STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff, | **Case No. 27-CR-22-12422**

v. | **ORDER GRANTING POSTCONVICTION RELIEF**

Thomas Gabor Gratzer

Defendant.

The above-entitled matter came before the Honorable Paul R. Scoggin January 8, 2024, on Mr. Thomas Gratzer's Petition for Postconviction Relief. Parties submitted multiple briefings and the Court held evidentiary hearings on March 11, 2024, and May 23, 2024.

Daniel Allard and Adam Petras represented the State of Minnesota.
Robert Richman represented Mr. Thomas Gratzer, ("Petitioner" herein).

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

I. Procedural History

Petitioner's case proceeded to a jury trial before this Court from June 5, 2023, to June 13, 2023. The Jury found Petitioner guilty of Criminal Sexual Conduct in the First Degree.

On August 10, 2023, Petitioner was sentenced to the custody of the Department of Corrections for 144 months and received credit for time served of three days.

Petitioner filed for direct appeal on November 7, 2023. Appellate proceedings were stayed on December 11, 2023, to allow Petitioner to pursue postconviction proceedings in front of this Court. Petitioner filed for postconviction relief on January 8, 2024. This Court held a hearing regarding the State's motion for an extension of their response deadline on February 1, 2024. The

Court granted a 10-day extension, and the State submitted their Answer on February 12, 2024. Following this, the parties submitted a series of arguments through briefs:

- February 14, 2024: Petitioner filed a reply to the State's Answer.
- February 23, 2024: State responded to Petitioner's reply.
- February 27, 2024: Petitioner responded to State's February 23, 2024, reply.

Pursuant to the State's request, this Court filed an Order Waiving Attorney Client Privilege on February 29, 2024. This Court held an evidentiary hearing on March 11, 2024. The parties presented testimony regarding trial counsel's reasoning behind not raising the statute of limitations claims as well as testimony related to the victim's report and whether Petitioner coerced her to not report the abuse.

The State presented testimony from Hillary Parsons, one of the attorneys who represented Petitioner at trial. Allan Caplan, the second attorney who represented Petitioner at trial was out of the state and did not get called by either party. Petitioner presented testimony from Petitioner and Denise Gochenouer, his present wife who was married to him before the trial. This Court received four exhibits offered by Petitioner:

- Ex. 1: Edina Police Department report from May 2, 2019, in response to a report from Hennepin County Child Protection.
- Ex. 2: Text messages between Ms. Parsons and Petitioner about Statute of Limitations
- Ex. 3: Recorded Phone call between Petitioner and the victim, A.G. in 2019. (Petitioner provided a transcript labeled as 3A).
- Ex. 4: Hennepin County Attorney Office's Witness Preparation Report with A.G. dated June 5, 2023.

This Court allowed a second evidentiary hearing on May 23, 2024, to receive expert testimony regarding the objective reasonableness of trial counsel's failure to raise a statute of limitations claim. Petitioner called Jon M. Hopeman as an expert witness. The State called Allan Caplan, Petitioner's trial attorney who asked to testify after reviewing the transcript from the

March 11, 2024, hearing. At the May 23, 2024, hearing the parties asked for additional briefing. The Court received additional briefing:

- On May 31, 2024, petitioner filed a post second evidentiary hearing brief.
- On June 14, 2024, the State filed a response to Defendant's second evidentiary hearing brief.

II. Facts

Reports Against Petitioner

On May 2, 2019, Edina Police Detective Kenna Dick received a report from Hennepin County Child Protection regarding A.G.'s alleged sexual abuse by her father, Petitioner. (Ex. 1). The report indicates that on May 1, 2019, A.G. verbally disclosed to her therapist in Washington D.C., Dr. Giulia Suro, that Petitioner raped her in their family home while she was in middle school. Pursuant to her obligations as a mandated reporter, Dr. Suro contacted Hennepin County Child Protection Services, who reported the matter to the Edina Police Department.

Dr. Suro added that A.G. did not want Petitioner to find out she made the report, and believed the family would be upset if child protection got involved. (Ex. 1). The reporting officer, Detective Dick, called A.G., who said that she lied to her therapist and did not want a report made. (*Id.*) A.G. added that she did not want a paper trail or further investigation done. (*Id.*) As a result, Detective Dick closed the case due to "lack of victim cooperation." (*Id.*) A.G. contacted the Edina Police Department directly on February 8, 2022, to make a second report that she had been sexually abused by Petitioner in her childhood home between 2008 and 2009.

The Hennepin County Attorney's Office filed a complaint on June 27, 2022, charging Petitioner with Criminal Sexual Conduct in the First Degree, pursuant to Minn. Stat. § 609.342,

subd. 1(a). The complaint alleged that he engaged in sexual penetration or contact with his daughter, A.G., between August 1, 2008, and May 13, 2012, when she was under the age of 13.

Petitioner's Relationship with A.G.

