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STATE OF NORTH DAKOTA

IN THE SUPREME COURT OF NORTH DAKOTA

Sean Michael Kovalevich, Petitioner/Appellant Vs. State of North Dakota, Respondent/Appellee	Supreme Court No. 201800109 District Court No. 18-2017-CV-957

APPEAL FROM AN ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION FOR SUMMARY DISPOSITION AND AN ORDER DENYING KOVALEVICH'S APPLICATION FOR POST-CONVICTION RELIEF, NORTHEAST CENTRAL JUDICIAL DISTRICT GRAND FORKS, NORTH DAKOTA THE HONORABLE JOHN THELEN PRESIDING

Supplemental Statement

Sean Michael Kovalevich #39835
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JURISDICTION

[¶1] The Petitioner, Sean Michael Kovalevich (Kovalevich), timely appealed the final judgment arising out of the Grand Forks County District Court. The North Dakota Supreme Court has Jurisdiction over the appeal of this matter under N.D. Const. art. VI §6, and N.D.C.C §§ 29-28-06 (1)(2)(4) and (5) and 29-28-03. A final judgment was entered on February 12, 2018. Kovalevich submits this Supplemental Statement in accordance with the decision of the Chief Justice on 5/30/18 denying Kovalevich's Motion to Withdraw Appellant's Brief, but allowing the filing of this document. Kovalevich has limited the length of this Supplemental Statement to sixteen pages, excluding cover, table of contents, and table of authorities.

STATEMENT OF THE ISSUES

[¶2] I. Did the Court err by summarily dismissing Issues I, II, and IV after an evidentiary hearing had been ordered?

II. Did the Court err when it found that Kovalevich's new evidence was not newly discovered but merely newly acquired?

III. Did the Court err by considering and including in its ruling, testimony and statements from the evidentiary hearing and closing arguments which contradict the evidence to which they refer? And if so, do the statements rise to the level of calling into question the integrity of all prior proceedings including the jury trial?

STATEMENT OF CASE

I. NATURE OF THE CASE

[¶3] This is a civil matter on appeal from Northeast Central Judicial District, Grand Forks County appealing the order Granting in Part and Denying in Part Respondent's Motion for Summary Disposition and an order denying Kovalevich's Application for Post-Conviction Relief.

II. DISPOSITION BELOW

[¶4] On April 17, 2017, Kovalevich filed a second application for Post-Conviction Relief. His petition alleged: 1) Violation of Due Process Rights, 2) Selective and Vindictive Prosecution, 3) Newly Discovered Evidence, and 4) Unlawful Conviction

[¶5] On May 15, 2017, Respondent filed its Answer, Motion for Summary Dismissal, and a Brief in Support of Motion for Summary Dismissal. Respondent argued that Kovalevich's claims should be dismissed on the basis of Res Judicata, Misuse of Process and that that the Petition was filed outside the statutory time limit. Respondent later conceded that the Petition was timely filed.

[¶6] On June 2, 2017, Kovalevich filed his response to the State's Motion for Summary Judgement arguing that Respondent's motion was premature, and that Kovalevich needed time to prepare and brief an argument.

[¶7] On June 6, 2017 District Court Judge Jon Jensen issued an Order Reserving Ruling on Motion for Summary Judgement. The order stated that judgement on the motion would be reserved until July 19, 2017, the date listed on the briefing schedule for Kovalevich's brief to be

submitted, and that Kovalevich should provide a concise statement why a full hearing is needed to resolve each issue.

[¶8] On July 19, 2017, Kovalevich filed a Supplemental Application for Post-Conviction Relief, Petitioner's Brief, and six exhibits.

[¶9] On July 20, 2017, Judge Jensen issued an order for Hearing and Request for Reassignment of the Case. In the order, Judge Jensen states that Kovalevich's brief has been received and the matter shall be set for an Evidentiary Hearing.

