APPENDIX A

POST VERDICT MOTION May 8,2018

POST VERDICT BRIEF May 8,2018

EXHIBIT 2
EXHIBIT 3
EXHIBIT 4
EXHIBIT 5
EXHIBIT 7

State of Minnesota **District Court**

County OF LYON

Judicial District:	FIFTH
Court File Number:	42-CR-14-600
Case Type:	CRIMINAL DIVISION

STATE OF MINNESOTA
Plaintiff

vs

ADOLFO GUTIERREZ AVILA JR.
Defendant

Notice of Motion and Motion

Post Verdict Motion
Dismissal of Case 42-CR-14-600

TO:

THE STATE OF MINNESOTA THROUGH ITS ATTORNEY RICK MAES, LYON COUNTY ATTORNEY, 607 WEST MAIN ST., MARSHALL, MINNESOTA. 56258

NOTICE

I will ask the court for an Order at a hearing scheduled as follows:

Date:	May 15, 2018	Time:	3:30 p.m.
Name of Courthouse:	LYON COUNTY COURTHOUSE	Judicial Officer (if known):	JUDGE LELAND BUSH
Street Address:	607 WEST MAIN ST.	City:	MARSHALL, MN 56258

POST VERDICT MOTION:

I am asking the court for an Order as follows:

1. **Defendant is requesting for criminal case 42-CR-14-600 be dismissed on the statute of limitations has expired grounds** and Due Process Violation Grounds under the Due Process Clause in the 14th Amendment of the Federal Constitution; (1) defendant's constitutional right to present a defense was denied; (2) defendant's constitutional right to a full discloser of the facts was denied; (3) defendant's constitutional right not to be punished as a pre trial detainee was denied.

FILED IN THIS OFFICE
5-14-18
Karen J. Bierman
COURT ADMINISTRATOR
Lyon County, Minnesota

2. For Investigator Rolling mislead the court(constituting perjury) and withheld information that proves the statute of limitations defense which evidence(cd of the July 25, 2011 interview of Maria Myran) was released after the June 30, 2015 Omnibus Hearing and the March 18, 2018 Omnibus hearing depriving defendant the opportunity to present the evidence relevant to the statute of limitations defense. For the Court applied the law unfairly due to this actions constituting a Due Process Violation under the Due Process Clause in the 14th Amendment of the Federal Constitution for the number one requirement of procedural due process is for the law to be administered fairly. Which this actions affected the overall case for defendant kept trying to gather all his evidence so in turn had no choice but to keep asking for a continuence due to the withholding of this and other evidence. Which even now there is still evidence that has not been disclosed.
3. Defendant is a Gulf War Disabled Veteran and has P.T.S.D.; Severe depression; anxiety but was denied treatment. Defendant never got to see a phsychaitrist or was never started or given his medication. Which he requested several times when he was brought back from Fairbault 10 months ago. The combination of being without the proper medication to control defendant's emotions and to be subjected to this corrupted Court proceedings (aggressive and unfair prosecution) which defendant understands has been very dramatic to defendant which it has been mental torture to be treated like crap of the record. Which obviously due to the type of crime defendant is being charged with. Defendant's constitutional right not to be punished as a pre trial detainee was denied.
4. **Relief defendant is requesting is the dismissal of this criminal case 42-CR-14-600.**

THE REQUESTS ARE MADE PURSUANT TO: Mn Law 609.48 Perjury; Napue V. Illinois 3 LED2D 1217,360 U.S. 264; Mooney V. Holohan 79 LED 791,294 U.S. 103; Pyle V. Kansas 87 LED 214, 317 U.S. 213; Brady v. Maryland, 373 U.S. 83(1963) 83 s. ct. 1194, 10LED .2d 215; Blackmore v. Kalamazoo County, 390 F.3d 890,384 (6th Cir.2004); State v. Albert Tupa Supreme Court of Minnesota 194 Minn. 488; 260 N.W. 875; 1935; State v. Krikorian, not reported in N.W.(2008); State v Danielski, 348 N.W.2d at 357.; Toussie v. U.S., 397 U.S. 112,25L.Ed. 2d 156, 90 s. ct. 858(1970); U.S. v. Eliopulos, 45 F.777,781(D.N.J. 1942);

I ADOLFO GUTIERREZ AVILA MAKE THIS AFFIDAVIT THAT I SERVED BY MAIL A COPY OF THIS MOTION: Dismissal of Case 42-CR-14-600 TO PROSECUTOR RICK MAES AT ADDRESS 607 WEST MAIN ST., MARSHALL, MN 56258.

Due to the tampering of defendant's Motions (items defendant is attaching to motions to support his arguments are not all being filed) all items to be attached will now be listed in motion.

Items attached to this 3 page Post Verdict Motion:

(1) 1 Post Verdict Brief dated May 8, 2018 (8 pages)

(2) 1 Statute of Limitations Fact Sheet 2011 (4 pages)

(3) 1 Xcel Energy letter dated May 13, 2015

(4) 1 Public Defender Investigator Report dated September 10, 2015 (2 pages)

(5) 1 Lyon County Sheriff Report dated July 24, 2006

(6) 1 Redwood court file 64-JV-11-69 transcript date June 23, 2011(10 pages)

(7) 1 Maria Myran Interview dated July 25, 2011 transcript (29 pages)

(8) 1 Public Defender letter from Cecil Naatz dated May 1,2018

(9) 1 Lyon County Attorney Letter from Rick Maes dated April 19,2018

(10) 1 Soux Falls VA Discharge Summary dated September 19,2014 with medication list (3 pages)

SAID MOTION is based upon arguments of parties, together with all pleadings, records and files herein.

[redacted]

Date 5-8-18

Signature

Printed Name: Adolfo Avila Jr.

Address: 611 West Main St.

City, State, Zip: Marshall, Mn 56258

State Of Minnesota

State of Minnesota

Lyon County,

District Court File No: 42-CR-14-600

V.

Adolfo Gutierrez Avila Jr.

Defendant,

Post Verdict Brief

May 8, 2018

Authorities

Merriam-Webster (Dictionary of Law) Judicial System

Court and Law Enforcement Personnel: The officers of the court are persons assembled at the court to administer Justice. They include the judge, who is the principal officer of the court, the lawyer, the clerk of courts, the sheriff, the Marshall, the bailiff, and possibly a constable or a court officer.

The Chief local law enforcement officer maybe called the prosecuting attorney, state attorney, or district attorney.

Affidavit: a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths.

CASELAW:

State V. Krikorian, not reported in N.W. (2008) "In this inquiry, the originating source of a report of abuse is irrelevant."

State V. Danielski, 348 N.W. 2d at 357. *"The Minnesota Appellate Courts have stated* someone actually brings the information to the proper law enforcement authorities, *before the statute begins to run."*

In **Toussie V. United States**, 397 U.S. 112, 25L. Ed. 2d 156, 90 S. Ct. 858(1970) the U. S. Supreme Court noted that, *" The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.* Such a time may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity."

United States V. Eliopulos, 45 F. Supp. 777, 781 (D.N.J. 1942).

"Statute of Limitations are founded upon the liberal theory that prosecutions should not be allowed to ferment endlessly in the files of the government to explode only after witnesses and proof necessary to the protection of the accused have by sheer lapsed of time passed beyond availability."

State V. Albert Tupa, Supreme Court of Minnesota 194 Minn. 488; 260 N.W. 875; 1935 Minn. Lexis 1025; 99 A.L.R. 147 No. 30,429. May 24, 1935. "The Failure to find the indictment within the 3 year statute of limitations was a complete bar to the prosecution."

Question Presented

Has the statute of limitations expired on criminal case 42-CR-14-600?

Rule of Evidence Involved

Minnesota Statute, Section 628. (e)(2009) Indictments or complaints for violation of section 609.342 to 609.345 if the victim was under the age 18 years at the time of the offense was committed, shall be found or made and filed in the proper court with in the later of the nine years after the commission of the offense or within three years after the offense was reported to Law Enforcement Authorities.

Statement of The Case

We present criminal case 42-CR-14-600 to Lyon County District Court by this brief for dismissal. The charges are dated Count I (Jan. to June 2001) and Count II (May, June, July 2001). The complaint was filed on July 3, 2014 which is 13 years later. The July 3, 2014 complaint is based on the within three years after the offense was reported to Law Enforcement Authorities clause not the nine year period. The report being used for this prosecution is Lyon County Sheriff's Office report dated July 20, 2011.

Summary of Argument

Under the Due Process Clause in the Fourteenth Amendment of the Federal Constitution (and Minnesota Constitution) we are entitled to due process of law so persons accused of wrong doing are treated fairly. Information in reports, in letters, in emails, in transcripts and in recordings (Maria's July 25, 2011 interview) prove prejudicial errors were made which violated defendant's due process right. Even thou evidence is being withheld the intrinsic evidence is still very strong to confirm the sexual misconduct was reported to the proper law enforcement authorities for sure before Nov. of 2003 and in 2006. Thus proving the statute of limitations has expired on this criminal case.

First Report to Law Enforcement for sure before Nov. 2003

Investigator Tony Rolling has made a career out of law enforcement. He became a police officer in 1997 for the Tracy P.D. then transferred to the Lyon County Sheriff's Office in Nov. of 2003. Then became an investigator for the Lyon County Sheriff's Office in 2006 and continues till this day to be employed by the Lyon County Sheriff's Office which will be 21 years this May.

When Ray Hay reported the suspected criminal sexual conduct **"Adolfo Avila got his daughter Maria pregnant"** to Investigator Rolling which notified him of the allegations constituted the reporting of the act; constituted the discovery of the crime and constituted official involvement. The act (the pregnancy) was reported to him as a Tracy Police Officer for sure before Nov. of 2003. **State V. Daniel Ski {348 N.W. 2d 356}** thus the offense was officially discovered for sure before Nov. of 2003.

Which prompt him to investigate" **But I was never able to substantiate that"** As to the reason defendant was not indicted or charged before Nov. 2003 is a question for Investigator Rolling and the Lyon County Attorney's office. In **Daniel Ski {348 N.W.2d 356}** the officers investigated the information they received on July 29, 1983 and brought charges against the defendants on August 26, 1983. In this case Investigator Rolling received the information before Nov. 2003 but charges were filed until July 3, 2014 which is 11 years later. About 8 years before the July 20, 2011 report the prosecutor is using to justify the prosecution based on the "within three years after the offense was reported to Law Enforcement Authorities." in **M.S. Section 628 (e) (2009).**

Even thou Investigator Rolling is withholding information (the 2001-2003 report) his own March 14, 2018 Omnibus hearing testimony under oath and the July 25, 2011 recorded interview of Maria Myran prove the fact of the matter is Investigator Rolling was notified of the allegations Maria got pregnant by her step-father (Adolfo Avila) while living at the trailer court in Tracy, Minnesota in 2001. Investigator Rolling while interviewing Maria clearly describes the color of the trailer (blue); the address (St. Greenwood); and location at the trailer court when he was first told of the allegations that Maria got pregnant by her step-father (Adolfo Avila) which they lived at this location in 2001 and 2002. Reference the transcript for the July 25, 2011 Interview of Maria Myran pg. 8 and 9. Reference Xcel Energy letter dated May 13, 2015 pointing out service started on July 5, 2001 to January 19, 2004 in the name of Adolfo Avila.

For at least 8 years Investigator Rolling was aware and could not substantiate the allegations that Maria got pregnant by her step-father (Adolfo Avila) before he even interviewed Maria Myran on July 25, 2011 and before he signed the July 3, 2014 criminal complaint for this criminal case 42-CR-14-600. Thus he volunteered this information to Maria while interviewing her because he knew the allegations pertained specifically to her.

At the March 14, 2018 Omnibus Hearing defendant asked Investigator Rolling of why was he not charged or arrested or even approached by Investigator Rolling in 2003 but Investigator Rolling response was **"I don't know why I didn't that long ago." (3/14/2018 t. pg. 30 line 10)**

Plain and simple Investigator Rolling was notified of the allegations **"Adolfo got his daughter Maria pregnant"** for sure before Nov. 2003 when he was a police officer in Tracy, Minnesota constituting the reporting of the act; constituting the reporting of the offense to the proper law enforcement authorities which constituted the discovery of the crime constituting law enforcement official involvement by Police Officer Rolling **"But I was never able to substantiate that"**

This triggered the 3 year limitations period in **M.S. Section 628 (e) (2009)** and not the July 20, 2011 report like the prosecutor suggests which the 3 year limitations period can be triggered by any source. State V. Krikorian, not reported in N.W. (2008) **"In this inquiry, the originating source of a report of abuse is irrelevant."**

The delay was caused by Investigator Rolling's failure to follow procedure and properly investigate the suspected criminal activity not by the defendant. Which it is ironic police officer Rolling knew defendant by face and name and where he and Maria lived at the only trailer court in the small community of Tracy, Minnesota. Defendant has lived in Tracy, Minnesota since 2001 until his arrest in 2014 except in 2006 and 2007 when he lived in Watertown, South Dakota. Investigator Rolling has lived in Tracy, Minnesota since at least 2001 and still lives in Tracy, Minnesota till this day. In **Toussie V. United States**, the U. S. Supreme Court noted that," **Such a time may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity."**

Second Report to Law Enforcement in 2006

In the July 25, 2011 interview Maria told Investigator Rolling that she told Mary J. Stanton and her social worker (in 2006) that Adolfo Avila was the father of her child and her step-father. Maria had no idea how the child support started because Maria told them to report the abuse. **(Reference Maria's July 25, 2011 Interview pg. 22,23).** This is why Prosecutor Nicole A. Sprinstead wanted defendants DNA for investigation purposes to confirm allegations and it was not for paternity establishment purposes in 2006. **Reference August 2, 2007 hearing from file 001438290802.**

Maria's affidavit dated May 31, 2006 points out the age difference/significant relationship:

Part A

What is the legal name of the child? First ***Makeyla*** *Middle* ***Marie*** *Last* ***Herrera***

Present age: ***4*** *Date of Birth* ***3-6-02***

What is the mother's legal name? Maria Clemencia Herrera

Date of Birth: ***12-29-85*** *Age:* ***20***

Who is the father of this child named above? ***"Adolfo Avila Jr."***

Part D

1. When and where did you first meet the father of this child? ***"At a party He married my mother and he now step-dad. "***

1. When did you first have intercourse with the father of this child? ***"July"***

Which state? ***"Mn"*** *City?* ***"Tracy"*** *County?* ***"Lyon"***

3. When did you have intercourse with him in which you believe resulted in this pregnancy?

"July" *Where?* ***"At the house in Tracy, Mn"***

Mary Stanton's Affidavit dated May 1, 2007 points out age differences; sex allegations:

1. The name(s), address (es), and date(s) of birth is/are as follows:

*Adolfo Avila

***Born on 1/03/1971**, in the County of Cook, in the state of IL.

*Maria Herrera

*The address is **confidential** and is on file with the public authority.

***Born on 12/29/1985,** in the county of Uvalde, in the State of Texas.

*Makelya M. Herrera was **born on 03/06/2002** in the County of Lyon, State of Minnesota.

4. **At the time of the joint child (ren)'s conception, the parties had a sexual relationship.**

Even thou the 2006 reciprocal report from the Human Services to the Lyon County Attorney's Office are being withheld. The paper trail does not lie. Lyon County Prosecutor Nicole A. Sprinstead read both affidavits to prosecute the May 8, 2007 complaint which indicate sexual abuse **(Adolfo Avila is my step-dad and the father of my child)** which it's ironic the entire 2007 paternity case is proof of what was reported. Constituting the reporting of the act; constituting the discovery of the crime and constituting law enforcement official involvement which in 2006 was Judge Jan Nelson; Lyon County Prosecutor Nicole A. Sprinstead; Lyon County Sheriff's Office for they wanted defendants DNA for investigation purposes to confirm allegations. Which according to the p.r.i.s.m. activity sheet the report (documentation) was sent on August 11, 2006 to the Lyon County Sheriff's Office. Which Judge Jan Creg Nelson points out in the August 2, 2007 hearing.**"The record should reflect that this matter comes before the court today pursuant to an order for continuance issued by this court—actually, an order for genetic testing and order for continuance issued by this court on July 5, 2007, continuing the matter which wasn't a paternity establishment matter. We're hearing today the court did, at the request of the oblige, order the parties in—including the obligor, to appear when and where directed by the child support officer to provide a sample for genetic testing and then continued the matter for a hearing today.**

In the July 25, 2011 interview Maria Myran clearly points out to Investigator Rolling that she wanted the 2006 DNA results to throw it in their face that she was not lying and when Investigator Rolling asked if she wanted to see defendant in jail her answer was yes. The record retention time period has not started so the Human services; Lyon County Court Administration and the Lyon County Sheriff's Office should have a copy of the 2006 reciprocal report based of Maria's 2006 report **(Adolfo Avila is my step-dad and father of my child)** to Human services.

In Adolfo Avila Jr.'s affidavit dated June 15, 2017 he describes the allegations Maria made in her May 31, 2006 affidavit **"Maria's version of events alleged that Maria and I met at a party and we had relations and then I started dating her mom. Maria also points out she got pregnant when she was 15 years old and that I am the biological father of her daughter Maykela and that I am her step-father."**

How can defendant describe the allegations Maria made in her May 31, 2006 affidavit since defendant received a copy of Maria's May 31, 2006 affidavit until November 3, 2017?

****Because those are the allegations defendant read in the May 20, 2007 report (documentation) served on him but in narrative form. Manuela Avila (Maria's mom) also describes this allegations in her affidavit dated May 2, 2017 without even seeing Maria's May 31, 2007 affidavit. ****

Defendant's constitutional right to a full discloser of the facts under the Federal Constitution was denied constituting a Due Process Violation and a Brady Violation under the Due process Clause of the 14th Amendment of the Federal Constitution. The 2001-2003 report made by Investigator Rolling (Tracy Police Officer Rolling) was never disclosed; the 2006 report to human services made by Maria Myran reporting the abuse was never disclosed; the 2006 reciprocal reports to Lyon County Sheriff's Office; to Lyon County Court Administration; to the Lyon County Attorney's Office were never disclosed; statements made by Maria for Investigator Rolling mentioned in the July 25, 2011 Interview on pg. 29 were never disclosed.

Mary J. Stanton's Affidavit dated May 1, 2007 and Maria's Affidavit dated May 31, 2006 and Lyon County Court file 001438290802 were not disclosed until November 3, 2017 which defendant had a right to all along and kept asking for them since September 8, 2014.

Maria Myran's July 25, 2011 recorded interview transcript was not disclosed to defendant until one day before the trial which in prior hearings Investigator Rolling and Prosecutor Rick Maes said on the record the July 25, 2011 recording did not exist.

Defendant has been in an uphill battle with the Lyon County Court Administration; Lyon County Attorney's Office and the Lyon County Sheriff's Office for evidence that defendant had a right to all along in the first place. The withholding of reports relevant to the statute of limitations defense in this criminal case is an open secret in the Lyon County Law Enforcement Community.

United States V. Eliopulos, 45 F. Supp. 777, 781 (D.N.J. 1942).

"Statute of Limitations are founded upon the liberal theory that prosecutions should not be allowed to ferment endlessly in the files of the government to explode only after witnesses and proof necessary to the protection of the accused have by sheer lapsed of time passed beyond availability."

This criminal case is a perfect example of why the right to the statute of limitations defense should be applied to this case. Defendant finds himself trying to prove a case were the reports that prove the facts are not available anymore; witnesses are not available anymore and the truth has been seriously distorted. Maria moved out at age 17 (in 2003) with her daughter and was not mad at anybody which she never had contact with defendant again.

On June 23, 2011 Maria had a deny/admit hearing where by her own free will gave up legal custody of her daughter Maykela because of the unfortunate event that Maykela got sexually abused by her step-father Corey Myran. Corey Myran was sent to prison and Maykela was removed from the home permanently. Maykela was adopted by another family. This turn of events was obviously devastating to Maria. Which a month later Maria Myran met with Investigator Rolling and made the July 25, 2011 interview at the Lyon County Sheriff's Office describing defendant as the worst person in the world.