A.G. testified about the reasons for her delayed report of Petitioner's abuse during trial. A.G. explained that she did not report Petitioner's abuse because she was afraid it could lead to her being placed in foster care. (Trial Tr. Vol. III, 36:8-19). A.G. believed this because once, during a family dinner, Petitioner shared a story about a colleague who abused his nieces and nephews to see if they would report his behavior to their parents. (*Id.* at 36:21-37:10). Petitioner mentioned that if anyone told CPS, they could get involved and suggested that his colleague's nieces and nephews could have been placed in foster care. *Id.*

A.G. also shared that one of her biggest concerns with reporting was that she would hurt her mother. (*Id.* at 32:14-23, 33:1-2, 92:13-18). A.G. felt like the sexual abuse was something she actively participated in and that it was a betrayal to her mother. *Id.* A.G. stated multiple times that Petitioner never made direct threats about what would happen if she reported him, but she explained she feared his reaction. (*Id.* at 36:17-19; *Id.* at 111:9-10)

A.G. testified about several times that she tried to report Petitioner's sexual abuse but was discouraged by the responses. A.G. stated that after the first incident of abuse, she attempted to report it to her mother, but did not have the proper vocabulary to express exactly what happened. (Trial Tr. Vol. III, 36:1-4). She told her mother that "dad fell on top of [her], and he didn't get off." (*Id.* at 16:22-25). A.G. additionally said that when this happened, she felt like she could not breathe. *Id.* A.G. explained that for a long time, she thought she reported Petitioner's abuse to her mother, and felt angry with her mother for doing nothing in response. (*Id.* at 17:10-14). A.G. mentioned another instance when her mother asked her about whether "something happened"

between her and her father. (*Id*. at 32:14-23). A.G. did not tell her mother then because she felt like Petitioner's abuse was a betrayal to her mother. *Id*.

A.G. testified that she attempted to report Petitioner's sexual abuse to her therapist when she was around fifteen, but ultimately did not. (*Id*. at 38:13-16). A.G. stated that she mentioned she thought her father was sexually abusive, and the therapist's response made her feel "shut down." (*Id*. at 38:18-39:17). A.G. testified that based on her therapist's response, she did not want to make any further report at the time. *Id*.

In addition to explaining the reason behind her delayed reporting, A.G. testified about why she denied the allegations when the Edina Police Department reached out to her in May 2019. A.G. said that when police called, she was "horrified" because her grandfather was in the room. (*Id*. at 46:13-16). She remembers being "really, really, really scared that [her] mom would be mad at [her]." *Id*. She explained that she had deeply ingrained fears about reporting the abuse, and those did not disappear when she became an adult. (*Id*. at 46:21-47:6).

Lastly, A.G. testified about her relationship with Petitioner. She indicated that Petitioner was not around much while she was growing up. (*Id*. at 111:23-25). She stated that he never disciplined her and was not involved in her day-to-day life. (*Id*. at 111:16-22). For example, Petitioner did not control her grades or activities. (*Id*. at 53:14-16). A.G. mentioned in her testimony that at times, Petitioner would throw things at her or hit her, and that he mistreated her cat. (*Id*. at 51:19-53:5, 111:15-16). She noted that when he slapped her or threw things at her, it did not leave bruises. (*Id*. 75:25-76:7).

During the hearing on March 11, 2024, Petitioner testified about his relationship with A.G. and any potential use of coercion to stop her from reporting. He described himself as a "loving, caring, supportive parent." He testified that he was more of a "best friend" to A.G. than a parent.

He stated that he did not act as a parent in disciplining A.G. and that her mother was the parent who disciplined the children. He explained that he was not as present as other parents as he worked between 60 and 65 hours a week. He knew that she participated in therapy during high school, possibly earlier, but he could not monitor what she shared as the sessions were confidential. Petitioner unequivocally denied coercing A.G. or preventing her from reporting.

Petitioner described A.G. as independent and said that she traveled extensively while growing up. He testified that when A.G. was 13, she had her bat mitsvah in Budapest, then traveled with her maternal grandparents around Europe for about four to six weeks after. The following summer, at age 14, she went to South America for an exchange program for most of the summer. When A.G. was 15, she participated in a language program in New England and traveled for some of the summer. When she was 16, she participated in an exchange program in Spain. In 2016, as a senior in high school, A.G. studied in Italy during the school year, then went to London. Petitioner noted that she would travel during school breaks and in the summers without him present.

Petitioner testified that he financially supported A.G. throughout high school and paid for her college tuition, living expenses, and moving expenses while she lived in Washington D.C.

Trial Counsel's Treatment of Statute of Limitations in Petitioner's Case

Petitioner retained Allan Caplan as counsel around June 24, 2022, while he was still being investigated for the allegations. Allan Caplan represented Petitioner for the entirety of proceedings, and Hillary Parsons joined as co-counsel shortly after the case began and made her first appearance with Mr. Caplan during the second Omnibus Hearing on October 3, 2022.