[¶10] On August 16, 2017, Respondent filed a Brief in Response to Plaintiff's Supplemental Application

[¶11] An Evidentiary Hearing was held on October 30, 2017 in Grand Forks with Judge John Thelen presiding. At the conclusion of the hearing, the judge ordered both sides to file written closing arguments and proposed orders. A transcript of the proceedings was ordered.

[¶12] Kovalevich filed his closing argument on January 2, 2018. Respondent filed a closing argument and proposed order on January 16, 2018. Kovalevich filed a rebuttal closing argument and proposed order on January 23, 2018

[¶13] An Order denying Kovalevich's Application for Post-Conviction Relief was entered on February 12, 2018.

[¶14] Kovalevich filed a Notice of Appeal and Order for Transcript on March 16, 2018. The Notice of Filing the Notice of Appeal was filed on March 16, 2018. An Amended Notice of Appeal with Preliminary Issues was filed on March 22, 2018 and the Notice of Filing the Amended Notice of Appeal was filed on March 22, 2018

[¶15] The Petitioner/Appellant's Brief was filed on April 24, 2018

[¶16] On May 23, 2018 Kovalevich filed a Motion to withdraw the brief, proceed Pro Se, and file a new brief.

[¶17] On May 30, 2018 the Chief Justice directed that an order be entered denying Kovalevich's motion to withdraw his counsel's brief and proceed pro se. However, he allowed Kovalevich to file a Supplemental Statement.

STATEMENT OF FACTS

[¶18] In the underlying criminal conviction, Kovalevich was found guilty of (2) counts Gross Sexual Imposition and (1) count Corruption of a Minor. It was alleged that Kovalevich engaged in a sexual act with a minor at the CanadInn Hotel in Grand Forks on two occasions when the minor was 14 years of age and one occasion when the minor was 15 years of age. The dates charged for Counts 1 and 2 were on or around February 3-6. 2012, and for Count 3 on or around August 13-15, 2012. Kovalevich was sentenced to 30 years incarceration followed by 10 years supervised probation.

[¶19] In an interview with North Dakota Bureau of Criminal Investigation Agent Craig Zachmeier, the alleged victim (S.M.) described (3) trips to the CanadInn Hotel with Kovalevich. She stated that on the first trip no sexual activity took place, but that sexual activity did take place on the second and third trips. She did not provide specific dates.

[¶20] ND BCI agents obtained Kovalevich's reservation records from the CanadInn Hotel showing (2) stays: February 3-6, 2012 and August 13-15, 2012. Kovalevich was charged based on these dates. It was alleged that these dates matched S.M's description of the 2nd and 3rd trips, and that the 1st trip must have been to a different hotel or reserved under a fake name.

[¶21] While preparing for trial, BCI agents also obtained Kovalevich's registration records from the Ramada Plaza Hotel in Fargo for February 6-7, 2012 and August 15-16, 2012, the dates immediately following the CanadInn reservation dates.

[¶22] Subsequent to trial, Kovalevich was able to obtain a third receipt from the CanadInn hotel for July 22-23, 2012. The record was not located by BCI; possibly because Kovalevich's name was inadvertently spelled wrong. This new record formed the basis of Kovalevich's Post-Conviction relief action. In his Amended Application for Post-Conviction Relief, Kovalevich argued that the (3) receipts together provided a much clearer picture, better supported S.M's statements to BCI, and showed that he could not possibly have been charged or convicted of GSI. In summary, Kovalevich argued that S.M. described (3) trips to CanadInn, there are now (3) receipts to match. This showed that the 1st trip would have been February 3-6, 2012, the 2nd trip July 22-23, 2012 (the new record) and the 3rd trip August 13-15, 2012. S.M. stated to BCI that sexual acts occurred on the second and third trips; which would have occurred after her June birthdate making her 15 years old. Kovalevich could not be convicted of GSI if S.M. was 15 years old since no force was alleged. Respondent claimed that the newly discovered record was merely an additional trip. They attempted to back this up by claiming that S.M. told BCI Agent Zachmeier in a recorded interview that the second trip to CanadInn was followed by a trip to Fargo. Since the Fargo Ramada dates immediately follow the CanadInn February dates, they claimed that the second trip must have been in February. This will be shown to be untrue.