The record and the paper trail do not lie defendant's criminal case has been seriously railroaded. Evidence (information) in the form of testimony under oath; Affidavits; transcripts; recordings were released late or not released at all prejudicing the June 30, 2015 Omnibus Hearing; the March 14, 2018 Omnibus Hearing and the Trial. Defendant respectfully request this criminal case be dismissed on statute of limitations grounds and due process violation grounds under the Due Process Clause of the 14th Amendment of the Federal Constitution.

State V. Albert Tupa, Supreme Court of Minnesota 194 Minn. 488; 260 N.W. 875; 1935 Minn. Lexis 1025; 99 A.L.R. 147 No. 30,429. May 24, 1935. **"The Failure to find the indictment within the 3 year statute of limitations was a complete bar to the prosecution."**

State V. Danielski, 348 N.W. 2d at 357. ***"The Minnesota Appellate Courts have stated*** **<u>someone actually brings the information to the proper law enforcement authorities,</u>** ***before the statute begins to run."***

Which in this criminal case someone did bring the information to Investigator Rolling for sure before Nov. 2003 and someone did bring the information to the Lyon County Attorney's Office in 2006. Constituting the reporting of the act; constituting the discovery of the crime and which constituted law enforcement official involvement before Nov. 2003 and 2006. The same Lyon County Attorney Office and the same Lyon County Court Administration in Lyon County brought and prosecuted the <u>civil complaint filed on May 8, 2007</u> and the <u>criminal complaint filed on July 3, 2014 of the same matter.</u> Seven years difference from one legal action to the next which this legal actions can only be brought or made by law enforcement authorities.

Date: 5-11-18 Sign: _____

Exhibit 2

IR: Yep.

MM: That was the house where we moved to after the trailer court.

IR: But did you find out you were pregnant in Marshall or Tracy?

MM: Tracy, when I was in school in Tracy.

IR: So what made you guys move to

MM: Like we came to Marshall but we didn't live in Marshall we stayed here probably like a week and they found the trailer and they got into the trailer right away, in Tracy. They rented a trailer there.

IR: In the trailer court?

MM: Mhmm

IR: And from there they moved to the farm?

MM: Yeah. It was

IR: Okay

MM: Yeah.

IR: So you found out in Tracy?

MM: Yeah, when I was in school.

IR: Okay. Living in the trailer court because I knew you guys lived in the trailer court sometime.

MM: Mhmm

IR: Was it the trailer house right when you come off of Greenwood?

MM: Yeah.

IR: You come in and it is right there?

MM: Yeah.

IR: Okay. Was it blue or something?

MM: Yeah.

IR: Yup. And that is where you guys were living when I first heard about it. You guys were living in the trailer court. Were your other sisters pregnant at that time or?

MM: Umm

IR: Or had been?

MM: I think my sister Roxanne was pregnant. But I am not sure.

IR: Antonio would be

Exhibit 2

MM: You know. I told my friend, told my friends the truth.

IR: Okay. So did you guys end up moving?

MM: *No verbal response given*

IR: Okay.

MM: Just to the farm or whatever you want to call it.

IR: Down by Tracy.

MM: Yeah.

IR: How old were you then? How long did

MM: I was still 16, she was probably, I don't know a month or so old or something. When we moved out there. Because I had her in March. I think she was under one for sure.

IR: Okay.

MM: And I tried leaving at 17 and they wouldn't let me because they were like we're going to call the cops, call you in as a runaway and unfit mother and all this other

IR: Mhmm

MM: Stuff and I told them to do it.

IR: Have you always, you haven't always lived at that house right?

MM: No. When I did eventually move out and I don't remember when but I did.

IR: did you guys move to the trailer house or your family move to the trailer court in Tracy for a bit?

MM: Not back then, no. Ever since we went to the house we haven't gone back to the trailer court.

IR: Okay. Has Adolfo moved in and out?

MM: When I was there he was always there.

IR: He was always there.

MM: Yeah.

IR: There was a time he moved to Brookings or something for a while?

MM: Yeah. When they went after him for paternity test. He moved to Brookings, they all moved to Brookings.

IR: So that is when that happened? That is why he moved to Brookings.

MM: He moves around every time something

IR: When it starts to catch up with him.

MM: I used to live with her. Like when I ran away from there. I moved in with her.

IR: On Roland?

MM: Yeah. I never go back there still.

IR: Did she have a boy named Tony?

MM: Tony.

IR: Gottskalskon, has a really weird name.

MM: Yeah, Gottskalskon, yeah.

IR: Yup, yup.

MM: And Kirby.

IR: Kirby, yup. He had blonde shaggy hair didn't he?

MM: Mhmm

IR: Yup. I kinda arrested that guy Paco Francisco Vasquez at her house. He was trying to rip her off.

MM: Oh.

IR: He fell asleep on her bed. Hahaha

MM: there's a lot of

IR: When did the sexual assaults from Adolfo stop? When he moved out?

MM: When I moved out.

IR: Okay, so before you were pregnant, did it occur, we will get into certain things, more detail.

MM: It occurred more than

IR: After the pregnancy?

MM: No, after the pregnancy it didn't happen.

IR: So after you were, gave birth to your daughter it never happened again.

MM: No.

IR: Okay. Was he doing this while you were pregnant?

MM: No.

IR: So basically when you found out that you were pregnant he stopped?

MM: Mhmm

IR: And that was when you were living in Marshall?

MM: No, it was still Tracy. Where my Mom lived at 3171 Hwy 14.

agencyrpt

EXHIBIT 3

NARRATIVE REPORT

Case Number: 11-11429	**Date of Narrative:** July 26, 2011
Report of Officer: Inv. Tony Rolling #104	
Disposition: Open, Pending Further Investigation	
Evidence/Property:	

On July 20, 2011, I, Inv. Tony Rolling received a reciprocal report from Marshall Police Detective, Tim Tomasek. The report explained how Maria Myran had given birth to her step-father's, Adolfo Avila, child. The report explained that Maria was 15 when she got pregnant by Adolfo, and was sixteen when she gave birth. The address of where the sexual assault occurred was at 3171 US Hwy 14, Tracy. This is a residence in Monroe Township in the Sheriff's Office's jurisdiction.

After getting the report, I had seen that Lyon County received the report from Andrea Guetter at Redwood County Human Services. I called Andrea and spoke with her about the report.

Andrea stated that Aldolfo Avila is paying child support for Makeyla Herrera. Makeyla is the daughter of Maria Herrera and Maria is a stepdaughter to Adolfo. Andrea stated that she has been in contact with Adolfo on several occasions in regards to this matter. Andrea stated that Adolfo became the payer of child support after multiple court hearings and multiple DNA requests by human services. Andrea stated that Adolfo never showed up for the court hearings and became the father by default.

Andrea stated that approximately two to three weeks ago, Adolfo called her and they spoke about the case. According to Andrea, Adolfo was dodging questions about the conception of Makeyla. Andrea told Adolfo that he was invited to court on the matter, but he did not show up. The conversation ended with Adolfo stating that he was not the father of Makeyla.

Andrea stated that she has had several conversations with Adolfo on being the father of Makeyla. Andrea stated that Adolfo at first claimed Makeyla as being his daughter. In later conversations, Adolfo claimed that he was not the father, and he would do what was needed to prove it. In further conversation, Adolfo refused to give a DNA sample to prove or disprove him being the father. Andrea stated that she asked Adolfo why he was paying child support if he was not the father, and Adolfo stated that he was paying the child support to help Maria.

In speaking with Andrea, and Paulette Koch, Makeyla's Guardian Ad Litem, I learned that Maria and her family lived in Weslaco, Texas for a time, and that Maria reported the sexual assault to the authorities there.

I called the Weslaco, Texas Police Department, and found that the only records for either Adolfo or Maria were some minor traffic violations for Adolfo. I was advised to call the Hidalgo County Sheriff's Office.

EXHIBIT 3

agencyrpt

EXHIBIT 3

In speaking with a Detective with the Hidalgo County Sheriff's Office in Texas, I learned that Maria's sexual assault was reported on June 7, 1999. The case was listed as a Sexual Assault of Child, and I was given a case number of 99-9445. I was advised that the address Adolfo and Maria at that time was Route 1 Box 362-136A, Weslaco, Texas. I was also told that child protection was notified and took part in the case.

On July 25, 2011, I conducted an interview with Maria Herrera at the Lyon County Sheriff's Office.

I began speaking with Maria, and introduced myself. I explained that prior to working at the Lyon County Sheriff's Office, I had been a Police Officer with the city of Tracy. I explained that while working there, I had heard a rumor that Adolfo Avila had gotten his daughters pregnant, but I was never able to substantiate that. I explained that I was somewhat familiar with the situation, and if she could tell me what had all occurred.

Maria stated that her family has always moved around. Maria stated that when she was nine or ten, her mother met Adolfo while they were living in Pelican Rapids. Maria stated that there was some possible trouble, so they moved to Weslaco, Texas where they built a house. Maria stated that the sexual assaults began in Weslaco. Maria stated that she had been sexually assaulted by Adolfo, and told her mother about the assault. Maria stated that her mother, did not believe her, and Adolfo kept assaulting her. Maria stated that she ended up telling a school counselor about the assault, and when she had gotten home, a worker from CPS (Child Protective Services) was there at her home. Maria stated that her family kept telling her that she was lying, and Maria was unsure if her sisters were being assaulted there or not. Maria stated that Adolfo was not able to live in the home after the report, and that she, deal with her family because of what was going on. Maria stated that she moved out of the home and went to live with her aunt, Sanjuanita. Maria stated that she lived with Sanjuanita for approximately six months, and returned home. When she got back home, Maria's mother told her that she and Adolfo had gotten married, and soon after, Adolfo moved back into the home. Maria stated that she was not around eleven years old, and as soon as Adolfo moved back, the sexual assaults started again. Approximately a year later, when Maria was approximately twelve or thirteen, Maria stated that her sister Roxanne had gotten pregnant while she was in high school. Maria was not sure how old her sister was at the time. Maria stated that when the family found that Roxanne was pregnant, they moved to Marshall, MN, very quickly, almost overnight. Maria stated that they lived in Marshall for a short time, and that they then moved to into the Tracy trailer court. Maria stated that she got pregnant while living in Tracy, and that when she got pregnant and everyone found out, Adolfo stopped the sexually assaulting her.

I asked Maria if she knew if Adolfo was sexually assaulting her sisters, Roxanna and Michelle. Maria stated that she was in the in the house when her sisters were sexually assaulted by Adolfo. Maria thought that Michelle was eighteen years old when she, Michelle, was being assaulted by Adolfo. Maria stated that she was sure

EXHIBIT 3

agencyrpt

EXHIBIT 3

that Michelle's son Michael and Roxanna's daughter Jasmin are children of Adolfo, but she was unsure about Ronsanna's son Antonio (Angel).

I then spoke to Maria about the actual assaults. Maria stated that she was unsure of the numbers of times. Maria stated that the assaults would occur when her mother had left the house. Maria stated that she could tell in Adolfo's demeanor, that she was going to be assaulted. Maria stated that Adolfo would look at her a certain way, and that she would then try to leave or get out of the house. Maria said that she would physically fight off Adolfo, but that he would hit her to get her to comply with him. Maria stated that it finally got to a point that she wouldn't fight it anymore, because if she fought it, she would get hit. Maria stated that every assault was vaginal sex, and that afterwards, Adolfo would tell her to keep her mouth shut. Maria said that she was assaulted approximately twelve to fifteen times in Texas, and that when she reported it, the report was given after the first time. Maria said that she was sexually assaulted in Marshall at Adolfo's translation office in Marshall once, and sexually assaulted in Tracy twice. Maria became pregnant while living in Tracy.

I asked Maria how this came out that Adolfo was the father to Makeyla, and Maria stated that when she went to get benefits, she had to give the father's information for child support. It appears that Redwood County human services realized not to long ago that Adolfo is the father of both Maria, and Maria's daughter Makeyla.

On July 26, 2011, I met with Carla Drown at SHHS in regards to Adolfo and him paying child support. Carla gave me printouts showing that Adolfo began paying child support on February 24, 2008, and is currently still paying child support. The printout also shows that from April 2008 through May 2009, the child support was coming directly form Adolfo's paycheck at Southwest Initiative Foundation in Hutchinson. The printout states that Maria is the Custodial Parent (CP) and that Adolfo is the Non-Custodial Parent (NCP).

Attached to this case file, will be a copy of the reciprocal report and child support list payment from SWHHS.

Case under investigation.

EXHIBIT 3

Exhibit 4

Xcel Energy®

1414 West Hamilton Avenue
P.O. Box 8
Eau Claire, WI 54702-0008

May 13, 2015

ADOLFO G AVILA
203 BENSON STREET
EVALDE TX 78801

Dear Adolfo G. Avila:

Thank you for your inquiry concerning verification for the period of time service has been in your name at the address listed below.

Our records show the following:

Customer Number: 51-4969678-4

Service Name: Adolfo G. Avila
Manuela H. Avila

Service Address: 600 Greenwood Ave., Lot 16, Tracy, MN

Service Dates: 07/05/2001-01/19/2004

Xcel Energy is committed to working with you to provide quality customer service. If you havé additional questions about your account, please call us at **1-800-895-4999** or visit us at our website www.xcelenergy.com.

Sincerely,

Xcel Energy
Customer Contact Center

Exhibit 4

Received Time Jun. 9. 2015 10:29AM No. 2575

EXHIBIT 5

STATE OF MINNESOTA — IN DISTRICT COURT

COUNTY OF LYON — FIFTH JUDICIAL DISTRICT

State of Minnesota, — District Court File No. 42-CR-14-600

Plaintiff, — Appellate Court File No. A16-0516

vs.

Adolfo Gutirrez Avila, — Omnibus Hearing

a/k/a Adolfo Gutirrez Avila, Jr.,

Defendant.

* *

TRANSCRIPT OF PROCEEDINGS

Volume 1 of 1

* *

The above-entitled matter came before the Honorable Leland Bush, Judge of District Court, at the Lyon County Government Center, Marshall, Minnesota, on June 30, 2015 at 9:00 A.M.

* *

APPEARANCES

The State was represented by Lyon County Attorney Richard Maes of Marshall, MN. The Defendant was represented by Attorney Kasprick of Marshall, MN. The Defendant appeared in person.

EXHIBIT 5

Darla M. Madsen
Certified Court Reporter
Marshall, Minnesota

5/28/2016 9:37:39
Lyon County,

EXHIBIT 5

Q. And specifically involved sexual intercourse when the alleged victim was approximately fifteen years old?
A. Correct.
Q. Now, Officer, can you tell us when this matter was first reported to the Law Enforcement Agency?
A. I received the report in July of 2011.
Q. And do you recall specifically what day it was?
A. I believe it was the 20th.
Q. Alright. Now, you received a report from the victim or from someone else?
A. I received a report from Human Services, a reciprocal report.
Q. Was that the first time you were notified of any alleged misconduct involving Mr. Avila and the alleged victim?
A. That was the first time it was reported to me.
Q. Okay. Now, to the best of your knowledge, was the incident -- well, I'll get back to that. Did you end up contacting the alleged victim?
A. I did.
Q. And do you remember when that occurred?
A. Within -- I think within five days. I believe it was July 25th.
Q. Okay. So shortly after you received the reciprocal?
A. Yes.
Q. Now, did the alleged victim disclose reports of sexual misconduct?

EXHIBIT 5

stated that the defendant would tell her to keep her mouth shut about the assaults.

Inv. Rolling has attempted to locate the defendant since these incidents were reported. He went to the residence where the defendant and "Victim A" were living at the time of the assaults and spoke to the defendant's step-daughter who is currently residing at the residence. She stated that the defendant moved a few years ago and that she hasn't heard from him, but believed he may be in Texas. However, approximately a half hour after the visit, the defendant called Inv. Rolling and stated that he had heard that Inv. Rolling was looking for him. The defendant claimed that he was currently in Sioux City but would not provide an address or give a number he could be reached at. Inv. Rolling explained what he wanted to talk to him about and the defendant stated that he didn't want to talk anymore. Given the fact that the defendant's whereabouts remain unknown, a warrant is being requested in this matter.

Complainant requests that said Defendant, subject to bail or conditions of release, be: (1) arrested or that other lawful steps be taken to obtain Defendant's appearance in court; or (2) detained, if already in custody, pending further proceedings; and that said Defendant otherwise be dealt with according to law.

COMPLAINANT'S NAME: Tony Rolling, Lyon County Sheriff's Dept

COMPLAINANT'S SIGNATURE: [signature]

Subscribed and sworn to before the undersigned this 3rd day of July, 2014.

NAME/TITLE: Kim Ickes, Deputy

SIGNATURE: [signature]

Being authorized to prosecute the offense(s) charged, I approve this Complaint.

Date: July 3 2014

PROSECUTING ATTORNEY'S SIGNATURE: [signature]

Richard R. Maes
Lyon County Attorney
607 West Main Street, Marshall, MN 56258
(507) 537-6755
Attorney Registration #: 203221

APPENDIX B

APPELLANT'S STATEMENT OF THE CASE

APPELLANT'S BRIEF 1-25-2017

REVERSED AND REMANDED May 22,2017
opinion unpublished

AFFIRMED August 5,2019
opinion unpublished

A18-1567

STATE OF MINNESOTA

IN COURT OF APPEALS

State of Minnesota,

Respondent,

vs.

Adolfo Gutierrez Avila, Jr.,

Appellant.

APPELLANT'S STATEMENT OF THE CASE

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St. Paul, MN 55101

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Lyon County Courthouse
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ATTORNEYS FOR RESPONDENT

OFFICE OF THE MINNESOTA APPELLATE PUBLIC DEFENDER

JENNA YAUCH-ERICKSON
Assistant State Public Defender
License No. 0392035

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St. Paul, MN 55104
(651) 201-6700

ATTORNEY FOR APPELLANT

Subject Matter Index Numbers: Argument I: 10H00
Argument II: 10K00

A18-1567

STATE OF MINNESOTA

IN COURT OF APPEALS

State of Minnesota,

Respondent,

vs.

Adolfo Gutierrez Avila, Jr.,

Appellant.

PROCEDURAL HISTORY

January-July, 2001	Date range of alleged offenses.
July 3, 2014	The State charged appellant with two counts of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subds. 1(g), 1(h)(ii).
September 22, 2015	Plea hearing. Appellant pleaded guilty to one count of criminal sexual conduct and the State dismissed the remaining count.
December 29, 2015	Sentencing. The district court denied appellant's motion to withdraw his guilty plea and sentenced appellant to 144 months in prison.
March 30, 2016	Appellant directly appealed his guilty plea.

May 22, 2017	This Court reversed and remanded for withdrawal of appellant's guilty plea.
March 14, 2018	Reopened omnibus hearing, the Honorable Leland Bush presiding.
April 9, 2018	Order denying appellant's motion to dismiss based on statute of limitations.
April 24, 2018	The State filed an amended complaint which corrected the alleged dates of the offenses.
April 25, 2018	Jury trial before Judge Bush. The jury returned two guilty verdicts.
June 26, 2018	Judge Bush sentenced appellant to two terms of 144 months, to be served consecutively.

LEGAL ISSUES

I. Where a concerned citizen reported to a police officer in 2003 a sexual assault committed by Avila, and the State did not file charges against Avila for eleven years, were those charges barred by the statute of limitations?

The district court ruled that the 2003 report did not trigger the statute of limitations. (Doc. 368.)

Apposite Authority
Minn. Stat. § 628.26, subd. (d) (2000)
State v. Soukup, 746 N.W.2d 918 (Minn. App. 2008)

II. Did the district court err by doubling the length of Avila's sentence following remand from this Court and thereby punishing Avila for his successful appeal?

The district court increased Avila's sentence from 144 months to two consecutive terms of 144 months. (Docs. 147, 433.)

Apposite Authority
Alabama v. Smith, 490 U.S. 794 (1989)
State v. Vang, 847 N.W.2d 248 (Minn. 2014)

STATEMENT OF THE CASE

On July 3, 2014, the State charged appellant Adolfo Avila by complaint in Lyon County with two counts of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subds. 1(g), 1(h)(ii). The charges related to conduct that allegedly occurred in 2001. Avila raised a statute of limitations defense and litigated that defense for over six months, in ten district court hearings. Ultimately, the district court denied his motion to dismiss on limitations grounds. Avila entered a guilty plea to one count and the State dismissed the remaining count. The district court denied Avila's pre-sentencing motion to withdraw his plea and sentenced him to 144 months in prison.