Petitioner testified that he first discussed the statute of limitations with Mr. Caplan during the fall of 2022. He testified that Mr. Caplan told him that the 2021 law, which eliminated the

statute of limitations for criminal sexual conduct in the first degree, governed and applied retroactively. Mr. Caplan concluded they could not raise a statute of limitations claim.

Petitioner testified that they had about two or three additional discussions about the statute of limitations. In each conversation, Mr. Caplan stated that there was no statute of limitations issue and finally, concluded that they would have to move forward with trial. On May 23, 2024, Allan Caplan, who had the opportunity to review Petitioner's testimony, testified that this was not true. Petitioner's trial attorneys never filed a motion to dismiss based on the statute of limitations.

Petitioner stated that after trial, he spoke to Ms. Parsons about the statute of limitations for a civil case. (Ex. 2). He asked her if the 2019 police report would mean the 2021 statute of limitations law governed in the criminal case. Ms. Parsons indicated that she would research it. Petitioner testified that after researching, Ms. Parsons told him she found Minnesota Supreme Court cases that allowed for the 2021 law to apply retroactively, and that there was no statute of limitation issue. Petitioner testified that Mr. Caplan supported this conclusion.

Petitioner testified that his trial attorneys never mentioned concerns over whether the 2019 report to Edina Police would constitute a report for the purposes of the statute of limitations. He additionally stated that they never indicated he could raise the statute of limitations issue, but it would risk introducing testimony about coercing A.G. to not report. Petitioner testified that the first time he learned about the application of the statute of limitations law from prior to 2021 was during a conversation with his appellate counsel, Mr. Richman. He testified that he would have pursued this claim if he thought it could have been raised as a pretrial motion.

Petitioner's wife partially corroborated his testimony – she testified that she spoke with Petitioner about the statute of limitations in 2022. She said that Petitioner told her he was "the most unlucky person because the statute of limitations changed" and his case was not too old to

charge. She additionally added that she believed he got that information from his trial attorneys because he spoke with Allan Caplan and Hillary Parsons almost daily during the pendency of his case. This Court finds petitioner's testimony not credible.

Ms. Parsons testified that she and Allan Caplan investigated a statute of limitations claim in August or early September of 2022. She indicated that she researched whether the 2019 report triggered the statute of limitations given that A.G. later denied the allegations. She reviewed a Minnesota case, *State vs. Avila*, 2019 WL 3545813, (Minn. App. 2019), and believed A.G.'s disclosure was not a report. Accordingly, she concluded that a motion to dismiss based on the statute of limitations had no chance of success. Mr. Caplan testified that agreed with this conclusion and believed A.G.'s claim that she lied vesicated the report. Ms. Parsons noted that she considered out of state cases, including a case from Oregon, when making this conclusion. Ms. Parsons did not discuss this decision with Petitioner and does not know if Mr. Caplan did. When he testified on May 23, 2024, Mr. Caplan confirmed he never spoke with Petitioner about the issue as he believed it was a "nonissue."

Ms. Parsons indicated that she is familiar with the Minnesota case law which provides an exception for the statute of limitations when a perpetrator coerces a child victim to not report. However, she and Mr. Caplan believed the deciding factor was that the 2019 report did not constitute a report, so did not consider whether Petitioner may have coerced A.G. As a result, Ms. Parsons indicated that they did not think much about if evidence suggesting Petitioner coerced A.G. to not report existed.

However, Ms. Parsons conceded that the discovery did not reflect any direct threats against A.G. Ms. Parsons additionally noted that she knew evidence of coercion could come up during

trial, even if she did not raise the statute of limitations issue. She expected that A.G. would explain why she waited 14 years to report her abuse during her testimony.

Ms. Parsons denied telling Petitioner that the 2021 statute of limitations was retroactive and therefore controlling. She additionally said that she never discussed the retroactivity of the 2021 statute of limitations with Mr. Caplan. She referred to their decision to not raise a statute of limitations claims as a strategic choice. This Court finds Ms. Parson's testimony credible.

On May 23, 2024, Mr. Caplan testified as well. Mr. Caplan indicated that he was aware of the May 2019 report to the Edina Police ad that his belief that the communication between the therapist and the Edina Police was not a report because within 24 hours the victim "eviscerated" the allegation. In his view, the "complete and total retraction" made the statute of limitations a "non-issue." (5/23/2024 hearing, T 506, 12). Mr. Caplan also indicated he spoke with petitioner many times during the course of his representation. Any discussion concerning the statute of limitations was limited to the civil statute and whether the victim could sue petitioner. Mr. Caplan denied ever telling Petitioner that the 2021 amendment applied to petitioner's case. The Court finds this testimony credible.

