IN THE SUPREME COURT OF IOWA
Supreme Court No. 18–0885

KHAMFEUNG THONGVANH,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR WEBSTER COUNTY
THE HON. ADRIA A.D. KESTER, JUDGE,

APPELLEE'S BRIEF

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ROUTING STATEMENT

The State agrees with Thongvanh's routing statement. *See* Def's Br. at 5. This appeal involves application of existing legal principles and settled law, and it therefore meets the criteria for transfer to the Iowa Court of Appeals. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Khamfeung Thongvanh was convicted of first-degree murder in 1984, and was sentenced to life in prison with no possibility of parole. His conviction was affirmed on direct appeal. *See State v. Thongvanh*, 398 N.W.2d 182 (Iowa Ct. App. 1986). He filed an application for post-conviction relief, which was denied. Thongvanh appealed, and that appeal went before the Iowa Supreme Court. One of the issues that Thongvanh raised was a challenge to his trial counsel's failure to challenge the jury venire under *Duren v. Missouri* on grounds that it "was unrepresentative of Asians in the community." *See Thongvanh v. State*, 494 N.W.2d 679, 683 (Iowa 1993). The Iowa Supreme Court held that the observed disparity (0.18 percent absolute disparity) was not substantial underrepresentation, and it also held that Thongvanh had not succeeded in establishing "that the disparity that does exist is due to a systematic exclusion of Asians from jury duty." *Id.* at 683–84.

In 2018, Thongvanh filed a PCR application, asserting that *State v. Plain* was a new ground of law that was not available to him within the three-year statute of limitations period for his PCR actions, and that *Plain* established that his *Duren* challenge was meritorious. *See* PCR Application (1/26/18); App. 5; *State v. Plain*, 898 N.W.2d 801, 821–29 (Iowa 2017). The State moved to dismiss the PCR action as untimely under Iowa Code section 822.3 and barred by Iowa Code section 822.8. *See* Motion to Dismiss (4/5/18); App. 8. The PCR court ordered briefing on the issue. Subsequently, it concluded that *Plain* does not apply retroactively and that, even if *Plain* were retroactive, Thongvanh could not prevail because his prior failure to demonstrate systematic exclusion was unaffected by *Plain*'s discussion regarding various ways to establish substantial underrepresentation. *See* PCR Order (5/18/18); App. 22. Based on that, it dismissed the action.

Thongvanh now appeals from that order granting dismissal. Thongvanh's only argument is that *Plain* applies retroactively.

Facts

The underlying facts are not at issue in this PCR litigation, and there were no additional facts adduced in this PCR action before the State moved to dismiss the PCR application.

ARGUMENT

I. The PCR Court Was Correct to Dismiss the PCR Action.

Preservation of Error

Thongvanh is renewing the argument raised in his resistance to the State's motion to dismiss and in his supporting brief, which was considered and rejected in the PCR court's order that granted the State's motion. *See* Resistance (4/17/18); App. 10; Brief in Support of Resistance (5/6/18); App. 13; PCR Order (5/18/18); App. 22. Error was preserved. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012); *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa 2002).

Standard of Review

"[R]eview of the court's ruling on the State's statute-of-limitations defense is for correction of errors of law." *See Nguyen v. State [I]*, 829 N.W.2d 183, 186 (Iowa 2013) (quoting *Harrington v. State*, 659 N.W.2d 509, 519–20 (Iowa 2003)).

Merits

Iowa Code section 822.3 requires PCR 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 PCR application filed outside of the applicable three-year limitations period "is time barred unless an exception applies." *See Harrington*, 659 N.W.2d at 520.

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. Thongvanh's argument is that Plain creates a new ground of law, and therefore could not have been raised within three years of his conviction. See Def's Br. at 6–9. But he also needs *Plain* to apply retroactively, because his conviction was long since finalized on exhaustion of his direct appeal when Plain was decided.

A. *Nguyen II* did not create a new ground of law that is relevant to Thongvanh's conviction or claim.

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. Thongvanh's argument is that *Plain* creates a new ground of law, and therefore could not have been raised within three years of his conviction. See Def's Br. at 6–9. But he also needs *Plain* to apply retroactively, because his conviction was final when *Plain* was decided—so he argues that *Nguyen v. State II* created new law on retroactive application of new Iowa cases. *See* Def's Br. at 8.

