

SUPREME COURT No. 18-0885
POLK COUNTY CASE No. PCCV319836

**IN THE
SUPREME COURT OF IOWA**

KHAMFEUNG THONGVANH
Applicant-Appellant,

v.

STATE OF IOWA
Respondent-Appellee.

*ON FURTHER REVIEW FROM THE COURT OF APPEALS OF IOWA &
THE IOWA DISTRICT COURT FOR WEBSTER COUNTY
HONORABLE ADRIA KESTER, DISTRICT COURT JUDGE*

**APPLICATION FOR FURTHER REVIEW OF
THE COURT OF APPEALS OF IOWA
FROM AN OPINION FILED MARCH 6, 2019**

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PROOF OF SERVICE

On March 26, I served this application on all other parties by EDMS to their respective counsel.

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CERTIFICATE OF FILING

I certify that I did file this application with the Clerk of the Iowa Supreme Court by EDMS on March 26, 2019

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QUESTIONS PRESENTED FOR REVIEW

The questions presented in this appeal are:

Whether the Iowa Constitution provides greater protections for its citizens than the United States Constitution, and as such, this Court should create a better framework for retroactivity under the Iowa Constitution.

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STATEMENT SUPPORTING FURTHER REVIEW

Khamfeung Thongvanh appealed from the dismissal of his postconviction relief application, based on a finding that *State v. Plain* did not apply retroactively. (App. at 22). This ruling was affirmed by the Iowa Court of Appeals on March 6, 2019. In its opinion, the Court of Appeals held that while Thongvanh's application was not time-barred, the court was not at liberty to overrule controlling Supreme Court precedent. (Opinion at 7). The Court further noted that Thongvanh's argument was "better directed to the supreme court." (Opinion at 7).

Thongvanh was convicted of first degree murder in 1984. His conviction was affirmed by the court of appeals in 1986. *State v. Thongvanh*, 398 N.W.2d 182 (Iowa Ct. App. 1986). His first application for postconviction relief was denied, which was affirmed by the Iowa Supreme Court. *Thongvanh v. State*, 494 N.W.2d 679 (Iowa 1993). The postconviction relief application at issue in this matter was filed following this Court's ruling in *State v. Plain*, 898 N.W.2d 801, 826 (Iowa 2017). The crux of Thongvanh's argument was that *Plain* expanded the types of statistical models under which a defendant could challenge his jury composition in asserting his right to a jury of a fair cross section of the community, and that *Plain* should be applied retroactively. Thongvanh

specifically argued that *Plain* created a watershed rule of criminal procedure implicating issues of fundamental trial fairness, and further that the Iowa Constitution should be interpreted to give broader retroactive application to new rules of criminal procedure than provided in *Teague v. Lane*, 489 U.S. 288 (1989). The court of appeals, relying on this Court's prior precedent, affirmed the dismissal of Thongvanh's application.

This Court should grant further review to correct the miscarriage of justice that has occurred state-wide in the refusal to apply *Plain* principles to the state's prisoners serving lengthy sentences after being convicted by jurors that did not come from a panel that represented a fair cross section of their communities. In this case, Thongvanh is spending the rest of his life in prison. This issue is one of exceptional importance that warrants this Court's intervention and correction.

I. FURTHER REVIEW IS NECESSARY BECAUSE THIS COURT SHOULD HOLD THAT THE IOWA CONSTITUTION PROVIDES GREATER PROTECTIONS FOR ITS CITIZENS THAN THE UNITED STATES CONSTITUTION PROVIDES, AND AS SUCH THIS COURT SHOULD CREATE A BETTER FRAMEWORK FOR RETROACTIVITY UNDER THE IOWA CONSTITUTION.

Iowa Code section 822.2 allows a trial court to set aside a conviction for an individual whose conviction "was in violation of the Constitution of the United States or the Constitution or the laws of this state." Iowa Code §

822.2(1)(a). In this case, there is no real dispute that Thongvanh, if tried today, would have the opportunity to challenge the jury composition pursuant to the standards set forth in *Plain*. Instead, the dispute is whether or not defendants serving lengthy prison sentences on convictions that violate *Plain* have any recourse in this court for this violation.

The applicable retroactivity framework for cases on collateral review is detailed in *Teague v. Lane*, 498 U.S. 288 (1989). The *Teague* analysis turns on whether the new rule has a procedure function or a substantive function. *Welch v. United States*, ___ U.S. ___, 136 S. Ct. 1257, 1266 (2016); *Goosman v. State*, 764 N.W.2d 539, 542 (Iowa 2009).

In affirming the district's court's dismissal of Thongvanh's application, the court of appeals found that *Brewer v. State*, 444 N.W.2d 77 (Iowa 1989) foreclosed any relief for Thongvanh, because this Court has previously held that a new rule regarding the composition of the jury venire pursuant to *Duren v. Missouri*, 439 U.S. 357 (1979) was not a watershed rule of criminal procedure. (Opinion at 6-7). *Duren* was not retroactive in *Brewer* and thus, the court reasoned, *Plain* is not retroactive here.