Expert Testimony Regarding Ineffective Assistance of Counsel Claim

On March 23, 2024, Petitioner called an expert witness Mr. Jon Hopeman, who had a breadth of experience practicing criminal law, teaching processional responsibility at University of Minnesota Law School, and reviewing cases for ineffective assistance of counsel claims at the Innocence Project. Ahead of the hearing, on April 30, 2024, Mr. Hopeman submitted his CV and a declaration regarding his analysis of this case. *See* MNCIS Index 140. This Court found him to be a credible witness and have sufficient experience to testify as an expert regarding the issue of ineffective assistance of counsel.

Mr. Hopeman, after detailing a litany of reasons for his conclusion, testified that he found Ms. Parsons and Mr. Caplan's representation to be deficient. He stated that based on his experience as well as his review of the file and case law, an objectively reasonable criminal defense attorney would have filed a motion to dismiss on the grounds that the statute of limitations had expired. In supporting this conclusion, he testified that believed trial counsel did not sufficiently research the issue, that it would be customary for a defense attorney to raise a motion particularly when the facts are unique and the issue is dispositive, and he noted that he believed defense counsel majorly misunderstood the law. He noted that his review of the case file suggested a "absolute complete lack of any indication that [the statute of limitations issue] had been addressed." Although credible, to the degree the expert is suggesting conclusions of law, this Court reserves those decisions to itself.

CONCLUSIONS OF LAW

Petitioner requests that this Court vacate his conviction and dismiss the complaint against him with prejudice. Petitioner seeks postconviction relief under Minn. Stat. § 590.01 on the grounds that he was denied effective assistance of counsel. Petitioner's ineffective assistance of counsel claim is based on his trial counsel's failure to seek dismissal of his case due to a lapse in the statute of limitations, an absolute defense to the charges against him. The State objects to this assertion, arguing that Petitioner's trial counsel was objectively reasonable in not challenging the complaint based on the statute of limitations given the case law and initial disclosures in the matter.

I. Petitioner's Statute of Limitations Claim

Complaints alleging violations of Minn. Stat. § 609.342, subd. 1(a) for offenses occurring between August 2009 and September 15, 2021 "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) (2009). The statute of limitations begins to run when the crime is complete. *State v. Danielski*, 348 N.W.2d 352, 355 (Minn. Ct. App. 1984) (quoting *Toussie v. United States*, 397 U.S. 112, 115-16 (1970)).

Here, the complaint, filed on June 27, 2022, alleges a continuing violation of Minn. Stat. § 609.342, subd. 1(a) between August 1, 2008, and May 13, 2012. The effective date of the 2009 amendment was August 1, 2009, and the legislature stated that it applied to "crimes committed before that date if the limitations period for the crime did not expire before August 1, 2009." 2009 Minn. Sess. Laws Ch. 59, Art. 5 § 20. The September 15, 2021, amendment, which eliminates the statute of limitations for violations of Minn. Stat. § 609.342, only applies to crimes committed on or after that date. 2021 Minn. Sess. Laws Ch. 11, Art. 4 § 29. As such, the applicable statute of limitations is the 2009 amendment, Minn. Stat. § 628.26(e) (2009). Both parties expressly agreed on the record that the 2009 version of the Statute applies.

Applying this statute of limitations, the three-year period after a report to law enforcement controls. According to the complaint, the offense was completed on May 13, 2012. The State filed a complaint thirteen months after the nine-year period ended on May 12, 2021. This matter involves two events that could constitute a report to law enforcement authorities: the initial report to the Edina Police Department on May 1, 2019, through Hennepin County Child Protection, and A.G.'s direct report to the Edina Police Department on February 8, 2022.

If the May 1, 2019, report triggered the statute of limitations, the timeline lapsed on May 1, 2022. However, the State filed the complaint 57 days later, on June 27, 2022. If the February 8, 2022, report triggered the statute of limitations the complaint was filed before the timeline lapsed. Accordingly, the success of Petitioner's claim depends on whether the May 1, 2019, began the

statute of limitations timeline, and whether the Coercive Authority Doctrine applies. Either of these outcomes would indicate that the State filed the complaint before the statute of limitations expired.

A. The May 1, 2019, Report Triggered the Statute of Limitations

In the present case, the State was required to file the complaint within three years after "the offense was reported to law enforcement authorities." *See* Minn. Stat. § 628.26(e) (2009). In the context of this statute, "'report' means to inform law enforcement authorities." *State v. Soukup*, 746 N.W.2d 918, 922 (Minn. Ct. App. 2008) (holding that the victim did not "report" sexual abuse by telling a relative about the incident).

