

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Cody Michael Atkins, Petitioner/Appellant, v. State of North Dakota, Respondent/Appellee.	Supreme Court Case No: 2020266 Case No.: 18-2020-CV-2006 PETITION FOR REHEARING
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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

PETITION FOR REHEARING

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North Dakota Cases

Chisholm v. State, 2014 ND 125, ¶ 18, 848 N.W.2d 703 (N.D. 2014) ¶ 3

Curtiss v. Curtiss, 2016 ND 197, 886 N.W.2d 565 (N.D. 2016) ¶ 2

Gonzales v. State, 2019 ND 47, 923 N.W.2d 143 (N.D. 2019) ¶ 3

Johnson v. State, 2010 ND 213, 790 N.W.2d 741 (N.D. 2010) ¶8

Ourada v. State, 2019 ND 10, 921 N.W.2d 677 (N.D. 2019) ¶ 3

Overlie v. State, 2011 ND 191, 804 N.W.2d 50 (N.D. 2011) ¶ 8

State v. Atkins, 2019 ND 145, 928 N.W.2d 441 (N.D. 2019) ¶ 6

Whetsel v. State, 2021 ND 28, 20200262 ¶ 10

North Dakota Century Code:

29-32.1-01 ¶ 8

29-32.1-02 ¶ 3

29.32.1-04 ¶ 8

29.32.1-09 ¶ 4

8th Circuit:

Embrey v. Hershburger, 131 F. 3d 739 ¶ 9

United States Supreme Court

Chavez v. Martinez, 538 U.S. 760, 123 S. Ct. 1994, 155 L. Ed. 2d 984 ¶ 8

Kuhlmann v. Wilson, 477 US 436, 91 L Ed 2d 364, 106 S.Ct 2616 ¶8

Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) ¶ 8, 9

Pennsylvania v. Finley, 107 SCT 1990, 95 LED2D 539, 481 US 551 ¶ 2

Yates v. Aiken, 484 US 211, 98 L Ed 2d 546, 108 SCT 534 ¶ 2

Issues Presented

I. Whether the District Court is required to provide notice before dismissing an application.

II. Whether Atkins raised newly discovered evidence.

STATEMENT OF CASE

[¶1] This is a petition to rehear the North Dakota Supreme Court's opinion in the above matter that was filed on May 6, 2021.

ARGUMENT

[¶2] “[W]hile there is no constitutional right to Post-Conviction review. Then a state elect's to provide an avenue for Post-Conviction Relief, the process must comport with the protections of the 14th Amendment.” *Yates v. Aiken*, 484 U.S. 211, 217-18, (quoting *Pennsylvania v. Finley*, 107 SCT 1990, 95 LED2D 539, 481 US 551 North Dakota has adopted the Uniform Post-Conviction Act which requires North Dakota to follow the 14th Amendment. North Dakota Further stated that “Procedural due process requires fundamental fairness, which, at a minimum, necessitates notice and a meaningful opportunity for a hearing appropriate to the nature of the case.” *Curtiss v. Curtiss*, 2016 ND 197, ¶8.

[¶3] This Court has ruled that Due process is even in post-conviction proceedings. *Ourada v. State*, 2019 ND 10, ¶ 6, 921 N.W.2d. 677 (quoting *Chisholm v. State*, 2014 ND 125, ¶ 18, 848 N.W.2d This Court found that the district court did err in dismissing Atkins application without giving him notice. See, Order ¶10. Which reversible error, Atkins constitutional rights allow him notice and an oppuranity to be heard. There is nothing in the history of this Court that has allowed a Court to dismiss an application without due process of law. This actually violates clearly established Federal law of states post-conviction procedures as pointed out in ¶2.

[¶4] This Court looked to see if this was a harmless error. A Harmless error is defined as “any error, defect, irregularity or variance which does not affect substantial rights.”

Gonzales v. State, 2019 ND 47, ¶14. (See, petition for rehearing ¶ 7) This can't be considered harmless for a couple of reasons first there is a Brady violation which would in fact if true would be a due process violation and would not have given Atkins a full informed decision to plead guilty. Second Atkins confession was used against him illegally against his Fifth Amendment and Chavez. Atkins should be given at the very least an opportunity to support his application, and the actual innocence exception Atkins could have explained all this in his brief if he was given due process.