Avila directly appealed and this Court reversed and remanded to allow Avila to withdraw his guilty plea. Upon remand, Avila waived his right to counsel, proceeded pro se, and continued to litigate his statute of limitations defense for another eleven months in over twenty hearings. After a reopened omnibus hearing the district court denied Avila's motion to dismiss on limitations grounds.

The case proceeded to a jury trial, the Honorable Leland Bush presiding, and the jury returned two guilty verdicts. Judge Bush sentenced Avila to two terms of 144 months to be served consecutively, doubling the sentence Avila received after his initial guilty plea.

This appeal follows. Avila asks this Court to reverse his convictions because a 2003 report to law enforcement triggered the statute of limitations and the complaint filed eleven years later, after the limitations period expired, was time barred. In the alternative, Avila asks this Court to reverse his sentence because the district court erred by doubling Avila's sentence on remand and punishing him for exercising his right to appeal.

STATEMENT OF THE FACTS

Adolfo Avila has multiple stepdaughters by marriage. (T. 110-11.) One stepdaughter is M.H. At trial, M.H. testified that their family moved from Texas to Minnesota in 2000. (T. 111-12.) The family lived first in Marshall, Minnesota and later moved to the city of Tracy. (T. 112-13.)

M.H. testified that in 2001, when she was fifteen, Avila sexually assaulted her more than ten times. (T. 113-15.) M.H. testified that the assaults occurred when her mother was out of the house and Avila would remove her clothes and "force himself on [her]." (T. 114-15.) She testified that the assaults included "intercourse" and that she sometimes fought back but Avila would hit her or threaten her. (T. 114, 119.) M.H. testified that she could not remember exact dates but that these assaults occurred in Marshall between January and April 2001 and in Tracy in the summer of 2001. (T. 114-15.) M.H. testified that she told her mother about the assaults but her mother did nothing in response. (T. 119.)

M.H. testified that she became pregnant when she was fifteen and her daughter was born March 6, 2002. (T. 116.) M.H. testified that she believed conception of her daughter had occurred in June 2001. (T. 116.) She testified that Avila was the father of her child and that she had no other sexual partners. (T. 116.) Several years later M.H. sought government assistance which led to Avila being adjudicated the father of M.H.'s daughter based on DNA testing. (T. 117.)

M.H. testified that she first reported the sexual assaults to the police in 2011. (T. 117.) In July 2011, Investigator Tony Rolling received a "reciprocal report" from a social

services agency that had become aware of M.H.'s sexual assault allegations. (T. 148.) Rolling conducted a recorded interview with M.H. on July 20, 2011. (T. 149.) As part of the investigation into M.H.'s report, the BCA tested DNA samples from Avila, M.H., and M.H.'s daughter and determined with 99% certainty that Avila was the father. (T. 195-96.)

ARGUMENT

I. AVILA'S CONVICTIONS MUST BE REVERSED BECAUSE THE LIMITATIONS PERIOD EXPIRED YEARS BEFORE HE WAS CHARGED

The criminal conduct alleged in this case occurred in 2001. Avila was not charged until 2014. The applicable statute of limitations has two parts: the criminal sexual conduct offenses had to be charged either within nine years of the commission of the offense or within three years from a report of the offense to law enforcement. The offenses unquestionably were not charged within nine years of commission. The State has argued that Avila was properly charged within three years of M.H.'s 2011 report to law enforcement. But because the same conduct was reported to law enforcement in 2003, the statute of limitations expired in 2006. The State did not file charges until after the limitations period expired, and therefore the district court should have dismissed the complaint as time barred.

A. Standard of Review

This Court reviews de novo the construction and application of statutes of limitation. *State v. Carlson*, 845 N.W.2d 827, 832 (Minn. App. 2014).

B. Avila's Conduct was Reported to Law Enforcement in 2003

The State charged Avila on July 3, 2014, with two counts of criminal sexual conduct which collectively alleged conduct occurring between January and July 2001. (Doc. 403.) M.H. reported the conduct to law enforcement on July 20, 2011. (T. 149.)

At numerous hearings, both before and after Avila withdrew his guilty plea, he litigated a statute of limitations defense. Most of the evidence relevant to the statute of limitations claim was adduced at the reopened omnibus hearing. (Doc. 371.)

When M.H. reported the sexual conduct in 2011, she gave a recoded interview to Investigator Tony Rolling of the Lyon County Sheriff's Office. (T. 147, 149.) But 2011 was not the first time Rolling learned of the allegations. Rolling had previously worked for the Tracy police department, from 1997 to 2003. (Doc. 371 at 7.) During his employment with Tracy police, a person named Ray Hay reported to Rolling that Avila committed criminal sexual conduct against his stepdaughters, resulting in pregnancy. (Doc. 371 at 9, 20-21.) Rolling recalled that Hay told him, "Adolfo Avila had gotten his [step]daughters pregnant." (Doc. 371 at 9, 20-21.) Despite the serious nature of this allegation, Rolling wrote no police report and did no investigation. (Doc. 371 at 12, 18.)

Rolling documented Hay's report various times during his 2011 investigation. Rolling's 2011 police report noted that he had heard a "rumor" of Avila's criminal sexual conduct when he worked for Tracy. (Doc. 371 at 8-9.) During his interview with M.H., Rolling discussed the trailer home in Tracy where M.H.'s family lived in 2001 and said "that is where you guys were living when I first heard about it." (Ex. 26 at 9.)[1] Indeed, something like fifteen years later Rolling was able to remember with relative certainty that

[1] The district court received the recording and transcript of Rolling's July 20, 2011 interview with M.H. as post-trial exhibits in order to ensure a complete record for appeal. (T. 246-47; Doc. 415.)

it was Ray Hay, who worked at the Tracy Bakery, who originally reported the crime. (Doc. 371 at 20-22.)

C. The State was Required to Charge Avila Within Three Years of Any Report to Law Enforcement

"[T]he purpose of the statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time and to prevent defendants from having to defend themselves against overly stale charges." *Carlson*, 845 N.W.2d at 833 (internal quotation omitted). A statute of limitations is a jurisdictional bar to prosecution. *Id.* Three main rationales animate statutes of limitation: 1) protecting defendants from delayed prosecution where the facts "may have become obscured by the passage of time," 2) minimizing "the danger of official punishment [for] acts in the far-distant past," and 3) encouraging law enforcement to promptly investigate suspected criminal activity. *State v. Danielski*, 348 N.W.2d 352, 355 (Minn. App. 1984) (quoting and citing *Toussie v. United States*, 397 U.S. 112, 115-16 (1970)).

> Indictments or complaints for violations of sections 609.342 to 609.345 if the victim was under the age of 18 years at the time the offense was committed, shall be [filed] within nine years after the commission of the offense or, if the victim failed to report the offense within this limitation period, within three years after the offense was reported to law enforcement authorities.

Minn. Stat. § 628.26, subd. (d) (2000).

In order to trigger the statute of limitations in § 628.26, subd. (d), a person must have reported "the offense," that is, the particular conduct that constitutes the crime charged in the complaint. *State v. Swan*, No. A15-0832, 2016 WL 764395, at * 3 (Minn. App. Feb. 29, 2016). As this Court has recently stated, a report must contain "enough detail

to put the authorities on notice that a specific criminal offense may have occurred." *State v. Keller*, No. A18-0664, 2018 WL 4289716, at *4 (Minn. App. Sep. 10, 2018). Such a report triggers the statute of limitations even if "more detail may have been necessary to charge the alleged offense." *Id.* Nor is "the complaining witness's cooperation [required] before the relevant charging deadline is triggered." *Id.* In order to qualify as a "report" under § 628.26, it must be a "report to law enforcement authorities." *State v. Soukup*, 746 N.W.2d 918, 922 (Minn. App. 2008).

As this Court has noted, the § 628.26, subd. (d) statute of limitation contains two alternative limitation periods. *State v. Krikorian*, No. A06-1530, 2008 WL 68841, at *2-4 (Minn. App. Jan. 8, 2008). The "general limitations period" is nine years. *Id.* at *3. The listed offenses must generally be charged within nine years of commission. Subdivision (d) also contains a second period that is an exception to the first. *Id.* In cases where the victim did not report the offense within nine years, a three-year limitation period applies and is triggered by a report to law enforcement by any person. *Id.* The statute "does not restrict from whom a report of abuse may originate in order to trigger the running of the three-year limitation period." *Id.*

D. The Statute of Limitations Expired Before the State Charged Avila

When a criminal offense is a continuing one, the statute of limitations begins to run when the offense ends. *Soukup*, 746 N.W.2d at 921. Avila's conduct ended, at the latest, on July 31, 2001.

It is undisputed that the State did not charge Avila within the general nine-year period in § 628.26, subd. (d). The State has instead argued that the three-year exception

period applies because M.H. did not report to law enforcement within nine years but first reported in 2011. According to the State, it charged Avila within three years of M.H.'s 2011 report and therefore the prosecution was not barred. The State is wrong because the 2003 report to Rolling triggered the three-year limitation period, which expired in 2006. The State failed to charge Avila within either the general or the exception period. The district court should have granted Avila's motion to dismiss.

Ray Hay's statement to Rolling in 2003 triggered the statute of limitations. The report was made to Rolling, a law enforcement officer. And it contained enough detail to put Rolling on notice that a crime had occurred and to constitute a report of "the offense" charged in the complaint. At a minimum, the report informed Rolling that Avila impregnated his stepdaughter. This statement clearly encompasses sexual penetration, as a pregnancy resulted. And the report involved a minor victim and the significant relationship between the victim and Avila.

Rolling protested that this report did not provide him enough information, but as this Court has held, a report need not contain enough information to charge an offense in order to trigger the statute of limitations. It is no doubt true that the Ray Hay report would not have been enough to file a complaint. But it certainly put Rolling on notice that a crime may have occurred. Rolling also deflected responsibility by labelling the Ray Hay report a "rumor." The investigator's semantic choice of a label does not affect the legal analysis. Rolling was able to identify the time and source of the information. He did not hear the information whispered in a crowded room of people. A concerned citizen gave a police

officer information about an intra-familial sexual assault. That was enough to trigger an obligation to investigate and charge within the limitations period.

The *Danielski* concerns are all present in this case. *See Carlson*, 845 N.W.2d at 833. By permitting the time-barred charges to proceed, the district court subjected Avila to prosecution even though the delay obscured many facts and subjected him to punishment for distant acts. Moreover, it allowed the State to avoid "properly investigat[ing] suspected criminal activity." Statutes of limitation exist to avoid all these problems. The State failed to charge Avila within either three years of the report to law enforcement or within nine years of the commission of the offense. The complaint should have been dismissed and this Court should reverse Avila's convictions.

II. THE DISTRICT COURT PENALIZED AVILA FOR HIS SUCCESSFUL APPEAL BY DOUBLING THE LENGTH OF HIS SENTENCE ON REMAND

Avila originally pleaded guilty to Count 1 of the complaint and the district court imposed the presumptive guidelines sentence of 144 months. After a successful appeal to this Court, Avila withdrew his guilty plea and elected a jury trial. Following guilty verdicts on both counts, the district court sentenced Avila to two consecutive terms of 144 months, one for each count, doubling the length of his sentence. Because this sentence penalized Avila for a successful appeal and because it is excessive, this Court should remand for reduction of the sentence to 144 months.

A. Standard of Review

While this Court typically reviews sentences for an abuse of discretion, *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000), when a challenge to a sentence is based on an issue of law it is subject to de novo review. *State v. DeRosier*, 719 N.W.2d 900, 903 (Minn. 2006).

B. The District Court Doubled Avila's Sentence On Remand

The State charged Avila with a two-count complaint on July 3, 2014. (Doc. 2.) Both counts charged first-degree criminal sexual conduct against M.H. and involved sexual penetration with a person under 16 and a significant relationship. (Doc. 2.) The two counts covered different time periods. (Doc. 2.) And Count 1 contained the additional element of personal injury in the form of pregnancy. (Doc. 2.) On September 22, 2015, Avila pleaded guilty to Count 1 and the State dismissed Count 2. (Doc. 166 at 8.) Per the agreement of the parties, the district court sentenced Avila to a term of 144 months, the

presumptive guidelines sentence with Avila's criminal history score of zero. (Doc. 166 at 8; Doc. 147.)

Avila directly appealed his conviction and this Court reversed and remanded for plea withdrawal. *State v. Avila*, No. A16-0516, 2017 WL 2223950, at *1 (Minn. App. May 22, 2017). Avila withdrew his plea and, following significant pretrial litigation, elected a jury trial. The jury found him guilty of both counts. (Doc. 412.) The district court entered conviction on both counts and imposed sentence on both counts. (Doc. 433.) The court sentenced Avila to two terms of 144 months, to be served consecutively. (Doc. 433.) Avila argued that the court could not increase the length of his sentence after his successful appeal. (Doc. 442 at 8.) The court gave no reasons for any part of the sentence. (Doc. 442 at 9-14.)

C. District Courts Generally May Not Increase Punishment on Remand After a Successful Appeal

This Court reviews a sentence to determine "whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." Minn. Stat. § 244.11, subd. 2(b). A reviewing court may vacate or set aside a sentence and also may direct entry of an appropriate sentence or order further proceedings. *Id.* A court "may at any time correct a sentence not authorized by law." Minn. R. Crim. P. 27.03, subd. 9. An unauthorized sentence includes a sentence that is based on "an error of law." *State v. Humes*, 581 N.W.2d 317, 320 (Minn. 1998).

The Minnesota Supreme Court has adopted, "as a matter of judicial policy," the rule that a defendant who receives a new trial after a successful appeal may not receive a "sentence more onerous than the one he initially received." *State v. Holmes*, 161 N.W.2d 650, 652 (Minn. 1968). "[A]ny increase in penalty upon a retrial inevitably discourages a convicted defendant from exercising his legal rights and is contrary to public policy." *Id.* at 653. This prohibition on increased sentences after a successful appeal also has a constitutional dimension. The due process clause is violated when a defendant is penalized for exercising his right to appeal by the imposition of a more onerous sentence on retrial. *North Carolina v. Pearce*, 395 U.S. 711, 725-26 (1969). A presumption of vindictiveness applies when a defendant receives a more onerous sentence upon retrial. *State v. Carver*, 390 N.W.2d 431, 434 (Minn. App. 1986).

When a more onerous sentence is imposed upon remand than was first imposed after a guilty plea, the presumption of vindictiveness does not apply. *Alabama v. Smith*, 490 U.S. 794, 801 (1989). But a defendant may still prove that the longer sentence violates due process. *State v. Vang*, 847 N.W.2d 248, 265 (Minn. 2014). In such circumstances, courts assess whether there is a justification for imposing a harsher sentence after the successful appeal. *Id.* These considerations include whether the more lenient sentence after the guilty plea was the result of the prosecutor's recommendation, whether the information adduced at trial about the nature and extent of the crimes warrants an increased sentence, and whether the defendant's conduct in court provided insight into his moral character and suitability for rehabilitation. *Id.* Because the presumption does not apply after an initial

guilty plea is reversed, a defendant who receives a longer sentence on remand in such circumstances must prove the judge acted vindictively. *Id.*

D. This Court Should Reduce Avila's Sentence Because By Doubling its Length the District Court Punished Him for a Successful Appeal

The district court doubled the length of Avila's sentence on remand. Because the twelve-year increase unfairly punished Avila for exercising his right to appeal, this Court should reverse for imposition of the original 144 month sentence.

The district court offered no explanation for Avila's sentence—it did not state why it imposed two sentences, why it ran them consecutively, or why it doubled the length of Avila's original sentence. This absence is particularly concerning because none of the *Smith* factors—potential justifications for a longer sentence—apply here. It was not the "prosecutor recommending a lower sentence" that resulted in the original 144-month term. *Vang*, 847 N.W.2d at 265. That sentence was driven by law: 144 months is the presumptive guidelines sentence for a person like Avila with zero criminal history. Certainly more facts were elicited at the trial on remand than at the initial plea hearing, but the core facts about the crime were always known to the court. Even at the time of the first sentencing, the court was aware that Avila committed sexual penetration against his fifteen-year-old stepdaughter, resulting in her pregnancy. The evidence at trial merely corresponded to the elements of the charged offenses. And Avila's conduct during trial did not give the court any reason to penalize him more harshly. In fact, Avila's status as a pro se litigant suggests an improper basis for the increased sentence—that the court imposed a doubly-long sentence as punishment for Avila exercising his right to appeal and then his right to self-

representation, which led to a long and arduous case in district court. The increased sentence on remand was vindictive and should be reduced by this Court.

In addition to punishing Avila for a successful appeal, the 288-month (24 year) sentence is also excessive. Minn. Stat. § 244.11, subd. 2(b). The potential for consecutive sentences to unfairly exaggerate a defendant's criminality is of particular concern in intra-familial sexual abuse cases. Because such cases typically involve multiple incidents against a single victim, permissive consecutive sentencing can result in "enormous disparity based on varying charging practices of prosecutors and discretionary judicial decisions." *State v. Notch*, 446 N.W.2d 383, 385-86 (Minn. 1989) (quoting Minnesota Sentencing Guidelines, II.F.06 Comment (1986)). For this reason, prior versions of the sentencing guidelines permitted consecutive sentencing in such cases only if the defendant was being sentenced for multiple offenses against *different* victims. *Id.* This is not a case involving multiple sentences for multiple victims.

Moreover, the availability of two sentences in this case is fundamentally a product of the charging decision to create two counts. The two counts covered one contiguous date range in the year 2001. The State could have charged one count involving multiple acts committed from January to July 2001 instead of charging two counts that split that range in half. This would have resulted in only one 144-month sentence for the same conduct. Obtaining two sentences may not have been the purpose of the manner of charging, but it is surely its effect. *Cf. State v. Folley*, 438 N.W.2d 372, 374 (Minn. 1989) (noting that allowing length of defendant's sentence to turn on matters subject to manipulation by prosecutors would defeat policy underlying guidelines).

This Court has the authority to modify a sentence even if it is within the presumptive guidelines range. *State v. Kraft*, 326 N.W.2d 840, 842 (Minn. 1982). Avila's consecutive 144-month sentences violate due process by punishing him for appealing. The total sentence is also excessive. This Court should reverse and remand for imposition of a reduced sentence, no longer than the original 144-month term. *Cf. State v. Hennum*, 441 N.W.2d 793, 801 (Minn. 1989) (reversing imposition of presumptive sentence).

CONCLUSION

This Court should reverse Avila's convictions because the statute of limitations was triggered by the citizen report in 2003 and the complaint was filed after the limitations period expired. In the alternative, this Court should reverse Avila's 288 month sentence because the district court erred by doubling Avila's sentence on remand.

Dated: February 19, 2019

Respectfully Submitted,

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ATTORNEY FOR APPELLANT

State Of Minnesota

In Court of Appeals

State of Minnesota

Respondent,

District Court File No: 42-CR-14-600

V.

Appellant Court File No: A16-0516

Adolfo Avila,

Appellant,

APPELLANT'S BRIEF

TABLE OF CONTENTS

Authorities

Merriam-Webster (Dictionary of Law) Judicial System

Court and law Enforcement Personnel:

The officers of the court are persons assembled at the court to administer Justice. They include the **judge**, who is the principal officer of the court, the **lawyers**, the **clerk of courts**, the **sheriff**, the **Marshall**, the **bailiff**, and possibly a **constable** or a **court officer.**

The **chief local law enforcement officer** maybe called the **prosecuting attorney, state attorney, or district attorney.**

Black's Law Dictionary (Seventh Edition) West Group Garner

Affidavit: a voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths.

Case Law

"Additionally, if a plea is contemplated, counsel must ensure that his client's plea will be voluntary. If a defense is possible under the facts of the case, the client will necessarily have to acknowledge the defense, acknowledge that counsel has fully advised him as to the defense, and then affirmatively waive it. The omission of any of these three essentials can raise the question of whether the plea was voluntary, Minn. R. Crim. P. 15.01, Subd. 1." **Minn. Vs. Fabrizio Montermini, Appellant. Court of Appeals of Minnesota 2009 Minn. App. Unpub. Lexis 532 A06-1640 May 19, 2009, filed.** "Furthermore, in drawing that conclusion, the district court overlooked Montermini's right to enter a voluntary plea, one characterized by an understanding of the nature of any possible defense and an express waiver of such a defense".ID

In Toussie V. United States, the U.S. Supreme Court noted that, in general, a statute of limitations should be liberally interpreted in favor of closure for an accused.

