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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2024 ND 99

Steven Aune, Petitioner and Appellant

v.

State of North Dakota, Respondent and Appellee

No. 20230273

Appeal from the District Court of Walsh County, Northeast Judicial District, the Honorable Barbara L. Whelan, Judge.

AFFIRMED.

Opinion of the Court by Tufte, Justice, in which Chief Justice Jensen and Justice McEvers joined. Justice Crothers filed a dissenting opinion. Justice Bahr also filed a dissenting opinion, in which Justice Crothers joined.

Miguel A. Surun Santos, Bismarck, N.D., for petitioner and appellant; submitted on brief.

Kelley M. R. Cole, State's Attorney, Grafton, N.D., for respondent and appellee; submitted on brief.

Aune v. State
No. 20230273

Tufte, Justice.

[¶1] Steven Aune appeals from district court orders dismissing his application for postconviction relief and denying his motion to reopen and reconsider his application for postconviction relief. He also appeals orders denying his motion for change of judge and his motion to reconsider the order denying his motion for change of judge. We affirm.

I

[¶2] Aune was convicted of manslaughter. He appealed, and this Court affirmed in *State v. Aune*, 2021 ND 7, 953 N.W.2d 601. This Court's judgment issued on January 13, 2021. Aune applied for postconviction relief on April 28, 2023. The district court dismissed the application before the State responded because it was untimely. After the dismissal, Aune demanded a change of judge, which was denied. He moved to have his application and demand for change of judge reconsidered, and both motions were denied. Aune appeals.

II

[¶3] Aune argues the district court improperly summarily dismissed his application without an evidentiary hearing, because there is a genuine issue of material fact. The district court summarily dismissed the application. As discussed below, the proper standard is whether, if taken as true, the application alleges a sufficient basis on which relief could be granted.

[¶4] Whether a district court has the authority on its own motion to summarily dismiss a postconviction relief application for being untimely is a question of law we review de novo. *State v. Dunn*, 2023 ND 24, ¶ 4, 985 N.W.2d 644. This precise question is a matter of first impression. Postconviction relief is a civil proceeding, and the North Dakota Rules of Civil Procedure are applicable to the extent that they do not conflict with North Dakota's Uniform Postconviction Procedure Act, ch. 29-32.1. *Burden v. State*, 2019 ND 178, ¶ 10, 930 N.W.2d 619.

[¶5] When an individual applies for postconviction relief, the application "must be filed within two years of the date the conviction becomes final." N.D.C.C. § 29-32.1-01(2). After two years, an applicant must satisfy one of the three exceptions in N.D.C.C. § 29-32.1-01(3) or the application is subject to dismissal under the two-year time bar.

[¶6] In postconviction proceedings, as in other civil proceedings, we have treated the statute of limitations as waived when a responsive pleading is filed without raising it. *Lehman v. State*, 2014 ND 103, ¶¶ 3, 8, 847 N.W.2d 119 (holding State waived affirmative defense of statute of limitations where it moved for summary disposition without asserting that defense). Affirmative defenses are governed by N.D.R.Civ.P. 8(c), which requires that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense." Rule 8(c) speaks only to how "a party" must raise (or waive) affirmative defenses. *Lehman* stands for the proposition that once the State responds, it waives any unasserted affirmative defenses, including the statute of limitations. Before the State responds, it has neither raised nor waived any affirmative defenses. The rule lists numerous affirmative defenses, including statute of limitations, but applies only once "a party" "respond[s] to a pleading"—it is silent on whether the court may raise a statute of limitations before a responsive pleading. N.D.R.Civ.P. 8(c)(1). In contrast, N.D.C.C. § 29-32.1-12(3) states: "Res judicata and misuse of process are affirmative defenses to be pleaded by the state." Conspicuously absent from this section is any reference to the statute of limitations as an affirmative defense that may be raised only by the State. Unlike in an ordinary civil case, in this postconviction case the court has statutory authority to dismiss on its own motion. The operative provision here is N.D.C.C. § 29-32.1-09,[1] which governs what the court may do on its own motion, before any response by the State.

[1] Section 29-32.1-09, N.D.C.C., was amended effective Aug. 1, 2023, to codify summary disposition (akin to summary judgment) at N.D.C.C. § 29-32.1-09.1 and retain summary dismissal, akin to dismissal for failure to state a claim, at N.D.C.C. § 29-32.1-09. 2023 N.D. Sess. Laws ch. 307.

[¶7] To determine whether chapter 29-32.1, N.D.C.C., permits dismissal of untimely applications on the court's own motion, we must consider section 29-32.1-09 in the context of related provisions, by comparison to prior versions, and by reference to interpretations from other states that have adopted the uniform act. *State v. Castleman*, 2022 ND 7, ¶¶ 7, 13, 15, 969 N.W.2d 169; N.D.C.C. § 1-02-13. Under the Uniform Postconviction Procedure Act of 1966, adopted by North Dakota in 1969, a court could dismiss an application after providing notice of intent to dismiss and time to respond.

> When a court is satisfied, on the basis of the application, the answer or motion, and the record, that the applicant is not entitled to post-conviction relief and no purpose would be served by any further proceedings, it may indicate to the parties its intention to dismiss the application and its reasons for so doing. The applicant shall be given an opportunity to reply to the proposed dismissal. In light of the reply, or on default thereof, the court may order the application dismissed or grant leave to file an amended application or direct that the proceedings otherwise continue. Disposition on the pleadings and record is not proper if there exists a material issue of fact.

N.D.C.C. § 29-32-06(2), 1969 N.D. Sess. Laws ch. 304, § 6(2). Idaho adopted this provision from the Uniform Postconviction Procedure Act of 1966 and has interpreted it as allowing a district court to dismiss an application for failing to comply with the statute of limitations even if the State failed to raise it as a defense. *See Martinez v. State*, 130 Idaho 530, 533, 944 P.2d 127 (Ct. App. 1997) (reasoning that because the trial court may dismiss before the State has filed a response, "it was proper for the district court to consider the statute of limitation though this defense was not raised by the State"); *see also State v. Ochieng*, 147 Idaho 621, 625, 213 P.3d 406 (Ct. App. 2009) ("While the statute of limitations can be raised as an affirmative defense by the State pursuant to I.C. § 19-4906(b), it can also be raised sua sponte by the court.").