Although no precedential opinion outlines the requirements for sufficient notification to law enforcement, a series of unpublished Minnesota Court of Appeals opinions are persuasive in finding whether sufficient notice occurred. First, the report must contain sufficient facts that detail conduct related to the specific offenses charged in the complaint, rather than general accusations. *State v. Swan*, No. A15-0832, 2016 WL 764395, *3 (Minn. Ct. App. Feb. 29, 2016) (holding that prior reports to law enforcement of sexual abuse that did not allege penetration did not constitute a report for first degree criminal sexual conduct); *State v. Keller*, A18-0664, 2018 WL 4289716, *4 (Minn. Ct. App. Sep. 10, 2018) (holding that a statement to police which included the conduct underlying the charged offense, and specified the dates, location, and a description of the perpetrator constituted a report to law enforcement); *State v. Avila*, A18-1567, 2019 WL 3545813, *2-3 (Minn. Ct. App. Aug. 5, 2019) (holding that a vague statement which omitted the victim's age, dates, and the defendant's specific actions was not a report); *State v. Konakowitz*, A21-1578, 2022 WL 3711450, at *3 (Minn. Ct. App. Aug. 29, 2022) (holding that broad allegations of sexual misconduct do not constitute a report of "the *particular offense*"). The report need not contain all information necessary to charge the alleged offense. *Keller*, 2018 WL 4289716 at *4.

Second, the report must be formal enough to put law enforcement on actual notice. *Id*. (finding that the law enforcement acting on the reports to conduct a prompt sexual-assault investigation demonstrates that the reports provided actual notice); *Avila*, 2019 WL 354813 at *3 (holding that the statement about the defendant's sexual abuse was an unsubstantiated rumor or "town gossip" and did not put law enforcement on actual notice).

Lastly, a report that triggers the statute of limitations does not require the victim's cooperation. *Keller*, 2018 WL 4289716 at *4; *State v. Tomlinson*, 938 N.W.2d 279, n2 (Minn. Ct. App. 2019) (noting that the district court barred prosecution when the state did not pursue charges within three years from a mandated reporter's police report due to the victim did not wanting to pursue charges).

On May 2, 2019, Hennepin County Child Protection ("CPS") made a report to the Edina Police Department that a mandated reporter reached out regarding allegations that Petitioner sexually abused A.G. when she was a child. CPS told Detective Dick that A.G.'s therapist, Dr. Suro, reported that A.G. described the sexual abuse by saying "her father raped her." (Ex. 1). A.G. disclosed other details such as Petitioner commenting on her breasts and walking around the home nude. (*Id*.) A.G. indicated this occurred when she was in middle school in her Edina, MN home.

The May 2, 2019, report, while not spelling out all the details explicitly, includes sufficient facts that detail the charged offense: criminal sexual conduct in the first degree – penetration with a person under 13 where the actor is over 36 months older. By using the word "rape" law enforcement was on notice that the sexual assault involved penetration, an element of the charged offense. "Rape" specifically refers to penetration, whereas "sexual assault" may encompass a broad category of criminal conduct, which could include rape. As such, this report details specific facts that did not exist in *Swan* or *Avila* and rendered those reports insufficient. The May 2, 2019,

report additionally identified Petitioner as the perpetrator, included the location: Edina MN, and suggested A.G.'s age and the date of offense by noting that the rape occurred when A.G. was in middle school.

The date and age information mirrors the report in *Keller*, where the defendant's identity was unknown at the time of the report, but police had sufficient information to identify him through further investigation. Police knew A.G.'s date of birth and could therefore determine that she was under thirteen while in middle school. Additionally, they could calculate the date of the offense by identifying which years she would have been in middle school. The report suggested the offense dates and alleged that Petitioner sexually penetrated A.G. when she was under 13. As such, Detective Dick was presented with sufficient facts to investigate the specific offense charged in the complaint.

In addition to presenting sufficient facts, the report must be made with a formality that puts law enforcement on actual notice. Similar to *Keller*, after receiving the report from Hennepin County Child Protection, Detective Dick began investigating the matter by calling A.G. By opening this investigation into Petitioner's alleged conduct, Detective Dick demonstrated she the report was sufficient to place her on notice of a specific crime. While a third party reported the crime, similar to *Avila*, the reliability and formality of the report far exceed the basis for the report in that case – unsubstantiated rumors and town gossip. As a mandated reporter, Dr. Suro was required to report A.G.'s disclosure through official channels. Additionally, Dr. Suro's basis of knowledge – A.G. directly disclosing the abuse during a therapy session earlier that day – far exceeds the reliability of the reporter's information in *Avila*: the town baker overhearing gossip. The May 2, 2019, report presented a formality that placed law enforcement on actual notice.

Contrary to the State's argument, this notice is not overcome by the fact that A.G. told Detective Dick she lied and asked them to not make a paper trail or investigate further. The State suggests the lack of A.G.'s cooperation renders the report insufficient. They additionally argue these facts are distinguishable from a recanting domestic abuse victim because those victims provide earlier records of their statement through 911 calls or police reports. Of course, the question here is not whether there is enough to file a complaint but whether the communication was sufficient to place the department on notice that a crime occurred. Certainly, cases are reported without victim cooperation. Dr. Suro's report of A.G.'s disclosure acted as a record of A.G.'s statement to support an investigation, in the same way a 911 call or police report does for a recanting domestic abuse victim. Most importantly, persuasive appellate cases on the matter conclude the opposite of what the State argues – lack of victim cooperation does not prevent an otherwise sufficient report from triggering statute of limitations timelines. *Keller*, 2018 WL 4289716 at *4.

