IN THE SUPREME COURT OF IOWA
Supreme Court No. 21–0144

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PETER LEROY VEAL,
Defendant-Appellant.

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

# APPELLEE'S BRIEF

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**II. Did the district court err in rejecting Veal's claim that representation of African-Americans on his jury panel was unfair and unreasonable because panelists with felony convictions were excused under Rule 2.18(5)(a), leaving a level of African-American representation on the jury panel that was within one standard deviation of the expected average level?**

Authorities

*Duren v. Missouri*, 439 U.S. 357 (1979)
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James M. Binnall, *Cops and Convicts: An Exploratory Field Study of Jurymandering*, 16 OHIO ST. J. CRIM. L. 221 (2018)
James M. Binnall, *Exorcising Presumptions? Judges and Attorneys Contemplate 'Felon-Juror Inclusion' in Maine*, 39 JUST. SYST. J. 4 (2018)
James M. Binnall, *Felon-Jurors in Vacationland: A Field Study of Transformative Civic Engagement in Maine*, 71 ME. L. REV. 71 (2018)
James M. Binnall, *Summonsing Criminal Desistance: Convicted Felons' Perspectives on Jury Service*, 43 L. & SOC. INQUIRY 4 (2018)

## III. Did the district court err in finding that error had not been preserved for any claim or challenge that alleged underrepresentation or exclusion of Hispanic people?

Authorities

*United States v. Suttiswad*, 696 F.2d 645 (9th Cir. 1982)
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## ROUTING STATEMENT

Veal requests retention. *See* Def's Br. at 12. At the time of this writing, the Iowa Supreme Court has retained appeals in *State v. Lilly*, No. 20–0617, and *State v. Plain*, No. 20–1000. Both appeals are about fair cross-section challenges, and both involve rulings where a district court applied *Lilly*/*Veal* to a developed record on remand. *See generally State v. Lilly*, 930 N.W.2d 293 (Iowa 2019); *State v. Veal*, 930 N.W.2d 319 (Iowa 2019). This appeal implicates some of the same as-yet-unresolved questions about fair cross-section challenges, and it could be retained and set for argument alongside *Lilly II* and *Plain II*. *See* Iowa R. App. P. 6.1101(2)(d), (f).

## STATEMENT OF THE CASE

### Nature of the Case

This is Peter Leroy Veal's appeal from a ruling that rejected his Sixth Amendment challenge to his jury panel, on remand from *Veal*, 930 N.W.2d 319 (Iowa 2019). Both parties presented evidence and argument on remand. The district court found that African-Americans were not underrepresented on Veal's combined jury panel. It also found that Veal failed to show that patterns of underrepresentation over time were attributable to the juror selection system. On appeal, Veal raises various challenges to the district court's thorough ruling.

**Statement of Facts**

During Veal's trial, overwhelming evidence established that Veal murdered two people and attempted to kill a third. Facts about those underlying offenses are not relevant to this appeal.

**Course of Proceedings**

Before jury selection, Veal raised a fair-cross-section challenge under the Sixth Amendment. He alleged that underrepresentation of African-Americans on his jury panel was unfair, and was the result of systematic exclusion. The trial court agreed that the first jury panel appeared to underrepresent African-Americans, so it summoned additional jury panels. *See* TrialTr.V1 35:8–48:23. There was better African-American representation on the combined jury panel: it had 153 panelists, and five of them were African-American. The trial court concluded that Veal failed to show a level of underrepresentation of African-Americans on that combined jury panel that was unfair or unreasonable. *See* TrialTr.V2 23:13–25:8. The court also found that Veal failed to prove systematic exclusion. *See* TrialTr.V2 25:9–26:3. Based on that, the court overruled Veal's fair cross-section challenge. A petit jury was selected and empaneled. Veal was tried and found guilty as charged on all three counts; he was sentenced accordingly.

Veal appealed. He argued that underrepresentation and systematic exclusion of African-Americans violated his rights under the Sixth Amendment of the United States Constitution, and under Article I, Section 10 of the Iowa Constitution. The Iowa Supreme Court held that Veal had failed to preserve error for any fair-cross-section challenge under Article I, Section 10. *See Veal*, 930 N.W.2d at 328 n.5. Then, it clarified the analysis for fair cross-section challenges under the Sixth Amendment, and it remanded the case for the district court to apply that reformulated analysis to the Sixth Amendment challenge that Veal *had* preserved.

> A remand will offer Veal a further opportunity to develop his arguments that his Sixth Amendment right to an impartial jury was violated. If the district court concludes a violation occurred, it shall grant Veal a new trial.

*See id.* at 328–30. A similar remand order was entered in *State v. Williams*, 929 N.W.2d 621, 630 (Iowa 2019).

On remand, the parties presented evidence at a Zoom hearing.[1] The Webster County Clerk of Court testified about her role as the jury manager for Webster County, and she described the procedures that she had used for assembling jury pools and jury panels in 2017. She

[1] It was partially consolidated with a hearing on remand from *Williams*, 929 N.W.2d at 621 (Floyd County FECR026437).

said that she used the judicial branch computer program to generate a random selection of names from the master list, whenever they needed a pool of jurors for a particular trial date in Webster County. *See* RemandTr. 8:7–9:19; RemandTr. 22:19–23:11. Then, she would print out a mailing label for each potential juror, and she would send them a summons and a questionnaire by mail (after checking to make sure that none of the mailings were headed to addresses outside of Webster County). *See* RemandTr. 9:20–10:18; RemandTr. 23:16–24:5. If a potential juror did not respond, she would send a follow-up letter "stating that they need to respond." *See* RemandTr. 14:24–15:23. She took no other follow-up, as a matter of course—but if a judge asked for a list of people who failed to respond or failed to appear for trial, she provided that list. *See* RemandTr. 15:24–16:13; RemandTr. 25:7–13.

Professor Mary Rose testified as an expert witness on the issue of systematic exclusion in juror selection processes. She testified that there is "a general consensus that you want to use something besides a voter registration list," to boost representation of minority groups that register to vote at lower rates—and she testified that "Iowa does that well" by merging its voter registration rolls with DOT records, to produce its master list. *See* RemandTr. 235:12–19. Rose testified that

it was important to send out *at least one* follow-up notice or reminder to potential jurors who do not respond to the initial mailing, but she clarified that there was no empirical data to suggest that it would help to send *more than one* follow-up mailing. *See* RemandTr. 262:2–17.

Rose was already "aware of several changes" in Iowa's juror selection processes and jury management systems since 2018, and she noted: "There is much better record keeping, asking about race, recording race, so that — so the courts are able to see, to some extent, where people are underrepresented, overrepresented, which was not the case generally in 2017." *See* RemandTr. 237:20–238:20. She also agreed that it was not possible to determine, from this data, whether the policy changes in December 2018 had improved levels of minority representation, or if they simply enabled better record-keeping about the actual levels of minority representation that had already existed, all along. *See* RemandTr. 249:24–251:11. Potential jurors who were selected before December 2018 filled out a survey that included an *optional* question about race; many of them chose not to answer it. After December 2018, that question on race was no longer optional—and better data collection may have produced an apparent uptick in documented representation levels. *See* RemandTr. 113:23–114:13.

Rose initially stated that there was no meaningful difference between a pattern of minority underrepresentation on jury pools and systematic exclusion of minority populations from jury service. *See* RemandTr. 241:6–14. But that position gave way as Rose recognized a more complex reality. Her own research showed "African-Americans are about 40 percent as likely to report that they are either very willing or somewhat willing [to] serve on a jury compared with whites"—even after controlling for a vast array of other factors—and that finding was consistent with other published research in that area. *See* RemandTr. 241:15–246:1; Mark A. Musick et al., *Much Obliged: Volunteering, Normative Activities, and Willingness to Serve on Juries* 40 L. & SOC. INQUIRY 433, 450 & 457 (2015).[2] And she noted the impact of external events on decision-making, as well. *See* RemandTr. 243:6–24 ("I think everybody who has lived through this summer [of 2020] knows that minorities probably have a different relationship to courts and law").

