

20-6177

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
JUNE TERM 2020

No. _____

JOHN LEO DAVIS

Petitioner

-against-

GOODYEAR POLICE DEPARTMENT, et al.,

Respondent's

FILED

AUG 28 2020

OFFICE OF THE CLERK
SUPREME COURT, U.S.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

John Leo Davis, ADOC # 343109

ASPC - Tucson, Rincon Unit, Cell 2A14

P.O. Box 24403

Tucson, AZ 85734-4401

QUESTIONS PRESENTED

1. Whether it is proper for a district court to dismiss a complaint, sua sponte, before process is issued and served - based on grounds of being time-barred by the statute of limitations, when upon the complaint face value - it could be further developed by means of leave to amend.

2. Whether an arrestee that is sexually abused, by an opposite-gender official who forcefully used threats and intimidation to photograph arrestee's naked body, in the absent of an emergency situation, is entitled to assert the "blameless ignorance" doctrine outlined in Urie v. Thompson, 337 U.S. 163, 170 (1949); Hearndon v. Graham, 767 So. 2d 1179, 1184 (Fla. 2000); or Doe v. Roe, 191 Ariz. 313, 330 (Ariz. 1998), based on the premises that arrestee remained ignorant he had been wronged because the officials served him with a search warrant, giving the officials the authority to photograph his naked body.

3. Whether an arrestee that is sexually abused, by an opposite-gender official who forcefully used threats and intimidation to photograph arrestee's naked body, in the absent of an emergency situation, is entitled to assert the "repressed memory" doctrine in Doe v. Roe, 191 Ariz. 318, 318-26 (Ariz. 1998), based on the premises that arrestee involuntarily blocked the memory of the sexual abuse as a defense mechanism to cope with the traumatic event, delaying the accrual of the cause of action until arrestee's first flashback of the sexual abuse.

4. Whether an arrestee that is sexually abused, by an opposite-gender official who forcefully used threats and intimidation to photograph arrestee's naked body, in the absent of an emergency situation, is entitled to assert the "unsound mind" doctrine outlined in Doe v. Roe, 191 Ariz. 313, 325-26 (Ariz. 1998) and in Ariz. Rev. Stat. § 12-502, based on the premises that arrestee suffered from "repressed memory," therefore tolling the statute of limitations until the removal of the disability.

PARTIES

Petitioner, John Leo Davis, is a prisoner at Arizona State Prison Complex - Tucson, Rincon Unit, at 10000 S. Wilmot Road, Tucson, Arizona 85734-4401.

Respondents are as follows:

Goodyear Police Department, a Governmental Municipality;

Jerry Greer, a Police Officer Chief Commander, at Goodyear Police Department;

James Daugal #1135, a Police Officer Detective Sergeant, at Goodyear Police Department;

Noah Yeo #1167, a Police Officer Detective Sergeant, at Goodyear Police Department; and

Lori Ohrt #139, a Crime Scene Technician, at Goodyear Police Department.

RELATED CASES

- John Leo Davis v. Goodyear Police Department, et al., No. 2:18-cv-02603-SMB-CDB, U.S. District Court for the District of Arizona. Judgment entered April 10th, 2019.
- John Leo Davis v. Goodyear Police Department, et al., No. 19-15857, U.S. Court of Appeals for the Ninth Circuit. Judgment entered March 6th, 2020.

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OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Ninth Circuit is unreported. It is cited in the Federal Appendix table at 796 Fed. Appx. 449 (9th Cir. 2020) and a copy is attached as Appendix A to this petition. The order of the U.S. Court of Appeals for the Ninth Circuit, denying Motion for Rehearing or Rehearing En Banc is not reported, and a copy is attached as Appendix F to this petition. The order of the U.S. District Court for the District of Arizona, dismissing the First Amended Complaint with leave to amend is attached as Appendix B to this petition. The order of the U.S. District Court for the District of Arizona, dismissing the Second Amended Complaint with prejudice and without leave to amend is attached as Appendix C to this petition. The Judgment in a Civil Case entered by the U.S. District Court for the District of Arizona is attached as Appendix D to this petition. The order of the U.S. District Court for the District of Arizona, denying Petitioner's Motion For Reconsideration is attached as Appendix E to this petition.

In addition, a copy of Petitioner's Motion To Amend As A Matter of Course of Original Complaint is attached as Appendix G to this petition. A copy of Petitioner's Second Amended Complaint is attached as Appendix H to this petition. A copy of Petitioner's Motion For Reconsideration For Judgment in a Civil Case is attached as Appendix I to this petition. A copy of Petitioner's Informal Opening Brief is attached as Appendix J to this petition. A copy of Petitioner's Motion For Rehearing With Suggestion of Rehearing En Banc is attached as Appendix K to this petition.

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JURISDICTION

The Judgment of the US Court of Appeals for the Ninth Circuit was entered on March 6th, 2020. The US Court of Appeals order denying a petition for Rehearing and/or Rehearing En Banc was entered on June 26th, 2020. Jurisdiction is conferred by 28 USC § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendment IV to the United States Constitution, which provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

In addition, this case involves Amendment XIV of the United States Constitution, which provides:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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The Amendments are enforced by Title 42, Section 1983, United States Code:

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, and Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioner's First Amended Complaint, (Appendix G at 10-11), and Second Amended Complaint, (Appendix H at 5-6), alleges that on March 26th, 2015, he was forced through threats and intimidation, by Goodyear Police Detectives James Dugal #1135 and Noah Yeo #1167, to strip naked in the presence of Lori Ohrt #139, a female Crime Scene Technician, and to allow her to photograph his naked body - in absent of an emergency situation being present. Subsequently, Petitioner was severely traumatized, in shock, and confused that Respondent's would force him to strip naked in the presence of a female official and further allow her to photograph his naked body, that Petitioner repressed all memory of the sexual abuse - as a coping mechanism to deal with the traumatic event. (Id at 10). Petitioner had no knowledge of the alleged sexual abuse until he triggered his first flashback on January 9th, 2018 (Id; see also, Appendix G at 13). Additionally, at the time of the alleged event, Petitioner was blamelessly ignorant that he was being wronged or injured because Respondents served him with a search warrant, which authorized the Respondent's to obtain naked photographs of

Petitioner. (Appendix G at 10; Appendix H at 5, 10). After Petitioner's first flashback, he became severely depressed due to the recall of sexual abuse, that he attempted suicide on November 30th, 2018.

Initially, Petitioner filed his Original Complaint, (Doc. 2), and Leave to Extend the Additional Page Limit, (Doc. 1), on August 16th, 2018. However, on September 4th, 2018, before the original complaint was screened by the district court, Petitioner filed a Motion to Amend as a matter of course, in order to reduce the excess pages, and a Motion Withdrawing leave To Extend the Additional Page Limit, and a proposed FAC was attached as an exhibit to the motion. (Appendix G.). In a November 16th, 2018, district court order, (Doc. 8), "[t]he Court [] denied] as moot the Motion for Leave to Extend Page Limit, grant[ed] the Application to Proceed and Motion to Amend, and dismiss[ed] the First Amended Complaint with leave to amend."

(Appendix B at 1). The district court held that "Plaintiff did not commence this action until August 16, 2018, more than three years after the incident that forms the basis for his claims and more than one year after the relevant statute of limitations expired. While Plaintiff broadly claims that he did not 'realize' he was injured until January 9, 2018, he does not allege any facts to show why none of his injuries would have been readily apparent on or about March 26, 2015. Nor has he alleged any basis for equitable tolling. Accordingly, Plaintiff has failed to state a claim under § 1983 and Counts One and Two will be dismissed accordingly.... Plaintiff's state-law claims are similarly flawed.... Thus based on the allegations in the First Amended Complaint, Plaintiff's state-law claims are barred by the relevant statute of limitations. Counts Three through Eight will therefore be dismissed." (Id at 5-6). The Court further held that "[w]ithin 30 days, Plaintiff may submit a second amended complaint to cure the deficiencies outlined above." (Id at 6).

On December 3rd, 2018, Petitioner filed his second Amended Complaint (Appendix H). Petitioner alleged in his SAC that "he has two defenses as to why his statute of limitations were tolled for 2 years - 9 months - and - 13 days, which is: (1) Plaintiff was ignorant as to whether his rights were violated; and (2) Plaintiff suffered from 'repressed memory.'" (Id at 10). Petitioner asserts as to the "ignorance" defense, that "Defendant's presented a search warrant to [him] - that authorized the Goodyear Police to obtain naked photo's of him and when he protested - Defendant's

told him that he did not have a choice and that if he did not willing comply with their demands, that they would use physical force to obtain the naked photo's." (Id). Petitioner "believed that because of the search warrant, that Defendants had legal authority in obtaining naked photo's of him." (Id). Petitioner "was completely ignorant as to his rights" or that he was even being wronged when he was photographed naked by an opposite-gender official, because "he was under the impression that Police Officers were to protect and serve the community and not once did Plaintiff think that Defendant's would intentionally violate the law, by having an opposite-gender take naked photo's of his naked body." (Id). As to the "repressed memory" defense, Petitioner asserts that, "at the time of the incident, Plaintiff had just suffered -hours prior- a traumatic event at his residence and was not in a sound state of mind to comprehend that Defendant's were breaking the law, when they further traumatized him by forcing him to strip naked in the presence of an opposite-gender and to allow her to take naked photo's of him. Plaintiff had repressed the traumatic event with Defendant's," and that it was not until January 9th, 2018, that Petitioner first "triggered the traumatic event with Defendant's," which is when he realized and had sufficient knowledge that he was even wronged or injured. (Id). In a April 10th, 2019 district court order, (Doc. 14), "the court finds that Plaintiff's §1983 and state-law claims are barred by the relevant statutes of limitations, the ~~the~~ Second Amended Complaint will be dismissed for failure to state a claim." (Appendix C at 5). The district court held that "Plaintiff did not commence this action until August 16, 2018, more than three years after the incident that forms the basis for his claims. He asserts two separate grounds for why his claims are not barred by the relevant statute of limitations, both premised on a theory of delayed accrual. Plaintiff's first contention, that he was 'ignorant as to his rights' until January 9, 2018, is irrelevant for purpose of this analysis. As discussed above, the date on which Plaintiff identified the legal basis for his claims does ~~not~~ not affect the accrual of those claims. Thus, Plaintiff's failure to appreciate the purportedly unlawful character of Defendant's conduct did not stop the clock from running on his §1983 or state-law claims. Plaintiff's second contention, that he suffered from memory repression, is similarly deficient. When viewed as a whole, his allegations show that he is not claiming to have

repressed all memory of Defendant Uhr's search until January 9, 2018. Rather he is claiming that the trauma of that search, combined with the incident that occurred previously at his residence, prevented him from 'comprehending' that Defendant [J]s were breaking the law.' Such awareness was not necessary for the statutes of limitations to begin running, however, And Plaintiff has not alleged any other basis for believing that he was unaware of his injury at the time the search occurred. Accordingly, the statutes of limitations began to run on Plaintiff's claims on March 26, 2015, and his claims are therefore time-barred.... Plaintiff has made two efforts at crafting a viable complaint and appears unable to do so despite specific instructions from the Court. The Court finds that further opportunities to amend would be futile. Therefore, the Court, in its discretion, will dismiss Plaintiff's Second Amended Complaint without leave to amend." (Id at 7-8).

