IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. PETER LEROY VEAL, Defendant-Appellant.	S.CT. NO. 21-0144

APPEAL FROM THE IOWA DISTRICT COURT
FOR CERRO GORDO COUNTY
HONORABLE RUSTIN DAVENPORT, JUDGE

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

THERESA R. WILSON
Assistant Appellate Defender
twilson@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEYS FOR DEFENDANT-APPELLANT FINAL

CERTIFICATE OF SERVICE

On the 27th day of July, 2021, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Peter Veal, No. 6202982, Iowa State Penitentiary, 2111 330th Avenue, P.O. Box 316, Fort Madison, IA 52627.

APPELLATE DEFENDER'S OFFICE

/s/ Theresa R. Wilson
THERESA R. WILSON
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
twilson@spd.state.ia.us
appellatedefender@spd.state.ia.us

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TRW/sm/7/21

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court. Veal asks this Court to consider the felon exclusion rule of Iowa Rule of Criminal Procedure 2.18(5)(a) as establishing systematic exclusion for the purposes of the Sixth Amendment's fair-cross-section requirement. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(a), (c), (d) (2021).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by Defendant-Appellant Peter Veal from a ruling on remand denying him a new trial on his fair cross-section claim under the Sixth Amendment to the United States Constitution. He was originally convicted of two counts of Murder in the First Degree and one count of Attempted Murder following a jury trial in Cerro Gordo County District Court. The Honorable Rustin Davenport presided over all relevant proceedings.

Course of Proceedings: On November 23, 2016, the State charged Veal with two counts of Murder in the First Degree, class A felonies in violation of Iowa Code sections

707.1 and 707.2(1)(a) (2015) (Counts I and II), and one count of Attempt to Commit Murder, a class B felony in violation of Iowa Code section 707.11 (2015) (Count III). (Trial Information)(App. pp. 6-8). Veal pleaded not guilty. (Written Arraignment)(App. pp. 9-10).

A jury trial was scheduled for July 11, 2017. (Order Regarding Trial p. 2)(App. p. 12). On July 20, 2017, the jury entered a verdict finding Veal guilty as charged on all counts. (Order Regarding Trial pp. 4-5)(App. pp. 14-15). Veal was sentenced to life without parole on Counts I and II and 25 years in prison with a mandatory 70% minimum to serve on Count III, with all counts running consecutively to one another. (Judgment and Sentence)(App. pp. 26-29).

Veal filed a notice of appeal on September 14, 2017. (2017 Notice)(App. p. 30). In a decision issued May 24, 2019, the Iowa Supreme Court rejected most of Veal's appellate claims but remanded his claim that his jury was not drawn from a fair cross-section of the community in violation of the Sixth Amendment. State v. Veal, 930 N.W.2d 319, 340 (Iowa

2019). Procedendo issued on August 12, 2019. (Procedendo)(App. pp. 31-33).

The District Court held a remand hearing on August 5, 2020. (8/5/20 Tr. p. 1 L.1-25). In a written order issued on January 29, 2021, the District Court denied Veal's Sixth Amendment challenge. (Order Following Supreme Court Remand)(App. pp. 74-97). The District Court initially ruled Veal had not preserved a challenge under the Iowa Constitution or a challenge to the representation of Hispanics in his jury pool. (Order Following Supreme Court Remand p. 4)(App. p. 77). While the court recognized African-Americans were a distinctive group for purposes of a Duren/Plain analysis, the court determined Veal had not established either unfair or unreasonable representation or that the underrepresentation was the result of systematic exclusion. (Order Following Supreme Court Remand pp. 5-23)(App. pp. 78-96).

Veal filed a timely notice of appeal on February 2, 2021. (2021 Notice of Appeal)(App. p. 98).

Facts: The Iowa Supreme Court summarized the relevant facts in the original appeal ordering remand:

> The defendant, an African-American, was charged with committing two murders in Cerro Gordo County and attempting to commit a third. Because of pretrial publicity he asked for a change of venue, and the trial was moved to Webster County. Although the Webster County jury venire contained five African-Americans, no African-American was seated on the jury that actually heard the defendant's case. The State exercised a peremptory strike on the last remaining African-American on the panel because the State's lead prosecutor in this case had also prosecuted her father successfully for murder. Following a jury trial, the defendant was convicted.

State v. Veal, 930 N.W.2d 319, 324 (Iowa 2019). Additional facts will be discussed below as necessary.

ARGUMENT

The District Court incorrectly applied the analysis for a Sixth Amendment violation. The mandatory exclusion of felons from jury service and failures in jury management practices resulted in the systematic exclusion and underrepresentation of both African-Americans and Hispanics. Veal should receive a new trial.

Preservation of Error: In his initial appeal of this matter, the Iowa Supreme Court determined Veal had not preserved a fair-cross-section claim under Article I Section 10

of the Iowa Constitution and remanded his case for further consideration of his claim under the Sixth Amendment. State v. Veal, 930 N.W.2d 319, 328 n.5 (Iowa 2019). Although Veal asserted that a state constitutional claim had been presented at trial, the District Court disagreed and abided by the remand order. (Professional Statement p. 1; Order Following Supreme Court Remand p. 4)(App. pp. 63, 77). In this appeal, Veal concedes error was not preserved on a state claim. (Trial Tr. Vol. 1 p. 2 L.1-16; Trial Vol. 2 p. 3 L.13-19; Motion for New Trial § 4(a))(App. pp. 21-23).

In its ruling on remand, the District Court held that any challenge to the representation of Hispanics had not been preserved at trial and exceeded the scope of the remand order. (Order Following Supreme Court Remand p. 4)(App. p. 77). Veal respectfully disagrees. In his oral motion to strike the jury pursuant to the Sixth Amendment, Veal argued that there were no minorities on his panel. (Trial Tr. Vol. 1 p. 2 L.1-16). He later referred to the systematic exclusion of minorities, including particularly blacks. (Trial Tr. Vol. 2 p. 3 L.20-p. 5

L.2). He provided the total number of jurors in pools over the course of six months, and mentioned there were 35 blacks, 20 Native Americans, 40 Hispanics, and 24 from other races. (Trial Tr. Vol. 2 p. 5 L.22-p. 6 L.10). Veal offered to give the District Court the percentage of each race, but the court said "No, that's – that's fine." (Trial Tr. Vol. 2 p. 6 L.11-20).

While the example used with the court initially was for African-Americans, Veal was challenging the racial composition of his jury pool and aggregate panels as a whole. (Trial Tr. Vol. 2 p. 19 L.13-p. 21 L.5). Nonetheless, the District Court focused on the number of African-Americans in Veal's pool and determined their percentage was comparable to their percentage in the population and that Veal had not proved systematic exclusion. (Trial Tr. Vol. 2 p. 23 L.13-p. 26 L.3). Simply put, Veal attempted to preserve a fair-cross-section claim as to all minorities, but the District Court only expressed interest in the numbers relating to African-Americans.

The Iowa Supreme Court's remand order in and of itself does not prohibit Veal from addressing a challenge to Hispanic representation in his pool or Webster County jury pools generally. While the Iowa Supreme Court initially characterized Veal's argument as a challenge to the under-representation of African Americans, that was more a recognition of the limitations effectively placed on Veal's argument by the District Court. State v. Veal, 930 N.W.2d 319, 326-27 (Iowa 2019). The Court remanded the case "to offer Veal an opportunity to develop his arguments that his Sixth Amendment right to an impartial jury trial was violated." Id. at 330. Nothing in this directive limited Veal to challenging only the underrepresentation of African Americans.

Accordingly, Veal's Sixth Amendment challenge to the systematic exclusion of minorities in his pool and Webster County jury pools generally was preserved for this appeal.

Standard of Review: Constitutional questions – including whether a distinctive group has been systematically

excluded from the jury pool in violation of the Sixth Amendment – are reviewed de novo. State v. Veal, 930 N.W.2d 319, 327 (Iowa 2019).

Merits: The District Court erred in its application of the analysis for a fair cross-section claim under the Sixth Amendment. The felon exclusion rule and inadequate jury management practices have led to a consistent pattern of underrepresentation of African-Americans and Hispanics in both Veal's own jury pool and recent jury pools in Webster County. The District Court erred in both its statistical analysis and its consideration of factors leading to the systematic exclusion of minorities from jury pools. Veal should receive a new trial.

A. The United States Supreme Court interprets the fair-cross-section requirement of the Sixth Amendment.

The fundamental right to a jury trial in criminal proceedings recognized under the Sixth Amendment to the United States Constitution applies to the States through the Due Process Clause of the Fourteenth Amendment. Duncan

v. Louisiana, 391 U.S. 145, 149 (1968). "[T]he American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." Taylor v. Louisiana, 419 U.S. 522, 526, 527 (1975). Accordingly, "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." Id. at 528. An impartial jury guards against abuse of power and supports public confidence in the fairness of criminal proceedings. Id. at 530.

While Taylor acknowledged the systematic exclusion of women from juries violated the fair cross-section requirement, it also provided caveats. Id. at 537-539. "The fair-cross-section principle must have much leeway in application." Id. at 537-38. States were still permitted to adopt relevant qualifications and provide hardship exemptions "so long as it may be fairly said that the jury lists or panels are representative of the community." Id. at 538.

In Castaneda v. Partida, the U.S. Supreme Court gave some clarification to the analysis. Castaneda v. Partida, 430

U.S. 482 (1977). Partida filed a federal habeas petition alleging a denial of due process and equal protection based upon gross under-representation of Mexican-Americans on grand juries. Id. at 491. The Court identified three steps for establishing a prima facie claim of an equal protection violation: 1) the excluded group is a recognized and distinct class singled out for different treatment;[1] 2) underrepresentation must be proved by "comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time"; and 3) the selection procedure used is subject to abuse or not racially neutral. Id. at 494-95.

