IN THE SUPREME COURT OF IOWA

MICHAEL NAVARRO JONES,	)	
	)	**Sup. Court No. 18-0745**
Applicant/Appellant,	)	
	)	
VS.	)	**Black Hawk PCCV133701**
	)	
STATE OF IOWA,	)	
	)	
Respondent/Appellee.	)	

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR BLACKHAWK COUNTY
HONORABLE GEORGE L. STIGLER, JUDGE PRESIDING

APPELLANT'S FINAL BRIEF

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the Supreme Court of Iowa using the EDMS system on December 11, 2018.

I further certify that I served this Final Brief through EDMS to the following counsel of record:

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I further certify that I have served this Final Brief by mailing one copy to Applicant-Appellant Michael Jones to his last known address.

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ROUTING STATEMENT

This appeal could be transferred to the Iowa Court of Appeals as it involves an issue of the application of existing legal principles. I.R.App.P. 6.1101(3)(a). However, this case could also be retained by the Iowa Supreme Court because it involves an issue of first impression (whether *State v. Plain*, 898 N.W.2d 801 (Iowa 2017) should be applied retroactively), the resolution of which involves a substantial question of enunciating or changing legal principles. I.R.App.P. 6.1101(2)(c) and (f).

STATEMENT OF THE CASE

Applicant Michael Jones ("Jones") filed a *pro se* Application for Post-Conviction Relief Pursuant to Iowa Code Section 822 ("*Pro se* Application") on December 11, 2017. (A. 5-9). Attorney Robert Stone ("Stone") was appointed to represent Jones on

December 20, 2017. Order, December 20, 2017, p. 1. The State filed a Motion to Dismiss Application for Post-Conviction Relief ("State's Motion to Dismiss") on February 28, 2018. (A. 10-11). The court entered an order scheduling a hearing on the State's Motion to Dismiss on March 6, 2018. Order, March 6, 2018, pg. 1.

Jones, by counsel, filed a First Amended Application for Post-Conviction Relief Pursuant to Iowa Code Chapter 822 ("First Amended Application") on March 16, 2018. (A. 27-30). Jones, by counsel, also filed a Resistance to Respondent's Motion to Dismiss Application ("Resistance") on March 9, 2018, (A. 19-21), supported by a "Brief in Support of his Resistance to Respondent's Motion to Dismiss Application" ("Brief in Support of Resistance") filed on the same date. (A. 22-26).

On April 16, 2018, a hearing was held on the State's Motion to Dismiss, (A. 31), which was granted following arguments of the parties. (*See* A. 36). A written order granting the State's Motion to Dismiss was entered on the same date. (A. 38). Timely notice of appeal was filed on April 27, 2018. (A. 39-40).

STATEMENT OF RELEVANT FACTS

The procedural history of this case is succinct, and for the purposes of this appeal, is appropriately detailed in the above Statement of the Case. However, the hearing on the State's Motion to Dismiss warrants further discussion, as it relates to the issues raised here on appeal.

A hearing was held on the State's Motion to Dismiss on April 16, 2018. (A. 31). Jones was present and represented by his attorney, Ben Stone. (A. 32). After identifying the parties, and before any argument was made, the court stated, "Mr. Stone, what this comes down to is basically you want the *Plain* case to be made retroactive. What law is there that it should be made retroactive?" (A. 32).

Stone replied that "…for the purpose of the hearing today… that the determination of whether or not it's retroactive would be something that is determined later than today, the motion to dismiss." (A. 32). Stone further argued that "the preference of Mr. Jones would be that the decision would be based upon whether or not there is a valid claim and that that would be based upon the

simple analysis that the *Plain* decision is clearly new law. The language in the decision is quite clear that this is overturning decades of prior law and that the determination of whether or not that is a retroactive application would be something for a later hearing." (A. 32-33). The State argued that "the three-year time bar absolutely applies" and that "This is not a 22.11(d) new ground of law or fact case." (A. 33). The State further argued that *Plain* was not retroactive and that the decision was not a new ground of law or fact. (A. 33).

Stone responded that "It's very clear that the decision of the Iowa Supreme Court in June of last year in the *Plain* decision represents a new law. It's a new law. We do not know yet whether or not it will be applied retroactively, but again we believe that." (A. 35). The court responded that "I disagree with you on that because if it were a factual matter, you would be entitled to hearing to dispute that. This is strictly a matter of legal interpretation. I don't see anything in the *Plain* decision that would treat it any different than *Heemstra* which is to say it's a declaration of a new standard of law to be applied prospectively

and not retrospectively because if we applied this that way, the flood gates would be unleashed like you could not believe." (A. 35).

The court ultimately stated that "you've got your issue and your issue is simple. Does *Plain* have retroactive applicability, and I am going to give you a ruling that it does not. And so you now have an appealable issue. And you may take it before the Iowa Supreme Court as to whether *Plain* has retroactive applicability or not. I am concluding that it is too burdensome, and it imposes far too many costs upon society to apply this new rule of law prospectively. The flood gates would be just horrendous if we were to buy your interpretation. But you've got an appealable issue and we will go from there." (A. 36).

A written order granting the State's Motion to Dismiss was entered following the hearing. (A. 38). A timely notice of appeal was filed on April 27, 2018. (A. 39-40).

