IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-0860

CHARLES NICHOLES,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR DALLAS COUNTY
THE HONORABLE GREGORY A. HULSE, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

The Supreme Court should not retain this case because our appellate courts have consistently ruled that a person who pled guilty cannot challenge his or her admission of guilt with a claim of newly discovered evidence. *See State v. Alexander*, 463 N.W.2d 421, 423 (Iowa 1990) ("Notions of newly discovered evidence simply have no bearing on a knowing and voluntary admission of guilt."); *see also Walters v. State*, No. 12-2022, 2014 WL 69589, at *6 (Iowa Ct. App. Jan. 9, 2014) (". . . [A] conviction based on a guilty plea that satisfied all legal requirements cannot be successfully challenged in a postconviction proceeding by claiming an alleged victim recantation is new evidence."); *Schmidt v. State*, No. 15-1408, 2016 WL 4384697, at *1 (Iowa Ct. App. Aug. 17, 2016) ("[W]e find the analysis and reasoning in *Walters* to be spot-on.").

Because this case involves the application of existing legal principles, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Applicant Charles Nicholes appeals the dismissal of his application for postconviction relief concerning his 2005 conviction for indecent exposure.

Course of Proceedings

On January 20, 2005, applicant Nicholes was charged with five counts of indecent exposure, each a serious misdemeanor in violation of Iowa Code section 709.9. PCR Ex. 5 (SRCR028357 Trial Information); App. 41. Three months later he accepted a plea agreement and entered a written guilty plea for one count of indecent exposure. PCR Ex. 7 (Written Plea); App. 57. The court gave him a suspended sentence and probation. PCR Ex. 8 (Judgment); App. 61. He did not pursue a direct appeal.

More than ten years later, Nicholes filed an application for postconviction relief. PCR Appl. (5/21/2015); App. 1. The State answered with a motion to dismiss, which the district court denied. Motion to Dismiss (6/10/2015), Order (7/31/2015); App. 5, 7. Nicholes's attorney then filed an amended PCR application. Amended Appl. (8/28/2015); App. 9.

The State filed a motion for summary disposition. Motion (3/4/2016); App. 13. The district court granted the motion. Order (4/20/2016); App. 64. Nicholes appeals. Notice (5/18/2016); App. 75.

Facts

According to the minutes of testimony, in January 2005 applicant Nicholes (then 21 years old) pulled down his pants and exposed his penis to his niece (T.N.), her friend, and three other household members. PCR Ex. 5 (Minutes); App. 44. The five victims ranged in age from 4 to 9 years old. PCR Ex. 5; App. 44–45. Nicholes laughed as he exposed his penis. PCR Ex. 5; App. 44. He instructed the children not to tell anyone, warning he would not give them piggyback rides anymore. PCR Ex. 5; App. 44.

One girl told her mother what Nicholes had done, and when questioned each of the children confirmed that Nicholes had pulled down his pants in front of them on different occasions. PCR Ex. 5 (police report); App. 50. In particular, T.N. told her mother (Kathy) that after Nicholes pulled down his pants T.N. told him, "Don't do that." PCR Ex. 5 (Kathy statement); App. 55. Nicholes ignored her, turned toward a younger boy, and pulled down his pants so the boy

could see. PCR Ex. 5 (Kathy statement); App. 55. T.N. explained that Nicholes pulled down his pants "a lot" when her mother and her mother's significant other were not home or were still in bed. PCR Ex. 5 (Kathy statement); App. 55.

When Nicholes pled guilty to indecent exposure, he admitted:

> I now state to the Court that I am in fact guilty of [indecent exposure]. In entering that plea of guilty, I admit that on the date alleged in the trial information, in Dallas County, I did expose my genitals or pubes to another not my spouse for the purposes of arousing or satisfying the sexual desire of myself.

PCR Ex. 7 (Written plea) ¶ II; App. 58. He also agreed that the court could examine the minutes of testimony and police reports to determine the factual basis. PCR Ex. 7 ¶ II(A); App. 58.

In 2015, Nicholes presented an affidavit signed by T.N. stating Nicholes "did not expose himself as alleged in the police reports." T.N. Affidavit; App. 19. Instead, T.N. claimed that while watching a movie Nicholes "rolled off the couch [and] his penis very briefly and accidentally slipped out from the front part of his pants." T.N. Affidavit; App. 19. She claimed that as a minor she was not allowed to tell her version of events, but after she became an adult she decided to

tell that "Nicholes never exposed himself to me, my sister, or [K.T.]." T.N. Affidavit; App. 20.