The Castaneda Court found Mexican-Americans were a distinctive class and that there was a 40 percentage point

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1. For purposes of the Equal Protection analysis, the Court said, the defendant must show the race or identifiable group of which he is a member was singled out for different treatment. Castaneda v. Partida, 430 U.S. 482, 494 (1977). For a Sixth Amendment fair cross-section claim, there is no requirement that the defendant be a member of the excluded group. Taylor v. Louisiana, 419 U.S. 522, 526 (1975).

differential between their numbers in the population and their numbers among those called for grand jury service over an 11-year period.[2] Id. at 495-96. Finally, the Court found the Texas system of selecting grand jurors to be highly subjective, with Spanish surnames being readily identifiable. Id. at 497. Because the State failed to rebut the presumption of purposeful discrimination, the Court found a denial of equal protection. Id. at 501.

In Duren v. Missouri, the United States Supreme Court created the three-part test that has been used to assess fair cross-section claims under the Sixth Amendment. Duren v. Missouri, 439 U.S. 357 (1979). In Duren, Missouri law automatically granted exemptions from jury service for women who requested them. Id. at 359-60. The U.S. Supreme

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2. In a footnote, the Court also noted that the standard deviation from the expected norm was 12. Castaneda v. Partida, 430 U.S. 482, 496 (1977). The Court indicated that "As a general rule for such large samples, if the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist." Id. n.17

Court found the resulting composition of jury venires with less than 15 percent women violated the Sixth Amendment. Id. at 360.

In assessing whether the practice violated the Constitution, the Court first considered whether women were a distinctive group. Id. at 364. Based on the Court's ruling in Taylor, it was clear they were. Id.

Next, the Court considered whether "the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community." Id. It compared the percentage of the unrepresented group in the community with the percentage of the group in the jury venire. Id. at 364-66. The Court looked at the differential between women making up 53 percent of the population but only 15 percent of jury venires and determined "Such a gross discrepancy between the percentage of women in jury venires and the percentage of women in the community requires the conclusion that women

were not fairly represented in the source from which petit juries were drawn in Jackson County." Id. at 365-366.

Finally, the Court considered whether Duren had established that the underrepresentation of women was due to systematic exclusion. Id. at 366. Notably, the Court found that Duren's "undisputed demonstration that a large discrepancy occurred not just occasionally but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized." Id. The Court also remarked that Duren had established where in the process the exclusion occurred – after women were summoned and were either allowed to request an exemption or presumed to have requested an exemption. Id. at 366-67. The Court held that the exclusion of women was "quite obviously" due to the system in which juries were selected, and held that Duren had established a prima facie claim of a fair cross-section violation. Id. at 367.

Once a defendant makes a prima facie showing of a constitutional violation, "it is the State that bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a significant state interest." Id. at 368. The Court found the State failed to provide adequate justification for automatically exempting all women based on "preclusive domestic responsibilities of some women." Id. at 369. Accordingly, Duren had established a prima facie violation of the Sixth Amendment and the Court remanded for further proceedings. Id.

Finally, in Berghuis v. Smith, the U.S. Supreme Court considered a habeas case in which Smith, who was African-American, alleged a violation of the Sixth Amendment after being convicted by an all-white jury. Berghuis v. Smith, 559 U.S. 314, 319 (2010). African-Americans constituted 7.28 percent of the eligible juror population in the county but only 6 percent of the pool from which Smith's jurors were drawn. Id.

The Michigan Supreme Court considered all three means of calculating underrepresentation – absolute disparity, comparative disparity, and standard deviation – and determined Smith had failed to establish a legally sufficient disparity. Id. at 324. Giving Smith the benefit of the doubt, however, the Michigan Supreme Court determined Smith had not shown systematic exclusion, either through socioeconomic factors or due to "siphoning" of jurors to district courts from circuit courts. Id. at 325. The Sixth Circuit granted relief based upon the state court's unreasonable application of clearly established law, using the comparative disparity test to find underrepresentation, and finding the juror assignment order in Smith's case caused the exclusion. Id. at 326.

The U.S. Supreme Court reversed, finding none of its decisions "clearly established" Smith's claim for relief. Id. at 327. First, the Court noted that "neither Duren nor any other decision of this Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools." Id. at 329. The Berghuis Court did not take any

stance on which of the three methods would be an appropriate measure of underrepresentation, recognizing that the Michigan Supreme Court assumed for the sake of argument such underrepresentation existed. Id. at 329-30.

Turning to the systematic exclusion prong, the Berghuis Court faulted Smith for not providing evidence regarding the percentages of African-Americans on district venires versus circuit venires in support of his siphoning argument. Id. at 331. The only statistical evidence Smith did provide, meanwhile, did not show a "significant" impact on representation when the questionable assignment practice was changed. Id. Although Smith pointed to a variety of factors that might lead to underrepresentation, the Court noted its precedent had not "clearly established" a prima facie claim of systematic exclusion could be proven through such factors.[3]

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[3] In a footnote, the Court also held it had "never 'clearly' decided, and have no need to consider here, whether the impact of social and economic factors can support a fair-cross-section claim." Berghuis v. Smith, 559 U.S. 314, 333 n.6 (2010).

Id. at 332-33. Because the Michigan Supreme Court decision did not involve an unreasonable application of federal law, the Sixth Circuit erred in reversing it. Id. at 333.

B. The Iowa Supreme Court addresses the fair cross-section requirement under the federal and state constitutions.

The Iowa Supreme Court has recently decided a number of cases in an attempt to clarify the standards for fair-cross section claims under both the Sixth Amendment and Article I Section 10 of the Iowa Constitution. The trend started with State v. Plain, which involved only a Sixth Amendment claim. State v. Plain, 898 N.W.2d 801, 821 (Iowa 2017).

Plain's jury pool contained one African-American out of 56 potential petit jurors. Id. And while African-Americans comprised 8.9 percent of the county population, they comprised just 1.8 percent of the jury pool summoned for Plain's trial. Id.

The Plain Court applied the Duren three-prong test and readily found African-Americans to be a distinctive group. Id. at 822. With respect to calculating underrepresentation, the

Court acknowledged it had previously adopted the absolute disparity test but acknowledged flaws with all three measures in use. Id. at 823-26. Ultimately the Court permitted district courts to use multiple analytical models in their analyses. Id. at 826-27. This approach was more consistent with the notion that communities can change over time and courts need the flexibility to address such changes. Id. at 827.

As to the systematic exclusion prong, the Court expressed concern that the jury manager had denied Plain access to historical data on the composition of juries in the county. Id. at 827-28. The Court found Plain's lack of access to the records undermined his ability to establish the third Duren prong. Id. at 828. The Court conditionally affirmed Plain's conviction and remanded his case to the District Court for development of additional record. Id. at 829.

The Court re-examined the Sixth Amendment analysis of Plain in State v. Lilly, and also took the opportunity to address the applicable analysis under Article I Section 10 of the Iowa

Constitution. State v. Lilly, 930 N.W.2d 293 (Iowa 2019). The opinion deviated from both Plain and Duren in several respects.

First, the Iowa Supreme Court decided upon standard deviation as the appropriate statistical measurement for underrepresentation under both the state and federal constitutions. Id. at 301-03. The strength of standard deviation analysis was its ability to determine whether there has been a deviation from randomness. Id. at 302-03. For purposes of the Iowa Constitution, the Court settled on a standard of one standard deviation. Id. at 304.

To calculate the percentage of the minority group in the population, the Court directed trial judges to use the most current census data available but with adjustments. Id. The population should include only jury-eligible members, meaning those 18 years or older who are not state prisoners. Id. at 304-305. Furthermore, a defendant is not limited to showing underrepresentation in his own pool, but may also rely on aggregated data to show statistical significance. Id. at

305. But if the proportion of a distinctive group in the defendant's jury pool is as large or larger than the proportion of the group in the jury-eligible population, his right to a fair cross-section would not be infringed "and there would be no reason to aggregate data in that event." Id.

With respect to systematic exclusion, the Lilly Court held that "statistically significant disparities alone are not enough. Rather, the challenger must tie the disparity to a particular practice." Id. at 307. For purposes of Article I Section 10, those practices could include "run-of-the-mill jury management practices" such as updating address lists, the granting of excuses, and the lack of enforcement of summons. Id.

In State v. Veal and State v. Williams – released the same day as Lilly – the Iowa Supreme Court clarified its view of the applicable analysis under the Sixth Amendment. State v. Veal, 930 N.W.2d 319 (Iowa 2019); State v. Williams, 929 N.W.2d 621 (Iowa 2019).

In Veal – the precursor to this appeal – the Court adopted its approach under Lilly for addressing Sixth Amendment claims, but with two exceptions. State v. Veal, 930 N.W.2d 319, 328 (Iowa 2019). First, the Court believed the U.S. Supreme Court had adopted two to three standard deviations as the threshold standard for underrepresentation under the Fourteenth Amendment. Id. at 329 (citing Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977)). Therefore, the Court believed two standard deviations downward were necessary to establish a Sixth Amendment claim. Id. Second, the Court disregarded run-of-the-mill jury practices as a basis for finding systematic exclusion under the Sixth Amendment. Id.

The Court noted that 3.27 percent of Veal's jury pool were African-American and that this was less than both the percentage of African-Americans in Webster County (4.6 percent) and the percentage of African-Americans 18 and older in Webster County (3.9 percent). Id. The aggregated data from 2016 also suggested the disparity was "statistically significant even under the higher Castaneda threshold." Id.