LAW AND ARGUMENT

[¶23] The North Dakota Rules of Civil Procedure govern post-conviction relief actions as they are civil in nature. *Garcia v. State,* 2004 ND 81, ¶6, 678 N.W.2d 568. The standard of review is abuse of discretion. "The district court's findings of fact in a post-conviction proceeding will not

be disturbed on appeal unless they are clearly erroneous under N.D.R.Civ.P.52(a) " *Tweed v State,* 2010 N.D. 38, ¶ 15, 779 N.W.2d. 845. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by the evidence, or if, although there is some evidence to support it, a reviewing court is left with a definite and firm conviction that a mistake has been made." *Heckelsmiller v State,* ND 191, ¶ 5, 687 N.W.2d 454. "Questions of law are fully reviewable on appeal of a post-conviction proceeding." *Peltier v. State,* 2003 ND 27, ¶ 6, 657 N.W.2d 238. An application for post-conviction relief based on newly discovered evidence is similar to a request for a new trial based on newly discovered evidence under N.D.R.Crim.P. 33.

> "To prevail on a motion for new trial on the basis of newly discovered evidence under N.D.R.Crim.P.33, the defendant must show (1) the evidence was discovered after trial (2) the failure to learn about the evidence at the time of trial was not the result of the defendant's lack of diligence, (3) the newly discovered evidence is material to the issues at trial, and (4) the weight and quality of the newly discovered evidence would likely result in an acquittal." *Wacht v State*, 2015 ND 154, ¶11, 864 N.W.2d 740

I. Did the Court err by summarily dismissing Kovalevich's Issues I, II, and IV after an evidentiary hearing had been ordered?

[¶24] Following Kovalevich's response to Respondent's Motion for Summary Judgement, Judge Jensen issued an order reserving ruling on the Motion. Kovalevich then submitted a Brief and Supplemental Application. The following day Judge Jensen issued an order setting the matter on for evidentiary hearing without restriction, and recusing himself from the case. This was the Court's response to the Motion for Summary Judgement. Although not explicitly stating that the Motion was denied, the act of setting the matter for a hearing effectively denied the Motion. Ruling on the Motion had been reserved *only until* Kovalevich

submitted his brief (Order Reserving Ruling on Motion for Summary Judgement, P.1). Respondent made no attempt to limit the scope of the Evidentiary Hearing or file any further motions until the day of the hearing. At that time, Respondent stated that she wished to "renew" her Motion for Summary Judgement. Kovalevich responded that enough evidence had already been presented to warrant a hearing and that the hearing was already scheduled. Eventually, Judge Thelen directed Respondent to file a proposed order regarding the Motion and he would sign it. The hearing was then limited to only Issue III. The Court erred by granting summary judgement because it had already ordered that the hearing be scheduled. Judge Jensen did not include any limitation in his order setting the matter for hearing. This decision was arbitrary and contradicted the Court's prior decision. Additionally, there was no motion pending before the Court since the Motion for Summary Judgement had been effectively denied.

[¶25] Kovalevich presented sufficient evidence in his Application for Post-Conviction Relief and Amended Application to warrant an evidentiary hearing on Issues I, II, and IV. This included newly discovered evidence consisting of an Open Records request response from the Office of the Attorney General supporting Issue IV, an Open Records request response from the Bureau of Criminal Investigation supporting Issue I, and Handwritten interview notes supporting Issue II. The Court should have proceeded with an evidentiary hearing on all issues as scheduled rather than just Issue III.

