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FEBRUARY 6, 2023
STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

BYRON LOREN WHETSEL,	)	**SUPREME COURT FILE NO. 20220351**
Petitioner and Appellant,	)	
vs.	)	
	)	**Ransom Co. District Court No. 37-2022-CV-00051**
STATE OF NORTH DAKOTA,	)	
Respondent and Appellee,	)	

BRIEF FOR THE APPELLEE, STATE OF NORTH DAKOTA

Appeal from the Order Dismissing Petitioner's Application for Postconviction Relief

Entered on the 28th day of November, 2022.

In District Court, Ransom County, State of North Dakota

THE HONORABLE JAY SCHMITZ

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE FACTS

A. UNDERLYING FACTS AND PROCEDURAL HISTORY

[¶1] Mr. Whetsel has filed numerous unsuccessful postconviction relief applications and has appealed several times as will be explained below. In the latest postconviction relief petition that is the subject of this appeal, Mr. Whetsel provides no material facts that would survive a summary judgment motion. Mr. Whetsel's substantial rights will not be abridged if this Court affirms the dismissal of Mr. Whetsel's postconviction relief petition. The State argues his rights will not be abridged because if Mr. Whetsel can present newly discovered evidence at any time in the future and meet the other requirements for a new trial or vacation of conviction, such relief could be granted at that time. Any such newly discovered evidence, if it exists, is an exception to the applicable statute of limitations. Mr. Whetsel has simply failed to present any such evidence by allegation or otherwise that would justify conducting a hearing at the district court.

[¶2] The underlying criminal jury trial facts are outlined in the State's Briefs for the Appellee found in Supreme Court Case Numbers 20170141 and 20190034. Mr. Whetsel's direct appeal from the conviction resulted in the conviction being affirmed. State v. Whetsel, 2017 ND 237, 902 N.W.2d 924.

[¶3] Mr. Whetsel's appeal in Supreme Court No. 20190034 relating to his first postconviction relief application was not successful and this Court affirmed the dismissal. Whetsel v. State, 2019 ND 237, 933 N.W.2d 466.

[¶4] Mr. Whetsel's appeal in Supreme Court File No. 20200262 relating to his first appeal of his second postconviction relief application was successful and the matter was remanded for further proceedings to allow Mr. Whetsel adequate time under the rules to

reply to the State's Motion to Dismiss. Whetsel v. State, 2021 ND 28, ¶ 9, 955 N.W.2d 57. Pending the first appeal from Civil No. 37-2020-CV-00066 and prior to the Supreme Court Opinion in Whetsel v. State, 2021 ND 28, 955 N.W.2d 57, Mr. Whetsel filed another application for postconviction relief (See R1 (Docket No. 1) in Civil No. 37-2020-CV-00092) and on remand following the decision in Whetsel v. State, 2021 ND 28, 955 N.W.2d 57, the district court consolidated the two then-pending applications for postconviction relief in cases 37-2020-CV-00066 and 37-2020-CV-00092. (See R25 (Docket No. 25) in Civil No. 37-2020-CV-00092). On remand, the district court dismissed the consolidated applications for postconviction relief and the Supreme Court affirmed the dismissals in Whetsel v. State, 2022 ND 36, 970 N.W.2d 200 (Supreme Court File Nos. 20210180 & 20210181).

[¶5] Mr. Whetsel brought another application for postconviction relief in case number 37-2022-CV-00019 that was dismissed by the district court and that decision was never appealed by Mr. Whetsel and became final.

[¶6] Mr. Whetsel has now brought yet another application for postconviction relief in district court case number 37-2022-CV-00051, which was dismissed by the district court. Mr. Whetsel appeals that dismissal in this latest North Dakota Supreme Court File No. 20220351. This is then the fifth State appeal made by Mr. Whetsel relating to the underlying criminal case (one direct appeal and this is the fourth postconviction relief appeal). In addition, Mr. Whetsel brought a Federal habeas corpus petition, which was denied in U.S. District Court for the District of North Dakota, Case No. 3:20-cv-41, Document 38. Mr. Whetsel appealed that decision to the United States Court of Appeals for the Eighth Circuit. The Judgment in Eight Circuit Case No. 21-1379 signed June 21,

2021 by the Clerk (of Court of Appeals, Eight Circuit, Michael E. Gans) was a denial of appealability and the federal case was dismissed on June 21, 2021. A petition for rehearing was denied by Order dated August 12, 2021.