[¶5] This Court further found that Atkins is not a habeas petitioner, however in 29-32.1-02 specifically states “A court in which original jurisdiction in habeas corpus is vested may entertain a habeas corpus proceeding under chapter 32-22 of this chapter. This chapter, to the extent appropriate, governs the proceeding.” This Court even further stated that “A proceeding under this chapter is not a substitute for and does not affect any remedy incident to the prosecution in the trial court or direct review of the judgment of conviction or sentence in an appellate court. Except as otherwise provided in this chapter, a proceeding under this chapter replaces all other common law, statutory, or other remedies available before July 1, 1985, for collaterally challenging the validity of the judgment of conviction or sentence. It is to be used exclusively in place of them.” State v. Atkins, 2019 ND 145, ¶ 11. So technically Atkins would be a post-conviction petitioner, Habeas corpus petitioner, any writ petitioner, common law petitioner.

[¶6] Atkins argues that many states have allowed for this exception is state post-conviction reliefs. (Due to the limitation on the length of the brief Atkins is unable to do this)

[¶7] Atkins does address the issues that Schlup does deal with Habeas Corpus. As discussed in Atkins appellant's brief that the actual innocence exception can be found in North Dakota's post-conviction act. The creation of modern state post-conviction remedies was in large part a response to the development and enlargement of federal habeas corpus jurisdiction. The idea was states could preserve much of their sovereignty over state criminal matters if it provided adequate opportunities for post-conviction remedies. Adoption of an actual innocence exception furthers this purpose.

[¶8] The actual innocence exception does not itself entitle the prisoner to relief, rather the exception merely allows Courts to consider Constitutional claims which would be procedurally barred. Schlup at 316. The actual innocence exception was put in place to fix miscarriage of justice or in the interest of justice. Mr. Atkins was going to argue that he had newly discovered evidence in his brief, to invoke this exception Atkins is required to show either newly discovered evidence or new reliable evidence. In North Dakota this Court has held many times that "A petitioner is not required to include, which an application for post-conviction relief, supporting evidentiary materials necessary to withstand a potential motion for summary dismissal." *Overlie v. State*, 2011 ND 191, ¶ 7, 804 N.W.2d 50 (citing N.D.C.C. § 29-32.1-04;) Atkins would support his application when the Court would have gave Atkins notice of its intent to dismiss the application or the State would have tried to dismiss that application based on affirmative defenses. This Court held that in Schlup at 318-3019, noted successive or abusive petitions for habeas corpus are generally precluded from review. See, Order at ¶ 22, however the development of actual innocence exception has allowed for such. The Eighth Circuit held that "Court is allowed to view previous rejected claims (a.k.a-successive petition). *Embrey v.*

Hershburger, 131 F.3d 739 (8th Circuit) (quoting Kuhlmann v. Wilson, 477 US 436, 91 L Ed 2d 364, 106 S. Ct 2616) as long as Mr. Atkins brings in new evidence, again Atkins is arguing he has newly discovered evidence. Atkins would also like to address one last issue with Schlup at 318-319, it specifically states that “this Court held that a habeas court must adjudicate even a successive habeas claim when required to do so by the “ends of justice.” Schlup at 319. Justice does require because there is constitutional issues at risk in this application such as Atkins is arguing that the state withheld exculpatory evidence and if he knew about this evidence he would have not plead guilty, which is due process violation; (2) that his plea is invalid due to the holding in Henderson v. Morgan, due process and 5th amendment violation; (3) that the judgement can’t stand because of the holding in Chavez v. Martinez which violated his 5th amendment; (4) That the police department threatened Atkins to confess with violence. Five, the court erred in applying res judicata and misuse of process in this case (this court reversed this exact thing in Johnson v. State, 2010 ND 213; Six, Atkins is stating that he is 100% innocent of the alleged crime; Seventh that there is a miscarriage of justice in this case. Eighth, that Atkins has asserted newly Discovered evidence by asserting that exception. The 8th Circuit held that “A petitioner ‘does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt” Schlup v. Delo, 513 U.S. 298, 329, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995)