The Court remanded Veal's case to allow for development of the record using the clarified standards. Id. at 330.

In Williams, there were no African-Americans on Williams' jury or in the panel from which it was constituted. State v. Williams, 929 N.W.2d 621, 629 (Iowa 2019). The Iowa Supreme Court reiterated that "For Sixth Amendment purposes, the defendant must then show that the percentage of the group in the jury pool is less than this expected percentage by at least two standard deviations." Id. at 630. The aggregation of pools can be used when one pool has numbers too small for statistical analysis. Id. Once underrepresentation has been shown, the defendant must show what practice or practices caused the underrepresentation and they must be something other than run-of-the-mill jury management practices. Id. A policy or practice of excusing certain jurors might, however, permit a finding of systematic exclusion under the Iowa Constitution. Id. As with Veal, the Williams case was remanded to allow

the parties to develop additional record under the new standards. Id.

C. The remand hearing.

On August 5, 2020, the District Court held a hearing pursuant to the Iowa Supreme Court's order remanding the case to consider Veal's Sixth Amendment claim. (8/5/20 Tr. p. 1 L.1-25). The witnesses at the hearing discussed the jury pools for both Veal's trial in July 2017 and the year preceding his trial, changes to juror management procedures that took effect after Veal's trial, and the likely impacts of changes to juror management practices.

Tina Ganzeveld, the Clerk of Court and jury manager for Webster County, testified that during Veal's trial they used a statewide computer program that she assumed used an algorithm to randomly generate names for jury summons. (8/5/20 Tr. p. 8 L.1-p. 9 L.19, p. 23 L.16-24). Her office would print out the summons and place them in the mail. (8/5/20 Tr. p. 8 L.19-p. 9 L.1). When the summons were returned, the juror information was entered into the computer.

(8/5/20 Tr. p. 9 L.1-3). Prospective jurors would call the number on the summons and receive a message as to whether they needed to report for duty. (8/5/20 Tr. p. 9 L.24-p. 10 L.12).

At the time of Veal's trial, Ganzeveld's office would also send questionnaires to prospective jurors. (8/5/20 Tr. p. 10 L.13-18). When the questionnaires were returned, her office would enter the information into the same statewide system and would also keep the originals. (8/5/20 Tr. p. 10 L.19-p. 11 L.9). The questionnaires requested demographic information but race identification was optional. (8/5/20 Tr. p. 11 L.10-20).

Ganzeveld explained that the state system used to create jury pools changed in December 2018. (8/5/20 Tr. p. 12 L.2-p. 13 L.15). The system changed to an online format in which information regarding demographics was now required and no longer optional. (8/5/20 Tr. p. 12 L.2-p. 14 L.23). If someone does not respond to the summons, Ganzeveld's office now sends out not one reminder but two. (8/5/20 Tr. p. 15

L.3-p. 16 L.10). The reminders could be by text or email if the person selected those methods. (8/5/20 Tr. p. 16 L.14-23). Previously, if someone did not respond to the first letter, there was no follow-up. (8/5/20 Tr. p. 15 L.14-p. 16 L.5). Ganzeveld testified the new system automatically reassigns non-reporters to another day and the related policy does provide options for contempt of court proceedings. (8/5/20 Tr. p. 16 L.11-p. 18 L.12).

Mark Headlee, the IT director for the judicial branch, provided more details about the online system implemented in December 2018. (8/5/20 Tr. p. 120 L.2-14, p. 123 L.21-p. 124 L.19). Headlee's office maintained the master file for jury management software using source lists from voter registration records and Department of Transportation licenses and identifications, which were updated annually. (8/5/20 Tr. p. 120 L.10-p. 121 L.20, p. 125 L.13-15). The judicial branch had been hoping to add Department of Revenue records as a third source list, but such a change

would require legislative action that had yet to occur. (8/5/20 Tr. p. 125 L.24-p. 126 L.21).

To create a jury pool, the jury manager would type the number of persons needed for a jury pool into the system, and the computer would do a random drawing of eligible jurors. (8/5/20 Tr. p. 122 L.24-p. 123 L.3). Jurors would then get a postcard and could go to a website to fill out their information. (8/5/20 Tr. p. 123 L.4-p. 124 L.5). As of December 2018, race identification was no longer an optional part of the questionnaire. (8/5/20 Tr. p. 124 L.12-p. 125 L.5, p. 129 L.1-p. 130 L.2).

Todd Nuccio, the State Court Administrator with the Iowa Judicial Branch, testified regarding the enactment of the new policies in 2018. (8/5/20 Tr. p. 102 L.1-21). One of the stated goals of the changes was to improve minority representation in jury pools in light of the Court's decisions in Lilly, Veal, and Williams. (8/5/20 Tr. p. 106 L.8-p. 107 L.25).

The changes made in 2018 included allowing people to add themselves to the master jury list, using postcard

summons in lieu of a more detailed letter, using a website to complete questionnaires, requiring cell phone numbers and email addresses to permit electronic reminders, and requiring race identification based on census categories on the questionnaires. (8/5/20 Tr. p. 108 L.1-p. 112 L.20, p. 113 L.23-p. 114 L.5, p. 116 L.18-p. 117 L.9). The policy changes also included a uniform approach to failures to appear, which included reminders, rescheduling, and contempts. (8/5/20 Tr. p. 110 L.16-25). Nuccio was waiting on a report on the resulting composition of jury panels, but he testified that the anecdotal information he had received from jury managers indicated the changes were working. (8/5/20 Tr. p. 112 L.24-p. 113 L.16).

Ganzeveld recalled that for Veal's trial in July 2017 they called in three jury pools and had 153 prospective jurors who reported. (8/5/20 Tr. p. 21 L.19-p. 22 L.3). She did not recall how many of the 153 who reported were African-American. (8/5/20 Tr. p. 22 L.4-9).

Statistical consultant Grace Zalenski testified regarding her analysis of the racial representativeness of Veal's pool and the jury pools for the year before his trial. (8/5/20 Tr. p. 34 L.8-25, p. 35 L.19-p. 36 L.7). Her analysis involved the use of z-scores – numbers that reflect how much the population proportion deviated from expected values – and their corresponding p-values, which give the percentage likelihood that a randomly selected jury pool would be equally over- or under-representative. (8/5/20 Tr. p. 36 L.8-p. 38 L.3).

Zalenski testified regarding several exhibits that tracked the racial composition of the various pools using percentages, z-scores, and p-values. (Ex. VR-A, VR-B, VR-C, VR-D, VR-E, VR-F)(App. pp. 48-53). Three of the exhibits assumed the exclusion of two African-American jurors who were excused due to felony convictions, while three other exhibits additionally excluded another African-American who was

struck by a peremptory challenge.[4] (8/5/20 Tr. p. 38 L.18-39 L.14, p. 46 L.9-15; Ex. VR-A, VR-B, VR-C; VR-D, VR-E, VR-F)(App. pp. 48-53). She also created a chart of the applicable juror-eligible population parameters in Webster County using the Citizen Voting Age Population from 2017, combining African-American mixed-race categories into one African-American category consistent with the juror questionnaire categories, and subtracting the Fort Dodge Correctional Facility population from the relevant categories. (8/5/20 Tr. p. 61 L.10-23, p. 73 L.21-p. 76 L.17; Ex. VR-M) (App. p. 57).

Zalenski testified that five of the 153 prospective jurors called for Veal's trial were African-American, making African-Americans 3.27 percent of Veal's pool. (8/5/20 Tr. p. 77 L.10-17). She calculated the expected percentage of African-Americans in Webster County's juror-eligible population at

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4. Veal had challenged the peremptory strike of the third juror on direct appeal as a Batson violation. State v. Veal, 930 N.W.2d 319, 332-34 (Iowa 2019). The Iowa Supreme Court upheld the strike, therefore Veal does not include the exclusion of this juror in his analysis in this appeal. Id. at 334.

3.02 percent, making Veal's pool facially representative of African-Americans. (8/5/20 Tr. p. 77 L.18-p. 78 L.4, p. 155 L.11-p. 156 L.3).

When the two felony-excused African-American jurors were excluded from the jury pool, however, the ratio reduced to three African-Americans out of 151 jurors, or 1.99 percent of the total. (8/5/20 Tr. p. 38 L.15-p. 40 L.4; Ex. VR-A Line 19)(App. p. 48). The z-score in that case was -0.745, indicating underrepresentation, with a p-value of 0.456, indicating a probability of 45 percent. (8/5/20 Tr. p. 40 L.21-p. 41 L.8, p. 43 L.11-p. 44 L.11; Ex. VR-B Line 19; Ex. VR-C Line 19)(App. pp. 49-50).

When Zalenski looked at the average z-score for African-Americans in all 37 pools over the course of the year, she came up with a z-score of -0.58, indicating a consistent pattern of under-representation. (8/5/20 Tr. p. 41 L.14-p. 43 L.3, p. 45 L.14-23; Ex. VR-B Line 39)(App. p. 49). She developed a graph with bell curves based on the normal distribution, sample distribution mapped to the normal curve,

and the sample distribution calculated from the data for the 37 pools. (8/5/20 Tr. p. 46 L.20-p. 53 L.1; Ex. VR-H)(App. p. 54). The sample for the 37 pools was skewed to the left indicating underrepresentation. (8/5/20 Tr. p. 49 L.8-21). More specifically, she explained, the population percentage of African-Americans was small enough that even having no African-Americans on any of the pools would still result in a z-score of only -1.5, and could never reach -2. (8/5/20 Tr. p. 49 L.8-p. 50 L.10, p. 62 L.14-p. 63 L.25, p. 92 L.13-p. 93 L.9). Her calculations revealed there was a 0.011 percent chance of an unbiased sample creating the same degree of underrepresentation, indicating there was some bias in the system causing the disparity. (8/5/20 Tr. p. 53 L.8-p. 58 L.12; Ex. VR-K)(App. p. 56).