T.N. testified that in 2005 she told the adults that while Nicholes was sleeping on the couch he rolled over and "it fell out." PCR Ex. 4 (T.N. Depo.) p. 6, line 5 – p. 7, line 13; App. 36. T.N. recalled that Nicholes returned to the house following his release from jail in March 2005 until he was arrested again in July 2005. PCR Ex. 4 p. 11, line 7 – p. 13, line 24; App. 37–38. And when Nicholes was released again in 2009 or 2010, he returned to live with T.N. and her family. PCR Ex. 4 p. 13, line 25 – p. 15, line 25; App. 38. T.N. testified that during that time she told Nicholes what she claimed happened. PCR Ex. 4 p. 16, lines 1–11; App. 38. More recently, T.N. met with the "attorney guy" and signed a paper. PCR Ex. 4 p. 16, line 12 – p. 17, line 6; App. 38–39.

T.N.'s mother, Kathy, testified in deposition that she had known the falsity of the police report "from the get-go." PCR Ex. 2 (Kathy Depo.) p. 15, lines 3–15; App. 24. Despite what she handwrote in her statement to police, she said T.N. had always told her "that Charlie was sleeping, he rolled over, it came out." PCR Ex. 2 p. 17, lines 2–15; App. 25. Kathy even claimed she told police that "Everybody is in

agreement that he was sleeping on the couch, he rolled over and it fell out." PCR Ex. 2 p. 19, lines 2–17; App. 25. She testified she never had a chance to tell Nicholes (her brother) about the falsity of her handwritten statement. PCR Ex. 2 p. 15, line 16 – p. 16, line 6; App. 24. Even though she knew Nicholes was in jail, she never visited him, mailed him a letter, or talked to him on the phone about the allegations. PCR Ex. 2 p. 17, line 16 – p. 19, line 1; App. 25.

Nicholes testified that he first learned of T.N.'s changed story in 2014. PCR Ex. 3 (Nicholes Depo.) p. 7, line 17 – p. 10, line 14; App. 27–28. Nicholes also agreed that he was in contact with T.N. and Kathy shortly after his conviction in 2005, and he conceded that he had access to mail and phones while incarcerated. PCR Ex. 3 p. 17, lines 4–21, p. 21, line 10 – p. 22, line 12; App. 30, 31.

Nicholes had the opportunity to read the trial information, minutes, police report, and witness statements before he accepted the plea agreement. PCR Ex. 3 p. 27, line 25 – p. 28, line 19; App. 32. He talked with his attorney and communicated that he "wasn't comfortable with the guilty plea." PCR Ex. 3 p. 28, line 20 – p. 29, line 4; App. 32–33. Nicholes said he "quite bluntly" told his attorney that he did not commit the crime, but his attorney advised there was a

"very high probability" he would lose at trial. PCR Ex. 33, lines 14–25; App. 34. His attorney explained his options of either accepting the plea agreement or going to trial. PCR Ex. 3 p. 34, lines 1–6; App. 34. Nicholes claimed that when he asked his attorney to investigate more, his attorney advised that accepting the plea agreement would likely result in his immediate release from custody and that further investigation might prompt the prosecutor to withdraw the plea offer. PCR Ex. 3 p. 34, line 7 – p. 35, line 13; App. 34. Nicholes chose to accept the plea offer and signed a written plea admitting that he had exposed himself to satisfy his sexual desires. PCR Ex. 3 p. 32, line 8 – p. 33, line 10; App. 33–34. He agreed that by signing the document he was "telling the court that's what [he] did." PCR Ex. 3 p. 33, lines 11–13; App. 34.

ARGUMENT

I. The District Court Properly Granted Summary Judgment to Dismiss Nicholes's Untimely and Dilatory PCR Application.

Preservation of Error

Nicholes erroneously argues that the State's motion for summary judgment preserved the error he raises on appeal. *See* Applicant's Br. at 7. In some circumstances, "a party faced with a motion for summary judgment can rely upon the district court to

correctly apply the law and deny summary judgment when the moving party fails to establish it is entitled to judgment as a matter of law." *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 27–28 (Iowa 2005). However,

> if the movant has failed to establish its claim and the court nevertheless enters judgment, the nonmovant must at least preserve error by filing a motion following the entry of judgment, allowing the district court to consider the claim of deficiency.