When a decision merely clarifies the existing law, it does not provide a "new ground of law" that can circumvent section 822.3. *See, e.g.*, *Nguyen I*, 829 N.W.2d at 188 (citing *Perez v. State*, 816 N.W.2d 354, 360–61 (Iowa 2012)). The decision in *Nguyen II* was an application of existing Iowa law on retroactivity. *See Nguyen v. State [II]*, 878 N.W.2d 744 (Iowa 2016). It did not broaden any right to retroactive application of new procedural rules, and it did not expand the list of Iowa decisions that apply retroactively to finalized cases. *See id.* at 752–58. There is no new ground of law in *Nguyen II* that would support Thongvanh's statement that filing his PCR application "within 3 years of the *Nguyen* decision" renders it "timely." *See* Def's Br. at 8; *accord Graves v. State*, No. 17–0350, 2018 WL 1863160, at *1–2 (Iowa Ct. App. Apr. 18, 2018) (affirming summary dismissal of PCR application that argued that *Welch v. United States* created a new ground of law and exempted his PCR action from section 822.3 because "[t]he Court in *Welch* did not announce a new framework for the determination of retroactivity; it simply applied existing frameworks to the issue before the Court"—and because "there was no new law announced in Welch, it cannot serve as a ground of new law to provide an exception to the statute of limitations in Iowa Code section 822.3.").

Even if *Nguyen II* could be construed to have created new law on Iowa's approach to retroactivity, it would not be new law that would create a "ground of law" to support Thongvanh's PCR action—*Nguyen II* foreclosed the argument that certain state constitutional provisions require a more expansive approach to retroactivity than the approach taken by the U.S. Supreme Court under *Teague v. Lane*. *See Nguyen II*, 878 N.W.2d at 752–58. If *Nguyen II* were "new" at all, it would be new because of how it *rejected* a claim like Thongvanh's. Thus, *Nguyen II* creates no foothold for Thongvanh's present claim.

B. *Plain* did not establish a new rule that falls within the *Teague* 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: "new rules should not be applied retroactively to cases on collateral review unless the change: (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." *See Brewer v. State*,

444 N.W.2d 77, 81 (Iowa 1999) (citing *Teague v. Lane*, 489 U.S. 288, 311 (1989)). Thongvanh argues *Plain* falls within that second exception for "watershed rules of criminal procedure" because it stated that "the fair cross-section requirement is a 'bedrock procedural element.'" *See* Def's Br. at 8–9 (quoting *Brewer*, 444 N.W.2d at 81–82). Thongvanh admits *Brewer* rejected a claim that *Duren v. Missouri* should apply retroactively on collateral review of finalized convictions, but he tries to distinguish *Brewer* by pointing out that his PCR claim "involves a lack of minority representation on the jury rather than the complaint in *Brewer*, regarding the exclusion of jurors over age 65." *See* Def's Br. at 9. But *Brewer* went further—it expressly accepted *Teague*'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. *Plain*'s entire discussion of the jury panel issue is an application of *Duren v. Missouri*. While *Plain* certainly 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*, 898 N.W.2d at 821–29. At best, *Plain* would vindicate the same procedural right that *Duren* delineated—which means cases foreclosing retroactive application of *Duren* also necessarily foreclose retroactive application of *Plain*. Even without *Brewer*, Iowa's adoption of *Teague* would necessarily be linked to its rationale for limiting retroactive availability of this specific claim:

> An examination of our decision in *Taylor* applying the fair cross section requirement to the jury venire leads inexorably to the conclusion that adoption of the rule petitioner urges would be a far cry from the kind of absolute prerequisite to fundamental fairness that is "implicit in the concept of ordered liberty." The requirement that the jury venire be composed of a fair cross section of the community is based on the role of the jury in our system. . . . [A]s we stated in *Daniel v. Louisiana*, . . . the fair cross section requirement "[does] not rest on the premise that every criminal trial, or any particular trial, [is] necessarily unfair because it [is] not conducted in accordance with what we determined to be the requirements of the Sixth Amendment."

Teague, 489 U.S. at 314–15 (quoting *Daniel*, 420 U.S. at 32). Iowa has adopted the retroactivity framework described in *Teague*—which was defined and explained primarily through an explanation of why fair cross section claims under *Duren* should not apply retroactively—and Iowa specifically adopted *Teague* in rejecting similar claims on identical grounds. *See Nguyen II*, 878 N.W.2d at 753; *Brewer*, 444 N.W.2d at 81–82. Because *Duren* falls outside of that "watershed rule" exception for retroactive application, *Plain*'s recalibration of *Duren* cannot establish a "watershed rule" within the meaning of *Teague*, and Thongvanh's argument to the contrary is foreclosed by *Brewer*.