[¶7] Mr. Whetsel's various applications for postconviction relief have become an abuse of process.

B. FACTS OF THIS APPEAL

[¶8] Mr. Whetsel argues that the statute of limitations does not apply or that it should be disregarded pursuant to N.D.C.C. § 29-32.1-01(3) based on newly discovered evidence. Appellant's Brief at ¶ 18. Mr. Whetsel has provided not even one scintilla of evidence, let alone admissible evidence, to support any finding of newly discovered evidence nor to survive summary judgment. Throughout this Brief, reference to the "statute of limitations" shall be reference to N.D.C.C. § 29-32.1-01.

[¶9] Mr. Whetsel's current application does not raise any issues that are exceptions to the 2-year statute of limitations. Mr. Whetsel's appellate counsel creatively characterizes Mr. Whetsel's application as one alleging "newly discovered evidence" despite there being no evidence even alleged that would support a finding of newly discovered evidence, viewed in a light most favorable to Mr. Whetsel. Appellant's Brief at ¶¶ 14-15.

[¶10] Mr. Whetsel's application for postconviction relief recited his grounds as (1) sentence reduction for murder AA to negligent homicide, and (2) removal of sentencing requirement to register. Appellant's Brief at ¶ 14. Mr. Whetsel's district court attorney attempted to develop those grounds into the following: "Mr. Whetsel appears to be claiming the conviction and registration requirements is in violation of the Eighth Amendment. Further support for his claim should be furnished at an evidentiary hearing

on the matter." Appellant's Brief at ¶ 14. The statement by Mr. Whetsel's counsel does not allege anything new that would equate to newly discovered evidence. The conviction and registration requirements are not newly discovered evidence and occurred years ago. Next, Mr. Whetsel's district court attorney added a citation which is disjointed from the grounds of said attorney's arguments when said attorney stated: "Postconviction relief may be granted when evidence, not previously presented and heard, exists requiring vacation of the conviction or sentence in the interest of justice." Appellant's Brief at ¶ 14 (citing to Kovalevich v. State, 2018 ND 184, ¶ 4, 195 N.W.2d 644, 646 (quoting N.D.C.C. § 29-32.1-01(1)(e))). Mr. Whetsel's appellate counsel now expands on those grounds. Appellate counsel argues that the foregoing arguments of counsel are Mr. Whetsel's factual allegations that, he argues, indicate that Mr. Whetsel would be able to produce new evidence at his postconviction application hearing if he is granted such a hearing. Appellant's Brief at ¶¶ 14-16. Nowhere does Mr. Whetsel or his counsel allege what specific, newly discovered, facts are being alleged to constitute newly discovered evidence. Appellant's Brief at ¶ 15. Mr. Whetsel does not even allege general, categorial, facts for the Court to analyze. The State would not even be able to prepare for such a hearing and subpoena appropriate witnesses, etc., because there are no specifics alleged that would allow the State to prepare to rebut. Instead of alleging newly discovered evidence, Mr. Whetsel's petition simply argues for requested action to reduce his sentence and remove registration requirements from his sentence.

LAW AND ARGUMENT

[¶11] The test for analyzing whether newly discovered evidence justifies postconviction relief requires the petitioner to establish the following elements:

(1) the evidence must have been discovered since the defendant's trial;

(2) the failure to discover the evidence sooner must not be the result of a lack of diligence on the defendant's part;

(3) the evidence must be material to the issues at trial; and

(4) if proved and reviewed in light of the evidence as a whole the newly discovered evidence would establish that the petitioner did not engage in the criminal conduct for which petitioner was convicted.

Bridges v. State, 2022 ND 147, ¶¶ 11-13, 977 N.W.2d 718, 723-724.

[¶12] "Summary disposition of an application for postconviction relief after the State responds is akin to summary judgment under N.D.R.Civ.P. 56." Id. at ¶ 6 (citing to Davies v. State, 2018 ND 211, ¶ 9, 917 N.W.2d 8, 12-13).