On April 10th, 2019, the district court entered a judgment in favor of Defendants. (Appendix D). On April 19th, 2019, Petitioner filed a Motion For Reconsideration For Judgment in a Civil Case. (Appendix I). Petitioner stated that the "Court has misplaced Plaintiff's Complaint by postulating what Plaintiff said or meant. First, on 3/25/15, Plaintiff had just experienced a traumatic event at his residence and was in complete shock and not in a sound mind to comprehend what the Defendants were doing to him.... Second, Plaintiff suffered from 'Repressed Memory,' which he repressed all his memory of Defendant Uhr's traumatic strip search leading up to 1/9/18, when Plaintiff's first memory of the traumatic strip search was triggered..." (Id at 3-4). On April 23rd, 2019, Petitioner filed a Notice of Appeal. (Doc. 16). In a May 1st, 2019 district court Order, (Doc. 18), "[t]he Court has read and considered Plaintiff's Motion for Reconsideration. (Doc. 17). No good cause appearing," and the court "Denied" the Motion. (Appendix E).

On May 17th, 2019, Petitioner filed Appellant's Informal Opening Brief, (Dkt. Entry 5), with the US Court of Appeals for the Ninth Circuit. (Appendix J). Petitioner stated in his Brief that he "believes that the USDC made assumptions as to whether Appellant repressed all or some memory of naked photographs being taken of him...., [and] that the USDC over-looked the controlling case authority that would have prohibited the USDC from dismissing

the complaint with prejudice." (Appendix J at 4). Petitioner reiterated his defenses as to why his statute of limitations were tolled as he explained in the SAC and Motion for Reconsideration. (Id at 5-C). In a March 6th, 2020 US Court of Appeals for the Ninth Circuit Memorandum, (Dkt. Entry 8), held that "[t]he district court properly dismissed Davis's action as time-barred because Davis filed this action more than two years after his federal claims accrued, and more than one year after his state law claims accrued," in which the Court "affirmed" the district court's holding. (Appendix A at 2). On March 18th, 2020, Petitioner filed with the Ninth Circuit a Motion For Rehearing With Suggestion of Rehearing En Banc. (Appendix K). Petitioner argued in his Motion, (Id), that "it's in [his] judgment that the panel decision has overlooked the material fact that Appellant suffered from 'Traumatic Amnesia,' Doe v. Roe, 191 Ariz. 313, 318-19 (1998), as well as Appellant being 'Blameless Ignorant,' Urie v. Thompson, 337 US 163, 170 (1949). It's further believed that the panel has overlooked the law in their decision..., [and that] the proceeding case involves questions of 'exceptional importance', which are: (1) How the 'blameless Amnesia' applies to the accrual of the statutes of limitations?" (Id at 1). Petitioner stated that "[t]he panels opinion directly conflicts with the opinion in Doe v. Roe, 191 Ariz. 313 (1998), and Urie v. Thompson, 337 US 163 (1949) and substantially affects a rule of national application..." (Id). In a June 26th, 2020 Ninth Circuit Order, (Dkt. Entry 10), the Court held that "[t]he panel has voted to deny the petition for panel rehearing. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc.... Davis's petition for panel rehearing and rehearing en banc [] are denied. No further filings will be entertained in this closed case." (Appendix F).

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BASIS FOR FEDERAL JURISDICTION

This case raises a question of interpretation of the Unreasonable Search and Seizure Clause of the Fourth Amendment to the United States Constitution. In addition, this case raises a question of interpretation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The district court had jurisdiction under the general federal question jurisdiction conferred by 28 USC § 1331.

REASONS FOR GRANTING THE WRIT

A. Conflicting Decisions Within The Ninth Circuit And Other Courts

The holding of the Ninth Circuit panel of Judges erroneously affirmed the district court sua sponte ruling—which was before process was issued and served—based on the grounds that Behlmer's complaint was properly dismissed with prejudice and without leave to amend, as being time-barred by the statute of limitations, Davis v. Goodyear Police Department, 796 Fed. Appx. 449, 449 (9th Cir. 2020), is directly contrary to the holding of four federal circuits, see, e.g., Krug v. Imbording, 896 F.2d 395, 396 (9th Cir. 1990); Hughes v. Loft, 350 F.3d 1157, 1163 (11th Cir. 2003); Nasim v. Warden, Maryland House of Corr., 64 F.3d 951, 959-60 (4th Cir. 1995); and Etatus v. Deland, 49 F.3d 673, 674-75 (10th Cir. 1995), as well as inconsistent with the delayed discovery doctrine in two state Supreme Courts. See, e.g., Hearndon v. Graham, 767 So.2d 1179, 1184 (Fla. 2000); and Doe v. Roe, 191 Ariz. 313, 322-23 (Ariz. 1998).