II. Did the Court err when it found that Kovalevich's new evidence was not newly discovered but merely newly acquired?

[¶26] The Court applied an unreasonable standard of diligence when evaluating prong two. The State argued and the Court agreed that Kovalevich should have taken several unreasonable steps to acquire the evidence prior to trial. First, upon receiving the CanadInn

reservations for February and August 2012 in discovery, Kovalevich would have had to assume that either the State was withholding additional records or that for some reason the BCI was unable to obtain additional records. This would not have been a reasonable assumption to make. An average person who believes in the fairness of our judicial system would assume the opposite, that the information they are given in discovery is full and complete. Kovalevich knew that he had stayed at the CanadInn more than once, so when presented with two reservation records this seemed perfectly normal. There would be no reason to investigate further.

[¶27] Secondly, even if Kovalevich had made the unreasonable assumption that he had not received all of the records from the CanadInn, he likely would not have been able to locate the additional record. To obtain the record, Kovalevich would have had to contact the CanadInn and request it. Prior to filing the Application for Post-Conviction Relief Kovalevich did just that. After receiving additional documents from S/A Zachmeier as part of a Motion for New Trial, Kovalevich began to question what other items may have been missed or not disclosed. On 4/6/17 Kovalevich contacted the CanadInn via letter stating that he had records from February 2012 and August 2012, and requesting that any additional records be provided to him. Over one month later CanadInn mailed a copy of the receipt for his August stay to Kovalevich. A reservation for this stay had already been obtained by BCI and turned over in discovery. Had Kovalevich contacted CanadInn prior to trial to make this request, the outcome would likely have been the same; resulting in him not obtaining the new record in question. On 5/30/18, Kovalevich sent a second request to CanadInn asking again for additional records. This time he received a response providing the July receipt, Kovalevich's newly discovered evidence. Upon receiving the receipt, Kovalevich determined that his name had inadvertently been spelled wrong when the reservation was made. The State glosses over the fact that Kovalevich initially did not

obtain any additional records. They wish for the Court to believe that it was easy to obtain the record and that had Kovalevich requested the record before trial it would have been immediately provided to him. This is an unreasonable expectation.

[¶28] Had Kovalevich contacted CanadInn pre-trial and not received any new records, it is likely that he would have accepted this result and continued with the assumption that he had all of the information that existed. However, the State suggests another unreasonable step that Kovalevich should have taken. The State argues that had no record been located, Kovalevich should have contacted his credit card companies, searched through the statements, located the date of the additional CanadInn trip, and presented the statement as evidence at trial. This strategy is based on information found on the receipt, which was not in Kovalevich's possession at the time; namely that a credit card was used to pay for the stay. Kovalevich had no idea at the time that there even was a July trip since he made frequent hotel stays and could not be expected to remember them all. Additionally, had the statement been located, the State would likely have objected to its admission into evidence at trial. The record of a charge made by CanadInn would not serve to prove or disprove that Kovalevich stayed at the hotel on the date of the charge. CanadInn, like most hotels, charges the guest's credit card whether they show up or not. This is the entire point of a credit card deposit for a reservation. Thus the theory that Kovalevich could have used his credit card receipt is unreasonable.

[¶29] The District Court adopted the State's arguments that Kovalevich could have easily obtained the July record prior to trial. In doing so, the Court applied an unreasonable standard of diligence. The second prong requires that failure to locate the evidence before trial not be due to the Defendant's lack of diligence. A defendant is expected to exercise reasonable diligence in locating relevant information prior to trial. This does not mean that all conceivable options must

be exhausted. Additionally, care should be used to avoid the corrective effect of hindsight in determining what is reasonable. Lastly, Respondent advanced the argument, and the Court included it in its decision, that Kovalevich knew about the July stay prior to trial and intentionally concealed this information to avoid a C Felony Corruption of a Minor charge for that date; and only presents it now because the statute of limitations has expired. This argument fails on more than one level. First, had Kovalevich known of the July stay, he would have immediately presented this information. Being charged with a C felony in exchange for the two AA felonies is an obvious choice. Even if the C felony was added in addition to the other three charges, any sentence received on it would more than likely run concurrent with the AA felonies. Secondly, the State incorrectly asserts that the statute of limitations has expired. In fact, the time to charge a sexual offense against a minor runs seven years from the minor's 15th birthday; which in this case is June 1997. The statute of limitations continues to run until June 2019. (N.D.C.C. § 29.04-03.1 and N.D.C.C. 29-04-03.2) The District Court expected Kovalevich to take steps that were inherently unreasonable at the time. Kovalevich exercised reasonable diligence and was unable to locate the record prior to trial; thus the record should be considered newly discovered and not merely newly acquired. Kovalevich has met prongs one and two.