Law enforcement authorities were sufficiently informed of Petitioner's alleged crimes against A.G. when they received the May 2, 2019, report. Therefore, the three-year statute of limitations in this matter began on May 2, 2019, when law enforcement authorities received the report. Unless the Coercive Authority Doctrine requires tolling of the statute of limitations in this matter, it expired on May 1, 2022, 57 days before the criminal complaint in this matter was filed.

This Court is acutely aware of the catch-22 the statute in its 2009 form presents. The therapist was mandated to report, and she did. The police immediately reacted and were rebuffed by the victim. Thus, the clock was ticking, but the investigator had nowhere to go. This dynamic likely provoked the subsequent legislative change. But that amendment specifically did not include cases prior to the effective date. As such, this Court must find the complaint was filed too late.

B. The Statute of Limitations Was Not Tolled by the Coercive Authority Doctrine

Minnesota case law requires tolling of the statute of limitations in cases "[w]here the same parental authority that is used to accomplish the criminal sexual acts against a child is used to prevent the reporting of that act." *State v. Danielski,* 348 N.W.2d 352, 357 (Minn. Ct. App. 1984). The statute of limitations does not begin to run until the child is no longer subject to that authority. *Id*. In applying this rule, courts typically look for active coercion: instances in which the perpetrator's conduct is the direct cause of the delayed reporting. *Id*. at 356. The coercive authority must be "in addition to that which characterizes every instance of familial abuse." *State v. Johnson*, 422 N.W.2d 14, 18 (Minn. Ct. App. 1988).

In cases where courts have applied the coercive authority doctrine established by *Danielski*, perpetrators have made direct threats to harm the child, issued punishments, and controlled the child's communication to prevent them from reporting the sexual abuse. *Id*. at 17; *Danielski*, 348 N.W.2d. at 354. In *Danielski*, the defendant coerced victim to not report by withholding her phone privileges and grounding her after acts of abuse and in instances where she tried to report the abuse. 348 N.W.2d at 354. When the victim told her mother about the perpetrator's acts, the mother began participating in the sexual abuse. *Id*. The victim reported the abuse when she visited her father, and he immediately reported authorities. *Id*. In *Johnson*, the perpetrator coerced the victim to not report his abuse by threatening that she would be put in jail, beaten, or grounded if she told anyone. 422 N.W.2d at 15. The perpetrator's threats were supported by his prior actions, as he disciplined his children by kicking them with pointed boots, whipping them with belts, and slapping them with the back of his hand. *Id*. at 17-18. He additionally once locked the victim in a county jail cell as punishment. *Id*.

The Court of Appeals declined to apply the coercive authority doctrine in an instance where the perpetrator, who was the victim's uncle and church elder, did not have authority to control the victim's day to day movements or communications, did not live with the victim, and did not threaten physical harm or punishment if she did report. *State v. French*, 392 N.W.2d 596, 599 (Minn. Ct. App. 1986). The court found that while psychological active coercion could be possible, the perpetrator's church sermons about respecting elders and his unpredictable temperament did not rise to that level. *Id*. The victim reported the abuse about seven years after her last contact with the perpetrator. *Id*. She explained that her delayed report was due to fear that her parents would not believe her, shame, and embarrassment. *Id*. at 596.

In the present case, there is no evidence from the postconviction testimony or through trial testimony that Petitioner directly threatened to harm A.G., issued punishments, or controlled her communications to prevent A.G. from reporting the abuse. A.G. explained several reasons why she did not report during her testimony: concern over her mother's reaction due to A.G.'s feelings that she was betraying her mother, fear that she would be placed in foster care, shame over the events, and her impression that family matters should not be spoken about. A.G. also testified that Petitioner never made direct threats to stop her from reporting his abuse. While these reasons are an entirely understandable reaction to years of abuse at Petitioner's hands, they do not demonstrate a situation in which Petitioner used his parental authority or took action to directly prevent A.G. from reporting.

A.G.'s fear of foster care placement arose when Petitioner shared a story during a family dinner around the time, he began sexually abusing A.G. Petitioner mentioned a colleague who mistreated their nieces and nephews and suggested that this could lead to CPS involvement and the children being placed in foster care. This Court does not doubt that Petitioner's story influenced

A.G.'s delayed reporting and could have been equally as effective in preventing the report as physical coercion. However, any intended threat presented by this story is too subtle and indirect to be characterized as active coercion seen in prior case law. This situation mirrors that in *French*, in which the court found that the perpetrator's church sermons about respecting elders did not rise to the level of psychological active coercion. 392 N.W.2d at 599. Similarly, Petitioner's story about a colleague whose abuse could have caused his nieces and nephews to be placed in foster care does not amount to active psychological coercion.