[¶8] In 1985, North Dakota replaced the Uniform Postconviction Procedure Act of 1966 with the 1980 revision published by the Uniform Law Commission. 1985 N.D. Sess. Laws ch. 366. The 1980 uniform act allowed a postconviction application to be filed at any time. N.D.C.C. § 29-32.1-03(2). The Editorial

Board Comments explain this section of the act complies with ABA Standards 22-2.4(a) that a statute of limitations is inappropriate for postconviction relief. Without repealing this section, the legislature amended N.D.C.C. § 29-32.1-01 in 2013 to include a two-year statute of limitations with three narrow exceptions. 2013 N.D. Sess. Laws ch. 248, § 1. Several other states have also amended their uniform postconviction procedure acts to provide a statute of limitations. *See, e.g.*, *Hooley v. State*, 537 P.3d 1267, 1273-74 (Idaho 2023) (affirming summary dismissal of untimely application under one-year statute of limitations); *McCoy v. State*, 737 S.E.2d 623, 626 (S.C. 2013) (reversing summary dismissal under one-year statute of limitations where the applicant alleged facts that would establish an exception under the statute of limitations); *State v. Williamson*, 969 A.2d 300, 303 (Md. 2009) (discussing 1995 amendment to impose ten-year statute of limitations on uniform postconviction procedure act). In the same legislation adding the statute of limitations, the Legislative Assembly amended N.D.C.C. § 29-32.1-09 to allow summary dismissal of meritless claims by the court before any response by the State. 2013 N.D. Sess. Laws ch. 248, § 2. These amendments both indicate an intent to narrow the opportunity for postconviction relief by limiting the time for filing an application and expediting dismissal of meritless applications.

[¶9] The district court has limited authority under chapter 29-32.1, N.D.C.C., to summarily dismiss a claim on its own motion. Under section 29-32.1-09(1) the court, "on its own motion, may enter a judgment denying a meritless application on any and all issues raised in the application before any response by the state." Rule 8(c), N.D.R.Civ.P., provides rules for pleading affirmative defenses *by a party*. It does not limit the court's authority under N.D.C.C. § 29-32.1-09 to consider the statute of limitations. Section 29-32.1-12, N.D.C.C., lists two other affirmative defenses "to be pleaded by the state" but does not include the statute of limitations as an affirmative defense. The timeliness (or lack of timeliness) is an issue raised in every application for relief. N.D.C.C. § 29-32.1-01(2) ("an application for relief under this chapter must be filed within two years of the date the conviction becomes final"). The criminal judgment challenged in the application, including the date of judgment and sentence, must be identified in the application. N.D.C.C. § 29-32.1-04(1). If

finality is delayed by an appeal to this Court or a petition for review in the United States supreme court, N.D.C.C. § 29-32.1-01(2)(b)&(c), the necessary information must also be included in the application. N.D.C.C. § 29-32.1-04(2). It will thus be apparent whether the application has been filed within two years of when the conviction became final and, if not, whether the application contains any allegation supporting a statutory exception to the statute of limitations. This sets apart the statute of limitations from other affirmative defenses. Unlike other affirmative defenses, which we do not address here, all information necessary to determine whether the application is time barred must be included. The dissent's interpretation of N.D.C.C. § 29-32.1-09(1) would read dismissal on the court's own motion right out of the statute.

[¶10] Taking Aune's allegations as true, there is no basis on which the district court could grant relief. The application incorrectly stated the judgment was issued on February 5, 2021, but the court in its order correctly noted that date was the mandate, not the judgment. A misstatement of a fact conclusively shown in the record is not sufficient to avoid dismissal. *See Shane v. Peoples*, 141 N.W. 737, 738 (N.D. 1913) ("Were the judgment itself pleaded, and did it show upon its face that the party seeking to avoid it had been served with legal notice, an averment that no such notice had in fact been served would not be sufficient to overcome the recital of notice in the record."). The judgment was entered on January 14, 2021. Aune's conviction became final under N.D.C.C. § 29-32.1-01(2)(b) on April 15, 2021, ninety-one days after entry of this Court's judgment, because he did not appeal to the United States Supreme Court "within 90 days after entry of the judgment." U.S.Sup.Ct.R. 13.1. Aune had two years, or until April 15, 2023, to file an application for relief or it would be untimely under N.D.C.C. § 29-32.1-01(2) unless an exception was alleged in the application under N.D.C.C. § 29-32.1-01(3). Aune filed his application on April 28, 2023, after the April 15, 2023 deadline, and he did not allege an exception under N.D.C.C. § 29-32.1-01(3). The application was untimely. The court did not err by summarily dismissing the application, because it correctly concluded no facts were alleged that could avoid dismissal of the untimely application.

III

[¶11] Aune argues the district court improperly dismissed the case because he was not given notice or an opportunity to be heard under N.D.C.C. § 29-32.1-09 and N.D.R.Ct. 3.2(a).

[¶12] Whether a statute or court rule requires a district court to give notice before it summarily dismisses a postconviction relief application for being untimely is a question of law. Questions of law are reviewed de novo. *State v. Dunn*, 2023 ND 24, ¶ 4.

[¶13] An application for postconviction relief "must be filed within two years of the date the conviction becomes final." N.D.C.C. § 29-32.1-01(2). After two years have elapsed, the applicant must qualify for an exception under N.D.C.C. § 29-32.1-01(3)(a) or the application is barred.

[¶14] The version of the statute in effect prior to the 1985 amendments, discussed above at ¶ 7, required the district court to inform the applicant it intended to dismiss the complaint and provide the applicant an opportunity to respond. This section was replaced with the current provision that does not require notice for summary dismissal. We conclude a district court may summarily dismiss an application without notice under N.D.C.C. § 29-32.1-09.

[¶15] The relevant provisions were recently amended to better distinguish between summary dismissal and summary disposition. Summary dismissal of an application before the State responds is analogous to dismissal under N.D.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted. *Etemad v. State*, 2023 ND 108, ¶ 5, 992 N.W.2d 1. The court on its own initiative may dismiss an application for failure to state a claim, but should do so only when it is clear no set of facts supports the claim. *Id.* 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.