First, this case is distinguishable from *Brewer*, as the matter involves a lack of minority representation on the jury rather than the complaint in *Brewer*, regarding the exclusion of jurors over age 65. Of more importance

is the critical distinction that Brewer’s argument depended on a finding that *Duren* had created a watershed rule of criminal procedure. (Opinion at 6). Here, Thongvanh urges the court to adopt a retroactivity framework under the Iowa Constitution.

The Iowa Constitution provides that “no person shall be deprived of life, liberty, or property, without due process of law.” Iowa Const. art. I., § 9. Iowa Courts are “free to interpret our constitution as to provide greater protection for our citizens’ constitutional right.” *State v. Cline*, 617 N.W.2d 277, 285 (Iowa 2000). The court’s refusal to apply new rules of jury composition retroactively does not comport with Iowa’s longstanding tradition to “jealously guard our right and duty to differ” from the federal counterpart and providing greater protection for its citizens. *State v. Short*, 851 N.W.2d 474, 513 (Iowa 2014) (quoting *State v. Cline*, 617 N.W.2d 277, 285 (Iowa 2000)).

“Our Iowa Constitution, like other state constitutions, was designed to be the primary defense for individual rights, with the United States Constitution Bill of Rights serving only as a second layer of protection, especially considering the latter applied only to actions by the federal government for most of our country’s history.”

State v. Baldon, 829 N.W.2d 785, 809 (Iowa 2013) (quoting Mark S. Cady, *A Pioneer’s Constitution: How Iowa’s Constitutional History Uniquely*

Shapes Our Pioneering Tradition in Recognizing Civil Rights and Civil Liberties, 60 Drake L.Rev. 1133, 1145 (2012)).

Thongvanh submits that the state adopt its own framework for retroactivity. A good starting point can be found in *Griffith v. Kentucky*, which is grounded in the federal constitutional requirement that trials be fundamentally fair and equal treatment for similarly situated defendants, provides that a rule should be applied to all similar cases pending on direct review. 479 U.S. 314, 328 (1987). “More good than harm” will come from adopting a framework such as *Griffith*. See *Charles v. Alaska*, 326 P.2d 978 (Ak. 2014). As the Alaska Supreme Court recently explained, “*Griffith* leads to more rational results . . . [a]nd in guaranteeing similar treatment to similarly situated defendants, *Griffith* is more fair.” *Id.* at 985. It necessarily follows that both *Griffith* and *Teague* set retroactivity floors, which states are obliged to follow. While states may give *Griffith* broader retroactive relief “by enacting appropriate legislation or by judicial interpretation of [their own Constitutions,]” they cannot give less. See *Danforth v. Minnesota*, 552 U.S. 264, 288 (2008); *Harper v. Virginia Dep’t of Taxation*, 509 U.S. 86, 100(1993) (observing that the Supremacy Clause does not allow states to deny remedies for federal rights “by the invocation

of a contrary approach to retroactivity under state law”). This court should see *Teague* and *Griffith* as retroactivity floors, not ceilings.

In *Danforth*, the United States Supreme Court explicitly held that *Teague* did not constrain the authority of state courts to give broader effect to new rules of criminal procedure. *Id.* *Teague* “does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed “nonretroactive” under *Teague*. *Id.* at 282. Accordingly, this court should use *Griffith* as the starting point for applying Iowa’s more expansive due process rights. Even if this court holds that *Plain* does not establish a new watershed rule of criminal procedure, it should nonetheless find that article I, section 9 of the Iowa Constitution supports *Plain*’s retroactivity here.

Data cited by the Iowa Supreme Court reflects the importance of minority representation in juries to fundamental trial fairness. *Plain* at 825-826. “A sound formula for assessing underrepresentation of minorities in our jury pools must provide meaningful protections of the right to an impartial jury.” *Plain* at 826. *Plain* recognized the impact a lack of minority representation has on juries. The empirical evidence shows that underrepresentation of minorities in juries negatively impacts fundamental trial fairness. Because of the impact on fundamental trial fairness, the rule of

Plain should be applied retroactively to grant Thongvanh an evidentiary hearing to demonstrate that he should be granted a fair retrial with a representative jury.

Finally, *Montgomery v. Louisiana*'s explanation of retroactivity has, in all states but Iowa, sparked courts and scholars to debate whether there needs to be a clearer, and more fair, application of retroactivity rules for all criminal proceedings. 136 S.Ct. 719 (2016); *See, e.g.*, "Eighth Amendment Retroactivity of New Constitutional Rules, 130 Harv. L. Rev. 377 (Nov. 2016) This Court should re-examine its precedents on retroactivity and determine that the Iowa Constitution's due process and equal protection clauses require *Plain* to apply retroactively. See U.S. Const. am. V, XIV. Additionally, to the extent error was not preserved at his criminal trial, Thongvanh received ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution as well as the Iowa Constitution. U.S. Const. amend. VI; Iowa Const. Art. I § 10.

CONCLUSION

For the reasons articulated herein, Khamfeung Thongvanh requests that this Court grant further review, vacate the Court of Appeals' opinion, reverse the dismissal of his application for postconviction relief, and remand for a merits hearing on the issues he raised in the application.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing this brief was \$0 because it was filed electronically.

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