III. Did the Court err by considering and including in its ruling, testimony and statements from the evidentiary hearing and closing arguments which contradict the evidence to which they refer? And if so, did this rise to the level of calling into question the integrity of all prior proceedings including the jury trial?

[¶30] ASA Larson called as a witness at the Evidentiary Hearing BCI S/A Craig Zachmeier. S/A Zachmeier was the agent who interviewed the S.M., was the lead investigator in the case, and testified at trial. ASA Larson was second chair counsel at trial. Both were very

familiar with the case. A transcript of the interview and trial were available. The interview transcripts were admitted into evidence at the Evidentiary Hearing as Exhibit 4 and Exhibit 5. During the hearing, in an attempt to show that the February dates, for which Kovalevich was charged with GSI, were the second trip that S.M. described, the following exchange took place between ASA Larson and her witness S/A Zachmeier.

> "Q. The second incident that she disclosed to you involved sexual activity, correct?"
>
> "A. Yes."
>
> "Q. And when did that take place?"
>
> "A. She said it was towards the end of January, that there was still snow on the ground on the second trip and that was followed up with a trip to Fargo."
>
> "Q. Were you able to find receipts that corroborated the allegations regarding the second incident?"
>
> "A. Yes
>
> "Q. What receipt was that?"
>
> "A. It was an early February receipt."
>
> (Evidentiary Hearing Transcript Pg. 34, Lns. 13-24)
>
> "Q. And was there other information that you were able to obtain that corroborated the victim's account of that incident?"
>
> "A. Yes"
>
> Q. What was that?"
>
> "A. They went shopping in Grand Forks, he had bought her stuff. She had some details she told me about. We have the trip to Fargo from here that we were able to get another receipt on."
>
> "Q. And so you were able to locate a receipt in Fargo, North Dakota, that corroborated her allegation that she had stayed in Grand Forks the second time in February."
>
> "A. Correct."
>
> "Q. And so from the, from your position, the February incident is the second time they traveled to Grand Forks and the first time sexual contact occurred?"
>
> "A. Correct."
>
> (Evidentiary Hearing Transcript Pg.35, Lns. 7-23)

"Q. And the second time, though, that she came to Grand Forks, she was very specific about the type of sexual contact that was perpetrated upon her, correct?"

"A. Yes."

"Q. And, in fact, it was more than one time."

"A. Yes."

"Q. And she was also very specific about going to Fargo afterwards, correct?"

"A. Yes."

"Q. And so you are certain that the second incident is the two charges from February of 2012?"

"A. Yes"

"Q. And she was very clear about that, correct?"

"A. Yes."

(Evidentiary Hearing Transcript Pg. 40, Lns. 3-16)

[¶31] It is obvious from the line of questioning that ASA Larson wishes to elicit testimony from S/A Zachmeier that S.M. described to him staying in Fargo after Grand Forks on the second trip. The receipt they refer to from Fargo is the Ramada Plaza receipt. This is made even more clear when ASA Larson asks very simply, "And she was also very specific about going to Fargo afterwards Correct?" (Evidentiary Hearing Transcript Pg. 40)