[¶9] It seems like there is confusion on how many times a person can raise newly discovered evidence. The Supreme Court found that Atkins raised 29.32.1-01(3) (a) (1) in State v. Atkins, 2019 ND 145, however in that case in particular it was argued that he had

newly discovered evidence. Atkins believe that he actually did have newly discovered evidence since that evidence was not presented at trial court level and that he didn't actually see it until after his sentencing. In Atkins application in 2018 when he alleged newly discovered evidence no court even the Supreme Court in Atkins case didn't acknowledge that subsection, They acknowledged section 29-32.1-01(1)(e). In this present application argues the actual innocence exception to the extent that he has newly discovered evidence that in fact would should that as a whole would prove that he didn't commit the crime. Atkins would be required to brief how his claims of newly discovered evidence do meet the 4 prong test adopted by North Dakota Supreme Court, before any hearing can be granted. Atkins just received this evidence after the last filing in Atkins case in 2020.

[¶10] This Court did rule that “it would be form over substance to reverse this case to give Atkins an opportunity to support this claim.” Atkins would like to address a couple of things. First this Court reversed and remanded a case in which the applicant had no possible chance of winning his post-conviction. See, Whetsel v. State, 2021 ND 28, justice didn't require the court in that case. However in Atkins case justice does require a reversal to allow Atkins to support his application because he is innocent of the alleged crime. Second Atkins believed that he was alleging new ly discovered evidence by asserting the actual innocence exception. The Court held that a person has to prove new evidence before that claims can be asserted. The Court stated that it would be procedure to reverse this case however since Atkins already had a chance he don't get another chance. See, Order at ¶ 25. Atkins argues that any case can be reversed however many times as long as there is a reversible error and the district court erred. As this is a

reversible error this court even stated that the court erred Atkins argues that the prejudice can be found in ¶ 8.

[¶11] Atkins would like to address one last thing. Atkins has discovered more new evidence from the police department who just wrote him while this appeal was pending which proves that they destroyed exculpatory evidence, DNA evidence, video evidence, expert testimony, recanted testimony.

CONCLUSION

[¶12] Mr. Atkins was not given due process of law as required by federal and state laws. This Court should be reversed and remanded back to the district court to allow Atkins to be given notice and an opportunity to submit evidence in support of this application, or Atkins asks that this honorable court dismiss without prejudice to allow Mr. Atkins to refile this application to unambiguously assert he has the newly discovered evidence.

Dated this 1st day of June, 2021.

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CERTIFICATE OF COMPLIANCE

[¶12] The undersigned certifies, in compliance with N.D.R.App.P. 32. That this Petition for Rehearing was prepared with proportional typeface, 12- point font, and the total number of pages in the above petition for rehearing, including table of contents, table of authorities, certificate of compliance and certificate of service is 10 pages.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Cody Michael Atkins, Petitioner/Appellant, v. State of North Dakota, Respondent/Appellee.	Case No.: 18-2020-CV-2006 Supreme Court Case No: 20200266 CERTIFICATE OF SERVICE
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¶1 The undersigned, being of legal age, being first duly sworn deposes and says that she served true copies of the following documents:

1. Petition for Rehearing
2. Certificate of Service

by electronically serving the same through the North Dakota Supreme Court e-filing system and that e-filing will provide service to the following:

Meredith Huseby Larson
Attorney for the Respondent
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North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

and by placing a true and correct copy of said items in a sealed envelope with USPS mail to:

Cody Michael Atkins
c/o J.R.C.C.
2521 Circle Drive
Jamestown, ND58401

Dated this 1st day of June, 2021.

/S/ Benjamin C. Pulkrabek
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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

<p>Cody Michael Atkins,</p> <p>Petitioner/Appellant,</p> <p>v.</p> <p>State of North Dakota,</p> <p>Respondent/Appellee.</p>	<p>Supreme Court Case No: 2020266</p> <p>Case No.: 18-2020-CV-2006</p> <p>CERTIFICATE OF SERVICE</p>
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¶1 I certify that a true and correct copy of the following, specifically:

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2. Certificate of Compliance
3. Certificate of Service

by electronically serving the same through the North Dakota Supreme Court e-filing system and that e-filing will provide service to the following:

North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

Meredith Larson
Grand Forks County States Attorney
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and by U.S. postal service with proper postage affixed to:

Cody Michael Atkins
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Inmate ID#41930
2521 Circle Drive
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Petitioner/Appellant.

Dated this 9th day of June, 2021.

/S/ Benjamin C. Pulkrabek
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