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 REPLY BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On the 4th day of August, 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.

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STATEMENT OF THE CASE

COMES NOW Defendant-Appellant Peter Veal, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's brief filed on July 19, 2021.

While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

ARGUMENT

I. Veal's claim that the felon exclusion rule should be considered a jury management practice for purposes of a challenge under the Sixth Amendment fair cross-section claim is properly before this Court. Likewise, the Court may consider legislative facts relevant to the felon exclusion rule in deciding this case.

A. Error has been preserved on Veal's claims regarding the felon exclusion rule.

The State suggests error was not preserved on Veal's claim felon-excused jurors should not be included in the fair cross-section analysis because he failed to object to their excusal prior to trial. State's Brief p. 40. The State's argument misses the point.

The question is not whether or not the District Court should have excused those jurors – once they were challenged by the State, their excusal was mandated by Iowa Rule of Criminal Procedure 2.18(5)(a) (2017). Veal is not challenging the substantive basis for the excusal but is instead arguing this policy or practice should be considered for its effect on the numerical analysis required for a Sixth Amendment claim. It is a distinction with a difference.

As it turns out – and as the State correctly recognizes – the District Court was entirely aware of the defense's argument when it was considering calling another panel with two African-American jurors who happened to have felony convictions:

> THE COURT: All right. Let -- let me add I -- that -- that's an interesting issue that I have -- I haven't talked about.
>
> Two of the African-American juror members did note on their questionnaire answers that they had prior felony convictions, and I don't know if both of those showed up here today or not.
>
> MR. BROWN: Both did, and both are on the initial panel.
>
> THE COURT: All right. My view -- *So*

> *the defense would argue they should not be included because they're not -- essentially not eligible jurors or they're not going to be picked in any criminal trial.*
>
> I think the idea of the jury pool operation is to cast a wide net and bring in people regardless of, you know, their -- you know, their age or background or circumstances. And -- and that's what the focus is, rather than, you know, a more narrow question of are they suitable to serve on this particular jury.

(Trial Tr. Vol. 2 p. 42 L.7-25)(emphasis added). State's Brief p. 40. The District Court's statement regarding Veal's position was likely based on Veal's aggregate analysis of Webster County jury pools he provided to the court, in which he remarked that four of the 35 African-American potential jurors were convicted felons and therefore ineligible to serve. (Trial Tr. p. 3 L.13-p. 6 L.20).

Furthermore, the Iowa Supreme Court's remand order envisioned additional record being made on potential exclusions. In State v. Lilly, the Iowa Supreme Court recognized its earlier decision in State v. Plain did not necessarily provide adequate guidance to counsel and courts on the requirements of a fair cross-section claim. State v.

Lilly, 930 N.W.2d 293, 301-02 (Iowa 2019). In addition to adopting a standard deviation analysis to examine underrepresentation, the Lilly Court addressed how to properly calculate the percentages of minority groups in a population so as to include only those eligible for jury service. Id. at 302-05. Finally, the Lilly Court acknowledged the U.S. Supreme Court's apparent disfavor of "run of the mill jury practices" as a basis for establishing systematic exclusion, but then took a different approach under the Iowa Constitution. Id. at 306-08 (citing Berghuis v. Smith, 559 U.S. 314, 332 (2010)). The Court remanded Lilly to allow the parties to make the appropriate record in light of the standards discussed in the Court's opinion. Id. at 308.

Likewise, the Iowa Supreme Court's initial opinion in Veal remanded Veal's case to provide additional development of the record in light of the standards identified in Lilly. State v. Veal, 930 N.W.2d 319, 330 (Iowa 2019). The Veal opinion noted the analysis would be somewhat different under the

Sixth Amendment – Veal would need to establish underrepresentation by two standard deviations and would have to identify some aspect of the system causing the underrepresentation outside of the "laundry list" of jury management practices. Id. at 329-330.

Veal did what the Iowa Supreme Court asked. He identified not just regular jury management practices he believed contributed to the underrepresentation of minorities in Webster County jury pools; he also identified a specific policy and practice of felon exclusion that contributed to the disparity. (Remand Tr. p. 5 L.20-23, p. 36 L.2-24; 8/27/20 Proposed Ruling p. 3)(App. p. 60). The District Court ruled upon his claim. (1/29/21 Order pp. 7-9, 13-16)(App. pp. 105-107, 111-114). The issue is properly before this Court. State v. Pickett, 671 N.W.2d 866, 869 (Iowa 2003)("Error preservation is important for two reasons: (1) affording the district court an 'opportunity to avoid or correct error'; and (2) providing the appellate court 'with an adequate record in

reviewing errors purportedly committed' by the district court.").