[¶16] We considered the question of notice before dismissal in *Etemad*: "Etemad also argues the court erred when it summarily dismissed his application for post-conviction relief *without affording him notice* and an opportunity to support his application." *Id.* at ¶ 4 (emphasis added). We explained, the court on its own motion may dismiss "a meritless application" under N.D.C.C. § 29-32.1-09(1) only "when it appears beyond doubt that no set of facts support the claim." *Id.* at ¶ 5. We concluded, "The district court did not err in denying Etemad's second application for post-conviction relief under N.D.C.C. § 29-32.1-09(1) prior to the State responding because his application on its face was meritless when he failed to provide a concise statement indicating adequate grounds for relief or allege any facts to support his claims." *Id.* ¶ 7.

[¶17] In criminal cases and civil cases outside the postconviction context, we have required notice of intent to dismiss before the district court may dismiss an action on its own motion. *City of Jamestown v. Snellman*, 1998 ND 200, ¶ 10, 586 N.W.2d 494; *Zink v. Enzminger Steel, LLC*, 2011 ND 122, ¶ 17, 798 N.W.2d 863. What distinguishes those cases from *Etemad* and this case is that in those cases the district court relied on its authority under the generally applicable criminal or civil procedure rules and the court's inherent power to sanction a party for noncompliance with its orders. *Snellman*, at ¶ 8 (treating dismissal as exercise of inherent power to sanction); *Zink*, at ¶ 13 (applying summary judgment standards). Neither case invoked a statute granting the court specific authority to dismiss on its own motion. The postconviction procedure act is silent as to whether notice is required. As discussed above, the prior version of the statute expressly required notice. The legislative assembly's removal of a statutory notice requirement is strong evidence of the intended meaning of N.D.C.C. § 29-32.1-09. Of course, nothing in the statute prohibits giving notice before dismissal. We hold the district court, on its own motion and without notice, may dismiss an application as meritless on its face only if it does not rely on information outside the application and concludes no set of facts would justify granting relief on the claims made in the application. *See Etemad*, 2023 ND 108, ¶ 7; *Riak v. State*, 2015 ND 120, ¶ 16, 863 N.W.2d 894.

[¶18] Here, it is clear the district court looked at the challenged criminal judgment to ascertain the correct dates in this matter. The criminal judgment challenged in an application for postconviction relief is necessarily embraced by the pleadings and does not require application of procedures applicable to summary disposition under N.D.C.C. § 29-32.1-09.1. *Etemad*, 2023 ND 108, ¶¶ 5-6 (describing when summary judgment procedures including notice apply to postconviction proceedings). In contrast to the situation here, in *Atkins*, we held that when a district court takes judicial notice of prior applications, district court orders, and appeals, dismissal must be considered under summary judgment standards, so the applicant must be given notice and an opportunity to respond to demonstrate a genuine issue of material fact. *Atkins v. State*, 2021 ND 83, ¶ 10, 959 N.W.2d 588. Notice was not required here, but even where a court erroneously fails to provide notice, the error may be harmless if the party had not alleged the additional evidence he later asserted he intended to bring. *Id*. at ¶ 12 ("Without even alleging he had new evidence, Atkins fails to show he was prejudiced by lack of notice.").

[¶19] Here, the district court properly considered the date judgment was entered in the underlying criminal case to determine when the conviction became final. Such consideration of the challenged criminal judgment for a date is different from the district court's extensive record examination in *Atkins*, because the dates do not aid a determination on the merits. Instead, the date shows Aune's application fails to allege facts sufficient to state a claim upon which relief can be granted. The district court properly dismissed the application because the information the court relied on was contained in the application or was embraced by the pleadings. Because the court relied only on the application and the challenged judgment to determine the timeliness of the claims, it did not err by dismissing the application without notice. *See Riak*, 2015 ND 120, ¶ 16.

[¶20] We hold that an application for postconviction relief filed more than two years after the challenged conviction has become final must plead one of the exceptions in N.D.C.C. § 29-32.1-01(3) or be subject to dismissal on the court's own motion under N.D.C.C. § 29-32.1-09. The court may consider a facially

untimely application only if (1) the "petition *alleges* the existence of newly discovered evidence," (2) the "petitioner *establishes* that the petitioner suffered from a physical disability or mental disease that precluded timely assertion of the application," or (3) the "petitioner *asserts* a new interpretation of ... law ... and the petitioner *establishes* that the interpretation is retroactively applicable." N.D.C.C. § 29-32.1-01(3)(a) (emphasis added). The use of the different verbs plainly requires the application to allege the existence of newly discovered evidence before the court may consider the application. To allege newly discovered evidence, the applicant logically must already have discovered it, so including the date of discovery is not a burdensome pleading requirement. N.D.C.C. § 29-32.1-01(3)(b) (application must be filed within two years of discovery). Whether the other exceptions, which require an applicant to assert or establish other exceptions, implicate different pleading requirements is not before us.

IV

[¶21] Aune also argues the dismissal of his application was premature because he did not receive notice of the assigned judge and his demand for change of judge should have been granted.

A

[¶22] First, Aune claims he did not have notice of the judge handling his application for postconviction relief because the notification of assignment and case number stated "Hon. No Judicial Officer."

[¶23] We have long held postconviction relief proceedings are "appropriately treated as a continuation of the criminal prosecution for purposes of N.D.C.C. § 29-15-21, and [the applicant] is not entitled to a new judge when the postconviction judge was also the trial judge." *Wald v. Hovey*, 2022 ND 15, ¶ 12, 969 N.W.2d 163; *Chisholm v. State*, 2019 ND 70, ¶ 12, 924 N.W.2d 127; *Syvertson v. State*, 2000 ND 185, ¶ 27, 620 N.W.2d 362; *Falcon v. State*, 1997 ND 200, ¶ 18, 570 N.W.2d 719. As Acting Presiding Judge Benson noted, it was an apparent oversight not to list the judge on the notice. Because this postconviction matter is a continuation of the underlying criminal matter and

the same judge retained the assignment, Aune was not entitled to demand a new judge under N.D.C.C. § 29-15-21 without regard to whether he received an incomplete notice of which judge had been assigned to the postconviction matter. *Chisholm*, 2019 ND 70, ¶¶ 9-12. Acting Presiding Judge Benson properly denied the demand.