[¶13] A postconviction relief petitioner must meet basic thresholds of proof in the allegations in the petition and a district court may deny such a petition even on its own when basic thresholds are not met. Atkins v. State, 2021 ND 83, ¶¶ 18-19, 959 N.W.2d 588, 593-594. In Chisholm v. State, 2014 ND 125, ¶ 14, 848 N.W.2d 703, 707, this Court stated the following:

> An applicant is not required to include argument or discussion of authorities in his application or to attach supporting materials. N.D.C.C. § 29–32.1–04. The plain language of N.D.C.C. § 29–32.1–09(1) authorizes a court to dismiss an application for postconviction relief before the State responds and before the applicant presents any evidence supporting his claims if the claims are meritless. The plain language of the statute indicates the court may decide the claims are meritless and dismiss the application relying solely on the facial validity of the claims made in the application. The legislative history also supports this interpretation. *See Hearing on S.B. 2227 Before Senate Judiciary Comm.,* 63rd N.D. Legis. Sess. (Feb. 5, 2013) (testimony of Justice Dale Sandstrom, Supreme Court Justice) ("A court could also summarily dismiss postconviction relief proceedings where the

> statute of limitations has run, and when from the face of the postconviction relief filing—even if what is alleged is true—it wouldn't be a basis to grant postconviction relief.").

[¶14] A postconviction relief petition must allege some sort of facts as was discussed in part in Atkins v. State, 2021 ND 83, ¶¶ 11-13, 959 N.W.2d 588, 592-593, where this Court stated:

> "If a party had no additional evidence to bring, it cannot argue it was prejudiced by a lack of notice and opportunity to address the issue." Id.; see also Smith v. Boyd, 945 F.2d 1041, 1043 (8th Cir. 1991) (holding failure by court to give notice was not reversible error where it is patently obvious the litigant could not prevail on the facts alleged).
>
> On appeal, Atkins argues the district court erred, including that he should have been allowed to present evidence under his theory of "actual innocence." Atkins' application for postconviction relief makes no mention of newly discovered evidence. He alleges in ground 1: "Actual Innocence exception—This is an exception that would allow Atkins to bring Constutional [sic] claims forward." Without even alleging he had new evidence, Atkins fails to show he was prejudiced by lack of notice.
>
> The question remains whether the district court erred in dismissing Atkins' application. Whether summary judgment was properly granted is a question of law which this Court reviews de novo on the entire record. Young v. Burleigh Morton Det. Ctr., 2021 ND 8, ¶ 4, 953 N.W.2d 597. Summary dismissal of a postconviction application, like summary judgment, is only appropriate if there is no genuine issue as to any material fact. Chatman v. State, 2018 ND 77, ¶ 6, 908 N.W.2d 724. A genuine issue of material fact exists if reasonable minds could draw different inferences and reach different conclusions from the undisputed facts. Id. This Court has established "[t]he party opposing the motion for summary disposition is entitled to all reasonable inferences at the preliminary stages of a postconviction proceeding and is entitled to an evidentiary hearing if a reasonable inference raises a genuine issue of material fact." Atkins v. State, 2019 ND 146, ¶ 4, 928 N.W.2d 438.

[¶15] More than a scintilla of evidence is required to overcome a motion for summary judgment as was discussed in Barbie v. Minko Construction, Inc., 2009 ND 99, ¶ 6, 766 N.W.2d 458, 461 where this Court stated:

> This Court has repeatedly cautioned that "mere speculation is not enough to defeat a motion for summary judgment, and a scintilla of evidence is not sufficient to support a claim." Heart River Partners v. Goetzfried, 2005 ND 149, ¶ 8, 703 N.W.2d 330 (quoting State v. North Dakota State Univ., 2005 ND 75, ¶ 8, 694 N.W.2d 225); In re Estate of Richmond, 2005 ND 145, ¶ 12, 701 N.W.2d 897; Investors Real Estate Trust, at ¶ 5; Zuger, at ¶ 8; Iglehart v. Iglehart, 2003 ND 154, ¶ 10, 670 N.W.2d 343. In order to meet the burden of establishing a genuine issue of material fact on an essential element of a claim, a party opposing a motion for summary judgment must present " 'enough evidence for a reasonable jury to find for the plaintiff.' " Riemers, at ¶ 7 (quoting Iglehart, at ¶ 10).