Zalenski also did similar calculations for Hispanics in Veal's jury pool and the remaining pools. Veal had no Hispanics in his pool, resulting in a z-score of -1.947 with a p-value of 0.052. (8/5/20 Tr. p. 41 L.9-13, p. 156 L.4-11; Ex. VR-A Line 19; Ex. VR-B Line 19; Ex. VR-C Line 19)(App. pp.

48-50). Zalenski referred to this as a "significant underrepresentation." (8/5/20 Tr. p. 41 L.9-13). For all pools, Hispanic representation had an average z-score of -0.37. (Ex. VR-B Line 19)(App. p. 49). The related bell curve graph also showed the sample curve based on the pool data was shifted to the left. (Ex. VR-J)(App. p. 55). Zalenski testified that p-value of all pools of 0.01234 indicated there was only a 1.2 percent chance the pattern of under-representation of Hispanics in the pools was due to random variation and not bias. (8/5/20 Tr. p. 58 L.18-p. 59 L.8, p. 156 L.12-p. 157 L.2).

Zalenski emphasized that one needs to look at both the individual pool and pools over time to determine whether there is systemic under-representation. (8/5/20 Tr. p. 97 L.7-p. 98 L.9). She explained that we should expect to have random variations in pools, but that the data was skewed against minorities enough to say with confidence it was not random. (8/5/20 Tr. p. 153 L.25-p. 155 L.4). The overwhelming underrepresentation of African-Americans and Hispanics was

not explainable by random variation and there had to be an extraneous factor at work. (8/5/20 Tr. p. 154 L.23-p. 155 L.10).

Mary Rose, an associate professor of sociology at the University of Texas-Austin, described her areas of expertise as jury decision-making, jury representation and participation, public views of the court system, and people's view of fairness and justice. (8/5/20 Tr. p. 232 L.10-p. 233 L.21). She authored several articles on jury representation and served as an expert in an Iowa case. (8/5/20 Tr. p. 234 L.13-20).

Based upon her research, Rose found underrepresentation of African-American and Latino persons in jury pools was a chronic feature in federal courts. (8/5/20 Tr. p. 234 L.21-p. 235 L.8). She identified several factors impacting underrepresentation, including felon disenfranchisement, lack of reminders, and lack of consequences for non-reporters. (8/5/20 Tr. p. 235 L.12-p. 236 L.15). Ideally, the jurisdiction should use more than

voter lists, summon randomly, and provide simple, postcard-like summons. (8/5/20 Tr. p. 235 L.16-p. 236 L.5).

Rose reviewed demographic reports for Webster County pools from 2017 and 2019 and noticed minority underrepresentation in the 2017 pools. (8/5/20 Tr. p. 236 L.16-p. 237 L.15). She noticed a change in minority representation between 2017 and 2019, which correlated with several changes adopted by Iowa courts at the end of 2018. (8/5/20 Tr. p. 237 L.20-p. 239 L.7). These changes included better attempts to contact non-responders and better record-keeping on race, and scholarship indicated such measures were likely to increase minority representation. (8/5/20 Tr. p. 238 L.4-p. 239 L.14).

Rose clarified she did not distinguish between a pattern of underrepresentation and systemic exclusion, as a pattern indicates consistency that likely results from how the system operates. (8/5/20 Tr. p. 241 L.6-14). She acknowledged research showing African-Americans were less willing to serve on juries as whites and inferred that could be because of their

more negative interactions with the legal system. (8/5/20 Tr. p. 242 L.13-p. 246 L.1). But she described a court's failure to create a means for handling those who ignore court orders to appear for service as a systemic problem, not simply an individual's choice. (8/5/20 Tr. p. 246 L.2-p. 247 L.23).

Rose noted Iowa's recent requirement for race identification and the resulting decrease in nonresponsiveness to that question. (8/5/20 Tr. p. 249 L.19-p. 252 L.1). At the same time, other research she had conducted showed attrition when people had to respond, with African-Americans having the lowest response rate. (8/5/20 Tr. p. 255 L.4-p. 257 L.14).

Rose recommended using sources including the Citizen Voting Age Population data from the American Community Survey, which is updated annually. (8/5/20 Tr. p. 260 L.3-p. 261 L.13). She also said courts should be summoning randomly, using more reminders and using more than just voter registration records as a source list. (8/5/20 Tr. p. 262 L.2-p. 263 L.18). She indicated that people often have misconceptions regarding jury service and additional

education can help people feel more comfortable with it. (8/5/20 Tr. p. 264 L.3-p. 265 L.13). Finally, she testified online questionnaires tend to increase participation across the board, but that the felon disenfranchisement rule may be keeping African-Americans from serving because there are more felons among African-Americans proportionally. (8/5/20 Tr. p. 266 L.2-24, p. 268 L.8-p.269 L.9).

The District Court requested the parties file proposed rulings rather than arguments. (8/5/20 Tr. p. 272 L.11-p. 273 L.14). In his proposed ruling, Veal identified himself, African-Americans, and Hispanics as members of distinctive groups. (Proposed Ruling p. 1)(App. p. 58). He claimed he had properly preserved a challenge under the Iowa Constitution and therefore addressed the claim of underrepresentation using a one standard deviation analysis. (Proposed Ruling p. 3)(App. p. 60).

Veal contended that potential jurors with felony convictions should not be included in the pool due to their inability to serve pursuant to Iowa Rule of Criminal Procedure

2.18(5)(a). (Proposed Ruling p. 3)(App. p. 60). Veal also excluded an African-American that was struck by the State through a peremptory challenge. (Proposed Ruling p. 3)(App. p. 60). Based upon these revised pool figures, the number of African-Americans in Veal's actual pool was 1.214 standard deviations below expectations. (Proposed Ruling p. 3)(App. p. 60).

Veal reiterated Lilly's holding that jury management practices can amount to systematic exclusion for purposes of the third Duren prong. (Proposed Ruling p. 3)(App. p. 60). In addition to his previous statements regarding exclusion of convicted felons, Veal attributed jury management system changes adopted in December 2018 with increasing minority representation, which was one of the stated purposes of the changes. (Proposed Ruling p. 4)(App. p. 61).

The State's proposed order asserted that Veal had failed to preserve either a challenge under the Iowa Constitution or a challenge to Hispanic representation and that those issues

therefore exceeded the scope of the remand order. (2/3/21 Proposed Order pp. 5-10)(App. pp. 103-108).

The State conceded African-Americans were a distinctive group under the first Duren prong. (2/3/21 Proposed Order p. 11)(App. p. 109). To calculate representation, the State indicated it did not matter whether the District Court used the State's offered percentages of 2.4% or 2.6% of juror-eligible African-Americans in the county population, or Zalenski's calculation of 3.02%. (2/3/21 Proposed Order p. 12)(App. p. 110). Either way, Veal's overall pool had 5 African-Americans out of 153 potential jurors or 3.27%, which was over-representative. (2/3/21 Proposed Order p. 13) (App. p. 111).

The State rejected Veal's attempt to exclude the black juror who was struck through a peremptory challenge, as Veal's Batson challenge was rejected on appeal. (2/3/21 Proposed Order p. 14)(App. p. 112). The State faulted Veal for not providing information regarding felon exclusions and peremptory strikes from any jury pool other than his own. (2/3/21 Proposed Order p. 15)(App. p. 113). The State

offered its own calculations showing that the resulting standard deviations were less than that required under either the state or federal constitutions. (2/3/21 Proposed Order pp. 15-17)(App. pp. 113-115). The State contended both an aggregate analysis and Zalenski's meta-analysis was unnecessary because Veal's own pool was representative. (2/3/21 Proposed Order pp. 17-18)(App. pp. 115-116).

With respect to systematic exclusion, the State asserted Veal had to identify specific practices that caused underrepresentation and could not simply rely on a "laundry list of factors." (2/3/21 Proposed Order pp. 19-21(App. pp. 117-119). The State acknowledged that courts were required to excuse convicted felons when challenged for cause, but faulted Veal for not establishing that blacks in Webster County were more likely to have felony convictions. (2/3/21 Proposed Order pp. 21-23)(App. pp. 119-121). The State also claimed felon disenfranchisement was common among the states and a reasonable exclusion. (2/3/21 Proposed Order pp. 23-24)(App. pp. 121-122). Nor had Veal shown the policy

changes actually increased minority representation, since racial identification was not required on questionnaires prior to the change. (2/3/21 Proposed Order pp. 25-27)(App. pp. 123-125). The State suggested any such increase was likely due to a multitude of factors, not just the jury management changes. (2/3/21 Proposed Order pp. 28-36)(App. pp. 126-134).

The District Court adopted the State's position. The court began by recognizing the Iowa Supreme Court had ruled that Veal's Iowa constitutional claim had not been preserved, so the District Court declined to address it. (Order Following Supreme Court Remand p. 4)(App. p. 77). The court also determined Veal had not preserved a challenge to the representation of Hispanics at trial, and that any such challenge also exceeded the scope of the Iowa Supreme Court's remand order. (Order Following Supreme Court Remand p. 4)(App. p. 77).