See Adlestein, Alan L. Rev. 199,262(1995); see also note, Barrier to Prosecution, supra note 5, at632 (observing that," prosecution should be based on evidence that is reasonably fresh and therefore more trustworthy than evidence with a probative value which has grown weaker as man's ability to remember has become impaired");21 Am. Jur 2d $ 291 ("**statute of limitations on criminal prosecutions are designed to protect individuals from having to defend themselves against charges when the basic facts may become obscured by the passage of time. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity...**")

Question Presented

Did the Judge correctly applied the law or made errors of law that induced a plea?

RULE OF EVIDENCE INVOLVED

Current Statute of Limitations M.S.A. 628.26 (e) Indictments or complaints for violation of section 609.342 to 609.345 if the victim was under the age of 18 years at the time of the offense was committed, shall be found or made and filed in the proper court with in the latter of the nine years after the commission of the offense

Or three years after the offense was reported to Law Enforcement Authorities.

Minnesota Statute 626.556 Sub.3 (b) Any person may voluntarily report to the local welfare agency, agency responsible for assessing or investigating the report, police department, or the county sheriff if the person knows, has reason to believe, or suspects a child is being or has been neglected or subjected to physical or sexual abuse. The police department or the county sheriff, upon receiving a report, shall immediately notify the local welfare agency responsible for assessing or investigating the report, orally and in writing. The local welfare agency or agency responsible for assessing or investigating the report, upon receiving a report, shall immediately notify the local police department or county sheriff orally and in writing.

Minnesota Statute 626.556 Sub.7 (b) Any report shall be of sufficient content to identify the child, any person believed to be responsible for the abuse or neglect of the child if the person is known, the nature of the abuse or neglect and the name and the address of the reporter. The local welfare agency or agency responsible for assessing or investigating the report shall accept a report made under subdivision 3 notwithstanding refusal by a reporter to provide the reporter's name or address as long as the report is otherwise sufficient under this paragraph. Written reports received by the police department or county sheriff shall be forwarded immediately to the local welfare agency or the agency responsible for assessing or investigating the report. The police department or the county sheriff may keep copies of reports received by them. Copies of written reports received by a local welfare department of the agency responsible for assessing or investigating the report shall be forwarded immediately to the local police department or the county sheriff.

STATEMENT OF THE CASE

Criminal case number: **42-CR-14-600** out of Lyon County District Court is presented for appeal. The charges are dated **Count I (Jan. to June 2001)** and **Count II (May, June, July 2001)**. The complaint was filed on **July 3, 2014** which is **13 years later**. The **July 3, 2014 complaint** is been based on the three year report to Law Enforcement Authorities clause not the Nine Year Latter. The report being used for this prosecution is Lyon County Sherriff's Office **Report dated July 20, 2011.** On April 27, 2006 the complainant applied for assistance at the Human Services in Marshall, Minnesota which in turn she was referred to Child Support Collections Enforcement Services.

The complainant reported to Child Support Officer Mary J. Stanton that the defendant is the biological father of the child. Which a legal action was commenced to establish parentage against the defendant in the District Court (Fifth Judicial District) located in Marshall Minnesota back in 2007 which law enforcement involved:

Honorable Jan Creg. Nelson oversaw the proceedings and the state was represented by County Attorney Nicole A. Springstead (registration no: 0326550).

Court Summons package (which included complaint, supporting affidavit, paternity testimony) was prepared and filed by Karen Bierman (Court Administrator) and Tammy Horner (Deputy Court Administrator).

The **COMPLAINT of May 8, 2007** initiated by the County Attorney Nicole A. Springstead with the **testimony** of Maria Herrera and Child Support Officer Mary J. Stanton in court and thru affidavit(which is done before an officer authorized to administer oath).

ALLEGES:

1. **This is an action to establish parentage** and basic support,
2. **The Plaintiffs are the county of Lyon and Maria Herrera. The Defendant is Adolfo Avila.**
3. **Maria Herrera is the mother of the following child** (ren) whose paternity is sought to be established in this action:
   ***Maykela M. Herrera was born on 03/06/2002 in the County of Lyon, State of Minnesota.**

4. Maria Herrera has assigned rights to child support to the state

5. **The act(s) of sexual intercourse**, which may have resulted in conception, **occurred within the state of Minnesota. At the time the act(s) occurred, Maria Herrera was a resident of the state of Minnesota.**
6. **Maria Herrera did not have sexual intercourse with any other man six weeks before or six weeks after the alleged date of conception(s).**
7. **Maria Herrera has never been married to Adolfo Avila.**
8. **Adolfo Avila is the father of the child** (ren).

On the September 20, 2007 paternity case hearing the complainant testified under oath in court about her and the defendant engaging in sexual intercourse which caused her to become pregnant and also the ages of complainant, defendant, and child were disclosed by the complainant in the hearing.

Summary of Argument

This brief will point out prejudicial errors(which are in the record) that were made that prevented the defendant from perfecting the statute of limitations claim and improperly pressured defendant to accept an involuntary guilty plea so to bring finality to this criminal case.

Legal Error 1

On June 30, 2015 at the Omnibus hearing the issue of the statute of limitations was raised by public defender A.J. Kasprick thru the Defendant's Memorandum of Law and in the hearing which was supported by intrinsic evidence (the child support file) that proved a legal proceeding (the 2007 paternity case) because of the complainant's report of the pregnancy to law enforcement authorities had taken place in the Fifth Judicial District Court. **(6/30 T. at 13)**

The Findings of facts, Conclusion of Law, in Lyon County Court file FA-07-566 clearly prove the alleged sexual misconduct and the complainant's, the defendant's, and child's age difference were reported to law enforcement Authorities which in this case a reciprocal report was sent to the Lyon County Sheriff's Office for summons/investigation purposes. **(9/8 T. at 9)** Referencing **Minnesota Statute 626.556 Subd.7 (b)** any report shall be of sufficient content to identify the child, person responsible for the abuse, the nature of the abuse. In this case it would be the complainant, the defendant, the conception which going by the age differences the complainant was 15 years old. The September 20, 2007 hearing constituted official involvement **state v. Daniel ski {348 N.W.2d 356}** which technically triggered the three years after the offense was reported to law enforcement authority statute of limitations clause. The complaint for this criminal case was filed on July 3, 2014 which is four years after the 3 year time period to report to law enforcement had expired. **On the July 8, 2015 written order** the Judge's decision was not properly based on the evidence introduced in the case. The Judge made an error(incorrectly applied the law) by not dismissing this criminal case once evidence of the 2007 paternity case was introduced proving the alleged sexual misconduct had been reported to law enforcement authorities and legal proceedings had taken place based on this reports(affidavits). Thus proving the statute of limitations had expired on this criminal case. **State v. French {392 N.W.2d 596}**

Under the facts of the case the statute of limitations defense was possible which public defender and defendant had acknowledged thus bringing up the issue at the omnibus hearing. This legal error would put the defendant in a predicament where due to the pressures from the court and prosecuting attorney to bring finality to this case defendant would have to involuntarily accept a plea deal. **(9/8 T. at 2-3)** The court made a prejudicial error by failing to inquire about the statute of limitations defense at the guilty plea hearing. **(9/22 T. at 2-34)**

Thus defendant never affirmatively waived the statute of limitations defense. The court overlooked the defendant's right to enter a voluntary plea, defendant never expressed waiver of statute of limitations defense. Once a defendant acknowledges a defense he must affirmatively wave it at the hearing or the plea is considered involuntary thus invalid. **Minn. Vs. Fabrizio Montermini, Appellant. Court of Appeals of Minnesota 2009 Minn. App. Unpub. Lexis 532 A06-1640 May 19, 2009, filed.** It is manifest unjust for the court to accept an involuntary plea of guilty to a crime. The "involuntariness of a guilty plea*** constitutes such a manifest injustice as to entitle defendant to withdraw his plea." **State v. Danh, 516 N.W.2d 539, 544 (Minn. 1994) (quoting Hirt v. State, 298 Minn. 553, 558, 214 N.W.2d 778, 782 (1974)).** This prejudiced the defendant's case for defendant never wanted to waive the statute of limitations defense so the court based their accepting of a plea on an assumption. Defendant should be allowed to withdraw he's plea to correct this manifest Injustice for the court failed to adequately inquire into the voluntariness of the plea. **Boykin v. Alabama 395 US 238, 1969**

Legal Error 2

At the June 30, 2015 omnibus hearing Investigator Rolling misrepresented the facts of when the alleged sexual misconduct was reported to him thus making the courts finding of facts erroneous. During direct examination Rick Maes(Prosecutor) asked the question" **Was that the first time you were notified of any alleged misconduct involving Mr. Avila and the alleged victim?"** and Investigator Rolling response was" **That was the first time it was reported to me."** ***(6/30 T. at 3-4)*** Yet in the report used for prosecution Investigator Rolling makes this statement. ***"On July 25, 2011, I conducted an interview with Maria Herrera at the Lyon county Sherriff's Office. I began speaking with Maria and introduced myself. I explained that prior to working at the Lyon County sheriff's Office, I had been a police officer with the city of Tracy. I explained that while working there, I had heard a rumor that Adolfo Avila had gotten his daughters pregnant, but I was never able to substantiate that. I explained that I was somewhat familiar with the situation, and if she could tell me what had all occurred."***

(This statement is in report used for prosecution No: 11-11429 dated July 26, 2011 on pg.2 second paragraph.)

When Investigator Rolling received the information of the suspected criminal activity constituted official involvement which the act (the pregnancy) was reported to him as a Tracy Police officer since at least 2003 **State v. Daniel ski {348 N.W.2d 356}** thus the offense was officially discovered since at least 2003. As to the reason the suspected criminal activity was not brought to the prosecuting authority on time is a question for Investigator Rolling. In **state v. Daniel ski {348 N.W.2d 356}** the officers investigated the information they received on July 29, 1983 and brought charges against the defendants on august 26, 1983. In this case Investigator Rolling received the information since at least 2003 but charges were filed until July 3, 2014 which is 11 years later.

Referencing **Minnesota statute 626.556 Subd.3 (b)** Any person may voluntarily report the information to the police/sheriff if there is reason to believe or suspect a child is being abused or subjected to physical or sexual abuse which in turn the police officer sends a reciprocal report to the Human services. The information according to **Minnesota statute 626.556 Subd.7 (b)** constitutes a report that notified him. Making him aware of the allegation which prompt him to investigate **"but I was never able to substantiate that. I explained that I was somewhat familiar with the situation,"** Referencing **Minnesota Statute 626.556 Subd.7 (b)** Even without the reporter's name and address any report shall be of sufficient content to identify the child, any person responsible for the abuse, and the nature of the abuse which in this case would be the complainant, Defendant, and the pregnancy.

In all the information of the alleged sexual misconduct was brought to a law enforcement officer which it is what the statute requires so to trigger the statute of limitations.

State v. Daniel ski {348 N.W.2d 356}

The Minnesota Appellate Courts have stated someone actually brings the information to the proper law enforcement authorities, before the statute begins to run **(Souk up, 746 N.W. 2d at 922 Citing Daniel ski, 348 N.W. 2d at 357.)** Defendant read Investigator Rolling's statement to the court in the December 4, 2015 hearing proving the alleged sexual misconduct was reported to a law enforcement officer since at least 2003. **(12/4 T. at 5-8).** Defendant filed a motion to do a deposition on Investigator Rolling to confirm the 2003 report and a motion to withdraw he's plea which were done before sentencing. A defendant has a fundamental right to decide to plead guilty which he must do so knowingly, intelligently, and voluntarily. **Butala v. State, 664 N.W.2d 333 (Minn. 2003) A valid guilty plea "must be accurate, voluntary, intelligent (i.e., knowingly and understandingly made).**

As a doctrinal matter, the Supreme Court's guilty plea cases suggest that government misrepresentation does in fact negate the voluntary and intelligent nature of a plea.

For example, in **Brady v. United States, 397 U.S. 742 (1970)**, the Supreme Court defined a voluntary plea in part by what it was not, explicitly excluding from its definition those pleas induced by threats, misrepresentation, and improper promises. **i.d. at 755. See also id. At 757** (recognizing "misrepresentation or other impermissible conduct by state agents" as a basis for invalidating a plea). A plea is not voluntary or intelligently made if premised on the misrepresentation of the facts. Either a voluntary and intelligent plea require informed decision making which in this case the lead investigator to this criminal case misrepresented the facts of when he actually got the first report. Changing the starting point of the 3 years after the offense was reported to law enforcement authority period from 2003 to 2011. Even the 2011 report date was troubling which public defender AJ raised the issue at the omnibus hearing. **(6/30 T. at 13-14)**

This misrepresentation of the facts made the parties mutually mistaken in the belief that the statute of limitations had not expired on this criminal case which the statute of limitations had expired thus barring prosecution. **State v. French {392 N.W.2d 596} Toussie v. United States {397 U.S.112}** The judge did not dismiss the case and the prosecutor continued prosecution because they based their decisions on this misrepresentation of the facts. Public defender unintelligently advice defendant to accept the guilty plea thus defendant made an unintelligent and involuntary decision to plead guilty based on this misrepresentation of the facts. Defendant did not voluntarily and knowingly enter the plea. **Butala v. State, 664 N.W.2d 333 (Minn. 2003) A valid guilty plea "must be accurate, voluntary, intelligent (i.e., knowingly and understandingly made).** It is manifest unjust for the court to accept an involuntary plea of guilty to a crime. The "involuntariness of a guilty plea*** constitutes such a manifest injustice as to entitle defendant to withdraw his plea." **State v. Danh, 516 N.W.2d 539, 544 (Minn. 1994)**

The Fair and Just Standard" requires district courts to give due consideration to two factors: (1) The reasons a defendant advances to support withdrawal and (2) prejudice granting the motion would cause the [s]tate given reliance on the plea." Raleigh, 778 N.W.2d at 97 (quoting Kim, 434 N.W.2d at 266). A defendant bears the burden of advancing fair-and-just reasons to support withdrawal State v. Lopez, 794 N.W.2d 379, 382 (Minn. App. 2011). In addition, the fair-and-just reasons must be supported by the record. Raleigh,778 N.W.2d at 97. (1) In this case the defendant's reason for the request of withdrawal of the plea was the statute of limitations applies which was proven by Investigators Rolling own statement admitting an earlier report. Contradicting he's own testimony and making the courts findings erroneous. Which defendant got from Investigator Rolling own report used for prosecution and read in open court and it is on the record. **(12/4 T. at 5-8)** (2) As to the prejudice it would cause the state would be the delay caused by law enforcement not by the defendant. The suspected criminal activity was officially discovered since at least 2003. **State v. Daniel ski {348 N.W.2d 356}**

On the December 29, 2015 hearing the judge denied the motion to do a deposition on Investigator Rolling to confirm the 2003 report and the motion to withdraw the plea and sentenced defendant. The court abused its discretion by not allowing defendant to withdraw the plea so defendant could perfect the statute of limitations claim even thou intrinsic evidence was read in court proving the courts findings of facts were erroneous and the statute of limitations had expired on this criminal case. The court made a prejudicial error by accepting an unintelligent and involuntary plea from the defendant. This prejudiced the defendant for the statute of limitations would have been officially perfected and this criminal case dismissed. The court overlooked the defendant's fundamental right to enter an Intelligent and voluntary plea. Defendant should be allowed to withdraw he's plea to correct this Manifest Injustice.

Legal Error 3

When a civil or criminal matter is commenced in court an affidavit is done on the witnesses by an officer authorized to administer oaths which for the child support file (2007 paternity case) an affidavit was done on Mary J. Stanton(child support officer) and on Maria Herrera(complainant).

The Findings of Facts, conclusion of law, in Lyon County Court file FA-07-566 **(IV-D Case no: 001438290802)** clearly show a supporting affidavit was done on Mary J. Stanton and a paternity affidavit was done on Maria Herrera. The affidavits are listed in several documents thru out the child support file: In the summons; in the complaint; in the admission of service on Maria Herrera; in the admission of service on the defendant and in other documents in the child support file. **(9/22 T. at 2-3) (reference exhibit 1)**

On September 8, 2015 a Motion to Compel Discovery was brought for the Lyon County Court file FA-07-556 **(IV-D Case no: 001438290802)** filed at the courthouse in reference to Mary J. Stanton's Affidavit and the complainant's sworn paternity affidavit but the Judge did not grant access to the actual courthouse file even thou that was the point of the motion. **(9/8 T. at 6)** Instead the in camera review was done but on the Human Services file. Mary J. Stanton's Affidavit and complainant's paternity affidavit sworn to an officer would be in the court file not the human services file. The in camera review was done on the wrong file.

On the September 22, 2015 hearing the Judge made a prejudicial error by providing a copy of the summons package and complaint from the child support file (IV-D Case no: 001438290802) which is the parentage case that took place in 2007 but copies of Mary J. Stanton's affidavit and the complainant's paternity sworn affidavit were not provided. **(9/22 T. at 2-5)(12/1 T. at 11-13) (12/29 T. at 9)**

The withholding of Mary J. Stanton's affidavit and the paternity testimony affidavit willingly or inadvertently caused an injustice against the defendant for with this documents the defendant could perfect the statute of limitations claim without a doubt.

In 2007 on several occasions Lyon County Sheriff's Officers stopped by the defendant's farm to try to serve the summons package on defendant until it was finally served on him on May 20, 2007. **(9/8 T. at 9)** In the paternity testimony affidavit the complainant points out the defendant is the father of the child; the age difference; and clearly points out the significant relationship. Referencing **Minnesota Statute 626.556 Subd.7 (b)** when there is a report of abuse to Human Services a reciprocal report is sent to the Sheriff's Department and vice versa which in this case a reciprocal report was sent for summons/investigation purposes to the Lyon County Sheriff's Office. **(9/8 T. at 9)**

The record retention time has not expired on this child support case filed at the Lyon County Courthouse. All the documents for this child support case do show up on the computer as filed so they should be in the physical file which defendant confirmed on the phone with Karen Bierman that the affidavits were there so defendant could get copies. **(10/21 T. at 4)**

On September 22, 2015 once defendant realized the affidavits were being withheld which trapped the defendant constituted an improper pressure which induced the defendant to accept the guilty plea. **(9/22 T. at 2-34)** This affidavits that were confirmed to be in the child support file had disappeared. **(9/22 T. at 2-5) (12/1 t. at 11-13)** Defendant had no choice but to summit and accept the guilty plea. The pressure had been felt for months by the defendant but he still would not accept the guilty plea. **(9/8 T. at 2-3)**

Even during the plea hearing defendant stopped responding for defendant did not want to continue the process of accepting the guilty plea but they persisted and kept going with the plea hearing and kept asking questions overriding the defendant's will. **(9/22 T. at 19-22)** A guilty plea must appear on the record to have been voluntarily and intelligently made. If not, the plea must be vacated. **State v. Casarez, 534, 536, 203 N.W.2d 406, 408 (1973)** Defendants attitude was one of a very emotional person under pressure for defendant realized the perfecting of the statute of limitations claim was blocked and he was now facing serious prison time which it would be double punishment if he did not summit and comply to the guilty plea. **(9/22 T. at 19-22)** Defendant brought up the issue of the missing report several times during the plea hearing. **(9/22 T. at 16) (9/22 T. at 32)**

A defendant has a fundamental right to decide to plead guilty which he must do so knowingly, intelligently, and voluntarily. **Butala v. State, 664 N.W.2d 333 (Minn. 2003) A valid guilty plea "must be accurate, voluntary, intelligent (i.e., knowingly and understandingly made).** The voluntariness requirement ensures that the guilty plea is not in response to improper pressures or inducements. How can this guilty plea been accepted as voluntary when defendant was not only improperly pressured into accepting the involuntary guilty plea but trapped to accept it. The court made a prejudicial error by accepting an involuntary plea which was induced by their error of withholding material evidence favorable to the defense of the statute of limitations claim. The process by which the trial judge accepted the plea violated the defendant's fundamental right to enter a voluntary plea. **Boykin v. Alabama 395 US 238, 1969**

On the December 1, 2015 hearing the Judge was aware the report (Mary J. Stanton's Affidavit) was not disclosed to the defendant but in the December 29, 2015 hearing the Judge makes a statement that the report had been disclosed to the defendant which it was not.