B. Importance Of The Questions Presented

This case presents a fundamental question of the interpretation of this Court's decision in Ariz. v. Thompson, 337 U.S. 163, 170 (1949), as well as presents a fundamental question of the interpretation of the State Supreme Courts' decisions in Doe v. Roe, 191 Ariz. 313, 322-23 (Ariz. 1998) and Hearndon v. Graham, 767 So.2d 1179, 1184 (Fla. 2000). In addition, this case presents a fundamental question of the interpretation of several federal circuit decisions in Krug v. Imbording, 896 F.2d 395, 396 (9th Cir. 1990); Hughes v. Loft, 350 F.3d 1157, 1163 (11th Cir. 2003); (15)

Nasim v. Warden, Maryland House of Corr., 64 F.3d 951, 959-61 (4th Cir. 1995); and Fratus v. Deland, 49 F.3d 673, 674-75 (10th Cir. 1995). The questions presented are of great public importance because it affects the operation of the Court systems in all 50 states and the District of Columbia, in dealing with dismissing a complaint, sua sponte, before process is issued and served, based on the grounds of being time-barred by the statute of limitations. In view of the large amount of litigation over the "delayed discovery" doctrine, which affects the statute of limitations, guidance on the questions is also of great importance to plaintiffs, because it affects their ability to bring forth non-frivolous claims, that would otherwise be time-barred by the statute of limitations, by presenting evidence that supports their legal theory of tolling the statute of limitations and/or delaying the accrual of the cause of action until they reasonably discover their right of action.

The issue's importance is enhanced by the fact that the lower courts in this case have seriously misinterpreted Urie. This Court held that "[w]e do not think the humane legislative plan intended such consequences to attach to blameless ignorance. Nor do we think those consequences can be reconciled with the traditional purposes of statute of limitations, which conventionally require the assertion of claims within a specified period of time after notice of the invasion of legal rights." Urie, 337 U.S. at 170. The Supreme Court of Florida reiterated this point in Hearndon v. Graham, 767 So.2d 1179, 1184 (Fla. 2000), and added that the "blameless ignorance" doctrine "thereby delay[s] the accrual of a cause of action until the plaintiff reasonably discovered the right of action..." *Id.* Several district courts and federal circuits have displayed a certain amount of confusion regarding the application of the delayed discovery doctrine. Some Courts have stated that the doctrine delays the "accrual" of the cause of action, while other Courts have held that the doctrine affects the "tolling" of the statute of limitations. Nevertheless, the Supreme Court of Florida held that the delayed discovery doctrine affects the "accrual" of the cause of action. *Id.* at 1185. "The 'delayed discovery' doctrine generally provides that a cause of action does not accrue until the plaintiff either knows or reasonably should know of the tortious act giving rise to the

Cause of action. See, Hillsborough Community Mental Health Ctr. v. Harr., 618 So.2d 187, 189 (Fla. 2000) [.] The United States Supreme Court applied the 'blameless ignorance' doctrine in Urie v. Thompson, 337 US 163, 170 [.] (1949), thereby delaying the accrual of a cause of action until the plaintiff reasonably discovered that right of action, reasoning that 'the traditional purpose of statute of limitations... requires that assertion of claims within a specified period of time after notice of the invasion of legal rights.' Id. Hearndon, 767 So.2d at 1184.

Furthermore, the Supreme Court of Arizona held that "[t]he purpose of the statute of limitations is to 'protect defendants and courts from stale claims where plaintiffs have slept on their rights,'" Doe, 191 Ariz. at 322, (quoting, Gust, Rosenfeld & Henderson v. Prudential Ins., Co., 182 Ariz. 586, 590 (Ariz. 1995); citing, Ritchie v. Grand Canyon Scenic Rides, 165 Ariz. 460, 464 (1990); Brooks v. Southern Pac. Co., 105 Ariz. 442, 444 (1970)), "[b]ut whether a tort victim or a contract claimant, a blamelessly uninformed plaintiff cannot be said to have slept on his rights." Gust, 182 Ariz. at 590-91. "One does not sleep on his or her rights with respect to an unknown cause of action. Thus, Arizona law recognizes that 'one of the fundamental reasons underlying the philosophy of these statutes—the presumed invalidity of a claim allowed to become stale—is not present in the case where the injured plaintiff has no knowledge that such a claim exists.'" Doe, 191 Ariz. at 322 (quoting, Mayer v. Good Samaritan Hosp., 14 Ariz. 248, 251-52 (1971)). "Under the discovery rule, [.] a cause of action does not accrue until the plaintiff knows or with reasonable diligence should know the facts underlying the cause." Doe, 191 Ariz. at 322 (citing, Gust, 182 Ariz. at 588). "The rationale offered for the discovery rule 'is that it is unjust to deprive a plaintiff of a cause of action before the plaintiff has a reasonable basis for believing that a claim exists.'" Doe, 191 Ariz. at 322 (quoting, Gust, 182 Ariz. at 589). "A plaintiff need not know all the facts underlying a cause of action to trigger accrual [.] Richards v. Powercraft Homes, Inc., 139 Ariz. 264, 266 [.] (App. 1983), vacated in part, 139 Ariz. 242 [.] (1984) [.] [however] the plaintiff must at least possess a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury." Doe, 191 Ariz. at 323 (citing, Lawhon v. L.B.J. Inst. Supply, Inc., 159 Ariz. 179, 183 (App. 1988)).