B

[¶24] Aune's demand for change of judge under N.D.C.C. § 29-15-21 also included claims of bias against Judge Whelan.

[¶25] A demand for a change of judge is not the proper route to remove a judge for bias. We have explained:

> [M]otions seeking the recusal of a judge for bias or prejudice are not within the scope of N.D.C.C. § 29-15-21(6), and the assigned judge is not disqualified from acting on matters within the case. *See, e.g., Schweitzer v. Mattingley*, 2016 ND 231, ¶¶ 14-15, 887 N.W.2d 541 (district court committed reversible error in allowing a different judge to rule on a motion for recusal based on bias). Unlike a demand for a change of judge, "a district court judge is not immediately divested of authority upon the filing of a motion to recuse." *Id.* at ¶ 15. While "a judge has a duty to recuse when required by the Code of Judicial Conduct, a judge also has an equally strong duty not to recuse when the circumstances do not require recusal." *Rath v. Rath*, 2016 ND 46, ¶ 31, 876 N.W.2d 474. Rule 2.7, N.D. Code Jud. Conduct, requires the assigned judge to hear and decide all matters assigned to the judge, unless disqualification is required or otherwise provided by law.

Chisholm, 2019 ND 70, ¶ 15.

[¶26] In *Chisholm*, the acting presiding judge reviewed and denied a request for a new judge which argued the assigned judge was biased. *Id.* at ¶ 14. We reversed because the bias claim should have been determined by the judge assigned to the case, not by another judge. *Id.* at ¶ 17. Here, Acting Presiding Judge Benson decided in his first order to deny the demand for change of judge because Aune "is not entitled to a new judge as Judge Whelan had presided

over the underlying criminal proceeding." Also, Judge Benson in his order denying Aune's motion to reconsider the demand for change of judge addressed the bias claim and found that Aune provided allegations of bias and that a claim of bias should have been raised before Judge Whelan as a motion for recusal. He concluded the demand based on bias did not comply with N.D.C.C. § 29-15-21 and denied reconsideration. Unlike *Chisholm,* Judge Benson did not make any conclusion on the bias claims which should have been placed before Judge Whelan. Judge Whelan considered and rejected the claim of bias in the order denying Aune's motion to reopen and reconsider his application. Thus, the orders denying the demand for a change of judge and motion to reconsider the change of judge were properly denied.

V

[¶27] We affirm the order summarily dismissing the application for postconviction relief, and the order denying the demand for a change of judge. We also affirm the orders denying motions to reconsider the summary dismissal of the postconviction application and the denial of the demand for a change of judge.

[¶28] Jon J. Jensen, C.J.
Lisa Fair McEvers
Jerod E. Tufte

Crothers, Justice, dissenting.

[¶29] I agree with the majority that N.D.C.C. § 29-32.1-09(1) grants district courts authority to *sua sponte* enter summary dismissal in some limited circumstances. I also agree that, with the benefit of Aune's post hoc briefing, it appears Aune's case was subject to dismissal under the statute of limitations. However, the procedure they set in place will require postconviction applicants who meet an exception to the statute of limitations to plead those exceptions to affirmative defenses not yet asserted by the State. I find no parallel requirement in civil or criminal law, and submit we should not impose that requirement here.

[¶30] Section 29-32.1-04(1), N.D.C.C., states an "application must identify the proceedings in which the applicant was convicted and sentenced, give the date of the judgment and sentence complained of, set forth a concise statement of each ground for relief, and specify the relief requested." That section makes clear that the application need not contain any "[a]rgument, citations, [or] discussion of authorities." *Id.*

[¶31] Although often observed in the breach, the Uniform Postconviction Procedure Act also requires the following:

> The application must identify all proceedings for direct review of the judgment of conviction or sentence and all previous postconviction proceedings taken by the applicant to secure relief from the conviction or sentence, the grounds asserted therein, and the orders or judgments entered. The application must refer to the portions of the record of prior proceedings pertinent to the alleged grounds for relief. If the cited record is not in the files of the court, the applicant shall attach that record or portions thereof to the application or state why it is not attached. Affidavits or other material supporting the application may be attached, but are unnecessary.

N.D.C.C. § 29-32.1-04(2).

[¶32] "Within thirty days after the docketing of an application or within any further time the court may allow, the state shall respond [to the application] by answer or motion." N.D.C.C. § 29-32.1-06(1). The State may raise the affirmative defenses of misuse of process and res judicata. N.D.C.C. §§ 29-32.1-06(3)(a) and (b); 29-32.1-12. Although not listed in the prior section, under N.D.C.C. § 29-32.1-01(3) the statute of limitations was added as affirmative defense. *Lehman v. State*, 2014 ND 103, ¶ 8, 847 N.W.2d 119. Categorically, affirmative defenses are waived if not raised by the State. *Id.* ("Affirmative defenses, including statutes of limitations, are waived if not pleaded.") (cleaned up); *Kinsella v. State*, 2013 ND 238, ¶ 4, 840 N.W.2d 625 ("Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure."); 5 Fed. Prac. & Proc. Civ. § 1278, *Effect of Failure to Plead an Affirmative Defense* (4th ed.) ("It is a frequently stated proposition of virtually

universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule of Civil Procedure 8(c) results in the waiver of that defense and its exclusion from the case.").

[¶33] Here, Aune's postconviction relief application identified relevant events in the district court. He alleged the trial judge was biased against him due to her prosecution of him while the judge was an assistant and State's Attorney. The current case was prosecuted by a State's Attorney who was the judge's assistant when the judge was a State's Attorney. Aune claimed his conviction was obtained and sentence was imposed in violation of "the Fourteenth Amendment Due Process Clause" and his "due process right under the Fourteenth Amendment to the United States Constitution and Article I, Section 12 of the North Dakota Constitution." The district court did not dismiss the application because it contained insufficient information about the underlying criminal cases or lacked citation to the record. As the majority opinion makes clear, Aune's application was *sua sponte* dismissed by the same judge because the application was not filed within two years. Majority opinion, ¶ 10 ("Aune filed his application on April 28, 2023, after the April 15, 2023 deadline, and he did not allege an exception under N.D.C.C. § 29-32.1-01(3). The application was untimely.").

