

IN THE SUPREME COURT OF IOWA  
SUPREME COURT NO. 16-0860

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CHARLES NICHOLAS,

Petitioner-Appellant,

vs.

STATE OF IOWA,

Respondent-Appellee.

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**APPEAL FROM THE DISTRICT COURT OF DALLAS COUNTY  
HONORABLE GREGORY A. HULSE, JUDGE**

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**APPELLANT'S BRIEF**

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## PROOF OF SERVICE

On the 1<sup>st</sup> day of November, 2016, I, the undersigned, did serve the within Brief upon Appellee's counsel by filing it with the Clerk of Court via EDMS.

## CERTIFICATE OF FILING

I certify that on the 1<sup>st</sup> day of November, 2016, I filed the within Brief with the Clerk of the Supreme Court via EDMS.

Respectfully submitted,

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**ISSUE PRESENTED FOR REVIEW**

Brief Point I: Whether summary judgment should have been granted

Fryer v. State, 325 N.W.2d 400 (Iowa 1982)

Jones v. State, 479 N.W.2d 265 (Iowa 1991)

Manning v. State, 654 N.W.2d 555 (Iowa 2002)

Walters v. State, No. 12-2022, 2014 WL 69589 (Iowa Ct. App.)

Iowa Code Section 822.3

## **ROUTING STATEMENT**

This case should be retained by the Iowa Supreme Court because it presents a substantial issue of first impression. Specifically, it presents the question of whether a postconviction applicant who entered a guilty plea is precluded from raising an issue of newly discovered evidence in a postconviction proceeding.

## **STATEMENT OF THE CASE**

This appeal arises from the district court's grant of a motion for summary judgment in a postconviction case filed in the Iowa District Court for Dallas County.

Charles Nicholes filed his application for postconviction relief on or about May 21, 2015. The criminal conviction Mr. Nicholes is challenging was entered on or about March 17, 2005, when Mr. Nicholes pled guilty to and was sentenced on a charge of indecent exposure. The ground of fact forming the basis for the postconviction application was stated to be "witnesses who were present during said crime will testify to the fact that said crime never occurred (sic)". (PCR Appl.; Appl. 2.)

Following the appointment of an attorney to represent Mr. Nicholes, an amended application was filed which essentially stated two grounds for relief: (1) newly discovered evidence, and (2) ineffective assistance of trial attorney. (Amended PCR Appl.; App. 9.)



On or about March 4, 2015, the State filed a motion for summary judgment in which it argued the PCR application was untimely filed because it was filed after the statute of limitations had run and newly discovered evidence does not provide a ground of fact or law which allows an application for postconviction relief to be filed beyond the statutory three-year statute of limitations. The State also argued that the alleged newly discovered evidence did not qualify as newly discovered evidence and that there was no issue of material fact to support the claim of ineffective assistance of counsel. (MSJ; App. 13.) An unreported hearing was held on that motion.

The Postconviction Court later entered an order granting the motion for summary judgment and dismissing the case. (PCR Ruling; App. 64.)

Mr. Nicholes then filed a timely notice of appeal and that appeal is now before this Court. (Notice of Appeal; App. 75.)

### **STATEMENT OF THE FACTS**

On or about January 20, 2005, a trial information was filed in the Dallas County District Court charging Charles Nicholes with five (5) counts of Indecent Exposure, in violation of Iowa Code Section 709.9, a serious misdemeanor. (TI; App. 41.) Count I was alleged to have occurred on January 5, 2005; the other four counts were alleged to have occurred on January 9, 2005. The names of the alleged victims, who were all minors, were not included on the Trial Information.

The Minutes of Testimony identify the victim of Count I as Jane Doe<sup>1</sup> and then gives Jane Doe's name and date of birth. (Minutes of Testimony, p. 1; App. 44.)

On or about March 17, 2005, Mr. Nicholes filed a written waiver of rights and plea of guilty to count I. (Waiver of Rights; App. 57.) His guilty plea was accepted by the trial court and he was sentenced that same day to 365 days in jail with all but 66 days suspended. (Judgment; App. 61.)

Mr. Nicholes did not appeal his conviction.