Moreover, the Ninth Circuit has "concluded that the district court may sua sponte dismiss a complaint as untimely so long as the defendant has not waived the defense." Levald, Inc. v. City of Palm Desert, 998 F.2d 680, 687 (9th Cir. 1993) (citing, Leonhard v. U.S., 633 F.3d 599, 609 n.11 (2d Cir. 1980)). Several circuits have held that "defendants have the burden of demonstrating that the statutory period ha[s] run before [Petitioner] filed his action." Cooley v. Strickland, 479 F.3d 412, 416 (6th Cir. 2007); see also, Tell v. Dean Witter Reynolds, Inc., 494 F.3d 956, 974 (11th Cir. 2007) (same); Fratus, 49 F.3d at 675. When a defendant raises a defense in their answer to plaintiff's complaint that such is time-barred, the burden of proof falls upon plaintiff to prove that they are entitled to tolling of the statute of limitations. Firstcom Inc. v. Quest Corp., 555 F.3d 669, 675 (8th Cir. 2009). Furthermore, the Ninth Circuit held that a Petitioner did not file his §1983 complaint until "three to four years after the alleged constitutional violations occurred... [in which] [t]he district court... dismissed the complaints sua sponte on the ground that they were barred by the statute of limitations... [however the Ninth Circuit] reversed in an unpublished memorandum disposition because the trial judge prematurely dismissed before process was issued and served... [given] that the statute of limitations was not jurisdictional, but rather an affirmative defense." Krug, 896 F.2d at 396 (citing, Krug v. Imbordinis, No. 742 F.2d 1462 (9th Cir. 1984) (unpublished memorandum disposition)). Additionally, the Eleventh Circuit held that "the district court dismissed [Petitioner's] [t] claims under the Fourteenth Amendment on the grounds that they were filed outside of [the] two-year statute of limitations applicable to §1983 actions and were therefore frivolous under 28 USC 1915 (e)(2)(B)(i)... [however] [t]o dismiss a prisoner's complaint as time-barred prior to ~~see~~ service, it must appear beyond a doubt from the complaint itself that [the prisoner] can prove no set of facts which would avoid a statute of limitation bar." Hughes, 350 F.3d at 1163 (quoting, Leal v. Ga. Dept. of Corr., 254 F.3d 1276, 1280 (11th Cir. 2001)). The Court further held that Petitioner "asserts, [t]hat he may be able to show that the limitations period was tolled if he is given a chance to amend his complaint... Thus, if [Petitioner] is able to plead facts that would support a finding that the statute of limitations has been tolled, he should be granted leave to amend his complaint." Hughes, 350 F.3d at 1163. Also, the Fourth Circuit held in a dissenting opinion, "[t]he district court has discretion to dismiss an in forma pauperis complaint 'if satisfied

that the action is frivolous or malicious,' 28 USC § 1915(d)... [However,] a waivable affirmative defense that has not been raised by any party, like the limitations defense here, can provide the basis for dismissal only if the defense is clear from the face of the complaint. Thus, prior to receipt of any pleading raising the defense, a district court has no discretion to dismiss an in forma pauperis action on the basis of a waivable affirmative defense if that defense is not clear from the face of the complaint. This has long been the rule in this circuit [7], and is consistent with the well-established principle that an affirmative defense can provide the basis for dismissal under Fed. R. Civ. P. 12(b)(6) 'only if [that defense] clearly appears on the face of the complaint.' Richmond, Fredericksburg & Potomac R. Co. v. Forst, 4 F.3d 244, 250 (4th Cir. 1993)... Not all such prisoner suits are frivolous or malicious... [and] we cannot dismiss or affirm the dismissals of such suits merely because we do not like them or because most of them are frivolous. Rather, the Supreme Court has directed that federal courts are to construe all pro se complaints 'liberally.' Nasim, 64 F.3d at 959-61 (citing, Boag v. MacDougall, 454 U.S. 364, 365 (1982) (per curiam) (reversing § 1915(d) dismissal)). Furthermore, the Tenth Circuit has held when "contemplating dismissal under section 1915(d), the district court may consider affirmative defenses sua sponte only when the defense is 'obvious from the face of the complaint' and '[n]o further factual record [is] required to be developed.'" Fratus, 49 F.3d at 674-75 (quoting, Yellen v. Cooper, 828 F.2d 1471, 1476 (10th Cir. 1987)). "In other words, the § 1915(d) frivolous determination, frequently made sua sponte before the defendant has even been asked to file an answer, cannot serve as a factfinding process for the resolution of disputed facts... Some improbable allegations might properly be disposed of on summary judgment, but to dismiss them as frivolous without any factual development is to disregard the age-old insight that many allegations might be 'strange, but true; for truth is always strange, stranger than fiction.'" Nasim, 64 F.3d at 959-61 (quoting, Denton v. Hernandez, 504 U.S. 25, 32-33 (1992)).

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The Supreme Court of Arizona has held that "[m]emory repression, also referred to as selective amnesia, traumatic amnesia, and dissociative amnesia, has been documented in various contexts among persons who have survived severe trauma, including concentration camp survivors, combat veterans, and victims of [sexual] abuse."² Doe, 191 Ariz. at 318. "In laymen's terms, memory repression is the involuntary blocking of memory so that the memory remains stored but inaccessible to the conscious mind. Repression is a psychological defense mechanism that protects the individual from being confronted with the memory of an event that is too traumatic to cope with." (*Id.* at 319). "Physiological research conducted on the functioning of memory demonstrates the brain's biological capacity to retain memories yet prevent conscious access to them. See Cynthia Grant Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L. REV. 549, 600-04 (1996)." Doe, 191 Ariz. at 319. "The memory is not lost but remains dormant and inaccessible. The individual functions with no conscious awareness of the traumatic event. Researchers and clinicians attest that the inaccessible memory may nonetheless adversely impact the individual's psychological wellbeing and is frequently manifested by substance abuse, severe depression, suicidal tendencies, and sexual and social dysfunctions. See Judith Herman & Emily Schatzow, *Recovery and Verification of Memories of Childhood Sexual Trauma*, 4 PSYCHOANALYTIC PSYCHOL. 1, 2 (1987)." Doe, 191 Ariz. at 319. "Repressed memories are, however, only temporarily inaccessible. Research on the biology of memory

