IN THE SUPREME COURT OF IOWA
Supreme Court No. 18-0745

MICHAEL NAVARRO JONES,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE GEORGE L. STIGLER, JUDGE

APPELLEE'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Federal Statute

State Statutes

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. The Postconviction Court Properly Dismissed the Applicant's Untimely Fair Cross-section Claim.

Authorities

Daniel v. Louisiana, 420 U.S. 312, 95 S.Ct. 7045, 42 L.Ed.2d 7902 (1975)
Duren v. Missouri, 439 U.S. 357 (1979)
Taylor v. Louisiana, 419 U.S. 522 (1975)
Teague v. Lane, 489 U.S. 2881 (1989)
Allison v. State, 914 N.W.2d 8660 (Iowa 2018)
Brewer v. State, 444 N.W.2d 771 (Iowa 1999)
Harrington v. State, 659 N.W.2d 5090 (Iowa 2003)
Jones v. State, No. 11-1033, 2012 WL 3590334 (Iowa Ct. App. Aug. 22, 2012)
Morgan v. State, 469 N.W.2d 4192 (Iowa 1991)
Nguyen v. State, 829 N.W.2d 183 (Iowa 2013)
Nguyen v. State, 878 N.W.2d 7449 (Iowa 2016)
Osborn v. State, 573 N.W.2d 9170 (Iowa 1998)
State v. Edman, 444 N.W.2d 1036 (Iowa Ct. App. 1989)
State v. Fenton, No. 17-0154, 2018 WL 30574426 (Iowa Ct. App. June 20, 2018)
State v. Heemstra, 721 N.W.2d 5498 (Iowa 2006)
State v. Jones, 490 N.W.2d 7873 (Iowa 1992)
State v. Plain, 898 N.W.2d 801 (Iowa 2017)
State v. Smith, No. 16-1881, 2017 WL 43150583 (Iowa Ct. App. Sept. 27, 2017)
State v. Tobin, 333 N.W.2d 8425 (Iowa 1983)
Wilkins v. State, 522 N.W.2d 8224 (Iowa 1994)
U.S. Const. amend. V
Iowa Code § 822.3
Iowa Code § 822.8

ROUTING STATEMENT

Jones notes that the issue raised in this case can be resolved through the application of existing legal principles, and transfer to the Court of Appeals is therefore appropriate. *See* Iowa R. App. P. 6.1101(3)(a). In the alternative, Jones adds that the Iowa Supreme Court could retain the case to decide whether *State v. Plain*, 898 N.W.2d 801 (Iowa 2017), should be applied retroactively. Because the *Plain* retroactivity issue has already been briefed and screened in the case of *Thongvanh v. State*, No. 18-0885, the State asks that this case be routed to the Court of Appeals and resolved in the same way as *Thongvanh*.

STATEMENT OF THE CASE

Nature of the Case and Course of Proceedings.

A Black Hawk county jury convicted Michael Navarro Jones of one count of first-degree robbery and one count of being a felon in possession of a firearm, in violation of Iowa Code sections 711.1, 711.2, 724.26, and 902.8 (2007). The charges stemmed from allegations that Jones robbed a store clerk at gunpoint.

Jones appealed, and his convictions were affirmed. *See State v. Jones*, No. 08-1917, 2009 WL 4842500 (Iowa Ct. App. Dec. 17, 2009). He subsequently filed three postconviction actions, all of which were unsuccessful; those denials were affirmed on appeal. *See State v. Jones*, No. 16-1561, 2017 WL 4049498 (Iowa Ct. App. Sept. 13, 2017) (recounting procedural history of previous postconviction cases); *Jones v. State*, No. 11-1033, 2012 WL 3590334 (Iowa Ct. App. Aug. 22, 2012).

