IN THE SUPREME COURT OF IOWA
Supreme Court No. 15-1815

MARTIN SHANE MOON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CLARKE COUNTY
THE HONORABLE GARY KIMES, JUDGE

APPELLEE'S BRIEF

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ROUTING STATEMENT

The State agrees, 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

In Clarke County case number FECR009878, Martin Shane Moon was charged and convicted of murder in the first degree, in violation of Iowa Code sections 707.1 and 707.2(1). *See* PCR App. at 1; App. 23. Moon was sentenced to incarceration for life without the possibility of parole. PCR App. at 1; App. 23.

Following a partially failed direct appeal, failed application for postconviction relief, and a failed appeal of the ruling denying his first application, Moon filed this second application for postconviction relief on January 12, 2012. *See* PCR App.; App. 23-28. The State moved to summarily dismiss the application on grounds that it was time barred by Iowa Code section 822.3. *See* Mot. for Summary Dismissal; App. 71-74. Following a hearing the court agreed that Moon's application was time barred and dismissed the application. *See* PCR Ruling; App. 103-08.

On appeal, Moon asserts that the court erred by summarily dismissing the case because Moon's application was exempt from the time bar because of newly discovered evidence.

Course of Proceedings

The State accepts the defendant's course of proceedings as adequate and essentially correct. Iowa R. App. P. 6.903(3).

Facts

The facts found in Moon's direct appeal, and the appeal from his first application for postconviction relief, are sufficient for purposes of this appeal:

> In 1990, Kevin Dickson was shot and killed at an abandoned farmhouse near Winterset. Nine years later, the State charged his friends Martin Moon and Casey Brodsack with first-degree murder. Brodsack ultimately pled guilty to second-degree murder and agreed to testify at Moon's trial.
>
> At trial, Brodsack testified that he, Moon, a friend named Scott Aukes, and the victim lived in the same building and regularly used drugs and alcohol together. One morning, Moon informed the other three that they would need to drive to an abandoned farmhouse to meet his drug dealer. When the four arrived at the farmhouse, Moon, Brodsack and Dickson went to the basement purportedly to look for drugs left by the dealer. While Brodsack was checking for drugs behind the water heater, he heard gunshots. He went around the heater and saw Dickson lying on the ground and Moon standing over him with a gun. According to Brodsack, Moon then demanded that Brodsack also shoot Dickson. To coerce compliance, Moon took another gun out and pointed it at Brodsack's

> head. He then handed Brodsack the original gun, which Brodsack fired at Dickson's supine body.
>
> Aukes, who remained outside during this episode, testified that he heard ten gunshots. Then, Moon and Brodsack came out of the farmhouse and Moon advised the others they needed to dispose of Dickson's body. The three went home, retrieved a sledgehammer, returned to the farmhouse, and attempted to cover Dickson with bricks. When that effort failed, they dragged Dickson outside and dumped his body into a cistern.
>
> To further support its case, the State introduced evidence from which a jury could have concluded the guns used in the murder were the same guns Moon and Brodsack stole from the farmstead of Madelyn Kerns several days earlier.

State v. Moon, No. 00-1128, 2002 WL 663486, at *1 (Iowa Ct. App. Apr. 24, 2002), *en banc* (hereinafter *Moon I*).

> About six years after Dickson's still-undiscovered murder, Brodsack happened to be painting fire hydrants with a co-worker near the abandoned farmhouse property. He told the co-worker, Brett Lovely, about the murder. The men looked into the cistern and saw Dickson's skeleton. Lovely kept Brodsack's secret for three years, but eventually told authorities about the discovery.

Moon v. State, No. 05-0816, 2007 WL 1345732, at *1 (Iowa Ct. App. May 9, 2007) (hereinafter *Moon II*).

ARGUMENT

I. The District Court was Correct to Conclude Moon's Application, Filed Approximately 10 Years After Procedendo from His Direct Appeal, was Time Barred by Iowa Code Section 822.3.

Preservation of Error

The district court ruling dismissing Martin Shane Moon's application preserves the argument he makes here. *See Lamasters v. State*, 821 N.W.2d 856, 862 (Iowa 2012).