Petitioner did not exercise control over A.G.'s communications in a manner that prevented her from reporting his abuse. A.G. and Petitioner both testified that Petitioner was not involved in A.G.'s day to day life while she was growing up. They agreed that A.G.'s mother was primarily in charge of disciplining the children and that Petitioner was not around often. Unlike *Danielski*, there is no evidence in the record that Petitioner would punish A.G. after instances of abuse, withhold her phone privileges, or limit her communications. A.G. regularly saw therapists throughout the period of abuse and had privileged conversations with them. She testified that she spent a lot of her time with her mother while at home. A.G. additionally traveled around the United States and internationally for extended periods of time without seeing Petitioner. In these instances, did not exercise any control over her communications.

A.G. made several attempts to report Petitioner's abuse to her mother and therapist, but factors outside of Petitioner's direct influence prevented her from successfully doing so. Petitioner's influence in A.G.'s life was not quite as removed as the defendant in *French*, who did not live with the victim or have any authority over her day-to-day movements or communications. However, his lack of involvement and monitoring of A.G.'s behavior is vastly different from the control exerted by the perpetrators in *Johnson* and *Danielski*. As such, this Court finds that

Petitioner did not actively coerce A.G. to delay her reporting through use of punishment or control over her communications.

A.G.'s testimony additionally highlighted instances where Petitioner physically and emotionally abused her. A.G. said that at times, Petitioner would throw items at her or hit her, insult her, and that he would mistreat her cat to upset her. However, this abuse does not rise to the level of consistent, extreme physical discipline seen in *Johnson*, which underscored the direct threats the perpetrator made to prevent the victim from reporting. It additionally does not seem to relate to preventing A.G. from reporting or constitute a use of authority in addition to that which characterizes familial abuse.

Based on the evidence in front of this Court, Petitioner's conduct does not demonstrate a situation in which he used his parental authority to directly cause A.G.'s delayed reporting. Accordingly, the Coercive Authority Doctrine does not toll the statute of limitations in this case.

The statute of limitations began running when Hennepin County Child Protection reported A.G.'s abuse to the Edina Police on May 2, 2019, and expired three years later, on May 1, 2022. Therefore, the statute of limitations lapsed 57 days before the State filed their complaint on June 27, 2022.

This Court notes that having heard the entirety of the trial there is little doubt that Defendant was subtle, manipulative, and mean. Likewise, the household was rigidly hierarchical, and money was effectively used to ensure the dominance born of dependency. As a consequence, the child's reluctance to report is the natural product of her dysfunctional upbringing. But the law requires something more, something concrete before a finding of coercion is justified. That simply is not in the record.

Nothing in this finding should be taken as suggesting the reported cruelty did not happen. The Jury found, and this Court agrees, that they did. Nothing here suggests actual innocence. This Court is simply finding the complaint was filed too late.

II. Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, the petitioner must satisfy a two-pronged test established by *Strickland v. Washington*, 466 U.S. 668 (1984). First, they must show that counsel's performance was deficient and not objectively reasonable. *Id*. at 687. Second, they must show that counsel's deficient performance prejudiced them: "but for counsel's errors, the result of the proceeding would have been different." *Wright v. State*, 756 N.W.2d 85, 91 (Minn. 2009). This Court will address each requirement in turn.

A. Counsel's Performance was Deficient and not Objectively Reasonable

Objectively reasonable performance is "representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993) (quoting *White v. State*, 248 N.W.2d 281, 285 (Minn. 1976)). A defense attorney's failure to raise a statute of limitations defense that requires dismissal of the charges falls below an objective standard of reasonableness. *United States v. Coutentos*, 651 F.3d 809, 818 (8th Cir. 2011). Generally, matters of trial strategy do not provide a basis for ineffective assistance of counsel claims. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999); *Boitnott v. State,* 631 N.W.2d 362, 370 (Minn. 2001).

Based on Ms. Parsons and Mr. Caplan's testimony, it appears they decided to not raise Petitioner's statute of limitations claim based almost entirely on an unpublished Minnesota case, *State v. Avila*, 2019 WL 3545813, (Minn. Ct. App. 2019). This case led them to conclude that A.G.'s denial of the report in 2019 rendered it insufficient to trigger the statute of limitations. Ms.

Parsons indicated that in addition to this Minnesota case, she did some out of state research. She does not recall reviewing other Minnesota cases, whether precedential or persuasive, and noted that she was not familiar with *Keller* or *Swan* at the time. Trial counsel did not have handwritten notes or any folders containing legal research related to this case. Ms. Parsons additionally testified that she did not research the issue of whether the active coercion doctrine could have tolled the statute of limitations in this case. Defense expert Jon Hopeman testified that based on his review of the file, there was "a complete lack of any indication that the [statute of limitations issue] had been addressed" and that it appeared counsel did not spend much time on the issue.