Jones filed his most recent postconviction application on December 11, 2017. *Pro Se* Postconviction Application; App. 5-9. The State moved to dismiss the application as untimely under Iowa Code section 822.3. State's Motion to Dismiss; App. 10. The postconviction court set the motion for a hearing and ultimately dismissed the case, finding that *State v. Plain,* 898 N.W.2d 801 (Iowa 2017), was not retroactive and therefore Jones could not prevail. The applicant now appeals.

Facts.

Because the underlying facts of the case are not pertinent to the issue raised on appeal, the State does not detail them here.

ARGUMENT

I. The Postconviction Court Properly Dismissed the Applicant's Untimely Fair Cross-section Claim.

Standard and Scope of Review.

Postconviction relief actions are civil in nature and are reviewed for the correction of errors at law. *Allison v. State*, 914 N.W.2d 866, 870 (Iowa 2018). To the extent that the applicant raises a constitutional issue, review is *de novo*. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998).

Preservation of Error.

Jones raised the *Plain* jury pool issue in his postconviction application; error on that claim is therefore preserved. As discussed more fully below, however, any additional complaint that the court improperly reached beyond the confines of the motion to dismiss hearing has not been adequately preserved.

Merits.

Iowa Code section 822.3 requires postconviction claims to be filed within three years of *procedendo*, which is intended to "limit postconviction litigation in order to conserve judicial resources, promote substantive goals of the criminal law, foster rehabilitation, and restore a sense of repose in our system of justice." *See Wilkins v.*

State, 522 N.W.2d 822, 824 (Iowa 1994) (quoting *State v. Edman*, 444 N.W.2d 103, 106 (Iowa Ct. App. 1989)). Any postconviction application filed outside of the three-year limitations period "is time barred unless an exception applies." *See Harrington v. State*, 659 N.W.2d 509, 520 (Iowa 2003). Section 822.3 creates an exception for "a ground of fact or law that could not have been raised within the applicable time period." *See* Iowa Code § 822.3. Jones contends in this case that *State v. Plain* created a new ground of law that enabled him to raise a claim outside the three-year postconviction time period, which expired in February 2013. To aid Jones, *Plain* must apply also retroactively, however, because his conviction was finalized when *Plain* was decided in 2017. The postconviction court here properly concluded that *Plain* was not retroactive and therefore provided Jones no basis for relief.

The Sixth Amendment guarantees criminal defendants the right to an impartial jury. U.S. Const. amend. VI. This right entitles the defendant to choose a jury from a "fair cross-section" of the community. *See State v. Plain*, 898 N.W.2d 801, 821 (Iowa 2017). In *Plain*, the Iowa Supreme Court confirmed that Iowa follows *Duren v. Missouri*, 439 U.S. 357 (1979), requiring three showings to establish a

prima facie violation of the fair cross-section requirement. *Plain*, *id.* A defendant must show (1) that he is part of a "distinctive" group alleged to be excluded; (2) that the representation of his group "in venires from which juries are selected is not fair and reasonable in relation to the number of persons in the community;" and (3) that the "underrepresentation is due to systematic exclusion of the group in the jury-selection process." *Plain*, 898 N.W.2d at 822 (quoting *Duren,* 439 U.S. at 364); *see also State v. Smith,* No. 16-1881, 2017 WL 4315058, at *3 (Iowa Ct. App. Sept. 27, 2017). No presumption of bias may be drawn from the racial composition of the jury pool. *State v. Fenton,* No. 17-0154, 2018 WL 3057442, at *6 (Iowa Ct. App. June 20, 2018).