[¶34] For more than a decade this Court has recognized the statute of limitations is an affirmative defense in postconviction relief proceedings. *Lehman*, 2014 ND 103, ¶ 8; N.D.C.C. § 29-32.1-01(3). In *Lehman* we held:

> A statute of limitations defense in a civil proceeding is an affirmative defense. N.D.R.Civ.P. 8(c)(1). Affirmative defenses, including statutes of limitations, are waived if not pleaded. *In Interest of K.B.*, 490 N.W.2d 715, 717 (N.D. 1992). Here, the State did not raise the two-year statute of limitations under N.D.C.C. § 29-32.1-01(2). Consequently, the defense was waived[.]

Id. Since deciding *Lehman* this Court has not held or even suggested the affirmative defense of statute of limitations stands on lesser footing than the affirmative defenses of res judicata or misuse of process. By its "conspicuously

absent" comment in paragraph 6, and "sets apart" comment in paragraph 9, the Court changes what ought to be equal treatment of affirmative defenses.

[¶35] Under *Lehman* the statute of limitations is an affirmative defense under N.D.R.Civ.P. 8(c)(1). Res judicata and misuse of process are affirmative defenses under N.D.C.C. § 29-32.1-12. The majority does not cite authority, and I have found none, supporting the relegation of an affirmative defense recognized under the Civil Rules to a legal position inferior to an affirmative defense recognized by statute. To the contrary, this Court stated, "Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure." *Kinsella*, 2013 ND 238, ¶ 4.

[¶36] No matter their origins all three affirmative defenses must be asserted by the State in response to claims by an applicant. *Lehman*, 2014 ND 103, ¶ 8; N.D.C.C. §§ 29-32.1-06(3) and 29-32.1-12. All three must be proven by the State. N.D.R.Civ.P. 8(c)(1) ("In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including: . . . statute of limitations."); *Barber v. State*, 141 N.E.3d 35, 41 (Ind. App. 2021) (the State has the burden of proving the affirmative defense of laches by a preponderance of the evidence). Although not made clear in the text of either N.D.R.Civ.P. 8 or N.D.C.C. §§ 29-32.1-06(3) and 29-32.1-12, affirmative defenses are waived if not asserted by a responding party. *Lehman*, at ¶ 8; *Comes v. State*, 2018 ND 54, ¶ 9, 907 N.W.2d 393 ("Here, the State did not raise the two-year statute of limitations under N.D.C.C. § 29-32.1-09(1). Consequently, the defense was waived, and we will address the merits of Comes' post-conviction relief application.").

[¶37] According to established North Dakota law, we start with the proposition that the State must respond to a postconviction relief application AND in that responsive pleading must include any affirmative defenses. Thus, under all legal principles known before today, until the State asserts affirmative defenses, the applicant has no obligation to plead facts or arguments anticipating defenses that might be advanced by the State in a responsive pleading. *Braden v. Wal-Mart Stores, Inc.,* 588 F.3d 585, 601 n.10 (8th Cir. 2009) ("a plaintiff need not plead facts responsive to an affirmative defense

before it is raised"); 5 Fed. Prac. & Proc. Civ. § 1276, *Plaintiff's Anticipation of an Affirmative Defense*, n.6 (4th ed.) (citing cases supporting proposition that a plaintiff need not anticipate or attempt to circumvent affirmative defenses).

[¶38] The majority's analysis starts and stops with the first part of N.D.C.C. § 29-32.1-01(2), providing that an application for relief under N.D.C.C. ch. 29-32.1 must be filed within two years of the date the conviction becomes final. "A conviction becomes final for purposes of this chapter when: a. The time for appeal of the conviction to the North Dakota supreme court expires; b. If an appeal was taken to the North Dakota supreme court, the time for petitioning the United States supreme court for review expires; or c. If review was sought in the United States supreme court, the date the supreme court issues a final order in the case." N.D.C.C. § 29-32.1-01(2).

[¶39] The majority opinion states:

> The criminal judgment challenged in the application, including the date of judgment and sentence, must be identified in the application. N.D.C.C. § 29-32.1-04(1). If finality is delayed by an appeal to this Court or a petition for review in the United States supreme court, N.D.C.C. § 29-32.1-01(2)(b)&(c), the necessary information must also be included in the application. N.D.C.C. § 29-32.1-04(2). It will thus be apparent whether the application has been filed within two years of when the conviction became final and, if not, whether the application contains any allegation supporting a statutory exception to the statute of limitations.

Majority opinion, ¶ 9. The majority is improperly mixing the exceptions to the statute of limitations affirmance defense in N.D.C.C. § 29-32.1-01(2) with the petition content requirements of N.D.C.C. § 29-32.1-04.

[¶40] First, the statute of limitations is an affirmative defense, and an applicant has no obligation to plead facts in anticipation of the State's defenses, affirmative or otherwise. *Anderson v. State*, 992 P.2d 783, 787 (Idaho Ct. App. 1999); *Braden*, 588 F.3d at 601 n.10; *Goodman v. Praxair, Inc.*, 494 F.3d 458, 465-66 (4th Cir. 2007).

[¶41] Second, the majority overstates the content of the application regarding relief sought from the United States Supreme Court. That review was sought from the Supreme Court is important for when the statute of limitations starts running. N.D.C.C. § 29-32.1-01(2). But the fact that review was sought and either obtained or not obtained is very different than the date of such. The former, but not the latter, is required as content of the application. N.D.C.C. § 29-32.1-04. Therefore, the majority is engrafting on an application proof that simply is not required by law.

[¶42] Third, the majority recognizes that Idaho, like North Dakota, adopted the Uniform Postconviction Procedure Act. Majority opinion, ¶ 8. In the Idaho *Anderson* case a district court dismissed an application for postconviction relief because the applicant failed to plead facts supporting his claim his mental illness excused his failure to commence his proceeding within the one-year limitation period. 992 P.2d at 787. The court of appeals reversed, holding:

> The district court held that the absence of an allegation of mental incompetence in Anderson's application for post-conviction relief precluded his reliance on such response to the statute of limitations defense. We find the district court's reasoning to be flawed. Although it would be prudent for an applicant to allege facts which he contends would avoid the time bar when an application is filed outside the one-year period specified in § 19-4902, the absence of such allegations in the initial pleading is not fatal to an applicant's claims.

