

# APPENDICES

A-THROUGH-H

IN THE COURT OF APPEALS OF IOWA

No. 21-1847  
Filed November 17, 2022

DAVID LEE HERING,  
Applicant-Appellant,

vs.

STATE OF IOWA,  
Respondent-Appellee.

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Appeal from the Iowa District Court for Muscatine County, Joel W. Barrows,  
Judge.

David Hering appeals the dismissal of his fourth application for  
postconviction relief. **AFFIRMED.**

David Hering, self-represented appellant.

Thomas J. Miller, Attorney General, and Darrel Mullins, Assistant Attorney  
General, for appellee State.

Considered by Vaitheswaran, P.J., Ahlers, J., and Mullins, \*S.J.

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206  
(2022).

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**MULLINS, Senior Judge.**

David Hering appeals the dismissal of his fourth application for postconviction relief (PCR). He argues the court erred in dismissing his claims of ineffective assistance of counsel based on new grounds of law and his claim that his convictions are void on speedy-trial grounds.

**I. Background**

In May 2021, David Hering filed his fourth application for PCR relating to his convictions on one count of first-degree murder and two counts of attempted murder that became final in early 2006.<sup>1</sup> His application argued recent decisions by the United States and Iowa Supreme Courts—*McCoy v. Louisiana*<sup>2</sup> and *Krogmann v. State*<sup>3</sup>—serve as new grounds of law voiding his convictions based on ineffective assistance of criminal trial counsel and his convictions are otherwise void because the State did not produce a valid waiver of his speedy-trial rights because any contracts he entered while the subject of a conservatorship were presumed to be fraudulent.

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<sup>1</sup> We briefly surveyed the history of Hering's conviction, appeal, further review, and other PCR proceedings in our recent decision affirming the dismissal of Hering's third PCR application. See *Hering v. State*, No. 21-0688, 2022 WL 1487111, at \*1–2 (Iowa Ct. App. May 11, 2022), *further review denied* (July 6, 2022). Here, we also note Hering has pursued relief through other avenues outside of chapter 822.

<sup>2</sup> See 138 S. Ct. 1500, 1509 (2018) (“When a client expressly asserts that the objective of ‘his defence’ is to maintain innocence of the charged criminal acts, his lawyer must abide by that objective and may not override it by conceding guilt.” (citation omitted)).

<sup>3</sup> See 914 N.W.2d 293, 326 (Iowa 2018) (finding counsel breached an essential duty by failing to properly challenge an unlawful freeze of defendant's assets resulting in a violation of defendant's “constitutional right to be master of his defense” and thus amounting to structural error and presumed prejudice).

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The State responded with a pre-answer motion to dismiss, arguing the application was time-barred by the statute of limitations in Iowa Code section 822.3 (2021) and the claims raised were barred under section 822.8 as either previously adjudicated or not raised in the original, supplemental, or amended application. Hering resisted, arguing his reliance on new grounds of law for his ineffective-assistance claims excepted him from the statute of limitations, and his speedy-trial claim was jurisdictional and could be raised at any time. In its ensuing answer, the State reprised its arguments for dismissal and added the exception to the time-bar based on new grounds of law does not apply because the cases Hering relied upon “are not to be retroactively applied.” Thereafter, Hering filed a “motion for stay” of the proceedings, in which he stated his ineffective-assistance claims were also raised in his third application for postconviction relief, the claims were not addressed by the district court, and his appeal of the district court’s decision dismissing his third application was pending on appeal. The court ordered that motion to be considered at the upcoming hearing on the State’s motion to dismiss.

Following a brief hearing in November 2021, the district court entered a ruling granting the State’s motion to dismiss. The district court observed this court already considered and rejected Hering’s speedy-trial claim, which he previously raised through a “Motion to Correct Illegal Sentence and Void Judgment.” See *generally State v. Hering*, No. 10-1360, 2011 WL 3129213 (Iowa Ct. App. July 27, 2011). As such, the district court found this claim was already the subject of a final adjudication in another proceeding taken to secure relief and could not serve as a basis for relief in the current application. See Iowa Code § 822.8. As to the

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ineffective-assistance claims based on *McCoy* and *Krogmann*, the court found Hering could have raised those claims in his third application and, because he “offer[ed] no justification for why he did not,” they also could not form the basis for his fourth application. *See id.*

Hering filed a motion to reconsider, enlarge, or amend pursuant to Iowa Rule of Civil Procedure 1.904(2), in which he asserted he did raise *McCoy* and *Krogmann* in his third application. As to the speedy-trial claim, he agreed this claim “was litigated back in 2010 and 2011” but argued *State v. Tipton*, 897 N.W.2d 653 (Iowa 2017), serves as a new ground of law in support of his claim. The court denied the motion, and this appeal followed.

## II. Standard of Review

Appellate review of a district court ruling on a motion to dismiss in a PCR proceeding is for errors of law. *Thongvanh v. State*, 938 N.W.2d 2, 8 (Iowa 2020). To the extent claims of ineffective assistance of counsel come into play, our review is de novo. *Sothman v. State*, 967 N.W.2d 521, 522 (Iowa 2021).

## III. Discussion

### A. Ineffective-Assistance Claims

Hering first argues the district court erred in dismissing his ineffective-assistance claims based on *McCoy* and *Krogmann* on the basis that he failed to raise them in his prior, third application when he in fact did raise those claims in the third proceeding.