ARGUMENT

I. THE DISTRICT COURT ERRED BY DISMISSING JONES' APPLICATION FOR POST-CONVICTION RELIEF ON GROUNDS THAT IT WAS BARRED BY THE STATUTE OF LIMITATIONS.

(1) Preservation of Error

Error was preserved by Jones' written resistance, (A. 19-21), to the State's motion to dismiss, (A. 10-11), and the district's court's ruling on that motion. (A. 38). *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997) (issue must be raised before district court to be preserved for appellate review). Where a trial court has considered and ruled on an issue error has been preserved. *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). Error is preserved even in cases where the court's ruling is "incomplete or sparse". *Id.*, citing *Jensen v. Sattler*¸ 696 N.W.2d 582, 585 (Iowa 2005) (finding error was preserved even though "the summary judgment record is not a model of clarity.").

Error was preserved on this issue.

(2) Standard of Review

Jones appeals the trial court's order granting the State's motion to dismiss, which argued that Jones' application for post-conviction relief was filed beyond the three-year statute of limitations set forth in Iowa Code § 822.3. This court reviews "the court's ruling on the State's statute-of-limitations defense...for correction of errors of law." *Phuoc Thanh Nguyen v. State*, 829

N.W.2d 183, 186 (Iowa 2013), citing *Harrington v. State*, 659 N.W.2d 509, 519 (Iowa 2003). Therefore, a reviewing court will "affirm if the trial court's findings of fact are supported by substantial evidence and the law was correctly applied." *Id*., citing *Harrington*, 659 N.W.2d at 520. However, a reviewing court "will affirm a dismissal only if the petition shows no right of recovery under any state of facts." *Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001), as amended on denial of reh'g (July 3, 2001), citing *Barnes v. State*, 611 N.W.2d 290, 292 (Iowa 2000).

(3) Argument on the merits

It was improper for the court to grant the State's motion to dismiss on statute of limitations grounds by determining that *State v. Plain*, 898 N.W.2d 801 (Iowa 2017) did not apply retroactively.

A. It was improper for the court to dismiss Jones' application for post-conviction relief when the application was filed within three years of the Iowa Supreme Court's decision in *State v. Plain*, which is "a ground of fact or law that could not have been raised within the applicable time period" under Iowa Code § 822.3, regardless of whether *Plain* was to be applied retroactively or not.

i. Post-conviction proceedings.

Jones filed a *pro se* application for post-conviction relief on December 11, 2017. (A. 5-9). The application alleged a single claim: that "There is a New ground of law and fact. The Iowa Supreme Court overruled State v. Jones, 490 NW2d 787, 793 (Iowa 1992) – the 'Absolute Disparity Test' and the failure to provide data on racial and ethnic composition violated a defendant's rights in State v. Plain, #16-0061 well [sic] as equal protection and due process when the District Court used the 'absolute disparity test' and denied jury pool data. The Iowa and U.S. Constitution guarantees these rights." (A. 5-9).

The State filed a Motion to Dismiss Application for Post-Conviction Relief on February 28, 2018, (A. 10-11), moving to "dismiss the Application for Post-Conviction Relief pursuant to Section 822.3 as the 3 year Statute of Limitations has expired and there is no new ground of law or fact and res judicata applies pursuant to Section 822.8…" (A. 10-11). The court ultimately dismissed Jones' Application because it found that *State v. Plain* did not apply retroactively. (*See* A. 36); (A. 38).

Section 822.3 of the Iowa Code governs the statutes of limitations for post-conviction applications. Section 822.3 provides that "applications must be filed within three years from the date the conviction or decision is final or, in the event of an appeal, from the date the writ of *procedendo* is issued. However, this limitation does not apply to a ground of fact or law that could not have been raised within the applicable time period." Iowa Code § 822.3.

The procedural history of the case as set forth in the State's motion to dismiss went unchallenged below. The State's motion to dismiss indicated that Jones was convicted on November 18, 2008. (A. 10-11). *Procedendo* issued on February 19, 2010. *Id*. Therefore, the statute of limitations for filing a post-conviction application expired on February 18, 2013. *Id*. Jones filed two prior post-conviction applications within the statute of limitations and one application outside of the statute of limitations. *Id*. All applications were denied, and the denials were affirmed on appeal. *Id*.

Jones' *pro se* application for post-conviction relief filed on December 11, 2017 was well outside the statute of limitations set forth in Iowa Code § 822.3. However, Jones claimed in both his *pro se* application, (A. 7), and in brief in support of his resistance to the State's motion to dismiss, (A. 24), that Jones' claim based on the Iowa Supreme Court's decision in *State v. Plain*, 898 N.W.2d 801 (Iowa 2017) constituted "a ground of fact or law that could not have been raised within the applicable time period," thereby exempting Jones' instant petition from the three-year statute of limitations set forth in Iowa Code § 822.3.

ii. Standards governing motions to dismiss.

Jones' pleadings should have been sufficient to survive a motion to dismiss because "the district court does not consider matters outside the pleadings," *Crall v. Davis*, 714 N.W.2d 616, 619 (Iowa 2006), citing *Wilson v. Ribbens*, 678 N.W.2d 417, 418 (Iowa 2004)—such as whether *Plain* was to apply retroactively—when determining whether a motion to dismiss should be granted.