Thongvanh's only argument that *Plain* is somehow "implicit in the concept of ordered liberty" is his claim that "data cited by the Iowa Supreme Court [in *Plain*] reflects the importance of minority

representation in juries to fundamental trial fairness." *See* Def's Br. at 8 & n.1 (quoting *Plain*, 898 N.W.2d at 825–26). Thongvanh is correct that *Plain* summarized a study with a statement that "having just one person of color on an otherwise all-white jury can reduce disparate rates of convictions between black and white defendants." *See Plain*, 898 N.W.2d at 825–26 (citing Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017 (2012)). This was an unfortunate misstatement of the cited study, which actually found that "the coefficients that characterize the black-white conviction rate gap when there is at least one black member seated on the jury are almost exactly the same size as the estimated impact of having at least one black potential juror in the pool"—and the equalizing effect occurs "*regardless of whether they are actually seated on the trial jury*." *See* Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. at 1035, 1046. This suggests that racist bias is not inherent in all decisions made by homogenous groups and may be counteracted by measures that encourage jurors to confront and disregard any bias. *See, e.g.*, Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. & SOC. SCI. 269, 273–74 (2015) (summarizing research showing that "most individuals believe that it

is important to be egalitarian, so they try to avoid bias when they are aware of the potential influence of race"); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1143 (2012) ("When the case is racially charged, jurors—who want to be fair—respond by being more careful and thoughtful about race and their own assumptions and thus do not show bias in their deliberations and outcomes."); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias*, 7 PSYCHOL. PUB. POL'Y & L. 201, 220–25 (2001) ("When race was made salient in the experimental trial, Whites demonstrated no signs of discrimination, apparently because the racial content of the trial activated a motivation to appear nonprejudiced"). Even if Thongvanh had identified language from *Plain* that applied to his particular trial, *Teague* and *Brewer* would still be correct in their observation that "the fair cross section requirement '[does] not rest on the premise that every criminal trial, or any particular trial, [is] necessarily unfair'" if a jury is racially homogenous but otherwise fair. *See Teague*, 489 U.S. at 314–15 (quoting *Daniel*, 420 U.S. at 32); *Brewer*, 444 N.W.2d at 82. Note that three potential jurors on Thongvanh's panel overheard a "prejudicial comment" about Thongvanh and were asked about it—and all three of them "found the comment inappropriate and biased."

See Thongvanh, 494 N.W.2d at 684. There is no reason to entertain speculation about whether Thongvanh's petit jurors could set aside any latent bias or prejudice, hold the prosecution to its burden of proof, and discharge their sworn duty to apply law to the facts and do justice. *Accord State v. Gomez Garcia*, 904 N.W.2d 172, 183–84 (Iowa 2017) (noting lower court's concern about prejudice from "prospective jurors who harbored bias against persons in this country who do not speak English," but finding that no automatic or inherent unfairness arose from mere possibility that hypothetical jurors might have been prejudiced because "Gomez Garcia would have had the opportunity to explore such attitudes during jury selection and challenge such jurors for cause or remove them through peremptory strikes").

Thongvanh 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. As such, his argument that *Plain* applies retroactively on collateral review of convictions that have already been finalized 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). Therefore,

since *Plain* does not apply to Thongvanh's collateral attack on this finalized conviction, he cannot raise *Plain* as a "new ground of law":

> Because Plain does not apply retroactively to Applicant's case on collateral review, his application has not alleged a ground of fact or law that could not have been raised within the applicable time period for collateral review as set forth in § 822.3. This application is thus untimely, and should be dismissed.

PCR Order (5/18/18) at 6; App. 27. Thus, Thongvanh's claim fails.

C. Thongvanh's claim is also barred by section 822.8 because the Iowa Supreme Court determined that he failed to establish systematic exclusion.

The State raised section 822.8 in its motion to dismiss. *See* Motion to Dismiss (4/5/18) at 1–2; App. 8–9. Its brief argued that Thongvanh had already failed to establish systematic exclusion in his previous PCR action, and the PCR court adopted that same argument in its order that granted the motion to dismiss. *See* Brief in Support of Motion to Dismiss (5/7/18) at 3–4; App. 15–16; PCR Order (5/18/18) at 5–6; App. 26–27. Because Thongvanh's claim of systematic exclusion was "finally adjudicated" by the Iowa Supreme Court in his prior PCR, his *Duren* claim "may not be the basis for a subsequent application." *See* Iowa Code § 822.8. Indeed, Thongvanh "presented no new fact or law as to why [the PCR court] should reconsider the Supreme Court's determination when it stated, 'we do not believe [Thongvanh] has

established that the disparity that does exist is due to a systematic exclusion of Asians from jury duty.'" *See* PCR Order (5/18/18) at 5; App. 26 (quoting *Thongvanh*, 494 N.W.2d at 684). Consequently, even if *Plain*'s discussion about the numerical analysis that can show substantial underrepresentation did apply retroactively, Thongvanh's *Duren* challenge would still be just as meritless as it was in 1993.