In assessing whether the court was correct, we look to Iowa Code section 822.8, which “sets out three categories that may not be the basis of a subsequent application: (1) grounds finally adjudicated, (2) ground not raised, or

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(3) grounds knowingly, voluntarily, and intelligently waived . . . in another proceeding that applicant has taken to secure relief.” *Hasselmann v. State*, No. 21-0483, 2022 WL 951084, at \*4 (Iowa Ct. App. Mar. 30, 2022).

Here, the district court appears to have relied on either the second or third category. But we agree Hering raised *McCoy* and *Krogmann* in the third proceeding,<sup>4</sup> as does the State. We noted as much in our most recent decision, although we did not address the claims because they were not preserved due to want of a district court ruling on the claims. See *Hering*, 2022 WL 1487111, at \*2. In turn, we agree dismissal of the claims in this proceeding, on the basis that they could have been raised in the third proceeding but were not, was error.

But that does not end our inquiry because we may affirm on the State’s alternative claims below that the application was untimely, is not excepted by a new ground of law that could not have been raised within the limitations period, and *McCoy* and *Krogmann* are not entitled to retroactive treatment. See *Brooks v. State*, 975 N.W.2d 444, 445 n.1 (Iowa Ct. App. 2022).

Hering’s convictions became final in 2006. His application was required to be filed within three years unless it was based on “a ground of . . . law that could not have been raised within the applicable time period.” Iowa Code § 822.3. It clearly was not filed within the limitations period, so Hering must rely on the ground-

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<sup>4</sup> However, he raised them in a different manner, under the auspice of ineffective assistance of prior PCR counsel whereas, here, he raises them as direct claims of ineffective assistance of criminal counsel, likely because we already observed any claims concerning effectiveness of Hering’s prior PCR counsel would be “untimely under both former law and the state of the current law.” *Hering*, 2022 WL 1487111, at \*3.

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of-law exception to overcome the time-bar. Then, as will be discussed below, retroactivity comes into play.

In order for Hering to survive dismissal on the State's alternative claims concerning the statute of limitations and nonretroactivity, he must clear two hurdles. He must first meet the "ground of law" exception to the time-bar, which might be satisfied by a claim that new caselaw applies retroactively on collateral review. See *Nguyen v. State*, 829 N.W.2d 183, 187 (Iowa 2013) (implying claim of retroactivity meets new-ground-of-law exception because the claim cannot be made before the new decision is issued). But even if the exception is satisfied, the second step involves a determination of whether the new caselaw is entitled to retroactive treatment. See *id.* at 189 (reversing dismissal on statute of limitations and remanding "for further proceedings on whether retroactive application . . . is required").

New grounds of law involve "a category of legal claims that were" previously "viewed as fruitless . . . but became meritorious later on," *id.* at 188, normally by virtue of some groundbreaking change in the law by the state or federal high courts. Cf. *Teague v. Lane*, 489 U.S. 288, 301 (1989) ("In general, . . . a case announces a new rule when it breaks new ground . . ."). But if such a decision "does not embody a new rule of constitutional criminal procedure," then "the matter could have been raised . . . , as that term is used in section 822.3, within the applicable time period." *Perez v. State*, 816 N.W.2d 354, 360–61 (Iowa 2012). Under that situation, the application is time-barred. *Id.* at 355. On the other hand, if the decision does create a new rule of constitutional criminal procedure, as Hering submits *McCoy* and *Krogmann* do, then it does not, subject to narrow exceptions,

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apply retroactively to allow an applicant to “rely upon it to set aside an earlier conviction.” *Id.* at 355.

So we first consider whether *McCoy* and *Krogmann* serve as new grounds of law that could not have been raised within the limitations period. Hering’s first claim of ineffective assistance under *McCoy* is that, although he agreed to pursue an insanity defense, counsel was ineffective in conceding guilt. Hering has already argued in a prior proceeding that “he received ineffective assistance because defense counsel presented an insanity defense, rather than presenting a general denial he committed the offenses” and “defense counsel could have presented inconsistent defenses by arguing he did not commit the offenses, but if he did commit the offenses, he was legally insane at the time.” *Hering v. State*, No. 13-1945, 2016 WL 3269454, at \*3–4 (Iowa Ct. App. June 15, 2016). On that claim, we found “Hering agreed to the presentation of an insanity defense, rather than a general denial he committed the offenses.” *Id.* at \*4. So, while this claim was made before *McCoy* was decided, Hering essentially made the same claim that counsel infringed on his “right to insist that counsel refrain from admitting guilt.” 138 S. Ct. at 1505. But the claim was rejected on the basis that Hering agreed to that strategy as opposed to a general denial. *See Hering*, 2016 WL 3269454, at \*4; *see also Hering v. Iowa*, No. 4:16-cv-00574-JEG, 2018 WL 9371455, at \* 2 (S.D. Iowa Sept. 25, 2018) (noting the court of appeals “found Hering personally agreed to the insanity defense over a general denial defense after discussing the options”

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with counsel). So this claim is one that could have been, and in fact was, raised earlier and therefore does not meet the ground-of-law exception.<sup>5</sup>

As to whether *Krogmann* amounts to a new ground of law, it does not fall within the “category of legal claims that were” previously “viewed as fruitless . . . but became meritorious later on.” *Nguyen*, 829 N.W.2d at 188. It therefore does not meet the exception to the statute of limitations.