Under the Iowa Supreme Court's well-established standard for a motion to dismiss under rule 1.421(1)(f), "The motion to

dismiss admits ... [the] well-pleaded facts in the petition for the purpose of testing their legal sufficiency." *Hawkeye Foodservice Distribution, Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 608–09 (Iowa 2012), *Herbst v. Treinen*, 249 Iowa 695, 699, 88 N.W.2d 820, 823 (1958); *Rieff*, 630 N.W.2d at 284. The Iowa Supreme Court described the standard for granting a motion to dismiss as follows:

> A court should grant a motion to dismiss if the petition fails to state a claim upon which any relief may be granted. In considering a motion to dismiss, the court considers all well-pleaded facts to be true. A court should grant a motion to dismiss only if the petition " ' "on its face shows no right of recovery under any state of facts." ' " Nearly every case will survive a motion to dismiss under notice pleading. Our rules of civil procedure do not require technical forms of pleadings....
>
> A "petition need not allege ultimate facts that support each element of the cause of action[;]" however, a petition "must contain factual allegations that give the defendant 'fair notice' of the claim asserted so the defendant can adequately respond to the petition." The "fair notice" requirement is met if a petition informs the defendant of the incident giving rise to the claim and of the claim's general nature. *Id.* at 609, citing *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353–54 (Iowa 2009).

The only issue when considering a motion to dismiss is the "petitioner's right of access to the district court, not the merits of

his allegations." *Id.*, citing *Rieff*, 630 N.W.2d at 284 (citations and internal quotation marks omitted).

iii. The district court did not follow the standards governing motions to dismiss at the hearing on the State's motion to dismiss.

A hearing was held on the State's motion to dismiss on April 16, 2018. (A. 31). The district court improperly considered whether *Plain* applied retroactively in deciding the State's motion to dismiss. The district court should grant a motion to dismiss *only* "if the petition " ' "on its face shows no right of recovery under any state of facts." ' " *Id.*, citing *U.S. Bank*, 770 N.W.2d at 353–54. The face of Jones' application for post-conviction relief showed a right of recovery under any state of facts by alleging that "Mr. Jones' Sixth Amendment right to an unbiased jury drawn from a fair cross-section of the community, as well as his right to an impartial jury under Section 10, Article I of the Iowa Constitution, were violated during his trial" and by alleging that "Mr. Jones asserts claims on the basis of equal protection and due process under the federal Constitution, and equal rights and due process of law under sections 1 and 9, Article I, of the Iowa Constitution."

(A. 29).

The amended application further alleged that "The composition of the jury pool involved in the trial of the Defendant was so lacking in diversity that its use violated the Defendant's right to a fair trial by an impartial jury drawn from a fair cross-section of the community as recently established under a new ground of law by the Iowa Supreme Court in *State v. Plain*, 898 N.W.2d 801 (Iowa 2017)." This allegation was sufficient, without determining whether *Plain* was retroactive, to satisfy the notice pleading requirements described by *U.S. Bank*, 770 N.W.2d at 353–54. Therefore, it was error for the court to consider *sua sponte* whether *Plain* was retroactive in adjudicating the State's motion to dismiss because, by doing so, the court considered "matters outside the pleadings," which it was not permitted to do. *Crall*, 714 N.W.2d at 619 (Iowa 2006), citing *Wilson*, 678 N.W.2d at 418.

iv. If the court had followed the standards governing motions to dismiss, the district court should have denied the State's motion to dismiss because Jones' claim based on *State v. Plain* was a "ground of fact or law that could not have been raised within the

applicable time period" under Iowa Code § 822.3.

A claim based on *Plain* is a "ground of fact or law that could not have been raised within the applicable time period" under Iowa Code § 822.3. Furthermore, Jones' application was timely filed within three years of *Plain* being decided. Therefore, Jones' application should have survived the State's motion to dismiss, which argued that Jones' application was barred by the statute of limitations. (A. 10). The Iowa Supreme Court's decision in *Phuoc Thanh Nguyen v. State*, 829 N.W.2d 183 (Iowa 2013) is instructive on this point.

The defendant in *Nguyen* was convicted of first-degree murder in 1999. *Id.* at 184. Nguyen filed a post-conviction application in 2002, which resulted in Nguyen receiving a new trial. *Id*. However, the State appealed, and the appellate court reversed the district's court order granting Nguyen's application, and *procedendo* issued on January 19, 2006. On August 25, 2006, the Supreme Court issued its decision in *State v. Heemstra*, 721 N.W.2d 549 (2006), which "overruled a series of cases which had held that an act causing willful injury and also causing the

victim's death could serve as the predicate felony for felony-murder." *Id.* at 185, citing *Heemstra,* 721 N.W.2d at 558. The *Heemstra* court further stated that its decision "would not apply retroactively to cases where the defendant's conviction and sentence had previously become final." *Id.* at 186.

Nguyen filed another application for post-conviction relief on April 2, 2009, "more than three years after *procedendo* had issued on his original direct appeal, but less than three years after *Heemstra*." *Nguyen*, 829 N.W.2d at 186. Nguyen argued that "(1) *Heemstra* would not have allowed him to be convicted of felony-murder, and (2) *Heemstra* should be applied retroactively." *Id.* On April 17, 2009, the Iowa Supreme Court issued *Goosman v. State*, 764 N.W.2d 539 (Iowa 2009), which "reiterated that limiting *Heemstra* to prospective application did not violate federal due process." *Id.*, citing *Goosman v. State*, 764 N.W.2d at 542–45.