On or about May 21, 2015 Mr. Nicholes filed an application for postconviction relief in which he challenged the conviction and sentence on the basis that witnesses who were present when the crime occurred would testify that no crime was committed. (PCR Appl., p 3; App. 2.) After an attorney was appointed to represent Mr. Nicholes an amended application was filed stating that the issues to be considered were newly discovered evidence in that the alleged victim was stating that the incident never happened and ineffective assistance of counsel for failure to properly investigate the case so that the guilty plea was the result of faulty advice and, therefore, not knowing, voluntary and intelligent. (Amended PCR, p 2-3; App. 10-11.)

The State thereafter filed a motion for summary judgment arguing the application was untimely filed and attacking the merits of the two issues raised in

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<sup>1</sup> Jane Doe is the witness who forms the basis of the claim of newly discovered evidence and will hereinafter be referred to in this Brief as "Jane Doe" rather than by her given name.

the amended application. (MSJ; App. 13.) Specifically, the State argued the application was filed after the relevant three-year statute of limitations had run and that the alleged newly discovered evidence in the form of a witness's recantation did not qualify as a ground of fact or law which could not have been raised before the statute of limitations expired. As to the merits of the two claims, the State argued the alleged newly discovered evidence was not newly discovered in that it could have been discovered earlier and that the alleged ineffective assistance of counsel did not affect Mr. Nicholes' decision to enter a guilty plea. (MSJ; App. 13.)

Numerous documents were submitted to the Postconviction Court in connection with the motion for summary judgment including the depositions of Mr. Nicholes, Jane Doe, and Jane Doe's mother.

An affidavit from Jane Doe was also submitted. In her affidavit Jane Doe states that Mr. Nicholes did not intentionally expose his penis to her as alleged in the trial information and minutes of testimony. She states he was watching TV with her and the alleged victims of the other counts and that when he rolled off the couch, his penis briefly and accidentally slipped out of the front of the pajama pants he was wearing. Mr. Nicholes quickly adjusted himself and apologized. Jane Doe further states that she was never questioned by the police or Mr. Nicholes' attorney about what had happened. (Applicant's Ex. 1; App. 19.)



During her deposition, taken on December 22, 2015, Jane stated she was now 19 years of age. (Jane Doe Depo. 4, lines 23-24; App. 35.) She was age six when the incident happened. (Jane Doe Depo. 6, lines 8-9; App. 36.) She said she was questioned about the incident when she was age six. The questions had come from her mother and stepmother after her sister reported the incident to her stepmother. She told her mother and stepmother that Mr. Nicholes had rolled off the sofa and his penis fell out, he said he was sorry and put it away. (Jane Doe Depo. 6, line 21 – 7, line 18; App. 36.) She was not questioned by any other adults.

Jane has talked to Mr. Nicholes about the incident several times over the years since it happened. (See Jane Doe Depo. 16, lines 1-19; App. 38.) But she said her mother's paramour/wife had prevented her from talking about it to other adults until she turned eighteen (18). (Jane Doe Depo. 18, line 18 -19, line 11; App. 39.) She first talked to her mother about coming forward to correct the record when she was about ten and was told she was too young to remember what happened. She had the same conversation with her mom and stepmom a couple of other times over the years. (Jane Doe Depo. 19, line 16 – 20, line 6; App. 39.) After turning eighteen (18) she spoke directly to Mr. Nicholes about her desire to correct the record. (Jane Doe Depo. 20, lines 16-18; App.39.)

Jane Doe's mother [hereinafter referred to as K.N.] was also deposed. She verified that Mr. Nicholes had been living with her at the time of the incident and had been sleeping on the couch. (K.N. Depo. 6, lines 9-13; App. 22.) She testified that the information provided at the time of the incident was incorrect. Jane had told her what happened but it somehow got changed to what the other minors were saying had happened multiple times. (K.N. Depo. 15, lines 9-15; App. 24.) K.N. provided a written statement to the police at the time of the incident which was consistent with the charges brought against Mr. Nicholes. She was shown the statement during the deposition and asked if she had ever told Mr. Nicholes that her written statement was not true. She replied that she had not done so until 2015. (K.N. Depo. 15, line 16 – 16, lines 17; App. 24.) Upon further questioning about the incident and her written statement, K.N. stated that she did not know what really happened; all she had was the statements of multiple children which kept changing. (K.N. Depo. 18, line 11 – 19, lines 17; App. 25.)

Mr. Nicholes was also deposed for purposes of the motion for summary judgment. He said he was released from prison in October of 2015. (Nicholes Depo. 4, lines 21-24; App. 26.) He first learned of Jane Doe's statements regarding what happened when he was speaking to her via telephone approximately one year before he was released and she asked him how to go about getting his conviction overturned. (Nicholes Depo. 7, line 17- 8, line 5; App. 27.)