B. The court may properly consider legislative facts not presented below if helpful in analyzing the legal arguments made by the parties and amicus with respect to the felon exclusion rule.

When it comes to constitutional claims such as the Sixth Amendment right to a fair cross-section of the community in jury selection, the Iowa Supreme Court has recognized its inherent ability to consider legislative facts not otherwise presented in the District Court:

> Our law recognizes a distinction between "adjudicative" and "legislative" facts. Greenwood Manor v. Iowa Dep't of Pub. Health, 641 N.W.2d 823, 836 (Iowa 2002). Most often, judicial decision-making is predicated solely on a finding of facts relating to the parties and their particular circumstances. Id. These facts are referred to as "adjudicative" facts, see id., and the resolution of a dispute over these facts is done within the framework of a set of rules to determine the admissibility of evidence tending to prove such facts. See generally Iowa Rs. Evid. At times, however, judicial decision-making involves crafting rules of law based on social, economic, political, or scientific facts. See 2 John W. Strong, McCormick on Evidence § 328, at 369 (5th ed. 1999) [hereinafter McCormick on Evidence]. These facts

have been denominated as “legislative” facts and become relevant to judicial decision-making when courts are required to decide the constitutionality of a statute, among other occasions. Id. As a result, judicial decision-making in the context of constitutional issues can involve the “process of adapting law to a volatile social-political environment.” Id. at 370. Legislative facts are relevant in deciding these constitutional issues because courts must normally analyze “whether there exist circumstances which constitutionally either legitimate the exercise of legislative power or substantiate the rationality of the legislative product.” Id. In fact, the common role of legislative facts in constitutional cases has led to an alternative designation of legislative facts called “constitutional facts” to better describe those facts “which assist a court in forming a judgment on a question of constitutional law.” Kenneth C. Davis, An Approach to Problems of Evidence in the Administrative Process, 55 Harv. L.Rev. 364, 403 (1942).

Unlike adjudicative facts, legislative or constitutional facts “may be presented either formally or informally.” Welsh v. Branstad, 470 N.W.2d 644, 648 (Iowa 1991). There is no formalized set of rules governing a court's ability to consider legislative or constitutional facts. See Iowa R. Evid. 5.201 (applying rule governing judicial notice only to adjudicative facts); Fed.R.Evid. 201 advisory committee's note (“No rule deals with judicial notice of ‘legislative facts.’ ”). See generally City of Council Bluffs v. Cain, 342 N.W.2d 810, 816–17 (Iowa 1983) (McCormick, J., dissenting). Thus, constitutional facts are introduced into judicial decisions through

> independent research by judges and written briefs of the parties, as well as testimony of witnesses. See McCormick on Evidence at 381–84. Importantly, constitutional facts are not subject to the rules of evidence when presented by a party in the form of witness testimony. Conceptually, testimony relating to constitutional facts is only presented as authority for the legal decision the court is required to make, and it would be inconsistent to apply formal rules of evidence to facts in the form of testimony that a court can independently obtain and consider in deciding the case.

Varnum v. Brien, 763 N.W.2d 862, 881 (Iowa 2009). To the extent this Court believes the legislative facts are credible and relevant authority for the purpose of making its legal decision in this case, the facts cited by the parties are an appropriate consideration. Id. The Court may rely on the legislative facts provided by both Veal and the NAACP as credible evidence of the likely extent and impact of the felon exclusion rule.

II. Courts should consider systematic exclusion of felons at the reporting stage, which is when their felon status prompts their exclusion.

Even the State recognizes that the Iowa Supreme Court has held that an excused person could be omitted from the calculations for underrepresentation if the excusal was the

result of a policy or practice. State's Brief p. 27. State v. Williams, 929 N.W.2d 621, 630 (Iowa 2019). Furthermore, the Sixth Amendment requires a defendant to point to more than "a host of factors that, individually or in combination, [that] might contribute to a group's underrepresentation." Berghuis v. Smith, 559 U.S. 314, 332 (2010). The felon exclusion rule is a specific policy or practice that contributed to the underrepresentation of African-Americans in Veal's own pool and likely other pools as well.

