

**IN THE COURT OF APPEALS OF IOWA**

No. 7-134 / 06-0401  
Filed March 28, 2007

**MICHAEL BLACKWELL,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Polk County, Richard G. Blane II,  
Judge.

A postconviction relief applicant appeals from the dismissal of his  
application. **AFFIRMED.**

Jeffrey Mains of Mains Law Office P.L.C., Des Moines, and Susan  
Stockdale, Colo, for appellant.

Michael Blackwell, Newton, pro se.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant  
County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

**SACKETT, C.J.**

Applicant-appellant, Michael Blackwell, appeals from the district court order dismissing his second application for postconviction relief. He contends the court erred in summarily dismissing his application because (1) the State did not plead the statute of limitations in its answer and (2) the State was not entitled to judgment as a matter of law. We affirm.

**Background Proceedings**

Appellant was convicted of first-degree murder in August of 1991. This court affirmed. *State v. Blackwell*, No. 91-1501 (Iowa Ct. App. May 4, 1993). He filed his first application for postconviction relief in September of 1994. It was denied in August of 1996. On appeal, counsel noted the existence of a psychiatric evaluation by Dr. Shin, arguing it was favorable to appellant and could have changed the result of his trial. This court affirmed. *Blackwell v. State*, No. 96-2086 (Iowa Ct. App. April 24, 1998). Following unsuccessful habeas corpus proceedings in federal court related to claims counsel was ineffective for not developing or using the report by Dr. Shin, appellant filed his second application for postconviction relief on December 17, 2004, alleging various claims of ineffective assistance relating to the report by Dr. Shin. The State filed an answer in February of 2005, denying all the allegations in the application. The State filed a motion to dismiss in October of 2006, alleging the application for postconviction relief was untimely and raised grounds that have been, or could have been, raised in prior proceedings.

The district court determined the application was appropriate for dismissal because it was not filed within three years of the time the applicant was alerted to

the existence of the report by Dr. Shin, which was during the appeal from the first postconviction proceeding in 1997. The court also determined the time period for filing the second postconviction application was not tolled during the time appellant was pursuing the habeas action in federal court.

### **Scope of Review**

We review postconviction proceedings for correction of errors at law. *Bugley v. State*, 596 N.W.2d 893, 895 (Iowa 1999). Review of a district court's determination a postconviction application is time-barred is "to correct errors of law." *Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003) (quoting *Dible v. State*, 557 N.W.2d 881, 883 (Iowa 1996)). "Thus, we will affirm if the trial court's findings of fact are supported by substantial evidence and the law was correctly applied." *Id.* at 520 (citing *Benton v. State*, 199 N.W.2d 56, 57 (Iowa 1972)).

### **Merits**

Applications for postconviction relief 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 (2003). A statute-of-limitations defense is an affirmative defense generally raised by a responsive pleading. *Davis v. State*, 443 N.W.2d 707, 708 (Iowa 1989). The State did not raise the issue of the timeliness of appellant's application in its answer, but in a subsequent motion to dismiss. We have recognized the statute of limitations may be raised in a motion to dismiss "when the narrow scope of the proceedings confirms the claim for relief was barred when the action was commenced." *Cornell v. State*, 529 N.W.2d 606, 609-10 (Iowa Ct. App. 1994). The application was filed in 2004. Following the direct appeal, procedendo issued on July 7,

1993. On its face, the application was filed eleven years after procedendo issued and untimely when commenced.

The statute provides an exception to the three-year limitation for “a ground of fact or law that could not have been raised within the applicable time period.” Iowa Code § 822.3. To take advantage of the exception, an applicant “must show the alleged ground of fact 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. Examples of exceptions to the time bar are newly-discovered evidence or a ground the applicant was at least not alerted to in some way. *Hogan v. State*, 454 N.W.2d 360, 361 (Iowa 1990). Appellant argues the report by Dr. Shin is evidence that falls within the exception. The district court determined appellant failed to show the claim could not have been raised earlier. We conclude the district court’s determination is supported by substantial evidence and that the court correctly applied the law. See *Harrington*, 659 N.W.2d at 520.

We have considered all claims and arguments raised on appeal. We find any issues not specifically addressed in this decision are either controlled by our resolution of the issues expressly addressed, need not be reached, or are without merit.

**AFFIRMED.**