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[2] Rose also discussed a 1998 study that followed up with people who chose not to respond to jury summons. In Rose's view, the study found that "a misconception about what jury service will involve" was a predictor of failure to respond and failure to appear. *See* RemandTr. 264:3–265:13. But that is not an accurate description of the study that Rose was describing. *See* Robert G. Boatwright, *Why Citizens Don't Respond to Jury Summonses and What Courts Can Do About It*, 82 JUDICATURE 156, 160 (1999) ("[S]ummons non-respondents are not significantly less aware of the nature of jury service . . . .").

Veal also presented expert testimony from Grace Zalenski, a statistical consultant. Zalenski showed that there was an apparent pattern of underrepresentation of African-Americans on jury pools in Webster County, over the course of the year preceding Veal's trial—the average Z-score was -0.58. *See* RemandTr. 35:24–47:25; Def's Ex. B & H; App. 49, 54. That pattern of underrepresentation over time was "statistically significant." But that was not a comment on the *degree* of underrepresentation. Rather, it meant that it was unlikely that this observed pattern of underrepresentation was solely attributable to variability or noise in random sampling. *See* RemandTr. 53:8–58:12; Def's Ex. K; App. 56. Zalenski clarified that she was not identifying the jury management system or juror selection process as a "source" of the non-random pattern that she had identified and quantified. *See* RemandTr. 70:4–73:20 ("I'm just concerned with detecting whether or not it exists; and I'm confident that it does exist."). And she agreed that Veal's combined jury panel was "proportionately representative of African-Americans." *See* RemandTr. 161:14–163:18. She clarified that finding a non-random pattern of underrepresentation over time could never prove "that a clearly overrepresentative jury pool [was], in fact, underrepresentative." *See* RemandTr. 80:18–83:4.

Both parties submitted proposed rulings and arguments. *See* State's Proposed Ruling (submitted 8/26/20, filed 2/3/21); App. 99; Def's Proposed Ruling (8/26/20); App. 58; State's Response (9/15/20); App. 65; Def's Response (9/16/20); App. 71.

The district court found that error had not been preserved for anything beyond a Sixth Amendment challenge to underrepresentation and exclusion of African-Americans from the combined jury panel, and it also found that considering any other challenge would exceed the scope of the remand order. *See* Ruling (1/29/21) at 4; App. 77. It applied *Veal*'s three-pronged framework to the preserved challenge.

On prong #2, the district court noted that the parties calculated different figures for the percentage of the jury-eligible population of Webster County that was African-American—but even if it adopted Zalenski's figure that purportedly included multi-racial respondents (3.02%), that was still below the observed level of African-American representation on Veal's combined jury panel: 5 out of 153, or 3.27%. *See* Ruling (1/29/21) at 6–7; App. 79–80. It rejected Veal's arguments that two African-American panelists with felony convictions (who had been challenged for cause) should be excluded from those calculations. *See id.* at 7–8; App. 80–81. And, in the alternative, it said this:

> If the two African-Americans and one Caucasian who were challenged for cause based upon a prior felony conviction were excluded, there still would be an insufficient showing by Veal under prong 2. Using the standard deviation analysis to assess the fairness and reasonableness of having three African-American people on this modified jury pool of 150 people and accepting Zalenski's adjusted calculations that 3.02% of eligible jurors in Webster County are African-American results in the following calculations:
>
> Standard deviation = √{0.0302 * 0.9698 * 150} = 2.096
>
> Expected representation = (3.02% * 150) = 4.53 people
>
> Actual representation ("x") = 3 people
>
> Difference = (3 – 4.53) = -1.53
>
> Z-score = (-1.53/2.096) = -0.730
>
> That means the observed level of African-American representation on Veal's jury pool—even without the panelists with felony convictions—was less than one standard deviation below the average expected value, . . .
>
> [. . .]
>
> Veal proposes that this Court use a meta-analysis to assess prior Webster County jury pools to determine whether there was a pattern of underrepresentation. However, such an analysis is unnecessary pursuant to the directions from the Iowa Supreme Court. *See Lilly*, 930 N.W.2d at 304; *Veal*, 930 N.W.2d at 929. Veal must show that *his* jury pool was not drawn from a fair cross section of eligible jurors in Webster County. This jury pool is large enough for this Court to reject that claim: Veal did have an expectation of some non-zero level of African-American representation, and it was met.

*Id.* at 8–10; App. 81–83. Because Veal could not show that the level of African-Americans on this combined jury panel was unreasonable or unfair, he failed to carry his burden on prong #2 of *Duren*/*Veal*.

On prong #3, the district court found that Veal failed to carry his burden of establishing a causal connection between any particular feature of the jury selection process or jury management system and underrepresentation of African-Americans on his jury panels. *See id.* at 11–23; App. 84–96. It noted that Veal was challenging the failure to adopt the December 2018 policy changed before his trial, in 2017—Veal was arguing "that recent changes to the process have succeeded in reducing underrepresentation," and "the state court administrator and the Webster County jury manager were systematically excluding African-Americans from jury service by failing to adopt policies more recently aimed to reduce underrepresentation." *See id.* at 16; App. 89. But it noted that most of the best practices that Rose identified were already used in Webster County, before 2018. *See id.* at 12–13; App. 85–86. It also noted that, because of the change from an *optional* racial identification question to a *mandatory* racial identification question, "the demographic information in 2016 and 2017 was incomplete" and comparing self-reported demographic data across those timeframes would not actually prove "that underrepresentation decreased in 2019 relative to 2016 and 2017." *See id.* at 16–17; App. 89–90. But even if that were established, that still would not establish systematic exclusion:

> There is a difference between a pattern of underrepresentation in jury pools—even a persistent one—and systematic exclusion from jury service. Even *Lilly* refused to equate those concepts in describing the required proof for a claim under Article I, Section 10 of the Iowa Constitution. *See Lilly*, 930 N.W.2d at 307 ("We are reluctant to impose an open-ended obligation on lower courts to follow unspecified 'known best practices,' whatever those best practices may turn out to be"). Persistent underrepresentation may be attributable to a confluence of broad social problems, including disproportionately high distrust of the American judicial system and its criminal courts. . . .
>
> [. . .]
>
> . . . The inverse is also true, too: when matters improve and underrepresentation drops over time, it is speculative to attribute that improvement to any particular change in the jury management process. Social conditions evolve over time, and public perceptions are constantly changing in response to events. If underrepresentation in Webster County jury pools declined between 2017 and 2019, that does not mean that any improvement was caused by changes to the jury management system that were implemented in 2018—it may only reflect changing attitudes towards jury service or the impact of other societal forces that erode some of those "actual or perceived barriers" (or it might even be attributable to *new* barriers to jury service that disproportionately affect other demographic groups).

*Id.* at 17–20; App. 90–93. The court also noted that Veal's argument "raise[d] a practical problem, as accepting this argument as proof of systematic exclusion would penalize and disincentivize attempts to improve representation levels and racial diversity in Iowa jury pools." *See id.* at 21–22; App. 94–95.

Ultimately, the court found "[t]he record supports a conclusion that underrepresentation results from a confluence of factors that are mostly beyond the control of the Webster County jury manager or the state court administrator, including factors affecting how individuals decide how to respond to being selected for jury service." *See id.*; App. 94–95. Because systematic exclusion required "a causal relationship between any policy, practice, or feature of the jury selection process or jury management system and any observed underrepresentation of African-Americans" that Veal failed to establish, the court found Veal's challenge failed on prong #3. *See id.* at 22–23; App. 95–96 (quoting *Veal*, 930 N.W.2d at 328).

Additional facts will be discussed when relevant.

## ARGUMENT

Veal's brief should be read as presenting three separate claims. The first is the claim that he focused on below: that something about the juror selection process or jury management system before 2018 caused underrepresentation at some point *before* potential jurors appeared for jury service (which is how underrepresentation would be detectable in the jury manager's data). The second is a claim that was not a focus of his efforts on remand: that allowing for-cause challenges to panelists with felony convictions has a disparate impact that causes underrepresentation and systematic exclusion of African-Americans. The third is a long-since-unpreserved claim about a different group.