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). While this does not make felons ineligible for jury service per se, it provides the legal basis for excluding felons as a matter of practice.

While Veal's counsel made a professional statement as to his experience with the felon exclusion rule, this Court does not need to look too deeply into the trial record to find the

practical effect of the rule. (Professional Statement)(App. pp. 63-64). Although the State suggests the prosecution almost did not challenge all of the potential jurors with felony convictions, the fact is the State did so. (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). State's Brief p. 29. Furthermore, during the discussion on whether to call panel number two to increase the number of minorities in Veal's panel, the District Court questioned whether it was even worth calling the panel considering the two African-American jurors with felony convictions would be excused. (Trial Tr. Vol. 1 Tr. p. 39 L.13–p. 40 L.16). The presumption was in favor of exclusion, with convicted felons considered inherently ineligible for jury service.

The fact that the exclusion occurs at the reporting stage rather than the summons stage is of little import. First, the Iowa Code defines the "jury pool" as "the sum total of prospective jurors *reporting* for service." Iowa Code §

607A.3(6) (2021)(emphasis added). Second, as a practical matter, the exclusion of felons will occur at the reporting stage because that is when the State will challenge them for cause under the rule, as occurred in this case. The District Court's comments about not bothering to even call certain jurors because they have felony convictions, however, indicates a possibility such jurors may be told early on that they do not need to report at all. (Trial Tr. Vol. 1 Tr. p. 39 L.13– p. 40 L.16). As the Iowa Supreme Court held, "a defendant should not be foreclosed from [proving systematic exclusion] by a rigid rule that calculates the pool based on who was summoned, rather than who actually appeared." State v. Williams, 929 N.W.2d 621, 630 (Iowa 2019).

Finally, the State's analogy to food poisoning among panelists misses the mark. State's Brief p. 28. Food poisoning is not a jury management practice, nor does it disproportionately impact minority groups. The felon exclusion rule, meanwhile, is codified in the Rules of Criminal

Procedure, permits a consistent practice of exclusion, and disproportionately impacts African-Americans as addressed in more detail in the briefs presented by Veal and the NAACP. The State is mixing apples with oranges, and the fruit is indeed rotten.

III. Aggregate analyses are used to establish systematic underrepresentation of minorities under the second prong of the Duren/Plain/Lilly analysis. A defendant who does not provide such an analysis risks failing to carry his burden.

The State contends it is inappropriate for courts to aggregate jury pools for the second prong of the Duren/Plain/Lilly analysis. State's Brief pp. 44-51. The State appears to suggest courts must apply a standard deviation analysis to a defendant's pool to establish underrepresentation and not move on to aggregated pools unless the defendant's pool is not large enough for statistical analysis. State's Brief p. 45. This is simply incorrect.

In Veal, the 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 is the same approach suggested in State v. Lilly. See State v. Lilly, 930 N.W.2d 293, 305 (Iowa 2019) (holding aggregation not necessary when a comparison of the percentage of the distinctive group in a defendant's pool is the same or larger than the percentage of the group in the jury-eligible population).

The State has been consistent in its attempts to avoid a requirement for aggregation since State v. Lilly. Id. Although the record in Lilly was unclear, it was assumed there were 75 to 115 people in Lilly's pool. Id. at 299 n.3. This Court rejected the State's argument then, stating:

> It is unfair to restrict the defendant to the current jury pool that may have as few as seventy-five persons, and then at the same time require the defendant to furnish results that have a certain degree of statistical significance. See Commonwealth v. Arriaga, 438 Mass. 556, 781

> N.E.2d 1253, 1263 (2003) ("A defendant must present evidence of a statistically significant sample, usually requiring analysis of the composition of past venires.").

Id. at 305.

The case cited in Lilly – Commonwealth v. Arriaga – provides an insightful take on the use of aggregated data. In that case, the defendants had 342 prospective jurors on their venire, which is more than double the number reporting in Veal's case. Commonwealth v. Arriaga, 781 N.E.2d 1253, 1263 (Mass. 2003). The defendants in Arriaga provided a statistical analysis using only their own jury pool. Id. The Massachusetts Supreme Court held that attempting to establish systematic underrepresentation under the second prong of Duren could not be accomplished by referring to only the defendants' own pool:

> The data the defendants offer does not meet their burden of showing underrepresentation for another reason. The single venire brought into the court room for the defendants' trial is an unacceptably small sample for the purpose of any statistical showing of underrepresentation. A defendant must do more than assess a small subsection of the

> venire present on a particular day in order to show that the group allegedly discriminated against is not fairly and reasonably represented in the venires in relation to its proportion of the community. A defendant must present evidence of a statistically significant sample, usually requiring analysis of the composition of past venires.