Id. The Idaho court continued:

> Therefore, it was not necessary for Anderson to include allegations about his post-conviction mental health in the application for hearing. To hold otherwise would require inmates, who are untrained in the law and are generally acting without the benefit of counsel in the preparation of their applications, to anticipate possible affirmative defenses and negate them even before the affirmative defense has been pleaded. In our view, justice would not be served by such a rule.

Id.

[¶43] In *Goodman* the court specifically addressed whether a plaintiff needed to plead facts in anticipation that the defendant would interpose the statute of limitations as an affirmative defense. The court held:

> "Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." To require otherwise would require a plaintiff to plead affirmatively in his complaint matters that might be responsive to affirmative defenses even before the affirmative defenses are raised. Of course, no such pleading is required except, perhaps, in the unusual case where a claim is filed clearly beyond the applicable limitations period and the plaintiff seeks to forestall its dismissal by alleging the facts of discovery.

494 F.3d at 466 (cleaned up).

[¶44] Here, Aune's application was not "filed clearly beyond the applicable limitations period." *Goodman,* 494 F.3d at 466. Under the majority's calculations, the application was days late. Further, the essential information in the application, as called for under N.D.C.C. § 29-32.1-04(1), does not include the dates of review sought or received from the United States Supreme Court. The law provides and the majority acknowledges that review sought by the United States Supreme Court proceedings can affect when the two-year period begins to run. N.D.C.C. § 29-32.1-01(3); majority opinion, ¶ 10. However, they do not account for the fact that dates concerning United States Supreme Court review is not required to be included in the application. Therefore, I cannot agree with their conclusion that "[t]he district court properly dismissed the application because the information the court relied on was contained in the application or was embraced by the pleadings." Majority opinion, ¶ 17. A district court contemplating *sua sponte* dismissal cannot independently search for information not contained in or embraced by the application. *See Atkins v. State*, 2021 ND 83, ¶ 10, 959 N.W.2d 588 (holding the district court erred when it relied on facts not alleged in an application and dismissed the case without notice). As recognized by the majority, "The court may dismiss an application without notice to the applicant only if it does not rely on information outside

the application and considers only the claims made in the application."[2] Majority opinion, ¶ 15. Without all information in the application about Supreme Court proceedings, the record will not be complete unless the majority opinion is read as imposing an additional pleading obligation on the applicant.

[¶45] Based on the law cited and the reason advanced above, I believe the jurisprudential shortcut permitted today is unwarranted and unworkable. Rather, we should leave to the adversarial process simple steps like requiring an application identifying claims for postconviction relief, requiring an answer to the application identifying defenses and affirmative defenses, and except for the rare cases where an applicant plainly fails to state a legally viable claim, require motions for summary dismissal and summary disposition.

[¶46] Daniel J. Crothers

Bahr, Justice, dissenting.

[¶47] I dissent from part III of the majority opinion. I would hold the district court was required to give Aune notice and the opportunity to respond before it dismissed the postconviction relief application on its own motion. I would

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[2] By quoting this portion of the majority opinion I do not embrace their conclusion that due process allows for *sua sponte* dismissal of a postconviction relief claim. Rather, I reserve that question for another day because this case can be resolved on non-constitutional grounds. However, in doing so I incorporate here what I wrote in a different context:

> Given the choice between a constitutional and an unconstitutional application of law, this Court is constrained to select the constitutionally compatible route. *Caldis v. Bd. of County Comm'rs*, 279 N.W.2d 665, 669 (N.D. 1979) ("[T]his court will construe a legislative enactment as constitutional if at all possible."). I believe the district court's *sua sponte* use of the State's answer as a de facto motion deprived Delvo of her due process right to notice and opportunity to respond. *See McWethy v. McWethy*, 366 N.W.2d 796, 798 (N.D. 1985) ("Judicial decision on motion of one party, without notice to and opportunity to be heard by the other party, is contrary to fundamental principles of justice and due process, except under exigent or special circumstances with reasonably prompt subsequent notice and opportunity to be heard.").

Delvo v. State, 2010 ND 78, ¶ 33, 782 N.W.2d 722 (Crothers, J., dissenting) (reversed on other grounds).

reverse the court's order dismissing Aune's application for postconviction relief because the court did not give Aune notice and the opportunity to respond before it dismissed his application. Because I would reverse on that ground, I would not address the other issues raised by Aune.

[¶48] The legislature amended N.D.C.C. § 29-32.1-09 in 2013 by adopting 2013 Senate Bill 2227. Senate Bill 2227 added two new subsections to section 29-32.1-09. The subsections provided, in part:

> 1. The court, *on its own motion*, may enter a judgment denying a meritless application on any and all issues raised in the application before any response by the state. . . .
>
> 2. The court, *on its own motion*, may dismiss any grounds of an application which allege ineffective assistance of postconviction counsel. . . .

2013 Sess. Laws ch. 248, § 2 (emphasis added).[3] However, the court's authority to dismiss actions on its own motion, including postconviction relief actions, existed before 2013. The 2013 amendments to section 29-32.1-09 simply codified case law holding courts have inherent authority to dismiss actions sua sponte. "Sua sponte" means "[w]ithout prompting or suggestion; on its own motion." Black's Law Dictionary 1722 (11th ed. 2019).