(12/1 T. at 11-13)(12/29 T. at 10, 11)

Defendant read this statement in the sentencing hearing on December 29, 2015 to the court. "Today I will be accepting a plea bargain that I do not agree or want to accept. But I feel the level of corruption here in Lyon County Minnesota is at a high level in our law enforcement and our court system. My biggest fear is the safety of my family. Also I am in fear of what they can do to me. Everything I have tried to do here has been blocked and some of the things they did they did not even hide from me. The statute of limitations has expired in my case. I should not have been arrested much less charged with two counts. For now it is best they think they won and I am done so the drama stops here. I am doing damage control where my punishment is less for it is obvious they will stop at nothing to do and get what they want. My first priority or main concern is my families safety and well being." **(12/29 T. at 14)**

It is manifest unjust for the court to accept an involuntary plea of guilty to a crime. The "involuntariness of a guilty plea*** constitutes such a manifest injustice as to entitle defendant to withdraw his plea." **State v. Danh, 516 N.W.2d 539, 544 (Minn. 1994) (quoting Hirt v. State, 298 Minn. 553, 558, 214 N.W.2d 778, 782 (1974))**. As a remedy to correct this prejudicial error defendant should be allowed to withdraw he's guilty plea to correct this Manifest Injustice.

Legal Error 4

Prosecutor made a prejudicial error by making a misleading statement to the court in reference to the statute of limitations. Prosecutor said in court a report must come from the alleged victim herself to trigger the statute of limitations and that is not correct. This erroneous view of the law prejudiced the defendant's case for the prosecutor litigated this on several occasions to the court. **(6/30 T. at 11)(9/29 T. at 7)** The court did not correct or disagree with the prosecutor about this erroneous view of the law. The court ruled against the defendant about the statute of limitations.

ARGUMENT

THE JUDGE RULED AGAINST CREDIBLE EVIDENCE PROVING THE STATUTE OF LIMITATIONS(THE CHILD SUPPORT FILE); DOES NOT APPROVE THE SEPTEMBER 8, 2015 MOTION TO COMPEL DISCOVERY FOR COURTFILE FA-07-566; DOES NOT DISCLOSE MARY STANTON'S AFFIDAVIT AND PATERNITY AFFIDAVIT ON THE SEPTEMBER 22, 2015 HEARING; MAKES A MISLEADING STATEMENT THAT MARY STANTON'S AFFIDAVIT WAS DISCLOSED WHICH IT WAS NOT; DOES NOT APPROVE MOTION FOR DEPOSITION ON INVESTIGATOR ROLLING FOR THE 2003 REPORT; ACCEPTS A GUILTY PLEA WHERE THE DEFENDANT STOPS RESPONDING BUT WAS PRESSURED THRU THE PLEA HEARING TO CONTINUE THE PROCESS TO ACCEPT THE GUILTY PLEA; DOES NOT DENY COUNSELS ERROR BUT DENIES POST CONVICTION PETITION RELIEF.THIS PROCEEDINGS TAKEN AS A WHOLE ENSUED PREJUDICED AGAINST THE DEFENDANT WHICH DENIED SUBSTANTIAL JUSTICE FOR THE DEFENDANT. A PROPER ADMINISTRATION OF JUSTICE WOULD HAVE ATLEAST APPROVED THE SEPTEMBER 8, 2015 MOTION TO COMPEL DISCOVERY ON THE ACTUAL CHILD SUPPORT COURTFILE AND APPROVED THE DEPOSITION ON INVESTIGATOR ROLLING'S 2003 REPORT TO CONFIRM OR DISCREDIT MATERIAL EVIDENCE FAVORABLE TO THE DEFENSE OF THE STATUTE OF LIMITATIONS CLAIM.

Conclusion

The intrinsic evidence is credible to prove the alleged sexual misconduct was reported to law enforcement authorities in 2003 and 2007. In conclusion, the statute of limitations was proven twice on the record **(6/30 T. at 13) (9/4 T. at 5-8)** thus barring prosecution but the Judge made legal errors of law which allowed the prosecution of this criminal case. The same County Attorney Office and the same court administration in Lyon County brought and prosecuted the first complaint filed on ***May 8, 2007*** and second complaint filed ***July 3, 2014***. 7 years difference from one legal action to the next which this legal actions can only be brought or made by law enforcement Authorities. A guilty plea is only constitutionally valid if it "represents a voluntary and intelligent choice among the alternative course of action open to the defendant." **Hill, 474 U.S. at 56.** In this case the withholding of the affidavits willingly or inadvertently changed the alternative course of action open to the defendant. The guilty plea was induced by the withholding of the affidavits. Defendant did not voluntary enter the plea. Defendant was denied that fundamental right. "a trial judge should not accept a guilty plea unless he has determined that such plea is voluntarily and knowingly entered by the defendant," **Boykin v. Alabama {395 US 238, 1969}** The trial judge failed to do he's duty to insure the guilty plea he accepted would be voluntary. When the reason for the rule fails to exist so should the rule itself. Defendant respectfully requests that this error in law in the name of Justice be corrected and this conviction which represents a Manifest Injustice be vacated. Thank you.

Sig. Date 1-25-17 12 out of 12 pages for Avila's Appeal Brief

This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).

STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0516

State of Minnesota,
Respondent,

vs.

Adolfo Gutirrez Avila,
Appellant.

Filed May 22, 2017
Reversed and remanded
Toussaint, Judge*

Lyon County District Court
File No. 42-CR-14-600

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Rick Maes, Lyon County Attorney, Abby Wikelius, Assistant County Attorney, Marshall, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and Toussaint, Judge.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

TOUSSAINT, Judge

On appeal from his conviction of first-degree criminal sexual conduct, and from the order denying his postconviction petition following a stay and remand, appellant Adolfo Gutirrez Avila argues that (1) his guilty plea was unintelligent because he did not understand that it would waive his right to appeal the statute-of-limitations defense and (2) his trial counsel was ineffective because he failed to advise appellant that his plea would waive all non-jurisdictional issues, including the statute-of-limitations defense. Appellant also filed a pro se supplemental brief in which he made several arguments pertaining to the statute-of-limitations issue. Because appellant's guilty plea was unintelligent, we reverse and remand to allow appellant to withdraw his plea.

DECISION

This court reviews a summary denial of postconviction relief for an abuse of discretion. *State v. Hokanson*, 821 N.W.2d 340, 357 (Minn. 2012). In doing so, we review the postconviction court's legal determinations de novo and its factual findings for clear error. *Bonga v. State*, 797 N.W.2d 712, 718 (Minn. 2011).

Under the rules of criminal procedure, there are two standards for judging a motion to withdraw a guilty plea; one applies only to a motion brought before sentencing, and the other applies to a motion brought at any time. The district court, in its discretion, "may allow the defendant to withdraw a plea *at any time before sentence* if it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2 (emphasis added). "*At any time* the court must allow a defendant to withdraw a guilty plea upon a timely motion and proof to the

satisfaction of the court that withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1 (emphasis added). The fair-and-just standard is discretionary and less demanding than the manifest-injustice standard. *State v. Raleigh*, 778 N.W.2d 90, 97 (Minn. 2010); *State v. Lopez*, 794 N.W.2d 379, 382 (Minn. App. 2011).

In denying appellant's motion to withdraw his guilty plea, the district court properly applied the fair-and-just standard under rule 15.05, subdivision 2, and then proceeded to sentencing. Appellant does not challenge the district court's reasoning in denying his motion under Minn. R. Crim. P. 15.05, subd. 2. Instead, he argues that the district court was compelled to grant his motion to withdraw his guilty plea in order to correct a manifest injustice under rule 15.05, subdivision 1.

"[A] defendant who can show manifest injustice is entitled as a matter of right to withdraw his plea of guilty." *Hirt v. State*, 298 Minn. 553, 557, 214 N.W.2d 778, 782 (1974). "A manifest injustice exists if a guilty plea is not valid." *Raleigh*, 778 N.W.2d at 94. A guilty plea is valid if it is accurate, voluntary, and intelligent. *Id.* The validity of a guilty plea is a question of law that is reviewed de novo. *Nelson v. State*, 880 N.W.2d 852, 858 (Minn. 2016).

The purpose of the requirement that a guilty plea be intelligent "is to insure that the defendant understands the charges, understands the rights he is waiving by pleading guilty, and understands the consequences of his plea." *Taylor v. State*, 887 N.W.2d 821, 823 (Minn. 2016) (quotation omitted). If the defendant is represented, his attorney plays an important role in ensuring that any plea is intelligent by explaining the charges, the rights to be waived, and the consequences of the plea. *Id.* One of the consequences of pleading

guilty is the waiver of all non-jurisdictional defects. *See State v. Ford*, 397 N.W.2d 875, 878 (Minn. 1986) ("A guilty plea by a counseled defendant has traditionally operated . . . as a waiver of all non-jurisdictional defects arising prior to the entry of the plea."). A statute-of-limitations defense is a non-jurisdictional issue that is waived by a guilty plea. *State v. Johnson*, 422 N.W.2d 14, 18 (Minn. App. 1988), *review denied* (Minn. May 16, 1988).

Appellant argues that his guilty plea was unintelligent because he did not understand that his plea would waive his right to appeal his statute-of-limitations defense. We agree. In *State v. Tupa*, the defendant was charged with being an accessory after the fact to a felony. 194 Minn. 488, 488, 260 N.W. 875, 876 (1935). The defendant demurred on the ground that the statute of limitations barred prosecution of the offense. *Id.* at 489, 260 N.W. at 876. After the district court overruled the demurrer, the defendant pleaded guilty to the charged offense. *Id.* On appeal from the denial of the defendant's motion to set aside the judgment, our supreme court held that the defendant, by his guilty plea, did not waive "any defects in the information and the defense of the statute of limitations" because there was no indication that he "intended to waive or relinquish a 'known right.'" *Id.* at 495-97, 260 N.W. at 878-79 (noting that waiver "is a voluntary relinquishment of a known right," that is "largely a matter of intention," and "must be based on a full knowledge of the facts" (quotation omitted)).

We acknowledge that the supreme court in *Tupa* did not hold that the statute-of-limitations defense may never be waived, and that our supreme court has since concluded that a "statute-of-limitations defense is a claim-processing rule, which is subject to waiver."

Reed v. State, 793 N.W.2d 725, 732 (Minn. 2010) (holding that a statute-of-limitations defense is not a jurisdictional rule that deprives a district court of its power to adjudicate a case). And as stated above, a valid guilty plea generally waives all non-jurisdictional defects. *See Ford*, 397 N.W.2d at 878. But as in *Tupa*, there is no indication that appellant intended to relinquish his right to argue his statute-of-limitations defense on appeal. The record reflects that after appellant was charged with first-degree criminal sexual conduct, he moved to dismiss the charges, asserting a statute-of-limitations defense. Although the district court denied the motion, appellant continued to litigate the issue, requesting reconsideration of the district court's decision, and later moving to compel discovery in order to obtain documents pertaining to the statute-of-limitations issue. In fact, at the sentencing hearing, when the prosecutor argued that the district court should deny appellant's request to withdraw his guilty plea, the prosecutor acknowledged that appellant was "hung up" on the statute-of-limitations issue. Yet despite appellant's continued intention of pursuing the statute-of-limitations issue, it is undisputed that appellant was not "informed about the fact that he would be waiving his statute-of-limitations defense on appeal" by pleading guilty.[1]

Because appellant did not understand that by pleading guilty he was waiving his right to appeal his statute-of-limitations defense, a right he clearly had no intention of relinquishing, we cannot conclude that appellant's guilty plea was intelligent. *See Taylor*,

[1] To the contrary, we note that in opposing appellant's request to withdraw his guilty plea, the prosecutor argued that because the statute-of-limitations issue was "already" decided by the district court, appellant's "proper course of action is either upon appeal . . . or in some form of a postconviction proceeding."

887 N.W.2d at 823. Accordingly, appellant's guilty plea was invalid, and the district court erred by denying appellant's request to withdraw his guilty plea. And because appellant must be entitled to withdraw his guilty plea, we need not address appellant's alternative ineffective-assistance-of-counsel argument, or the claims raised in appellant's pro se supplemental brief.

Reversed and remanded.

This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).

STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1567

State of Minnesota,
Respondent,

vs.

Adolfo Gutierrez Avila, Jr.,
Appellant.

Filed August 5, 2019
Affirmed
Schellhas, Judge

Lyon County District Court
File No. 42-CR-14-600

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Rick Maes, Lyon County Attorney, Abby Wikelius, Assistant County Attorney, Marshall, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Schellhas, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his convictions of, and sentences for, two counts of first-degree criminal sexual conduct, arguing that (1) the charges are barred by the statute of

limitations and (2) the district court erred by imposing two consecutive 144-month sentences on remand after his successful appeal. Appellant also raises several issues in his pro se supplemental brief. We affirm.

FACTS

Respondent State of Minnesota charged appellant Adolfo Avila with two counts of first-degree criminal sexual conduct on July 3, 2014. The complaint alleged that in July 2011, Lyon County Sheriff's Office Investigator Tony Rolling received a report indicating that M.H. named Avila, her step-father, as the father of her nine-year-old child. Investigator Rolling interviewed M.H., who stated that Avila had sexually assaulted her between 15 and 18 times before she became pregnant. The complaint alleged that based on the birth date of M.H.'s child, the likely date of conception was sometime during June 2001, when M.H. was 15 years old.

Avila moved to dismiss the charges under Minn. Stat. § 628.26(e) (2018), which requires the state to bring a criminal-sexual-conduct charge within the later of nine years of the commission of the offense, or three years after the offense was reported to law enforcement.[1] The district court denied the motion, finding that nothing in the record indicated that the 2001 offenses "had been previously reported to law enforcement," and that the complaint was filed "within three years of the incident being reported" to law

[1] We cite the current version of the statute because, although renumbered, the substance of the current statute for purposes of this case is the same as the statute in effect at the time of the commission of the offense. *Compare* Minn. Stat. § 628.26(e) (2018) *with* Minn. Stat. § 628.26(d) (2000).

enforcement. Avila requested reconsideration based on allegedly new evidence relevant to the statute of limitations. The court denied the motion.

Avila continued to pursue his statute-of-limitations defense but eventually pleaded guilty to one count of first-degree criminal sexual conduct in September 2015. One month later, he moved to withdraw his plea. The district court denied his motion and sentenced him to 144 months in prison. Avila appealed, claiming that his guilty plea was invalid and that his counsel provided him ineffective assistance. This court concluded that the plea was unintelligently entered, and reversed and remanded to allow Avila to withdraw his guilty plea. *State v. Avila*, No. A16-0516 (Minn. App. May 22, 2017).

On remand, Avila waived his right to counsel and proceeded pro se. He continued to pursue his statute-of-limitations defense, claiming that because Investigator Rolling heard about the alleged sexual misconduct in 2003, when Rolling was employed with the Tracy Police Department, the statute of limitations expired three years later in 2006. Avila also claimed that even if the statute of limitations did not expire in 2006, it expired in 2010, three years after a paternity action was filed against him alleging that he was the father of M.H.'s child.

The district court re-opened Avila's omnibus hearing on March 14, 2018. Investigator Rolling testified that while he was a police officer in Tracy in 2003, he "heard" a "rumor" from R.H., the town baker, that "Avila had gotten his daughters pregnant." Investigator Rolling testified that "[i]t was just a rumor," with no "facts, dates, . . . anything to substantiate that rumor," and that he therefore did not investigate the rumor. The court denied Avila's motion, concluding that an "unsubstantiated rumor is not a report to law

enforcement that would trigger the statute of limitations," that "[n]either the paternity testimony nor the affidavit clearly identif[ied] all necessary elements" of the alleged first-degree criminal-sexual-conduct offense, and that the filing of the paternity action by Lyon County in 2007 therefore did not constitute "a report to law enforcement."

A jury found Avila guilty of two counts of first-degree criminal sexual conduct. The district court imposed 144-month sentences on both counts, to be served consecutively. This appeal follows.

DECISION

I. Statute of limitations

Avila challenges the district court's denial of his motion to dismiss on the grounds that the charges against him were time-barred under the applicable statute of limitations. We review the construction and application of a statute of limitations de novo. *State v. Carlson*, 845 N.W.2d 827, 832 (Minn. App. 2014), *review denied* (Minn. June 17, 2014).

The applicable statute of limitations provides:

> Indictments or complaints for violation of sections 609.322 and 609.342 to 609.345, if the victim was under the age of 18 years at the time the offense was committed, shall be found or made and filed in the proper court within the later of nine years after the commission of the offense or three years after the offense was reported to law enforcement authorities.

Minn. Stat. § 628.26(e). The purpose of a statute of limitation is: (1) to protect defendants from defending themselves against crimes when the facts "may have become obscured"; (2) to minimize the danger of official punishment for acts in the distant past; and (3) to encourage law enforcement to promptly investigate suspected criminal activity. *State v.*

Danielski, 348 N.W.2d 352, 355 (Minn. App. 1984) (quotation and emphasis omitted), *review denied* (Minn. July 26, 1984).

The district court denied Avila's motion to dismiss under the second part of Minn. Stat. § 628.26(e), finding that M.H. first reported the offense to law enforcement in July 2011, and that the state filed its complaint within three years of M.H.'s report. Avila argues that the court erred because R.H. first reported the offense to law enforcement in 2003, that the statute of limitations therefore expired in 2006,[2] and that the court should have dismissed the complaint as time-barred.

Avila's argument requires the construction of Minn. Stat. § 628.26(e). "The objective of statutory interpretation is to ascertain and effectuate the Legislature's intent." *State v. Struzyk*, 869 N.W.2d 280, 284 (Minn. 2015). "When interpreting a statute, the first question is whether the language of a statute is ambiguous." *State v. Pakhnyuk*, 926 N.W.2d 914, 920 (Minn. 2019). "The plain language of the statute controls when the meaning of the statute is unambiguous." *State v. Boecker*, 893 N.W.2d 348, 351 (Minn. 2017). If a statute does not define a phrase, that phrase is given "its plain and ordinary meaning." *State v. Defatte*, 928 N.W.2d 338, 340 (Minn. 2019) (quotation omitted). And "[s]tatutory words and phrases must be construed according to the rules of grammar and common usage." *Id.* (quotation omitted).

[2] We note that even if R.H.'s statement constituted a report to law enforcement authorities, the statute of limitations would not have expired under Minn. Stat. § 628.26(e) in 2006, it would have expired in 2010, nine years after the commission of the offense.

Minn. Stat. § 628.26(e) unambiguously states that the three-year charging deadline is triggered when the offense is "reported to law enforcement authorities." In *State v. Soukup*, this court stated that "by 'reporting,' the statute means notifying law enforcement authorities." 746 N.W.2d 918, 922 (Minn. App. 2008), *review denied* (Minn. June 18, 2008). Because the term "reported" is not defined by the statute, we look to dictionary definitions to ascertain the common and ordinary meaning of this term. *See State v. Thonesavanh*, 904 N.W.2d 432, 436–37 (Minn. 2017) (looking to dictionary definitions to determine common and ordinary meaning of undefined terms in statute).

One dictionary defines "reported" as "[t]o make or present an official or formal account of," or "[t]o tell about the presence or occurrence of," or "[t]o relate or tell, especially from personal experience." *The American Heritage Dictionary of the English Language* 1490 (5th ed. 2018). Similarly, another dictionary defines "reported" as to "make a formal statement or complaint about (someone or something) to the necessary authority." *New Oxford American Dictionary* 1481 (3rd ed. 2010). Based on the common and ordinary meaning of "reported," we conclude that an offense is "reported" to law enforcement if the report provides law enforcement with actual notice of sufficient facts that form the basis of notice to law enforcement that a specific criminal offense may have occurred.