Even if we were to assume *McCoy* and *Krogmann* serve as new grounds of law for purposes of section 822.3, as noted above, we would then consider whether they are entitled to retroactive treatment. If a decision creates a new rule of constitutional criminal procedure, then it does not, subject to narrow exceptions, apply retroactively to allow an applicant to “rely upon it to set aside an earlier conviction.” *Perez*, 816 N.W.2d at 355. The only potential narrow exception that could have applied here to allow retroactive treatment of *McCoy* and *Krogmann* is if they are watershed rules of criminal procedure that are “central to an accurate determination of innocence or guilt.”<sup>6</sup> *Id.* at 358–59 (quoting *Teague*, 489 U.S. at 313–14). But the United States Supreme Court has since foreclosed that exception to nonretroactivity. See *Edwards v. Vannoy*, 141 S. Ct. 1547, 1559–60 (2021) (“At this point, some 32 years after *Teague*, we think . . . no new rules of criminal procedure can satisfy the watershed exception. We cannot responsibly

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<sup>5</sup> Our prior conclusion that Hering agreed with counsel’s strategy is also essentially a final adjudication on a *McCoy* claim, that Hering’s autonomy was infringed. See Iowa Code § 822.8; see also *McCoy*, 138 S. Ct. at 1505 (premising the case on *McCoy* “adamantly object[ing] to any admission of guilt” by counsel).

<sup>6</sup> The other “exception to nonretroactivity arises when previously illegal conduct is no longer prohibited by the law.” *Perez*, 816 N.W.2d at 358. That exception does not apply here.

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continue to suggest otherwise to litigants and courts. . . . [T]he purported exception has become an empty promise.”).

Even if the exception was still available, *McCoy* does not meet it. See *Smith v. Stein*, 982 F.3d 229, 235 (4th Cir. 2020), cert. denied 141 S. Ct. 2535 (2021); see also *Pennebaker v. Rewerts*, No. 21-1216, 2021 WL 7237920, at \*3 (6th Cir. 2021); *Christian v. Thomas*, 982 F.3d 1215, 1224–25 (9th Cir. 2020). This is because *McCoy* is a refinement and extension of a presupposed watershed rule in *Gideon v. Wainwright*, 372 U.S. 335 (1963) and is not a watershed rule in and of itself. *Stein*, 982 F.3d at 235.

Turning to *Krogmann*, it was also an extension of other prior caselaw, including *McCoy* and, by extension, *Gideon*. See *Krogmann*, 914 N.W.2d at 318 (noting *Krogmann*’s challenge was rooted in the prevention of him “from being the master of his own defense in violation of the Sixth Amendment and the Iowa Constitution” (citing *McCoy*, 138 S. Ct. at 1510–11)); *id.* at 324 (“Like in *McCoy*, the violation of *Krogmann*’s protected autonomy right was complete when the court allowed the State and the victim to unlawfully wrestle away control of issues that were within *Krogmann*’s sole prerogative . . .”).

So even if *McCoy* and *Krogmann* serve as new grounds of law to except Hering from the statute of limitations, which we have concluded they do not, they do not apply retroactively to allow Hering to set aside his earlier conviction on collateral review. We affirm the dismissal of Hering’s PCR application on these alternative grounds urged by the State below.

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**B. Void-Judgment Claim**

Turning to what Hering styles as his “void judgment claim,” he agrees he litigated this claim “[i]n 2010 . . . through a motion to correct illegal sentence void judgment,” but he submits the final decision by this court “did not issue a final judgment on the merits of the void judgment claim” because we allegedly disposed of the claim “because Hering did not cite any authority to support his argument.” Long story short, we affirmed the district court’s denial of Hering’s “void judgment claim,” and that was a final adjudication for purposes of section 822.8. We have considered Hering’s other arguments on this point, and we summarily reject them. We affirm the district court on this point.

**IV. Conclusion**

We affirm the dismissal of Hering’s application for postconviction relief.

**AFFIRMED.**

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IOWA APPELLATE COURTS

State of Iowa Courts

**Case Number**  
21-1847

**Case Title**  
Hering v. State

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IN THE IOWA DISTRICT COURT IN AND FOR SCOTT COUNTY

**DAVID LEE HERING,**

**Plaintiff/Petitioner,**

**V.**

**STATE OF IOWA,**

**Defendant/Respondent.**

**Case No. 07791 PCCV026087**

## RULING ON STATE'S MOTION TO DISMISS

On November 4, 2021, the State's Motion to Dismiss came before the Court for argument. The Plaintiff appeared Pro Se and by telephone. The State was represented by Muscatine County Attorney James Barry, who appeared via video link. After having considered the evidence presented, the written and oral arguments of counsel, and the applicable law, the Court enters the following ruling on the pending motion.