[¶49] In *Albrecht v. First Fed. Sav. & Loan Ass'n of Grand Forks & Minot*, 372 N.W.2d 893, 894 (N.D. 1985), this Court addressed "whether the district court had the authority to dismiss with prejudice sua sponte the [plaintiffs'] complaint." After looking to federal court's interpretations of the Federal Rules of Civil Procedure, "we adopt[ed] the principle articulated by the federal courts that a court may, of its own initiative, note the inadequacy of a complaint and dismiss it for failure to state a valid claim." *Id.* We noted "this power must be

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[3] In 2023, the legislature amended section 29-32.1-09, dividing it into two sections. The amendments left subsections 1 and 2, which include the language "*on its own motion,*" in section 29-32.1-09 and amended the section title to "Summary dismissal." 2023 Sess. Laws ch. 307.

exercised most sparingly and with great care to protect the rights of the respective parties," agreeing "with the caveat that a sua sponte dismissal is a radical step, not to be taken lightly." *Id.* at 894-95; *see also Ennis v. Dasovick*, 506 N.W.2d 386, 389 (N.D. 1993) ("A trial court may, on its own initiative, and in the cautious exercise of its discretion, dismiss a complaint for failure to state a valid claim under Rule 12(b), N.D.R.Civ.P."); *Patten v. Green*, 397 N.W.2d 458, 459 (N.D. 1986) ("The district court may, on its own initiative, and in the cautious exercise of its discretion, dismiss a complaint for failure to state a valid claim."). In *Berlin v. State,* 2005 ND 110, ¶ 7, 698 N.W.2d 266, we recognized a court has inherent power to dismiss a postconviction relief application on its own motion. We emphasized that "this power must be exercised sparingly and with great care to protect the rights of the parties[.]" *Id.*; *see also Wong v. State*, 2010 ND 219, ¶ 8, 790 N.W.2d 757 (discussing court's power to dismiss an application for postconviction relief on its own initiative). Thus, at least as early as 2005, it was recognized a court could dismiss a postconviction relief application on its own motion.

[¶50] However, sua sponte, or on its own motion, does not mean without notice. Citing federal precedent, in *City of Jamestown v. Snellman,* 1998 ND 200, ¶ 10, 586 N.W.2d 494, we noted that "when a court dismisses an action sua sponte, it is still required to give the parties notice of its intent to do so and an opportunity to respond." "Following *Snellman,* it is settled law in North Dakota that in both criminal and civil cases, a court seeking to dismiss a case without a prior motion from the parties must give the parties adequate notice and an opportunity to respond." *Zink v. Enzminger Steel, LLC*, 2011 ND 122, ¶ 17, 798 N.W.2d 863.

[¶51] Codifying case law, section 29-32.1-09 permits the district court to deny a meritless application without a motion by the State prompting it to do so. Section 29-32.1-09 does not provide the court may deny a meritless application without providing the applicant notice and the opportunity to respond. The words "on its own motion" do not imply a court may deny an application without providing the applicant notice and the opportunity to respond. Under North Dakota case law, which the legislature presumably knew, a court is

required to "give the parties adequate notice and an opportunity to respond" before denying an application on its own motion. *Zink*, 2011 ND 122, ¶ 17. "The Legislature is presumed to know the law when enacting legislation." *Comstock Const., Inc. v. Sheyenne Disposal, Inc.*, 2002 ND 141, ¶ 28, 651 N.W.2d 656. Had the legislature intended to change the meaning of "on its own motion," it could have done so. It did not.

[¶52] Because section 29-32.1-09 is unambiguous, we need not look to the legislative history of 2013 Senate Bill 2227. *See* N.D.C.C. § 1-02-05. However, the legislative history of Senate Bill 2227 supports the conclusion the legislature did not intend to change the law established in *Snellman* and *Zink*. Neither case is mentioned in the legislative history. There is also no discussion indicating "on its own motion" or "summarily dismiss" means without notice to the applicant. Then Justice Dale Sandstrom, on behalf of the North Dakota Judicial Conference, testified in support of Senate Bill 2227. Justice Sandstrom was on this Court when *Snellman* was issued, and is the author of *Zink*, in which he wrote, "A court attempting to dismiss a civil action without a prior motion from the parties must give those parties adequate notice and an opportunity to respond." 2011 ND 122, ¶ 19. In his written testimony, Justice Sandstrom explained, "This bill would provide that in such cases the district court can summarily dismiss the case without requiring filings and briefing by the State." *See Hearing on S.B. 2227 Before the House Judiciary Committee*, 63rd N.D. Legis. Sess. (March 20, 2013) (testimony of Dale Sandstrom, North Dakota Supreme Court Justice); *Hearing on S.B. 2227 Before the Senate Judiciary Committee*, 63rd N.D. Legis. Sess. (February 5, 2013) (same). Conspicuously absent from Justice Sandstrom's testimony, and any other testimony or discussion, is any statement a court could summarily dismiss a case without providing the applicant notice and the opportunity to respond. I do not read the legislature's silence on the notice issue, *see* Majority, at ¶ 17 ("The postconviction procedure act is silent as to whether notice is required."), as evidence it intended to legislatively overrule *Snellman* and *Zink* and authorize courts to quit protecting the rights of postconviction relief applicants. *See Wong*, 2010 ND 219, ¶ 8 (explaining a court must exercise "great care to protect the rights of the parties" when it exercises its power to dismiss a

postconviction relief application on its own initiative); *Berlin*, 2005 ND 110, ¶ 7 (same).

[¶53] Under the pre-2013 version of section 29-32.1-09, this Court wrote "the applicant must be given notice and an opportunity to respond and submit evidence to demonstrate there is a genuine issue of material fact before the court may dismiss the application." *Chisholm v. State*, 2014 ND 125, ¶ 10, 848 N.W.2d 703. Addressing the 2013 amendments, we concluded the statute does not waive "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." *Id.* at ¶ 14. A year later, we affirmed that after the 2013 amendments, "an applicant is still entitled to notice and an opportunity to submit evidence before an application is dismissed." *Riak v. State*, 2015 ND 120, ¶ 16, 863 N.W.2d 894.

[¶54] Arguably, the holding in *Chisholm* and statement in *Riak* are limited to summary dismissals where the district court considers evidence outside the pleadings. *See also Atkins v. State*, 2021 ND 83, ¶ 10, 959 N.W.2d 588 (concluding the court erred when it, without giving petitioner notice and before the State filed an answer, considered petitioner's previous filings and summarily dismissed his application). However, that still begs the question—must a district court give an applicant notice and the opportunity to respond before it summarily dismisses a postconviction relief application on its own motion? This Court previously answered that question, stating, in both criminal and civil cases, that a court must give the parties adequate notice and an opportunity to respond before the court dismisses the case on its own motion. *Zink*, 2011 ND 122, ¶ 17; *Snellman,* 1998 ND 200, ¶ 10. Nothing in 2013 Senate Bill 2227 removed the requirement that a court give parties notice and the opportunity to respond before the court dismisses a postconviction relief application on its own motion.