Strategically, Veal needs to argue against counting panelists with felony convictions as part of his combined jury panel. If those panelists are counted, then African-American panelists comprised 3.27% of Veal's jury panel (5 of 153), and his challenge automatically fails on prong #2 (even before getting to as-yet-unresolved questions about aggregation). But a claim about Rule 2.18(5)(a) cannot change the fact that African-Americans were *overrepresented* among people who appeared for service on this combined jury panel. No arguments about reporting-stage underrepresentation can prevail on these facts.

Veal's claim about for-cause challenges is interesting, but it is also meritless. It is interesting because some causation is apparent from the trial record: three panelists were excused for cause under Rule 2.18(5)(a), and two of them were African-American—so the level of African-American representation on Veal's jury panel dropped. But on prong #2, a panel with 3 African-Americans among 150 people is not unfair or unreasonable in a county where 3.02% of jury-eligible residents are African-American (Z = -0.730). Moreover, on prong #3, Veal would have to prove that African-Americans were *systematically* excluded by operation of Rule 2.18(5)(a)—but he did not provide any evidence to prove that this exclusion was systematic and inherent to the operation of Rule 2.18(5)(a), rather than attributable to variability in the distribution of panelists with felony convictions among groups as a natural consequence of random sampling. Beyond that, there are two additional problems. First, Veal did not preserve error through any objection to the State's three challenges for cause, before trial. And second, a *prima facie* claim under *Duren* would still fail because granting for-cause challenges to any panelists with felony convictions was a reasonable exemption that protected the probity of the jury.

## I. The district court was correct that Veal failed to prove both underrepresentation and systematic exclusion for his claim that some policy or practice that changed in December 2018 had excluded African-Americans from the group of potential jurors who were selected, received summons, and appeared for jury service.

### Preservation of Error

The district court ruled on Veal's claims that pre-2018 policies or practices had systematically excluded African-Americans from the set of potential jurors who would appear for jury service, and caused an observable pattern of underrepresentation in jury pool data that was gathered at that stage (or earlier). *See* Ruling (1/29/21) at 5–23; App. 78–96. That ruling preserved error to renew those specific claims on appeal. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

### Standard of Review

Review of a ruling on a fair-cross-section challenge is de novo. *See Lilly*, 930 N.W.2d at 298 (quoting *State v. Plain*, 898 N.W.2d 801, 810 (Iowa 2017)).

### Merits

This claim resembles arguments in *Lilly II*, No. 20–0617; in *Plain II*, No. 20–1000; and in *Williams II*, No. 21–0158. Because Veal's jury panel was overrepresentative at the reporting stage, this challenge is comparatively easy to resolve.

### A. For claims that African-Americans were excluded by operation of jury management practices *before* the reporting stage, a quantitative analysis should include panelists who reported for jury service and were excused through challenges for cause.

In *Williams*, the defendant argued that the quantitative analysis on prong #2 should not include one potential juror who had been excused before the morning of trial, because she was attending college. *See Williams*, 929 N.W.2d at 630. The Court explained that it would be correct to omit that excused respondent in calculating the level of observed underrepresentation, if (and only if) the defendant alleged that underrepresentation and exclusion were the result of "[a] policy or practice relating to excusing jurors." *See id*. This makes sense. If the claim is that excusals under that policy cause underrepresentation and exclusion of African-Americans, the defendant can analyze the post-excusal panel/pool to show that the excusals under that policy produced underrepresentation. However, if the allegation was about source lists or undeliverable mail, it would be correct to *include* that potential juror when analyzing the jury pool—after all, she was drawn from the list; she received the jury summons; and she responded to the questionnaire. Simply put, the analysis should use data from the stage where the exclusion is alleged to have occurred.

As an additional illustration, imagine that a group of panelists got food poisoning after lunch (halfway through voir dire), and were promptly excused. If the defendant alleged that a distinctive group was underrepresented and excluded by operation of some feature of the jury management system that took effect *before* panelists appeared for voir dire, then it would be incorrect to omit those sick panelists from the quantitative analysis. No matter what the defendant says about source lists or undeliverable summons, those features did not exclude the sick panelists—and the defendant cannot pretend they did by omitting them from quantitative analysis on prong #2. Conversely, if the defendant was alleging that excusing sickened panelists caused underrepresentation, then it would become proper to *exclude* those sickened-and-excused panelists from the prong #2 analysis, in order to quantify the underrepresentation that the excusal policy caused.

Veal argues "persons with felony convictions are jury ineligible and should be excluded from calculations derived from [his] pool." *See* Def's Br. at 58–60. This is incorrect on two levels. First, in 2017, people with felony convictions were not *ineligible* for jury service. They could be challenged for cause; any such challenge for cause would have to be granted. *See* Ruling (1/29/21) at 13–14; App. 86–87.

But a person with a felony conviction could serve on a petit jury if neither party challenged them (which almost happened, in this case). *See* TrialTr.V2 203:19–204:19; TrialTr.V3 11:6–13:24; *see generally Ford v. United States*, 201 F.2d 300, 301 (5th Cir. 1953) (explaining "previous conviction of a felony does not render the convicted person fundamentally incompetent to sit as a juror," and that "it is a ground of challenge for cause, which [either party] may insist upon or waive, as he elects"), *cited with approval in Sieren v. Hildreth*, 118 N.W.2d 575, 577–78 (Iowa 1962). Second, and more importantly, the panelists with felony convictions were excused on challenges for cause, but they were not "excluded" by the pre-2018 jury management practices that Veal identified as sources of systematic exclusion. *See* Def's Proposed Ruling (8/27/20) at 4; App. 77; Def's Br. at 70–77. These panelists actually appeared for jury service on the morning of trial—they were not "excluded" by sending a written questionnaire with the summons; by only sending one follow-up mailing; by failing to enforce a penalty for failure to respond/appear; or by any other policy or practice in the juror-selection process that preceded voir dire. As such, they should be included in any quantitative analysis that aims to determine whether *those practices* produced underrepresentation on this combined panel.

### B. Veal's combined jury panel contained 153 people. Five of them were African-American—or 3.27%. That is overrepresentation, which forecloses any proof of underrepresentation for prong #2.

*Lilly* left open some questions about using aggregated data from prior jury pools, but it was clear about one thing: "A defendant whose jury pool has a percentage of the distinctive group at least as large as the percentage of that group in the jury-eligible population has not had his or her right to a fair cross section infringed, and there would be no reason to aggregate data in that event." *See Lilly*, 930 N.W.2d at 305. Likewise, *Veal* noted that this challenge would fail on remand if "the percentage of jury-eligible African-Americans in the overall jury-eligible population" was "below 3.27%"—because that was "the actual percentage of African-Americans in Veal's juror pool." *See Veal*, 930 N.W.2d at 329 n.8. Even after Zalenski used an adjustment for multi-racial residents (which the State was unable to verify), that only raised the population parameter to 3.02%. *See* Def's Ex. VR-M; App. 57; RemandTr. 73:21–76:17. African-Americans comprised 3.27% of this combined panel; that forecloses proof of prong #2 for this claim.

### C. Veal failed to establish systematic exclusion.

Even if Veal could establish underrepresentation on prong #2, this claim would fail because he cannot prove systematic exclusion.

Veal argues that he established that post-2018 policy changes *caused* improvements in levels of minority representation on jury pools. *See* Def's Br. at 74–77. He is wrong. At best, he had testimony from Rose that she had seen data that showed improvement in representation in 2019, compared to 2016 and 2017. *See* RemandTr. 237:4–239:7. But Veal ignores the rest of Rose's testimony about that data.