## BACKGROUND FACTS

On June 4, 2004, Petitioner was convicted by a jury on one count of murder and two counts of attempted murder. Crim. Verdict at pg. 1-3, *State v. Hering*, No. FECR027417 (EDMS) (Iowa Dist. Ct. for Muscatine County June 4, 2004). On July 28, 2010, the Iowa District Court for Muscatine County denied Petitioner's subsequent Motion to Correct Illegal Sentence/Void Judgment. Pet'r's App. for Post-Conviction Relief pg. 3. The grounds raised were that Petitioner's right to a speedy trial was violated and the district court therefore lacked the power to impose any sentence upon him and that the judgment was void because the district court lost personal jurisdiction over Petitioner after the speedy trial deadline expired. *Id.* The Iowa Supreme Court subsequently affirmed the judgment of the district court, rejecting Petitioner's arguments. *Id.* at 4.

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On November 25, 2013, the Iowa District Court for Muscatine County denied an application made by Petitioner for Post-Conviction Relief. *Id.* at 2. The grounds raised were Ineffective Assistance of Counsel, and trial, appellate, and judicial misconduct. *Id.* The Iowa Supreme Court affirmed the District Court's ruling on June 15, 2016. *Id.* at 3. Petitioner in that application claimed that he was actually innocent and that the defense attorney who represented him provided ineffective assistance by pursuing a strategy of insanity as a defense, which the court rejected. Ruling Denying Post Conviction Relief with Costs to Pl. at pg. 5, *Hering v. State*, Case No. PCCV016622 (EDMS) (Iowa Dist. Ct. for Muscatine County Nov. 25, 2013).

Petitioner filed a second application for post-conviction relief on January 17, 2014. Application for Postconviction Relief Pursuant to Iowa Code Section 822, *Hering v. State*, No. PCCV022294 (EDMS) (Iowa Dist. Ct. for Muscatine County Jan. 17, 2014). Petitioner claimed that his conviction was void because he was incompetent to stand trial. *Hering v. State*, 885 N.W.2d 219 (Table) 2016 WL 3285445 (Ct. App. Iowa 2016) at \*1. This application was dismissed by the District Court on April 1, 2014, on the grounds of untimeliness and res judicata. *Id.* at \*2. The Iowa Court of Appeals subsequently upheld the dismissal on the ground of untimeliness. *Id.* *Procedendo* was thereafter issued by the Iowa Supreme Court. *Procedendo*, *Hering v. State*, No. PCCV022294 (EDMS) (Iowa Dist. Ct. for Muscatine County January 16, 2018).

On December 4, 2018, Petitioner filed a third Application for Post-Conviction Relief, stating as a grounds for relief a claim of actual innocence and ineffective assistance of counsel. Ruling on State's Mot. to Dismiss App. for Postconviction Relief at pg. 2, *Hering v. State*, No. PCCV024926 (EDMS) (Iowa Dist. Ct. for Muscatine County May 11, 2021). On May 11, 2021, the Iowa District Court for Muscatine County denied Petitioner's application because the claims

were time-barred by section 822.3 of the Iowa Code. *Id.* at pg. 8. Petitioner appealed the District Court's decision. Notice of Appeal, *Hering v. State* No. PCCV024926 (EDMS) (Iowa Dist. Ct. for Muscatine County May 13, 2021). *Procedendo* has not yet been issued in that case. *See generally Hering v. State*, No. PCCV024926 (EDMS) (Iowa Dist. Ct. for Muscatine County August 31, 2021).

On May 19, 2021, Petitioner filed his fourth application for post-conviction relief. *See generally* Pet'r's Application for Post-Conviction Relief. This fourth application is the application now at issue. Petitioner once more alleges that the State violated his right to a speedy trial, specifically asserting that he could not have consented to a speedy trial waiver because he was appointed a conservator under Iowa Code §633.638. Petitioner further asserts that the Iowa Supreme Court case *Krogmann v. State* 914 N.W.2d 293 (Iowa 2018) and the United States Supreme Court case *McCoy v. Louisiana*, 138 S.Ct. 1500 (2018) present new bases of law which merit reversal of his murder and attempted murder convictions. Petitioner seeks in relief for the Court to vacate his felony conviction in *State v. Hering*, No. FECR027417 (EDMS) (Iowa Dist. Ct. for Muscatine County June 4, 2004) and for the Court to dismiss the charges with prejudice. On June 18, 2021, The State filed a Pre-Answer Motion to Dismiss 4<sup>th</sup> Application for Postconviction Relief which is now before the Court. The State asserts that Petitioner's application is untimely under Iowa Code §822.3 and is also precluded by Iowa Code §822.8.

On June 29, 2021, Petitioner filed a resistance to Respondent's Motion to Dismiss, which asserts that the new law claims under *Krogmann* and *McCoy* are timely as a matter of Iowa Code §822.3 and that his argument for relief under Iowa Code §633.638 was in fact an application to vacate a void judgment, and therefore not subject to Iowa Code §822.3 and §822.8. On

September 30, 2021, Petitioner filed a Recasted Application for Postconviction Relief, alleging substantially the same arguments as in his original application in this case.

### ANALYSIS

“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(3). “The principles underlying summary judgment procedure apply to motions of either party for disposition of an application for postconviction relief without a trial on the merits.” *Manning v. State*, 654 N.W.2d 555, 559-560 (Iowa 2002), *See also Poulin v. State*, 525 N.W.2d 815, 816 (Iowa 1994) (“The principles underlying our summary judgment procedure also apply to summary dispositions under the postconviction procedures”).

