

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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<b>JASON JAMES VOGT,</b>  PETITIONER AND APPELLANT  <i>v.</i>  <b>STATE OF NORTH DAKOTA,</b>  RESPONDENT AND APPELLEE	<b>SUPREME COURT No. 20220058</b>  DIST. CT. No. 09-2021-CV-03382
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*APPEAL FROM JUDGMENT  
ENTERED ON FEBRUARY 2, 2022*

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*CASS COUNTY DISTRICT COURT  
EAST CENTRAL JUDICIAL DISTRICT  
THE HONORABLE JOHN C. IRBY, PRESIDING*

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**APPELLEE'S BRIEF**

**ORAL ARGUMENT REQUESTED**

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## STATEMENT OF THE ISSUES

[¶ 1] Whether the district court abused its discretion in continuing the September 2021 hearing.

[¶ 2] Whether the district court properly dismissed the case as untimely.

## STATEMENT OF THE CASE

[¶ 3] In November 2020, Jason Vogt filed a third application seeking post-conviction relief from his 2014 conviction for gross sexual imposition. The State answered, asserting the application was barred by res judicata, misuse of process, and the statute of limitations. Several months later, the State moved for summary disposition based on the defenses raised in its answer. Vogt responded to the State's motion. At a hearing in January 2022, the district court granted the State's motion for summary disposition, holding Vogt's claims were barred by the statute of limitations. Vogt now appeals from the dismissal of his application.

## STATEMENT OF FACTS

### A. "*Vogt I*"

[¶ 4] In 2014, Vogt pled guilty to gross sexual imposition and was sentenced. In 2015, he filed his first petition for post-conviction relief. 09-2015-CV-00957. In the first petition, he alleged ineffective assistance

of counsel. The district court denied the petition, and this Court affirmed. *Vogt v. State*, 2016 ND 48, 876 N.W.2d 485 (“*Vogt I*”).

[¶ 5] In 2017, Vogt filed a second petition for post-conviction relief. 09-2017-CV-03345. The second application was denied, and Vogt did not appeal.

### **B. “*Vogt II*”**

[¶ 6] In March 2019, Vogt moved in the underlying criminal file to vacate the judgment and withdraw his guilty pleas. *State v. Vogt*, 2019 ND 236, ¶ 3, 933 N.W.2d 916 (“*Vogt II*”). Vogt alleged “(1) his confession was coerced; (2) his attorney misinformed him of the sentence he would receive if he pleaded guilty; and (3) his plea was not entered into voluntarily, knowingly, or intelligently.” *Id.* The State responded, asserting Vogt’s claims were barred as fully and finally litigated in prior proceedings. *Id.* at ¶ 4. However, the State did not move for summary disposition. *Id.*

[¶ 7] Two days later, without a response from Vogt, the district court denied Vogt’s motion. *Id.* at ¶ 5. The district court found Vogt entered a knowing and voluntary guilty plea. *Id.* It construed Vogt’s other arguments as claims of ineffective assistance of counsel which had been determined in Vogt’s previous applications for post-conviction relief. *Id.*

[¶ 8] Vogt appealed from the denial of his motion. *Id.* at ¶ 1. This Court construed Vogt’s motion to vacate judgment and withdraw his guilty plea as an application for post-conviction relief. *Id.* at ¶ 7 (citing *Chase v. State*, 2019 ND 214, ¶ 4, 932 N.W.2d 529). This Court explained a district court may treat an answer as a motion for summary dismissal, but it must also provide the nonmoving party notice and an opportunity to be heard. *Id.* at ¶ 9. Because the district court did not provide proper notice, this Court reversed the district court’s summary dismissal and remanded for further proceedings. *Id.* at ¶¶ 10, 12. On remand, Vogt moved to withdraw his prior motion to vacate judgment and withdraw his guilty plea.