Note that the State does not concede that Thongvanh would be able to establish substantial underrepresentation. Thongvanh only showed a 0.18% absolute disparity between Asian representation on his jury panel and Asian representation in the relevant community. *See Thongvanh*, 494 N.W.2d at 683. The PCR record contains no data on the total number of potential jurors on Thongvanh's panel, so it is impossible to calculate standard deviation. Even so, it is wildly unlikely that Thongvanh could ever establish substantial underrepresentation on any *Duren* claim involving 0.18% absolute disparity. Courts in Iowa and elsewhere routinely find that substantial underrepresentation is not present when considering absolute disparity figures that are more than *ten times higher* than the .18% disparity that Thongvanh alleges. *E.g.*, *State v. Huffaker*, 493 N.W.2d 832, 634 (Iowa 1992) ("A 2.85% absolute disparity is not a substantial deviation."); *State v. Washington*,

No. 15–1829, 2016 WL 6270269, at *10 (Iowa Ct. App. Oct. 26, 2016) ("We do not believe 2.3% is a 'substantial' deviation"); *see generally Berghuis v. Smith*, 559 U.S. 314, 330 n.5 (2010) (collecting cases); *United States v. Orange*, 447 F.3d 792, 798 & n.7 (10th Cir. 2006) (collecting cases). That infinitesimally low absolute disparity means that Thongvanh cannot show substantial underrepresentation—and no amount of additional math or statistics could change that reality. *See Orange*, 447 F.3d at 799 (if preliminary disparity calculations "fall within our accepted range, a court need not look further into other statistical methods"); *United States v. Chanthadara*, 230 F.3d 1237, 1257 (10th Cir. 2000) ("Standard deviations are not helpful [when they] merely represent a manipulation of the same numbers that we have held were not sufficient to establish a prima facie violation of the Sixth Amendment.").

The absurdity of this *Duren* challenge can be illustrated by assuming, for sake of argument, that Webster County called in the largest jury panel ever seen in Iowa: 750 people from Webster County, where Asian people comprised .18% of the population (in the 1980's). Even on a hypothetical jury panel of that unprecedented scale, there would *still* be a 25.8% chance that no potential jurors would be Asian.

See WOLFRAMALPHA, "0 successes in 750 trials with p=.0018", http://www.wolframalpha.com/input/?i=0+successes+in+750+trials+with+p%3D.0018. This cannot be substantial underrepresentation—this happens naturally, due to natural variance in random sampling, and it would occur in 25% of all jury panels of that large size that were drawn from that particular county's population. *See United States v. Hernandez-Estrada*, 749 F.3d 1154, 1165 (9th Cir. 2014) (explaining that "if a statistical analysis shows underrepresentation, but the underrepresentation does not substantially affect the representation of the group in the actual jury pool, then the underrepresentation does not have legal significance in the fair cross-section context"). And in a more plausible scenario, where Webster County called 100 people for jury service and where only 0.18% of its residents were Asian people, there would be an 83% chance that each jury panel would include no Asian people. WOLFRAMALPHA, "0 successes in 100 trials with p=.0018," http://www.wolframalpha.com/input/?i=0+successes+in+100+trials+with+p%3D.0018. No jury panel of any realistically conceivable size would enable Thongvanh to show substantial underrepresentation through any statistical measure—other than comparative disparity, which is useless *precisely because* it would take such claims seriously.

See Commonwealth v. Arriaga, 781 N.E.2d 1253, 1265 (Mass. 2003) (criticizing comparative disparity because it "overstate[s] the degree of underrepresentation in the case of a small minority population"); *United States v. Hafen*, 726 F.2d 21, 24 (1st Cir. 1984) ("[T]he smaller the group is, the more the comparative disparity figure distorts the proportional representation."); *accord Hernandez-Estrada*, 749 F.3d at 1162–63 ("[N]o court has been able to articulate or defend the use of a comparative disparity test on any sound statistical basis."). This analysis demonstrates why this Court should be skeptical that *Plain* has changed anything at all with respect to cases involving such low absolute disparity numbers—after all, if considering other statistical measures is supposed to *improve* the statistical analysis, then it will not breathe life into such quantifiably meritless claims. No amount of new law will change the mathematics that foreclose this claim.

Thongvanh's claim is already foreclosed by *Brewer* and *Teague*, which preclude retroactive application of *Duren*-based cases —which, in turn, forecloses Thongvanh's attempt to circumvent section 822.3. Thongvanh's present claim is also barred by section 822.8, because the Iowa Supreme Court already determined that he failed to prove systematic exclusion, which every *Duren* challenges requires. Finally,

even after *Plain*, there is no substantial underrepresentation when a jury panel of any conceivable size fails to include any members of a minority group comprising 0.18% of the county's population. Thus, the PCR court did not err in granting the State's motion to dismiss.

CONCLUSION

The State respectfully requests that this Court reject Thongvanh's challenge and affirm the PCR court's dismissal order.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **3,863** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: October 12, 2018

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