This is the fourth application for post-conviction relief that Petitioner has filed. “All grounds for relief available to an applicant under this chapter must be raised in the applicant's original, supplemental or amended application. Any ground finally adjudicated or not raised, or knowingly, voluntarily, and intelligently waived in the proceeding that resulted in 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. The Iowa Supreme Court has interpreted Iowa Code §822.8 to “impose a burden upon a postconviction applicant to show sufficient reasons why any ground for relief asserted in a postconviction relief petition was not previously asserted on direct appeal.” *Manning v. State*, 654 N.W.2d 555, 561 (Iowa 2002). The Iowa Court of Appeals has



further held that a petitioner bringing subsequent applications for post-conviction relief has the burden to show why such issues were not raised in prior applications. *Odem v. State*, 483 N.W.2d 17, 19 (Iowa Ct. App. 1992) (“[Petitioner] must show sufficient reason why the issues raised in this second postconviction relief proceeding were not raised on direct appeal or in the first postconviction relief proceeding”). “Postconviction relief proceedings are not an alternative means for litigating issues that were or should have been properly presented for review on direct appeal.” *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). The Court may therefore only consider Petitioner’s application if Petitioner has provided an adequate reason why these claims could not have been brought in any of his previous applications or upon direct appeal. Petitioner asserts three bases of law for his new application: Iowa Code §633.638, the Iowa Supreme Court case *Krogmann v. State*, and the U.S. Supreme Court Case *McCoy v. Louisiana*.

Iowa Code §633.638 was last modified in 1979. Laws of the Sixty-Eighth G.A., 1979 Session, Ch. 141, 1979 Iowa Acts 447. Petitioner could have raised this issue in any one of his three previous applications, or upon direct appeal. On its face, Petitioner’s argument on this issue violates Iowa Code §822.8. Petitioner argues that his claim under Iowa Code §633.638 is actually an application to vacate a void judgment, and therefore not subject to any of the aforementioned rules limiting the bringing of applications for Post-Conviction Relief. The Iowa Court of Appeals has already assessed this exact same argument from Petitioner and rejected it, stating Petitioner’s “challenge is a thinly-veiled attempt to circumvent the deadlines for raising substantive challenges to his conviction.” *State v. Hering* 804 N.W.2d 314 (Table) 2011 WL 3129213 (Iowa Ct. App. July 27, 2011) at \*1. The Court of Appeals went on to state that Petitioner’s “speedy-trial objection is not an argument that his sentence is inherently illegal.” *Id.* (Internal quotations omitted). Rather, the Court of Appeals found that his argument was an

“impermissible attempt ‘to re-examine errors occurring at the trial or other proceedings prior to the imposition of the sentence.’” *Id.* (quoting *Hill v. United States*, 368 U.S. 424, 430, 82 S.Ct. 468, 472, 7 L.Ed.2d 417, 422 (1962)). The Court of Appeals further found that Petitioner’s argument that the claimed speedy trial objection rendered the judgment void was also meritless, stating that Petitioner “cites no authority for the proposition that a speedy trial violation deprives the court of personal jurisdiction over a defendant.” *Id.*

“The doctrine of res judicata embraces the concepts of claim preclusion and issue preclusion.” *Spiker v. Spiker*, 708 N.W.2d 347, 353 (Iowa 2006). “When an issue of fact or law is *actually litigated* and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.” *Id.* (quoting *Restatement (Second) Judgments* §27, at 250 (1982)). Petitioner has already argued his claim of void judgment via a speedy trial rights violation. *State v. Hering* 804 N.W.2d 314 (Table) 2011 WL 3129213 at \*1. The Court of Appeals held that a violation of Petitioner’s speedy trial right would not vacate the district court’s personal jurisdiction over him, and that he therefore had no valid arguments for a void judgment. *Id.* This issue was fully litigated before the District Court of Muscatine County and before the Iowa Court of Appeals. Since Petitioner is raising the same issue of law on the same judgment, the Court is bound by *res judicata* to reject it. Petitioner’s claim under Iowa Code §633.638 is thus time barred, and may not serve as a basis for his current post-conviction relief application.

As to the other two grounds of law asserted in this case, Petitioner filed his third Application for Post-Conviction Relief on December 4, 2018, more than five months after the Iowa Supreme Court issued *Krogmann v. State* and approximately six months after the United

States Supreme Court issued *McCoy v. Louisiana. Krogmann* 914 N.W.2d; *McCoy* 138 S.Ct. Petitioner offers no justification for why he did not raise the grounds of law arguments regarding *Krogmann* and *McCoy* in his third Application for Post-Conviction Relief. Petitioner has failed to allege facts sufficient to justify his failure to bring these claims in his third Post-Conviction Relief Application, as is his burden under *Manning* and *Odem*. Under Iowa Code §822.8, these claims may not form the basis for his Fourth Application.