The *Plain* court overruled *State v. Jones*, 490 N.W.2d 787, 792-93 (Iowa 1992), which had used "absolute disparity" to calculate underrepresentation and had suggested that any absolute disparity under 10% would not constitute substantial underrepresentation. *Jones*, *id.* at 793, *overruled by Plain*, 898 N.W.2d at 826. Absolute disparity is defined as the percentage of a distinct group in the population minus the percentage of that group represented in the jury panel. *Id.* After *Plain*, Iowa courts may consider other models and

calculations in addition to absolute disparity, such as comparative disparity and standard deviation, to analyze substantial underrepresentation. *Plain*, 989 N.W.2d at 897. The *Plain* court offered no further guidance. *Id.*

A. The Applicant Cannot Circumvent the Time Bar of Iowa Code Section 822.3 Based on *State v. Plain*, 898 N.W.2d 801 (Iowa 2017), Nor Overcome Iowa Code Section 822.8.

This court should first find that the three-year time bar of Iowa Code section 822.3 forecloses Jones' claim.[1] *State v. Plain* is not a new ground of law that excuses Jones' untimely postconviction filing. Jones cites *Nguyen v. State* [*Nguyen I*], 829 N.W.2d 183 (Iowa 2013), for the proposition that a case announcing a change in the law may operate as a "new ground of law" for postconviction statute of limitations purposes. Applicant's Br., p. 19-25. *Nguyen*, however, is distinguishable. The *Nguyen* court was discussing the effect of *State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006) and the court's overruling of a "long line of cases" regarding predicate felonies and felony-murder. *See Nguyen*, *id.*; *Nguyen v. State* [*Nguyen II*], 878

[1] The State raised the time bar issue below, but the postconviction court proceeded directly to the ultimate issue of *Plain*'s retroactivity. *See* Motion to Dismiss Tr. p. 2, line 2-6, line 16; Motion to Dismiss; Postconviction Ruling; App. 10, 38.

N.W.2d 744, 749 (Iowa 2016). 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. *See Nguyen I*, 829 N.W.2d at 188 ("In our view, a ground of law that had been clearly and repeatedly rejected by controlling precedent from the court with final decision-making authority is one that 'could not have been raised' as that phrase is used in section 822.3."). The *Nguyen I*'s court's description of claims that "were viewed as fruitless at the time but became meritorious later on" (*id.* at 188) applies to *Heemstra* claims but not *Plain* claims. *Plain* added two other tests to the jury pool cross-section mix but did not remove absolute disparity as an appropriate calculation. 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. Because the *Jones* caselaw was not nearly as firmly entrenched as the pre-*Heemstra* line of cases, *Plain* is not comparable to *Heemstra* and should not be considered a new ground of law under *Nguyen* to circumvent section 822.3.

Moreover, this applicant did raise a jury pool fair cross-section claim before *Plain*. *See State v. Michael Navarro Jones*, No. 11-1033, 2012 WL3590334, at *4 (Iowa Ct. App. Aug. 22, 2012). On appeal from his first postconviction case, the court noted that the applicant argued his appellate lawyer was ineffective in failing to pursue a challenge to the composition of the jury panel; 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." *Id.* at *4.

This finding is relevant both before and after *Plain* because it is one of the three components of the *Duren* test necessary to establish a *prima facie* fair cross-section violation. *See Plain*, 898 N.W.2d at 822 (quoting *Duren*, 439 U.W. at 364). Jones' claim is thus also barred by Iowa Code section 822.8.

Section 822.8 provides:

> Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulting the conviction or sentence, or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason

> was not asserted or was inadequately raised in the original, supplemental, or amended application.

Iowa Code § 822.8. In this case, the State raised the issue of *res judicata* below. *See* Motion to Dismiss; App. 10. 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. Jones cannot prevail using any of the statistical models establishing substantial underrepresentation because he has already failed the systematic exclusion prong of the *Duren* test. He should not be permitted to relitigate his claim.

B. Jones is Not Entitled to Relief on the Ground that the Court Violated the Dictates of *State v. Manning*, 654 N.W.2d 555 (Iowa 2002).