> **STATE**: . . . Are you aware that one of the changes that was made to our jury questionnaires is to change the race inquiry from optional to mandatory?
>
> **ROSE**: That has been described to me, yes.
>
> **STATE**: Okay. Great. Does it appear, from the data you looked at, that the amount of non-responses to the race question have gone down?
>
> **ROSE**: Very much so.
>
> **STATE**: . . . [W]ould it be fair to say that we are much more aware of the racial composition of our jury pools than we were before?
>
> **ROSE**: Yes.
>
> **STATE**: Okay. So if we're finding that we have more minority representation on our jury pools, that might be because we have more minority participation, or it might be because we're better at detecting the level of minority participation that we already have, or a mix of both?
>
> **ROSE**: A — Yes.

*See* RemandTr. 249:19–251:11. The district court agreed that it was unable to infer that representation levels actually improved (even if 2019 data seemed to show higher representation levels) because the pre-2018 data contained a significant amount blank responses to the

question about respondent race. *See* Ruling (1/29/21) at 16; App. 89. Veal's response is to claim he "had no ability, let alone obligation, to obtain the information" and that "[his] inability to do so is a creation of the courts' failure to keep such records." *See* Def's Br. at 77. But Veal cannot blame the judicial branch for his decision to assert that *this specific data* established that pre-2018 jury management policies were a source of systematic exclusion, and that recent tweaks to those policies were producing more representative jury pools. Veal chose to make an empirical claim that the data simply does not support—and it is not unfair to him to point that out. Veal might be arguing that he should not have to carry his burden of proving causation, or he might be arguing that he should benefit from something analogous to a spoliation inference. Whatever that argument is, this Court should reject it. The district court was correct that this data does not show what Veal claimed it showed, and Veal is not entitled to demand that anyone overlook that conspicuous failure of proof.

A litigant could try to fill that gap with evidence or argument to support favorable inferences from those blank responses on race in the pre-2018 data. But this record foreclosed that, too. Rose agreed that there are some generalizable patterns in non-response rates on

racial identification questions—and in some contexts where minority respondents hold certain attitudes, they are disproportionately likely to decline to indicate their race. *See* RemandTr. 251:12–254:5; *accord* Ruling (1/29/21) at 16–17; App. 89–90 (citing Mary R. Rose & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases*, 2011 MICH. ST. L. REV. 911, 926 & n.67 (2011)). That means it is impossible to assume that non-response on racial identification in pre-2017 data was proportionally distributed among racial groups—and it means that any apparent improvement in representation levels in the 2019 data is at least equally likely (if not more likely) to support the conclusion that the modified version of the juror questionnaire has simply gathered more complete data about an otherwise-unchanged population of potential jurors.

Veal argues that causation should be inferred or presumed because "changes adopted in 2018 were the type of changes likely to increase minority representation." *See* Def's Br. at 75. But most of the policies that Rose had described as measures that would increase minority representation were already in place in 2017, either in Webster County or statewide. *See, e.g.*, RemandTr. 235:12–236:5; RemandTr. 262:2–263:4; Ruling (1/29/21) at 12–13; App. 85–86.

The jury manager was already mailing out a follow-up reminder to any potential jurors who failed to respond to the first round of mailings. *See* RemandTr. 14:24–15:23. Potential jurors were already drawn at random, from a master list that combined voter registration rolls with DOT records. *See* RemandTr. 121:8–123:3. Rose's testimony did not offer any reason to conclude that any of the post-2018 policy changes had significantly improved minority representation on jury pools, or that failing to implement those specific policies in Webster County before December 2018 could amount to systematic exclusion.

Veal is asking this Court to assume that those policy changes actually worked, so that he can argue that all juror selection practices that existed *before* 2018 were causing systematic exclusion. But that illustrates one of the most common flaws in "systematic negligence" theories of systematic exclusion. *See* Def's Br. at 75–76 (quoting *Lilly*, 930 N.W.2d at 307). Ordinarily, negligence requires breach of duty of reasonable care. *See, e.g.*, *Thompson v. Kaczinski*, 774 N.W.2d 829, 834–35 (Iowa 2009). Evidence of subsequent remedial measures that post-date the alleged breach is only admissible for limited purposes—it may be offered to refute claims that it would be impossible to take those particular measures, or to show that the defendant had control

over particular facilities or practices. However, that evidence cannot "prove negligence or culpable conduct"—it cannot establish breach. *See* Iowa R. Evid. 5.407; *Hall v. Jennie Edmundson Memorial Hosp.*, 812 N.W.2d 681, 686–87 (Iowa 2012).

> Two policy reasons are typically cited to support rule 5.407 and its federal counterpart. First, the advisory committee notes to Federal Rule of Evidence 407 explain that "the rule rejects the notion that 'because the world gets wiser as it gets older, therefore it was foolish before.'" . . . . Second, as we have recognized, "[t]he public policy supporting the rule is 'that the exclusion of such evidence may be necessary to avoid deterring individuals from making improvements or repairs after an accident.'" [*Bangs v. Maple Hills, Ltd.*, 585 N.W.2d 262, 266 (Iowa 1998)] (quoting [*Tucker v. Caterpillar, Inc.*, 564 N.W.2d 410, 412 (Iowa 1997)]).

*Scott v. Dutton-Lainson Co.*, 774 N.W.2d 501, 507 (Iowa 2009). Both policy concerns are implicated by Veal's attempt to prove his claim of "systematic negligence" by relying on evidence of subsequent efforts to improve African-American representation. Veal is asserting that jury managers are wiser now, therefore they were foolish before. *See* Def's Proposed Ruling (8/27/20) at 3–4; App. 60–61 ("As there was nothing special, unusual, or burdensome about these new practices, the Defendant contends, there is no reason they could not have been in place previously and the failure to employ such practices amounted to a systematic exclusion."); *accord* Def's Br. at 70–77. But that does

not logically follow, nor can it establish a Sixth Amendment violation. Even if 2019 data made it unmistakably clear that 2018 policy changes caused improvements in African-American representation levels, that would only establish that pre-2018 practices were suboptimal—and it would *not* establish that judicial branch officials acted unreasonably or negligently before 2018, while operating under then-existing policies. And, as the district court noted, offering those policy changes as proof of systematic negligence in all pre-2018 jury pools would penalize the judicial branch for its efforts to solve this problem, and it would also disincentivize other stakeholders from joining this worthwhile cause:

> If these statewide changes to jury management procedures in 2018 counted as adequate proof that all underrepresentation in jury pools drawn before 2018 was the result of systematic exclusion, it would encourage stakeholders who want to avoid retrials (like prosecutors and victim advocates) to resist any future efforts to improve Iowa's jury management system. Courts should not be deterred from exercising supervisory authority to test and implement potential solutions.
>
> [. . .]
>
> There must be space for policymakers and stakeholders to attempt to reduce underrepresentation on Iowa jury pools without changes being proof of unconstitutional failings of the previous methods. The court system must be able to identify any patterns of underrepresentation and work to fix them without construing any success as an admission that all of their prior efforts were constitutionally deficient.

Ruling (1/29/21) at 21–22; App. 94–95. In other words, "[t]here is a legal distinction between constitutional command and best practices; the constitution does not require we micromanage the significant advances already made in jury representation and those yet to come." *See Lilly*, 930 N.W.2d at 318–19 (McDonald, J., dissenting in part).

Perhaps if Iowa had been lagging behind other jurisdictions in implementing policies that were already known to solve the problem of persistent underrepresentation of African-Americans on jury pools, then it might be reasonable to claim that failure to solve this problem before 2018 was systematic exclusion or "systematic negligence." But Rose testified that this same problem exists in "most all jurisdictions" in the United States, even now. *See* RemandTr. 234:21–235:11; *accord* Mary R. Rose et al., *Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts*, 15 J. EMPIRICAL LEGAL STUD. 378, 399–402 (2019) (summarizing empirical data that shows "the ubiquity of underrepresentation [of African-Americans] in jury pools," and that it is "reliably likely to occur both across the system and across time"). If there is another jurisdiction that stands out as a model of success that Iowa should have emulated before 2018 (or a jurisdiction that it should emulate now, to improve further), neither Veal nor Rose have

identified it. Federal courts in Massachusetts build jury pools by using records from an annual statewide census, and those jury pools *still* tend to underrepresent African-Americans. *See* Rose & Abramson, *Data, Race, and the Courts*, 2011 MICH. ST. L. REV. at 947; RemandTr. 257:15–260:2. There are persistent fault lines in American society that create fissures between minority communities and the courts—substituting postcards for written questionnaires will not change the fact that African-Americans are more reluctant to serve on juries. *See* Musick et al., *Much Obliged*, 40 L. & SOC'Y INQUIRY at 442–52 (finding that African-American respondents were only about 40% as willing to participate in jury service, after controlling for variety of other factors); RemandTr. 241:15–246:1; *accord* Rose & Abramson, *Data, Race, and the Courts*, 2011 MICH. ST. L. REV. at 950 (noting non-response rates for jury summons that "were not marked undeliverable" were higher in areas "with high concentrations of African-Americans" and listing "mistrust of the criminal justice system" among most likely causes). Veal's claim of "systematic negligence" would make more sense if he showed that reasonable jury managers in 2017 would identify these policy changes as sure-fire solutions—but he did not even prove that they could be identified as sure-fire solutions *in retrospect*.

Veal failed to prove that 2018 policy changes actually improved African-American representation on Webster County jury pools. And even if he had, the fact that the jury manager and the judicial branch did not identify and implement those specific policy changes before Veal's trial in 2017 would not establish systematic exclusion, or even systematic negligence. *See* Ruling (1/29/21) at 16–23; App. 89–92. Veal failed to establish systematic exclusion, and this challenge fails.

Much of this discussion is superfluous, because this Court has already held that "run-of-the-mill jury management practices" cannot "constitute systematic exclusion under the Sixth Amendment." *See Veal*, 930 N.W.2d at 329. That holding is law of the case. *See State v. Ragland*, 812 N.W.2d 654, 658 (Iowa 2012) (quoting *Bahl v. City of Asbury*, 725 N.W.2d 317, 321 (Iowa 2006)) ("[A]n appellate decision becomes the law of the case and is controlling on both the trial court and on any further appeals in the same case."). But even if this Court were writing on a blank slate and applying *Lilly*, this claim would fail.

## II. The district court was correct that Veal failed to prove both underrepresentation and systematic exclusion for his claim that granting for-cause challenges to panelists with felony convictions was a violation of his fair cross-section right, under the Sixth Amendment.

### Preservation of Error

Veal did not object to the State's for-cause challenges to panelists who had felony convictions. Before the trial, when the parties litigated Veal's challenge to the jury panels, the Court indicated that it would include potential jurors with felony convictions for the purposes of a fair cross-section claim, even though they could be excused for cause.

> 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 . . .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.

TrialTr.V2 40:22–43:11. Three panelists had felony convictions—two were African-American, and one was Caucasian. The State challenged each of them for cause under Rule 2.18(5)(a). The court granted each of those challenges. *See* TrialTr.V2 61:6–63:11; TrialTr.V2 131:16–135:8; TrialTr.V2 204:20–205:5; TrialTr.V2 216:17–218:3; TrialTr.V3 11:6–18:22. Veal did not resist those challenges for cause, nor did he argue that excusing jurors with felony convictions would violate his rights.

The upshot is that error was preserved to argue that panelists with felony convictions should not be counted in any quantitative measure of underrepresentation—but error was *not* preserved for a claim that attacked Rule 2.18(5)(a) itself, nor any claim that the court should not have excused those panelists on those challenges for cause.

The error-preservation problem is clearest when considering the appropriate remedy: if Veal challenged Rule 2.18(5)(a) as a source of underrepresentation and systematic exclusion before trial, he would have asked the trial court to overrule any for-cause challenges to the panelists with felony convictions. But Veal did not do that. Instead, he seemed to *agree* that any panelists with felony convictions should be excused if they were challenged for cause, and his argument was that something in the juror selection process had systematically excluded *other* African-American residents of Webster County. Rather than ask the trial court to overrule for-cause challenges to those panelists, Veal asked it to find that those panelists were ineligible for jury service to begin with, to improve his claim that *eligible* African-Americans were underrepresented and excluded. *See* TrialTr.V2 5:24–6:15; TrialTr.V2 42:10–44:14. Veal was trying to press his motion for a new jury panel because what he *really* wanted was dismissal on speedy-trial grounds.

*See* TrialTr.V2 28:8–31:24. If he challenged Rule 2.18(5)(a), the court could conceivably grant relief while keeping the same jury panel and avoiding further delay—but that would undermine Veal's claim for the remedy that he actually *did* want. *See* TrialTr.V2 31:18–33:10.

Veal's challenge on the morning of trial was that something had already excluded African-Americans and caused underrepresentation on the combined jury panel—not that overruling for-cause challenges to panelists with felony convictions would stop underrepresentation and systematic exclusion from occurring (or stop it from worsening). The "only corrective action" that Veal sought was to strike the panel, not to reject for-cause challenges to panelists with felony convictions. *See Williams*, 929 N.W.2d at 629 n.1 (quoting *Johnson*, 476 N.W.2d at 334). Consequently, error was not actually preserved for this claim.

On remand, the district court did rule on this claim, to a point. It ruled that all three panelists with felony convictions who were excused on challenges for cause should be counted in its quantitative analysis, because "Veal's attempts to prove systematic exclusion do not align with his argument that these particular jurors should be excluded from jury pool calculations." *See* Ruling (1/29/21) at 7–8; App. 80–81. It also noted that Veal did not show "that felons are disproportionately likely

not to appear for jury service," and he also "ha[d] not established that African-American residents of Webster County [who would be eligible for jury service] are more likely to have felony convictions." *See id.* at 13–14; App. 86–87. The district court did not consider the analysis or argument in the NAACP's brief—none of that was offered on remand.

To the extent that the district court's ruling could be construed as a ruling on Veal's already-unpreserved claim about Rule 2.18(5)(a) and for-cause challenges to panelists with felony convictions, its ruling could not preserve error on any claim that was already unpreserved, before that point. *See Williams*, 929 N.W.2d at 629 n.1; *Johnson*, 476 N.W.2d at 334. And to the extent that it ruled on any claim that was not preserved by timely objection before voir dire, that ruling would exceed the scope of the remand order and have no effect. *See, e.g.*, *Winnebago Industries v. Smith*, 548 N.W.2d 582, 584 (Iowa 1996). Ultimately, this Court should find that error is not preserved for any claim that targets Rule 2.18(5)(a) as a source of underrepresentation, because Veal did not raise any such claim before his jury was sworn.

**Standard of Review**

Review of a ruling on a fair-cross-section challenge is de novo. *See Lilly*, 930 N.W.2d at 298 (quoting *Plain*, 898 N.W.2d at 810).

**Merits**

Veal argues Rule 2.18(5)(a) was "keeping African-Americans from serving because there are more felons among African-Americans proportionally." *See* Def's Br. at 80–85. The NAACP's brief purports to prove both parts of that compound claim with additional data that was never presented below. *See* Amicus Br. at 13–14 & 22–31. Even if it were appropriate to consider this challenge, it would still fail.

### A. Even without panelists with felony convictions, the level of African-American representation on this combined jury panel was fair and reasonable.

The district court was correct when it held "[e]ven excluding felons on this jury pool from calculations, Veal's claim would still fail on prong #2 because African-American representation levels on that jury pool are still fair and reasonable." *See* Ruling (1/29/21) at 8–10; App. 81–83. After panelists were excused under Rule 2.18(5)(a), there were 150 panelists left, and three of them were African-American. *See* TrialTr.V2 42:7–15; TrialTr.V2 216:17–218:3; TrialTr.V3 11:6–18:22. The district court used Veal's population figure (3.02%) and found:

> Standard deviation = √{0.0302 * 0.9698 * 150} = 2.096
> Expected representation = (3.02% * 150) = 4.53 people
> Actual representation ("x") = 3 people
> Difference = (3 – 4.53) = -1.53
> Z-score = (-1.53/2.096) = -0.730

*See* Ruling (1/29/21) at 8–9; App. 81–82. That Z-score is above -1, and any preserved claim under *Veal* fails (as would any claim under *Lilly*). *See Veal*, 930 N.W.2d at 329; *Lilly*, 930 N.W.2d at 304.

The NAACP contends that "*Lilly* and *Veal* held that, if the percentage of the distinctive group in defendant's own jury pool or panel was *not* at least as large as that in the jury-eligible population, aggregated jury pool data needed to be examined, using standard deviation analysis." *See* Amicus Br. at 20. That is not quite accurate. *Lilly* and *Veal* both noted that aggregated data *may* be necessary if there is underrepresentation on the defendant's jury pool or panel, but both opinions declined to resolve questions about sample size—they did not identify a minimum sample threshold where aggregation could be used, nor identify an appropriate maximum-sample-size limit where aggregation must stop. *See Veal*, 930 N.W.2d at 330 n.9; *Lilly*, 930 N.W.2d at 305 n.7. This case involves a combined jury panel—it was already somewhat aggregated. And while *Lilly* found that it was unfair to expect a defendant to prove a statistically meaningful level of underrepresentation in a small jury pool, that implies that it would *not* be unfair in a situation where the sample size was large enough to give rise to a testable expectation of representation—like in this case.

*See Lilly*, 930 N.W.2d at 305. The State has explained its approach in other pending appeals. *See Lilly*, No. 20–0617; *Plain*, No. 20–1000. This case illustrates the correctness of the State's approach.

The NAACP argues that analyzing Veal's combined jury panel for prong #2 without additional aggregated data "could mask or hide systemic underrepresentation." *See* Amicus Br. at 20. But prior data can and should be used to identify patterns over time and nail down the *cause* of apparent patterns of underrepresentation, on prong #3. The problem is that data on African-American representation levels for a January 2017 jury pool is irrelevant in determining whether a level of African-American representation *on this panel in July 2017* was fair or reasonable—which is the actual inquiry under prong #2. The NAACP and Veal want this Court to direct Iowa courts to use a single standard-deviation analysis of aggregated jury pool data. *See* Def's Br. at 57–64; Amicus Br. at 20–21. But that was not what Veal asked the district court to do, on remand. *See* Def's Proposed Ruling (8/27/20) at 3; App. 60 (arguing that, after removing three panelists who were all African-American, "the number of African-Americans in the Defendant's actual jury pool was -1.214 standard deviations from the number expected," which "establishes this prong in [his] favor").

Moreover, aggregating data from months or years of jury pools into a single sample for a standard-deviation analysis would make no sense. This Court should reject any calls to adopt that kind of framework.

Under the State's approach, the outcome on prong #2 is tethered to the fairness and reasonableness of the actual jury pool/panel.

| **TABLE 1:** Outcomes under State's approach | Level of group representation on jury panel (n = 150) | Z-Score, using p = 3.02%, SD = 2.096, EV = 4.53 | Is this unfair or unreasonable, on prong #2 of *Lilly* and *Veal*? |
|---|---|---|---|
| 0 DGM panelists | 0% | Z = -2.16 | Yes |
| 1 DGM panelist | 0.67% | Z = -1.68 | Only under *Lilly* |
| 2 DGM panelists | 1.33% | Z = -1.21 | Only under *Lilly* |
| 3 DGM panelists | 2.00% | Z = -0.73 | No |
| 4 DGM panelists | 2.67% | Z = -0.25 | No |
| 5 DGM panelists | 3.33% | Z = 0.22 | No |
| 6 DGM panelists | 4.00% | Z = 0.70 | No |
| 7 DGM panelists | 4.66% | Z = 1.18 | No |
| 8 DGM panelists | 5.33% | Z = 1.66 | No |
| 9 DGM panelists | 6.00% | Z = 2.13 | No |

This shows that, under the State's approach, both *Lilly* and *Veal* gave him a non-zero expectation of fair and reasonable representation on this jury panel, in this county. And the table shows that this test works:

lower levels of African-American representation on this panel would fail to meet those quantifiable expectations, while higher levels of representation on this panel would meet or exceed those expectations.

Under Veal and the NAACP's approach, the aggregated data overwhelms his actual jury panel, and drowns it out entirely.

| **TABLE 2:** Outcomes under Veal's approach | Level of group representation (n = 2,171, with 34 prior DGM) | Z-Score, using p = 3.02%, SD = 7.974, EV = 65.56 | Is this unfair or unreasonable, in Veal's view of prong #2? |
|---|---|---|---|
| 0 DGM panelists | 1.57% | Z = -3.96 | Yes |
| 1 DGM panelist | 1.61% | Z = -3.83 | Yes |
| 2 DGM panelists | 1.66% | Z = -3.71 | Yes |
| 3 DGM panelists | 1.70% | Z = -3.58 | Yes |
| 4 DGM panelists | 1.75% | Z = -3.46 | Yes |
| 5 DGM panelists | 1.80% | Z = -3.33 | Yes |
| 6 DGM panelists | 1.84% | Z = -3.21 | Yes |
| 7 DGM panelists | 1.89% | Z = -3.08 | Yes |
| 8 DGM panelists | 1.93% | Z = -2.95 | Yes |
| 9 DGM panelists | 1.98% | Z = -2.83 | Yes |
| 10 DGM panelists | 2.03% | Z = -2.70 | Yes |

In that last example, Veal's panel would be 6.67% African-American—more than doubling that 3.02% population parameter. And yet, this

aggregated analysis would call that an unfairly and unreasonably low representation level, as the result of a pattern of underrepresentation on *prior* jury pools in Webster County. That would make no sense. *See* RemandTr. 161:14–163:18 (Zalenski agreeing that Veal's jury panel "appear[s] to be proportionately representative of African-Americans," independent of her finding about a pattern of underrepresentation in prior jury pools throughout the year that preceded Veal's trial).

Of course, *Lilly* adopted a standing requirement: "A defendant whose jury pool has a percentage of the distinctive group at least as large as the percentage of that group in the jury-eligible population has not had his or her right to a fair cross section infringed, and there would be no reason to aggregate data in that event." *Lilly*, 930 N.W.2d at 305. Veal and the NAACP argue that should be the only step where a court analyzes the defendant's actual jury pool or jury panel. *See* Def's Br. at 56–64; Amicus Br. at 20–21. But that means aggregated data from prior jury pools will drown out the analysis in every case where the defendant's jury pool is not facially overrepresentative. Here, after excusing people with felony convictions, African-Americans comprised 2% of this jury panel (3 of 150). That is less than Zalenski's parameter (3.02%)—but it is still close enough that it may be fair and reasonable.

It makes sense to use standard deviation to determine if this qualifies as enough of a deviation from the expected average that it "indicate[s] a problem" with this combined panel. *See Lilly*, 930 N.W.2d at 302.

In more quantifiable terms, *Lilly* wanted a test that would be satisfied by a showing of underrepresentation that corresponds to a cumulative binomial probability of 16% or less. *See id.* at 304 (noting that a result that is one standard deviation below average means "the probability [is] 16% that the departure is a random event"). The odds of randomly drawing a combined jury panel of 150 people where only three of them (or fewer) are members of a group that comprises 3.02% of the population: 33.33%—exactly one in three. *See* WOLFRAMALPHA, https://www.wolframalpha.com/input/?i=3+successes+in+150+trials+p%3D0.0302. An additional 19.2% of randomly drawn jury panels of that size (150) would contain exactly four members of the group. *See* https://www.wolframalpha.com/input/?i=4+successes+in+150+trials+p%3D0.0302. Those panels still show a slight underrepresentation (Z = -0.25)—but that is the single most likely result. Random sampling *should* produce that jury panel, more often than any other. But Veal's approach would aggregate months of prior jury data into those panels and drown them out, in pursuit of artificial statistical significance.

Iowa's juror selection process uses random sampling by design, and variability in results is natural and expected—any given group will be overrepresented in some jury pools and underrepresented in others. The State's approach uses *Lilly* to calibrate non-zero expectations for fair and reasonable representation (and if those non-zero expectations do not exist because a jury pool or panel is too small, then the State's approach will permit limited aggregation until a non-zero expectation arises from the new aggregated sample). Veal and the NAACP claim that their approach does the same thing—but it does not. Instead, for any Iowa counties with an observable pattern of underrepresentation over time (which judicial branch employees and local jury managers may not be able to solve), Veal's approach would treat any panel with slight underrepresentation as "unfair and unreasonable" on prong #2, even when that slight underrepresentation is well within the range of reasonable and fair results for any random sampling of that county's jury eligible population. Nothing in *Lilly* or *Veal* requires that result, which would effectively replace random sampling with racial quotas.

There are two other problems with this challenge. First, if people with felony convictions on the panel are treated as flatly ineligible and are not counted, then the parameter should not include them, either.

Nobody has presented county-level data that can be used to calculate the percentage of the jury-eligible population of Webster County that is African-American, if "jury-eligible population" excludes all people with felony convictions. Both Veal and the NAACP are claiming that African-Americans in Webster County who are otherwise eligible for jury service are disproportionately likely to have felony convictions (although they have no county-level data). *See* Def's Br. at 80–86; Amicus Br. at 22–31. Assuming that is true, then "the data should be adjusted to reflect the population that would actually be eligible for jury service." *See Lilly*, 930 N.W.2d at 304–05. Nobody knows what that population parameter should be for Webster County; this claim is impossible to analyze. Second, as the district court noted, "Veal's data is drawn from responses to jury questionnaires"—which precede challenges for cause to panelists with felony convictions. *See* Ruling (1/29/21) at 7–8; App. 80–81. The impact of Rule 2.18(5)(a) on Veal's jury panel is apparent from the trial record, but there is no data from prior panels/pools on Rule 2.18(5)(a) excusals (or any other for-cause challenges). Thus, even if it were proper to analyze aggregated data on prong #2 for *other* claims, it would still be impossible to use the prior jury pool data to establish underrepresentation for *this* claim.

This claim is interesting because of arguments about challenges for cause under Rule 2.18(5)(a). But it fails before that point, because a combined jury panel with three African-American panelists among 150 people is not unfair or unreasonable in a county where 3.02% of the jury-eligible population is African-American (Z = -0.730). There is no reason to aggregate data here for *any* claim, because Veal had an expectation of non-zero representation on his actual panel—meaning that if African-Americans had been totally absent, Veal would have been able to carry his burden on prong #2 (Z = -2.16). And there was no suitable data to aggregate for this claim, anyhow. Therefore, the district court was correct that this claim would fail on prong #2. *See* Ruling (1/29/21) at 8–10; App. 81–83.

### B. Veal did not prove that Rule 2.18(5)(a) caused systematic exclusion of African-Americans on Webster County jury pools or jury panels.

This particular jury panel shifted from overrepresentative to slightly underrepresentative, as a result of challenges for cause under Rule 2.18(5)(a).[3] That would seem to establish a causal link between

[3] Of course, even without Rule 2.18(5)(a), those panelists might have been excused on *other* challenges for cause. One of them had been prosecuted by the same AAG who was prosecuting this case. *See* TrialTr.V2 40:22–42:6; TrialTr.V2 61:6–62:8.

Rule 2.18(5)(a) and slight underrepresentation in this particular case. But that is not the same as demonstrating systematic exclusion—it does not mean underrepresentation is systematic or "inherent in the particular jury-selection process utilized." *See State v. Fetters*, 562 N.W.2d 770, 777 (Iowa Ct. App. 1997) (quoting *Duren v. Missouri*, 439 U.S. 357, 366 (1979)). Rose's testimony barely touched on the issue of felon exclusion; she believed it was "plausible" that felons might be deterred from responding or appearing for jury service because of a mistaken belief that they were flatly ineligible (rather than subject to challenges for cause, at either party's discretion), but she specifically said that she had no empirical data that would show that it had any racially disparate impact. *See* RemandTr. 266:2–24; *cf.* RemandTr. 235:20–23. The district court was correct that Veal had offered nothing that could prove systematic exclusion for any claim about Rule 2.18(5)(a). *See* Ruling (1/29/21) at 13–15; App. 86–88.

Random sampling means that some jury pools will contain more people with felony convictions, and some will contain fewer. Likewise, random sampling means that some jury pools will contain more people *of a particular race* with felony convictions, and some will contain fewer. The NAACP points out that two African-American

panelists were excused by challenges for cause under Rule 2.18(5)(a), compared to only one Caucasian panelist. *See* Amicus Br. at 13–14. But that would still happen occasionally, even if felony convictions were proportionately distributed among groups in Webster County.

The amicus brief takes an interesting approach that mirrors Wheelock's method for estimating the impact of felon exclusion on jury pools in Georgia. *See* Amicus Br. at 21–31; *see generally* Darren Wheelock, *A Jury of One's "Peers": Felon Jury Exclusion and Racial Inequality in Georgia Courts*, 32 JUSTICE SYS. J. 335 (2011). Although its point heading states that it uses "aggregated data," it does not use prior jury pool data—instead, it estimates the rate of felony convictions among African-Americans in Iowa, with more adjustments to exclude people who had died, left Iowa, reoffended, or had not yet discharged their sentences on those felony convictions. *See* Amicus Br. at 21–29. None of that was before the district court. This was precisely the kind of argument where Veal could "present proof on remand." *See Veal*, 930 N.W.2d at 329 n.8; *accord Lilly*, 930 N.W.2d at 304–05 (agreeing with NAACP that questions about demographics are "'not a matter for hasty determination' but for 'carefully developed' proof on remand").

Veal did not do that. As such, the State has not had an opportunity to develop a factual record that would enable any meaningful analysis.

The NAACP's standard-deviation analysis is an example of the kind of aggregated analysis that is unhelpful. *See* Amicus Br. at 29–30. Its finding of statistical significance just means *there is a difference* that is not attributable to randomness—that African-Americans were overrepresented among people with felony convictions. That does not mean that being African-American was a strong predictor of whether a person would be excusable for cause under Rule 2.18(5)(a). And the aggregated sample size for that population-level analysis meant that statistical significance ($Z \geq 2$) would only require a small disparity: for any group expected to comprise 3.2% of 139,507 felony offenders (or 4,464 people), a finding that they were 3.29% of felony offenders (or 4,596 people) is "significant." A statistically significant difference between populations in aggregated data is not, in itself, meaningful.

Assuming that the calculations in the NAACP's brief are correct, they are all about a statewide population—not Webster County. Even if the NAACP is right that statewide application of Rule 2.18(5)(a) had a disproportionate impact that disqualified "958 [African-Americans] more than expected," there is nothing in the record or in either brief

that would help extrapolate or quantify the impact in Webster County. If Veal had offered this analysis on remand, then the court might have taken that claimed disparity in re-enfranchised felony offenders and scaled it down to Webster County, which accounts for about 1% of the overall population of the State of Iowa. A projected disparity of only 9.5 people is very small, even for Webster County (with its estimated 819 African-Americans among its 25,259 eligible jurors). *See* Def's Ex. VR-M; App. 57. Applying 1% of the NAACP's numbers to the figures in Zalenski's demographic calculations would produce this result:

| **TABLE 3:** Extrapolation to Webster County | Zalenski's demographic calculations (VR-M) | 1% of NAACP estimate of all eligible jurors affected in IA | Estimate of non-excusable jury-eligible population |
|---|---|---|---|
| African-Americans | 819 | -54 | 765 |
| All adults | 27,039 | -1,395 | 25,644 |
| African-Americans as percent of total | 3.02% | → | 2.98% |

That miniscule change, together with this trial record, raises an interesting question: if an interaction between a policy and a random one-off event causes underrepresentation, is that systematic exclusion? The prong #2 inquiry is about underrepresentation in the defendant's own jury pool or panel (or a small aggregated group of pools/panels).