Since all bases of law alleged by Petitioner in his Fourth Application for Post-Conviction relief are invalid, per Iowa Code §822.8, Petitioner has alleged no valid grounds for the Court to grant his Application for Post-Conviction Relief. The State's Pre-Answer Motion to Dismiss asserts that the Court has the authority to dismiss this case based on Iowa Code 822.6, referring to the authority of a court to summarily dismiss an application for Post-Conviction Relief. Respondent's Pre-Answer Motion to Dismiss at 5. As such, it would appear that the State's Motion to Dismiss is actually a Motion for Summary Disposition. Courts "look to the substance of a motion to determine its character." *State v. Cullen*, 357 N.W.2d 24, 27 (Iowa 1984). The Court therefore treats the State's Motion to Dismiss as a Motion for Summary Disposition, as is appropriate in a proceeding for post-conviction relief. Summary Disposition is appropriate when the moving party is entitled to judgment as a matter of law. Since Petitioner has alleged no valid grounds of relief, the State is entitled to summary disposition of Petitioner's fourth application for post-conviction relief.

#### RULING

For all of the above-stated reasons, it is the ruling of the Court that the State's Motion to Dismiss is Granted.

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State of Iowa Courts

**Case Number**  
PCCV026087  
**Type:**

**Case Title**  
HERING DAVID VS STATE OF IOWA  
OTHER ORDER

So Ordered

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Joel W. Barrows, District Court Judge,  
Seventh Judicial District of Iowa

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**IN THE SUPREME COURT OF IOWA**

No. 21-1847

Muscatine County No. PCCV026087

**ORDER**

**DAVID LEE HERING,**  
**Applicant-Appellant,**

**vs.**

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

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After consideration by this court, en banc, further review of the above-captioned case is denied.

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IOWA AFFILIATE COURTS

State of Iowa Courts

**Case Number**  
21-1847

**Case Title**  
Hering v. State

So Ordered

A handwritten signature in black ink, appearing to read "SLC", is written over a horizontal line.

Susan Larson Christensen, Chief Justice

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**FILED**  
IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

2003 SEP 19 AM 10:32

STATE OF IOWA,

Plaintiff

-VS-

David Spring

Defendant

JEFF L. TOLLENAER  
CLERK OF DISTRICT COURT  
MUSCATINE CO. IOWA

FECR 27417

**ARRAIGNMENT ORDER**

**Appearances:**

1. State by: O. Steyer

2. Defendant personally and by: Dutton

3. Attorney appointed for Defendant:

4. Defendant has been advised of Constitutional Rights.

5. Defendant has received a copy of Trial Information and acknowledges charged in correct name and Social Security Number is correct.

**Plea Data:**

1. Defendant waives time to plead, or time to plead continued to:

2. Defendant pleads NOT GUILTY

3. Depositions shall conform to IRCrP 2.11. If defendant is indigent they shall be at the expense of State.

**PRETRIAL CONFERENCE is:**

10-24, 2003 at 10 A.M.

Defendant is hereby ordered to be at pretrial conference.

**TRIAL is set**

for: 11-17, 2003

Bond remains as previously set  
Plea agreements under IRCrP 2.10 must be entered at or before pretrial conference and plea entered before trial date.  
No plea agreement after pretrial conference will be allowed by court without good cause.

**Speedy Trial:**

Defendant DOES NOT waive speedy trial.

**If speedy Trial Has Not Been Waived it**

**EXPIRES:** 12-10-03

[if auxiliary aids or services are needed to allow you to participate in court because of a disability, immediately call District ADA coordinator at 563-263-6511. If hearing impaired, call Relay Iowa TTY at 1-800-735-2942]

**It Is Further Ordered:**

1. Under IRCrP 2.11(5) Motion for Bill of Particulars to be in writing and filed within 10 days of arraignment.

2. All other motions shall be filed in accordance with IRCrP 2.11

Dated: 9-19, 2003.

R  
JUDGE IOWA DISTRICT COURT

"Appendix D" p. 22 Madden

PDO ✓  
CA ✓  
TAH ✓  
9/22

04-1822

10-1360

FILED

SEP 18 2004

CLERK SUPREME COURT

2004 SEP 10 AM 10:31

1 IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

2 STATE OF IOWA,

3 Plaintiff,

4 vs.

5 DAVID HERING,

6 Defendant.

JEFF L. TOLLBAER  
CLERK OF DISTRICT COURT  
MUSCATINE CO. IOWA

) No. FECR027417

) TRANSCRIPT OF  
ARRAIGNMENT

ORIGINAL

7 The above-entitled matter came on before the Honorable  
 8 Patrick J. Madden at 10:17 a.m., September 19, 2003, at the  
 9 Muscatine County Courthouse in the City of Muscatine, Iowa.

10 APPEARANCES

11 Plaintiff appears by:

12 ASSISTANT COUNTY ATTORNEY ALAN R. OSTERGREN  
 Muscatine County Courthouse  
 13 401 E. 3rd Street  
 Davenport, IA 52761

15 Defendant personally appears with:

16 ATTORNEY CHRISTINE DALTON  
 2nd Floor Batterson Bldg.  
 17 319 E. 2nd Street  
 Muscatine, IA 52761

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Jenny A. Soenksen  
 Certified Shorthand Reporter  
 Muscatine County Courthouse  
 Muscatine, IA 52761

FILED

JAN 24 2011

CLERK SUPREME COURT



1 THE COURT: Okay. And this is Mr. Hering?

2 MS. DALTON: Yes, your Honor.

3 THE COURT: Okay. This is State of Iowa versus  
4 David Hering, FECR027417 and, Mr. Hering, we're here for  
5 your arraignment this morning. Ms. Dalton?