² Dissociative amnesia is the term recognized in the diagnostic manual of psychologists and psychiatrists, where it is described as a 'disruption in the usually integrated functions of consciousness, memory, identity, or perception of the environment' and is 'characterized by an inability to recall important personal information, usually of a traumatic or stressful nature, that is too extensive to be explained by ordinary forgetfulness.' AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC & STATISTICAL MANUAL FOR MENTAL DISORDERS § 300 at 477 (4th ed. 1994). Other facets of the syndrome include a 'reversible memory impairment in which memories of personal experience cannot be retrieved in a verbal form and clinically significant distress or impairment in social, occupational, or other important areas of functioning caused by the symptoms,' *Id.* § 300.12 at 478.

verifies the brain's capacity to retrieve previously inaccessible memory in response to stimuli.³

These stimuli, commonly referred to as triggers, include sensory experiences, therapy, and spontaneous recall." (Id).

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³ Bowman and Mertz Summarize:

Both short and long-term memories take implicit as well as explicit forms. Explicit memory—the content of what we know and remember—generally involves the temporal lobes of the brain and, in particular, the hippocampus.... Implicit memory—storage of the largely unconscious perceptual and motor portions of experiences—is processed by different parts of the brain: the amygdala and the cerebellum. Explicit memory, which ‘corresponds to stored information that can be used in language, reasoning, and the production of novel behavior,’ is more accessible to conscious reflection and manipulation. Implicit memory, by contrast, tends to work in a more inflexible and reflexive manner, and is often triggered in a fairly automatic, unthinking fashion by external stimuli (a sight, sound, or smell, for example, that is similar to one involved in the memory). This kind of stimulus-based triggering of sensory / motor experiential memory is consistent with the flashback experiences reported by trauma survivors.

Bowman & Mertz, *Supra*, 109 HARV. L. REV. at 600-01 (citations omitted).

"In addition, the biological functioning of memory may leave persons who experience trauma incapable of synthesizing a narrative description of the event."⁴ (Id).

The Supreme Court of Arizona further held that "If the jury must determine at what point Plaintiffs knowledge, understanding, and acceptance in the aggregate provided sufficient facts to constitute a cause of action. We take as instructive the ~~Utah~~ Utah Supreme Court's remand instructions in Olsen v. Hooley, 865 P.2d 1345 (Utah 1993). After determining the discovery rule applied in cases involving repressed memory the Court stated: 'If the fact finder finds for [Plaintiff] on [this] issue, it must then ascertain at what point [he] recalled the abuse. It is at that point

⁴ Dr Bessel van der Kolk has extensively researched traumatic memory, particularly in the processes of encoding and retrieving memories, and summarized his findings as follows:

Dissociation refers to a compartmentalization of experience: elements of the experience are not integrated into a unitary whole, but are stored in memory as isolated fragments consisting of sensory perceptions or affective states.... [W]hen people feel threatened, they experience a significant narrowing of consciousness, and remain merely focussed on the central perceptual details. As people are being traumatized, this narrowing of consciousness sometimes evolves into amnesia for parts of the event, or for the entire experience. Students of traumatized individuals have repeatedly noted that during conditions of high arousal 'explicit memory' may fail. The individual is left in a state of 'speechless terror' in which the person lacks words to describe what has happened. However, while traumatized individuals may be unable to give a coherent narrative of the incident, there may not be interference with implicit memory: they may 'know' the emotional valence of a stimulus and be aware of associated perception, without being able to articulate the reasons for feelings or behaving in a particular way.

Such dissociative processing of traumatic experience complicates the capacity to communicate about the trauma. In some people the memories of a trauma may have no verbal (explicit) component at all: the memory may be entirely organized on an implicit or perceptual level, without an accompanying narrative about what happened.

B. van der Kolk, & R. Finkel, Dissociation and the Fragmentary Nature of Traumatic Memories: overview and Exploratory Study, 8 J. TRAUMATIC STRESS 505, 510-12 (1995) (citations omitted),

the limitations period began to run.' *Id.* at 1350; see also *Osland v. Osland*, 442 N.W.2d 907, 909 (N.D. 1989); *Hammer v. Hammer*, 142 Wis.2d 257 [1] (Wis. App. 1987). *Doe*, 191 Ariz. at 324. Although a plaintiff "is charge with the duty to investigate with due diligence to discover the necessary facts..., the reasonable diligence component of the discovery rule does not impose a rigid investigate and discover standard that ignores the psychology of repressed memory. *Doe [v. Roe]*, 187 Ariz. [605] [1], 615 [App. Ariz. 1996] [1]." *Doe*, 191 Ariz. at 324. "To impose such a standard to memories that may be physiologically inaccessible to the conscious mind is antithetical to the policy behind the discovery rule." (*Id.*) (citing, *Gust*, 182 Ariz. at 589). However, "if an investigate and discover standard exists, [then] Plaintiffs actions [will] at least present [1] a question for the jury." (*Id.* at 324-25) (citing, *Doe*, 187 Ariz. at 615).

