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

IN THE SUPREME COURT OF IOWA

KHAMFEUNG THONGVANH

Applicant-Appellant,

v.

STATE OF IOWA

Defendant-Appellee.

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

FINAL REPLY BRIEF FOR APPELLANT

Jamie Hunter
Counsel of Record
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

PROOF OF SERVICE

On October 23, 2018, I served this brief on all other parties by EDMS.

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 proof 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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REPLY ARGUMENT

I. THONGVANH'S APPLICATION WAS TIMELY BECAUSE IT WAS FILED WITHIN THREE YEARS OF *PLAIN*

In Thongvanh's principal brief, he noted that his application was timely because it was filed within three years of *Nguyen v. State* (II), 878 N.W.2d 744 (2016). In response, the State argued that *Nguyen II* did not provide a new ground of law under Iowa Code section 822.3.

Thongvanh does not need to rely on *Nguyen II* in order to support the timeliness of his application. There is no dispute that he filed his application within three years of *Plain*, which is the new ground of law that Thongvanh relies on. *Nguyen II* supports the proposition that Thongvanh's case should be remanded to determine its retroactivity. The language in *Plain* makes clear that the court considered the fair cross section requirement to be a bedrock procedural element that was necessary to protect the right to an impartial jury. *Plain* at 826. *Plain* established a "watershed" rule of criminal procedure which implicated an issue of fundamental trial fairness.

II. IOWA SHOULD PROVIDE FOR BROADER RETROACTIVITY THAN FEDERAL LAW IN *TEAGUE*

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 procedural 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). Although *Teague* involved a constitutional rule, the court has been careful to say that its analysis applies equally to new non-constitutional rules that narrow the scope of a criminal statute by interpretation. *Id.* at 351-52.

The State argues that *Plain* did not create a "watershed" rule of criminal procedure implicating issues of fundamental fairness. *See Teague* at 311. Additionally, the State claims that *Nguyen II* "foreclosed the argument" that certain state constitutional provisions require a more expansive approach taken by the United States Supreme Court under *Teague*. This claim is incorrect.

First, Thongvanh explained in his principal brief how the data cited by the Iowa Supreme Court in *Plain* explained the importance of minority representation in juries to fundamental trial fairness. *Plain* at 825-26. Because the underrepresentation of minorities negatively impacts fundamental trial fairness, it should thus be considered a "watershed" rule under *Teague*.

Moreover, nothing in *Nguyen II* foreclosed the notion that the Iowa Constitution could provide for broader retroactivity than federal law as discussed in *Teague*. Under *Danforth v. Minnesota*, states can give broader retroactive application to new rules of criminal procedure than provided in *Teague*. 552 U.S. 264 (2008). Similarly, the Iowa Constitution provides for a broader retroactivity of new rules than provided in *Teague*, which was based on the federal constitution.

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). Here, Thongvanh submits that the state adopt its own framework for retroactivity which provides more expansive due process rights that would ensure that trials are fundamentally fair and provide equal treatment of similarly situated defendants. See, i.e., *Griffith v. Kentucky*, 479 U.S. 314 (1987). 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." *Charles v. Alaska*, 326 P.2d 978, 985 (Alaska 2014). It necessarily follows that both *Griffith* and *Teague* set retroactivity floors, which states are obligated 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 *Teague* and *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.

III. THE CASE SHOULD BE REMANDED TO ALLOW THONGVANH THE OPPORTUNITY TO DEMONSTRATE SYSTEMATIC EXCLUSION

The State argues that Thongvanh had previously failed to establish systematic exclusion in his previous PCR action, pointing out that Thongvanh "presented no new fact or law as to why [the PCR court] should reconsider the Supreme Court's determination." (State's Br. at 19). Thongvanh's instant application was dismissed. He did not have the opportunity to present any new facts or law as to how there was systematic exclusion of Asians from jury duty or why that information may not have been discoverable in his original PCR action back in 1993. Thongvanh was not even allowed to appear at the dismissal hearing. Following the court's order of dismissal, Thongvanh filed a pro se motion to enlarge and amend or vacate, arguing that he had not been notified of the dismissal hearing, did not have an opportunity to participate in the hearing, and did not have the opportunity to "file his own documents and

to have a hearing on those documents." (Motion to Vacate). The district court declined to take action on Thongvanh's motion, as counsel had already filed a notice of appeal.

It was premature to find that Thongvanh would not be able to demonstrate that there was systematic exclusion. A motion to dismiss is only appropriate when it appears to a certainty that the applicant is not entitled to any relief under any facts provided in support of the claims asserted. *See Haupt v. Miller*, 514 N.W.2d 905 (Iowa 1994). At this stage of the proceedings, the application should be construed in the light most favorable to Thongvanh, and he should have been given the opportunity to present evidence to support his claim of systematic exclusion.

CONCLUSION

For the reasons articulated herein, Thongvanh requests this court reverse the district court's order of dismissal and remand the case for further proceedings.

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.

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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