He admitted he had contact with Jane prior to that date. (Nicholes Depo. 21, line 10 – 22, line 6; App. 31.)

Regarding his guilty plea, Mr. Nicholes agreed he had received and reviewed the trial information, minutes of testimony, and attached police reports including the written statements of the mothers of the alleged victims. (Nicholes Depo. 26, line 16 – 28, line 7; App. 32.) He had discussed the information in these documents with his attorney. (Nicholes Depo. 28, lines 19-22; App.32.) This discussion took place on the day he entered his guilty plea. Mr. Nicholes told his attorney he was not comfortable pleading guilty; his attorney responded that he could take it to trial but the attorney also indicated that the attorney did not think they would “have a case.” (Nicholes Depo. 29, lines 1-10; App. 33.) Mr. Nicholes stated it was his decision to plead guilty. (Nicholes Depo. 35, lines 2-13; App. 34.)

**BRIEF POINT I: WHETHER SUMMARY JUDGMENT SHOULD HAVE BEEN GRANTED**

Preservation of issue: The State filed a motion for summary judgment which was granted. The issue of whether or not it was appropriate to grant summary judgment is therefore preserved for consideration in this appeal. (PCR Ruling; App. 64.)

Standard of Review: Postconviction relief proceedings are reviewed for correction of errors at law. *Manning v. State*, 654 N.W.2d 555, 558-59 (Iowa 2002) (citation omitted).



The Law and Argument: The rules of summary judgment in a civil proceeding are applied to a motion for summary disposition in a postconviction proceeding. *Manning*, 654 N.W.2d at 560. Consequently, summary disposition is proper only when there is no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. *Id.* (citation omitted). The movant has the burden of proof to show the nonexistence of a material fact; the court must consider all materials presented to it in the light most favorable to the nonmoving party. *Id.* (citation omitted). A genuine issue of material fact exists if reasonable minds could draw different inferences and reach different conclusions from the undisputed facts. *Id.* (citation omitted).

In its ruling, the Postconviction Court addressed the three issues before it as follows:

1. The court found a postconviction applicant who enters a guilty plea is precluded from raising an issue of newly discovered evidence (PCR Ruling 7; App. 70);
2. The court found that the alleged newly discovered evidence could have been discovered earlier because Mr. Nicholes was in contact with the victim shortly after his guilty plea (PCR Ruling 7; App. 70.);
3. There is no issue of material fact regarding the claim of ineffective assistance of counsel for failure to investigate because Mr Nicholes knew of this failure prior to pleading guilty (PCR Ruling 8-9; App. 71-72.).

This brief will address the first two issues.

#### A. THE POSTCONVICTION COURT ALTERED THE ELEMENTS OF A CLAIM OF NEWLY DISCOVERED EVIDENCE



The Postconviction Court found that Mr. Nicholes was precluded from raising a claim of newly discovered evidence because newly discovered evidence cannot be a ground of fact or law which allows a postconviction action to be filed after the three-year statute of limitations has run. (PCR Ruling 7; App. 70.) The Postconviction Court relied solely upon an unpublished opinion of the Iowa Court of Appeals to support this finding. Specifically, the court relied upon the statement in *Walters v. State*, No. 12-2022, 2014 WL 69589 (Iowa App., Jan. 9, 2014), that when a postconviction applicant who entered a guilty plea brings a claim of newly discovered evidence the ground of fact or law he is raising in avoidance of the three-year statute of limitations is not a claim of newly discovered evidence but a claim of actual innocence. (PCR Ruling 6; App. 69.) Actual innocence is something that is known to the applicant at the time of guilty plea so that it could have and should have been raised before the statute of limitations has run; further, a claim of actual innocence is waived by the guilty plea. (PCR Ruling 6-7; App. 69-70.)

Although it is true that actual innocence is something that is known to a defendant at the time he enters a guilty plea, it is not true that a postconviction action raising that claim alone can be raised and won within three years of the time the conviction becomes final as required by Section 822.3 of the Iowa Code. This is so because a postconviction applicant bears the burden of proof in regard to any

claim he may bring. Specifically, the applicant must prove his claim by a preponderance of the evidence. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). Consequently, a postconviction applicant must provide evidence to the court which supports his claim; his bare assertion that a claim is meritorious will not meet this burden of proof. In other words, a postconviction applicant whose sole claim is that he is innocent will have to provide evidence to a court which supports this claim. An applicant who merely testifies that he is innocent, regardless of whether he went to trial or pled guilty, will not meet his burden of proof. He needs some evidence which supports that claims. Consequently, it is somewhat disingenuous to say that a claim of actual innocence can be brought within the statute of limitations – it can be raised but without evidence to support it, it will be lost.