On October 10, 2010, "the State moved for summary disposition, asserting that Nguyen's postconviction relief application was barred by the three-year statute of limitations for such actions." *Id.* at 186, citing Iowa Code § 822.3. Nguyen

resisted the State's motion, arguing that "*Heemstra* represented 'a dramatic change in criminal law' that 'was not previously available to Applicant.'" He also argued that the retroactivity of *Heemstra* was required by the equal protection, due process, and separation of powers clauses of the Iowa Constitution as well as the Equal Protection Clause of the United States Constitution—grounds that had not been addressed in *Goosman*." *Id.* The district court granted the State's motion, and Nguyen appealed. *Id.*

The Iowa Supreme Court held that "section 822.3 does not bar Nguyen's constitutional claims. When Nguyen was tried and convicted in 1999, a consistent line of authority had upheld the use of a felony-murder instruction even in cases where the felony and the murder were the same act." *Nguyen*, 829 N.W.2d at 188, citing *State v. Anderson*, 517 N.W.2d 208, 214 (Iowa 1994); *State v. Rhomberg*, 516 N.W.2d 803, 805 (Iowa 1994); *State v. Ragland*, 420 N.W.2d 791, 793 (Iowa 1988); *State v. Mayberry*, 411 N.W.2d 677, 682–83 (Iowa 1987); *State v. Beeman*, 315 N.W.2d 770, 776–77 (Iowa 1982). The court determined that the "*Heemstra* decision

was not simply a 'clarification of the law' or 'an application of preexisting law.'...It expressly overruled the prior law." *Id.* at 188. The *Nguyen* court noted that prior to the expiration of the statute of limitations, "Nguyen could not have successfully raised the argument in district court that it was improper to instruct the jury on felony-murder, because we had squarely held to the contrary." *Id.* at 188.

The *Nguyen* court then "reverse[d] the district court's dismissal of Nguyen's postconviction relief application on statute of limitations grounds" and "remand[ed] for further proceedings on whether retroactive application of *Heemstra* is required by the equal protection, due process, and separation of powers clauses of the Iowa Constitution, or the Equal Protection Clause of the United States Constitution." *Id.* at 189.

Here, *procedendo* entered on February 9, 2010. (A. 10). Jones filed his *pro se* application for post-conviction relief on December 11, 2017, (A. 5), which was well-beyond the three-year statute of limitations set forth in Iowa Code § 822.3. However, *State v. Plain*, 898 N.W.2d 801 (Iowa 2017) was not decided until June 30, 2017,

more than seven years after *procedendo* issued, just as *Heemstra* had been decided four years after *procedendo* issued in Nguyen's case. *See Nguyen v. State,* 829 N.W.2d at 185. In both this case and in *Nguyen*, the applicant filed his post-conviction application beyond the statute of limitations set forth in Iowa Code § 822.3 but within three years of the decision that the applicant argued was "a ground of fact or law that could not have been raised within the applicable time period"—or, a law that was otherwise "new."

The *Nguyen* court held that the *Heemstra* decision was "a ground of fact or law that could not have been raised within the applicable time period" because it "expressly overruled the prior law." *Id.* at 188. Nguyen could not have brought a claim based on *Heemstra* within the statute of limitations, as the law during that time period was "squarely...to the contrary." *Id.* Similarly, Jones could not have raised a claim based on *Plain* from February 9, 2010 to February 9, 2013 because *Plain* was squarely to the contrary of the Iowa Supreme Court's decision in *State v. Jones*, 490 N.W.2d 787 (Iowa 1992) during that time.

Prior to the expiration of the statute of limitations in this case, *Jones*, which was expressly overruled by *Plain*, *see Plain*, 898 N.W.2d at 826 ("Our decision to adopt absolute disparity as the exclusive test and to reject comparative disparity in *Jones* rested upon an error of law and on cases from other jurisdictions that have since been overruled or criticized. After surveying the various tests, and bearing in mind the practical problems associated with the use of the absolute disparity test in Iowa, we conclude it is no longer appropriate to rely exclusively upon the absolute disparity test as an indicator of representativeness. We therefore overrule *Jones*, 490 N.W.2d at 792–93."), had been the law in Iowa for twenty-five years.

As in *Nguyen*, *Plain* should be considered "a ground of fact or law that could not have been raised within the applicable time period" that would have exempted Jones' application for post-conviction relief from the statute of limitations set forth in Iowa Code § 822. Where Jones' pleadings adequately explained why his *Plain* claim was not barred by the statute of limitations, it was error for the district court to disregard the legal standard on

motions to dismiss and to dismiss Jones' application based on "a matter outside of the pleadings" that the court raised *sua sponte*. The district court's order dismissing Jones' application should therefore be reversed.

B. Jones' right to due process was also violated by the manner in which the district court dismissed Jones' application for post-conviction relief.