Id. at 1263-64 (internal citations omitted). The Arriaga Court noted other jurisdictions had endorsed to use of "broad time frames" in assessing underrepresentation and held that statistics based solely on a defendant's own pool "do not provide a large enough sample over a great enough period of time to demonstrate underrepresentation." Id. at 1264.

Thus, the State's argument gets it perfectly wrong on two fronts. First, aggregation is, in fact, the assumed method for assessing systematic exclusion of minorities from jury pools (assuming a defendant's own pool is not fairly representative at the outset). Second, contrary to the State's assertion, aggregation does not go to establishing the cause of systematic exclusion per se, but instead establishes systematic exclusion

under the second prong of the Duren/Plain/Lilly analysis. State's Brief p. 46.

As for the concern regarding the period of time to be used for aggregation, a one-year timeframe appears to be acceptable. In Duren v. Missouri, for example, Duren was able to establish systematic exclusion by providing aggregated information on "every weekly venire for a period of nearly a year." Duren v. Missouri, 439 U.S. 357, 362-63, 366 (1979). Veal's reliance on one year's worth of jury pool data for his aggregation analysis is appropriate, particularly in light of the Veal Court's direction not to exclude 2017 pools if the information was available. State v. Veal, 930 N.W.2d 319, 330 (Iowa 2019).

Finally, Veal recognizes data is not readily available regarding the number of convicted felons in Webster County or in the other Webster County jury pools used as the data set for Veal's claim. It does not appear that the judicial system's recordkeeping in 2017 tracked racial demographics except at

the jury pool and jury panel stages and did not track challenges for cause. It also failed to collect data regarding those who did not respond to summons or failed to appear. Again, it would seem unfair to place the burden on Veal to provide such information 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).

Veal has provided the information that was readily available to him – information regarding his own pool. And the statistical analysis he has provided regarding the aggregate pools would include those jurors who would have been excused under Rule 2.18(5)(a) because their later excusal would not be reflected in the numbers provided by the court. In other words – at least with respect to the aggregated pools – the State receives the benefit of having felon-excused jurors in the pools. And yet, as evidenced by Veal's statistical analysis,

even with felon-excused jurors counted in the aggregate pools, African-Americans and Hispanics were under-represented by more than two standard deviations in almost every circumstance. Def.'s Brief pp. 62-66.

IV. The application of the felon exclusion rule does not contribute to the probity of the jury, but undermines the concept of a fair and impartial jury.

Veal's brief thoroughly addresses the unwarranted concerns regarding the impact of the felon exclusion rule on the probity of the jury. Def.'s Brief. pp. 86-90. But the State's repeated citations to State v. Chidester, 570 N.W.2d 78 (Iowa 1997), and Lockhart v. McCree, 476 U.S. 162 (1986), invite more discussion.

Chidester and Lockhart both involved the question as to what constituted a "distinctive group" for Sixth Amendment purposes. Chidester recognized the United States Supreme Court had not specifically defined the term "distinctive group" and instead considered the distinctiveness of a group

according to the three purposes of the fair cross-section requirement:

> (1) ensuring the composition of juries is not arbitrarily skewed so as to deprive a defendant of the "commonsense judgment of the community"; (2) maintaining the public's confidence in the fairness of our jury system; and (3) giving effect to our conviction that "sharing in the administration of justice is a phase of civic responsibility."

State v. Chidester, 570 N.W.2d at 81 (quoting Lockhart v. McCree, 476 U.S. at 174-75). In both cases, the Courts determined the respective groups – death-qualified jurors opposed to the death penalty, farmers, and those who would be uncompensated by their employers during jury service – were either not distinctive groups or provided a legitimate basis for excusal. Id. at 82-83; Lockhart v. McCree, 476 U.S. at 174-77.

The State's references to Chidester and Lockhart, however, miss the larger point. Veal is not arguing that *convicted felons* are a *distinctive group*. Rather, he is arguing that *African-Americans* are a *distinctive group* and that the

felon exclusion rule is the *practice or policy* that leads to their underrepresentation. The State's argument conflates the first and third prongs of the Duren/Plain/Lilly test.

