**IN THE SUPREME COURT OF IOWA**

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| **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 REPLY 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 Reply Brief through EDMS to the following counsel of record:

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

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## REPLY 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.

#### A. *Plain* is a new ground of law that excuses Jones' untimely post-conviction petition.

Jones disagrees with the State that "This court should first find that the three-year time bar of Iowa Code section 822.3

forecloses Jones' claim. *State v. Plain* is not a new ground of law that excuses Jones' untimely postconviction filing." (State's Br. at 11). The State argued in its brief that *Phuoc Thanh Nguyen v. State*, 829 N.W.2d 183 (Iowa 2013), on which Jones relies, (App. Br. at 23-24), was distinguishable. (States's Br. at 11). The State argued that *Nguyen* is distinguishable because "The precedent on that subject before *Heemstra* was longstanding and unequivocal, and *Heemstra* broke new ground. In contrast, although *Plain* rejected *Jones*' exclusive use of absolute disparity, it did not overrule an unbroken chain of clear authority in the way *Heemstra* did." (State's Br. at 12-13). Jones disagrees.

First, the precedent on the subject before *Plain* was longstanding and unequivocal. *State v. Plain*, 898 N.W.2d 801, 826 (Iowa 2017), which was decided on June 30, 2017, expressly overruled *State v. Jones*, 490 N.W.2d 787 (Iowa 1992), which was decided on July 22, 1992—twenty-four years and eleven months prior to *Plain* being decided. In comparison, *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006), which was decided on August 25, 2006, expressly overruled *State v. Beeman*, 315 N.W.2d 770

(Iowa 1982), which was decided on February 17, 1982—twenty-four years and six months prior to *Heemstra* being decided.

Both *Heemstra* and *Plain* squarely overruled decisions that were nearly twenty-five years old. If "The precedent on that subject before *Heemstra* was longstanding and unequivocal," (State's Br. at 11), so too was the precedent on the subject before *Plain*. The State argues that "the *Jones* caselaw was not nearly as firmly entrenched as the pre-*Heemstra* line of cases," (State's Br. at 12), but a review of the cases cited above—and when they were decided—shows the opposite to be true. *Jones* and *Heemstra* are nearly identically entrenched.

Secondly, *Plain* broke new ground, just as *Heemstra* did. The *Heemstra* court recognized that its holding was "inconsistent with our prior cases, including *Beeman* and its progeny." *Heemstra*, 721 N.W.2d at 558. *Heemstra* overruled *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 (1988); and *State v. Mayberry*, 411 N.W.2d 677, 682-83 (Iowa 1987) "insofar as they hold that the act constituting willful injury and also causing

the victim's death may serve as a predicate felony for felony-murder purposes." *Id*. Similarly, *Plain* overruled the nearly twenty-five-year-old case of *Jones*, 490 N.W.2d 787, *Plain*, 898 N.W.2d 801, 826, and departed from the cases that followed in *Jones*' wake. *See State v. Huffaker*, 493 N.W.2d 832 (Iowa 1992); *Thongvanh v. State*, 494 N.W.2d 679 (Iowa 1993).

The State argued that *Plain* did not break new ground because "*Plain* added two other tests to the jury pool cross-section mix but did not remove absolute disparity as an appropriate calculation." (State's Br. at 12). But this itself was groundbreaking because prior to *Plain*, the court relied "exclusively upon the absolute disparity test as an indicator of representativeness."" *Plain*, 898 N.W.2d at 826. This will certainly lead to "claims that 'were viewed as fruitless at the time but became meritorious later on,'" (State's Br. at 12), because now several different tests can be used to challenge racial makeups of jury pools, whereas prior to *Plain*, only one could be used.

Both *Heemstra* and *Plain* broke new ground by starkly departing from well-established law. Therefore, "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.'" (App. Br. at 25).