Moreover, the Supreme Court of Arizona held, "the Arizona legislature has enumerated [two] conditions that toll the running of the statute of limitations—minority [and] unsound mind.... So far as relevant, ARS § 12-502 states: 'if a person entitled to bring an action.... is at the time the cause of action accrues.... of unsound mind, the period of such disability shall not be deemed a portion of the period limited for commencement of the action. Such person shall have the same time after removal of the disability which is allowed to others.'" *Doe*, 191 Ariz. at 325. "The statutory provision for tolling based on unsound mind is premised on equitable principles similar to those that underlie the discovery rule: it is unfair to bar an action in which the plaintiff is mentally disabled and thus unable to appreciate or pursue his or her legal rights." (*Id.*) (citing, *Vega v. Morris*, 184 Ariz. 461, 463-64 (1996) (footnote omitted); *O'Neal v. Division of Family Services*, 821 P.2d 1139, 1142 (Utah 1991) ("Tolling statutes based on mental incompetency are enacted to relieve from the strict time restrictions people who are unable to protect their legal rights because of an overall inability to function in society.")¹⁴).

¹⁴ Note that cases cited in *Florez [v. Sargeant]*, [185 Ariz. 521 (1996)] supports the proposition that the effects of repressed memory would support a claim for unsound mind. In *Doe v. Coffee County Board of Ed.*, [1] 852 S.W.2d 899, 905-06 (Tenn. App. 1992), the court indicated that repression of memory of abuse would comprise unsound mind for the tolling of the limitation period. In *Hildebrand v. Hildebrand*, 736 F.Supp. 1512, 1524 (S.D. Ind. 1990), the court held that while the discovery rule was not applicable under Indiana law, the limitations period for plaintiffs physical and sexual abuse claims could be tolled nonetheless under the doctrine of fraudulent concealment. Likewise, in *O'Neal*, 821 P.2d at 1143-45, the court indicated that repression of memory might toll the statute of limitations under the discovery rule.

Nevertheless, "[a] common thread seems to run through all the types of actions where courts have applied the discovery rule. The injury or the act causing the injury, or both, have been difficult for the plaintiff to detect. In most instances, in fact, the defendant has been in a far superior position to comprehend the act and the injury. And in many, the defendant had reason to believe the plaintiff remained ignorant he had been wronged. Thus there is an underlying notion that plaintiff's should not suffer where circumstances prevent them from knowing they have been harmed. And often this is accompanied by the corollary notion that defendants should not be allowed to knowingly profit from their injuree's ignorance." Doe, 191 Ariz. at 330 (quoting, Gust, 182 Ariz. at 589). "The important inquiry in applying the discovery rule is whether the plaintiff's injury or the conduct causing the injury is difficult for plaintiff to detect, not whether the action sounds in contract or in tort. ... The defense of statute of limitations is never favored by the Courts, and if there is doubt as to which of two limitations periods should apply, courts generally apply the longer." Doe, 191 Ariz. at 330 (citing, Gust, 182 Ariz. at 590).

Here, the lower court's reasoning that Pettitoner's § 1983 and state-law claims in his Second Amended Complaint are time-barred by the statute of limitations is unconvincing and some cited cases misinterpreted. The Court relied on cases from six federal circuits, some which does contain that holding. See, Lervald, 998 F.2d at 687; Pino v. Ryan, 49 F.3d 51, 53-54 (2d Cir. 1995); Moore v. McDonald, 30 F.3d 616, 620-21 (5th Cir. 1994); Johnson v. Rodriguez, 943 F.2d 104, 107-08 (1st Cir. 1991); Hughes, 350 F.3d at 1163; and Nasim, 64 F.3d at 956. In Lervald, the Court held that a district court may dismiss a complaint sua sponte as being untimely, only when the defendant has not waived the defense. Lervald, 998 F.2d at 687. In the present case, the defendants were never issued and served the complaint, thereby defendant's never plead the statute of limitations as a defense. Therefore, the Court erred in dismissing the complaint sua sponte as being untimely. Next, in Pino, the Court held that a suit that is dismissed sua sponte, raising of the limitations defense—at the threshold—before any time or expense has been expended to be appropriate, especially when plaintiff has the opportunity to file a timely motion for reconsideration—alleging ~~additional~~ additional facts that might existed, which could affect limitation period. Pino, 49 F.3d at 53-54. However holding that an affirmative defense appearing on the face of a complaint may not be.

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the basis for a sua sponte dismissal under section 1915(d) prior to service of the complaint (Id). Here, Petitioner's complaint was dismissed after the court imposed the in forma pauperis filing fee's upon Petitioner. Additionally, on the face of Petitioner's complaint, it may have suggested an affirmative defense, therefore the Court erred in basising the sua sponte dismissal under section 1915(d), prior to service of the complaint. And even know Petitioner filed a motion for reconsideration—clarifying and asserting additional facts that would toll and/or delay the accrual of the cause of action, the district court still denied the motion. Next, in Moore, the Court held that the district court correctly concluded that Moore's claim as to the allegedly unreasonable search of the car was time barred because he was aware that he suffered an injury or had sufficient information to know he had been injured. Moore, 30 F.3d at 621. This case is misplaced and distinguishable. In Moore, plaintiff knew that he was subjected to an illegal pretextual stop in violation of his Fourth Amendment and that his car was unreasonably searched. However, in the present case, Petitioner did not know that he was being wronged or injured. Simply, Petitioner was in shock and confused by the photographing of his naked body—by an opposite gender official, coupled with the fact that defendants presented him with a search warrant—authorizing the photographing of his naked body, as well as defendants authoritative demands and threats for Petitioner to comply with the photographing of his naked body, that Petitioner was “blamelessly ignorant” that he was even being wronged or injured and “repressed” all memory of the traumatic event. As for cases involving breach of implied warranty or medical malpractice case, it would be equally unfair to deny a victim of sexual abuse the application of the delayed discovery doctrine, given the nature of the alleged tortious conduct and it's effect it has on the victim, therefore such doctrine is applicable to sexual abuse cases and is consistent with the application of the doctrine to tort cases, Hearndon, 767 So.2d at 1188. Next, the district court reliance of Johnson is completely misplaced. In Johnson, it involves employment discrimination claim brought under section 1981, which the plaintiff argued a continuing violation theory, that the statute of limitations were tolled by reasons of ongoing discriminatory practices. Johnson, 943 F.2d at 107-08. Here, Petitioner's complaint was brought under section 1983 and involves sexual abuse and has