This standard was most recently reiterated by this Court in Johnston Law Office, P.C. v. Brakke, 2018 ND 247, ¶ 8, 919 N.W.2d 733, 737 where this Court stated in part "'[w]hen no pertinent evidence on an essential element is presented to the trial court in resistance to the motion for summary judgment, it is presumed that no such evidence exists.'" (citing to Barbie at ¶ 6).

[¶16] In Bridges vs. State, 2022 ND 147, 977 N.W.2d 718 the district court summarily dismissed a petition for postconviction relief without holding an evidentiary hearing. The defendant argued that former testimony of his psychiatrist in a separate postconviction relief application was "newly discovered" evidence. Id. at ¶ 14. This Court held (1) the defendant did not assert how the "newly discovered" evidence would establish he did not engage in the conduct for which he was convicted; and (2) the defendant did not provide competent admissible evidence entitling him to postconviction relief. Id. at ¶ 14.

[¶17] The defendant in Bridges also argued that testimony regarding an internal investigation—him not being present at his initial appearance—and an order denying him

a new trial were all "newly discovered" evidence. Id. at ¶¶ 15-16. This Court held the district court correctly concluded that those allegations by the defendant failed to provide competent admissible evidence entitling him to postconviction relief. Id. at ¶¶ 15-16. In Bridges, the defendant therefore alleged specific facts that were ultimately determined not to be newly discovered evidence. Conversely, in this case Mr. Whetsel does not even allege any facts that he claims are newly discovered.

[¶18] A holding consistent with Mr. Whetsel's argument would allow a flood of future petitioners making general, non-factual requests for relief that would be interpreted as newly discovered factual assertions and entitle them to evidentiary hearings. Such a holding would permit such petitioners to circumvent the legal limits of postconviction relief by simply filing petitions for postconviction relief. It would let their counsel later morph non-factual requests into arguments of newly discovered evidence justifying an evidentiary hearing—as Mr. Whetsel's attorneys have done in this case. The public policy of repose would be upset without a competing interest of justice founded on newly discovered evidence.

[¶19] Even if Mr. Whetsel's Application was not barred by the statute of limitations, his misuse of process also supports affirmation of the district court's dismissal of Mr. Whetsel's Application. Mr. Whetsel's district court level stated grounds for postconviction relief were (1) sentence reduction for murder AA to negligent homicide, and (2) removal of sentencing requirement to register. Both of these "grounds" were present at the time of trial and subsequent sentencing and entry of judgment. Mr. Whetsel had the chance to argue for and seek his requested relief previously in Mr. Whetsel's: (1) direct State appeal, (2) Federal habeas corpus proceeding and attempted Federal appeal, (3) various State

postconviction relief applications, or (4) previous appeals of postconviction relief dismissals.

CONCLUSION

[¶20] Mr. Whetsel has been unable to establish an exception to the two-year statute of limitations. The Appellee, State of North Dakota, therefore respectfully asks this Court to AFFIRM the lower court's Judgment of Dismissal of Mr. Whetsel's Application for Postconviction Relief in District Court File Number 37-2022-CV-00051.

REQUEST FOR ORAL ARGUMENT

[¶21] Oral Argument is requested by the State to be able to orally argue that Appellant has raised no newly discovered evidence that would entitle him to an evidentiary hearing or postconviction relief.

NOTICE OF INTENT TO APPEAR AND PARTICIPATE IN ORGAL ARGUMENT

[¶22] This is also the undersigned attorney's notice of intent to appear and participate in oral argument.

Dated this 6th day of February, 2023.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for Appellee, State of North Dakota, hereby certifies that Appellee Brief was prepared with proportional typeface and that Appellant's Brief does not exceed 38 pages.

Dated this 6th day of February, 2023.

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

BYRON LOREN WHETSEL,	)	**SUPREME COURT FILE NO. 20220351**
Petitioner and Appellant,	)	
vs.	)	**Ransom Co. District Court No. 37-2022-CV-00051**
STATE OF NORTH DAKOTA,	)	
Respondent and Appellee,	)	

[¶1] I certify that a true and correct copy of the following documents:

1. Brief for the Appellee, State of North Dakota with Certificate of Compliance and Request for Oral Arguments
2. Certificate of Electronic Service

were filed electronically through the North Dakota Supreme Court e-filing system and that the North Dakota Supreme Court e-filing system will provide electronic service to the following:

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Dated this 6th day of February, 2023.

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