6 MS. DALTON: Your Honor, David is charged under  
7 his true and correct name, he's had an opportunity to read  
8 the Trial Information, waives reading of it on the record  
9 this morning. He wishes to plead not guilty to the charges.  
10 He is requesting speedy trial.

11 THE COURT: Okay.

12 MR. OSTERGREN: I believe that date is December  
13 10th of this year. I'd ask counsel to acknowledge that  
14 date.

15 MS. DALTON: I would agree with that date, your  
16 Honor.

17 THE COURT: Okay. Mr. Hering, we'll go ahead,  
18 then, and set your pretrial conference for October the 24th  
19 at 10 a.m., and trial November 17 at 9 a.m. Thank you.

20 MR. OSTERGREN: Thank you, your Honor.

21 MS. DALTON: Thank you, your Honor.

22 (Proceedings concluded at 10:18 a.m.)  
23  
24  
25



## THE IOWA DISTRICT COURT

MUSCATINE COUNTY

IN THE MATTER  
OF THE CONSERVATORSHIP OF

David Hering

Probate No. GCR008298PETITION FOR APPOINTMENT  
OF CONSERVATOR (INVOLUNTARY)

The undersigned states:

1. The above-named person has the following post office address:  
Muscatine County Sheriff, 400 Walnut St., Muscatine IA 52761  
and is adult years of age.
2. Such person (check one):  
  
☐ is a minor. The circumstances of this case (do) (do not) require that the proposed ward be represented by an attorney. An affidavit explaining these circumstances is attached to this petition as Exhibit A.  
  
☒ whose decision-making capacity is so impaired that the person is unable to make, communicate, or carry out important decisions concerning the proposed ward's financial affairs.
3. The name of the proposed Conservator, who is qualified to serve in that capacity, is  
Walcott Trust and Savings Bank, whose post office address is  
101 W. Bryant Street, Walcott, IA 52773
4. The proposed ward is a resident of the State of Iowa, or is present in the State of Iowa.
5. A limited conservatorship ~~(is)~~ (is not) appropriate pursuant to Iowa Code Section 633.635.
6. (Optional) Attached to this form is a verified statement from a physician licensed to practice in the state of Iowa regarding the proposed ward's condition.
7. (Optional) Third-party assistance (is) (is not) available.
8. The proposed ward is presently in the care, custody or control of Muscatine County Sheriff, who has the following post office address  
400 Walnut Street, Muscatine, IA 52761
9. The proposed ward has property of the estimated values as follows:  
real property \$100,000.00, personal property \$25,000.00. The estimated gross annual income of the proposed ward's estate is \$15,000.00. Money ~~(is)~~ (is not) payable, or to become payable, to the proposed ward by the United States through the Veterans Administration.
10. The proposed ward ~~(is)~~ (is not) indigent within the meaning of Iowa Code Section 633.575(3) and proof of the proposed ward's income and resources ~~(are)~~ (are not) attached to this petition.

The proposed ward is hereby notified as follows:

#### NOTICE OF RIGHTS OF PROPOSED WARD

YOU ARE HEREBY NOTIFIED THAT, IN A PROCEEDING FOR THE APPOINTMENT OF A CONSERVATOR FOR YOU AS AN ADULT, YOU HAVE A RIGHT TO COUNSEL. IF YOU ARE INDIGENT OR INCAPABLE OF REQUESTING COUNSEL, THE COURT SHALL APPOINT AN ATTORNEY TO REPRESENT YOU AND, IF YOU ARE INDIGENT, THE APPOINTMENT OF SUCH COUNSEL SHALL BE AT THE COUNTY'S EXPENSE. IF YOU ARE A MINOR, THE COURT SHALL DETERMINE WHETHER, UNDER THE CIRCUMSTANCES OF THE CASE, YOU ARE ENTITLED TO REPRESENTATION. THE DETERMINATION REGARDING REPRESENTATION SHALL BE MADE ONLY AFTER SUCH NOTICE TO YOU IS MADE AS THE COURT DEEMS NECESSARY. YOU HAVE A RIGHT TO SEEK COUNSEL IF YOU SO CHOOSE, AND YOU HAVE A RIGHT TO BE PERSONALLY PRESENT AT ALL PROCEEDINGS. THE APPOINTMENT OF A CONSERVATOR FOR YOU INVOLVES A POTENTIAL DEPRIVATION OF YOUR CIVIL RIGHTS.

11. The proposed ward is hereby further notified as follows:

#### NOTICE OF CONSERVATORSHIP POWERS

YOU ARE NOTIFIED THAT IF A CONSERVATORSHIP IS APPOINTED FOR YOU, THE CONSERVATORSHIP MAY, WITHOUT COURT APPROVAL, MANAGE YOUR PRINCIPAL, INCOME, AND INVESTMENTS, SUE AND DEFEND ANY CLAIM BY OR AGAINST YOU, SELL AND TRANSFER PERSONAL PROPERTY, AND VOTE AT CORPORATE MEETINGS. YOU ARE FURTHER NOTIFIED THAT, UPON THE COURT'S APPROVAL, THE CONSERVATOR MAY INVEST YOUR FUNDS, EXECUTE LEASES, MAKE PAYMENTS TO OR FOR YOUR BENEFIT, SUPPORT YOUR LEGAL DEPENDENTS, COMPROMISE OR SETTLE ANY CLAIM, AND DO ANY OTHER THING THAT THE COURT DETERMINES IS IN YOUR BEST INTERESTS.