The District Court found African-Americans were a distinctive group under the first prong of the Duren/Plain test.

(Order Following Supreme Court Remand p. 5)(App. p. 77). As for underrepresentation under the second prong, the court determined that the percentage of African-Americans in Veal's jury pool – 3.27 percent – exceeded Zalenski's jury-eligible population estimate of 3.02 percent and the State's varying estimates between 2.4 percent and 2.6 percent. (Order Following Supreme Court Remand pp. 6-7)(App. pp. 79-80). Because the five African-Americans in Veal's pool exceeded what one would expect from their percentage of the population, the court determined Veal had not established a fair cross-section claim and there was no need to aggregate data. (Order Following Supreme Court Remand pp. 7, 10) (App. pp. 80, 83).

Recognizing Veal was asking to exclude the three African-American jurors who were removed from his pool, the District Court determined he had provided no reason for doing so. (Order Following Supreme Court Remand pp. 7-8)(App. pp. 80-81). The court recited the Iowa Supreme Court's denial of Veal's Batson challenge, and relied on its own calculations

showing even an aggregated analysis based on Zalenski's population percentages would not result in sufficient underrepresentation. (Order Following Supreme Court Remand pp. 8-9)(App. pp. 81-82).

Finally, the court determined Veal had failed to establish any underrepresentation was caused by systematic exclusion. (Order Following Supreme Court Remand pp. 13-23)(App. pp. 86-96). The court found that Webster County was already doing three of the measures Rose suggested for improving minority representation at the time of Veal's trial. (Order Following Supreme Court Remand pp. 12-13)(App. pp. 85-86). With respect to the issue of felon disenfranchisement and its impact on African-American representation, the court agreed with Veal that judges had no discretion to allow convicted felons to serve on juries when challenged, but contended Veal had failed to show how the rule impacted African-American representation on Webster County juries. (Order Following Supreme Court Remand pp. 13-16)(App. pp. 86-89). Furthermore, the court determined the rule was commonplace

and served a significant government interest. (Order Following Supreme Court Remand pp. 14-16)(App. pp. 87-89).

To the extent Veal argued recent changes in jury management policies had increased minority representation, the District Court found a failure of proof. (Order Following Supreme Court Remand pp. 16-20)(App. pp. 89-93). Given that race identification was optional prior to the 2018 changes, the court considered the demographic information obtained prior to the change to be "incomplete." (Order Following Supreme Court Remand p. 16)(App. p. 89). Even if minority representation had increased after the change, the court held, Veal failed to establish the lack of such procedures prior to his trial caused exclusion. (Order Following Supreme Court Remand pp. 17-20)(App. pp. 90-93). Correlation did not establish causation. (Order Following Supreme Court Remand p. 20)(App. p. 93).

Finding Veal failed to establish the second and third Duren/Plain prongs for a claimed violation of the Sixth Amendment, the District Court denied relief. (Order

Following Supreme Court Remand p. 23)(App. p. 96). The District Court erred.

D. The District Court improperly applied the Lilly and Veal analyses, and should have excluded convicted felons from the number of eligible jurors.

To establish a Sixth Amendment violation under the Duren/Plain framework, a defendant must show:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

State v. Plain, 898 N.W.2d 801, 821 (Iowa 2017)(quoting Duren v. Missouri, 439 U.S. 357, 364 (1979)). The original appellate decision in Veal explained how to do the analysis. State v. Veal, 930 N.W.2d 319, 328-30 (Iowa 2019). The District Court failed to follow the Iowa Supreme Court's guidance.

1. Distinctive group

In this case, Veal is an African-American and the State conceded African-Americans were a distinctive group. State v. Veal, 930 N.W.2d 319, 324 (Iowa 2019). (2/3/21 Proposed Order p. 11)(App. p. 108). Hispanics are also a distinctive group. United States v. Weaver, 267 F.3d 231, 240 (3rd Cir. 2001).

It does not matter that the defendant is not a member of the particular distinctive group that is alleged to have been excluded. Taylor v. Louisiana, 419 U.S. 522, 526 (1975). All defendants have a constitutional right to jury venire drawn from a fair cross-section of the community. Id. This means that any defendant – regardless of his or her race – can challenge the underrepresentation of a distinction group in their jury pool.

2. Underrepresentation

In examining whether a distinctive group is underrepresented among jury pools, courts are to first consider whether the percentage of a minority group in the

defendant's pool is less than the percentage of the minority group in the population using the most recently available census data. State v. Lilly, 930 N.W.2d 293, 304 (Iowa 2019); State v. Veal, 930 N.W.2d 319, 329 (Iowa 2019). Only jury-eligible persons are to be considered, so persons under the age of 18, noncitizens, and those who are incarcerated must be removed from the analysis. State v. Lilly, 930 N.W.2d 293, 304-05 (Iowa 2019); State v. Veal, 930 N.W.2d 319, 329 (Iowa 2019).

The District Court applied a standard deviation analysis to Veal's pool in determining whether African-Americans were underrepresented in his pool. (Order Following Supreme Court Remand pp. 8-9)(App. pp. 81-82). Veal respectfully suggests this is not what the Veal opinion directed. In its analysis, the Veal Court started with a simple comparison of the percentage of African-Americans in Veal's pool and the percentage of African-Americans in Webster County. State v. Veal, 930 N.W.2d 319, 329 (Iowa 2019). It did not conduct a standard deviation calculation in this initial step. The Court

conducted a standard deviation analysis on the aggregate pools. Id. This approach is consistent with the Court's statement that one pool should not be considered in isolation. State v. Lilly, 930 N.W.2d 293, 305 (Iowa 2019). Veal follows the Court's approach in this brief.

a. African-Americans

The parties provided differing percentages for the number of jury-eligible African-Americans in Webster County. Zalenski testified she used the Citizen Voting Age Population from 2017, combining African-American mixed-race categories into one African-American category consistent with the juror questionnaire categories, and subtracted the Fort Dodge Correctional Facility population from the relevant categories. (8/5/20 Tr. p. 61 L.10-23, p. 73 L.21-p. 76 L.17; Ex. VR-M) (App. p. 57). She determined African-Americans made up 3.02 percent of the juror-eligible population. (8/5/20 Tr. p. 76 L.7-17; Ex. VR-M)(App. p. 57). The State did not present expert testimony, but claimed African-Americans comprised

anywhere from 2.396 percent to 2.612 percent of the juror-eligible population. (Pre-Hearing Brief p. 8)(App. p. 41).

Veal's initial jury pool had five African-Americans out of 153 potential jurors, or 3.27 percent. (8/5/20 Tr. p. 77 L.10-14). At first blush, this would appear higher than any of the juror-eligible African-American population percentages calculated by the parties. But 3.27 percent is not an accurate reflection of the percentage of African-American eligible jurors in Veal's pool.

Three of the original 153 potential jurors – including two African-Americans – were excused due to having felony convictions. (Trial Tr. Vol. 2 p. 61 L.5-p. 64 L.2, p. 216 L.21-p. 218 L.3; Trial Tr. Vol. 3 p. 11 L.11-p. 18 L.17). In 2017, convicted felons were not eligible for jury service. Iowa R. Crim. P. 2.18(5)(a) (2017). Where the juror's felony status is established, it would be an abuse of discretion for the court not to disqualify the juror. Cf. State v. Jonas, 904 N.W.2d 566, 571-75 (Iowa 2017)("we have long cautioned trial courts against allowing close issues to creep into the record and

threaten the validity of a criminal trial"). The District Court agreed that excusing potential jurors with felonies was mandatory. (Order Following Supreme Court Remand pp. 13-14)(App. pp. 86-87). A more detailed discussion of the felon-exclusion rule as it applies to this case is addressed in Subsection D(3)(b) below and incorporated by reference. In short, persons with felony convictions are jury ineligible and should be excluded from calculations derived from Veal's pool.

If all three felony-convicted potential jurors are excluded from Veal's pool, the proportion of African-Americans drops to three out of 150, or 2 percent.[5] This is lower than all of the population percentages offered by the parties.

Looking at aggregated data of pools over time, it is worth mentioning that the parties below did not use the same

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5. Zalenski calculated the felon-excused numbers by removing the two African Americans from the pool, leaving a ratio of three out of 151. (Ex. VR-A; Ex. VR-B)(App. pp. 48-49). If felony-excused persons are to be excluded, it would be appropriate to exclude all felony-excused jurors – including the Caucasian juror – which would leave a ratio of three out of 150.

aggregate analysis sanctioned by the Iowa Supreme Court in Veal. Zalenski conducted a meta-analysis for the 37 pools, calculating a z-score for each race in each pool and an average z-score for each race in all pools combined. (Ex. VR-B)(App. p. 49). In Veal, however, the Iowa Supreme Court did not look to each individual pool and average them out, but created a total number of jurors in the pools and calculated standard deviations using the total number of African-Americans in those aggregated pools. State v. Veal, 930 N.W.2d 319, 329 (Iowa 2019).

Using the approach discussed in Veal, in almost all conceivable scenarios presented by the parties African-Americans are underrepresented by more than two standard deviations.[6] The calculations for the aggregated data under different scenarios are:

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6. According to the Lilly Court, the probability of random chance creating a variance of two standard deviations in one direction would be 2.5 percent. See State v. Lilly, 930 N.W.2d 293, 304 (Iowa 2019)(discussing probabilities for one and two standard deviations).