When ruling on the State's motion to dismiss, the court in this case should have limited its inquiry to whether *Plain* was "a ground of fact or law that could not have been raised within the applicable time period," such that the application could survive dismissal based on statute of limitations grounds. It was error for the district court to make a *sua sponte* determination that Jones' application for post-conviction relief should be dismissed, not because *Plain* did not constitute new law, but because, in its view, *Plain* did not apply retroactively. The court's ruling went beyond the subject matter of the State's motion to dismiss and Jones' resistance thereto, depriving Jones of notice and an opportunity to respond to the district court's position that *Plain* had no retroactive effect.

Iowa Code section 822.6 provides for disposition of a postconviction relief application without a trial on the merits as provided for in section 822.7. *Manning v. State*, 654 N.W.2d 555, 559 (Iowa 2002). Iowa Code section 822.6 provides, in pertinent part, that "The court may grant a motion by either party for summary disposition of the application, when it appears from the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Iowa Code § 822.6. The purpose of summary disposition under this section of the code is "to provide a method of disposition *once the case has been fully developed by both sides,* but before an actual trial." *Id.*, citing *Hines v. State*, 288 N.W.2d 344, 346 (Iowa 1980) (emphasis original).

This case had not been "fully developed by both sides" at the time of the hearing on the State's motion to dismiss. Jones filed a *pro se* application for post-conviction relief based on *Plain*. (A. 7). The State moved to dismiss the application on the grounds that

"the 3 year Statute of Limitations has expired and there is no new ground of law or fact and res judicata applies pursuant to Section 822.8." (A. 10). The State did not raise the issue of the retroactive application of *Plain* in its motion to dismiss. *See id*. Therefore, Jones did not address that issue in his resistance to the State's motion to dismiss. (*See* A. 19-21).

At the hearing on the State's motion to dismiss, the court, on its own, raised the issue of the retroactive application of *Plain* before the parties could even address the State's motion. (A. 32). After asking Mr. Jones where he was incarcerated, the court indicated that "He appears by attorney Ben Stone. The state of Iowa appears by assistant county attorney Kimberly Griffith. Mr. Stone, what this comes down to is basically you want the *Plain* case to be made retroactive. What law is there that it should be made retroactive?" A. 32. Mr. Stone responded,

> Well, Your Honor, for the purpose of the hearing today that under the case law ma [sic] general is I believe how you pronounce it, that in a post conviction relief case, that the determination of whether or not it's retroactive would be something that is determined later than today, the motion to dismiss, the preference of Mr. Jones would be that the decision would be based upon whether or not there is a valid claim and that that would be based upon the simple analysis

> that the *Plain* decision is clearly new law. The language in the decision is quite clear that this is overturning decades of prior law and that the determination of whether or not that is a retroactive application would be something for a later hearing. (A. 32-33).

The State argued that *Plain* should not apply retroactively, (A. 33), but this was the first time that the State had ever made this argument, and the State only mentioned it as a secondary argument. (*See* A. 33). The court then proceeded to state that "This is strictly a matter of legal interpretation. I don't see anything in the *Plain* decision that would treat it any different than *Heemstra* which is to say it's a declaration of a new standard of law to be applied prospectively and not retrospectively because if we applied this that way, the flood gates would be unleashed like you could not believe." (A. 35).

The court concluded that "you've got your issue and your issue is simple. Does *Plain* have retroactive applicability, and I am going to give you a ruling that it does not. And so you now have an appealable issue. And you may take it before the Iowa Supreme Court as to whether *Plain* has retroactive applicability or not. I am concluding that it is too burdensome, and it imposes far too

many costs upon society to apply this new rule of law prospectively. The flood gates would be just horrendous if we were to buy your interpretation. But you've got an appealable issue and we will go from there." (A. 36).

The district court thereafter entered a written order reflecting its ruling at the hearing on the State's motion to dismiss. (*See* A. 38). ("The amended petition filed March 16, 2018, cites to the recent case of *State vs. Kelvin Plain*. The issue is whether *Plain* should be given retroactive applicability. The court likens this case to *State vs. Heemstra* and finds nothing within *Plain* at 896 N.W.2d 801 (Iowa 2017) which would cause this court to conclude that Plain should be given retroactive applicability. If *Plain* were given retroactive applicability, it would unleash a flood gate of litigation with the possibility that hundreds of cases would have to be retried.").

As stated by Stone at the hearing on the State's motion to dismiss, the issue before the court at that hearing was not whether *Plain* was to be applied retroactively, but whether Jones' claim based on *Plain* exempted Jones' application for post-

conviction relief from the three-year statute of limitations. (A. 32-33). The retroactive application of *Plain* did not become an issue until the court raised it at the hearing on the State's motion to dismiss.

The district court raised this issue, *sua sponte*, without giving either party an opportunity to prepare a response on the issue. Dismissing the case on a ground not developed by the State in its motion to dismiss subverted section 822.6's goal of providing a method of disposition "*once the case has been fully developed by both sides*." *Manning*, 654 N.W.2d at 559, citing *Hines*, 288 N.W.2d at 346. The legal issue on which the court based its decision to dismiss the application was not an issue that had been developed at all—by either party—prior to the hearing on the State's motion to dismiss. Nor was it an issue that either party would have anticipated addressing at a hearing on the State's motion to dismiss because it was a "matter outside the pleadings" and therefore improper to consider at this stage of the litigation. Accordingly, Jones' right to due process was violated by the trial court's dismissal of his application on grounds that were raised by

the court for the first time during the hearing on the State's motion to dismiss.