Standard of Review

Postconviction proceedings are law actions ordinarily reviewed for errors of law. *See Harrington v. State*, 659 N.W.2d 509, 520 (Iowa 2003). When the basis for relief is a constitutional violation, Iowa courts review the issue de novo. *Id.*

Where a district court's disposition of the postconviction relief action is based upon on the State's statute-of-limitations defense, the appellate court reviews for correction of errors of law. *Id.* The appellate court will affirm if the district court's findings of fact are supported by substantial evidence and the law was correctly applied. *Id.*

When the district court "adopts one party's proposed findings, a closer and more careful scrutiny of the record is required on appeal."

Frohwein v. Estate of Brandt, No. 12-0054, 2012 WL 5356125, at *2 (Iowa Ct. App. Oct. 31, 2012) (citing *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 97 (Iowa 2011)). If the review is de novo, however, "no additional level of scrutiny is required as [the appellate court] carefully scrutinize[s] the record in making [its] own findings of fact . . . ." *Id.*

Merits

Iowa Code section 822.3 requires all postconviction relief actions to be filed within three years of the date of conviction or decision is final, or in the event of appeal, from the date procedendo is issued. The purpose of the statute is "to limit postconviction litigation in order to conserve judicial resources, promote substantive goals of the criminal law, foster rehabilitation and restore a sense of repose in our system of justice." *State v. Edman*, 444 N.W.2d 103, 106 (Iowa Ct. App. 1989).

The statute includes an exception for grounds of fact or law that could not have been raised within the applicable time period. Iowa Code § 822.3; *Edman*, 444 N.W.2d at 106. Claims based on these previously unavailable grounds must be raised within three years of their availability. *Wilkins v. State*, 522 N.W.2d 822, 824 (Iowa 1994)

("A reasonable interpretation of the statute compels the conclusion that exceptions to the time bar would be, for example, newly-discovered evidence or a ground that the applicant *was at least not alerted to in some way*." (emphasis added)); *see generally Nguyen v. State*, 829 N.W.2d 183, 188-89 (Iowa 2013) (finding a case which overruled a "ground of law that had been clearly and repeatedly rejected by controlling precedent from the court with final decision-making authority" created a new ground of law that would be an exception to section 822.3); *Lopez-Penaloza v. State*, 804 N.W.2d 537, 542 (Iowa Ct. App. 2011) (defendant's failure to bring timely postconviction claim barred relief despite her claim she did not discover the deportation consequences of her plea until after the passing of the statute of limitation).

The proper inquiry under section 822.3 is whether the applicant " 'was or should have been alerted' to the potential claim before the limitation period expired." *Cornell v. State*, 529 N.W.2d 606, 611 (Iowa Ct. App. 1994); *see also Wilkins*, 522 N.W.2d at 824 ("Wilkins cannot assert ignorance of the claim because he should have at least been alerted to trial counsel's failure to raise the shirt issue and

appellate and postconviction counsels' failure to raise ineffectiveness claims.").

In addition to showing that the claim could not have been raised earlier, "the applicant must also show a nexus between the asserted ground of fact and the challenged conviction." *Harrington*, 659 N.W.2d at 520. In order to show a nexus, the applicant must show that the evidence is relevant, meaning that the "the ground of fact must be of the type that has the *potential* to qualify as material evidence for purposes of a substantive claim under section 822.2." *Id.* at 521 (emphasis added).

Newly discovered evidence requires four factors to be established:

> (1) the evidence was discovered after judgment; (2) the evidence could not have been discovered earlier in the exercise of due diligence; (3) it is material to the issue, not merely cumulative or impeaching; and (4) it would probably change the result if a new trial is granted.

Summage v. State, 579 N.W.2d 821, 822 (Iowa 1998).

A successful *Brady* claim requires the applicant to establish: "(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the

issue of guilt." *Harrington*, 659 N.W.2d at 516. Evidence qualifies as "material," for *Brady* violation purposes, "when 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.' " *DeSimone v. State*, 803 N.W.2d 97, 104 (Iowa 2011) (quoting *U.S. v. Bagley*, 473 U.S. 667, 682 (1985)).