The State argues that "Defendants in the appellate system ten years ago could have at least raised a *Jones* fair cross-section claim and could have argued for a different computation or analysis," (State's Br. at 12), but a defendant would only be able to make such a challenge using the absolute disparity test. In fact, the State's description of Jones' prior attempt to challenge his jury pool composition prior to *Plain* illustrates the point. The State correctly notes that "this applicant did raise a jury pool fair cross-section claim before *Plain*," (State's Br. at 12), but "the court cited *State v. [Milton] Jones*, and concluded that '[Michael Navarro] Jones presented no evidence that the underrepresentation of African-Americans on the panel was due to the systematic exclusion of this group from the jury selection process.'" (State's Br. at 13). Had *Plain*—instead of *Jones*—been the law at that

time, Michael Jones could have challenged his jury pool on other grounds than those allowed by *Jones*.

**B. Jones' claim is not barred by *res judicata*.**

On a related point, Jones' claim in this application was not barred by *res judicata*. The State claimed that "Because the Court of Appeals has already decided the issue of systematic exclusion adversely to Jones in his first postconviction appeal, that finding is fatal to his current claim." (State's Br. 14). Jones argued in *Jones v. State*, 821 N.W.2d 778 (Iowa Ct. App. 2012) that "his attorney on direct appeal was ineffective in failing to pursue a challenge to the composition of the jury, following the removal for cause of two African–Americans." However, Jones argued in his post-conviction application that "The applicant was denied a fair and impartial jury, as well as equal protection and due process when District Court used the 'absolute disparity' test and denied jury pool data. The Iowa and U.S. Constitution guarantees these rights." (App. 7).

Jones' claim in *Jones v. State*, 821 N.W.2d 778 was an ineffective assistance of appellate counsel claim, whereas Jones'

claim in his post-conviction application was an equal protection and due process claim. Because the claims are distinct, Jones' claim in his post-conviction application would not be barred by *res judicata* principles because this claim was never addressed and finally resolved in *Jones v. State*, 821 N.W.2d 778 prior to Jones raising it in a subsequent application.

### C. Jones' argument based on *Manning* was preserved.

The State argued in its brief that "it challenges error preservation on Jones' complaint regarding the nature of the hearing." (State's Br. at 14). The State acknowledged that defense counsel "did express a 'preference' that the court simply rule on the issue of whether *Plain* was a new ground of law under Iowa Code section 822.3 and leave for another day the substantive issue of *Plain*'s retroactivity," (State's Br. at 14), but the State argued that counsel "did not press the issue, object to the court's immediate discussion of *Plain*'s retroactivity, or request a subsequent hearing to argue the merits of whether *Plain* was retroactive." (State's Br. at 14-15).

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. Tr. p. 2-3.

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).

Defense counsel 1) "pressed the issue," 2) "objected to the court's immediate discussion of *Plain*'s retroactivity," and 3) "requested a subsequent hearing to argue the merits of whether

*Plain* is retroactive" by politely stating that "[3] the determination of whether or not it's retroactive would be something that is determined later than today, the motion to dismiss, [1][2] 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." (A. 32-33). Short of interrupting the court or walking out of the room during the hearing, defense counsel did what he could to preserve this issue before he was steamrolled into discussing the retroactivity of *Plain*.

The State argues that Manning is factually distinguishable, (State's Br. at 15), which Jones acknowledges in his brief. (State's Br. 33). Jones cited *Manning* because 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," *Manning v. State*, 654 N.W.2d 555, 561 (Iowa 2002)—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 State does not address this

substantive point in its brief other than to state that "The court properly set the State's motion to dismiss for a hearing and notified the parties at the outset that the ultimate legal issue was whether *Plain* was retroactive," (State's Br. at 17), without citing any portion of the record in support of this claim.

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

Jones stands on the arguments made in his opening brief on this issue. *See* (App. Br. at 40-45).

## 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

I, Nate Nieman, hereby certify the actual cost of reproducing the necessary copies of the preceding Applicant-Appellant's Proof Brief consisting of 16 pages was $0 and that that amount had been paid in full by me.

_____/s/ Nate Nieman_____

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_____/s/ Nate Nieman_____

Dated this 11th day of December, 2018.

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