[¶55] Federal courts agree a party is entitled to notice and the opportunity to respond before a court dismisses a complaint or claim on the court's own motion. "Of course," wrote the United States Supreme Court, "before acting on its own initiative, a court must accord the parties fair notice and an

opportunity to present their positions." *Day v. McDonough*, 547 U.S. 198, 210 (2006); *see also Robertson v. Anderson Mill Elementary Sch.*, 989 F.3d 282, 290-91 (4th Cir. 2021) (explaining a district court may only exercise authority to sua sponte dismiss inadequate complaints if "the procedure employed is fair to the parties," *i.e.*, "the party whose complaint stands to be dismissed must be 'afforded notice and an opportunity to amend the complaint or otherwise respond.'" (citations omitted)); *Davoodi v. Austin Indep. Sch. Dist.*, 755 F.3d 307, 310 (5th Cir. 2014) (stating a district court may dismiss a claim on its own motion "as long as the procedure employed is fair," and "fairness . . . requires both notice of the court's intention and an opportunity to respond" (citations omitted)); *Am. United Life Ins. Co. v. Martinez*, 480 F.3d 1043, 1069 (11th Cir. 2007) (explaining the court prohibits sua sponte dismissals where "the district court has failed to provide the plaintiff with notice of its intent to dismiss or an opportunity to respond"); *Perez v. Ortiz*, 849 F.2d 793, 797 (2d Cir. 1988) (stating "sua sponte dismissals may be appropriate in some circumstances," but the general rule is a district court has "no authority to dismiss a complaint for failure to state a claim upon which relief can be granted without giving the plaintiff an opportunity to be heard" (citations omitted)); *see also Hager v. DBG Partners, Inc.*, 903 F.3d 460, 464 (5th Cir. 2018) (explaining fairness in the context of a sua sponte dismissal requires notice of the court's intention and an opportunity to respond, but appellant forfeited the issue by not raising it on appeal); *Smithrud v. City of St. Paul*, 746 F.3d 391, 395 (8th Cir. 2014) (stating the court did not err in dismissing the case sua sponte after ordering the parties to submit briefs on the issue); *Chute v. Walker*, 281 F.3d 314, 319 (1st Cir. 2002) (stating the general rule is sua sponte dismissals of complaints under Rule 12(b)(6) are improper unless the parties have been afforded notice and an opportunity to amend the complaint or respond); *see also* 5B Charles Alan Wright, Arthur R. Miller & Benjamin Spencer, *Fed. Prac. & Proc. Civ.* § 1357 n.24 (4th ed. February 2024 Update).

[¶56] Our recent decision in *Etemad v. State*, 2023 ND 108, 992 N.W.2d 1, may appear inconsistent with my position. However, the notice issue addressed in *Etemad* was quite limited. In his opening brief, Etemad argued "[he] was denied an evidentiary hearing[.]" In his reply brief, he argued he was entitled

to notice and an opportunity to respond and submit evidence because the court's summary dismissal was in fact a summary judgment. *See Etemad*, at ¶ 5 (discussing summary dismissals for failure to state a claim and summary dismissals where the court considers matters outside the pleadings); *see also Chisholm*, 2014 ND 125, ¶¶ 10, 12 (explaining when the court considers matters outside the pleading when summarily dismissing an application on its own motion, "the applicant must be given notice and an opportunity to respond and submit evidence to demonstrate there is a genuine issue of material fact before the court may dismiss the application"). Thus, the issue in *Etemad* was whether "the court erred when it summarily dismissed his application for post-conviction relief without affording him *notice and an opportunity to support his application*." 2023 ND 108, ¶ 4 (emphasis added). This Court concluded the district court did not treat the summary dismissal as a summary judgment so *Etemad* was not entitled to submit evidence to demonstrate there was a genuine issue of material fact. *Id.* at ¶ 6.

[¶57] In *Etemad*, this Court applied well-established law—an applicant must be given notice and an opportunity to respond and submit evidence when a district court considers matters outside the pleading when summarily dismissing an application—to the facts of the case. *Atkins*, 2021 ND 83, ¶ 10; *Riak*, 2015 ND 120, ¶ 16; *Chisholm*, 2014 ND 125, ¶¶ 10, 12; *State v. Gress*, 2011 ND 233, ¶ 9, 807 N.W.2d 567; *Wong*, 2010 ND 219, ¶ 16; *State v. Bender*, 1998 ND 72, ¶ 23, 576 N.W.2d 210. Etemad did not raise, the parties did not brief, and this Court did not decide whether a court is required to give an applicant notice and the opportunity to respond before the court dismisses a postconviction relief application on its own motion. *Snellman* and *Zink* address and resolve that issue.

[¶58] I agree with the majority that one intent of the 2013 amendments to chapter 29-32.1 was to expedite dismissal of meritless applications. Majority, at ¶ 8. The amendments accomplish that purpose by permitting the district court, on its own motion and prior to the State responding, to summarily dismiss meritless applications. However, there is nothing in the amendments indicating the legislature intended to upset settled case law by permitting

courts to dismiss applications without providing applicants notice and the opportunity to respond. And a court providing an applicant notice and the opportunity to respond only causes a slight delay in the dismissal of meritless applications, while protecting the applicant's rights. As we have said, a court's sua sponte dismissal of a complaint "is a radical step, not to be taken lightly," *Albrecht*, 372 N.W.2d at 894-95, which "must be exercised sparingly and with great care to protect the rights of the parties," *Wong*, 2010 ND 219, ¶ 8 (quoting *Berlin*, 2005 ND 110, ¶ 7). Courts do not protect applicants' rights when they dismiss applications on their own motion without providing the applicants notice and the opportunity to respond. *Cf. Ourada v. State*, 2019 ND 10, ¶ 6, 921 N.W.2d 677 ("Due process, even in the post-conviction setting, requires notice and an opportunity to be heard.").

[¶59] I dissent from part III of the majority opinion. I would hold a district court must give an applicant notice and the opportunity to respond before it summarily dismisses a postconviction relief application on its own motion.

[¶60] Daniel J. Crothers
Douglas A. Bahr