Id. at 28 (citing *Bill Grunder's Sons Constr., Inc. v. Ganzer*, 686 N.W.2d 193, 197–98 (Iowa 2004)). If the non-moving party fails to object to a particular issue, then error is preserved only if the "motion for summary judgment presented the issue to the district court and the district court ruled on it." *Id.*

Nicholes did not preserve error for one of the issues he presents on appeal. He contends the district court "altered the elements of a claim of newly discovered evidence." Applicant's Br. at 9. But the district court's ruling did not address any request to alter the elements of the test for newly-discovered evidence, so it did not preserve the issue Nicholes presents on appeal. Additionally, Nicholes did not file a written resistance to the State's motion, he has not provided a record any oral objection from the unreported hearing,

and he did not file a motion to reconsider to address any deficiency in the district court's ruling. Accordingly, this Court should decline to consider Nicholes's unpreserved claim.

Standard of Review

"Our review of the court's ruling on the State's statute-of-limitations defense is for correction of errors of law." *Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003).

Discussion

The district court properly concluded that Nicholes could have pursued his claim before expiration of the three-year statute of limitations. First, the claimed newly discovered evidence does not qualify as a new "ground of fact" to escape the limitations period following his guilty plea. Second, the supposed newly discovered evidence could have been presented earlier through the exercise of due diligence. Consequently, this Court should affirm the summary judgment dismissing Nicholes's untimely PCR claim.[1]

[1] In the district court Nicholes also presented a claim of ineffective assistance, but he has waived that claim by choosing not to address it on appeal. *See* Applicant's Br. at 8–9 ("In its ruling, the Postconviction Court addressed the three issues . . . This brief will address the first two issues."); *see also* Iowa R. App. P. 6.903(2)(g)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue.").

A. The claimed newly discovered evidence does not meet the "ground of fact" exception.

Nicholes filed his second PCR application late. PCR applications like his "must be filed within three years from the date the conviction or decision is final or, in the event of an appeal, from the date the writ of procedendo is issued." Iowa Code § 822.3 (2013). Nicholes's conviction was final when the court entered judgment on March 17, 2005. PCR Ex. 8 (Judgment); App. 61. He filed his PCR application more than ten years later on May 21, 2015. PCR Appl.; App. 1. Thus, he failed to comply with the three-year statute of limitations.

Nicholes's only avenue for relief is to fit his claim into the exception to the three-year statute of limitations: "[T]his limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period." Iowa Code § 822.3. In attempting to qualify for this exception, Nicholes misidentifies the "ground of fact" at play in his case.

A convicted person can seek postconviction relief when "[t]here exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of

justice." Iowa Code § 822.2(1)(d) (2013). The applicant must prove all of the following:

> (1) that the evidence was discovered after the verdict; (2) that it could not have been discovered earlier in the exercise of due diligence; (3) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) that the evidence probably would have changed the result of the trial.

Harrington v. State, 659 N.W.2d 509, 516 (Iowa 2003) (citing *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991)).

The doctrine of newly discovered evidence only works for people who were convicted at trial. The test itself presupposes that the convicted person challenged the State's evidence at trial—the new evidence must have been discovered "after the verdict" and the evidence must create a probability of changing "the result of trial." *Id.* This test provides the convicted person an opportunity to present newfound reasonable doubt that undermines the jury's verdict. Just as the person forced the State to prove the charge at trial, a claim of newly discovered evidence resurrects the convicted person's insistence that the evidence prove guilt beyond a reasonable doubt.

A defendant like Nicholes who pled guilty cannot rely on newly discovered evidence to attack a finding of guilt. He purports to be

pursuing a claim "that he would not have been convicted at trial." Applicant's Br. at 11. But unlike a defendant who insisted on trial, Nicholes's guilty plea waived his right to be found guilty with proof beyond a reasonable doubt. *See State v. Speed*, 573 N.W.2d 594, 596 (Iowa 1998) ("[I]tis well settled that a plea of guilty waives all defenses or objections which are not intrinsic to the plea itself." (quotation omitted)). A court accepting a guilty plea "must only be satisfied that the facts support the crime, 'not necessarily that the defendant is guilty.'" *State v. Keene*, 630 N.W.2d 579, 581 (Iowa 2001) (quotation omitted). Therefore, only the factual basis—not proof beyond a reasonable doubt—was intrinsic to Nicholes's guilty plea. And he satisfied that factual basis by admitting he exposed his genitals to gratify his sexual desires. *See* PCR Ex. 7 (Written plea); App. 58.