Moreover, while "[w]e recognize that we are not bound to follow precedent from other states or federal courts, these authorities can be persuasive." *State v. McClenton*, 781 N.W.2d 181, 191 (Minn. App. 2010), *review denied* (Minn. Jun. 29, 2010). And we note that our interpretation of "reported" is consistent with foreign caselaw. *See People v. Quinto*, 964 N.E.2d 379, 384–85 (N.Y. 2012) (concluding that "the phrase 'the offense is

reported' as used in [the statute of limitations] would mean a communication that, at a minimum, describes the offender's criminal conduct and the particular harm that was inflicted on the victim" because "[i]nformation of this nature provides the police with actual notice that a specific criminal offense has occurred, allowing them to conduct a prompt investigation"); *State v. Harberts*, 108 P.3d 1201, 1209 (Or. Ct. App. 2005) (explaining that offense is "reported" under Oregon statute of limitations when "there has been actual communication of the facts that form the basis for the particular offense reported" (quotation omitted)); *State v. Green*, 108 P.3d 710, 721 (Utah 2005) (stating that something qualifies as "report of the offense" under Utah statute of limitations when there is (1) a discrete and identifiable oral or written communication; (2) that is "intended to notify a law enforcement agency that a crime has been committed"; and (3) that "actually communicates information bearing on the elements of a crime as would place the law enforcement agency on actual notice that a crime has been committed").

Here, the rumor that R.H. relayed to Investigator Rolling in 2003 was insufficient to put Rolling on actual notice that a specific criminal offense may have occurred. R.H.'s statement described general conduct rather than conduct that would constitute a specific criminal offense. For example, the actual charged offense involved Avila's step-daughter, M.H. In contrast, R.H. relayed a rumor that Avila got his "daughters pregnant." Moreover, R.H.'s relayed rumor contained no information about the age of Avila's daughters when Avila was rumored to have impregnated them. The age of Avila's daughters at the time of the rumored conduct would dictate the specific offense for which Avila could be charged. Moreover, R.H.'s statement was vague and made with no formality, and Investigator

Rolling characterized R.H.'s statement as more of a "rumor" or town gossip, than a report. A "rumor" or "town gossip" is inconsistent with the dictionary definitions of "reported." We therefore conclude that the district court properly determined that R.H.'s statement to Investigator Rolling in 2003 did not constitute a report to law enforcement authorities for purposes of Minn. Stat. § 628.26(e).

In his pro se supplemental brief, Avila contends that M.H.'s report to a social worker in 2006, which precipitated the filing of Lyon County's paternity action, constituted a report to law-enforcement authorities for purposes of Minn. Stat. § 628.26(e). We disagree. Minn. Stat. § 628.26(e) specifically requires the offense to have been "reported *to law enforcement authorities*." (Emphasis added.); *see Soukup*, 746 N.W.2d at 922 (stating that "by 'reporting' [Minn. Stat. § 628.26(e)] means notifying law enforcement authorities"). Neither the Lyon County Attorney nor the county human services constitute law enforcement. This conclusion is supported by statute. *See* Minn. Stat. § 388.051 (2018) (defining duties of county attorney, which do not include investigation); Minn. Stat. § 626.556, subd. 10a(a) (2018) (distinguishing between local welfare agencies and law-enforcement agencies for purposes of investigating allegations of sexual abuse). We conclude therefore that the district court properly determined that the filing of a paternity action did not constitute a report to law enforcement.

In sum, neither Lyon County's filing of the paternity action nor R.H.'s statement to Investigator Rolling in 2003 constituted a report to law enforcement for purposes of Minn. Stat. § 628.26(e). Instead, based on the record, M.H. first reported Avila's offense to law enforcement on July 20, 2011, and the state filed its complaint against Avila on July 3,

2014, within three years after the offense was first reported to law enforcement. Accordingly, the district court properly concluded that the statute of limitations under Minn. Stat. § 628.26(e) had not expired and the charges against Avila therefore were not time-barred.

II. Consecutive sentences

Avila challenges the district court's imposition of consecutive sentences following his convictions of two counts of first-degree criminal sexual conduct on the bases that the sentence penalized him for a successful appeal and is excessive. We disagree.

Consecutive sentences are permissible punishment for criminal sexual conduct committed in violation of Minn. Stat. § 609.342, subd. 1. Minn. Sent. Guidelines II.F. (2000). "We review a district court's decision to impose consecutive sentences for an abuse of discretion." *State v. Ali*, 895 N.W.2d 237, 247 (Minn. 2017). We will not interfere with a district court's discretion unless the sentence is disproportionate to the crime or unfairly exaggerates the criminality of the defendant's conduct. *Id.*

The supreme court has held that it was improper for a district court "to impose on a defendant who has secured a new trial a sentence more onerous than the one he initially received." *State v. Holmes*, 161 N.W.2d 650, 652 (Minn. 1968). In concluding that this decision was based on public policy, and not on constitutional grounds, the court explained that "as a matter of law . . . any increase in penalty upon a retrial inevitably discourages a convicted defendant from exercising his legal rights." *Id.* at 653. The supreme court later expanded on *Holmes* and held that "procedural fairness and principles of public policy" prohibit a district court from imposing a more severe sentence for the same crime after a

case has been remanded for resentencing. *State v. Prudhomme*, 228 N.W.2d 243, 246 (Minn. 1975).

After remand, the district court's sentence of Avila on count I is the same sentence that followed Avila's guilty plea. Although the aggregate total of Avila's sentence is longer after remand, the sentence includes a sentence for first-degree criminal-sexual conduct, a conviction Avila avoided by pleading guilty. Because Avila's sentence on count I is the same after remand as was imposed following his guilty plea, his sentence for count I is not more onerous, and Avila therefore cannot demonstrate that his sentence violated his due-process rights.

Avila also contends that his total aggregate sentence of 288 months is "excessive" and "a product of the charging decision to create two counts." But "a prosecutor has broad discretion in the exercise of the charging function and ordinarily, under the separation-of-powers doctrine, a court should not interfere with the prosecutor's exercise of that discretion" absent special circumstances. *State v. Foss*, 556 N.W.2d 540, 540 (Minn. 1996). Avila cannot show that special circumstances exist here. Moreover, consecutive sentences are permissible under the sentencing guidelines, even when the offenses involve a single victim. *See* Minn. Sent. Guidelines II.F.; *see also State v. Perleberg*, 736 N.W.2d 703, 706 (Minn. App. 2007), *review denied* (Minn. Oct. 16, 2007). The record reflects that Avila sexually assaulted his step-daughter several times over a seven-month period, which ultimately resulted in her pregnancy. Under the circumstances, Avila's sentence is not excessive, particularly when compared to sentences imposed in similar cases. *See State v. Suhon*, 742 N.W.2d 16, 23 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008)

(affirming imposition of consecutive sentences totaling 278 months in prison for three counts of criminal sexual conduct based on 832 acts of abuse over 11 years); *see also Perleberg*, 736 N.W.2d at 707 (affirming imposition of three consecutive sentences of 144 months, which totaled 432 months in prison when defendant was convicted of six counts of first-degree criminal sexual conduct involving one victim). We conclude that the district court did not abuse its discretion by sentencing Avila consecutively on the two counts of first-degree criminal sexual conduct.

III. Pro se arguments

In addition to the statute-of-limitations arguments addressed above, Avila argues in his supplemental brief that (A) a *Brady* violation occurred; and (B) the prosecutor committed misconduct.

A. Brady violation

The state has an affirmative duty in criminal cases to disclose evidence that is favorable and material to the defense. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97 (1963); *State v. Williams*, 593 N.W.2d 227, 234 (Minn. 1999). To constitute a *Brady* violation, the following three requirements must be established:

> (1) the evidence must be favorable to the defendant because it would have been either exculpatory or impeaching;
>
> (2) the evidence must have been suppressed by the prosecution, intentionally or otherwise; and
>
> (3) the evidence must be material—in other words, the absence of the evidence must have caused prejudice to the defendant.

Zornes v. State, 903 N.W.2d 411, 417 (Minn. 2017) (quotation omitted). "Because a *Brady* materiality analysis involves a mixed question of law and fact, [appellate courts] review a district court's materiality determination de novo." *Id.* (quotation omitted).

Avila asserts that in the redacted portion of an affidavit signed by M.H. in May 2006, M.H. stated that she believed she got pregnant in July 2001, which is inconsistent with the charges brought by the state that alleged in count I that Avila committed first-degree criminal sexual conduct in June 2001, and in count II that the sexual abuse occurred in January-April 2001. Avila contends that because M.H. was unable to read the redacted portion of the affidavit, he was unable to impeach her with the May 2006 affidavit. Avila argues that the redaction of the affidavit constitutes a *Brady* violation.

Assuming, without deciding, that Avila's construction of the affidavit is correct, the first two *Brady* requirements are satisfied because the evidence could have been used to impeach M.H.'s testimony on the elements of count I, and the redaction of the affidavit appears to indicate intent by the state. As a result, Avila's arguments turn on the third element, materiality.

Evidence is considered material for purposes of a *Brady* violation "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 418 (quotations omitted). A "reasonable probability" is defined as one that is sufficient to undermine confidence in the verdict. *Id.*

Here, no reasonable probability exists that, had the affidavit not been redacted, the result of the proceeding would have been different. As Avila acknowledges in his main brief, M.H. testified at trial that (1) Avila sexually assaulted her more than ten times and

that these assaults occurred between January and April 2001, and in the summer of 2001; (2) she became aware that she was pregnant around July 2001, which is not completely inconsistent with her May 2006 affidavit; (3) the baby was born on March 6, 2002; (4) she had no other sexual partners; and (5) Avila was adjudicated the father of her daughter based on DNA testing. Avila's claim that a *Brady* violation occurred therefore fails.

B. Prosecutorial misconduct

Avila contends that the Lyon County Attorney committed prosecutorial misconduct by "not authorizing the release" to the Lyon County Sheriff the 2006 report M.H. made to human services regarding the sexual abuse. To support his claim, Avila cites Minn. Stat. § 626.556, subd. 3(b) (2018), which provides that a person "*may* voluntarily report to the local welfare agency, agency responsible for assessing or investigating the report, police department, [or] county sheriff . . . if the person knows, has reason to believe, or suspects a child is being or has been . . . subjected to . . . sexual abuse." (Emphasis added.) But "may" is "permissive." Minn. Stat. § 645.44, subd. 15 (2018). And Avila cites no legal authority to support his prosecutorial-misconduct claim. We need "not consider pro se claims on appeal that are unsupported by either arguments or citations to legal authority." *State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008). Moreover, Avila was not prejudiced by the alleged prosecutorial misconduct. He therefore is unable to demonstrate that he is entitled to relief from the claims raised in his pro se supplemental brief.

Affirmed.

APPENDIX C

PETITION FOR REVIEW
MINNESOTA SUPREME COURT

RE REVIEW DENIED ORDER Dated October 15,2019

A18-1567

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Adolfo Gutierrez Avila, Jr.,

Petitioner.

PETITION FOR REVIEW OF COURT OF APPEALS' DECISION

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A18-1567

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Respondent,

vs.

Adolfo Gutierrez Avila, Jr.,

Petitioner.

PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS FILED ON AUGUST 5, 2019

TO: THE MINNESOTA SUPREME COURT

Petitioner Adolfo Avila requests Supreme Court review of the above-entitled decision of the court of appeals.

I. Parties

The parties and counsel are identified on the front cover of this petition.

II. Decision Appealed

Petitioner requests review of the August 5, 2019 opinion of the court of appeals which affirmed his convictions and sentence for first-degree criminal sexual conduct. (Addendum.)

III. Legal Issue

The statute of limitations in Minnesota Statutes section 628.26(e) is triggered when an offense is "reported to law enforcement authorities." What level of specificity is required of a communication to law enforcement authorities to constitute a "report" and trigger the limitations period?

In 2003 a concerned citizen told a law enforcement officer that Avila "got his daughters pregnant." (Doc. 371 at 9, 20-21.) The officer did not investigate this information. (Doc. 371 at 12, 18.) Avila was not charged with criminal sexual conduct until 2014. (Doc. 403.) The district court denied Avila's motion to dismiss the charges on statute of limitations grounds, holding that the 2003 communication was merely a "rumor" and did not constitute a report. (Doc. 368.) The court of appeals affirmed, holding for the first time in Minnesota that to constitute a "report" a communication must provide law enforcement with "actual notice of sufficient facts...that a specific criminal offense may have occurred." (Addendum at 6.)

IV. Procedural History

January-July, 2001	Date range of alleged offenses.
July 3, 2014	The State charged petitioner with two counts of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subds. 1(g), 1(h)(ii).
September 22, 2015	Plea hearing. Petitioner pleaded guilty to one count of criminal sexual conduct and the State dismissed the remaining count.
December 29, 2015	Sentencing. The district court sentenced petitioner to 144 months in prison.
March 30, 2016	Petitioner directly appealed his guilty plea.
May 22, 2017	The court of appeals reversed and remanded for withdrawal of petitioner's guilty plea.
March 14, 2018	Reopened omnibus hearing, the Honorable Leland Bush presiding.
April 9, 2018	Judge Bush denied petitioner's motion to dismiss based on statute of limitations.

April 25, 2018	Jury trial before Judge Bush. The jury returned two guilty verdicts.
June 26, 2018	Judge Bush sentenced petitioner to two terms of 144 months, to be served consecutively.

V. Statement of Facts

M.H. testified that in 2001, when she was fifteen, Avila sexually assaulted her more than ten times. M.H. testified that she could not remember exact dates but that these assaults occurred between January and April 2001 and in the summer of 2001. M.H. testified that she became pregnant when she was fifteen and her daughter was born March 6, 2002. M.H. personally reported the conduct to law enforcement on July 20, 2011.

The State charged Avila on July 3, 2014, with two counts of criminal sexual conduct which collectively alleged conduct occurring between January and July 2001.

When M.H. reported the sexual conduct in 2011, she gave a recoded interview to Investigator Tony Rolling of the Lyon County Sheriff's Office. But 2011 was not the first time Rolling learned of the allegations. Rolling had previously worked for the Tracy police department, from 1997 to 2003. During his employment with Tracy police, a person named Ray Hay reported to Rolling that Avila committed criminal sexual conduct against his stepdaughters, resulting in pregnancy. Rolling recalled that Hay told him, "Adolfo Avila had gotten his [step]daughters pregnant." Despite the serious nature of this allegation, Rolling wrote no police report and did no investigation.

Rolling documented Hay's report various times during his 2011 investigation. Rolling's 2011 police report noted that he had heard a "rumor" of Avila's criminal sexual

conduct when he worked for Tracy. During his interview with M.H., Rolling discussed the trailer home in Tracy where M.H.'s family lived in 2001 and said "that is where you guys were living when I first heard about it." Indeed, something like fifteen years later Rolling was able to remember that it was Ray Hay, who worked at the Tracy Bakery, who originally reported the crime.

VI. Reasons for Granting Review

The purpose of statutes of limitation is to "limit exposure to criminal prosecution to a certain fixed period of time," to protect against delayed prosecution, to minimize punishment based on "far-distant" acts, and to encourage law enforcement to "promptly investigate suspected criminal activity." *Toussie v. United States*, 397 U.S. 112, 114-15 (1970). Statutes of limitation are important to the varied stakeholders in the criminal justice system: to defendants, to crime victims who sometimes delay reporting of offenses, and to attorneys and judges who need certainty in the application of the law. That is, the interpretation of statutes of limitation is exceedingly and broadly important.

The alleged criminal sexual conduct in this case occurred in 2001. Avila was not charged until 2014. This was outside the general limitations period of nine years. Minn. Stat. § 628.26, subd. (d) (2000).[1] The complaint against Avila was timely only if filed within three years of the offense being "reported to law enforcement authorities." *Id.* The State argued that the only triggering report occurred in 2011 and within three years the

[1] This statute has been renumbered as § 628.26, subd. (e) (2018), but its substance remains the same. *See* Addendum at 2 n.1.

State filed charges. Avila argued that the limitations period expired before he was charged because there were qualifying reports to law enforcement first in 2003 and second in 2006.

This case required the district court and court of appeals to conduct statutory interpretation of Minn. Stat. § 628.26, subd. (d) (2000), to determine whether the citizen's 2003 communication to Investigator Rolling constituted a report and triggered the limitations period. *See* Addendum at 5. Neither the word "reported" nor "report" is defined within the limitations statutes. The court of appeals has held that a report means "notifying law enforcement authorities." *State v. Soukup*, 746 N.W.2d 918, 922 (Minn. App. 2008). But no published Minnesota case has considered what level of specificity is required for a communication to law enforcement to constitute a report. The court of appeals here relied on dictionary definitions to hold for the first time in Minnesota that "an offense is 'reported' to law enforcement if the report provides...actual notice of sufficient facts...that a specific criminal offense may have occurred." (Addendum at 6.) The court of appeals did not publish this opinion. This statutory interpretation of first impression merits review by this Court, particularly because it involves the important matter of limitations in criminal charging and prosecution.

VII. Conclusion

For the reasons stated herein, Avila respectfully requests that this Court grant his petition for review.

Dated: August 19, 2019

Respectfully Submitted,

JENNA YAUCH-ERICKSON
Assistant State Public Defender
License No. 0392035

540 Fairview Avenue North
Suite 300
St. Paul, MN 55104

ATTORNEY FOR PETITIONER

FILED
October 15, 2019
OFFICE OF
APPELLATE COURTS

STATE OF MINNESOTA

IN SUPREME COURT

A18-1567

State of Minnesota,

Respondent,

vs.

Adolfo Gutierrez Avila, Jr.,

Petitioner.

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Adolfo Gutierrez Avila, Jr. for further review be, and the same is, denied.

Dated: October 15, 2019

BY THE COURT:

Lorie S. Gildea
Chief Justice

APPENDIX D

RU

RULE 60 MOTION DatedJune 30,2021
BRIEF Dated June 30,2021

JUDGEMENT ENTERED January 13,2021
JUDGEMENT ENTERED January 26,2021
ORDER DENYING RULE 60 motion dated July 8,2021

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Adolfo G. Avila Jr.
O.I.D.#248824 ~~Plaintiff(s)~~,
(Petitioner)

vs.

Case No. 0:19-cv-03112-PJS-ECW

Warden Vicky Janssen

(Respondent) ~~Defendant(s)~~.

RECEIVED BY MAIL
JUL 06 2021
CLERK, U.S. DISTRICT COURT
MINNEAPOLIS, MINNESOTA

MOTION TO/FOR

Based on Rule 60(b)(3)fraud(Judicial Misconduct)
(Provide basis for Motion)

The following party/parties (insert the names of all parties who are filing the Motion):

Adolfo Gutierrez Avila Jr. in the above-named case hereby move(s) the United States District Court, District of Minnesota for an Order to: (state what you want the Court to order)

Petitioner respectfully requests for the Lyon County Judgement be overturned and Petitioner be released from custody. For the Lyon County Judgement violates the Due Process Clause in the 14 Amendment in the U.S. Federal Constitution.

because:

SCANNED
JUL 06 2021
U.S. DISTRICT COURT MPLS

(In numbered paragraphs, **briefly** list main reasons the Motion should be granted. Attach additional sheets of paper if necessary; more detail must be provided in a Memorandum of Law accompanying the Motion.)

1. Judge Bush willfully "unreasonably applied" clearly established federal law as determined by the Supreme Court of the U.S. constituting Judicial Misconduct and a violation of the Due
2. Process Clause in the 14th Amendment in the U.S. Federal Constitution. The Statute of limitations claim is not procedurally barred Which it is the claim Judge Bush prejudiced with fraud.

Said Motion is based upon the attached Memorandum of Law, Exhibits attached. _____ (identify all other supporting documents that are being submitted with the Motion, if any) and all of the files, records, and proceedings herein.

Signed this 30 day of June, 20 21.

Signature of Party Adolfo G. Avila Jr.

Mailing Address Adolfo G. Avila Jr.
O.I.D.#248824
MCF-Rush City
7600 525th st.
Rush City,Mn 55069

Telephone Number _____

Note: All parties filing the Motion must date and sign the Motion and provide his/her mailing address and telephone number. Attach additional sheets of paper as necessary. The Motion must be served on each party, together with the Notice of Hearing, the Memorandum of Law and other accompanying documents, if any.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Adolfo G. Avila Jr.
O.I.D.#248824
Petitioner ~~Plaintiff(s)~~,

vs.

Case No.
0:19-cv-03112-PJS-ECW

RECEIVED BY MAIL
JUL 06 2021
CLERK, U.S. DISTRICT COURT
MINNEAPOLIS, MINNESOTA

Warden Vicky Janssen
Respondent

~~Defendant(s)~~

Memorandum of Law

☒ **In Support of or** ☐ **In Opposition to**

(Check "In Support of" if you are filing the motion and "In Opposition to" if you are opposing the Motion that was filed.)