In this case there is no dispute that Moon's application was filed well after the three year deadline imposed by Iowa Code section 822.3. Instead, the question is whether an affidavit that Brandon Lee Boone created in 2011 qualifies as either newly discovered evidence, or, in the alternative, if it qualifies as *Brady* material. If the Boone affidavit fails to qualify as newly discovered evidence and it fails to qualify as *Brady* material, then the district court was correct to rule that Moon's application was time barred. *See* Iowa Code § 822.3.

A. If Moon had Exercised Due Diligence He Would have been Alerted to this Potential Claim Earlier.

Moon asserts that exercise of due diligence would not have alerted him earlier to the alleged fact that Boone had apparently recanted his story to police. Moon primarily rests this assertion on the fact that in the Boone affidavit Boone makes the claim that had he

testified he would have falsely testified that Moon committed the murder, and thus, Moon could not have known about the alleged recantation. However, Moon's duty to exercise due diligence does not end with the jury's verdict, and instead is a continuing duty.

Moon was well aware that Boone was a key witness in his murder case, yet the facts indicate that Moon failed to discuss the matter with Boone until 2012. *See* Boone Affidavit; App. 69-70. Moon asserts that he was not aware that there were potential problems with Boone's testimony, but a brief review of the trial record reveals that is untrue.

The State included Boone as a witness in the original Minutes of Testimony, which from the very beginning put Moon on notice that Boone was an important witness to depose or interview. *See* FECR009878 Minutes; App. 1-14. Following the Minutes, there were numerous filings involving Boone. The importance of Boone's testimony was highlighted by the fact that the State filed a material witness warrant for Boone in addition to the fact that Moon's trial attorney requested to depose Boone, but ultimately was unable to do so because he would not cooperate with the prosecution. *See* FECR009878 Material Witness Warrant 04/25/00; FECR009878

Notice of Taking Depo. 04/17/2000; App. 15-17. Even more notable, however, is the language used in the defense's motion to exclude Boone as a witness: "Boone was in custody . . . and was not talking to [DCI] . . . . [T]he Defendant has not had an opportunity to depose Mr. Boone or investigate his statement to the DCI . . . . Defense counsel understands that Mr. Boone is refusing to cooperate." *See* FECR009878 Motion to Exclude; App. 18-20.

There is an indication that in 2000 Moon was attempting to investigate Boone's statements to DCI, and even more importantly, Moon was aware that Boone was refusing to cooperate with DCI or the State. *See* FECR009878 Motion to Exclude; App. 18-20. Moon cannot now say that it was a reasonable exercise of due diligence to not continue to investigate this line of inquiry until more than ten years later.

The record indicates that Moon was aware *before* his criminal trial that there were questions about Boone's statements to police, and that there were indications that Boone was not being cooperative with investigators, yet Moon never bothered to investigate why. This made—or should have made—Moon aware that there was something

worth at least investigating during his *first* application for postconviction relief.

Moon's failure to exercise due diligence by not talking to Boone for over a decade after his trial, even though he was aware at that time that there may be something worth investigating, precludes the Boone affidavit from qualifying as an exception under Iowa Code section 822.3. *See Cornell*, 529 N.W.2d at 611. The Court need not determine if the affidavit qualifies as either newly discovered evidence or *Brady* material because the Boone affidavit is entirely barred by the statute of limitations and the court had no jurisdiction to hear the claims. *See* Iowa Code § 822.3. This Court should affirm the district court's dismissal of Moon's application because the claim could have been raised within the time limitation had Moon acted with due diligence.

B. The Boone Affidavit Fails to Potentially Qualify as Newly Discovered Evidence.

The Boone affidavit fails to even potentially qualify as newly discovered evidence because: (1) the evidence was known to Moon before the judgment in his criminal trial; (2) Moon failed to exercise due diligence in uncovering the evidence; (3) the evidence is merely impeaching; and (4) the evidence probably would not change the

result of a new trial. Accordingly, the evidence fails to even potentially qualify as newly discovered evidence, and Moon's claim is foreclosed to him.

First, as discussed above, Moon's own filings at his criminal trial reveal that Moon was—at least partially—aware that there were potential problems with Boone's intended testimony. Moon's filings to the court before his trial indicate that Moon was questioning the veracity of Boone's statements to the police, and Moon was aware that the State and DCI were having difficulty with Boone's cooperation. *See* FECR009878 Motion to Exclude; App. 18-20. Moon was aware of these problems all along, and he simply failed to contact Boone. Certainly the affidavit itself was not created until 2011, but that does not mean the evidence—Boone's apparently problematic discussions with the police—was itself new. Moon was aware before his criminal trial that there were questions about Boone's statements that he had not been able to investigate, and thus this is not new evidence.