This case is similar to *Manning v. State*, 654 N.W.2d 555 (Iowa 2002). The applicant in *Manning* filed an application for post-conviction relief alleging five grounds of ineffective assistance of counsel and three grounds of prosecutorial vindictiveness. *Id.* at 557. The State filed a motion to dismiss, and Manning filed a resistance. *Id.* The district court set the State's motion to dismiss for hearing. *Id.* Manning thereafter filed an amended application. *Id.* The district court then entered an order dismissing the application for post-conviction relief after a "'[t]he matter proceeded to hearing by the Court's review of the court file only.'" *Manning*, 654 N.W.2d at 558.

In *Manning*, "The State's motion to dismiss alleged only that Manning had failed to raise his postconviction relief issues earlier and by pleading guilty he waived all claims of ineffective assistance of counsel. The district court not only agreed with both grounds, but went on to address on the merits two claims of ineffective assistance of counsel." *Id.* at 560. The *Manning* court

identified the "real problem" in that case as "the district court's ruling on the merits of Manning's postconviction relief application." *Id.* at 561. The court noted that "Manning was not made aware that the hearing the court set was to be on the merits. The order setting the hearing clearly states that hearing is 'on the State's Resisted *Motion to Dismiss Application* for Postconviction Relief.'" (Emphasis added.) So it is clear that Manning was not properly notified that he would need to present proof on any issue other than what was alleged in the State's motion to dismiss." *Id.*

Furthermore, the trial court made rulings on "claims bearing on whether Manning's pleas were knowing and voluntary," which "raise[d] genuine issues of material fact precluding entry of summary disposition on those claims" without the State first meeting its burden to show that there were no genuine issues of material fact. *Id.* The *Manning* court concluded that the district court should not have summarily dismissed Manning's application, and it reversed and remanded for further proceedings. *Manning*, 654 N.W.2d at 561.

While this case is distinguishable from *Manning* in that the district court in this case never reached the merits of Jones' application, it is similar in that Jones "was not properly notified that he would need to present proof on any issue other than what was alleged in the State's motion to dismiss," *id.* at 561—namely, that Jones would need to present legal argument on whether *Plain* was retroactive, which was an issue that had not previously arisen in the case. The transcripts from the hearing on the State's motion to dismiss show Stone being blind-sided by this issue. (*See* A. 32).

Here, as in *Manning*, the district court, on its own initiative, went beyond the substance of the State's motion to dismiss to dismiss the application on a ground that was not yet in dispute among the parties. This deprived Jones of right to due process. *State v. Willard*, 756 N.W.2d 207, 214 (Iowa 2008) (citations omitted) ("At the very least, procedural due process requires 'notice and opportunity to be heard in a proceeding that is 'adequate to safeguard the right for which the constitutional

protection is invoked.'"). The district court's order dismissing Jones' application should therefore be reversed.

II. *STATE v. PLAIN* SHOULD BE APPLIED RETROACTIVELY.

(1) Preservation of Error

Jones addresses *Plain*'s retroactively here, even though the district court did not give the parties a chance to adequately address the issue below, in order not to forfeit the issue on appeal. However, Jones maintains this this case should be remanded to the district court for an opportunity for the parties to fully brief the issue of *Plain*'s retroactive application. Jones nonetheless acknowledges that the issue is preserved for review because the district court considered it (even if in error) below. *See McCright*, 569 N.W.2d at 607 (issue must be raised before district court to be preserved for appellate review)l; *Lamasters*, 821 N.W.2d at 864 ("Where a trial court has considered and ruled on an issue error has been preserved.").

Error was therefore preserved on this issue.

(2) Standard of Review

Jones argues here that the district court erred by dismissing his application because *State v. Plain* did not apply retroactively. "Generally, an appeal from a denial of an application for postconviction relief is reviewed for correction of errors at law." *Perez v. State*, 816 N.W.2d 354, 356 (Iowa 2012), citing *Goosman,* 764 N.W.2d at 541. A reviewing court must "affirm if the trial court's findings of fact are supported by substantial evidence and the law was correctly applied." *Id.*, citing *Harrington,* 659 N.W.2d at 520. Where the applicant alleges constitutional error, the reviewing court's "review is *de novo* 'in light of the totality of the circumstances and the record upon which the postconviction court's rulings w[ere] made.' " *Id.*, citing *Goosman,* 764 N.W.2d at 541, quoting *Giles v. State,* 511 N.W.2d 622, 627 (Iowa 1994).

(3) Argument on the merits

State v. Plain, 898 N.W.2d 801 (Iowa 2017) should apply retroactively to cases that were final when it was decided. *Teague v. Lane*, 489 U.S. 288 (1989) is "the Supreme Court's leading pronouncement on when a federal constitutional rule of criminal procedure may be applied retroactively to a conviction that

became final before the rule was announced." *Perez*, 816 N.W.2d at 358. "Without expressly adopting the federal per se framework," the Iowa Supreme Court has "applied a similar per se framework to evaluate the retroactive effect of United States Supreme Court cases." *Nguyen v. State*, 878 N.W.2d 744, 753 (Iowa 2016), *reh'g denied* (June 2, 2016), citing *Ragland,* 836 N.W.2d at 114; *Perez,* 816 N.W.2d at 358–59; *Goosman,* 764 N.W.2d at 540, 544–45; *Morgan v. State,* 469 N.W.2d 419, 422 (Iowa 1991). The Iowa Supreme Court "likewise fully considered common law retroactivity in deciding *Heemstra,*" *id.*, which the district court in this case likened to *Plain*. *See* Order, April 26, 2018.