No one seriously disputes that African-Americans are a distinctive group due to their race. And both Veal and amicus NAACP have provided data showing the disproportional impact of the felon exclusion rule on African Americans. But even if this Court were to apply the rational basis standard to convicted felons as the State suggests,[1] the

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1. The State suggests Duren and Taylor v. Louisiana applied something akin to intermediate scrutiny analysis because the distinctive group in question was women, but a lower standard of rational basis should apply to the felon exclusion rule. State's Brief pp. 62-63 (citing Duren v. Missouri, 439 U.S. 357, 367-69 (1979) and Taylor v. Louisiana, 419 U.S. 522, 534-35 (1975). Again, the distinctive group at issue here is African-Americans. If the nature of the distinctive group is key to the level of scrutiny, policies or practices that contribute to underrepresentation of African-Americans should be judged according to strict scrutiny. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995). Veal has not asked this Court to apply strict scrutiny, but rather the "heightened" standard adopted for fair cross-section claims in Duren. Duren v. Missouri, 439 U.S. 357, 367-68 (1979).

felon exclusion rule would still run up against the portion of Lockhart the State has chosen not to discuss.

During its consideration of a fair cross section claim involving disqualification of "Witherspoon excludables" in a death penalty case,[2] the United States Supreme Court held:

> Furthermore, unlike blacks, women, and Mexican-Americans, "Witherspoon-excludables" are singled out for exclusion in capital cases on the basis of an attribute that is within the individual's control. *It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.* Because the group of "Witherspoon-excludables" includes only those who cannot and will not conscientiously obey the law with respect to one of the issues in a capital case, "death qualification" hardly can be said to create an "appearance of unfairness."

Lockhart v. McCree, 476 U.S. 162, 176 (1986)(emphasis added).

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2. Witherspoon excludables are jurors whose opposition to the death penalty is so strong that those views would interfere with their ability to serve as impartial jurors. Lockhart v. McCree, 476 U.S. 162, 165 (1986)(citing Witherspoon v. Illinois, 391 U.S. 510 (1968)).

In other words, excluding an entire category of potential jurors based on stereotypes regarding their "unique attitudes, ideas, or experiences" deprives a defendant of "the benefit of this group's peculiar common sense" for the purposes of the Sixth Amendment fair cross-section requirement. State v. Chidester, 570 N.W.2d 78, 82 (Iowa 1997). While groups with "shared attitudes that render members of the group unable to serve" may be excluded from jury service without offending the Sixth Amendment, there must in fact be "shared attitudes." Lockhart v. McCree, 476 U.S. 162, 176 (1986). Lockhart itself acknowledged that those who were firmly opposed to the death penalty could still serve if they stated they were able to put their beliefs aside. Id.

In contrast to Lockhart, Rule 2.18(5)(a) prohibits anyone with felony convictions from serving when a challenge is made. Iowa R. Crim. P. 2.18(5)(a) (2017). There is no requirement that the parties inquire into the jurors' attitudes, beliefs, or experiences as they relate to the criminal justice system. It

should surprise no one, then, that the questioning of the jurors with felony convictions in Veal's case focused solely on whether they were, in fact, convicted felons. (Trial Tr. Vol. 2 p. 61 L.5-p. 64 L.2, p. 131 L.16-p. 135 L.8, p. 216 L.21-p. 218 L.3; Trial Tr. Vol. 3 p. 11 L.11-p. 18 L.17). Convicted felons are presumed to be unable to serve without any individualized consideration of their impartiality. This is inconsistent with the United States Supreme Court's jurisprudence and inconsistent with the individual characteristics of convicted felons as discussed in the briefs filed by Veal and amicus NAACP. Def.'s Brief pp. 84-90; NAACP Brief Div. III.

The felon exclusion rule leads to underrepresentation of African-Americans, a distinctive group, in Iowa's jury pools generally and in Veal's jury pool in particular.

CONCLUSION

For all of the reasons discussed above and in his Brief and Argument Defendant-Appellant Peter Veal respectfully requests this Court vacate his conviction, sentence, and

judgment, and remand his case to the District Court for a new trial.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $3.32, 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 4,194 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Theresa R. Wilson Dated: *8/4/21*

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