**C. The present case, “Vogt III”**

[¶ 9] Vogt filed the present application for post-conviction relief on November 3, 2020. *Application*, R1. He asserted as grounds for relief: (1) actual innocence, (2) ineffective assistance of counsel, (3) his plea was involuntary, and (4) his confession was coerced. *Application*, R1:2:¶¶5–8. On November 12, 2020, the State filed an answer denying each of Vogt’s claims and asserting the defenses of res judicata, misuse of process, and untimeliness. *Answer*, R7:1–2:¶¶1–9.

[¶ 10] In September 2021, the State moved for summary disposition of Vogt’s application. *Motion to Dismiss or Motion for Summary*

*Disposition*, R33:1. The State argued the district court should dismiss Vogt's application because his claims were barred by res judicata, misuse of process, and the statute of limitations. *Brief in Support of Motion to Dismiss or Motion for Summary Disposition*, R32:3–4:¶¶9–11.

[¶ 11] Vogt responded to the State's motion, arguing the defenses raised were not timely raised under N.D.R.Civ.P. 12. *Reply to State's Motion to Dismiss*, R40:1:¶¶2–3. The State filed a reply brief, highlighting that it had, in fact, asserted the defenses in its answer as required by N.D.R.Crim.P. 12. *State's Reply Brief*, R42:1:¶1.

[¶ 12] The district court held a post-conviction hearing on September 17, 2021. At the outset of the hearing, the court noted the State's recently filed motion for summary disposition. September 17, 2021 Transcript ("Sept. 17, 2021 Tr.") 2:13–22. Vogt's counsel objected to the timing of the State's motion:

[MS. KRAUS-PARR:] Again, I would like my 30 days to properly brief the issue and provide it to the Court, but I think we need to go ahead with the evidentiary hearing today. Either way, even if we didn't have the 30-day problem, we still have the 14-day problem of improper notice. So procedurally, I don't think we can move forward on the motion to dismiss.

Sept. 17, 2021 Tr. 3:11–16.

[¶ 13] The district court held a hearing on the motion on January 21, 2022. January 22, 2022 Transcript ("Jan. 22, 2022 Tr.") 2:1–22. The State

argued Vogt’s claims were barred by res judicata, misuse of process, and the statute of limitations, and again highlighted that the defenses were raised in the State’s answer. Jan. 22, 2022 Tr. 3:11–14.

[¶ 14] Vogt argued in his response to the State’s motion that his application was not barred by the statute of limitations because he sought to present newly discovered evidence. *Reply to State’s Motion to Dismiss*. R:40:2:¶7. The purported newly discovered evidence was a mental health evaluation completed after Vogt filed the application for post-conviction relief. R16. The district court held the evaluation was not newly discovered evidence. Jan. 22, 2022 Tr. 12:23 –13:1. The district court granted the State’s motion and denied Vogt’s application as untimely and barred by res judicata and misuse of process. *Order to Dismiss*, R46.

### STANDARD OF REVIEW

[¶ 15] “Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure.” *Friesz v. State*, 2022 ND 22, ¶ 7, 969 N.W.2d 465 (internal citation omitted). Subsection 29-32.1-09(3), N.D.C.C., authorizes a district court to summarily dismiss an application for post-conviction relief on the motion of either party if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. “If the State moves for summary dismissal,



putting a petitioner to his proof, a minimal burden shifts to the petitioner to support his application with admissible evidence, by affidavit or other comparable means, to raise a genuine issue of material fact.” *Friesz*, at ¶ 7 (internal citations omitted). “The party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of a post-conviction proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact.” *Id.* (internal citations omitted). This Court reviews an appeal from a summary denial of post-conviction relief as it reviews an appeal from summary judgment. *Id.* (internal citation omitted).