The *Teague* court indicated that "[u]nless they fall within an exception to the general rule, *new* constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Perez*, 816 N.W.2d at 358, citing *Teague*, 489 U.S. at 310 (Emphasis original). *Teague* defined a new rule as one that "breaks new ground or imposes a new obligation on the States or the Federal Government" or, to

put it another way, "was not *dictated* by precedent existing at the time the defendant's conviction became final." *Id.*, citing *Teague*, 489 U.S. at 301. (Emphasis original). Such new rules "generally should not be applied retroactively to cases on collateral review." *Id.*, citing citing *Teague*, 489 U.S. at 305.

Teague allowed for two narrow exceptions to its principle that new rules do not apply retroactively. One is for new rules of criminal procedure that are actually substantive because they place "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Id.*, citing citing *Teague*, 489 U.S. at 311. Thus, the first exception to nonretroactivity arises when previously illegal conduct is no longer prohibited by the law. *Id*. The second exception is "reserved for watershed rules of criminal procedure...without which the likelihood of an accurate conviction is seriously diminished." *Perez*, 816 N.W.2d at 359, citing *Teague*, 489 U.S. at 311. Hence, the second exception involves new rules that are "central to an accurate determination of innocence or guilt" and also "implicit in

the concept of ordered liberty." *Id.*, citing *Teague*, 489 U.S. at 313–14.

A. *STATE v. PLAIN* ANNOUNCED A NEW RULE.

The rule announced in *Plain* was a "new rule" under *Teague* because it "breaks new ground." *Perez*, 816 N.W.2d at 358, citing *Teague*, 489 U.S. at 301. The *Plain* court held that "Parties challenging jury pools on the ground that they are unrepresentative may base their challenges on multiple analytical models. The district court may use multiple analytical models in its analysis, taking into account the various strengths and weaknesses of each test when determining whether jury pools comport with the Sixth Amendment mandate of representativeness." *Plain*, 898 N.W.2d at 827.

This holding is was not "dictated by precedent existing at the time the defendant's conviction became final." *Perez*, 816 N.W.2d at 358, citing *Teague*, 489 U.S. at 301. In fact, *Plain* expressly departed from existing law to reach its holding. *See Plain*, 898 N.W.2d at 826 ("Our decision to adopt absolute disparity as the exclusive test and to reject comparative disparity in *Jones* rested

upon an error of law and on cases from other jurisdictions that have since been overruled or criticized. After surveying the various tests, and bearing in mind the practical problems associated with the use of the absolute disparity test in Iowa, we conclude it is no longer appropriate to rely exclusively upon the absolute disparity test as an indicator of representativeness. We therefore overrule *Jones*, 490 N.W.2d at 792–93."). Therefore, the district court correctly determined that *Plain* was a "new rule". (*See* A. 36). ("I am concluding that it is too burdensome, and it imposes far too many costs upon society to apply this *new rule* of law prospectively.") (Emphasis added).

B. *STATE v. PLAIN* SHOULD BE APPLIED RETROACTIVELY BECAUSE IT IS A NEW RULE THAT IS "CENTRAL TO AN ACCURATE DETERMINATION OF INNOCENCE OR GUILT" AND IS ALSO "IMPLICIT IN THE CONCEPT OF ORDERED LIBERTY."

"New rules" are generally not retroactively applied unless the rule fits into one of *Teague*'s two narrow exceptions. *See Perez*, 816 N.W.2d at 358, citing *Teague*, 489 U.S. at 310. The *Plain* rule does not fall into the first exception because it does not make

previously illegal conduct legal. *Perez*, 816 N.W.2d at 358, citing *Teague*, 489 U.S. at 311. Rather, the *Plain* rule is a "watershed rule[] of criminal procedure...without which the likelihood of an accurate conviction is seriously diminished," *Id.* at 359, citing *Teague*, 489 U.S. at 311, and is "central to an accurate determination of innocence or guilt" and also "implicit in the concept of ordered liberty." *Id.*, citing *Teague*, 489 U.S. at 313–14.

The *Plain* rule falls into this exception because, for the first time, it allows defendants to use multiple analytical models to challenge the composition of their jury pools to ensure a defendant's "Sixth Amendment right to have a jury pool made up of a fair cross-section of the community." *Plain*, 898 N.W.2d 801, 82. The *Plain* rule is intended to allow defendants to challenge structural error in the composition of their jury.

The United States Supreme Court found an error to be "structural," and thus subject to automatic reversal, only in a "very limited class of cases." *Neder v. United States*, 527 U.S. 1, 8 (1999), citing *Johnson v. United States,* 520 U.S. 461, 468, (1997), citing *Gideon v. Wainwright,* 372 U.S. 335 (1963) (complete denial

of counsel); *Tumey v. Ohio,* 273 U.S. 510 (1927) (biased trial judge); *Vasquez v. Hillery,* 474 U.S. 254 (1986) (racial discrimination in selection of grand jury); *McKaskle v. Wiggins,* 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller v. Georgia,* 467 U.S. 39 (1984) (denial of public trial); *Sullivan v. Louisiana,* 508 U.S. 275 (1993) (defective reasonable-doubt instruction).