Further, equating a claim of newly discovered evidence with a claim of actual innocence changes one of the elements of a claim of newly discovered evidence. A claim of actual innocence is exactly that – a claim that the defendant is innocent. In order to succeed on the claim, the defendant must prove his innocence. In contrast, a claim of newly discovered evidence is not a claim that the defendant is innocent but a claim that he would not have been convicted at trial. This is so because one of the four (4) elements of a claim of newly discovered evidence is that the evidence probably would have changed the outcome of the trial. *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991) (citation omitted). Proving the outcome

would probably have been different is not the same as proving innocence. By equating Mr. Nicholes' claim of newly discovered evidence with a claim of actual innocence, the Postconviction Court essentially changed this last element of a claim of newly discovered evidence and therefore erred as a matter of law.

**B. THERE IS A DISPUTE OF MATERIAL FACT ON THE CLAIM OF  
NEWLY DISCOVERED EVIDENCE**

After it altered the elements of a claim of newly discovered evidence by equating that claim with a claim of actual innocence, the Postconviction Court found that even if such a claim could be raised by Mr. Nicholes, his claim was not newly discovered because he had been in contact with Jane Doe and her mother shortly after he pled guilty. (PCR Ruling 7; App. 70.) In other words, this information was “newly” discovered because it was known shortly after the guilty plea. This finding ignores all of the evidence put before the court and fails to view that evidence in the light most favorable to Mr. Nicholes. The Postconviction Court therefore erred as a matter of law.

A review of all of the evidence provided to the Postconviction Court shows that Mr. Nicholes did have contact with Jane Doe and her mother periodically beginning shortly after he pled guilty. Further, Jane Doe testified during her deposition that she had talked to Mr. Nicholes about the incident while she was still a minor. (See Jane Doe Depo. 16, lines 1-19; App. 38.) But she said her mother's paramour/wife had prevented her from talking about it to other adults



until she turned eighteen (18). (Jane Doe Depo. 18, line 18 -19, line 11; App. 39.)

Jane also stated that she first talked to her mother about coming forward to correct the record when she was about ten and was told she was too young to remember what happened. She had the same conversation with her mom and stepmom a couple of other times over the years. (Jane Doe Depo. 19, line 16 – 20, line 6; App. 39.) After turning eighteen (18) she spoke directly to Mr. Nicholes about her desire to correct the record. (Jane Doe Depo. 20, lines 16-18; App. 39.)

When this evidence is viewed in a light that is favorable to Mr. Nicholes, it establishes a dispute as to a material fact. Specifically, at the very least, it shows there is a dispute as to whether or not Jane Doe's testimony could have been "discovered" before she turned eighteen. She may have provided the information to Mr. Nicholes at an earlier point in time but until she turned eighteen, her mother had control of her contact with law enforcement and, by Jane's testimony, prevented this contact from occurring. Jane's version of what happened could not realistically be "discovered" and form the basis of a claim of newly discovered evidence until it could be brought into court. It was therefore not discovered (or discoverable) until she turned eighteen and her mother could no longer prevent her from testifying. There is therefore a dispute regarding a material fact so that the Postconviction Court erred as a matter of law when it granted the motion for summary judgment on the claim of newly discovered evidence.



## **CONCLUSION**

The Postconviction Court erred as a matter of law in two respects. First, when it equated a claim of newly discovered evidence with a claim of actual innocence that could have been raised within the three-year statute of limitations. Second, when it found no dispute as to material fact on the claim of newly discovered evidence. The grant of the motion for summary judgment should be reversed and this case remanded for an evidentiary hearing in the claim of newly discovered evidence centered on the testimony of Jane Doe.

## **STATEMENT OF DESIRE TO BE HEARD IN ORAL ARGUMENT**

Appellant hereby requests to be heard in oral argument upon submission of this case.

Respectfully submitted,

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Susan R. Stockdale, AT0007533

## **CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitation of Iowa R.App.P. 6.903(1)(g)(1) or (2) because:

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Nov. 1, 2016

Date