12. I have read the foregoing petition and verily believe that the statements contained therein are true.

WHEREFORE, the undersigned prays the Court to appoint such proposed person as the Conservator of said individual.

I certify under penalty of perjury and pursuant to the laws of the State of Iowa that the preceding is true and correct.

9-4-2003

Date

Kathleen D. Franks

Signature

Kathleen D. Franks

Petitioner's Name

2951 12th Ave

Moline IL 61265

Address

App. E, p. 26

FILED

## IN THE IOWA DISTRICT COURT

2003 OCT -6 AM 8:45

## IN AND FOR MUSCATINE COUNTY

JEFF L. TONLEKAR  
CLERK OF DISTRICT COURT  
MUSCATINE CO. IOWAIN THE MATTER OF THE  
CONSERVATORSHIP

OF

DAVID L. HERING

PROBATE NO. GCPR00 8298ORDER APPOINTING  
CONSERVATOR

NOW, on this 6<sup>th</sup> day of October, 2003, the Petition of Kathleen D. Franks for the appointment of a Conservator for the property for David L. Franks, coming on for hearing before the Court, the proposed Ward, David L. Hering, being represented by his appointed attorney, William Creasey, the Petitioner being represented by Robert S. Gallagher and the Court after being fully advised in the premises finds that the proposed ward, David L. Hering, is presently incarcerated in the Muscatine County Jail and that it would be in his best interests that a Conservator be appointed during the pendency of his incarceration and that Walcott Trust & Savings Bank suitable and qualified to act as such Conservator.

WHEREFORE, IT IS ORDERED that Walcott Trust & Savings Bank, Walcott, Iowa, is hereby appointed as Conservator for David L. Hering, serve without bond, and that upon taking the oath prescribed by law, Letters of Conservatorship shall issue. *The Bank shall release no conservatorship funds without prior court approval. R*

*R*  
\_\_\_\_\_  
Judge of the Seventh Judicial District

*Madden*

H:\WP\DOCS\IE- H\H\HeringDavidCons\OrderAppingCons.wpd

"Appendix F" p.27

Received Time Oct. 6. 9:03AM

WFC  
RG

FILED

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

2003 AUG 14 PM 1:14

STATE OF IOWA,

Plaintiff,

vs.

DAVID HERING,

Defendant.

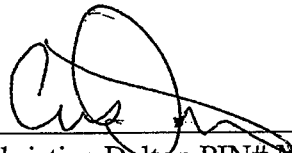
JEFF L. TOLLENAER  
CLERK OF DISTRICT COURT  
MUSCATINE CO. IOWA Case No. FECR027417

)  
)  
) APPEARANCE and WAIVER  
) of PRELIMINARY HEARING  
)  
)  
)  
)  
)

COMES NOW the undersigned counsel, Christine Dalton, Muscatine Public Defender Office, 319 East 2<sup>nd</sup> Street, Suite 206, Muscatine, IA 52761-4100, and appears in the above-captioned matter on behalf of the Defendant.

Pursuant to Iowa Rules of Criminal Procedure 2.2(4)(a), the Defendant hereby waives Preliminary Hearing in this matter.

Dated: August 14, 2003.



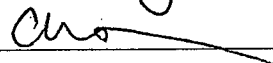
Christine Dalton PIN# MU0009707  
ATTORNEY FOR DEFENDANT  
319 East 2<sup>nd</sup> Street, Suite 206  
Muscatine, IA 52761-4100  
(563) 263-0850

cc: CA

PROOF OF SERVICE

I, the undersigned, hereby certify that a true copy of the foregoing instrument was served upon each of the attorneys of record by the United States mail or by Muscatine County Courthouse mail on the 14 day of Aug, 2003.

By



"Appendix G" p. 28

OCT 09 2003

CA

FILED

IN THE IOWA DISTRICT COURT IN AND FOR MUSCATINE COUNTY

2003 OCT -8 PM 1:45

STATE OF IOWA

JEFF L. TOLLENAER  
CLERK OF DISTRICT COURT  
MUSCATINE CO. IOWA

CASE NO. FEUR 027417

Plaintiff,

vs.

David Hering

Defendant.

## ENTRY OF APPEARANCE

COMES NOW David R. Treimer and J.E. Tobey and hereby enters their appearance on behalf of Defendant in the above-captioned cause and in substitution of the Iowa Public Defenders office.

Approved:

David Hering

David Hering

J.E. Tobey

J.E. Tobey  
Attorney at Law  
601 Brady Street, Suite 211  
Davenport, Iowa 52803-5251  
(563) 323-5700  
(563) 323-9309 facsimile

David R. Treimer

David R. Treimer  
Attorney at Law  
601 Brady Street, Suite 211  
Davenport, Iowa 52803-5251  
(563) 323-7889  
(563) 323-9309 facsimile

COPY TO:  
Muscatine County Attorney

### PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 10-8-03

BY:

☐ U. S. Mail ☐ FAX ☐ Hand Delivered  
☐ Overnight Courier ☐ Certified Mail ☐ Other

Signature: David R. Treimer

"Appendix H" p 29