Jones also asks this court to find that under *State v. Manning*, 654 N.W.2d 555, 561 (Iowa 2002), the postconviction court improperly reached beyond the scope of the motion to dismiss hearing in concluding that *Plain* was not retroactive. The State first challenges error preservation on Jones' complaint regarding the nature of the hearing. 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. *See* Motion to Dismiss Tr. p. 2, line 11 – p. 3, line 5. However, 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* is retroactive. Under the circumstances, Jones acquiesced in the court's decision to address the retroactivity of *Plain* and thus waived any error that the court went beyond the scope of a motion to dismiss hearing.

Second, *Manning* is distinguishable and does not apply to Jones. There, Manning raised claims in postconviction proceedings after he had pleaded guilty and his direct appeal had been dismissed as frivolous over his objection. *Id.* at 561. The postconviction court quickly dismissed the case after an unreported hearing, accepting the State's argument that Manning had waived his claims by pleading guilty; the court went on to reject the *merits* of the claims without giving Manning notice that he could present evidence on the merits at the hearing. *Id.*

Manning had timely presented at least two claims of ineffective assistance related to counsel's plea advice that called into question its knowing and voluntary nature, which are claims that can survive a

guilty plea. *Id.* The State had simply moved to dismiss on grounds of waiver by virtue of the guilty plea. *Id.* The Iowa Supreme Court concluded that "[w]ithout a fully developed record, there is no clear-cut way to determine whether Manning can establish those claims." *Id.* at 561. Manning's claims, if he could establish them, would have entitled him to relief despite his earlier guilty plea, and the *Manning* court concluded that the defendant should have been given notice that the hearing would be his opportunity to present facts establishing his claims. *Id.* There were no procedural hurdles that were impossible for him to surmount.

In contrast, Jones's time-bar posture distinguishes his claim. The basis of his postconviction claim is that *State v. Plain* should be applied retroactively to his case a decade after it was tried. As the postconviction court correctly noted, that claim is purely legal. An evidentiary hearing to develop factual assertions under *Manning* is unnecessary because *Plain* is not retroactive. If *Plain* is not retroactive, Jones cannot prevail under any set of facts. In any event, Jones is not entitled to a remand to argue the retroactivity of *Plain* before the postconviction court because the court discussed the issue with the parties, albeit briefly, and ruled that *Plain* was not

retroactive. *See* Motion to Dismiss Tr. at p. 2, line 11 – p. 6, line 16. Because the issue is properly before the appellate court and Jones has presented his legal argument regarding *Plain*'s retroactivity in full in his appellate brief, there is no need to remand the case for further proceedings in the lower court. *Cf. State v. Tobin*, 333 N.W.2d 842, 844-45 (Iowa 1983) (the Iowa Supreme Court reached and decided a double jeopardy issue despite trial counsel's failure to raise the claim below; the court noted the defendant had "bargained for an opportunity to make an appellate challenge to his conviction" and because the court would decide the issue on appeal, no basis existed to invalidate his conviction on the ground that it was not raised earlier).

In sum, Jones was not entitled to postconviction relief and "no purpose would be served by further proceedings" under Iowa Code section 822.6. 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. Jones is not entitled to another hearing on the subject.

C. *State v. Plain* is Not Retroactive Because It Did Not Establish New Law that Falls Within the *Teague v. Lane* Exception for "Watershed Rules."

Out of respect for "principles of finality that are at the foundation of the criminal laws' deterrent effect," the Iowa Supreme Court has adopted the United States Supreme Court's framework for determining whether its holdings apply retroactively to criminal cases that have already been finalized through exhaustion of all avenues for direct review. *See Brewer v. State*, 444 N.W.2d 77, 81 (Iowa 1999) (citing *Teague v. Lane*, 489 U.S. 288, 311 (1989)). New rules should *not* be applied retroactively to cases on collateral review; however, two exceptions exist. *Id.* If the change in the law: (1) places certain types of individual, private conduct beyond the ability of lawmakers to proscribe, or (2) creates a 'watershed' rule of criminal procedure implicating issues of fundamental trial fairness," retroactive application is appropriate. *See Brewer*, *id.* As noted, *State v. Plain* overruled *State v. Jones* and its exclusive use of absolute disparity in calculating the racial composition of the jury pool; the *Plain* court offered a "flexible" approach of applying any of three different approaches, including absolute disparity. As discussed below, the *Plain* decision does not constitute a "watershed rule[] of criminal

procedure… without which the likelihood of an accurate conviction… is seriously diminished."