[¶ 16] This Court reviews a district court’s decision to grant a continuance under an abuse of discretion standard.” *State v. McGowen*, 2020 ND 121, ¶ 19, 943 N.W.2d 817 (internal citations omitted). A district court abuses its discretion by acting unreasonably, arbitrarily, or unconscionably. *Id.* There is no mechanical test for determining whether a trial court abused its discretion. Rather, an appellate court looks to the particular facts and circumstances of each case. *Id.*

## LAW AND ARGUMENT

### **I. The district court did not abuse its discretion in continuing the September 2021 hearing.**

[¶ 17] Vogt argues the district court erred in granting summary disposition because the State’s motion was untimely. However, Vogt has failed to establish that the grant of a continuance was an abuse of discretion.

#### **A. The State timely asserted its defenses in its answer.**

[¶ 18] Much of Vogt’s argument seems centered on whether the State asserted the defenses of res judicata, misuse of process, and the statute of limitations within 21 days after filing of the application as required by N.D.R.Civ.P. 12. Appellant’s Brief “At. Br.” at ¶¶ 13, 19. Vogt argues the defenses were waived because the State did not move for summary disposition within 21 days of filing of his application. At. Br. at ¶ 13. Vogt conflates pleading a defense with moving for relief based on a defense. Rule 12(b), N.D.R.Civ.P., requires “[e]very defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required.” (Emphasis added). The State pled the defenses of res judicata, misuse of process, and the statute of limitations in its answer on November 12, 2020, nine days after the application was filed. *Answer*, R7:1–2:¶¶7–9. Therefore, the State’s defenses were timely pled under N.D.R.Civ.P. 12.

**B. The State timely moved for dismissal and summary disposition.**

[¶ 19] Vogt also argues the State’s motion was untimely under N.D.R.Civ.P. 56, which requires “[t]he motion and supporting documents must be filed at least 90 days before the day set for trial and 45 days before the day set for the hearing unless otherwise ordered.” At. Br. at ¶13. Vogt misconstrues the State’s motion as one for summary judgment under N.D.R.Civ.P. 56.

[¶ 20] The State moved for dismissal or summary disposition under N.D.C.C. §§ 29-32.1-06 and 29-32.1-09. While there are similarities between summary disposition under the Uniform Post-Conviction Procedure Act and summary judgment or dismissal under the North Dakota Rules of Civil Procedure, the two are not perfectly synonymous.

[¶ 21] Section 29-32.1-06, N.D.C.C., permits the State to move for dismissal “on the ground that it is evident from the application that the applicant is not entitled to postconviction relief and no purpose would be served by any further proceedings.” Section 29-32.1-06, N.D.C.C., makes no mention of when such motion must be filed. Section 29-32.1-09, N.D.C.C., permits a district court to deny a petition before response from the State, but it provides no timeframe for when a motion for summary disposition must be made by the State.

**C. Equitable estoppel did not bar continuance of the September 2021 hearing.**

[¶ 22] Vogt argues equitable estoppel should have barred the continuance of the September 2021 hearing because the State “induced the Petitioner into a stipulated continuance of the scheduled evidentiary hearing.” This argument fails for two reasons: first, it is being raised for the first time on appeal; second, equitable estoppel is generally applied to bar assertion of a statute of limitations as a defense.

[¶ 23] Vogt did not raise equitable estoppel in the district court. This Court has often stated that it will not consider issues raised for the first time on appeal. *See, e.g., State v. Hammer*, 2010 ND 152, ¶ 21, 787 N.W.2d 716; *State v. Kurtenbach*, 2009 ND 93, ¶ 2, 767 N.W.2d 529 (per curiam); *State v. Kieper*, 2008 ND 65, ¶ 16, 747 N.W.2d 497; *State v. Gill*, 2008 ND 152, ¶ 21, 755 N.W.2d 454. “One of the touchstones for an effective appeal on any proper issue is that the matter was appropriately raised in the trial court so it could intelligently rule on it.” *State v. Osier*, 1999 ND 28, ¶ 10, 590 N.W.2d 205. Because the district court had no opportunity to rule on the equitable estoppel issue, it is improperly before this Court, and this Court should decline to consider the issue.