1. African-Americans using Zalenski's 3.02% population from Ex. VR-M

Using Minus 2 AA[7]

Have 37 self-identified African Americans out of 2171 total, or 1.7%[8]

If African-Americans are 3.02% of eligible jurors in the county, we would expect 65.56 African-Americans, or 28 more than appeared

Standard deviation is the square root of (2171 x .0302 x .9698) = 7.9739

Difference is 3.51 standard deviations

Z-score is -28/7.9739 = -3.5114

Using Veal's full jury pool

Have 39 self-identified African-Americans out of 2174 total, or 1.8%

If African-Americans are 3.02% of eligible jurors in the county, would expect 65.65 African-Americans, or 26 more than appeared

Standard deviation is the square root of (2174 x .0302 x .9698) = 7.9794

Difference is 3.25 standard deviations

Z-score is -26/7.9794 = -3.2583

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7. For the calculations excluding two African-Americans for felony convictions, Veal has adjusted the number of total potential jurors in the aggregated pools from 2174 to 2171 to reflect the exclusion of all three convicted felons.

8. Exhibit VR-A did not provide a total number of persons for each race for the combined pools. In order to obtain the number of African-Americans in all pools, one must multiply the "size-race provided" numbers by the percentage of African-Americans for each of the 37 pools and then add the resulting number from each pool together.

2. African-Americans using the State's numbers

Population of 2.396% (Best case scenario for State)
For Minus 2AA

We would expect 52 African-Americans out of 2171 total jurors, or 15 more African-Americans than appeared

Standard deviation is the square root of (2171 x .02396 x .97604) = 7.125

Difference is 2.1 standard deviations

Z score is -15/7.125 = -2.1052

For Full Pools

We would still expect 52 African-Americans out of 2174 total jurors, or 13 more African-Americans than appeared

Standard deviation is the square root of (2174 x..02396 x .97604) = 7.130

Difference is 1.82 standard deviations

Z score is -13/7.130 = -1.8232

Population of 2.498% (Most likely scenario according to the State)
For Minus 2AA

We would expect 54 African-Americans out of 2171, or 17 more than appeared

Standard deviation is the square root of (2171 x .02498 x .97502) = 7.2716

Difference is 2.33 standard deviations

Z score is -17/7.2716 = -2.3378

For Full Pools

Would expect 54 African-Americans out of 2174, or 15 more than appeared

Standard deviation is the square root of (2174 x .02498 x .97502) = 7.2766

Difference is 2,06 standard deviations
Z score is -15/7.2766 = -2.0614

Population of 2.612% (Most favorable scenario for Veal according to the State)
For Minus 2AA
We would expect 56 African-Americans out of 2171, or 19 more than appeared
Standard deviation is the square root of (2171 x .02612 x .97388) = 7.4313
Difference is 2.55 standard deviations
Z score is -19/7.4313 = -2.556

For Full Pools
We would expect 56 African-Americans out of 2174, or 17 more than appeared
Standard deviation is the square root of (2174 x .02612 x .97388) = 7.4365
Difference is 2.28 standard deviations
Z score is -17/7.4365 = -2.2860

The appropriate calculations for both Veal's own pool and for the aggregated pools establish significant underrepresentation of African-Americans for purposes of the Sixth Amendment. Zalenski's meta-analysis corroborates these findings, detailing consistent underrepresentation of African-Americans in Webster County jury pools. (8/5/20 Tr. p. 41 L.14-p. 43 L.3, p. 45 L.14-23, p. 53 L.8-p. 58 L.12; Ex. VR-A; Ex. VR-B)(App. pp. 48-49).

b. Hispanics

Hispanics were also underrepresented in both Veal's pool and in the aggregated pools. Zalenski calculated the percentage of juror-eligible Hispanics in Webster County to be 2.44 percent. (Ex. VR-M)(App. p. 57). Using that number, one would expect to see at least three Hispanics out of the 153 persons in Veal's pool. There were no Hispanics in Veal's pool. (Ex. VR-A Line 19)(App. p. 48).

Looking to the aggregate analysis, there were 34 self-identified Hispanics out of 2,174 total potential jurors, or approximately 1.56 percent.[9] If 2.44 percent of the juror-eligible Webster County population were Hispanic, one would expect to see 53 Hispanics in the aggregated pools, or 19 more than the pools actually had. The standard deviation would be the square root of (2174 x .0244 x .9756), or 7.1938. Using

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9. Again, Exhibit VR-A did not provide a total number of persons for each race for the combined pools. In order to obtain the number of Hispanics in all pools, one must multiply the "size-race provided" numbers by the percentage of Hispanics for each of the 37 pools and then add the resulting number from each pool together.

the aggregate analysis, Hispanics were underrepresented by 2.64 standard deviations. The Z-score would be -19/7.1938 or -2.6411.

If Veal's felon-excused jurors were excluded, the calculations would use 2,171 total jurors, one would expect to see 52 Hispanics in the aggregated pools or 18 more than the pools actually contained. The standard deviation would be the square root of (2171 x .0244 x .9756) or 7.188. Hispanics were still underrepresented by 2.50 standard deviations. The Z-score would be -18/7.188 or -2.5041.

The appropriate calculations for both Veal's own pool and for the aggregated pools establish significant underrepresentation of Hispanics for purposes of the Sixth Amendment. Zalenski's meta-analysis corroborates these findings, detailing consistent underrepresentation of Hispanics in Webster County jury pools. (8/5/20 Tr. p. 41 L.9-13, p. 156 L.4-11, p. 58 L.18-p. 59 L.8, p. 156 L.12-p. 157 L.2; Ex. VR-A; Ex. VR-B)(App. pp. 48-49).

3. Systematic exclusion

The United States Supreme Court has been less than clear as to what constitutes "systematic exclusion" for purposes of the Sixth Amendment. In Duren v. Missouri, the Court held that Duren's "undisputed demonstration that a large discrepancy occurred not just occasionally but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized." Duren v. Missouri, 439 U.S. 357, 366 (1979). The Court also remarked that Duren had established where in the process the exclusion occurred – after they were summoned and were either allowed to request an exemption or presumed to have requested an exemption. Id. at 366-67. The Court found that Duren had established a prima facie claim of a fair cross-section violation. Id. at 367.

In the habeas case of Berghuis v. Smith, however, the Court appeared to say it had not set any particular standard for measuring underrepresentation or establishing systematic

exclusion. Berghuis v. Smith, 559 U.S. 314, 319 (2010). First, the Court noted that "neither Duren nor any other decision of this Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools." Id. at 329. Second, when Smith pointed to a variety of factors that might lead to underrepresentation, the Court noted its precedent had not "clearly established" a prima facie claim of systematic exclusion could be proven through such factors.[10] Id. at 332-33. Because the Michigan Supreme Court decision did not involve an unreasonable application of federal law, the Sixth Circuit erred in reversing it. Id. at 333.

In its assessment of the appropriate Sixth Amendment analysis, the Iowa Supreme Court held that "statistically significant disparities alone are not enough. Rather, the challenger must tie the disparity to a particular practice."

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10. In a footnote, the Court also held it had "never 'clearly' decided, and have no need to consider here, whether the impact of social and economic factors can support a fair-cross-section claim." Berghuis v. Smith, 559 U.S. 314, 333 n.6 (2010).

State v. Lilly, 930 N.W.2d 293, 307 (Iowa 2019). For purposes of Article I Section 10, those practices could include "run-of-the-mill jury management practices" such as updating address lists, the granting of excuses, and the lack of enforcement of summons. Id. The Court did not believe these practices would qualify to establish systematic exclusion under the Sixth Amendment. State v. Veal, 930 N.W.2d 319, 329 (Iowa 2019)(citing Berghuis v. Smith, 559 U.S. 314, 332 (2010)).

The opinion in Berghuis must be read in conjunction with its context. Berghuis simply held that federal precedent did not "clearly establish" that merely "pointing to a host of factors that, individually or in combination, might contribute to a group's underrepresentation" was adequate to establish systematic exclusion. Berghuis v. Smith, 559 U.S. 314, 332-33 (2010). Berghuis did not hold that such factors were irrelevant or that they could never amount to systematic exclusion under the Sixth Amendment. Duren, meanwhile, held that a pattern of underrepresentation coupled with an

identification of practices leading to underrepresentation was adequate to support a fair-cross-section claim. Duren v. Missouri, 439 U.S. 357, 366 (1979).

Veal points to two factors that led to the exclusion of minority jurors in his case and in other Webster County cases: Jury management practices and the felon exclusion rule.

a. Jury management practices

In December 2018, various changes were made to the jury management practices used statewide with the stated goal of improving minority representation in light of Lilly, Veal, and Williams. (8/5/20 Tr. p. 106 L.8-p. 107 L.25). The changes included allowing people to add themselves to the master jury list, using postcard summons in lieu of a more detailed letter, using a website to complete questionnaires, requiring cell phone numbers and email addresses to permit electronic reminders, and requiring race identification based on census categories on the questionnaires. (8/5/20 Tr. p. 12 L.2-p. 14 L.23, p. 108 L.1-p. 112 L.20, p. 113 L.23-p. 114 L.5, p. 116 L.18-p. 117 L.9, p. 123 L.4-p. 125 L.5). The policy changes

also included a uniform approach to failures to appear, which included reminders, rescheduling, and contempts. (8/5/20 Tr. p. 110 L.16-25). State Court Administrator Todd Nuccio was waiting on a report on the resulting composition of jury panels, but he testified that the anecdotal information he had received from jury managers indicated the changes were working. (8/5/20 Tr. p. 112 L.24-p. 113 L.16).