This leaves the question of what responsibility attaches to pursue a claim based on unsettled law. This Court is mindful that in the Strickland context there is a "strong presumption that counsel's performance was reasonable." *Zornes v. State,* 880 N.W.2d, 363, 370 (Minn. 2016). The risk of hindsight superseding the reasonable decisions of seasoned counsel in cases where the law is not settled is substantial.

Here, this Court believes that the report made by the therapist is a qualifying report triggering the statute of limitations. But this Court also finds the definition of report in this context is not well settled law in Minnesota. Finding that a third-party report by a mandated reporter to the police is a report despite the immediate and unequivocal denial by the victim is a reasonable extension of existing precedent. But it is an extension – there is no reported case that is an all fours the facts of this case.

Petitioner asserts that the objectively reasonable standard for effective representation includes raising issues that are "clearly foreshadowed" by existing law. *Chase v. Macauley,* U.S. 233 73d 1298, 1304 (11th Cir. 2000). Or "there is relevant authority strongly suggesting" the motion has merit. *United States v. Morris*, 917 F.3d 818 (4th Cir. 2019). Petitioner notes that the

non-precedential decision *State v. Keller*, No. A18-0664, 2018 WL 4289716 (Minn. Ct. App. Sept. 10, 2018) and *State v. Avila*, No. A18-1567, 2019 WL 3545813 (Minn. Ct. App. Aug. 5, 2019) point the way to a firm basis that the statute was triggered in this case. Thus, the failure to raise the issue falls below an objectively reasonable standard of representation.

The State counters, noting that in *State v. Soukup*, 746 N.W.2d 918 (Minn. Ct. App. 2008), arguably the last reported decision on what it means to report, it could be reasonably interpreted that the report had to come from the victim rather than a third party and the immediate denial belies any such direct report. Although no party argued the 'victim only' suggestion in *Soukup*, the statute has been amended since 2008. The language no longer ties the report to the 'by the victim' language in the earlier form. Likewise, *Keller* and *Avila* dealt with unsubstantiated informal rumors and vague factual statements, they do not give direction in which a third-party report is immediately and completely denied. Coupled with the implication in *Soukup* a reasonable practitioner could easily conclude the issue was, as Mr. Caplan described it, "a non-starter."

The 8th Circuit ruled that where the law is unsettled "counsel' failure to anticipate a rule of law that has yet to be articulated by the governing courts surely cannot render counsels' performance professionally unreasonable." *Fields v. United States*, 201 F.3d 1025 (8th Cir. 2000).

Minnesota State law on the obligation to raise unsettled legal issues is unclear. But taking account of the somewhat strident position of the petitioner's expert, the persuasive value of the nonpresidential decisions and the standards applied by the foreign jurisdiction leads this Court to the conclusion that the *Strickland* standard has been met. This was a delayed report case. In this Courts experience the limitation issue is commonly raised in delayed report cases. At a minimum, counsel was on notice that this was a close call. In the context of a dispositive issue, the limitations motion should have been brought.

This Court struggled with the issue of separating the Strickland effective representation prong and hindsight in light of the finding the Statute was triggered. Counsel rendered a vigorous factual defense and managed a difficult client. But in this Court's experience, delayed report cases commonly require careful consideration of the limitation question. While this Court believes counsel did review the issue, the decision to deem the issue a 'nonstarter' and not even bring the motion was unreasonable. Existing case law left considerable leeway in making the argument. Depriving the petitioner of the opportunity to benefit from a dispositive motion, in this context, was unreasonable. As such, this prong of the Strickland test is met.

B. Counsel's Deficient Performance Prejudiced Petitioner

To succeed on an ineffective assistance of counsel claim, the petitioner must show that "but for" trial counsel's errors, "the result of the proceeding probably would have been different." *Gates v. State,* 398 N.W.2d 558, 562 (Minn. 1987) (citing *Strickland,* 466 U.S. at 693-94). In the present case, had trial counsel raised the meritorious statute of limitations claim during pretrial proceedings, Petitioner's case would have been dismissed. This matter would not have proceeded to trial, nor would Petitioner have been found guilty, convicted, and sentenced to 144 months in prison – almost 10 months of which he has now served. Trial counsel's failure to raise the lapse in statute of limitations undoubtedly prejudiced Petitioner. Even if this Court did not find that the statute of limitations issue had merit, failing to raise the issue waived any ability to address it through appellate proceedings. As such, the second prong of ineffective assistance of counsel is satisfied.

Petitioner's conviction is constitutionally defective because he was denied effective assistance of counsel as guaranteed under the United States and Minnesota Constitutions.

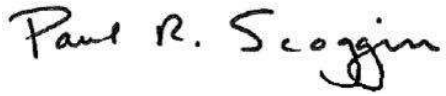
ORDER

1. Petitioner's Postconviction Relief Petition is **GRANTED.**

2. Petitioner's conviction is vacated and the complaint in this matter is dismissed.

IT IS SO ORDERED.

BY THE COURT:



Date: June 27, 2024

Paul R. Scoggin
Judge of District Court