[¶ 24] Vogt cites *Burr v. Trinity Medical Center*, 492 N.W.2d 904 (N.D. 1992) for the proposition that equitable estoppel may preclude

application of a statute of limitations. At. Br. at ¶16. In *Burr*, this Court explained the plaintiff asserting equitable estoppel must establish three elements:

First, the plaintiff must prove that the defendant made statements and from the nature of defendant's statements and all of the surrounding facts and circumstances that the statements were made with the idea that plaintiff would rely thereon. Second, the plaintiff must show that she relied on the representations or acts of defendant and, as a result of that reliance, she failed to commence the action within the prescribed period. Lastly, the plaintiff must show that the acts of defendant giving rise to the assertion of estoppel must have occurred before the expiration of the limitation period.

*Id.* (cleaned up). Not only is Vogt's argument raised for the first time on appeal, but it is also seemingly an issue of first impression for this Court. The issue is this: whether a petitioner's reliance on the respondent's request for a continuance precludes the respondent from moving for dismissal or summary disposition after the continuance. The cases cited by Vogt deal with nonapplication or extension of a statute of limitations based on plaintiffs' reliance on statements by defendants. Vogt cites no authority extending equitable estoppel as a bar to continuing a hearing. As such, this Court should decline to consider the issue.

## **II. The district court properly denied Vogt's application as untimely.**

[¶ 25] The district court held Vogt's application was barred by the statute of limitations in N.D.C.C. § 29-32.1-01(2)(a). R45:3:¶10. Vogt's judgment

became final in October 2014. *Id.* This application for post-conviction relief was filed in October 2020, well beyond the two-year statute of limitations. Because the application was filed more than two years after judgment became final, the district court properly denied the application as untimely.

**A. The “newly discovered evidence” exception to the statute of limitations does not apply.**

[¶ 26] Vogt argues the district court erred in denying his application as untimely because N.D.C.C. § 29-32.1-01(3)(a)(1) creates an exception to the statute of limitations when a petitioner for post-conviction relief alleges 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 the petitioner was convicted.”

[¶ 27] Vogt filed his application for post-conviction relief in October 2020, making no mention of newly discovered evidence. R1:1–3. The purported newly discovered evidence is a report of examination conducted by Dr. Jessica Mugge completed in May 2021. R16:1–32. The exception for newly discovered evidence in N.D.C.C. § 29-32.1-01(3)(a)(1) is inapplicable here, because newly discovered evidence was not alleged in the petition or response to the State’s answer.

[¶ 28] Moreover, Dr. Mugge’s report was created after Vogt filed his application. If a report created after filing a petition were to be considered newly discovered evidence, the exception in N.D.C.C. § 29-32.1-01(3)(a)(1) would swallow the rule. Any time the State raises the statute of limitations as a defense, a petitioner would be able to thwart the time bar by seeking an evaluation to create “newly discovered evidence.” Because Vogt’s application does not allege newly discovered evidence and Dr. Mugge’s report is not newly discovered evidence, the district court properly applied the statute of limitations.

### **CONCLUSION**

[¶ 29] Because the district court correctly denied the application, the State respectfully requests this Court **AFFIRM** the district court judgment dismissing Vogt’s application for post-conviction relief.

## ORAL ARGUMENT STATEMENT

[¶ 30] The State requests oral argument to aid the Court in consideration of the complex procedural history of this post-conviction action and its prior companion cases.

Respectfully submitted this 18<sup>th</sup> day of May 2022.

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**CERTIFICATE OF COMPLAINT**

[¶ 1] Pursuant to N.D.R.App.P. 32(d), the principal brief complies with the page limitation and consists of 16 pages.

Respectfully submitted this 18<sup>th</sup> day of May 2022.

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**CERTIFICATE OF SERVICE**

[¶ 1] A true and correct copy of the foregoing document was e-served on  
May 18, 2022 to:

Kiara Kraus-Parr ([service@krausparrlaw.com](mailto:service@krausparrlaw.com))

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