Likewise, Nicholes cannot rely on newly discovered evidence to challenge the voluntariness of his guilty plea. He seems to argue that he would no longer choose to plead guilty after learning of T.N.'s story that his penis "fell out" of his pants while sleeping. *See* Amended PCR Appl. at 3; App. 11. But the Court has previously rejected a similar argument concerning new exculpatory evidence bearing upon

a defendant's decision to plead guilty: "This argument fails to distinguish between a defendant's tactical rationale for pleading guilty and a defendant's understanding of what a plea means and his or her choice to voluntarily enter the plea." *Speed*, 573 N.W.2d at 596; *see also State v. Alexander*, 463 N.W.2d 421, 423 (Iowa 1990) ("Notions of newly discovered evidence simply have no bearing on a knowing and voluntary admission of guilt."). Nicholes was present when the children saw his penis, so he could have pursued the "wardrobe malfunction" defense if his exposure were truly accidental. But rather than risk a less certain outcome at trial, he voluntarily chose to admit his guilt with full knowledge of the rights he was waiving and the consequences of his decision. His plea was a "lid on the box," not a platform for pursue further challenges to his guilt. *See Kyle v. State*, 322 N.W.2d 299, 304 (Iowa 1982). Because Nicholes's guilty plea waived all defenses that were not intrinsic to his plea, he cannot rely on T.N.'s recantation as newly discovered evidence. *See Speed*, 573 N.W.2d at 596 ("Any subsequently-discovered deficiency in the State's case that affects a defendant's assessment of the evidence against him, but not the knowing and voluntary nature of the plea, is not intrinsic to the plea itself.").

The Court has already addressed a similar claim in *Walters v. State*, No. 12-2022, 2014 WL 69589 (Iowa Ct. App. Jan. 9, 2014). In *Walters*, the applicant who had pled guilty to sexual abuse sought postconviction relief more than ten years later when his victim recanted. *Id.* at *1–2. The Court found that his claim of actual innocence—not the recantation itself—was the "ground of fact" at play in his case. *Id.* at *5–6. The Court concluded the applicant's focus on the recantation was a "backdoor approach" to set aside his guilty plea. *Id.* at *6. Also, the Court determined the applicant could not overcome the "in the interest of justice" hurdle of the PCR statute's newly discovered evidence provision:

> An alleged recantation does not un-waive his defenses or objections and does not remove the lid from the box. We hold that "in the interest of justice" requires that a conviction based on a guilty plea that satisfied all legal requirements cannot be successfully challenged in a postconviction proceeding by claiming an alleged victim recantation is new evidence.

Id. Recently the Court reaffirmed its holding from *Walters*. *See Schmidt v. State*, No. 15-1408, 2016 WL 4384697, at *1 (Iowa Ct. App. Aug. 17, 2016) ("[W]e find the analysis and reasoning in *Walters* to be spot-on.").

The district court properly analogized Nicholes's case to *Walters*. *See* PCR Ruling at 6–7; App. 69–70 (concluding *Walters*'s "reasoning is sound"). Like *Walters*, Nicholes challenges his conviction for a sex offense with a victim recantation he alleged was uncovered more than ten years after his guilty plea. Like *Walters*, Nicholes's waived all objections and defenses that were not intrinsic to his guilty plea. And like *Walters*, the victim's recantation was not intrinsic to his plea and does not constitute a "ground of fact" that would permit Nicholes to accomplish a "backdoor approach" to set aside his guilty plea.

The State was entitled to judgment as a matter of law. A victim's supposed recantation is not a new "ground of fact" to excuse an untimely PCR application. Accordingly, the district court properly granted summary judgment to dispose of Nichole's untimely and improper PCR claim.

B. As a matter of law, Nicholes could have pursued T.N.'s recantation earlier by exercising due diligence.

Even assuming Nicholes could pursue a claim of newly discovered evidence after his guilty plea, he cannot—as a matter of

law—prove such a claim. Postconviction relief procedure permits the district court to summarily dispose of meritless cases like his:

> The court may grant a motion by either party for summary disposition of the application, when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Iowa Code § 822.6 (2013). This procedure "is analogous to the summary judgment procedure" in the Rules of Civil Procedure. *Manning v. State*, 645 N.W.2d 555, 559 (Iowa 2002). "Therefore, the principles underlying summary judgment procedure apply to motions of either party for disposition of an application for postconviction relief without a trial on the merits." *Id.* at 560. Summary disposition is proper "when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id.*

Nicholes's claim of newly discovered evidence required him to prove:

> (1) that the evidence was discovered after the verdict; (2) that it could not have been discovered earlier in the exercise of due diligence; (3) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) that the

> evidence probably would have changed the result of the trial.