nothing to do with employment discrimination claims brought under section 1981, nor does Petitioner claim involve ongoing discriminatory practices, therefore the court erred in citing Johnson as controlling authority to uphold sua sponte dismissal on the basis of being time-barred. Next, in Hughes, the Court held that the district court dismissed plaintiffs claims on the grounds that they were time-barred by the statute of limitations and therefore frivolous under 28 USC § 1915(e)(2)(B)(i). Hughes, 350 F.3d at 1163. However in order to dismiss a prisoners complaint as being time-barred prior to service, it must appear beyond a doubt from the complaint itself that plaintiff cannot prove any set of facts which would avoid a statute of limitations, however if plaintiff would be able to pled his facts to show that the limitation period was tolled by the means of amending his pleading, then the court should grant leave to amend the complaint. (Id). Here, the district court erred in dismissing Petitioner's complaint sua sponte because not only could Petitioner prove the facts alleged in his complaint, he could have easily clarified and plead additional facts to support the tolling of the statute of limitations, if he was granted leave to amend his complaint. Therefore, the district court sua sponte dismissal as being time-barred is unpersuasive. Next, in Nasim, the Court held that plaintiff possessed sufficient knowledge of his cause of action to place him on inquiry notice, and therefore the district court did not abuse it's discretion in concluding that the action was frivolous under 28 USC § 1915(d), because the complaint was time-barred. Nasim, 64 F.3d at 956. As correctly held by dissenting circuit Judge Motz, Chief Judge Ervin, Judge Murnaghan, and Judge Michael, that "a waivable affirmative defense that has not been caused by any party, like the limitations defense, [] can provide the basis for dismissal only if the defense is clear from the face of the complaint. Thus, prior to receipt of any pleading raising the defense, a district court has no discretion to dismiss an in forma pauperis action on the basis of a waivable affirmative defense if that defense is not clear from the face of the complaint. (Id at 959). Here, not only could Petitioner prove from the face of his complaint that the statute of limitations were tolled, he could have afforded additional facts, if he was granted leave to amend his complaint, therefore the district court erred in dismissing Petitioner's complaint sua sponte on grounds of being time-barred.

Furthermore, the district court reliance on Shafer v. McCombs, 2018 WL 17500496 at 3 (Ariz. Ct. App., Apr. 12th, 2018) that Petitioner "cannot hide behind his [] ignorance when reasonable investigation would have alerted the plaintiff to the claim, the plaintiff must affirmatively and timely investigate if any basis exist for legal action," (*Id.*), however such is inconsistent with the "blameless ignorance" doctrine in Urie, 337 U.S. at 170; and with the delayed discovery doctrine in Doe, 191 Ariz. at 322-25, 331; and Hearndon, 767 So.2d at 1184. Nevertheless, although the Ninth Circuit correctly held that a "unsound mind equitable tolling may not be established by 'conclusory averments such as assertions that one was unable to manage daily affairs or understand legal rights and liabilities' but rather requires plaintiff to set forth 'specific facts,'" Davis, 796 Fed. Appx. at 449 (citing, Doe, 191 Ariz. at 326), however "cases cited in Florez supports the proposition that the effects of repressed memory would support a claim for unsound mind." Doe, 191 Ariz. at 326 n.14. Here, Petitioner has set forth "specific facts" that he suffered from repressed memory loss and did not have any memory or flashback of the sexual abuse until January 9th, 2018, therefore it is at that point the statute of limitations period began to run. (*Id.* at 324).

Thus, the Court below seriously misinterpreted Urie v. Thompson by failing to recognize the "blameless ignorance" doctrine, as well as the "delayed discovery" doctrine in Doe v. Roe and Hearndon v. Graham. In addition, there is a serious misinterpretation and conflicting decisions in Davis v. Goodyear Police Department; Krug v. Imbordino; Hughes v. Lott; Fratus v. Deland; and Nasim v. Warden, Maryland House of Corrections on dismissing a complaint *sua sponte* - before process is issued and served - on the grounds of being time-barred by the statute of limitations, when it's clear upon the face of the complaint, that if Petitioner was given a chance to amend his complaint, he could have provided additional facts that would have supported his theory that the statute of limitations were tolled and/or delayed the accrual of the cause of action. Thus Court should correct the misinterpretation and make it clear as to whether it is proper for a district court to dismiss a complaint, *sua sponte*, before process is issued and served, based on the grounds of being time-barred by the statute of limitations - when on the complaint's face value - the complaint could be amended to clarify and/or cure the legal theory of tolling the statute of limitations. In addition, this Court should also correct the misinterpretation

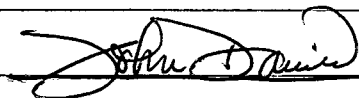
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and make it clear as to the "blameless ignorance" doctrine, as well as the "delayed discovery" doctrine—specifically "repressed memory" and "unsound mind" doctrine. Based on the foregoing issues and argument presented, it's obvious that the lower courts lack guidance from this Court on the issues in question, and therefore, Petitioner respectfully request intervention from this Court.

CONCLUSION

For the foregoing reasons and with good cause showing, Certiorari, should be granted in this case.

RESPECTFULLY SUBMITTED this 20th day of October, 2020


John Davis