Second, again as discussed above, Moon failed to exercise due diligence by failing to discuss with Boone his version of what he apparently told—or inferred—to the police. Because Moon failed to follow this line of inquiry, even though his desire to investigate the

matter was on the record prior to his criminal trial, the evidence cannot qualify as newly discovered when there is nothing that even potentially shows Moon acted diligently by waiting over a decade to talk to Boone.

Third, the evidence referred to in the Boone affidavit is merely impeaching. Boone's statement merely insinuates that another witness, Casey Brodsack, caused Boone to lie about Moon's involvement in the murder. *See* Boone Affidavit; App. 69-70. Boone did not testify at trial and the only purpose this evidence may have been relevant is to show that Brodsack was potentially being untruthful and may have had a motive to lie. At most this is simply impeachment evidence, which cannot qualify as newly discovered evidence. *See Summage*, 579 N.W.2d at 822. The evidence would similarly have been used to impeach Boone himself had he testified against Moon—as he stated he would in his affidavit. Again, because this evidence is solely impeaching it cannot qualify as newly discovered evidence. *Id.*

Finally, the evidence would not have changed the outcome of the trial. It should first be noted that the case against Moon was not

weak. "We find substantial evidence to support each of the[] elements [of first-degree murder]." *Moon I*, 2002 WL 663486, at *6.

In fact, the majority opinion of the Iowa Court of Appeals, *en banc*, repeatedly referred to the evidence against Moon as "overwhelming." *See id.* at *5-6. Even the dissenting opinion found that "the State's case against Moon was substantial." *Id.* at *7 (Huitink, P.J., dissenting). The Court of Appeals again reiterated the strength of the State's case in the appeal of the denial of Moon's first application for postconviction relief. *See Moon II*, 2007 WL 1345732, at *9. It is unlikely the impeachment evidence offered by Boone would have swayed the outcome of the trial.

The Boone affidavit fails each of the four factors required to qualify as newly discovered evidence. The court was correct to reject Moon's argument and to dismiss Moon's application as time barred. *See* Iowa Code § 822.3.

C. The Boone Affidavit Fails to Potentially Qualify as *Brady* Material.

The Boone affidavit similarly fails to qualify as *Brady* material because: (1) there is no indication that the State suppressed evidence of Boone's alleged wavering; (2) the evidence is not favorable to Moon's position; and (3) the evidence is not material to Moon's guilt

because it is unlikely it would have swayed the outcome. Accordingly, this Court should reject the Boone affidavit as potentially qualifying as *Brady* material.

First, Moon operates under the assumption that the State suppressed the evidence. However, as discussed above, there is indication that the State in fact did disclose the potential problems with Boone's testimony to the defense, or at the very minimum, the defense knew enough essential facts to take advantage of the potential evidence. While the State certainly has a duty to disclose *Brady* material, " 'if the defendant either knew or should have known of the essential facts permitting him to take advantage of the evidence,' the evidence is not considered 'suppressed.' " *See DeSimone*, 803 N.W.2d 103 (quoting *Harrington*, 659 N.W.2d at 522). "[D]efense counsel must be aware of the potentially exculpatory nature of the evidence and its existence." *Id.*

There are essentially two components to Boone's claims in his affidavit. First, Boone claims that he made recantations to police, or at least that he made apparent "indications of falsehood" in his statements. *See* Boone Affidavit; App. 69-70. Second, Boone claims that Brodsack "prepared" Boone as a witness against Moon. *See*

Boone Affidavit; App. 69-70. While the Boone affidavit implies that the police, and impliedly therefore the State, were aware of the problems relating to the truthfulness of Boone's statements, nothing in the affidavit—or anything else presented by Boone—indicates that the police or the State were aware of the alleged interference by Brodsack. *See* Boone Affidavit; App. 69-70. Therefore, the only portion of the Boone affidavit which should even be evaluated for its potential to qualify as *Brady* material is the truthfulness of Boone's statements to police. There is nothing that shows the State was aware of this alleged Brodsack interference until the Boone affidavit itself. The remainder of the *Brady* material analysis, therefore, will focus on the truthfulness of Boone's statements to police.

