

**IN THE
SUPREME COURT OF IOWA**

KHAMFEUNG THONGVANH

Applicant-Appellant,

v.

STATE OF IOWA

Respondent-Appellee.

*ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR WEBSTER COUNTY
HONORABLE ADRIA KESTER, DISTRICT COURT JUDGE*

FINAL BRIEF FOR APPELLANT

Jamie L. Hunter

Counsel of Record – Final Brief

DICKEY & CAMPBELL LAW FIRM, PLC

301 East Walnut St., Ste. 1

Des Moines, Iowa 50309

PHONE: (515) 288-5008

FAX: (515) 288-5010

EMAIL: jamie@dickeycampbell.com

Andrew J. Smith

Counsel of Record - Proof Brief

Mack, Hansen, Gadd, Armstrong & Brown

316 E. 6th Street

PO Box 278

Storm Lake, Iowa 50588

PHONE: (712) 732-3538

PROOF OF SERVICE

On October 23, 2018, I served this brief on all other parties by EDMS to their respective counsel:

Attorney General
Criminal Appeals Division
Hoover Building
Des Moines, Iowa 50319
(515) 281-5976

I served the Appellant by mailing him a copy to the following address:

Anamosa State Penitentiary
406 North High Street
Anamosa, IA 52205

/s/ Jamie Hunter
Jamie Hunter, AT#0011084
Counsel of Record for Appellant
DICKEY & CAMPBELL LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: jamie@dickeycampbell.com

CERTIFICATE OF FILING

I certify that I did file this brief with the Clerk of the Iowa Supreme Court by EDMS on October 23, 2018.

/s/ Jamie Hunter
Jamie Hunter, AT#0011084
Counsel of Record for Appellant
DICKEY & CAMPBELL LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: jamie@dickeycampbell.com

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STATEMENT OF ISSUES

I. THE TRIAL COURT IMPROPERLY GRANTED THE STATE'S MOTION TO DISMISS

Brewer v. State, 444 N.W.2d 77 (Iowa 1989)
Brown v. State, 589 N.W.2d 273 (Iowa 1998)
Castro v. State, 795 N.W.2d 789 (Iowa 2011)
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State v. Plain, 898 N.W.2d 801 (Iowa 2017)
Thongvanh v. State, 494 N.W.2d 679 (Iowa 1993)
State v. Thongvanh, 398 N.W.2d 182 (IA App. 1986)
Iowa Code § 822.3

ROUTING STATEMENT

Because this case involves the application of facts to existing law, transfer to the Iowa Court of Appeals is appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

This is an appeal from an order entered by Honorable Adria A.D. Kester filed May 18, 2018, which granted the State's Motion to Dismiss Appellant's Application for Postconviction relief.

STATEMENT OF FACTS

In 1984, Applicant was convicted of Murder in the First Degree in Webster County case number FECR213260. The conviction was confirmed by the Iowa Court of Appeals. *State v. Thongvanh*, 398 N.W.2d 182 (Iowa Ct. App. 1986). Applicant subsequently filed an application for postconviction relief, which was denied. The denial was upheld by the Iowa Supreme Court. *Thongvanh v. State*, 494 N.W.2d 679 (Iowa 1993).

On January 26, 2018, Applicant filed an application for postconviction relief. (App. at 5). The State filed a motion to dismiss, asserting that the application was untimely. (App. at 8). Following a hearing and briefing, the Court granted the motion to dismiss, finding that the case relied upon by Appellant did not apply retroactively. (App. at 22).

ARGUMENT

I. THE TRIAL COURT IMPROPERLY GRANTED THE STATE'S MOTION TO DISMISS

Preservation of Error

Appellant asserts that error was preserved by making oral argument at the hearing on the motion to dismiss and subsequently filing a brief in resistance to the State's motion. A final ruling was entered on the issue on May 18, 2018. (App. at 22).

Standard of Review

Dismissal of an application for postconviction relief is reviewed to correct errors at law. *Brown v. State*, 589 N.W.2d 273, 274 (Iowa 1998). However, postconviction proceedings that raise constitutional infirmities are reviewed de novo. *Castro v. State*, 795 N.W.2d 789, 792 (Iowa 2011).

Merits

The application filed by Thongvanh was made pursuant to Iowa Code chapter 822. Iowa Code section 822.3 dictates the limitations period for the filing of such actions. Specifically, the deadline with respect to a conviction is three years from the date of conviction is final or from the date of issuance of procedendo in the event of an appeal. There is no question the filing here is beyond that three-year period. However, there is an exception for "ground of fact or law that could not have been raised within the applicable time period."

Iowa Code §822.3. The Iowa Supreme Court has determined that one such situation where a ground of law “could not have been raised” is where a controlling precedent in effect at the time of the original decision is subsequently overruled. *Nguyen v. State*, 829 N.W.2d 183 (Iowa 2013).

Thongvanh asserts that his conviction was in violation of the Iowa and United States Constitutions. Specifically, he asserts that trial counsel was ineffective for failing to object to the composition of the jury venire.

Thongvanh made this argument in his first postconviction relief application.

Thongvanh at 683. The Iowa Supreme Court relied upon *State v. Jones*, 490 N.W.2d 787 (Iowa 1992), which had applied to the absolute disparity test and found that an absolute disparity of 1.5 percent was insufficient to find a prima facie violation of the Sixth Amendment. *Thongvanh* at 683-84.

In *State v. Plain*, the Iowa Supreme Court overruled *Jones* and found it was “no longer appropriate to rely exclusively upon the absolute disparity test as an indicator of representativeness. 898 N.W.2d 801, 826 (Iowa 2017). Not only did *Plain* explicitly overrule *Jones*, but it specifically cited Thongvanh’s first postconviction relief case as an instance of improper application of the absolute disparity test as the sole test for assessing the composition of the jury pool. *Id.* at 824. Instead, defendants “challenging jury pools on the ground that they are unrepresentative may base their challenges on multiple analytical models.” *Id.* at 827.

Thongvanh filed the application herein within three years of the *Nguyen* decision. As such, the application is timely. The matter in *Nguyen* was remanded to the district court for a determination regarding the retroactive applicability of the case involved there, *State v. Heemstra*, 721 N.W.2d 549 (Iowa 2006). Following remand, the district court found *Heemstra* should not be applied retroactively and the Iowa Supreme Court affirmed. *Nguyen v. State*, 878 N.W.2d 744 (Iowa 2016).

Thongvanh asserts that retroactive application of *Plain* is appropriate in this case. While the general rule is that cases are not retroactively applicable, one exception is where the change “creates a ‘watershed’ rule of criminal procedure implicating issues of fundamental trial fairness.” *Morgan v. State*, 469 N.W.2d 419, 422 (Iowa 1991). The analysis in *Morgan* suggests that the rule at issue here may not constitute a “watershed.” *Id.* at 425. However, 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.

Thongvanh asserts that this language in *Plain* is recognition that the fair cross section requirement is a “bedrock procedural element,” contrary to the holding in *Brewer v. State*, 444 N.W.2d 77, 81-82 (Iowa 1989). Additionally, 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.

In contrast to *Brewer*, the Iowa Supreme Court has recognized, in *Plain*, the impact a lack of minority representation has on juries. The empirical evidence recognizes 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.

CONCLUSION

The trial court improperly dismissed Thongvanh's application for postconviction relief. The decision should be reversed and remanded to allow for an evidentiary hearing on Thongvanh's 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 electronically submitted.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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/s/ Jamie Hunter
Counsel of Record for Appellant
DICKEY & CAMPBELL LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: jamie@dickeycampbell.com