Rule 60(b)(3)fraud(Judicial Misconduct)

(Name of Motion filed)

Provide below an explanation of why the Motion should be granted or denied. Your explanation should be provided in consecutively numbered paragraphs. If you run out of space, you may attach additional sheets of paper and continue to number your paragraphs.

1. MEMORANDUM OF LAW

COVER SHEET

SCANNED
JUL 06 2021
U.S. DISTRICT COURT MPLS

Arizona v. Youngblood 488 U.S. 51
Supreme Court of the U.S.
No. 86-1904, November 29, 1988

~~[illegible]~~ [citizens of the U.S.]

Amendment 14 Sec. 1 [;] 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 protections of the law.

USCS Const. Amend. 14, Part 1 of 14

Rights guaranteed to Petitioner by the Due Process Clause in the 14th Amendment of the United States Federal Constitution have been violated for the following reason(s):

1. **"unreasonable application"** of clearly established state law pertaining to the statute of limitations defense. In violation of State v. Soukup, 746 N.W. 2d 918,922(Minn.App.2008).
2. **"unreasonable application"** of clearly established federal law pertaining to the statute of limitations defense. In violation of Toussie v. U.S., 397 U.S. 112,25 L. Ed. 2d 156(1970).
3. **"unreasonable application"** of clearly established federal law pertaining to perjury. In violation of U.S. v. Dunnigan, No.91-1300. February 23,1993.
4. **"unreasonable application"** of clearly established federal law pertaining to Prosecutor Misconduct (Brady Violation). In violation of Brady v. Maryland, 373 U.S. 83(1963).
5. **"unreasonable application"** of clearly established federal law pertaining to sentencing. In violation of North Carolina v. Pearce,395 U.S. 711, 725-26(1969) and State v. Carver,390 N.W.2d 431, 434(Minn.App.1986). And State v. Johnson, 733 NW2d 834(Minn.App.2007).
6. Judicial Misconduct targeting a person of color with vindictiveness contributing to **systemic racism**. In violation of In re Anderson, 312 Minn. 442, 252 N.W.2d 592(1977).

1)In the laws of mandatory reporting (M.S.626. 556.Reporting) there is no substantial basis at all for the conclusion to label a report of sexual abuse of a minor a "rumor". Which to the contrary it is state law that any information that describes any type of abuse of a minor(s) constitutes a report. Thus, Judge Bush's ruling to label the report of sexual abuse of M.H. a "rumor" is an "unreasonable application" of clearly established state law.

> See M.S.626. 556.Subd.2. Definitions. (m) "Report" means any communication received by the local welfare, police department, county sheriff, or agency responsible for the child protection pursuant to this section that describes neglect or physical or sexual abuse of a child....
>
> See State v. Soukup, 746 N.W. 2d 918,922(Minn.App.2008).
> (In order to qualify as a "report" under section 628.26, it must be a "report" to law enforcement authorities.")

Petitioner asserted his Federal Rights protected by the Due Process Clause in the 14th Amendment to Judge Bush in court proceedings, in briefs and motions. The "unreasonable application" of clearly established state and federal laws was brought to Judge Bush's attention by Petitioner quoting and citing state and federal case law. Judge Bush still used the "unreasonable application" of clearly established state and federal laws to defeat Petitioner's asserted federal Rights constituting a violation of the Due Process Clause in the 14th Amendment.

See Sun Oil Co. v. Wortman,486 U.S. 717, 731(1988) (a misconstruction of sister-state law "that is clearly established and that has been brought to the court's attention" **would violate due process**.).

2) Judge Bush's decision of when the statute of limitations begins to run is both "contrary to" and involves an "unreasonable application" of clearly established federal law as determined by the Supreme Court of the U.S. See Toussie v. U.S., 397 U.S. 112,25 L. Ed. 2d 156(1970).

In Toussie v. United States, the Supreme Court answered the question of when the statute of limitations starts to run by considering the purpose served by the limitation, the nature of the crime and the legislative intent. The following general principles were discussed: Three main rationales animate statute of limitations: 1) protecting defendants from delayed prosecution where the facts "may have become obscured by the passage of time," 2) minimizing "the danger of official punishment [for] acts in the far-distant past." And 3) encouraging law enforcement to promptly investigate suspected criminal activity.

1) That criminal limitations statutes are to be liberally interpreted in favor of repose.
2) The statute of limitations normally begins to run when the crime is complete.
3) And congress has declared a policy that the statute of limitations should not be extended "except as otherwise expressly provided by law."

By permitting the time-barred charges to proceed, Judge Bush subjected Petitioner to prosecution even though the delay obscured many facts (the 2006 Lyon County Sheriff report) and subjected him to punishment for distant acts and allowed the state to avoid "properly investigat[ing] suspected criminal activity."

The record established that the reporting of the act that constitutes the crime charged in the July 3,2014 criminal complaint was reported to Officer Rolling in 2001 constituted official involvement. Which triggered the statute of limitations 3-year period in section 628.26(e) (2009). Quoting Officer Rolling from the July 25,2011 interview of M.H.: See Exhibit 2 (pg.9)

Officer Rolling: But did you find out you were pregnant in Marshall or Tracy?

Maria: Tracy, when I was in school in Tracy." (pg. 9 lines 3 and 4.)

Officer Rolling: Okay. Living at the trailer court because I knew you guys lived in the trailer court sometime.

Maria: mhmm

Officer Rolling: Was it the trailer house right when you come off Greenwood?

Maria: Yeah.

Officer Rolling: You come in and it is right there?

Maria: Yeah.

Officer Rolling: Okay was it blue or something?

Maria: Yeah.

Officer Rolling: Yup. And that is where you guys were living when I first heard about it. You guys were living in the trailer court. Were your other sisters pregnant at that time or? See Exhibit 2(pg.9 lines 3,4 and 16 to 25)

In this interview M.H. made a statement that the family moved from the trailer court to the farm around March 2002:

Maria: "I was 16, she was probably, I don't know a month or so old or something. **When we moved out there**. Because I had her in **March**."(pg.6 lines 9,10)

Officer Rolling discovered the offense(s) between July 5,2001 and **March 2002**. See Exhibit 2 (pg.6 lines 9 and 10) and Exhibit 4.

Another important purpose of the statute of limitations is to protect a defendant from having to defense himself against stale charges. In this case the local law enforcement authorities (Officer Rolling) was notified of the particular conduct constituting the offense(s) (sexual-penetration/pregnancy of M.H.) any were from July, 5 2001 and March 2002. The same conduct constituting the offense(s) charged in the July 3,2014 criminal complaint drafted and signed by Officer Rolling. See Exhibit 7. It took Officer Rolling 13 years to draft and sign the Offense(s) reported to him in 2001. Which Officer Rolling has made a career out of law enforcement since 1997 and continues to be a law enforcement officer today. Which this case is based on the statute of limitations 3-year period. Which it was triggered around March 2002. In applying the principles in Toussie v. U.S. to this case. The strict application of the statute of limitations 3-year period in section 628.26(e) (2009) does apply for Officer Rolling discovered the offense(s) between July 5,2001 and March 2002 constituting official involvement. But did not draft and bring the criminal complaint until July 3,2014 to the prosecuting authorities. Officer Rolling's actions were the direct cause for the 13-year delay in prosecuting the offense(s). Which congress has declared a policy that the statute of limitations should not be extended "except as otherwise **expressly provided by law**." Judge Bush's labeling the report of sexual abuse of M.H. a "rumor" does not equal to **"expressly provided by law."**

Judge Bush's ruling to label the report of sexual abuse of M.H. a "rumor" resulted in a decision that was both "contrary to" and involved an "unreasonable application" of clearly established governing law set forth in the Supreme Court case Toussie v. U.S., pertaining to when the statute of limitations begins to run.

Under the "unreasonable application" clause, the statute clear that habeas may (is) issue under 28 U.S.C.S. & 2254(d)(1). If a state court "decision" is contrary to clearly established federal law.

See Williams v. Taylor, 529 U.S. 362 Supreme Court of the U.S. (April 18,2000)

"under 2254(d)(1)'s "unreasonable application" clause, a federal court may grant a writ of habeas corpus if a state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."

This case falls under section 2254(d)(1) resulted in a decision that was contrary to, or involved an "unreasonable application" of clearly established Federal law, as determined by the Supreme Court of the United States; or

A. STANDARD OF REVIEW

Reasonableness Standard

APPOSITE AUTHORITY

Lindh v. Murphy, 96 F.3 856 (7th Cir.1996).

STANDARD OF CORRECTNESS

The law in effect at the time the decision became final.

APPOSITE AUTHORITY

Teague v. Lane, 489 U.S. 288,310(1989)

Also falls under section 2254(b)(1)(B)(ii) circumstances exist that render such a process ineffective to protect the rights of the applicant. See, Panetti v. David,863 F.3d 366, 373-74(5th Cir. 2017). (Due Process Violation).

3) Judge Bush's decision to deny Petitioner's motion to dismiss pertaining to Officer Rolling's perjury that prejudiced the statute of limitations defense is both "contrary to" and involved an "unreasonable application" of clearly established federal law as determined by the Supreme Court of the U.S. See U.S. v. Dunnigan, No 91-1300. (February 23, 1993). In U.S. v. Dunnigan, the Supreme Court set out the parameter of perjury within the U.S. law. The court uses the Dunnigan -based legal standard: a defendant (a) knowingly made a (b) false (c) material statement (d) under oath (e) in a legal proceeding.

The Dunnigan distinction manifests its importance with regard to the relation between two components parts of perjury's definition: in willfully giving a false statement, a person must understand that he is giving a false statement to be considered a perjurer under the Dunnigan framework. Deliberation on the part of the defendant is required for a statement to constitute perjury.

It is clearly documented by Officer Rolling himself that he knew of the offense(s) charged since 2001. Which he acknowledged to M.H. in the July 25,2011 interview and documented it also in his July 26,2011 Lyon County Sheriff's report. Which these statements must be true because as a police officer just doing his job documented everything to initiate the case. And he was not under oath when he made the first statements material to the statute of limitations defense. Plus, the statute of limitations defense had not been brought up yet.

First material statements made to the statute of limitations defense:

In July 25,2011, Quoting Officer Rolling from July 25,2011 interview of M.H.:

Officer Rolling:" but did you find out you were pregnant in Marshall or Tracy?"

Maria:" Tracy, when I was in school in Tracy."

Officer Rolling:" Yup. And that is where you guys were living when I first heard about it. You guys were living in the trailer court." See Exhibit 2(pg.9)

In the July 26,2011 Lyon County Sheriff Report (**Introduction statement**)

"On July 25, 2011 I conducted an interview with Maria Herrera at the Lyon County Sheriff's Office. I began speaking with Maria and introduced myself. I explained that, prior to working at the Lyon County Sheriff's Office, I had been a police officer with the City of Tracy. I explained that while working there I had heard a rumor that Adolfo Avila had gotten his daughters pregnant but I was never able to substantiate that. I explained that I was somewhat familiar with the situation, and if she could tell me what had all occurred." See Exhibit 3.(pg.2)

Once the statute of limitations defense was raised at the June 30,2015 omnibus hearing Officer Rolling made his first false material statement to the statute of limitations defense. Completely contradicting his statements made in 2011, 4 years earlier. Which he was under oath this time: Quoting Officer Rolling from the June 30,2015 omnibus hearing: See Exhibit 5 (pg.4)

Prosecutor Rick Maes:" Now, Officer, can you tell us when this matter was first reported to the Law Enforcement Agency?"

Officer Rolling:" **I received the report in July 2011."**

Prosecutor Rick Maes:" Was that the first time you were notified of any alleged misconduct involving Mr. Avila and the alleged victim?"

Officer Rolling:" **That was the first time it was reported to me."**

Officer Rolling (a) knowingly made a (b) false (c) material statement (d) under oath (e) in a legal proceeding directly affecting the statute of limitations defense outcome constituting perjury.

Since Officer Rolling made contradicting statements pertaining to the statute of limitations defense another omnibus hearing was done on March 14,2018. This time Officer Rolling acknowledged the report of sexual abuse of M.H. but labeled it a "rumor". Which Officer Rolling's wilfulness to withhold information, to dodge questions, to avoid the word"notified", not answer questions, or make petitioner repeat himself and call Petitioner a rapist are clearly documented. See Exhibit 1.

Officer Rolling's perjury was so obvious that petitioner called him out on it. Quoting Petitioner:

Petitioner:"Perjury is a crime against administration of justice. And And in just going by your statement, it's obvious that you investigated,sir. So obviously, you're withholding information right now." See Exhibit 1 (pg.20)

Even after Petitioner called him out on his perjury Officer Rolling flat out lied: Quoting Officer Rolling when asked if the recording of the July 25,2011 interview of M.H. existed which he conducted the interview and made the recording of M.H.:

Officer Rolling:" I don't know for certain that her's was recorded If If there's a recording,I guess.There may be one. I don't know.If it was done in the interview room there very well could be one." See Exhibit 1(pg.26)

Clearly this is very strong corroborative evidence proving that Officer Rolling willfully and (a) knowingly made a (b) false (c) material statement (d) under oath (e) in a legal proceeding. The July 25,2011 interview recording of M.H. was finally given to Petitioner on April 20,2018.Which supposedly it did not exist for 7 years. See Exhibit 22.

Even after 7 years that the July 25,2011 interview recording of M.H. made by Officer Rolling was finally given to Petitioner only a partial recording was given to Petitioner not all of it.

See Minnesota law 626.561 Interviews with child abuse victims. Subd.3. Record required. Whenever an interview is conducted, the interviewer must make a record of the interview. The record must contain the following information:

(1) the date,time,place,and duration of the interview;
(2) the identity of the persons present at the interview;

The records shall be maintained by the interviewer in accordance with applicable provisions of section 626.556.subdivision 11 and chapter 13. See copy attached.

If you listen to the recording all of the details outlined above and Officer Rolling's introduction statement are missing. In order to delete the introduction statement which Officer Rolling documented in his July 26,2011 Lyon County Sheriff's report. You would have to delete anything in front of it. That is why all the details mentioned above required by law are missing. See Exhibit 3. This is more corroborative evidence that proves Officer Rolling's wilfulness to withhold information specifically pertaining to the statute of limitations defense. Obviously the introduction statement "Adolfo Avila got his daughters pregnant,but I was never able to substantiate that. I explained that I was somewhat familiar with the situation,and if she could tell me what had all occurred."Exhibit 3 would have more weight if heard in audio form. Plus what other information material to Petitioner was destroyed?

Officer Rolling deviated from standard procedure by withholding the July 25,2011 interview of M.H. for 7 years after numerous requests for discovery and by destroying the first half of the July 25,2011 interview of M.H.. Which under Arizona v. Youngblood's badfaith standard it constitutes a violation of the Due Process Clause in the 14th Amendment. See Arizona v. Youngblood, and Amadeo v. Zant, 486 U.S.214(1988)"when the government concealed evidence a prisoner needed to prove his claim."

Under the "unreasonable application" clause, the statute is clear that habeas may issue under 28 U.S.C.S. & 2254(d)(1). If a state court "decision" is contrary to clearly established federal law.

See Williams v. Taylor, 529 U.S. 362 Supreme Court of the U.S. (April 18,2000)

"under 2254(d)(1)'s "unreasonable application" clause, a federal court may grant a writ of habeas corpus if a state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."

This case falls under section 2254(d)(1) resulted in a decision that was contrary to, or involved an "unreasonable application" of clearly established Federal law, as determined by the Supreme Court of the United States; or

A. STANDARD OF REVIEW

Reasonableness Standard

APPOSITE AUTHORITY

Lindh v. Murphy, 96 F.3 856 (7th Cir.1996).

STANDARD OF CORRECTNESS

The law in effect at the time the decision became final.

APPOSITE AUTHORITY

Teague v. Lane, 489 U.S. 288,310(1989)

Also falls under section 2254(b)(1)(B)(ii) circumstances exist that render such a process ineffective to protect the rights of the applicant. See, Panetti v. David,863 F.3d 366, 373-74(5th Cir. 2017). (Due Process Violation).

The perjury by Officer Rolling are grounds for reversal of the conviction. Which prejudiced Petitioner's statute of limitations claim. Which are grounds for dismissal. See Pyle v. Kansas, 87 LED 214, 317 U.S. Supreme Court(December 7,1942)."The constitutional requirement of due process was not satisfied where a conviction was obtained by perjury." and Brady v. Maryland,373 U.S.83(1963) (Suppression of evidence favorable to an accused violates due process) and Toussie v. U.S.,(And Congress has declared a policy that the statute of limitations should not be extended "except as otherwise expressly provided by law."

4) Judge Bush's decision on what nondisclosure violates Due Process on the Prosecutor Misconduct(Brady Violation) grounds is both "contrary to" and involved an "unreasonable application" of clearly established federal law as determined by the Supreme Court of the U.S. See Brady v. Maryland, 373 U.S. 83(1963).(Precedents) In Brady v. Maryland, the Supreme Court of the U.S. ruled on what nondisclosure by a prosecutor violates due process: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution."

First request for Discovery on July 29,2014. Exhibit 14.

Second request for Discovery on June 3, 2015. Exhibit 15.

Third request for Discovery on September 8,2015. Exhibit 16.

Court ordered Discovery on September 14,2015. Exhibit 21.

Which Procecutor Rick Maes is responsible for the proper Disclosure of the evidence in this case. See Napue v. Illinois,360 U.S. 264. (April 30,1959)."The prosecutor has the responsability and duty to correct what he knows to be false and elicit the truth." Supreme Court of the U.S.

The improper disclosure of the July 25,2011 interview of M.H. allowed Officer Rolling to commit perjury at the only two omnibus hearings in this case(June 30,2015 and March 14,2018) of when he was first actually informed of M.H.'s sexual abuse allegation. See Exhibit 22. Proving the statute of limitations defense in this case is grounds for dismissal but it was prejudiced by Prosecutor Rick Maes's improper disclosure of the July 25,2011 interview of M.H. given to Petitioner after this two omnibus hearings.

The improper disclosure of the May 31,2006 affidavit of M.H. (the mediocre redacted version Exhibit 8) allowed M.H. to commit perjury at trial, See U.S. v. Dunnigan,No.91-1300(February 23,1993) M.H. documented in her May 31,2006 affidavit:

Part E
1. When did you first have intercourse with the father of this child? July
Which State? Mn City? Tracy County? Lyon See Exhibit 8.(pg.2)

Which both Count I and Count II dates are before July 2001. At trial M.H. testified she could still read through the redaction but it was Prosecutor Rick Maes who intentionally suppressed the favorable, material information prejudicing Petitioner's Fundamental Federal Rights to a fair trial. At the minimum Petitioner would of been convicted of one count and not two cutting the 24 year sentence in half to 12 years. Quoting Petitioner,M.H. and Rick Maes:

Petitioner:" Yeah, you can still see through it."
Maria:" Yes, I do."
Prosecutor Rick Maes:" I'd object, Judge."
Judge Bush:" The basis of your objection."
Prosecutor Rick Maes:" Well, we just heard it was scribbled out so there's no answer to the question." See Exhibit 19.(pg.128)

See Brady v. Maryland, 373 U.S. 83(1963)"Suppression by prosecution of evidence favorable to an accused upon request violates due process where evidence is material either to guilt or punishment, irrespective of good faith or bad faith of prosecution." U.S.C.A.Const. Amend. 14.

All the elements constituting the offense(s) charged in the July 3,2014 criminal complaint are detailed in the May 31,2006 affidavit of M.H.: Part A details the child's date of birth 3-6-02 and M.H.'s date of birth 12-29-1985 showing conception at 15. And names Petitioner as the father. Which Part D points out the(Exhibit 8) significant relationship: "He married my mother". Which the reciprocal report(mandated by law) to the Lyon County Sheriff's Office reporting the act(s) was done on the same day of May 31,2006. See Exhibit 10. Quoting Marry J. Stanton from the p.r.i.s.m. activity sheet dated 8/11/2006.:

Begin Date: 5/31/2006
"Sent to Lyon County Sheriff for service.....MJS"

activity sheet dated 8/24/2006.:

"Discussed with my Supervisor. I will not be sending to the Private Process server at this time, we'll wait and see if the Sheriff's Dept. gets the NCP served by 8/28/06."....MJS

With the 2006 Lyon County Sheriff's report dated May 31,2006 Petitioner can prove the statute of limitations defense but according to Chief Prosecutor Rick Maes it does not exist. Which Petitioner knows it exists because he was served a copy of it on May 20,2007. See Exhibit 9 and Exhibit 20.