These practices were not in place when Veal's trial occurred in July 2017. (8/5/20 Tr. p. 12 L.2-p. 13 L.15). Instead, the Webster County Clerk of District Court used a statewide computer program to randomly generate names for jury summons. (8/5/20 Tr. p. 8 L.1-p. 9 L.19, p. 23 L.16-24). The office printed out both a summons and a questionnaire and placed them in the mail. (8/5/20 Tr. p. 8 L.19-p. 9 L.1, p. 10 L.13-18). The questionnaires requested demographic information but did not require respondents to identify their race. (8/5/20 Tr. p. 11 L.10-20).

Under the new system, the clerk's office sends out not one reminder but two if someone does not respond to the

summons and the reminders could be by text or email. (8/5/20 Tr. p. 15 L.3-p. 16 L.10). Previously, if someone did not respond to the first letter, there was no follow-up. (8/5/20 Tr. p. 15 L.14-p. 16 L.5). The new system automatically reassigns non-reporters to another day and the related policy does provide options for contempt of court proceedings. (8/5/20 Tr. p. 16 L.11-p. 18 L.12).

Mary Rose, an associate professor of sociology at the University of Texas-Austin, testified that underrepresentation of African-American and Latino persons in jury pools was a chronic feature in federal courts. (8/5/20 Tr. p. 234 L.21-p. 235 L.8). She identified several factors impacting underrepresentation, including felon disenfranchisement, lack of reminders, and lack of consequences for non-reporters. (8/5/20 Tr. p. 235 L.12-p. 236 L.15).

Rose reviewed demographic reports for Webster County pools from 2017 and 2019 and noticed minority underrepresentation in the 2017 pools. (8/5/20 Tr. p. 236 L.16-p. 237 L.15). She noticed a change in minority

representation between 2017 and 2019, which correlated with the changes adopted by Iowa courts at the end of 2018. (8/5/20 Tr. p. 237 L.20-p. 239 L.7). These changes included better attempts to contact non-responders and better record-keeping on race, and scholarship indicated such measures were likely to increase minority representation. (8/5/20 Tr. p. 238 L.4-p. 239 L.14).

Rose clarified she did not distinguish between a pattern of underrepresentation and systemic exclusion, as a pattern indicates consistency that likely results from how the system operates. (8/5/20 Tr. p. 241 L.6-14). While she acknowledged research showing African-Americans were less willing to serve on juries as whites, she described a court's failure to create a means for handling those who ignore court orders to appear for service as a systemic problem, not simply an individual's choice. (8/5/20 Tr. p. 242 L.2-p. 247 L.23).

Rose recognized Iowa's recent requirement for race identification and the resulting decrease in nonresponsiveness to that question. (8/5/20 Tr. p. 249 L.19-p. 251 L.1). Rose

said courts should be summoning randomly, using more reminders, and using more than just voter registration records as a source list. (8/5/20 Tr. p. 262 L.2-p. 263 L.18). She testified online questionnaires tend to increase participation across the board. (8/5/20 Tr. p. p. 268 L.8-p. 269 L.9).

The District Court found this evidence to be insufficient to establish systematic exclusion. Given that race identification was optional prior to the 2018 changes, the court considered the demographic information obtained prior to the change to be "incomplete." (Order Following Supreme Court Remand p. 16)(App. p. 89). Even if minority representation had increased after the change, the court held, Veal failed to establish the lack of such procedures prior to his trial caused exclusion. (Order Following Supreme Court Remand pp. 17-20)(App. pp. 90-93). Correlation did not establish causation. (Order Following Supreme Court Remand p. 20)(App. p. 93).

While Veal agrees correlation may not always equal causation, there is more than simply correlation in this record.

The changes adopted in 2018 were the type of changes likely to increase minority representation. One of the purposes of adopting the changes was to increase minority representation in light of Lilly, Veal, and Williams. (8/5/20 Tr. p. 106 L.8-p. 107 L.25). It is hardly a leap of logic to suggest that changes that were specifically designed to increase minority representation – changes that have been shown to increase participation elsewhere – would actually result in increases in minority representation. It is much more speculative to suggest – as the District Court did – that the increase in participation was due to some amorphous "social conditions evolv[ing] over time." (Order Following Supreme Court Remand p. 20)(App. p. 93).

Furthermore, while a defendant must identify where in the system minority jurors are being excluded, the State is not excused from its obligations by referring to socioeconomic factors outside of the court's control. (Order Following Supreme Court Remand pp. 18-20)(App. pp. 91-93). The

Iowa Supreme Court has adopted the position of expert Paula Hannaford-Agor:

> Although the socioeconomic factors that contribute to minority underrepresentation in the jury pool do not systematically exclude distinctive groups, the failure of courts to mitigate the underrepresentation through effective jury system practices is itself a form of systematic exclusion.

State v. Lilly, 930 N.W.2d 293, 307 (Iowa 2019). Improved attempts to address nonresponsiveness – using simpler postcard summons, providing online access, sending additional reminders – are likely to address some of these socioeconomic concerns and increase minority representation. (8/5/20 Tr. p. 235 L.12-236 L.15, p. 268 L.8 -p. 270 L.16). This can also include use of the U.S. Postal Service's National Change of Address database to reduce the occurrence of "undeliverables." Paula Hannaford-Agor, Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded, 59 Drake L. Rev. 761, 782-83 (Spring 2011).

Finally, the District Court's expressed concern over the lack of record-keeping on racial identification prior to 2017 is understandable, but not of Veal's making. (Order Following Supreme Court Remand p. 16)(App. p. 89). There is only one entity that could have required potential jurors to identify their race prior to 2018 – the court system. Veal should not be faulted for not providing the race of every single juror in all 37 pools when he had no ability, let alone obligation, to obtain the information. To the extent the District Court placed the burden on Veal to provide such information, one must recognize Veal's inability to do so is a creation of the courts' failure to keep such records. It would seem odd to find Veal has not proven systematic exclusion when it is the system that hinders his ability to do so. Cf. State v. Plain, 898 N.W.2d 801 (Iowa 2017)("the constitutional fair cross-section purpose alone is sufficient to require access to the information necessary to prove a prima facie case).

b. The felon exclusion rule

In State v. Williams, the Iowa Supreme Court made the unremarkable statement that "A policy or practice relating to excusing jurors might amount to systematic exclusion." State v. Williams, 929 N.W.2d 621, 630 (Iowa 2019). It should go without saying that if there is a "systematic" cause of underrepresentation in juries, some practice or policy "of the system" must be causing it. One such policy or practice is the felon exclusion rule.

> Forty-nine states, the District of Columbia, and the federal government statutorily restrict convicted felons' eligibility for jury service. In twenty-eight jurisdictions, such restrictions are permanent, banning convicted felons from jury service for life. Thirteen jurisdictions bar convicted felons from jury service until the full completion of their sentence, notably disqualifying individuals serving felony-parole and felony-probation. Eight jurisdictions enforce hybrid regulations that may incorporate penal status, charge category, type of jury proceeding, and/or a term of years. And finally, two jurisdictions recognize lifetime for-cause challenges, permitting a trial judge to dismiss a prospective juror from the venire solely on the basis of a felony conviction. Maine is the only U.S. jurisdiction that places no restriction on a convicted felon's opportunity to serve as a juror.

James M. Binnall, Felon-Jurors In Vacationland: A Field Study Of Transformative Civic Engagement In Maine, 71 Me. L. Rev. 71, 73 (2018).[11]

In 2017, the Iowa Rules of Criminal Procedure provided that a potential juror could be challenged and disqualified if the juror had "a previous conviction … of a felony." Iowa R. Crim. P. 2.18(5)(a) (2017).[12] Where the juror's felony status is established, it would be an abuse of discretion for the court not to disqualify the juror. Cf. State v. Jonas, 904 N.W.2d 566, 571-75 (Iowa 2017)("we have long cautioned trial courts against allowing close issues to creep into the record and threaten the validity of a criminal trial"). The District Court

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11. Iowa and Illinois are the two states listed as having lifetime for-cause challenges. James M. Binnall, Felon-Jurors In Vacationland: A Field Study Of Transformative Civic Engagement In Maine, 71 Me. L. Rev. 71, 73 n.9 (2018).

12. Rule 2.18(5)(a) has since been amended to read:

2.18(5) Challenges for cause. A challenge for cause may be made by the state or defendant, and must distinctly specify the facts constituting the causes thereof. It may be made for any of the following causes:

a. A previous conviction of the juror of a felony unless it can be established through the juror's testimony or otherwise that the juror's rights of citizenship have been restored.

deemed a person's felon status to be a mandatory disqualification. (Order Following Supreme Court Remand pp. 13-14)(App. pp. 86-87).

Professor Rose testified the felon disenfranchisement rule may be keeping African-Americans from serving because there are more felons among African-Americans proportionally. (8/5/20 Tr. p. 266 L.2-24). The evidence bears her out.

Although African-Americans make up 4 percent of Iowa's population, they comprise approximately 25 percent of Iowa's prison population. The State Data Center of Iowa & the Commission on the Status of African-Americans, African-Americans in Iowa: 2020 (Feb. 2020), available at https://www.iowadatacenter.org/Publications/aaprofile2020.pdf. This represents 1.7 percent of all African-Americans in Iowa. We Are Iowa, VERIFY: Rate Of Incarceration Highest Among Black Iowans, (June 3, 2020), available at https://www.weareiowa.com/article/news/verify/verify-iowa-incarceration-rates-by-race-african-american-black-hispanic-

jail/524-62eb1e74-68f7-4dc6-ac49-aa6b7071163f. The Iowa Supreme Court has acknowledged the scope of the problem:

> The data evidencing the impact of racially unrepresentative juries on case outcomes are especially troubling given that Iowa ranks worst in the nation for the percentage of our prison population that is African-American (more than 25%), while African-Americans represent just 3.3% of the state's population. Troubling, too, is the fact that African-Americans in Iowa are ten times more likely to be arrested than persons of other races; and Iowa ranks third worst in the nation for our incarceration rate for black men (9.4%).