In *Brewer v. State,* the court rejected a similar fair cross-section retroactivity claim. In *Brewer*, the defendant argued that *Duren v. Missouri* modified the standard to be applied in fair-cross section jury challenges and that the "new law" should be applied retroactively to allow him to relitigate the issue. *Id*. at 80. The *Brewer* court disagreed; it accepted *Teague v. Lane*'s holding that *Duren* did not announce a "watershed rule" and did not involve a "bedrock procedural element" that merited retroactive application:

> Even assuming, *arguendo*, that the court in *Brewer* should have applied *Duren*'s "significant state interest" test rather than a rational basis test to measure the constitutionality of age-based juror restrictions, we would still be left with the question whether *Duren*'s higher standard should be given retroactive application on postconviction review. In a strikingly similar case, the United States Supreme Court recently held that new constitutional rules of criminal procedure generally should not be applied retroactively to cases on collateral review. *See Teague v. Lane*, 489 U.S. 288, ----, 109 S.Ct. 1060, 1075–78, 103 L.Ed.2d 334, 356—60 (1989). We concur in the Court's conclusion and adopt it here.
>
> [. . .]

> Because the absence of a fair cross section on the jury venire does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction, we conclude that a rule requiring that petit juries be composed of a fair cross section of the community would not be a "bedrock procedural element" that would be retroactively applied under the second exception we have articulated.
>
> *Id.* at ----, 109 S.Ct. at 1077, 103 L.Ed.2d at 359; *accord Daniel v. Louisiana*, 420 U.S. 31, 32, 95 S.Ct. 704, 705, 42 L.Ed.2d 790, 792 (1975) (refusing to apply [*Taylor v. Louisiana*, 419 U.S. 522 (1975)] retroactively). Applying this same reasoning to the case before us, we find no error in the trial court's rejection of Brewer's claim that *Duren v. Missouri* announced new law that should be retrospectively applied to furnish Brewer a new trial.

See Brewer, 444 N.W.2d at 81–82.

At its core, *Plain*'s analysis of the jury panel issue is an application of *Duren v. Missouri*. While *Plain* departed from other Iowa precedent that applied *Duren*, it cannot be more of a "watershed rule" or "bedrock procedural element" than *Duren* itself. *See Plain*, *id.* at 821–29. At best, *Plain* would vindicate the same procedural right that *Duren* delineated—which means that cases foreclosing

retroactive application of *Duren* also necessarily foreclose retroactive application of *Plain*.

Jones cannot demonstrate that *Plain*, unlike *Duren* itself, qualifies as a "watershed rule" about a bedrock procedural element that is indispensably necessary for a fair trial. His argument that *Plain* applies retroactively must fail in favor of the general rule that "new rules do not apply retroactively to cases on collateral review." *See Morgan v. State*, 469 N.W.2d 419, 422 (Iowa 1991). Because *Plain* is not retroactive, it does not serve as a basis to invalidate Jones' 2008 convictions. Further, *Plain* does not constitute a "new ground of law" under Iowa Code section 822.3 that would negate the three-year time bar. As the postconviction court correctly concluded, Jones is not entitled to relief.

CONCLUSION

For the reasons discussed above, the State respectfully requests that the court affirm the postconviction court's denial of relief to Michael Navarro Jones.

REQUEST FOR NONORAL SUBMISSION

The applicant has requested oral argument. The State believes the case can be decided by reference to the briefs without further elaboration. In the event the applicant is granted oral argument, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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