Harrington v. State, 659 N.W.2d 509, 516 (Iowa 2003) (citing *Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991)). Motions for new trial based on newly discovered evidence are "not favored and should be closely scrutinized and granted sparingly." *State v. Kramer*, 231 N.W.2d 874, 881 (Iowa 1975).

The district court concluded that under the undisputed facts Nicholes was unable to demonstrate the element of due diligence. *See* PCR Ruling at 7; App. 70 ("[T]here is further no dispute that the Applicant could have reasonably discovered it within the three years following his conviction."). "The showing of diligence required is that a reasonable effort was made." *State v. Compiano*, 154 N.W.2d 845, 850 (Iowa 1967) (quotation omitted). The applicant "must exhaust the probable sources of information concerning his case; He must use that of which he knows, and He must follow all clues which would fairly advise a diligent man that something bearing on his litigation might be discovered or developed." *Id.*

Nicholes did not make a "reasonable effort" to discover the information before his guilty plea. According to T.N.'s 2015 deposition, she had told adults since the incident in 2005 that

Nicholes's penis accidentally "fell out" while he was sleeping. PCR Ex. 4 p. 6, line 5 – p. 7, line 13; App. 36. Likewise, T.N.'s mother testified she knew "from the get-go" that T.N. always reported that Nicholes's penis accidentally "came out" while he was sleeping. PCR Ex. 2, p. 15, lines 3–15, p. 17, lines 2–15; App. 24, 25. Nicholes had a simple method to discover this information: Ask. He was entitled to take depositions and to confront the witnesses at trial. And because he was present during the exposure of his penis, he knew whether that exposure was purposeful or accidental. Nicholes cannot claim now that he exercised due diligence when chose to plead guilty rather than undertake the most basic steps to investigate the accusations against him.

Even if Nicholes had exercised due diligence before pleading guilty, he still did not make a "reasonable effort" to pursue the recantation. First, Nicholes was in contact with both T.N. and her mother shortly after his 2005 conviction—he even lived in the same home when he was released after pleading guilty. PCR Ex. 3 p. 17, lines 4–21, p. 21, line 10 – p. 22, line 12, PCR Ex. 4 p. 11, line 7 – p. 13, line 24; App. 30, 31, 37–38. If he were falsely accused, all he had to do was ask T.N. and her mother to recant their statement to police.

Second, in 2009 or 2010 when Nicholes moved back in with the family, T.N. told him that the story in the police report was false. PCR Ex. 4 p. 13, line 25 – p. 16, line 11; App. 38. Thus, Nicholes knew no later than 2010 that T.N. recanted her story. He cannot claim to have exercise due diligence by waiting another five years to bring his PCR action.

Nicholes erroneously attempts to shift his burden of due diligence to other people. He claims that although T.N. "may have" provided him the information earlier, "until she turned eighteen, her mother had control of her contact with law enforcement and, by [T.N.]'s testimony, prevented this contact from occurring." Applicant's Br. at 12. This argument overlooks the fact that Nicholes—not T.N. or her mother—bore the burden of exercising due diligence to pursue his claim. Once Nicholes learned of T.N.'s recantation, he had to make a "reasonable effort" to present that information to the court. Rather than wait years until T.N. and her mother reached out to law enforcement on their own, Nicholes should have filed his PCR action and used compulsory process to secure their testimony if they were unwilling to volunteer it. In short, Nicholes cannot blame anyone else for his failure to exercise due diligence.

Summary judgment was appropriate because Nicholes is unable to demonstrate the element of due diligence. He did not investigate the accusations before or after pleading guilty, and once he learned of the recantation he did not diligently present it to the court. The State was entitled to judgment as a matter of law, so this Court should affirm the summary judgment ruling.

CONCLUSION

The Court should affirm the denial of Charles Nicholes's application for postconviction relief.

REQUEST FOR NONORAL SUBMISSION

This case involves a routine application of existing law, so it is unlikely that oral argument will assist the Court.

Respectfully submitted,

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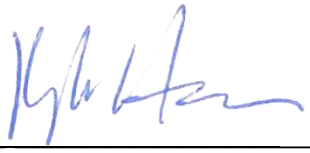

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