See Brady v. Maryland, 373 U.S. 83(1963)"Suppression by prosecution of evidence favorable to an accused upon request violates due process) U.S.C.A.Const. Amend. 14.

Judge Nelson tried twice to get Petitioner's DNA in 2007 and it was not for paternity establishment purposes. See Exhibit 11(pg3/4) Quoting Judge Nelson:" continuing the matter which wasn't a paternity establishment matter." See Exhibit 11(pg.3 and 4).

5) The due process clause is violated when a defendant is penalized for exercising his right to appeal by the imposition of a more onerous sentence on retrial. See North Carolina v. Pearce, 395 U.S. 711, 725-26(1969). A presumption of vindictiveness applies when a defendant receives a more onerous sentence upon retrial. See State v. Carver, 390 N.W.2d 431, 434(Minn.App.1986). Judge Bush offered no explanation for Petitioner's sentence-he did not state why he imposed two sentences, why he ran them consecutively, or why he doubled the length of Petitioner's original sentence. This is troubling because none of the Smith factors-potential justifications for a longer sentence-apply here. Which Petitioner is a wartime(Gulf War) disabled veteran with zero criminal history. Petitioner did make motions in the Lyon County Court proceedings for the recusal of Judge Bush from this case citing Judicial misconduct constituting a due process violation by Judge Bush. Which would explain the vindictiveness by Judge Bush towards Petitioner. See State v. Carver, 390 N.W.2d 431, 434(Minn.App.1986).State v. Johnson(2007)

6) Minnesota caselaw proves whitemen with the same type of crime like in this case, their statute of limitations defense was upheld. See State v. Keller,2018 Minn.App.Unpub,LEXIS 780 and See State v. French,Court of Appeals,392 N.W.2d 596, No.CX-86-326 (1986 Minn.App.LEXIS 4697).

The fact that whitemen with the same type of crime, their statute of limitations was upheld but Petitioner's was not is evidence of discrimination.

Rule 1.2 of the Code of Judicial Conduct states that "[a]judge shall act at all times in a manner that promotes public confidence in the independence,integrity,and impartiality of the judiciary,

At the December 29,2015 hearing Judge Bush flat out lied in court about giving Petitioner the 2006 Lyon County Sheriff's report and about doing the in-camera review. See (12-29-2015 transcript pg.9 lines 1 to 11 and pg.10 line 23 and pg.11 lines 1 and 2).

Quoting Judge Bush:"The report referenced out of the paternity file" "has been made available to you, and has been the subject of court review."See Affidavit of prejudice dated July 5,2017.

Rule 1.1 of the Code of Judicial Conduct requires "[a]judge [to] comply with the law,including the Code of Judicial Conduct."

Where Judge Bush's "unreasonable application" of clearly established state law pertaining to the statute of limitations defense violated Rule 1.1 of the Code of Judicial Conduct constituting Judicial Misconduct. Which it also violated Canon 2(A) "[a]judge shall respect and comply with the law and act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

Where Judge Bush's "unreasonable application" of clearly established federal law pertaining to the statute of limitations defense in violation of Toussie v. U.S.,397 U.S. 112,25 L.Ed.2d 156(1970) violated Canon 2(A) constituting Judicial Misconduct.

Where Judge Bush's "unreasonable application" of clearly established federal law pertaining to perjury in violation of U.S. v. Dunnigan, No.91-1300.(February 23,1993).violated Canon 2(A) constituting Judicial Misconduct. And the "unreasonable application" of clearly established federal law pertaining to Prosecutor Misconduct in violation of Brady v. Maryland, 373 U.S. 83(1963) in violation of Canon 2(A) constituting Judicial Misconduct.

Quoting Judge Bush from his order dated September 8,2015:

"Said records sought by defendant are protected by the Data Practice Act and privilege, and are not otherwise accessible by Defendant."

Quoting Judge Bush from his order dated February 19,2018:

"It is true that the Court did not order the release of the files as the Court judged that to be unnecessary because the Defendant already had access to that file if the Defendant would request it."

It was Judge Bush who denied the discovery disclosure request specifically for court file #556. See Exhibit 21(date of request)

Quoting Chief Public Defender Cecil Naatz from his letter:

"The Judge would not grant access to the file."

Quoting Public defender A.J. Kasprick from his e-mail:

"The Judge did not "open the file" in the Order."

Another tactic used by Judge Bush is the tampering of the record so to confuse the record to withhold information favorable to Petitioner. In pg.173 of the Trial transcript dated April 25,2018

Line 18 A. But I didn't know who at the time. I didn't know that it was "Maria". was stated by Officer Rolling not by Petitioner. Which the correct statements:

13 A. "That I had first heard about it?"
14 Q. "Yes."
15 A. "I had heard of a rumor."
16 Q. "But it was pertaining to her."
17 A. "Yes."
18 A. "But I didn't know who at the time. I didn't know that it was
19 "Maria"."

ISAIAH 56:1
Thus says the Lord:
"Keep justice,and do righteousness,"

This type of misconduct, for a complete disregard for the rule of law, undermines the integrity of the judicial system and its officers. This type of misconduct undermines the public trust and confidence. See In re Ginsberg, 690 N.W.2d at 550; In re Winton, 350 N.W.2d at 344; In re Gillard, 271 N.W.2d 785, 805 [843 N.W.2d 569](Minn. 1978) and In re Anderson, 312 Minn. 442, 252 N.W.2d 592(1977). See Affidavit of Prejudice(July 5,2017)

The fact that Judge Bush intentionally departed from clearly established state and federal laws proves the Judicial Misconduct.

The fact that whitemen with the same type of crime in Minnesota, their statute of limitations defense was upheld, but Petitioner's was not is evidence of discrimination.

The fact that Judge Bush doubled Petitioner's sentence from 12 to 24 years on remand with no legal bases or explanation proves the vindictiveness.See State v. Carver,390N.W.2d (Minn.App.1986).

The fact that Judicial Misconduct targeting, with vindictiveness and discrimination a person of color proves the <u>systemic racism.</u>

CONCLUSION

Petitioner respectfully requests for the relief that this illegal Lyon County Judgement contrary to well settled state and federal laws be overturned and Petitioner be released from custody to correct the infringement by Judge Bush on Petitioner's Federal Rights protected by the Due Process Clause in the 14th Amendment in the United States Federal Constitution.

I declare under penalty of perjury that everything I have stated in this Memorandum of law is true and correct.28 U.S.C.S.&1746.

dated: 6-30-2021 signature: Adolfo G. Avila Jr.

U.S. District Court
District of Minnesota
Clerk's Office
300 South Fourth St.,Suite 202
Minneapolis, Mn 55415

Adolfo G. Avila Jr.
O.I.D.#248824
MCF-Rush City
7600 525th st.
Rush City,Mn 55069

2.

Signed this 30 day of June, 2021

Signature of Party

Adolfo G. Avila Jr.
O.I.D.#248824
MCF-Rush City
7600 525th st.
Rush City,Mn 55069

Mailing Address

Telephone Number

Note: All parties filing the Memorandum of Law must date and sign the Memorandum and provide his/her mailing address and telephone number. Attach additional sheets of paper as necessary. The Memorandum of Law must be served on each party, together with the Notice of Hearing, Motion and other accompanying documents, if any.

UNITED STATES DISTRICT COURT

District of Minnesota

Adolfo Gutierrez Avila, Jr.,

Petitioner,

v.

Vicky Janssen,

Respondent.

JUDGMENT IN A CIVIL CASE

Case Number: 19-cv-3112 PJS/ECW

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. The Petition (Dkt. 1) is **DENIED** and that this action is **DISMISSED WITH PREJUDICE**.

2. Petitioner's Motions to Expand the Record (Dkts. 12, 16) is **DENIED**.

3. No certificate of appealability be issued.

Date: 1/13/2021

KATE M. FOGARTY, CLERK

UNITED STATES DISTRICT COURT

District of Minnesota

Adolfo Gutierrez Avila, Jr.,

Petitioner,

v.

Vicky Janssen,

Respondent.

JUDGMENT IN A CIVIL CASE

Case Number: 19-cv-3112 PJS/ECW

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT:

1. The order and judgment entered on January 13, 2021 [ECF Nos. 28–29] are

   VACATED.

2. Petitioner's 28 U.S.C. § 2254 petition for writ of habeas corpus [ECF No. 1]

   is DISMISSED WITH PREJUDICE.

3. Petitioner's motions to expand the record [ECF Nos. 12, 16] are DENIED.

4. No certificate of appealability will issue.

Date: 1/26/2021

KATE M. FOGARTY, CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

ADOLFO GUTIERREZ AVILA, JR.,	Case No. 19-CV-3112 (PJS/ECW)
Petitioner,	
v.	ORDER
VICKY JANSSEN, MCF-RC Warden,	
Respondent.	

Petitioner Adolfo Gutierrez Avila, Jr., was convicted in state court of two counts of criminal sexual conduct and was sentenced to 144 months in prison on each count, to be served consecutively. Avila filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. ECF No. 1. The Court adopted the Report and Recommendation of Magistrate Judge Elizabeth Cowan Wright and dismissed his petition with prejudice. *See* ECF No. 32. Avila then filed two motions for relief from judgment under Fed. R. Civ. P. 60, which the Court denied. ECF Nos. 35, 39, 50, 53. Avila also appealed to the United States Court of Appeals for the Eighth Circuit, which denied his motion for a certificate of appealability and dismissed his appeal. ECF No. 55.

This matter is before the Court on Avila's third Rule 60 motion for relief from judgment. Avila makes the same types of arguments in this motion as he did in his earlier motions, and it is accordingly denied for the same reasons. *See* ECF Nos. 39, 53.

ORDER

Based on the foregoing, and on all of the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT:

1. Petitioner's motion for relief from judgment under Fed. R. Civ. P. 60 [ECF No. 57] is DENIED.

2. To the extent a certificate of appealability is necessary, no certificate will issue.

Dated: July 8, 2021

s/Patrick J. Schiltz
Patrick J. Schiltz
United States District Judge

APPENDIX E

JUDGEMENT ENTERED April 22,2021
U.S. COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-1520

Adolfo Gutierrez Avila, Jr.

Plaintiff - Appellant

v.

Vicki Janssen, MCF-RC Warden

Defendant - Appellee

Appeal from U.S. District Court for the District of Minnesota
(0:19-cv-03112-PJS)

JUDGMENT

Before LOKEN, SHEPHERD, and KOBES, Circuit Judges.

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.

April 22, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX F

PETITION FOR REHEARING EN BANC

ORDER DENYING REHEARING EN BANC
Dated May 27,2021

No: 21-1520

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Adolfo Gutierrez Avila Jr.

Appellant

v.

Vicki Janssen, MCF-RC Warden

Appellee

PETITION FOR REHEARING EN BANC

Petitioner respectfully requests for a rehearing En Banc:

Because the panel decision in this case conflicts with the U.S. Supreme Court Decisions specifically (Toussie v. U.S.,397 U.S. Supreme Court 112(1970)) pertaining to the governing legal principle pertaining to the statute of limitations defense and (U.S. v. Dunnigan, No.91-1300 Supreme Court of the U.S. February 23,1993) pertaining to the governing legal principle pertaining to perjury. It also contradicts every U.S. Supreme Court or Federal Court Decision granting a Federal writ to protect the Fundamental Federal Due Process Rights protected by the Due Process Clause in the 14th Amendment of the U.S. Federal Constitution.

Thank you.

No: 21-1520

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Adolfo Gutierrez Avila Jr.

Appellant

v.

Vicki Janssen, MCF-RC Warden

Appellee

Appeal from U.S. District Court for the District of Minnesota

(0:19-cv-03112-PJS)

PETITION FOR REHEARING EN BANC

Adolfo Gutierrez Avila Jr.

Pro Se Petitioner

O.I.D. 248824

MCF-Rush City

7600 525th st.

Rush City, Mn 55069

Appellant

Vicki Janssen

MCF-RC Warden

MCF-Rush City

7600 525th St.

Rush City, Mn 55069

Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

MINNESOTA STATUTES:

FEDERAL DECISIONS:

OTHER:

SUMMARY OF THE ARGUMENT

The record established the fact that the particular conduct that constitutes "the offense" charged in this case the sexual-penetration of M.H. was reported to the local law enforcement authorities (Tracy Police Officer Rolling) in 2001. Triggered the statute of limitations three-year period in section 628.26(e) (2009). But Judge Bush labeled the report of sexual abuse of M.H. a "rumor" to undermine the statute of limitations claim outcome with the **"unreasonable application"** of clearly established state laws (M.S.626. 556.Reporting of Maltreatment of Minors) and clearly established federal laws (Toussie v. U.S./Dunnigan v. U.S.) constituting an intentional violation of Rights guaranteed to Petitioner by the Due Process Clause in the 14th Amendment.

Quoting Officer Rolling from the July 25,2011 interview of M.H.: See Exhibit 2(pg.9)

Officer Rolling:" **but did you find out you were pregnant in Marshall or Tracy?"**

Maria:" Tracy, when I was in school in Tracy."

Officer Rolling:" Yup. And that is where you guys were living **when I first heard about it. You guys were living in the trailer court."**

The evidence in this case is overwhelming that proves the fact of the matter is "the offense" was reported to Officer Rolling in 2001 but Judge Bush labeled it a "rumor" to prejudice the statute of limitations claim outcome.

ARGUMENT

I. According to the laws of mandatory reporting (M.S.626. 556.Reporting of Maltreatment of Minors):

(1) Any person may voluntarily report.
(2) Any report should be of sufficient content.
(3) Any communication that describes any type of abuse of a minor(s) constitutes a report.

In the laws of mandatory reporting (M.S.626. 556.Reporting of Maltreatment of Minors) there is no substantial basis at all for the conclusion to label a report of sexual abuse of a minor a "rumor". Which to the contrary it is state law that any information that describes any type of abuse of a minor(s) constitutes a report. Thus, Judge Bush's ruling to label the report of sexual abuse of M.H. a "rumor" is completely wrong and completely the opposite of the clearly well settled state laws (M.S.626. 556.Reporting of Maltreatment of Minors).

See M.S.626. 556.Subd.2. Definitions. (m)

"Report" means any communication received by the local welfare, police department, county sheriff, or agency responsible for the child protection pursuant to this section that describes neglect or physical or sexual abuse of a child....

A. STANDARD OF REVIEW

Reasonableness Standard

APPOSITE AUTHORITY

Lindh v. Murphy, 96 F.3 856 (7th Cir.1996).

STANDARD OF CORRECTNESS

The law in effect at the time the decision became final.

APPOSITE AUTHORITY

Teague v. Lane, 489 U.S. 288,310(1989)

II. Judge Bush's Judicial misconduct also involved an **"unreasonable application"** of clearly established federal laws as determined by the Supreme Court of the U.S. See Toussie v, U.S.,397 U.S.112,25L.E.D.2d156(1970). Which it is the correct governing legal principle pertaining to the statute of limitations but Judge Bush's **"unreasonable application"** of this Supreme Court decision to the facts of this case prejudiced the statute of limitations claim. The record clearly established the fact that the same conduct that constitutes "the offense" charged in this case the sexual penetration of M.H. was reported to the local law enforcement authorities (Tracy Police Officer Rolling) in 2001 but Judge Bush ruled it a "rumor" resulting in an **"unreasonable application"** of clearly established state and federal laws. Judge Bush's ruling to label the report of sexual abuse of M.H. a "rumor" seriously prejudiced Petitioner's statute of limitations claim outcome.

This case falls under section 2254(d)(1) resulted in a decision that was contrary to, or involved an **"unreasonable application"** of clearly established Federal law, as determined by the Supreme Court of the United States; or

See Williams v. Taylor, 529 U.S. 362 Supreme Court of the U.S. (April 18,2000)

"under 2254(d)(1)'s "unreasonable application" clause, a federal court may grant a writ of habeas corpus if a state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the prisoner's case."

A. STANDARD OF REVIEW

Reasonableness Standard

APPOSITE AUTHORITY

Lindh v. Murphy, 96 F.3 856 (7th Cir.1996).

STANDARD OF CORRECTNESS

The law in effect at the time the decision became final.

APPOSITE AUTHORITY

Teague v. Lane, 489 U.S. 288,310(1989)

III. Another **"unreasonable application"** by Judge Bush that also prejudiced the statute of limitations claim was the **"unreasonable application"** of clearly established federal law as determined by the Supreme Court of the U.S. in relation to the governing legal principle pertaining to perjury: See 18 & 1621 Perjury

See U.S. v. Dunnigan, No.91-1300 Supreme Court of the U.S. (February 23,1993).

Quoting Officer Rolling from the June 30,2015 omnibus hearing: See Exhibit 5

Prosecutor Rick Maes:" Now, Officer, can you tell us when this matter was first reported to the Law Enforcement Agency?"

Officer Rolling:**" I received the report in July 2011."**

Prosecutor Rick Maes:" Was that the first time you were notified of any alleged misconduct involving Mr. Avila and the alleged victim?"

Officer Rolling:**" That was the first time it was reported to me."**

Quoting Officer Rolling from the July 25,2011 interview of Maria: See Exhibit 2

Officer Rolling:**" but did you find out you were pregnant in Marshall or Tracy?"**

Maria:" Tracy, when I was in school in Tracy."

Officer Rolling:" Yup. And that is where you guys were living **when I first heard about it. You guys were living in the trailer court."**

Judge Bush's **"unreasonable application"** of this Supreme Court decision pertaining to perjury to the facts of this case also prejudiced the statute of limitations claim. Clearly Judge Bush intentionally prejudiced this case.

This case falls under section 2254(d)(1) resulted in a decision that was contrary to, or involved an **"unreasonable application"** of clearly established Federal law, as determined by the Supreme Court of the United States; or

See Williams v. Taylor, 529 U.S. 362 Supreme Court of the U.S. (April 18,2000)

"errors that undermine confidence in the Fundamental fairness of the state adjudication certainly justify the issuance of the federal writ."

A. STANDARD OF REVIEW

Reasonableness Standard

APPOSITE AUTHORITY

Lindh v. Murphy, 96 F.3 856 (7th Cir.1996).

STANDARD OF CORRECTNESS

The law in effect at the time the decision became final.

APPOSITE AUTHORITY

Teague v. Lane, 489 U.S. 288,310(1989)

See Pyle v. Kansas,87 LED 214,317 U.S. 213-216 (December 7,1942)

" Petitioner's application for a writ of habeas corpus alleged facts which, if proven, entitled him to release from prison because he was held pursuant to a court judgement rendered in violation of rights guaranteed him by the due process clause of the 14th Amendment of the Federal Constitution."

The Lyon County Judgement is an illegal Judgement for it is completely contrary to well settled state laws (M.S.626. 556.Reporting of Maltreatment of Minors) and contrary to well settled federal laws (Toussie v. U.S./Dunnigan v. U.S.).

Judge Bush's Judicial misconduct was not recorded by a smart phone but it is clearly recorded by the record in this case. The Lyon County Judgement was not correct when rendered.

CONCLUSION

Petitioner respectfully requests for the relief that this illegal Lyon County conviction contrary to well settled state and federal laws be overturned and Petitioner be released from custody to correct the infringement by Judge Bush on Petitioner's Fundamental Federal Due Process Rights protected by the Due Process Clause in the 14th Amendment of the U.S. Federal Constitution.

I declare under penalty of perjury that everything I have stated in this Petition for rehearing En Banc is true and correct.28 U.S.C.S. & 1746.

Dated: April 25, 2021 signature: Adolfo G. Avila Jr.

U.S. Court of Appeals
For the Eighth Circuit
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St. Louis, Missouri 63102

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 21-1520

Adolfo Gutierrez Avila, Jr.

Appellant

v.

Vicki Janssen, MCF-RC Warden

Appellee

Appeal from U.S. District Court for the District of Minnesota
(0:19-cv-03112-PJS)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Stras did not participate in the consideration or decision of this matter.

May 27, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans