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The National Registry of EXONERATIONS

A Joint Project of Michigan Law & Northwestern Law

**Currently 1,063 Exonerations**

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## Terry Harrington

In July 1977, a retired police captain working as a security guard at a car dealership in Council Bluffs, IA was murdered. When police eventually picked up Kevin Hughes, a friend of Terry Harrington's, he claimed that he, Harrington, and another boy, Curtis McGhee, all black, had attempted to steal a car that night, and when the guard came to investigate, Harrington opened fire. This alleged co-conspirator and several other witnesses testified that Harrington had been the shooter or that they had seen Harrington's car in the area that night. Although Harrington presented an alibi -- he had been at a concert that night and had been talking to his former football coach -- the prosecution's witnesses rebutted his alibi and claimed the shooting occurred after the concert. The prosecution denied under oath that there were any other suspects.

In August 1978, an all-white jury convicted Harrington of first-degree murder and he was sentenced to life in prison without parole.

In the early 1990's, with the help of the prison barber, Harrington pursued evidence of his innocence. Hughes, the boy first picked up by police, admitted that he had never seen Harrington that night. He had been coached by the prosecution, and was promised that charges against him would be dropped if he testified. He lied on the stand to collect the $5,000 reward money. The witnesses who had backed Hughes also recanted. Harrington's case file contained a number of police reports that had never been turned over to the defense, including one stating that a witness saw a white male with his dog running from the scene, and clear evidence that there had been at least one other suspect, a white man with a dog. In April 2003, the Iowa Supreme Court granted Harrington a new trial and he was released.

McGhee had also filed a motion for a new trial, but, in September 2003, accepted a deal with the prosecution after the prosecutor misled McGhee and his attorney about the strength of the case against him. He entered an "Alford plea" (which allowed him to continue to maintain his innocence) to second-degree murder and received a sentence of time already served.

In October 2003, the prosecution announced that they would not seek to retry Harrington, although they stated that they still believed he committed the crime. McGhee and Harrington filed suit against the county for misconduct by the prosecutor and the police and won a large judgment. The case was appealed to the Supreme Court, but ultimately settled for $12 million before the court issued an opinion.

- *Stephanie Denzel*

**Report an error or add more information about this case.**

| | |
|---|---|
| **State:** | Iowa |
| **County:** | Pottawattamie |
| **Most Serious Crime:** | Murder |
| **Additional Convictions:** | |
| **Reported Crime Date:** | 1977 |
| **Convicted:** | 1978 |
| **Exonerated:** | 2003 |
| **Sentence:** | Life |
| **Race:** | Black |
| **Sex:** | Male |
| **Age:** | 18 |
| **Contributing Factors:** | Perjury or False Accusation, Official Misconduct |
| **Did DNA evidence contribute to the exoneration?:** | No |

# Exoneration News

More News...

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We welcome new information from any source about the exonerations that are already on our list and about new cases that might be exonerations. And we will be happy to respond to inquiries about the Registry.

- Tell us about an exoneration that we may have missed
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## About the Registry

The National Registry of Exonerations is a joint project of the University of the Michigan Law School and the Center on Wrongful Convictions at Northwestern University School of Law.

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# Terry Harrington

**State:** Iowa
**Incident Date:** 7/22/77
**Age at Arrest:** 18
**Conviction Date:** 8/4/78
**Age when Exonerated:** 44
**Exonerated Date:** 2/26/03
**Time Served:** 25 years
**Conviction:** Murder
**False Confession:** No
**Implicated by Another Youth:** No

**Details**

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Terry Harrington was only eighteen years old when he and Curtis McGhee Jr. were convicted of the 1977 murder of a retired police officer in Pottawattamie County, Iowa. Harrington's conviction was primarily based on the testimony of one key witness, Kevin Hughes, who claimed Harrington was the perpetrator despite Harrington's strong alibi. Years later, Hughes recanted his testimony and admitted that he had falsely accused Harrington in order to avoid being prosecuted for the murder himself. Numerous undisclosed police reports were discovered in 2001 that pointed to another man as a suspect. As a result of the discovery of these reports and Hughes's recanted testimony, Harrington was exonerated and released from prison in 2003.

**Post Exoneration:**

## Resources

**Harrington v State (2003)**
*Supreme Court of Iowa - February 23, 2003*
**State:** Iowa
**Type:** Case
**Topic:** Juveniles and Wrongful Convictions

http://www.talkleft.com/story/2005/08/29/668/76462

Lawsuit Filed Over Wrongful Conviction
By TChris, Section Innocence Cases
Posted on Mon Aug 29, 2005 at 02:52:04 PM EST
Tags: (all tags) Share This: Digg!
by TChris
John Schweer, a security guard and former police officer in Council Bluffs, Iowa, was killed with a shotgun in 1977. Two black teenagers were charged with his murder. Prosecutors failed to provide the defense with reports concerning a 47-year-old white man who carried a shotgun while walking his dogs in the area. The man seems like a good suspect:
The man had been a suspect in a 1963 slaying and had faced gun charges. The man failed a lie detector test when asked if he had shot John Schweer, a police report concluded.
Despite having alibis, the teens, Terry Harrington and Curtis McGhee, were convicted on the testimony of individuals who have since recanted. Harrington and McGhee have sued Pottawattamie County Attorney Dave Richter, his assistant Joseph Hrvol, and Council Bluffs police detectives Daniel C. Larsen and Lyle W. Brown, alleging that the police and prosecutors framed them in a racially motivated conspiracy.
The lawsuits portray police and prosecutors as obsessed with finding Schweer's killer. Police targeted Harrington and McGhee after a group of teenagers said they had seen the pair in the area.
Kevin Hughes, then 16, had been arrested in neighboring Omaha, Neb., on a car theft charge. He said he was told he would be charged with Schweer's slaying if he didn't come up with the real killer, according to court records.
The lawsuits allege that authorities crafted a case "by editing Hughes's story to eliminate the lies that were demonstrably false and by providing him with details of the crime to make him seem more credible."
The other teens agreed to back up Hughes' story.
The Iowa Supreme Court reversed Harrington's conviction in 2003 after concluding that the withheld evidence could have caused a different outcome in his trial. The prosecution nonetheless tried to keep Harrington in prison, prompting Gov. Tom Vilsack to give Harrington a reprieve. Now Harrington works as a truck driver as he tries to rebuild his life.
J. Douglas McCalla, an attorney in the Wyoming law firm of Gerry Spence, said he is helping Harrington to right a wrong [by representing him in the lawsuit].
A quarter century in prison is a huge wrong to right. The cases are scheduled for trial in 2007.
< Journalist Toll in Iraq Exceeds Vietnam | 'War. What is it good for?' >

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"The pump don't work 'cause the vandals took the handles"


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Lawsuit Filed Over Wrongful Conviction | 6 comments (6 topical)

Re: Lawsuit Filed Over Wrongful Conviction (none / 0) (#5)
by Talkleft Visitor on Wed Aug 31, 2005 at 01:31:09 AM EST

bOO HOO SO THE 2 BLACKS GOT SENT TO JAIL. They may have been innocent on this but im sure they were quilty of something else! at least in jail they didnt rob or kill anyone.

Re: Lawsuit Filed Over Wrongful Conviction (none / 0) (#6)
by Talkleft Visitor on Wed Aug 31, 2005 at 04:27:38 PM EST

Please delete this and fartknocker's post.

Re: Lawsuit Filed Over Wrongful Conviction (none / 0) (#1)
by DawesFred60 on Sat Dec 17, 2005 at 01:02:54 PM EST

If this one is for real the black guys who did time for no crime need 50 million to pay for the hell each one was in, and the judge needs to end his or her life into a cell.

Re: Lawsuit Filed Over Wrongful Conviction (none / 0) (#2)
by Joe Bob on Sat Dec 17, 2005 at 01:02:55 PM EST

How about this idea for restorative justice: If you are found to have falsely and maliciously participated in the prosecution of someone you know to be innocent: you serve the full sentence you sent the innocent to jail for.

Re: Lawsuit Filed Over Wrongful Conviction (none / 0) (#3)
by Johnny on Sat Dec 17, 2005 at 01:02:56 PM EST

(What steps can I take to make sure that I actually stay signed into TypeKey for two weeks, and that my email address stays shared?) There will be the typical apologists that sally to the defense of theprosecution on this one... Too bad. The state screwed up in this one, they need to pay. Period. Whattya say?

Re: Lawsuit Filed Over Wrongful Conviction (none / 0) (#4)
by Talkleft Visitor on Sat Dec 17, 2005 at 01:02:56 PM EST

Is this Lyle W. Brown the same Lyle Brown who went on to become an internal affairs investigator for the Council Bluffs Police Department? Like others have posted, it looks like a lot of compensation is owed the two framed individuals. They were just 17-year-old kids, their whole lives before them, back in 1977.

Lawsuit Filed Over Wrongful Conviction | 6 comments (6 topical)

http://forejustice.org/db/McGhee-Jr--Curtis-W.html
Wrongly Convicted Database Record

Go to Database Search Page
Go to Database Index Page
Curtis W McGhee Jr

Years Imprisoned:
26
Charge:First Degree Murder

Sentence:Life Imprisonment
Year Convicted:1978
Year Cleared:
2003
Location of Trial:
Iowa
Result:
Not Judicially Exonerated
Summary of Case:
Co-defendant of Terry Harrington. Both men were convicted of first-degree murder in separate trials and sentenced to life in prison in 1978. In overturning Harrington's conviction in February 2003, the Iowa Supreme Court ruled that several police reports pointing to another suspect were not turned over and noted that a witness testified at a post-conviction hearing that he lied at Harrington's trial because police and prosecutors pressured him. The court also relied on Brain Fingerprinting technology that tended to corroborate Harrington's innocence. In an earlier appeal, the court dismissed Harrington's claims that prosecutor Joseph Hrvol intimidated a defense witness, suborned the perjury of a state witness and committed improprieties in his dealings with other witnesses. Harrington was released from prison on April 18, 2003 when Iowa Governor Tom Vilsack signed a reprieve. The prosecutor refused to dismiss the charges against Curtis W. McGhee Jr., although he was convicted on the same discredited evidence as Harrington, and so in September 2003 McGhee agreed to plead guilty to second-degree murder in exchange for his immediate release. Harrington and McGhee filed a federal civil rights lawsuit againt Pottawattamie County and their prosecutors for their actions as investigators in the case. The prosecutor's defense against the lawsuit was they had prosecutorial immunity, and after the US Court of Appeals ruled the prosecutors were not immune from the allegations in the complaint, the U.S. Supreme Court accepted the case and heard arguments on November 4, 2009. On January 5, 2010 it was announced that the two men and the County had reached a settlement. Harrington was to receive $7.03 million, and McGhee Jr. was to receive $4.97 million. The case was dismissed and the U.S. Supreme Court removed the case from its docket.
Conviction Caused By:
Perjured prosecution testimony suborned by the prosecutor.

Innocence Proved By:
McGhee was released five months after Terry Harrington was released, when he agreed to plead guilty to second-degree murder.

Defendant Aided By:

Compensation Awarded:$4.97 million (January 2010)
Was Perpetrator Found?
Age When Imprisoned:

Age When Released:

Information Source 1:Actual Innocence - Exonerated Individuals whose cases involved prosecutorial misconduct
Information Location 1:
http://www.publicintegrity.org/pm/default.aspx?sid=sidebarsb&aid=38
Information Source 2:
284 N.W.2d 244 and 659 N.W.2d 509

http://www.mindfully.org/Reform/2004/Prison-Exonerations-Gross19apr04.htm

(ii) *Pleas of guilty or no contest.* Sometimes a defendant who has protested his innocence for years, and who had obtained a reversal of his conviction, accepts an offer from the state to plead guilty to a lesser crime and go free immediately, rather than stay in jail and risk a re-trial that could result in another false conviction. For example, in 1978 Curtis McGhee was convicted of murder in Council Bluffs, Iowa, on the basis of a confession from a supposed accomplice. In February, 2003, the Iowa Supreme Court reversed the convictions because the police had concealed the fact that they had questioned another suspect who was seen near the scene of the crime, and who failed a polygraph test. By then the confessor, and all other key prosecution witnesses, had recanted their testimony. McGhee was offered a deal: plead guilty to second degree murder and go free; he decided to play it safe, took the deal, and was released.[31] We have not included McGhee in our data, nor any other defendant who pled guilty in order to be released, regardless of the evidence of the defendant's innocence. We are examining exonerations, and the final official act in such a case is not an exoneration but a conviction, however nominal or misleading.[32] (We have included McGhee's co-defendant, Terry Harrington, who refused to take a similar deal, and got a dismissal after the state's star witness at the original trial recanted once more.)

Supreme Court of Iowa.
Terry J. HARRINGTON, Appellant,
v.
STATE of Iowa, Appellee.
**No. 01-0653.**

Feb. 26, 2003.
Rehearing Denied April 18, 2003.

Following affirmance of his conviction for first-degree murder, 284 N.W.2d 244, and affirmance of the denial of his federal petition for habeas corpus relief, 983 F.2d 872, defendant filed an application for postconviction relief. The District Court, Pottawattamie County, Timothy O'Grady, J., denied application. Defendant appealed. The Supreme Court, Ternus, J., held that: (1) defendant's motion for expansion of court's findings of fact and conclusions of law was timely filed and, thus, tolled 30-day period for filing notice of appeal; (2) defendant's application for postconviction relief fell within exception to three-year statute of limitations, abrogating *Hogan v. State*, 454 N.W.2d 360, and *Dible v. State*, 557 N.W.2d 881; and (3) prosecution committed *Brady* violation when it failed to disclose police reports identifying alternative suspect.

Reversed and remanded.

Cady, J., filed dissenting opinion.

West Headnotes

**[1] Criminal Law 110 1081(5)**

110 Criminal Law
110XXIV Review
110XXIV(F) Proceedings, Generally
110k1081 Notice of Appeal
110k1081(4) Time of Giving
110k1081(5) k. Effect of Delay. Most Cited Cases
(Formerly 30k428(2))
If a motion to expand court's findings of fact and conclusions of law is not timely filed, it will not toll the 30-day time period for filing a notice of appeal. Rules App.Proc., Rule 6.5(1); Rules Civ.Proc., Rule 1.904(2).

**[2] Criminal Law 110 1081(6)**

110 Criminal Law
110XXIV Review
110XXIV(F) Proceedings, Generally
110k1081 Notice of Appeal
110k1081(4) Time of Giving
110k1081(6) k. Excuse for Delay; Extension of Time and Relief from Default. Most Cited Cases
Trial judge's ruling confirming that, on the tenth day after denying defendant's application for postconviction relief, he received and accepted defendant's motion for expansion of court's findings of fact and conclusions of law substantially complied with requirement that filing date be noted on the motion for expansion, and thus the motion tolled the 30-day time period for filing notice of appeal from the denial of postconviction relief, even though the motion was not date stamped by clerk of court on or before the ten-day deadline. Rules App.Proc., Rule 6.5(1); Rules Civ.Proc., Rules 1.442(5), 1.904(2), 1.1007.

**[3] Criminal Law 110 1992**

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1992 k. Materiality and Probable Effect of Information in General. Most Cited Cases
(Formerly 110k700(2.1))
To establish a *Brady* violation, the defendant has to prove (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issue of guilt.

**[4] Criminal Law 110 ⚿1536**

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1536 k. Newly Discovered Evidence. Most Cited Cases

To prevail on a postconviction relief claim based on newly-discovered evidence, defendant is required to show (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. I.C.A. § 822.2(4).

**[5] Criminal Law 110 ⚿1134.90**

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)10 Interlocutory, Collateral, and Supplementary Proceedings and Questions
110k1134.90 k. In General. Most Cited Cases
(Formerly 110k1134(10))

**Criminal Law 110 ⚿1139**

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In General. Most Cited Cases

Postconviction proceedings are law actions ordinarily reviewed for errors of law; but when the basis for relief is a constitutional violation, the Supreme Court's review is de novo.

**[6] Criminal Law 110 ⚿1139**

110 Criminal Law
110XXIV Review
110XXIV(L) Scope of Review in General
110XXIV(L)13 Review De Novo
110k1139 k. In General. Most Cited Cases

On appeal from the denial of postconviction relief, Supreme Court would employ a de novo review of the lower court's ruling on an asserted *Brady* violation of the Due Process Clause. U.S.C.A. Const.Amend. 14.

**[7] Criminal Law 110 ⚿1158.36**

110 Criminal Law
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158.36 k. Post-Conviction Relief. Most Cited Cases
(Formerly 110k1158(1))

On appeal from the denial of postconviction relief, the Supreme Court's review of the lower court's ruling on the state's statute-of-limitations defense was for correction of errors of law; thus, the Supreme Court would affirm if the trial court's findings of fact were supported by substantial evidence and the law was correctly applied. I.C.A. § 822.3.

**[8] Criminal Law 110 ⚿1586**

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)1 In General
110k1586 k. Time for Proceedings. Most Cited Cases

Defendant's application for postconviction relief, which was based on previously undisclosed police reports and prosecution witnesses's recantation of trial testimony, fell within ground-of-fact exception to three-year statute of limitations for postconviction relief actions; such evidence could not have been discovered earlier in the exercise of due diligence, and there was a nexus between the undisclosed police reports and recantation evidence on one hand and defendant's murder conviction on the other. I.C.A. § 822.3.

**[9] Criminal Law 110 ⚿1586**

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)1 In General
110k1586 k. Time for Proceedings. Most Cited Cases

In addition to showing that asserted ground of fact or law could not have been raised earlier, applicant relying on exception to three-year statute of limitations for postconviction relief applications must show a nexus between the asserted ground of fact and the challenged conviction. I.C.A. § 822.3.

**[10] Criminal Law 110 ⚿1536**

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1536 k. Newly Discovered Evidence. Most Cited Cases

To succeed on a claim for postconviction relief based on newly-discovered evidence, an applicant must establish, among other things, that the newly-discovered evidence is material, not merely cumulative or impeaching, and would probably have changed the outcome of the trial. I.C.A. § 822.2(4).

**[11] Criminal Law 110 ⚿1586**

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)1 In General
110k1586 k. Time for Proceedings. Most Cited Cases

Postconviction relief applicant relying on the ground-of-fact exception to three-year statute of limitations for postconviction relief applications must show the ground of fact is relevant to the challenged conviction; in this context, "relevant" means the ground of fact must be of the type that has the potential to qualify as material evidence for purposes of a substantive claim. I.C.A. §§ 822.2, 822.3.

**[12] Criminal Law 110 ⚿1586**

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)1 In General
110k1586 k. Time for Proceedings. Most Cited Cases

Postconviction relief applicant need not show the asserted ground of fact would likely or probably have changed the outcome of the underlying criminal case in order to avoid a limitations defense, under exception to three-year statute of limitations for postconviction relief actions; a determination of that issue must await an adjudication, whether in a summary proceeding or after trial, on the applicant's substantive claim for relief; abrogating *Hogan v. State*, 454 N.W.2d 360, and *Dible v. State*, 557 N.W.2d 881. I.C.A. § 822.3.

**[13] Criminal Law 110 ⚿2003**

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k2002 Information Within Knowledge of Prosecution
110k2003 k. In General. Most Cited Cases
(Formerly 110k700(2.1))

Evidence is "suppressed," for purposes of *Brady* rule, when information is discovered after trial which had been known to the prosecution but unknown to the defense.

**[14] Criminal Law 110 ⚿2005**

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k2002 Information Within Knowledge of Prosecution
110k2005 k. Responsibility of and for Police and Other Agencies. Most Cited Cases

(Formerly 110k700(7), 110k700(6))
Evidence unknown to the individual prosecutor may be considered "suppressed," for purposes of the *Brady* rule, given that the prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police.

**[15] Criminal Law 110 2003**

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k2002 Information Within Knowledge of Prosecution
110k2003 k. In General. Most Cited Cases
(Formerly 110k700(6))
Regardless of whether the prosecutor actually learns of evidence favorable to the defense, the prosecution bears the responsibility for its disclosure under the *Brady* rule.

**[16] Criminal Law 110 1991**

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1991 k. Constitutional Obligations Regarding Disclosure. Most Cited Cases
(Formerly 110k700(2.1))
Under the *Brady* rule, it is the fact of nondisclosure of evidence that is important; the good faith or bad faith of the prosecution in failing to produce the evidence is not.

**[17] Criminal Law 110 1991**

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1991 k. Constitutional Obligations Regarding Disclosure. Most Cited Cases
(Formerly 110k700(2.1))
Under the *Brady* rule, prosecution's duty to disclose evidence is applicable even if there has been no request by the accused for the information.

**[18] Criminal Law 110 1995**

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1993 Particular Types of Information Subject to Disclosure
110k1995 k. Diligence on Part of Accused; Availability of Information. Most Cited Cases
(Formerly 110k700(2.1))
If the defendant either knew or should have known of the essential facts permitting him to take advantage of undisclosed evidence, the evidence is not considered "suppressed," for purposes of *Brady* rule.

**[19] Criminal Law 110 1997**

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1993 Particular Types of Information Subject to Disclosure
110k1997 k. Evidence Incriminating Others. Most Cited Cases
(Formerly 110k700(3))
Undisclosed police reports, documenting that an individual with a shotgun and a dog was caught trying to break into a vehicle late at night just days before the murder of night watchman at car dealership, were "suppressed" in first-degree murder prosecution, so as to support finding of a *Brady* violation, even though defense counsel had some in-

formation at trial about a man seen walking a dog and carrying a shotgun near the car dealership; defendant's trial counsel did not have the essential facts of the police reports, so as to allow the defense to wholly take advantage of the evidence.

**[20] Criminal Law 110 1997**

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1993 Particular Types of Information Subject to Disclosure
110k1997 k. Evidence Incriminating Others. Most Cited Cases
(Formerly 110k700(3))
Undisclosed police reports, documenting that an individual with a shotgun and a dog was caught trying to break into a vehicle late at night just days before the murder of night watchman at car dealership, constituted evidence favorable to defendant in first-degree murder prosecution, so as to support finding of a *Brady* violation; police reports would have provided abundant material for defense counsel to argue that the individual identified in the reports had opportunity and motive to commit the murder, thereby creating reasonable doubt that defendant was the perpetrator.

**[21] Criminal Law 110 1992**

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1992 k. Materiality and Probable Effect of Information in General. Most Cited Cases
(Formerly 110k700(2.1))
The suppression of favorable evidence is not a denial of due process under the *Brady* rule unless the evidence is "material" to the issue of guilt; evidence is material when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. U.S.C.A. Const.Amend. 14.

**[22] Criminal Law 110 1992**

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1992 k. Materiality and Probable Effect of Information in General. Most Cited Cases
(Formerly 110k700(2.1))
The test for materiality of undisclosed evidence, for purposes of establishing *Brady* violation, does not require the defendant to prove disclosure of the evidence would have resulted in his acquittal.

**[23] Criminal Law 110 1992**

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1992 k. Materiality and Probable Effect of Information in General. Most Cited Cases
(Formerly 110k700(2.1))
For purposes of establishing *Brady* violation, the inquiry concerning the materiality of the undisclosed evidence is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions; rather, the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

**[24] Criminal Law 110 1992**

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information

110k1992 k. Materiality and Probable Effect of Information in General. Most Cited Cases
(Formerly 110k700(2.1))
In deciding whether its confidence in the verdict is undermined as a result of undisclosed evidence, such that the evidence would be considered material for purposes of *Brady* rule, the Supreme Court considers the totality of the circumstances, including the possible effects of nondisclosure on defense counsel's trial preparation.

**[25] Criminal Law 110 ⚿1997**

110 Criminal Law
110XXXI Counsel
110XXXI(D) Duties and Obligations of Prosecuting Attorneys
110XXXI(D)2 Disclosure of Information
110k1993 Particular Types of Information Subject to Disclosure
110k1997 k. Evidence Incriminating Others. Most Cited Cases
(Formerly 110k700(3))
Police reports, documenting that an individual with a shotgun and a dog was caught trying to break into a vehicle late at night just days before the murder of night watchman at car dealership, were material to the issue of guilt in first-degree murder prosecution, and thus the suppression of those reports by prosecution constituted *Brady* violation; the primary witness against defendant was by all accounts a liar and a perjurer, and identifying an alternative suspect would have made it more probable that the jury would have at least doubted the primary witness's testimony.
***512** Thomas P. Frerichs of Frerichs Law Office, P.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, and Richard Crowl, Pottawattamie County Attorney, for appellee.

Thomas H. Makeig of Thomas H. Makeig, P.C., Fairfield, for amicus curiae Dr. Lawrence A. Farwell.

TERNUS, Justice.

Terry Harrington appeals a district court decision denying his application for postconviction relief. He claims the court erred in holding his claims were time barred. *See* Iowa Code § 822.3 (1999) (imposing a three-year statute of limitations on postconviction relief actions). In addition, he faults the district court for failing to vacate his first-degree murder conviction and order a new trial on the basis of newly discovered evidence consisting of a recantation by the State's primary witness, police investigative reports implicating another suspect in the crime, and "brain fingerprinting" test results. *See id.* § 822.2(4) (providing postconviction remedy where material facts were not presented at criminal trial). Harrington also rests error on the court's refusal to grant relief based on a due process violation resulting from the prosecution's failure to produce the police reports at the time of Harrington's criminal trial. *See id.* § 822.2(1) (providing postconviction remedy where conviction was in violation of United States Constitution). The State disputes Harrington's allegations of error and affirmatively asserts that Harrington's appeal is untimely.

After submission of the appeal, Harrington filed a conditional motion for limited remand. In the event this court believes that he is not entitled to a new trial on the basis of the present record, Harrington seeks to have the case remanded for the purpose of taking additional testimony in support of his application.

Upon our review of the record and the arguments of the parties, we conclude (1) Harrington's appeal is timely; (2) this action is not time barred; (3) Harrington is entitled to relief on the basis of a due process violation; and (4) Harrington's motion for conditional remand is moot. Accordingly, we reverse the district court judgment, and remand for entry of an order vacating Harrington's conviction and sentence, and granting him a new trial. We deny Harrington's motion for remand on the basis of mootness.

***513** I. *Timeliness of Appeal*.

Before we discuss the merits of Harrington's appeal, we address the State's contention that this court lacks jurisdiction because Harrington's notice of appeal was not filed before the applicable deadline. *See In re Marriage of Mantz,* 266 N.W.2d 758, 759 (Iowa 1978) (stating when an appellant files a late notice of appeal, the appellate courts are without jurisdiction to hear the appeal). The trial court entered its decision on March 5, 2001. The defendant then filed a motion under Iowa Rule of Civil Procedure 1.904(2) asking the court to expand its findings of fact and conclusions of law. The court denied the motion on March 28 and Harrington filed his notice of appeal on April 20. Thus, the notice of appeal was filed within thirty days of the court's ruling on the post trial motion, but more than thirty days from the court's initial decision.

[1] Iowa Rule of Appellate Procedure 6.5(1) requires that a notice of appeal be filed within thirty days of the trial court's decision or within thirty days of the trial court's ruling on any rule 1.904(2) motion that is filed. If the rule 1.904(2) motion is not timely filed, however, it will not toll the thirty-day time period for filing a notice of appeal. *See State ex rel. Miller v. Santa Rosa Sales & Mktg., Inc.*, 475 N.W.2d 210, 213-14 (Iowa 1991). A rule 1.904(2) motion must be filed within the time allowed for filing a motion for new trial, which is ten days after the filing of the district court's decision. *See* Iowa Rs. Civ. P. 1.904(2), .1007.

[2] In the present case, the rules of civil procedure required Harrington to file his post trial motion by Thursday, March 15. Harrington acknowledges that his motion was not date stamped by the clerk of court on or before March 15, but claims he faxed a copy to the clerk of court and the presiding judge on that date. He also served a copy of the motion on opposing counsel by mail on the same day.[FN1]

FN1. Harrington's motion did not contain a proof of service. *See* Iowa R. Civ. P. 1.442(7) (requiring certificate of service on all papers required or permitted to be served or filed). The State does not complain about the *sufficiency* of the defendant's rule 1.904(2) motion, however, so we do not consider the absence of a certificate of service in determining the timeliness of this appeal.

The trial court file contains two copies of Harrington's motion, one file stamped on Monday, March 19 and one filed stamped on Tuesday, March 20. In addition, when this issue was raised by the State on appeal, the district court, at Harrington's request, entered an order "to clarify or correct the record." In this order, the court made a factual finding that Harrington had faxed a motion under rule 1.904(2) to the clerk and to the court on March 15, and had mailed a copy to the clerk on the same day. The court also noted that it had made a finding in its ruling on the rule 1.904(2) motion that the "motion was timely filed."

Although our rules contemplate that pleadings will be filed with the clerk, rule 1.442(5) addresses the situation where a pleading is filed with a judge. That rule provides:

> *Filing with the clerk defined*. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, *except that a judge may permit them to be filed with the judge, who shall note thereon the filing date and forthwith transmit them to the office of the clerk*.

Iowa R. Civ. P. 1.442(5) (emphasis added). We think the exception to the rule applies here.

***514** The trial judge apparently accepted the defendant's motion for filing when the judge received a copy on March 15. Although the judge did not note the filing date on his copy as required by rule 1 .442(5), it appears the judge did transmit the motion to the clerk, as there are two copies in the clerk's file, each with a different date stamp. We think the judge's later ruling confirming his receipt

and acceptance of the motion on March 15 substantially complies with the rule's requirement that the filing date be noted on the motion. Therefore, Harrington's rule 1.904(2) motion was timely filed and, consequently, his notice of appeal filed within thirty days of the court's ruling on his motion was likewise timely filed.

We turn now to the substantive issues raised in this appeal. Our discussion begins with the factual background and procedural history of this case.

II. *Background Facts and Proceedings*.

A. *Original murder trial*. On August 4, 1978, Terry Harrington was convicted of first-degree murder in the shooting death of John Schweer. Because most of the relevant facts in this postconviction relief action relate to the underlying criminal proceeding in which Harrington was the defendant, we will refer to Harrington as the defendant in the remainder of our opinion.

Sometime after midnight on July 22, 1977, security guard John Schweer was murdered at a car dealership in Council Bluffs, Iowa. At the time, Schweer, a retired police captain, was a night watchman for several car dealerships in the area. Schweer had been shot, and a 12 gauge shotgun shell was found in the vicinity of the crime.[FN2] Footprints and dog prints were also discovered near Schweer's body.

> FN2. The police determined the shell was manufactured prior to 1966, some twelve years before the crime.

Harrington, who was seventeen at the time, was charged with Schweer's murder and was ultimately convicted, primarily on the testimony of a juvenile accomplice, Kevin Hughes.[FN3] Hughes gave the following account of July 22, 1977. Shortly after midnight, Hughes, Harrington, and another juvenile, Curtis McGhee, went to the dealership with the intent to steal a beige Toronado. Hughes waited in Harrington's car while Harrington and McGhee walked around a building to find the desired automobile. Harrington had a shotgun. Shortly after Harrington and McGhee left, Hughes heard a gun shot. Then Harrington and McGhee came running back. Harrington said he had just shot a cop.

> FN3. Hughes' status as an accomplice was disputed at the time of Harrington's murder trial. *See State v. Harrington*, 284 N.W.2d 244, 248 (Iowa 1979) (stating court had "serious doubts whether Hughes was an accomplice"). Years later, however, when Harrington's claim for habeas corpus relief was heard in federal court, evidence had come to light that Hughes had been charged with a crime-conspiracy to steal an automobile-stemming from the events on the night of the murder. *Harrington v. Nix*, 983 F.2d 872, 875 (8th Cir.1993).

Hughes was impeached by the defense with prior statements he had made implicating other persons in the crime. Hughes had separately named three other men as the killer. Each man was ultimately discovered to have an alibi before Hughes finally fingered Harrington. Hughes admitted that he had also changed his testimony about the type of gun used, first stating that Harrington had a pistol, then a 20-gauge shotgun, and finally a 12-gauge shotgun. He conceded he was "a confessed liar," having lied "[a]bout five or six times talking about this case." Hughes ***515** acknowledged that he visited the murder scene with the police and prosecutor and told them what he thought they wanted to hear. At the time, Hughes was being held on various theft and burglary charges and "he was tired of [being in jail]." He admitted that these charges were dropped after he agreed to testify against Harrington and McGhee.

The physical evidence linking Harrington to the crime was minimal. Hughes claimed Harrington wrapped the shotgun in his-Harrington's-jacket after the shooting. Chemical examination of the jacket by the police several weeks after the murder revealed two flakes of smokeless gunpowder consistent with the type used in shotgun shells. In addi-

tion, one of McGhee's friends testified that he saw part of a shotgun in the trunk of Harrington's car a few days before the murder.[FN4]

> FN4. The murder weapon itself was never found. Additionally, even though plaster casts were made of footprints found at the murder scene, the police did not compare these casts to Harrington's feet.

Harrington presented an alibi defense, but this defense was rebutted by the prosecution's witnesses who testified they saw Harrington with Hughes and McGhee late in the evening of July 21. These witnesses included Hughes' girlfriend, Candice Pride, and two other juvenile friends of Hughes, Roderick Jones and Clyde Jacobs. They testified they saw Hughes get into Harrington's car around eleven o'clock on the evening of July 21 and drive off with Harrington and McGhee. Another girlfriend of Hughes, Linda Lee, testified that Hughes came to her home in the early morning hours one night in July 1977. When she walked Hughes to the door as he was leaving, she saw Harrington's car. Lee stated she could not tell if Harrington was in the vehicle, only that there were two other people in the car.[FN5] She could not recall which night in July this occurred.

> FN5. In our decision on Harrington's direct appeal, we stated that Lee "saw the defendant in his car with another person, waiting for Hughes" when she walked Hughes to the door sometime "after midnight in July of 1977." *Harrington,* 284 N.W.2d at 249. A review of the trial transcript reveals, however, that Lee testified there were two persons waiting in the car for Hughes, but she could not see who these individuals were.

Harrington and McGhee were both convicted of first-degree murder in separate trials. Harrington's appeal failed, *see State v. Harrington,* 284 N.W.2d 244 (Iowa 1979), as did a subsequent postconviction relief action in which he claimed that Hughes' testimony was perjured, *Harrington v. State,* 458 N.W.2d 874 (Iowa Ct.App.1990). Harrington also unsuccessfully sought habeas corpus relief in federal court. *See Harrington v. Nix,* 983 F.2d 872 (8th Cir.1993). He is currently serving a life sentence without the possibility of parole.

B. *Second postconviction relief (PCR) action*. The present PCR action was filed in 2000, more than twenty years after Harrington's conviction. Based on this timing, the State asserted the statute of limitations as an affirmative defense. Harrington relied on an exception to the statutory limitations period for "a ground of fact or law that could not have been raised within the applicable time period." Iowa Code § 822.3. Although the trial court concluded the evidence upon which Harrington relied was newly discovered and could not have been discovered earlier in the exercise of due diligence, the court inexplicably concluded Harrington's petition for postconviction relief was time barred.

Notwithstanding this determination, the court also addressed the merits of the ***516** defendant's claim for relief. Harrington requested vacation of his conviction under Iowa Code section 822.2, which provides in pertinent part:

> Any person who has been convicted of, or sentenced for, a public offense and who claims that:
>
> 1. The conviction or sentence was in violation of the Constitution of the United States or the Constitution or laws of this state; [or]
>
> ....
>
> 4. There exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
>
> ....
>
> may institute, without paying a filing fee, a proceeding under this chapter to secure relief.

*Id*. § 822.2(1), (4). Harrington's claim under section 822.2(1) was based on an alleged due process violation arising from the prosecution's failure to turn over eight police reports to the defense during the criminal trial. *See Brady v. Maryland,* 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218 (1963) (holding failure of prosecution to disclose evidence that may be favorable to the accused is a violation of the Due Process Clause of the Fourteenth Amendment). The same police reports, in addition to recantation testimony and novel computer-based brain testing,[FN6] also served as a basis for Harrington's claim of newly discovered evidence under section 822.2(4).

> FN6. This testing evidence was introduced through the testimony of Dr. Lawrence Farwell, who specializes in cognitive psychophysiology. Dr. Farwell measures certain patterns of brain activity (the P300 wave) to determine whether the person being tested recognizes or does not recognize offered information. This analysis basically "provide[s] information about what the person has stored in his brain." According to Dr. Farwell, his testing of Harrington established that Harrington's brain did not contain information about Schweer's murder. On the other hand, Dr. Farwell testified, testing did confirm that Harrington's brain contained information consistent with his alibi.

[3][4] In order to establish a *Brady* violation, the defendant had to prove "(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issue of guilt." *State v. Veal,* 564 N.W.2d 797, 810 (Iowa 1997), *overruled in part on other grounds by State v. Hallum,* 585 N.W.2d 249, 253 (Iowa 1998). To prevail on his newly discovered evidence claim, Harrington was required to show:

> (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.

*Jones v. State,* 479 N.W.2d 265, 274 (Iowa 1991).

Because we conclude the due process claim is dispositive of the present appeal, we do not reach the question of whether the trial court erred in rejecting Harrington's request for a new trial on the basis of newly discovered evidence. Nonetheless, we briefly review the evidence introduced by the defendant at the PCR hearing with respect to various witnesses' recantation of their incriminating trial testimony, as it gives context to our later discussion of the materiality of the police reports. Because the scientific testing evidence is not necessary to a resolution of this appeal, we give it no further consideration.

1. *Witness recantation*. Harrington introduced testimony from three witnesses ***517** who had testified for the prosecution at the criminal trial: accomplice Kevin Hughes, and two individuals who rebutted Harrington's alibi, Candice Pride and Clyde Jacobs. All three recanted their trial testimony.[FN7]

> FN7. Harrington asserts in his motion for limited remand that if this matter were remanded, he would present the testimony of the remaining two prosecution witnesses who had rebutted his alibi, Linda Lee and Roderick Jones. He claims these witnesses will also recant their trial testimony placing Harrington with Hughes on the night of the murder.

Hughes testified that he made up the story about he, Harrington and McGhee going to the dealership to steal a car. He said he lied to obtain a $5000 reward being offered for information about the murder and to avoid being charged with the crime. (It appears Hughes was being held in Omaha on car theft charges at the time he came to the attention of the Council Bluffs police. Omaha authorities suspected that Hughes or others involved in a car theft ring

might have been involved in or might know something about the Schweer homicide, and so contacted the Council Bluffs investigators.)

Pride testified that she knew nothing about Harrington's involvement in the murder and had no idea if her testimony at his criminal trial was true. She said she had simply testified to what Hughes told her to say because she was dating Hughes at the time.

Finally, Jacobs testified he lied when he said at the criminal trial that he saw Harrington with Hughes the night of the murder. Jacobs said he never saw Harrington that night. He claims he gave a contrary story at trial because he was pressured by the prosecutors and police. Jacobs stated he, Hughes, and others were stealing cars back then, and he implicated Harrington to avoid being prosecuted for those offenses. He asserted Harrington was never part of the car theft ring.

Joseph Hrvol, the then assistant county attorney who prosecuted the case against Harrington, testified for the State at the second PCR hearing. Hrvol emphatically denied that any "buy" money was offered to Hughes or that Jacobs' testimony was coerced. While there was no documentation in police records that Hughes had been offered a reward, one of the previously undisclosed police reports indicated that the police had "put the word out what we had to offer and what we wanted in return." This same report, dated July 27, 1977, stated that "officers made several other contacts this evening [July 25, 1977] putting out information money," and that the next day, "[s]ome of the contacts started to make contact back to [the police]." This report identified one individual by name who "was offered money if he could come up with something," and another potential witness "who was also offered information money."

The PCR court determined the recantation evidence could not have been discovered earlier in the exercise of due diligence. The court also concluded, however, that the recantations were not credible. The court considered the new testimony cumulative and merely impeaching, and thought it would not affect the outcome of the case in a new trial.

2. *Police investigative reports*. As indicated earlier, Harrington claims in the present action that eight police reports were not made available to him during his criminal trial in 1978. Harrington's original defense attorney, Paul Watts, died after the appeal of the criminal case and therefore his file was not available for review. Nonetheless, James Cleary, who represented Harrington on his first PCR claim, testified at the second PCR trial ***518** that he told the county attorney's office in 1987 "that [he] wanted to see everything," "the DCI files, ... the police department files from Council Bluffs, and any and all related documents relative to their investigation." The materials disclosed to him at that time did not contain the eight police reports. The evidence showed these reports were not known to Harrington or his PCR attorneys until 1999 when a person who had become interested in Harrington's case asked the Council Bluffs police department for a copy of the complete file pertaining to Schweer's murder.[FN8] The police reports were produced at that time and eventually given to Harrington's present counsel.

> FN8. Ann Danaher, who worked as a barber at the Iowa State Penitentiary in 1994, became acquainted with Harrington's case after striking up a conversation with Harrington's family in the parking lot of the penitentiary. Ms. Danaher worked for five years gathering information and talking to persons connected with the Schweer murder investigation and Harrington's prosecution in an effort to assist Harrington's family in proving his innocence.

Harrington argued this newly discovered evidence warranted vacation of his conviction. He also asserted a *Brady* violation occurred in 1978 because these reports contained potentially exculpatory evidence of an alternative suspect and they had been withheld by the prosecution. All but one of the eight reports documented the police department's

investigation of another suspect in the Schweer homicide, forty-eight year old Charles Gates.

Of particular relevance here, these documents showed that Schweer had made a written request for additional lighting in the car lot just days before his murder. In a note dated 12:30 a.m. July 20, 1977, Schweer stated he had observed a man trying to get into one of the trucks "last night" and had chased him out of the parking lot. Schweer wanted the dealership to install floodlights in the car lot. Police confirmed this incident through John Burke, a Northwestern Bell employee who worked in the area of the car dealership and approached police after the murder to provide the following information. Burke told police he saw a man running with a dog in that vicinity shortly before midnight on July 19, 1977. At first Burke thought the man was carrying a board, but then realized it was a shotgun. Burke said that not long after he saw this man, another man in a vehicle stopped to ask if Burke had seen the running man. Burke later identified the person in the vehicle as John Schweer.

Another incident the following night was also documented in the police reports. This report, prepared by a Council Bluffs police officer on the morning of July 23, 1977, revealed that the officer had talked with Schweer in the early morning hours of July 21 concerning Schweer's observation of a man in the area of the dealership. Schweer told the officer that he had observed a man carrying what Schweer thought was a rifle, although the item could have been a car jack. Schweer said he had lost sight of the man, but he believed the man was still in the area, hiding in some nearby weeds. The officer's report also documented there was a dog in the vicinity that Schweer thought belonged to the man with the rifle.

The investigative reports also revealed the police had talked to an individual who worked at a service station near the car dealerships. This witness told the police he had seen a man walking a dog in that area during the evening hours on various occasions. This witness was able to identify Charles Gates as that person from a photograph.

***519** Although the undisclosed reports state the police subsequently located Gates and questioned him at the police station, no summary or recording of that interview has been discovered. One of the reports also references a polygraph test administered to Gates by Confidential Polygraph Service in Omaha. This test was interpreted to show Gates was "not truthful in his denial of owning a shotgun or having shot John Schweer." The actual polygraph results, which are stated in one of the newly discovered reports to be contained in an addendum to that report, have never been produced, even though, according to the police, polygraph reports are usually put in the case file. The reports that were found showed that Gates was a suspect in a fourteen-year-old unsolved murder in Omaha. Police also learned during interviews with Gates' former neighbors and a former landlord that Gates was "a 'spooky type individual,' " was a loner, had "very strange living habits," and had three dogs that appeared to be "extremely mean."

Several Council Bluffs police officers involved in the investigation of Schweer's murder were also called to testify at the second PCR hearing. They basically confirmed the substance of the written reports. These officers agreed that several witnesses had seen Charles Gates in the vicinity of the car lot in the days surrounding the murder. An individual, whom the police thought was Gates, had been observed walking a dog and carrying a gun in the area. One officer, Larry Williams, stated the police thought Gates was the person Schweer had chased off the car lot a few days before Schweer's death. This same officer, who oversaw the investigation in the Schweer murder case, believed the police eventually excluded Gates as a suspect, but no one could now recall the reason for Gates' elimination. Although Officer Williams testified a report stating why Gates was no longer a suspect "should have been" in the file, such a report has not been discovered.

The district court found Harrington's trial counsel

did not have the police reports in question and that the reports were material and not merely cumulative or impeaching. Nonetheless, the court concluded disclosure of the police reports probably would not have changed the outcome of the trial. The court noted that other information admittedly provided to Harrington's original attorney revealed "[m]ore than a dozen potential suspects, including Gates." The court noted one report known to defense counsel stated a person living in the vicinity saw an individual matching Gates' description walking dogs in the area. Moreover, defense counsel knew the police had taken casts of dog paw prints from the murder scene. Concluding the evidence would probably not have changed the outcome of the criminal trial, the district court denied postconviction relief on the basis of the *Brady* violation and under the theory of newly discovered evidence.

III. *Scope of Review*.

[5][6] "Postconviction proceedings are law actions ordinarily reviewed for errors of law." *Bugley v. State*, 596 N.W.2d 893, 895 (Iowa 1999). But when the basis for relief is a constitutional violation, our review is de novo. *Id*. Because the basis for relief here is a due process violation, we employ a de novo review of the court's ruling on the asserted *Brady* violation. *See State v. Romeo*, 542 N.W.2d 543, 551 (Iowa 1996) (conducting a de novo review of due process claim based on a *Brady* violation).

[7] Our review of the court's ruling on the State's statute-of-limitations defense is for correction of errors of law. *See* ***520***Dible v. State*, 557 N.W.2d 881, 883 (Iowa 1996) (reviewing trial court's dismissal of PCR action as time barred "to correct errors of law"). Thus, we will affirm if the trial court's findings of fact are supported by substantial evidence and the law was correctly applied. *Benton v. State*, 199 N.W.2d 56, 57 (Iowa 1972). We start with that issue.

IV. *Statute of Limitations*.

[8] Iowa Code section 822.3 contains a statute of limitations for postconviction relief actions. At the time Harrington filed the present action, this provision required that PCR applications "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. This statute was enacted in 1984, several years after Harrington's conviction and appeal became final. *See* 1984 Iowa Acts ch. 1193, § 1 (codified at Iowa Code section 663A.3 (1985)). In *Brewer v. Iowa District Court*, 395 N.W.2d 841 (Iowa 1986), we held "that all potential postconviction applicants whose convictions became final prior to July 1, 1984, must file their applications for postconviction relief on or before June 30, 1987, or be barred from relief." 395 N.W.2d at 844 (holding Harrington's first PCR application was timely filed). Thus, Harrington's present action is time barred unless an exception applies.

To avoid this problem, Harrington relies on that part of Iowa Code section 822.3 providing that the three-year statute of limitations "does not apply to a ground of fact or law that could not have been raised within the applicable time period." The district court apparently concluded this exception did not apply because it ruled that Harrington's PCR action was "time barred by section 822.3."

[9] In addition to the obvious requirement that an applicant relying on section 822.3 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. *See Dible*, 557 N.W.2d at 884; *Hogan v. State*, 454 N.W.2d 360, 361 (Iowa 1990). This additional requirement is based on the common sense conclusion that it would be absurd to toll the statute of limitations pending the discovery of a trivial fact that could not possibly affect the challenged conviction. *See generally State v. Anderson*, 636 N.W.2d 26, 35 (Iowa 2001) (stating court interprets statutes to avoid an absurd result). Accordingly, we have held that an "exonerating ground of

fact must ... be 'relevant and ... likely [to] change the result of the case.' " *Hogan,* 454 N.W.2d at 361; *accord Dible,* 557 N.W.2d at 884 ("a satisfactory nexus exists when the exonerating ground would likely have changed the result of the original criminal case").

[10] The State contends and the trial court apparently believed that the nexus test mirrors the requirements for a substantive claim for postconviction relief based on newly discovered evidence. *See* Iowa Code § 822.2(4). To succeed on such a claim an applicant must establish, among other things, that the newly discovered evidence is material, not merely cumulative or impeaching, and would probably have changed the outcome of the trial. *See Jones v. State,* 479 N.W.2d 265, 274 (Iowa 1991). Although our prior cases have never equated the requirements for the ground-of-fact exception with a newly-discovered-evidence claim for relief, the language used in our cases dealing with both concepts is similar. *Compare Dible,* 557 N.W.2d at 884 (holding section 822.3 requires *likelihood* that result would be different), *with Jones,* 479 N.W.2d at 274 ***521** (holding section 663A.2(4) (now found at section 822.2(4)) requires *probability* of different result). Since this similarity has generated confusion in the present case, it is appropriate at this time to clarify the differences between these two concepts.

[11][12] Initially, we confirm our statement in *Hogan* that a postconviction-relief applicant relying on the ground-of-fact exception must show the ground of fact is relevant to the challenged conviction. 454 N.W.2d at 361. By "relevant" we mean 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. We specifically reject any requirement that an applicant must show the ground of fact would likely or probably have changed the outcome of the underlying criminal case in order to avoid a limitations defense. A determination of that issue must await an adjudication, whether in a summary proceeding or after trial, on the applicant's substantive claim for relief. We disavow our prior cases to the extent they are inconsistent with the standard we set forth today.

Turning to the case at hand, we note the trial court did not discuss whether the ground-of-fact exception asserted by Harrington applied. Notwithstanding the lack of express findings on this matter, we can safely assume the court's rejection of this exception was not based on Harrington's failure to show that he could not have raised the asserted matters earlier. With respect to both the undisclosed police reports and the recantation evidence, the court held, in ruling on Harrington's substantive claims, that he had proved they were discovered after the verdict in his criminal trial and that they could not have been discovered earlier than they were discovered in the exercise of due diligence. These findings are clearly supported by substantial evidence, which we have reviewed above, and so are binding under the standard of review applicable to the statute-of-limitations issue.

The court's rejection of the ground-of-fact exception was apparently based on its erroneous belief that Harrington had to prove the exonerating ground met the requirements for a claim of newly discovered evidence, a claim expressly rejected by the trial court. This error is significant because application of the correct principles of law requires a conclusion contrary to that reached by the trial court.

Having determined Harrington could not have raised these matters earlier, the only remaining task for the trial court was to decide whether there is a nexus between the undisclosed police reports and the recantation evidence on one hand and the defendant's conviction on the other. Clearly there is. Both classes of evidence are the type of facts having the *potential* to qualify as material evidence that probably would have changed the outcome of Harrington's trial. They are, therefore, relevant and, as such, meet the nexus requirement.

Because Harrington asserted a relevant ground of fact or law "that could not have been raised within the applicable time period," this action is not time barred. The district court erred in making a contrary ruling. That brings us to the merits of Harrington's application for postconviction relief.

V. *Due Process Claim*.

We briefly restate two earlier observations to set the stage for our analysis. First, our review is de novo. *See Romeo,* 542 N.W.2d at 551. Second, to show a due process violation, Harrington must prove "(1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material ***522** to the issue of guilt." *Veal,* 564 N.W.2d at 810 (stating requirements for a *Brady* violation). We address each element separately.

[13][14][15][16] A. *Suppression of the evidence*. Evidence is suppressed "when information is discovered after trial 'which had been known to the prosecution but unknown to the defense.' " *Cornell v. State,* 430 N.W.2d 384, 385 (Iowa 1988). This test does not mean, however, that evidence unknown to the individual prosecutor is not considered suppressed. *See Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 1567, 131 L.Ed.2d 490, 508 (1995). The prosecutor "has a duty to learn of any favorable evidence known to ... others acting on the government's behalf in the case, including the police." *Id*. Regardless of whether the prosecutor actually learns of the favorable evidence, the prosecution bears the responsibility for its disclosure. *Id*. at 438, 115 S.Ct. at 1567-68, 131 L.Ed.2d at 508. Thus, it is the fact of nondisclosure that is important; "[t]he good faith or bad faith of the prosecution in failing to produce the evidence" is not. *Romeo,* 542 N.W.2d at 551; *accord Kyles,* 514 U.S. at 437-38, 115 S.Ct. at 1567-68, 131 L.Ed.2d at 508.

[17][18] It is also now well established that the prosecution's duty to disclose "is applicable even if there has been no request by the accused" for the information. *Strickler v. Greene,* 527 U.S. 263, 280, 119 S.Ct. 1936, 1948, 144 L.Ed.2d 286, 301 (1999). Nonetheless, "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." *Cornell,* 430 N.W.2d at 385.

[19] The State does not dispute that the evidence in question was known to the prosecution-or at least the police-during trial. Nor does the State challenge the trial court's factual finding that the police reports were not known to the defense at trial. Upon our de novo review, we agree with the trial court and find that Harrington did not discover the reports until more than twenty years after his conviction when a person assisting Harrington's family obtained the complete file on Schweer's murder.

We also think the reports were "suppressed" within the meaning of the *Brady* rule. It is apparent from some of the questions asked by Harrington's defense counsel at trial that he had some information about a man seen walking a dog and carrying a shotgun near the railroad tracks by the car dealership. Gates is never mentioned by name, however, and Harrington's first postconviction relief counsel testified that there were no police reports referring to Gates in the materials provided to him by the prosecutor in 1987. In addition, one of the lead investigators testified without impeachment at Harrington's 1988 PCR hearing that the police had no immediate suspects in the Schweer homicide. FN9 We think it probable that original trial counsel did not know that Gates was the suspicious person seen by witnesses in the area. Clearly, counsel did not know of Schweer's contact with a person fitting Gates' description in the nights preceding Schweer's murder, including the fact that Schweer caught this individual trying to break into a truck.

FN9. The same officer admitted at Harrington's second PCR hearing in 2000 that Gates was a suspect within a couple of days of the murder.

We conclude Harrington did not have the "essential facts" of the police reports so as to allow the defense to wholly take ***523** advantage of this evidence. As the Nevada Supreme Court stated under similar circumstances, "[O]nly access to the documents themselves would have provided the range and detail of information necessary to fully understand the implications of the police investigation." *Mazzan v. Warden,* 116 Nev. 48, 993 P.2d 25, 37 (2000) (holding oral disclosure of identity of another suspect was not sufficient to avoid *Brady* violation for failing to produce police investigatory reports); *see also Wilson v. State,* 874 So.2d 1131, ----, 2002 WL 732110 (Ala.Crim.App.2002) (finding *Brady* violation despite defendant's knowledge of witnesses' identities, where withheld police report gave details of their testimony in the absence of which the defendant would have had "no reason to expend the time or resources to locate them"). Because Harrington did not have the essential details contained in the withheld police reports, we hold the evidence was suppressed.

[20] B. *Exculpatory nature of the evidence*. To prove a *Brady* violation, the defendant must show the undisclosed evidence was favorable to his defense. *See Romeo,* 542 N.W.2d at 551. Here, Harrington steadfastly claimed he did not commit the murder.[FN10] Obviously, evidence that someone else killed Schweer would be favorable to this defense. The police reports, documenting an individual with a shotgun and a dog caught trying to break into a truck late at night just days before the shooting, would provide abundant material for defense counsel to argue that Gates had the opportunity and motive to commit the crime, thereby creating reasonable doubt that Harrington was the perpetrator. Harrington has proved the second element of a *Brady* violation.

> FN10. At Harrington's sentencing he stated:
>
> > I just want you to know that no matter what happens, I know I'm innocent, and as long as, you know, I feel that inside, then I'm going to keep on fighting because I know I can't see myself locked up for the rest of my life for something I didn't do. .... I feel like I was judged by the color of my skin and not the content of my character, and I'll always feel that way until I get, you know, the kind of verdict the testimony shows, and that's innocent or not guilty as they would say in the courtroom.

[21][22][23][24] C. *Materiality*. The suppression of favorable evidence is not a denial of due process unless the evidence is "material to the issue of guilt." *Id*. Evidence is material when " 'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.' " *Cornell,* 430 N.W.2d at 386 (citing *United States v. Bagley,* 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481, 494 (1985)). This test does not require the defendant to prove disclosure of the evidence "would have resulted in his acquittal." *Romeo,* 542 N.W.2d at 551. As the United States Supreme Court has recently explained:

> [T]he materiality inquiry is not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict."

*Strickler,* 527 U.S. at 290, 119 S.Ct. at 1952, 144 L.Ed.2d at 307 (quoting *Kyles,* 514 U.S. at 435, 115 S.Ct. at 1566, 131 L.Ed.2d at 506); *accord State v. Tangie,* 616 N.W.2d 564, 572 (Iowa 2000). In deciding whether our confidence in the verdict is undermined, we consider "the totality of the circumstances, including the possible effects of nondisclosure on defense***524** counsel's trial preparation." *Cornell,* 430 N.W.2d at 386.

[25] Upon our de novo review of the record and consideration of the totality of the circumstances, our collective confidence in the soundness of the defendant's conviction is significantly weakened. Hughes, the primary witness against Harrington, was by all accounts a liar and a perjurer. With the police offering a $5000 reward for information, Hughes named three other individuals as the murderer before finally identifying Harrington as the perpetrator, and then only after the other three men produced alibis.

As questionable as Hughes' veracity is, it is not the character of the prosecution's principal witness that undermines our confidence in the defendant's trial; Hughes' ability and propensity to lie were well known in 1978. The unreliability of this witness is, however, important groundwork for our analysis because this circumstance makes it even more probable that the jury would have disregarded or at least doubted Hughes' account of the murder had there been a true alternative suspect. Gates was that alternative. *See Kyles,* 514 U.S. at 439, 115 S.Ct. at 1568, 131 L.Ed.2d at 509 ("[T]he character of a piece of evidence as favorable will often turn on the context of the existing or potential evidentiary record.").

At the original trial Gates was one of more than a dozen individuals who were considered by the police as the potential culprit. Certainly defense counsel would not have had the time and resources to track down and investigate each of these individuals. But if the defendant had known the additional information contained in the withheld investigatory reports, the defense would surely have focused its efforts on Gates, not only in preparing for trial, but at trial as well. Our conclusion is based on two important points revealed in these reports: (1) Gates' identification as the suspicious person seen in the area with a gun and a dog; and (2) Schweer's contact with Gates, which for the first time provided a concrete link between an alternative suspect and the victim.

The State is hard pressed to argue the defendant's trial preparation and trial strategy would not have been altered by this additional information. Officers testifying at the second PCR hearing admitted the police considered Gates to be "the prime suspect" based on their investigation, an investigation unknown to Harrington at the time of his criminal trial. It is fair to conclude that had Harrington's counsel been provided with this information, he would have zeroed in on Gates in his trial preparation and at trial, just as the police had zeroed in on Gates during their investigation. Harrington's attorney could have used Gates as the centerpiece of a consistent theme that the State was prosecuting the wrong person.

Independent witnesses placed Gates at the scene of the crime in the days before the murder. Independent witnesses saw him with a shotgun and a dog. The victim himself interrupted a person resembling Gates breaking into a truck only two nights before the victim was shot to death in the car lot. In contrast, Harrington was identified as the murderer by a confessed liar, whose testimony was corroborated only by two particles of gunpowder found on Harrington's coat several weeks after the murder and the now-recanted testimony of the witness's teenage cohorts. The murder weapon was never found and no one has ever connected Harrington with the dog prints found at the murder scene, even though the police from the beginning had focused their investigation on finding "a man with a dog."

***525** Given this evidence, a jury might very well have a reasonable doubt that Harrington shot Schweer. That is all that is required to establish the materiality of the undisclosed evidence. *See Lay v. State,* 116 Nev. 1185, 14 P.3d 1256, 1263 (2000) (stating "specific evidence of the existence of another shooter" was potentially material because the defense "might develop reasonable doubt as to whether [the defendant] was the actual killer"). We do not think Harrington had to show, as the State argues, that the police reports would have "led to evidence that someone else committed [the] crime." It was incumbent on the State to prove Harrington's

guilt beyond a reasonable doubt; it was not Harrington's responsibility to prove that someone else murdered Schweer. Therefore, if the withheld evidence would create such a doubt, it is material even if it would not convince the jury beyond a reasonable doubt that Gates was the killer.

Under the circumstances presented by the record before us, we cannot be confident that the result of Harrington's murder trial would have been the same had the exculpatory information been made available to him. We hold, therefore, that Harrington's due process right to a fair trial was violated by the State's failure to produce the police reports documenting their investigation of an alternative suspect in Schweer's murder. *See Mazzan,* 993 P.2d at 74-75 (finding *Brady* violation where withheld "police reports provided support for [the defendant's] defense that someone else murdered" the victim); *Davis v. Commonwealth,* 25 Va.App. 588, 491 S.E.2d 288, 293 (1997) (holding prosecution's failure to disclose information of other African-American females in vicinity of drug sale constituted a *Brady* violation). Accordingly, we reverse the trial court's contrary ruling, and remand this matter for entry of an order vacating Harrington's conviction and granting him a new trial.

**REVERSED AND REMANDED.**

All justices concur except CADY, J., who dissents, and LARSON, J., who takes no part.

CADY, Justice, (dissenting).

I respectfully dissent. Harrington's due process claim is not based on his pretrial lack of knowledge of a potential suspect who had been seen walking a dog and carrying a shotgun near the railroad tracks by the car dealership a few days prior to the murder. Furthermore, Harrington's claim is not that he did not have knowledge that dog prints were observed at the murder scene. If these were his claims, I would have no disagreement with the majority. Instead, his claim is that the police failed to turn over the written reports of their investigation into the potential suspect. Although suppression by the police of potentially exculpatory information can justify a new trial, it does not in this case because Harrington clearly knew enough about the information independent of the contents of the suppressed police reports to conduct his own investigation and determine its value as a defense.

I am outraged that the police, apparently, failed to turn over the questioned reports. This was a clear violation of *Brady*. However, due process does not require a new trial unless the suppressed reports would have reasonably altered the outcome of the trial. Although the passage of time, as well as the death of the defense attorney, has cast a cloud of vagueness over much of the trial proceedings, it is undisputed that Harrington and his attorney knew enough about the information contained in the suppressed police reports to examine witnesses at trial about the matter. Moreover, this information was so sensational and so exculpatory that Harrington's ***526** counsel surely would have earnestly pursued the matter independent of any police reports and then formulated a defense around it if it had been warranted. Consequently, I am unable to conclude that the reports would have altered anything at the original trial.

The majority cites two decisions to support its conclusion that the suppression of the reports denied Harrington the essential facts to structure a defense around the suppressed reports. *See Mazzan,* 993 P.2d at 37; *Wilson,* 2002 WL 732110, 874 So.2d at ----. However, in *Mazzan* the actual police reports were essential to understanding and appreciating the implications of the information. Similarly, in *Wilson* defense counsel would have had no reason to "expend the time or resources" to locate the witness unless he would have known about the details of their testimony contained in the suppressed reports. In this case, however, there is no dispute that Harrington and his counsel had been made aware of the eerie, suspicious circumstances mentioned in the suppressed reports. Moreover, police did provide defense counsel with a report identifying the potential suspect by name, together with a host of names and addresses of neighbors who had seen

the suspicious person. The suppressed police reports were not necessary to understand the significance of this known information or to prod any competent attorney to investigate every aspect of the information.

I believe the majority has attached too much significance to the suppression of the reports, and has elevated the circumstances implicating Gates as the murderer into a sensationalized claim that seemingly vindicates Harrington today, yet was known and rejected by police and Harrington's own defense counsel twenty-five years ago. The majority exalts the claim far beyond the significance anyone involved in the case gave it twenty-five years ago, including Harrington's own defense counsel, whose competency was not questioned in this proceeding. The majority now sets aside a twenty-five year old jury verdict and places the State in the difficult position of retrying this case after the passage of two and one-half decades because of a misdeed by the police which, while disconcerting, did not result in prejudice to Harrington. I would conclude the *Brady* violation is not cognizable in this postconviction relief proceeding. I would otherwise affirm the district court ruling.

Iowa,2003.
Harrington v. State
659 N.W.2d 509

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# United States Court of Appeals
## FOR THE EIGHTH CIRCUIT

No. 07-1453

| | | |
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| Curtis W. McGhee, Jr.,<br><br>Appellee,<br><br>v.<br><br>Pottawattamie County, Iowa; Joseph Hrvol; David Richter,<br><br>Appellants. | * | |
| Terry Harrington, individually and in his capacity as the father of Nicole Antoinette Harrington,<br><br>Appellee,<br><br>v.<br><br>County of Pottawattamie, Iowa; David Richter, in his individual and official capacities; Joseph Hrvol, in his individual and official capacities,<br><br>Appellants. | * | Appeals from the United States District Court for the Southern District of Iowa. |

No. 07-1524

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|---|---|
| Curtis W. McGhee Jr., | * |
| | * |
| Appellee, | * |
| | * |
| v. | * |
| | * |
| Matthew Wilber, | * |
| | * |
| Appellant, | * |
| | * |
| | * |
| Terry Harrington, individually and in his capacity as the father of Nicole Antoinette Harrington, | * |
| | * |
| | * |
| Appellee. | * |

Submitted: May 15, 2008
Filed: November 21, 2008

Before RILEY, TASHIMA,[1] and SMITH Circuit Judges.

[1]The Honorable A. Wallace Tashima, United States Circuit Judge for the Ninth Circuit, sitting by designation.

RILEY, Circuit Judge.

In 1978, Curtis W. McGhee Jr. (McGhee) and Terry Harrington (Harrington) were convicted of murdering John Schweer, a retired police department captain who was working as a security guard. McGhee and Harrington were each sentenced to life imprisonment. In 2002, the Iowa Supreme Court reversed Harrington's conviction and remanded for a new trial, finding the prosecutor committed a Brady[2] violation by failing to disclose evidence of an alternative suspect. The current prosecutor, Matthew Wilber (Wilber), concluded it would be impossible to retry Harrington and also agreed to move to vacate McGhee's conviction. McGhee agreed to enter an Alford[3] plea to second degree murder in exchange for a sentence of time served. With the agreements, McGhee was released.

McGhee and Harrington both brought civil rights actions against Pottawattamie County, Iowa (County), and the former prosecutors and officers involved in the initial investigation and prosecution, arguing they used perjured and fabricated testimony and withheld evidence in violation of McGhee's and Harrington's constitutional rights. McGhee and Harrington also alleged Wilber defamed them. Defendants moved for summary judgment based on qualified and absolute immunity. The district court found some defendants were entitled to qualified immunity on certain claims and denied qualified immunity and absolute immunity on the remaining claims.

Defendants Joseph Hrvol (Hrvol) and David Richter (Richter) filed a consolidated interlocutory appeal from the denial of qualified, absolute, and sovereign immunity arguing the district court: (1) used an improper standard for determining probable cause in the absolute immunity analysis, (2) erred in waiving sovereign immunity for the prosecutors, and (3) erred in concluding McGhee and Harrington

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[2]Brady v. Maryland, 373 U.S. 83 (1963).

[3]North Carolina v. Alford, 400 U.S. 25, 37 (1970).

alleged a constitutional violation when the district court denied qualified immunity to Hrvol and Richter. Wilber also appeals the denial of his motion for summary judgment regarding McGhee's defamation claim, contending Wilber has sovereign and qualified immunity. We affirm in part and reverse in part.

## I. BACKGROUND

In July of 1977, John Schweer (Schweer), a retired police captain working as a night security guard at the McIntyre Oldsmobile dealership (McIntyre dealership) in Council Bluffs, Iowa, was shot and killed with a 12-gauge shotgun. Two Council Bluffs detectives, Daniel C. Larsen (Detective Larsen) and Lyle W. Brown (Detective Brown) (collectively, detectives) led the murder investigation with the active participation of Assistant County Attorney Hrvol participating in witness interviews and canvassing the neighborhood near the crime scene. Hrvol admits he was "intensely involved in the investigation," even though he was not yet assigned any role in the prosecution of the case.

Richter, the County Attorney, oversaw his office's participation in the murder investigation and received regular reports from Hrvol. Richter had been appointed as County Attorney in 1976 and would stand for election, for the first time, in 1978. Richter was campaigning in the face of Schweer's unsolved murder.

In the investigation's early stages, more than a dozen individuals were under suspicion, but McGhee and Harrington were not yet suspects. The best lead was Charles Gates, known to investigators as "the man with the dog and shotgun." Gates had been a suspect in a 1963 homicide investigation involving the murder of a female coworker of Gates. The detectives knew Schweer left a note at the McIntyre dealership the night before his murder noting Schweer had chased off someone who had a gun. A witness saw a man with a dog and a shotgun around the time of the murder, a man Detective Larsen determined was Gates. Richter personally interviewed another witness who positively identified Gates as the person seen

walking dogs in the vicinity of the murder. Two more witnesses also placed Gates near the scene of the murder in the relevant time frame. Richter and Hrvol went so far as to consult an astrologer regarding their suspicions of Gates. Gates submitted to a polygraph exam in which the examiner opined Gates was not truthful when he denied owning a shotgun and, more importantly, denied shooting Schweer. Eight reports dealing with Gates and the murder investigation were written by the Council Bluffs police, yet, Richter and Hrvol never disclosed any of this evidence to Harrington's or McGhee's trial or post-conviction relief counsel. Hrvol, in answering McGhee's post-conviction hearing discovery, went so far as to disavow any other suspects but McGhee, inaccurately answering that the "man and dog" (Gates) was "never found or identified."

The primary witness relied upon in bringing charges against McGhee and Harrington was Kevin Hughes (Hughes), a 16-year old with a long criminal record. Hughes was interrogated by both Fremont, Nebraska, and Council Bluffs, Iowa, police before the arrests of Harrington and McGhee. On September 9, 1977, Hughes, along with two other teenagers, was stopped in a Cadillac which had been stolen nine days earlier from a Fremont, Nebraska, car dealership. Hughes denied stealing the Cadillac, and identified Harrington, McGhee and Anthony Houston (Houston) as the men who stole the Cadillac and three other cars from dealerships in Fremont and Lincoln, Nebraska, and Council Bluffs, Iowa.

Detectives Larsen and Brown traveled to Lincoln to interview Hughes, telling Hughes they knew he was involved in the car theft ring and the Schweer murder, but promised: (1) he would not be charged with the murder, (2) he would be helped with his other criminal charges, and (3) there was a $5,000 reward available, if Hughes helped the detectives with the Schweer murder. Hughes agreed to help.

Hughes's first written statement identified a light skinned man, later identified as Steven Frazier, as the man who told Hughes that he stole a Lincoln Continental

from the McIntyre dealership, killing a security guard in the process. The detectives told Hughes they knew he was lying because no Lincoln was stolen from the McIntrye dealership.

Next, Hughes identified Arnold Kelly as involved in the murder. This was also demonstrably false as Kelly was in the Kansas City Job Corps at the time of the murder.

Harrington and McGhee assert that Hrvol, Richter, Detective Larsen and Detective Brown (1977 Defendants) began to pressure Hughes to implicate Harrington, McGhee and Houston in the Schweer murder, even though Hughes initially expressed his belief the three were incapable of murder. Hughes's story then changed again as he reported Harrington and the others told him they had murdered Schweer. Authorities accused Hughes of lying about this conversation. Once confronted, Hughes admitted to lying once more.

On September 30, 1977, Hughes told police he was at the McIntyre dealership when Schweer was murdered. The 1977 Defendants met with Hughes at the murder scene. After this visit, Hughes reported he was with Houston at the McIntyre dealership when the Schweer murder occurred. The 1977 Defendants knew Hughes was lying again because they already knew Houston was in jail at the time of the murder.

Hughes's story continued to change. When describing the murder weapon, Hughes first said Schweer was murdered with a pistol. This was wrong. Hughes next claimed a 20-gauge pump shotgun was the murder weapon, which was also inaccurate. Finally, only after being told by the 1977 Defendants a 12-gauge shotgun shell was found near the body did Hughes say a 12-gauge shotgun was the murder weapon.

In light of the changing stories, inaccuracies and inconsistencies, Detective Larsen considered Hughes's credibility suspect and later Detective Larsen admitted he always had problems with Hughes's final story. Nevertheless, a preliminary True Information charging Harrington with Schweer's murder was issued on November 16, 1977, and a similar preliminary True Information charging McGhee was issued on November 17, 1977, based on Hughes's accusations. Richter and Hrvol approved the decision to arrest McGhee and Harrington, who were arrested on November 17, 1977. A True Information charging McGhee and Harrington with first degree murder was filed on February 17, 1978.

At trial, the state's cases were based upon the testimony of: (1) Hughes, (2) the two other teens arrested with Hughes in the stolen Cadillac, (3) two other friends of Hughes, and (4) jailhouse informants who testified Harrington confessed while housed with or adjacent to them. McGhee and Harrington were found guilty in separate trials and sentenced to life.

Both McGhee and Harrington pursued post conviction relief, but were unsuccessful. Only after Anne Danaher[4] (Danaher) began an independent investigation did the extent of the Brady violations committed by Hrvol and Richter come to light. These Brady violations ultimately were the grounds upon which Harrington's conviction was overturned by the Iowa Supreme Court.

While Wilber dismissed all charges against Harrington and agreed to vacate McGhee's sentence, Wilber announced in a press conference and a press release his personal belief that he had no doubt Harrington had committed the murder, the jury made the right decision, and the "right man went to prison for over twenty-five years." Wilber stated he "owed it to the family of John Schweer to do my best on this case to

[4]Danaher was an employee at the prison where Harrington was incarcerated. Danaher got to know Harrington and his family.

bring his killer to justice a second time." Wilber concluded by saying "[a]s for the final justice for Terry Harrington, I will defer that honor to a higher power."

As for McGhee, Wilber said, "McGhee pleaded no contest today to a charge of second degree murder for the death of John Schweer . . . . Even though Mr. McGhee did not pull the trigger . . . our case against him was stronger than [the case] against Terry Harrington [as] . . . McGhee had made admissions to at least three different people about being with Terry Harrington when Harrington shot a police officer in Council Bluffs." Wilber noted these statements were not admissible against Harrington, but "would certainly come into evidence at a trial against Mr. McGhee."

Hughes, the other juvenile witnesses, and the jailhouse informants who testified against Harrington and McGhee have recanted their testimonies. Hughes admits he lied, first in hopes of garnering a proffered reward, and then in an attempt to avoid being personally charged with the murder and car thefts.

McGhee and Harrington both brought civil rights actions against the County and the former prosecutors and officers involved in the initial investigation and prosecution, arguing they used perjured and fabricated testimony and withheld evidence in violation of McGhee's and Harrington's constitutional rights. McGhee and Harrington also allege Wilber defamed them. Defendants moved for summary judgment based on qualified and absolute immunity. The district court found some defendants were entitled to qualified immunity on some claims, and denied qualified immunity and absolute immunity on the remaining claims. Hrvol and Richter filed this interlocutory appeal, which Wilber joined.[5]

[5]Harrington also filed a defamation claim against Wilber. The district court denied Wilber's motion for summary judgment on Harrington's defamation claim. See Harrington v. Wilber, 353 F. Supp. 2d 1033, 1048 (S.D. Iowa 2005). Because Wilber did not appeal this decision, we will not consider this claim.

## II. DISCUSSION

In this interlocutory appeal, Hrvol and Richter assert the district court: (1) used an improper standard for determining probable cause in the absolute immunity analysis, (2) erred in waiving sovereign immunity for the prosecutors, Hrvol and Richter, and (3) erred in concluding McGhee and Harrington alleged a constitutional violation when the district court denied qualified immunity to Hrvol and Richter. Wilber appeals the denial of his motion for summary judgment in regards to McGhee's defamation claim on the basis Wilber has sovereign and qualified immunity.

### A. Jurisdiction

We ordinarily lack jurisdiction over an interlocutory appeal challenging the denial of a summary judgment motion, but when a summary judgment motion based on sovereign immunity or qualified immunity is denied, an interlocutory appeal "is appropriate because immunity from suit is effectively lost if the party claiming it is erroneously forced to stand trial." Monroe v. Ark. State Univ., 495 F.3d 591, 593-94 (8th Cir. 2007) (internal alterations, quotation marks and citations omitted). Hrvol, Richter and Wilber all assert the district court erred in finding they were not shielded by sovereign or qualified immunity. Thus, we have jurisdiction to determine if the appellants' motions for summary judgment based upon sovereign and qualified immunity were improperly denied.

### B. Standards of Review

"We review de novo the district court's denial of summary judgment on qualified immunity grounds, construing the evidence in the light most favorable to the nonmoving party." Dible v. Scholl, 506 F.3d 1106, 1109 (8th Cir. 2007) (citation and emphasis omitted). We review de novo as well "the question of whether a state (or its agencies and officials) has waived sovereign immunity." Doe v. Nebraska, 345 F.3d 593, 597 (8th Cir. 2003) (citation omitted).

### C. Absolute Immunity and Probable Cause

Before the establishment of probable cause to arrest, a prosecutor generally will not be entitled to absolute immunity. See Buckley v. Fitzsimmons, 509 U.S. 259, 274 (1993) ("A prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested.") (footnote reference omitted). Defendants assert the district court erred in determining probable cause was not present at the time Harrington and McGhee were arrested for Schweer's murder and thereby determining Hrvol and Richter were not entitled to absolute immunity. Specifically, defendants assert probable cause justified arresting Harrington and McGhee for car theft and, because probable cause exists to support arrests for car theft, then Hrvol and Richter are entitled to absolute immunity. Defendants raised this argument in the district court for the first time in their summary judgment reply brief. The district court did not consider this argument. See S.D. Iowa L.R. 7(g) (A reply brief may be filed "to assert newly-decided authority or to respond to new and unanticipated arguments made in the resistance [brief]."); see also Jones v. Shalala, 887 F. Supp. 210, 214 n.3 (S.D. Iowa 1995) ("[T]he reply brief submitted by [defendants] is not in compliance with the local rule in that it raises new issues not addressed in [their] initial brief."). The district court did not abuse its discretion or otherwise commit error by following the court's local rule prohibiting new arguments submitted in a reply brief. Because the defendant's probable cause argument was not properly raised in the district court, we decline to consider it on appeal. See Aaron v. Target Corp., 357 F.3d 768, 779 (8th Cir. 2004) ("Arguments and issues raised for the first time on appeal are generally not considered, and no good reason has been advanced to depart from that rule.") .

### D. Sovereign Immunity

Defendants next assert the district court erred when it waived sovereign immunity for Hrvol, Richter and Wilber, arguing they are shielded by the Iowa Tort Claims Act (ITCA), Iowa Code § 669 *et seq.*, and/or the Iowa Municipal Tort Claims Act (IMTCA), Iowa Code § 670 *et seq*. Under the doctrine of sovereign immunity a

tort claim against a state employee, acting within the scope of his office or employment with the state, must be brought pursuant to the ITCA. See Iowa Code § 669.2(3)-(4).

The State of Iowa (Iowa) possesses sovereign immunity. See Doe, 345 F.3d at 597 (stating the Eleventh Amendment provides states with immunity from suits). As such, Iowa and its employees can only be sued to the extent Iowa expressly waives its immunity. Id. The ITCA is a statutorily defined waiver of sovereign immunity allowing certain claims to be filed against Iowa which fit within the ITCA's specified reach, and which do not fall within explicit exceptions where Iowa expressly retained its sovereign immunity.

**1. Hrvol and Richter**

Hrvol and Richter challenge the district court's denial of their summary judgment motion on the state law claims based on sovereign immunity. Harrington asserted a claim of intentional infliction of emotional distress and a claim for loss of parental consortium, on behalf of his daughter, against Hrvol and Richter. McGhee asserted claims of false arrest and imprisonment and intentional infliction of emotional distress against Hrvol and Richter. Harrington and McGhee base their claims on allegations Hrvol and Richter arrested them without probable cause, coerced and coached witnesses, fabricated evidence against them, and concealed exculpatory evidence. Both Harrington and McGhee contend Hrvol and Richter were acting within the scope of their employment at all times relevant to the complaint.

Having concluded Hrvol and Richter could be considered state employees under the ITCA, the district court found they were entitled to sovereign immunity to the extent Harrington's and McGhee's claims were premised on allegations Hrvol and Richter concealed exculpatory evidence. The district court reasoned these actions were taken within the scope of Hrvol's and Richter's prosecutorial duties. However, the district court found Hrvol and Richter were not entitled to sovereign immunity to

the extent the state law claims were premised on allegations Hrvol and Richter arrested Harrington and McGhee without probable cause, coerced and coached witnesses, and fabricated evidence. The district court, relying on its analysis of absolute immunity, concluded that, because these "investigatory actions" were taken before filing the True Information, the investigatory actions "could arguably be deemed to have been taken outside the 'scope of their employment' as prosecutors of state criminal violations."

Hrvol and Richter argue the district court erred in failing to conduct an analysis of the scope of their employment for sovereign immunity purposes distinct from the court's analysis of whether Hrvol and Richter were entitled to absolute immunity. We agree.

To determine whether Hrvol and Richter are entitled to sovereign immunity for the actions they took before filing the True Information, the district court should have looked to the duties of county attorneys as they existed in 1977 and 1978, and to the provisions of the ITCA. The ITCA applies to:

> Any claim against an employee of the state for money only, on account of damage to or loss of property or on account of personal injury or death, caused by the negligent or wrongful act or omission of any employee of the state *while acting within the scope of the employee's office or employment*.

Iowa Code § 669.2(3)(b) (emphasis added). "'Acting within the scope of the employee's office or employment' means acting in the employee's line of duty as an employee of the state." Iowa Code § 669.2(1).

Among the duties of a county attorney were the duties to:

> 1. Diligently enforce or cause to be enforced in his county, all of the laws of the state, actions for a violation of which may be commenced or

> prosecuted in the name of the state of Iowa, or by him as county attorney, except as otherwise specially provided.
> . . . .
> 6. Commence, prosecute, and defend all actions and proceedings in which any county officer, in his official capacity, or the county, is interested, or a party.
> . . . .
> 11. Perform other duties enjoined upon him by law.

Iowa Code § 336.2(1), (6) & (11) (1977). In separate subsections, the Iowa Code distinguishes between the duty to "prosecute" an action and the duty to "enforce" the laws of the state of Iowa, the "violation of which **may** be . . . prosecuted." Iowa Code § 336.2(1) (1977) (emphasis added). Thus, to "enforce" necessarily must mean something other than to "prosecute." According to Black's Law Dictionary 569 (8th ed. 2004), the term "enforce" means "[t]o give force or effect to (a law, etc.)" or "to compel obedience to." The Iowa Code also broadly expands the county attorney's duties to include "[p]erform[ing] other duties enjoined upon him by law." Iowa Code § 336.2(11) (1977). We conclude the official duties of a county attorney included more than the mere prosecution of an action.

If Hrvol and Richter were acting within the scope of their office or employment during the investigation, the court must consider whether Iowa has waived sovereign immunity for the state law claims asserted against them. The ITCA does not apply to, thus the state retains sovereign immunity for, "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." Iowa Code § 669.14(4). See Trobaugh v. Sondag, 668 N.W.2d 577, 584 (Iowa 2003) (stating § 669.14(4) "describe[s] the categories of claims for which the State has not waived its sovereign immunity"). A plaintiff may not assert a claim against the state when "[t]he gravamen of [the] plaintiff's claim . . . is the functional equivalent" of a claim listed in § 669.14(4). Greene v. Friend of Court, Polk County, 406 N.W.2d 433,

436 (Iowa 1987) (referring to Iowa Code § 25A.14(4), which was the prior version of § 669.14(4), and explaining § 669.14(4) "identifies excluded claims in terms of the type of wrong inflicted").

If Hrvol and Richter were acting within the scope of their office or employment, the ITCA explicitly bars McGhee from asserting claims of false imprisonment and false arrest against them. Iowa Code § 669.14(4). McGhee's and Harrington's claims for intentional infliction of emotional distress and Harrington's claim for loss of parental consortium are premised on allegations Hrvol and Richter arrested them without probable cause, coerced and coached witnesses, and fabricated evidence. The gravamen of these claims arises out of false imprisonment, false arrest, abuse of process and deceit.

We decline to decide whether Hrvol and Richter were acting within the scope of their duties as county attorneys when they took "investigatory actions" before filing the True Information. Instead, we reverse the district court's denial of sovereign immunity and remand this matter to the district court for further development of the record and analysis consistent with this opinion.

**2. Wilber**

Wilber appeals the denial of his summary judgment motion on McGhee's defamation claim based on Wilber's sovereign immunity and qualified immunity defenses under the ITCA, an argument Wilber did not make to the district court where he relied instead upon the protections afforded by the IMTCA. The district court held the IMTCA's protection only applied if Wilber's comments were "a judgment call driven by social, economic or political concerns" and found they were not.

The ITCA defines a state employee, for purposes of the act, as including any "persons acting on behalf of the state . . . in any official capacity, temporarily or permanently in the service of the state of Iowa." Iowa Code § 669.2(4). Thus, for

purposes of the ITCA, Wilber is a state employee when acting in his official capacity as County Attorney. We find no language within the ITCA which would restrict Wilber's immunity under the ITCA solely to prosecutorial acts. Instead, the only restriction is for acts taken in an official capacity. See id. Clearly, when Wilber held his press conference and issued his written press release he was acting in his official capacity as County Attorney discussing prosecutions by the state.

McGhee's defamation claim is governed by the ITCA which explicitly bars a claim for defamation arising out of libel or slander. See Iowa Code § 669.14(4). Therefore, the district court erred as a matter of law in denying Wilber's motion for summary judgment as to McGhee's defamation claim. This claim must be dismissed.

**E. Constitutional Violation**

Hrvol and Richter assert the district court erred in determining their acts of obtaining, manufacturing, coercing and fabricating evidence before the filing of the True Information constituted a constitutional violation justifying the denial of qualified immunity. Hrvol and Richter assert it is only the use of this evidence, not its procurement, that constitutes a violation of McGhee's and Harrington's substantive due process rights. Further, as the district court held, Hrvol and Richter have absolute immunity for their use of this evidence at trial. Thus, Hrvol and Richter alternatively admit they violated McGhee's and Harrington's right to substantive due process, but assert the violation was not in procuring, but only in using the evidence at trial, an act for which they have absolute immunity.

The district court held the procurement or fabrication of the evidence constituted a due process violation, noting this court has held a person's due process rights are violated when police officers use falsified evidence to procure a conviction, see Wilson v. Lawrence, 260 F.3d 946, 954-55 (8th Cir. 2001), stating "it would be a perverse doctrine of tort and constitutional law that would hold liable the fabricator of evidence who hands it to an unsuspecting prosecutor but exonerate the wrongdoer

who enlists himself in a scheme to deprive a person of liberty." McGhee v. Pottawattamie County, 475 F. Supp. 2d 862, 907 (S.D. Iowa 2007).

The district court's decision is in accord with the Second Circuit Court of Appeals which held "the right at issue is a constitutional right, provided that the deprivation of liberty . . . can be shown to be the result of [the prosecutor's] fabrication of evidence" where the prosecutor was accused of both fabricating evidence and then using the fabricated evidence at trial. Zahrey v. Coffey, 221 F.3d 342, 344, 349 (2d Cir. 2000). The district court acknowledged that the Second Circuit noted its decision was "in tension, if not conflict, with the majority opinion by Judge Easterbrook for the Seventh Circuit in Buckley IV,[6] on remand from the Supreme Court," but the Second Circuit concluded it was unclear if Buckley I[7] was decided on this basis or on the distinguishable basis of causation. Zahrey, 221 F.3d at 354-55. Even if there is some tension, there is agreement "[i]mmunity is absolute only when the prosecutor performs distinctively prosecutorial functions." Buckley I, 919 F.2d at 1240.

We find immunity does not extend to the actions of a County Attorney who violates a person's substantive due process rights by obtaining, manufacturing, coercing and fabricating evidence before filing formal charges, because this is not "a distinctly prosecutorial function." The district court was correct in denying qualified immunity to Hrvol and Richter for their acts before the filing of formal charges.

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[6]Buckley IV refers to Buckley v. Fitzsimmons, 20 F.3d 789 (7th Cir. 1994).

[7]Buckley I refers to Buckley v. Fitzsimmons, 919 F.2d 1230 (7th Cir. 1990).

## III. CONCLUSION

We reverse the decision of the district court as to McGhee's defamation claim against Wilber, because Wilber is entitled to sovereign immunity under the ITCA for those alleged actions. We also reverse and remand the decision of the district court denying sovereign immunity to Hrvol and Richter on Harrington's and McGhee's state law claims premised on Hrvol's and Richter's investigatory actions taken before filing the True Information. We remand this issue to the district court for further development of the record and analysis consistent with this opinion. We affirm the district court in all other respects.

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