It must be noted that there is nothing offered by Moon, beyond the 2011 Boone affidavit itself, corroborating that Boone actually made recantations to the police. However, as discussed above, Moon's defense counsel made filings with the court that highlighted the fact that Moon was aware of the potential credibility problems surrounding Boone's statement to police. In fact, the defense filing to exclude Boone as a potential witness at trial explicitly notes that "Defense counsel understands that Mr. Boone is refusing to

cooperate," and that "the Defendant has not had an opportunity to . . . investigate [Boone's] statement" to police. *See* FECR009878 Motion to Exclude; App. 18-20. Further, the State's response to the motion not only acknowledges that Boone is being uncooperative, but it explicitly notes that the defense had been supplied DCI reports containing Boone's interview. *See* FECR009878 Motion to Exclude; App. 18-20.

This proves that the State had been informing Moon about Boone's refusals to cooperate with DCI, and Moon's defense attorney focused in on the fact that this created questions as to the entirety of Boone's proposed testimony and his statements to police to the point that Moon moved to exclude Boone as a witness entirely. *See* FECR009878 Motion to Exclude; App. 18-20. The defense was clearly aware of problems surrounding Boone, and it appears clear that the defense was in contact with either the State or the police about problems with Boone's cooperation. There are no indications of suppression occurring.

Additionally, in the four years following the creation of the Boone affidavit in 2011 (with the present postconviction proceedings, hearings, discovery, etc. spanning over three and a half years of that

time), Moon has apparently been unable to come up with any additional evidence that the police or the State was actually aware that Boone had recanted or been untruthful about his statements. In fact, the only evidence cited by Moon, even at this stage, is the Boone affidavit and a subsequently created affidavit by Moon himself (wherein Moon claims to have never received police reports regarding Boone's statements, although the State explicitly stated in a filing to the court during the criminal trial that these were given to the defense). *See* FECR009878 State's Response to Motion to Exclude; Moon Affidavit; Boone Affidavit; App. 21-22, 67-70.

There simply is no indication that there was actually evidence suppressed by the State, and the defense filings indicate that the State was in communication with Moon's counsel over problems with Boone's cooperation. The evidence therefore should not qualify as *Brady* material.

Second, the evidence is not beneficial to Moon's defense as he alleges. Moon primarily focuses his analysis on the Brodsack interference issue, but again, because nothing—including the Boone affidavit—shows the State was ever aware of this alleged interference

it cannot be considered *Brady* material. The analysis must instead focus on the truthfulness of Boone's statements to police.

If Boone's alleged recantation was actually used during trial it would likely have come through as impeachment of Boone's own testimony. However, because Boone never testified, there would be no relevant reason to introduce impeachment evidence against Boone. Further, had Boone actually been called to testify—so that this apparent impeachment could occur—by Boone's own admission "had [he] been called to testify . . . [he] would have stuck with the story . . . ." *See* Boone Affidavit; App. 69-70. This testimony—even when impeached by his alleged recantation—would have harmed Moon's position, not helped it.

Finally, the evidence is not material because it is unlikely that it would have changed the outcome. Because Boone did not testify at all, the apparent impeachment evidence that could be used against Boone is irrelevant and could not possibly have altered the trial. Further, even if Boone *had* testified, there only would have been *more* testimony that Moon had committed the murder. *See* Boone Affidavit; App. 69-70. Even if the evidence could have been used to impeach Boone, having an additional witness testify that Moon

committed the murder certainly would not have made the jury less likely to acquit, especially in the light of the other overwhelming evidence against Moon. *See Moon I*, 2002 WL 663486, at *5-6.

The evidence fails each factor required to qualify as *Brady* material, and thus the court was correct to conclude that Moon's claim was barred by Iowa Code section 822.3. This Court should affirm the district court's denial of Moon's application for postconviction relief.

CONCLUSION

The State respectfully requests that this Court affirm the district court's ruling disposing of Martin Shane Moon's application.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission as it is not overly complex and it involves the routine application of existing legal principles. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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