[¶32] This testimony would seem to show that S.M. told S/A Zachmeier that the second trip to CanadInn in Grand Forks, where she alleges sexual activity took place, was followed by a trip to Fargo. This would support the State's position that the second trip was in February. However, this is completely untrue. In fact, in the transcript of S/A Zachmeier's interview with S.M., she is very clear that she did not stay in Fargo after the second trip to Grand Forks. She states that she went to Fargo to go shopping. S/A Zachmeier clarifies: "C.Z. But you never stayed in Fargo?" "S.M. Uh-uh. (Negative)..." (BCI S.M. Interview #1 Pg. 29 of 73)

There is no ambiguity here, S.M. is clear. Additionally, no mention can be found in S.M.'s description of the second trip of there being snow on the ground as stated by S/A Zachmeier. Rather, S.M. mentions snow on the ground when describing the first trip. (BCI S.M. Interview #1 Pg. 19 of 73)

[¶33] ASA Larson assisted S/A Zachmeier in testifying falsely under at the evidentiary hearing. Both were involved in the case from the beginning and had access to all of the transcripts. This was not an accident; it was designed to support their position. Their statements are directly contradicted by the transcript of the interview to which they refer. Additionally, ASA Larson repeated the same false statement in her written closing argument. "S.M. told law enforcement the second trip, where sexual acts took place, was also during the winter around January of 2012, and that she travelled to Fargo subsequently. See Post-Conviction Hearing Exhibit 4, October 30, 2017, p.19." (Respondent's Closing Argument P.8, ¶4)

[¶34] This is simply not true. When we refer to the cited portion of the record, Exhibit 4, BCI Interview #1 at P.19, we find that S.M. is talking about her first trip to CanadInn. The interview is conducted in chronological order; S.M. does not begin to talk about her second trip until page 28, and it is on page 29 where she plainly states that she did not stay in Fargo on the second trip. Respondent uses the complicated fact pattern of this case to make statements which are clearly erroneous.

[¶35] In his written rebuttal closing argument at ¶4 Kovalevich pointed out to the Court that the statements made by Respondent were false and did not match the transcript to which she referred. Nevertheless the Court included the false statements and reference to the interview transcript in its order denying Kovalevich's Post-Conviction petition. The order states that

Kovalevich's argument may have merit if not for the Fargo stay mentioned by Respondent. (Order Denying Second Application for Post-Conviction Relief, Pg. 10, ¶19) The Court's order makes numerous mentions of the claimed trip to Fargo and incorporates them into the decision making process. As previously explained herein, these statements are not an accurate representation of what S.M. said in the interview. They represent a misleading narrative put forth by Respondent to change the focus of the hearing.

[¶36] The District Court erred by considering these false statements and incorporating them as an integral part of its ruling. In the Order Denying Second Application for Post-Conviction Relief ¶23 the Court states:

> "The victim told law enforcement the second trip, where sexual acts took place, was also during the winter around January of 2012, and that she and Kovalevich traveled to Fargo after that stay. See Post-Conviction Hearing Exhibit 4, p.29....Consistent with the victim's disclosure that they made a trip to Fargo following the February 3-6, 2012 stay, law enforcement located a corroborative receipt documenting Kovalevich's presence at a Fargo establishment. Such is significant corroborative documentation validating the victim's testimony that sexual acts occurred in connection with the early February stay at Canad Inns..."

[¶37] Here, the Court refers to the correct portion of the record, BCI S.M. Interview #1 P.29, but is clearly mistaken about what is actually said in that portion of the transcript. As previously mentioned, S.M. states on page 29 that she did not stay in Fargo after her second trip to Grand Forks. "C.Z. But you never stayed in Fargo? S.M. Uh-uh (Negative)" (BCI S.M. Interview #1 Pg. 29 of 73). It appears that the Court took Respondent's argument, changed the page citation from P.19 to P.29, and incorporated the argument into its ruling.

[¶38] This entire argument, when stated and cited correctly, significantly corroborates Kovalevich's view of the events. If, as stated on page 29 of the Interview Transcript, S.M. did not stay in Fargo after the second trip, the second trip could not have been Feb 3-6, 2012 because

the February trip was followed immediately by a trip to Fargo. Therefore, Feb 3-6 must have been the first trip, as argued by Kovalevich. Since S.M. stated that sexual acts occurred only on the second and third trips, even if these acts occurred Kovalevich could not have been charged with AA felony GSI because all remaining dates are after S.M.'s 15th birthday.

