2018 asking the Court to dismiss the application based on misuse of process and res judicata. The District Court filed an Order on December 7, 2018. Atkins appealed to the Supreme Court in which the Supreme Court reversed and remanded allowing Atkins to respond to the State's

Motion. *Atkins v. State*, 2019 ND 146. Atkins filed his response on June 3, 2019, a hearing was held on November 8, 2019. The District Court issued an Order on December 19, 2019. Atkins filed a Motion for Reconsideration. A hearing was held on June 5, 2020, where the District Court denied the Motion. Atkins has appealed which is pending.

[¶8] Atkins filed another Post-Conviction on September 17, 2020. The State never filed an answer, without any notice the District Court concluded that Atkins is time barred and barred by *res judicata* and abuse of process. See Appellant App. at 17. Atkins now appeals.

### Law & Argument

#### I. Whether the District Court Erred in Denying Atkins Application for Post-Conviction Relief.

[¶9] Mr. Atkins filed Post-Conviction Relief. Appellant App. at 1. The State never filed an answer. In fact the District Court denied the Application on the basis of misuse of process and *res judicata* and statute of limitation.

[¶10] Post-Conviction relief proceeding under the Uniform Post-Conviction 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. The affirmative defenses of Misuse of Process and *Res Judicata* are part of the uniform post-conviction procedure act. N.D.C.C. § 29-32.1-12. However in N.D.R. Civ. Procedure, Rule 8 it states “A party must affirmatively state any avoidance or affirmative defense.” In Post-Conviction proceedings there (2) party’s, there’s the Petitioner and Respondent, specifically in Atkins Application the party’s would be Cody Michael Atkins and the State of North Dakota. Further the State did not file an answer so 29-32.1-12 should not apply. As 29-32.1-12(3) states in part “*res judicata* and misuse of process are affirmative defenses to be pleaded by the state.” So by law the judge has no authority under that subsection to deny Atkins application unless a party affirmatively asserts that defense.

[¶11] Atkins argues the reason he didn't file his brief is because in 29-32.1-04 states "arguments, citations, and discussion of authorities are unnecessary." Atkins also thought he would be given notice if the Court tried to dismiss it. (This will be addressed further in the brief).

[¶12] Atkins argues the district Court overlooked his Application, as Atkins raised the Actual Innocence Exception. In that Exception the District Court must determine if Atkins presents evidence so strong that no reasonable juror would find him guilty. See *Schlup v. Delo*, 513 U.S. 298 only after would that allow his constitutional issues to come forward. Atkins argues that the actual innocence exception can be found in 29-32.1-01 (3) (a) (1). Atkins would also argue that if he met the actual innocence exception he would be able to bring back successive petition(s) so that is why Atkins brought back all his constitutional issues with the actual innocence expectation as the first issue. *Id.* at 316

## II. Whether the District Court erred by not giving Atkins Notice that his Application is being dismissed

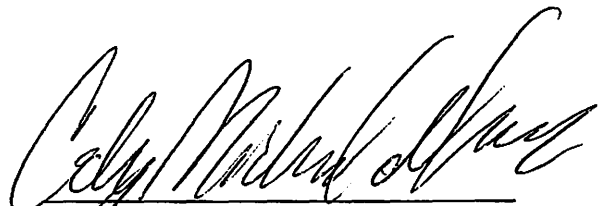
[¶13] This Court has held that the Petitioner is required to receive notice before dismissing an application. *Vogt v. State*, 2019 ND 236, *Ourada v. State*, 2019 ND 10,921 N.W.2d 677, *Chisholm v. State*, 2014 ND 125. Atkins argues that due process even in post-conviction setting requires, notice and an opportunity to be heard. *Ourada v. State*, 2019 ND 10, ¶ 6. The least the Court should have done is provided Atkins with Notice that the Court was going to dismiss the application so Atkins could properly respond. It is clear from the record that the Court provided no notice to Atkins of its intent to dismiss. See Appendix at. 1

[¶14] The Court in *Riak* further stated that "The amendments to N.D.C.C. § 29-32.1-09 changed the law, and the statute now expressly authorizes a court to dismiss an application on its own motion for various reasons, including when the claims in the application are meritless. However, we do not agree that the statute waives the previous requirement that an applicant be given notice and an opportunity to submit evidence before the court considers evidence outside the pleading to determine a claim is meritless." *Riak*

v. State, 2015 ND 120 ¶ 16. Atkins argues that this Court has many time held that a Petitioner is required notice and an oppuranity to respond and support his Application.

**CONCLUSION**

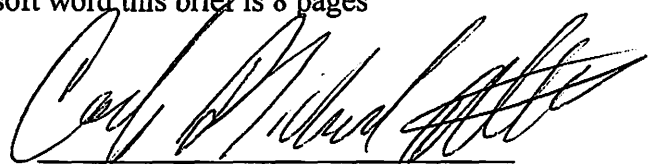
[¶15] Atkins respectfully request this honorable Court Reverse and Remand back to the District Court with instructions to provide sufficient notice to Mr. Atkins that the Courts intent is to dismiss the application and allow Mr. Atkins to file a brief in support of his Application.



Cody Michael Atkins, Inmate # 41930  
2521 Circle Drive  
Jamestown, ND 58401

**Certificate of compliance**

Pursuant to Rule 32 (8), Rule 32(e) this Appellant brief does comply with the page count authorized which is 38 pages . Pursuant to Microsoft word this brief is 8 pages



Cody Michael Atkins, Inmate # 41930  
2521 Circle drive  
Jamestown, ND 58401



IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Cody Michael Atkins, )  
Appellant, ) **CERTIFICATE OF SERVICE**  
Vs. )  
State of North Dakota, )  
Appellee. ) Case No. 20200266

I, the undersigned, hereby certify that on this 13 day of October, 2020, I served true and correct copies of the foregoing:

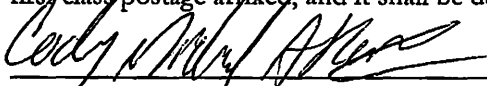
**APPELLANT'S BRIEF**  
**APPELLANT'S APPENDIXS**

Upon the following parties:

State of North Dakota  
124 South 4<sup>th</sup> Street  
Grand Forks, ND 58203

Clerk of Supreme Court  
600 East boulevard Ave  
Bismarck, ND 58505

By submitting same to a designated civilian employee of the James River Department of Corrections for a prompt processing and mailing by authorized prison personnel within the facility mailroom, with sufficient first class postage affixed, and it shall be deemed FILED as of the above date.

  
Cody Michael Atkins, Inmate # 41930  
2521 Circle Drive, JRCC  
Jamestown, ND 58401