State v. Plain, 898 N.W.2d 801, 826 (Iowa 2017)(internal citations omitted).

To understand the scope of the felon exclusion rule, however, it is not adequate to look simply at the prison population at a given time. Anyone with a previous felony conviction is disqualified from serving on a jury regardless of their incarceration or supervision status or whether their citizenship rights were otherwise restored. Iowa R. Crim P. 2.18(5)(a) (2017). Nationally, only about one-fifth of the correctional population was in prison – the remainder were on some variation of supervision. The Sentencing Project, 6

Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016, available at https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2016/ (last viewed May 11, 2021). This does not account for those convicted felons who have already discharged their sentences.

A 2017 study that reviewed state and national numbers on both incarcerated and non-incarcerated felons in the United States estimated that 3 percent of the total U.S. adult population and 15 percent of the African-American adult male population had been to prison, while people with felony convictions accounted for 8 percent of all adults and 33 percent of the African-American adult male population. Sarah K.S. Shannon, et al., The Growth, Scope, and Spatial Distribution of People With Felony Records in the United States, 1948–2010, 54 Demography 1795, 1814 (2017).

A 2011 study of the felon exclusion rule in Georgia found 14 percent of African-American adults were excluded from jury

service due to their felon status. Darren Wheelock, A Jury of One's "Peers": Felon Jury Exclusion and Racial Inequality in Georgia Courts, 32 Justice Sys. J. 335, 347 (2011). There were higher rates of felon exclusion in counties that had higher African-Americans populations, which was not surprising given that African-Americans were more likely to have felony convictions. Id. at 344. Yet some of the highest rates of exclusion were found in rural counties with relatively low African-American populations – a trend the authors attributed to the poverty level and African-Americans' proportion of the population in those counties. Id. at 347, 350-51. Notably, "[o]ver half of African-American men in certain counties are disqualified from jury service solely due to their felon status." Id. at 352.

Similar numbers were reflected in Veal's jury pool. Of the five African-American jurors who responded to the summons, two were excused for being convicted felons. The felon exclusion rule reduced the representation of African Americans from 3.27 percent of the pool to 2 percent of the

pool, well under their population percentage of 3.02 percent. (Ex. VR-M)(App. p. 57).

The impacts of the felon exclusion rule – both on African-Americans directly and the judicial system and community as whole -- are significant. The felon exclusion rule can serve as a tool for racially homogenizing juries. See Darren Wheelock, A Jury of One's "Peers": Felon Jury Exclusion and Racial Inequality in Georgia Courts, 32 Justice Sys. J. 335, 352-53 (2011)(discussing lack of eligible African-Americans to serve on juries). Such whitewashing is directly contrary to United States Supreme Court's stated purpose of the fair cross-section requirement:

> The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. Duncan v. Louisiana, 391 U.S., at 155—156, 88 S.Ct., at 1450—1451. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent

> with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.

Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

Furthermore, as Darren Wheelock points out:

> This work shows that felon jury exclusion can have implications for broader patterns of racial inequality in civic engagement. Many minority groups continue to be underrepresented across domains of civic engagement, leading to disparities in juries, the electorate, and possibly even elected office. Furthermore, there is little to no resistance to felon-jury-exclusion policies (and collateral consequences more generally) despite strong preliminary evidence that they have an important and significant impact on racial minorities. The ripple effects of felon jury exclusion could act as a feedback loop back into the criminal justice system, whereby inequalities in the jury-selection system ultimately lead to greater levels of racial inequality throughout the criminal justice system itself.

Darren Wheelock, A Jury of One's "Peers": Felon Jury Exclusion and Racial Inequality in Georgia Courts, 32 Justice Sys. J. 335, 353-54 (2011).

The Iowa Supreme Court has expressly recognized the broad impacts of excluding African-Americans from jury

service. In State v. Plain, the Court cited to empirical research showing "having just one person of color on an otherwise all-white jury can reduce disparate rates of convictions between black and white defendants." State v. Plain, 898 N.W.2d 801, 825-26 (Iowa 2017). The Court referred to a study of more than 700 criminal trials occurring over a 10-year period finding juries with at least one African-American juror convicted whites and blacks at equal rates, while all-white juries convicted blacks 81 percent of the time and whites 66 percent of the time. Id. at 826 (citing Shamena Anwar, et al., The Impact of Jury Race in Criminal Trials, 127 Q.J. Econ. 1017, 1027–28, 1032 (2012)).

Regardless of the disproportionate impact of the felon exclusion rule on African-Americans and its impacts more broadly, the District Court found the rule was justified by the significant state and judicial interest in "protect[ing] the probity of the petit jury and assur[ing] impartiality in deliberations and verdict. (Order Following Supreme Court Remand p. 15)(App. p. 88). Notably, the Duren Court rejected

any notion that the right to a jury comprised of a fair cross-section of the community could be overcome by "mere rationality." Duren v. Missouri, 439 U.S. 357, 367 (1979). Rather, the significant state interest alleged must be "manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group." Id. at 367-68.

The District Court also described the felon exclusion rule as "commonplace throughout the country." (Order Following Supreme Court Remand p. 14)(App. p. 87). Yet the Iowa Supreme Court has stated "If a practice that leads to systematic underrepresentation of a distinctive group in jury pools can be identified and corrected, there is no reason to shield that practice from scrutiny just because it is relatively commonplace." State v. Lilly, 930 N.W.2d 293, 307-08 (Iowa 2019).

The purported justifications for the felon exclusion rule have been summarized by Professor James Binnall:

> Courts and lawmakers offer two justifications in support of these categorical felon-juror exclusions. The first alleges that convicted felons lack the character to perform the requisite duties of jury service. The second claims that felon-jurors would undermine the impartiality of a jury, arguing that convicted felons harbor an inherent bias, making each sympathetic to criminal defendants and adversarial toward prosecutorial agents. Taken together, the proffered justifications for felon-juror exclusion assume that citizens with a felonious criminal history pose a significant threat to the jury process.
>
> Yet, this purported threat lacks empirical support. Prior research focused on the character rationale for felon-juror exclusion demonstrates that convicted felons may actually enhance, rather than diminish, the deliberation process. Similarly, in studies of the inherent bias rationale, data demonstrates that felon-jurors pose no more of a threat to the impartiality of the jury than do other groups of eligible prospective jurors. Though few, these studies contradict the declared rationales for felon-juror exclusion statutes, ostensibly calling into question their necessity.

James M. Binnall, Felon-Jurors In Vacationland: A Field Study Of Transformative Civic Engagement In Maine, 71 Me. L. Rev. 71, 73-74 (2018).

Binnall examined data from a large-scale field study in Maine, which is the only state that places no limitations on a convicted felon's ability to serve as a juror. Id. at 73, 76. In

interviews with prospective and former felon-jurors, he found most participants considered jury participation as mitigating the stigma of their prior convictions and "delabeling." Id. at 89-90. It increased their self-esteem and gave them a sense of responsibility. Id. at 90. They referred to having seen both sides of the criminal justice system and believed it made them fairer to both sides and made it easier to judge credibility. Id. at 90-91. Contrary to concerns that former felons would side with the defense, the participants generally recounted a juror's role as hearing the evidence on both sides and making a judgment in line with the applicable law. Id. at 92-93. Both the former felons and court personnel believed jury participation was beneficial to integrating former felons back into society. Id. at 94-96.

It is worth noting that a blanket exclusion is not the only tool available to the court and the parties to address concerns of bias on the part of convicted felons. Voir dire is the process sanctioned by the courts to weed out bias amongst potential jurors. Skilling v. United States, 561 U.S. 358, 387

(2010) ("[T]he in-the-moment voir dire affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury service). See also State v. Jonas, 904 N.W.2d 566, 575 (Iowa 2017)(finding abuse of discretion in failing to disqualify juror who expressed anti-gay bias in voir dire). To the extent convicted felons are to be disqualified from jury service due to perceived biases among members of the group, then it stands to reason that other groups should likewise be disqualified from jury service due to the perceived biases of their members, including both law students and law enforcement officers. James M. Binnall, Cops and Convicts: An Exploratory Field Study of Jurymandering, 16 Ohio St. J. Crim. L. 221, 222, 232 (Fall 2018).

The proffered justifications for the felon exclusion rule do not meet the heightened Duren standard. Given the detrimental impacts upon African-American representation in juries and the resulting impacts on the criminal justice system and society as a whole, there is no significant state interest in adhering to a rule that undermines the constitutional

guarantee of a jury comprised of a fair cross-section of the community.

4. Summary

Defendant-Appellant Peter Veal has established that African-Americans and Hispanics were significantly underrepresented in his pool and aggregate pools. The exclusions were the result of systemic causes, including ineffective jury management practices and the felon exclusion rule. His right to a fair cross section under the Sixth Amendment to the United States Constitution has been violated.

CONCLUSION

Defendant-Appellant Peter Veal was denied his right to a jury comprised from a fair cross-section of the community under the Sixth Amendment to the United States Constitution. He respectfully requests this Court vacate his conviction, sentence, and judgment and remand his case to the District Court for a new trial.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $6.67, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

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) because:

[X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 13,569 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Theresa R. Wilson Dated: *7/27/21*

THERESA R. WILSON
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
twilson@spd.state.ia.us
appellatedefender@spd.state.ia.us