[¶39] Additionally, as discussed in Kovalevich's Proposed Order for Petitioner's Closing Argument, when S.M. describes her first trip to CanadInn she states that she stayed in the Penthouse, and describes the room in detail. (BCI S.M. Interview Transcript #1, P. 21 of 73). This matches perfectly with the CanadInn receipt for Feb 3-6 which was introduced at the evidentiary hearing as Exhibit 1. When describing her second trip to CanadInn, S.M. states that she stayed in a room that "wasn't really that fancy, just a room." (BCI S.M. Interview Transcript #1 P. 28) This again matches perfectly with Kovalevich's newly discovered evidence, the CanadInn receipt for a stay July 22-23, 2012 which was introduced as Exhibit 2. This was the only one of the three CanadInn receipts that was for what would be considered a regular room. Both the Feb 3-6 and Aug 13-15 receipts show "Executive King" as the room type. This is what CanadInn calls their Penthouse rooms as evidenced by the PH prefix on the room number as seen in Exhibit 3. The receipt for the July stay, Exhibit 2, shows a room number of 1214, a standard room. Thus according to S.M.'s description of the rooms, the second trip could not have been Feb 3-6 because this was a Penthouse room and she stated that the second trip was a regular room. The only regular room was July 22-23 as argued by Kovalevich. Kovalevich met Prongs three and four. The new evidence is clearly material to the issues at trial because it shows that the timeline presented by Respondent at trial is inaccurate. The evidence shows that even if sexual acts occurred as alleged, Kovalevich could not have been found guilty of AA GSI since S.M.

stated that no sexual acts occurred on the first trip, and the second and third trips occurred after her 15th birthday.

Conclusion

[¶40] Kovalevich met all four prongs required to grant relief based on newly discovered evidence. It was agreed that prong one was met. On prong two the Court applied an unreasonable standard of diligence using the benefit of hindsight to require Kovalevich to have taken steps a normal person would not have thought rational at the time. On prong three and four, the Court reached a decision that was not supported by the facts. The decision was based on a falsification of the facts as put forward by Respondent. This finding of fact was clearly erroneous.

[¶41] Additionally, the purposefully false testimony as to the contents of the BCI interview transcript, and false statements to the same effect in closing arguments calls into question the integrity of all prior proceedings; including the jury trial in this matter. If Respondent is willing to claim that a written transcript says the opposite of what it actually does, it is quite possible that prior proceedings have also been affected, in ways not so easily visible; denying Kovalevich a fair trial.

[¶42] Therefore Defendant prays that this Court vacate his conviction; or alternatively that the case be reversed and remanded for a new trial, or any other relief the Court deems appropriate.

Sean Michael Kovalevich #39835
Plaintiff/Appellant
North Dakota State Penitentiary
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Bismarck, ND 58506

IN THE SUPREME COURT OF NORTH DAKOTA

Sean Michael Kovalevich, Petitioner/Appellant Vs. State of North Dakota, Respondent/Appellee	Supreme Court No. 201800109 District Court No. 18-2017-CV-957 **Affidavit of Service by Mail**

[¶1] Sean Michael Kovalevich being duly sworn, deposes and states that he is of legal age and that on the 13th day of June 2018, he served the **Supplemental Statement** and **Appendix** in Supreme Court No. 201800109 by mail directed to the following persons and addresses by placing them in the U.S. Mail at the North Dakota State Penitentiary with postage prepaid.

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Subscribed and sworn to before me this 13th day of June 2018

Sean Michael Kovalevich
Petitioner/Appellant
North Dakota State Penitentiary
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Notary Public

BARBARA J. BAILEY
Notary Public
State of North Dakota
My Commission Expires June 19, 2020