Cases involving structural error contain a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Neder*, 527 U.S. at 8–9, citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Such errors "infect the entire trial process," *id*., citing *Brecht v. Abrahamson,* 507 U.S. 619, 630 (1993), and "necessarily render a trial fundamentally unfair," *Id*., citing *Rose v. Clark,* 478 U.S. 570, 577 (1986). Put another way, these errors deprive defendants of "basic protections" without which "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence ... and no criminal punishment may be regarded as fundamentally fair." *Id.,* citing *Rose*, 478 U.S. at 577–578.

The United States Supreme Court has long treated the errors which affect the composition of venire, grand juries, and petit juries as structural error. *Gray v. State*, 133 S.W.3d 281, 286 (Tex. App. 2004), *rev'd,* 159 S.W.3d 95 (Tex. Crim. App. 2005), citing *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 135–36 (1994) (petit jury); *Batson v. Kentucky,* 476 U.S. 79, 85–86 (1986) (petit jury); *Vasquez,* 474 U.S. at 263–64 (grand jury); *Duren v. Missouri,* 439 U.S. 357, 359 (1979) (venire); *Taylor v. Louisiana,* 419 U.S. 522, 526 (1975) (venire); *Cassell v. Texas,* 339 U.S. 282, 283–84 (1950) (grand jury).

As the Supreme Court stated in *Taylor,* "[T]he requirement of a jury's being chosen from a fair cross section of the community is fundamental to the American system of justice." *Id.*, citing *Taylor,* 419 U.S. at 529, 95 S.Ct. 692. The Court went on to quote the following from the debate on the floors of the House and Senate when enacting legislation ensuring this Sixth Amendment right:

> It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross

> sectional goal, biased juries are the result—biased in the sense that they reflect a slanted view of the community they supposed to represent. *Id.*, citing *Taylor*, 419 U.S. at 530 n. 7.

Biased juries, like partial judges, *Tumey,* 273 U.S. at 523–24, are structural defects which defy harm analysis. *Id.*

The *Plain* rule, which now equips defendants to show structural error in the composition of their jury pools in ways that had been foreclosed to them in the past, is a "watershed rule of criminal procedure." *Perez*, 816 N.W.2d at 359, citing *Teague*, 489 U.S. at 311. It is so because the "likelihood of an accurate conviction is seriously diminished" when there is structural error in the jury composition. Prior to *Plain*, the absolute disparity test used in *Jones* was ineffective in showing that structural error. *See Plain,* 898 N.W.2d 801, 825–26. The *Plain* court's discussion of the shortcomings of *Jones* suggests that their may have been structural error occurring in Iowa cases that would not have been cognizable legal error under *Jones*.

Allowing defendants to challenge the composition of their juries under multiple analytic models is "central to an accurate determination of innocence or guilt" and also "implicit in the

concept of ordered liberty." *Perez*, 816 N.W.2d at 358, citing *Teague*, 489 U.S. at 313–14. These methods will unveil structural error that had always been present but could not be challenged. This is possible now only because of *Plain*.

The district court stated that if *Plain* was to apply retroactively, "the flood gates would be unleashed like you could not believe." (A. 35). While that is unlikely, it is also analytically besides the point. This "flood gates" concern was the district court's sole justification for determining that *Plain* was not to apply retroactively. The district court did not analyze the *Plain* decision under the *Teague* framework or any other framework. It simply voiced its concern that applying *Plain* retroactively would result in a flood of new claims. (A. 35). While it is true that deciding whether a decision will apply retroactively will necessarily have practical consequences, those consequences should not be—and in fact are not—the determining factor as to whether a case should apply retroactively. *Plain* should apply retroactively for reasons stated above, and it was error for the district court to determine that it did not.

CONCLUSION

The District Court erred by dismissing Jones' application for post-conviction relief on grounds that it was barred by the statute of limitations. Jones' application for post-conviction relief was filed within three years of the Iowa Supreme Court's decision in *State v. Plain*, which is "a ground of fact or law that could not have been raised within the applicable time period," regardless of whether it was to be applied retroactive or not. Therefore, this application for post-conviction relief should have been exempted from the three-year statute of limitations. Furthermore, Jones' right to due process was also violated by the manner in which the district court dismissed Jones' application for post-conviction relief by dismissing the petition on grounds that were premature, that the parties did not raise, and that the parties did not have an opportunity to respond to.

Lastly, even if the district court properly considered the retroactive application of *Plain*, the district court should not have dismissed Jones' application on grounds that *Plain* was not

retroactive because *Plain* should be retroactive as a matter of law for reasons described above.

Accordingly, Jones respectfully requests this Honorable Court to reverse the district court's order dismissing Jones' application for post-conviction relief and remand the matter to the trial court for further proceedings.

REQUEST FOR ORAL ARGUMENT

The Appellant requests oral arguments in this appeal.

ATTORNEY'S COST CERTIFICATE

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_____/s/ Nate Nieman_____

Dated this 11th day of December, 2018.

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