Here, Rule 2.18(5)(a) had an obvious effect on Veal's combined panel, but it was not enough to enable Veal to carry his burden on prong #2 under *Veal* (or even under *Lilly*). But if *all* African-American panelists had been excused (which would satisfy prong #2), and if the State had offered this data to show that excluding all otherwise eligible panelists with felony convictions would only cut the expected African-American representation level by 0.04%, what would happen? The State submits that any showing that Rule 2.18(5)(a) had such a miniscule effect on African-American representation over time would effectively foreclose proof of prong #3. This is because, under *Duren* and *Plain*, prong #3 requires a showing that "this underrepresentation [from prong #2] is due to systematic exclusion of the group in the jury-selection process." *See Plain*, 898 N.W.2d at 822 (quoting *Duren*, 439 U.S. at 364). By an unfortunate fluke of random sampling, 40% of the African-Americans on this combined panel had felony convictions. But even if excusing those panelists under Rule 2.18(5)(a) counted as "exclusion," it would not count as "systematic" if a broader view of excusals over time would show a proportional (or sufficiently random) distribution of its effects. That would foreclose any showing that exclusion was "inherent in the particular jury-selection process utilized." *See Fetters*, 562 N.W.2d at

777 (quoting *Duren*, 439 U.S. at 366). Here, there is no evidence that operation of Rule 2.18(5)(a) inherently produced underrepresentation and exclusion of African-Americans in Webster County. Rather, it authorized excusal of *any* panelists who had felony convictions—and they happened to be mostly African-American, in this particular case. Even if those excusals had an effect on Veal's panel that would have satisfied prong #2, Veal failed to establish that any such "exclusion" was inherent to the operation of Rule 2.18(5)(a) or tantamount to systematic exclusion, so this claim would still fail on prong #3. *See* Ruling (1/29/21) at 7–8 & 13–15; App. 80–81, 86–88.

The NAACP also argues that apparent underrepresentation in reporting-stage data—before any challenges for cause—was caused by Rule 2.18(5)(a), because the rule "discouraged juror responses and deterred appearance by those persons to whom it applies." *See* Amicus Br. at 10–13. Of course, that did not deter these three panelists. Nor did it deter panelists who were excused through for-cause challenges that happened "routinely," "automatically," and "typically," according to Veal's counsel's "informal survey of public defender's offices around the State." *See* Def's Proposed Ruling (8/27/20) at 3; App. 60. And if there was such a deterrent effect, that effect would have continued

until changes to Rule 2.18(5)(a), in March 2021—so this argument conflicts with all of the advocacy in this case (and others) claiming that *a lack of underrepresentation in reporting-stage data from 2019* established that December 2018 policy changes were so effective that failing to adopt them before 2018 was systematic negligence. *See* Def's Br. at 70–77. There is a similar problem with the NAACP's claim that asking respondents if they have ever been convicted of a crime other than a traffic offense on a juror questionnaire "works as a deterrent to juror participation" because it causes "most individuals" to "draw the conclusion that any criminal conviction except traffic offenses will disqualify them from jury service." *See* Amicus Br. at 31 n.18; *but see* Iowa Judicial Branch, *Juror Questionnaire* (accessed June 23, 2021), https://www.iowacourts.gov/juror/juror-questionnaire (listing that question as part of the current juror questionnaire). And anyone who has tried a case or reviewed a transcript of voir dire would know that there plenty of potential jurors with convictions for various offenses who appear for jury service. Neither of those two claims aligns with any fact in this record or elsewhere, and neither can substitute for a real showing of systematic exclusion—which Veal has not made.

Because Veal failed to show that operation of Rule 2.18(5)(a) was systematically excluding African-Americans from jury pools in Webster County, his claim about Rule 2.18(5)(a) fails on prong #3.

### C. Even if Veal could establish all three prongs of a prima facie claim under *Duren*, this claim fails because permitting challenges to panelists with felony convictions protects the probity of the jury.

The Iowa Supreme Court recently amended Rule 2.18(5)(a) to permit for-cause challenges to panelists who have felony convictions "unless it can be established . . . that the juror's rights of citizenship have been restored." *See* Iowa R. Crim. P. 2.18(5)(a); *accord* Iowa R. Civ. P. 1.915(6)(a). But that does not mean that the old version of the rule was unconstitutional, or that it served no important purpose. *Cf. Griffin v. Pate*, 884 N.W.2d 182, 196 (Iowa 2016) ("Attitudes might be changing to recognize that those convicted of infamous crimes can be trustworthy and valuable electors, but the premise of at least some disqualification based on conviction still appears to have general acceptance throughout the country."). Veal does not address any of the decisions that were cited in the district court's ruling, all rejecting challenges to felon exclusion from jury service. *See* Ruling (1/29/21) at 14–15; App. 87–88; Def's Br. at 86–90. The NAACP argues that those cases are wrong and distinguishable because Veal's claim "is grounded

in the Sixth Amendment, not the Equal Protection Clause." *See* Amicus Br. at 37–39. But the ruling cited decisions that rejected challenges to felon exclusion under *both* constitutional provisions—and those were far from the only ones. *See, e.g.*, *United States v. Foxworth*, 599 F.2d 1, 2–4 (1st Cir. 1979); *DeBlanc v. State*, 799 S.W.2d 701, 706–07 (Tex. Ct. Crim. App. 1990). The State is unaware of *any* contrary authority.

The NAACP's first critique is that "the Sixth Amendment fair cross-section analysis requires the intermediate scrutiny test," even for disparate-impact claims. *See* Amicus Br. at 37–38. But that is a questionable reading of *Duren* and *Taylor*. Language in both cases suggested a test like intermediate scrutiny, but they were discussing sex-based classifications—not classifications on some other basis that had a disparate impact on gender representation. *See Duren*, 439 U.S. at 367–69; *Taylor v. Louisiana*, 419 U.S. 522, 534–35 (1975). *Duren* warned against exemptions that were "expressly limited to a group in the community of sufficient magnitude and distinctiveness so as to be within the fair-cross-section requirement—such as women." *See Duren*, 439 U.S. at 367–69. But at the same time, it endorsed "occupational and other reasonable exemptions" that "may inevitably involve some degree of overinclusiveness or underinclusiveness." *See id.* That looks

like it is describing rational-basis review for occupational exemptions, even if women claim the exemptions at disproportionate rates. *See id.*; *accord State v. Machia*, 449 A.2d 1043, 1049 (Conn. Super. Ct. 1979) (rejecting challenge to occupational exemptions under *Duren* because "the features of the jury selection process alleged to have produced the discrepancy are in their terms and application neutral between sexes and are reasonably related to the protection of justifiable social interests"); *Brewer v. State*, 444 N.W.2d 77, 81 (Iowa 1989) (noting doubts that *Duren* would require intermediate scrutiny in reviewing other exemptions "as distinct from gender-based exemptions").

In *Chidester*, this Court observed that fair cross-section claims are more likely to show a Sixth Amendment violation from exclusion of specific groups from jury service "'on the basis of some immutable characteristic such as race, gender, or ethnic background,' rather than on the basis of their inability to serve as jurors." *See State v. Chidester*, 570 N.W.2d 78, 81–82 (Iowa 1997) (quoting *Lockhart v. McCree*, 476 U.S. 162, 175 (1986)). Then, it considered a challenge to a categorical exemption for farmers during planting season and harvesting season. It noted that in considering challenges to occupational exemptions, some courts "have skipped the distinctive-group analysis and have

simply held the government had a legitimate reason to exclude the occupational group under consideration." *See id.* at 82–83 (citing *State v. Williams*, 264 N.W.2d 779, 781 (Iowa 1978), among others). *Chidester* followed the same approach: it assumed that farmers were a distinctive group and that they were systematically excluded from jury service during those seasons by that exemption—and then it rejected the Sixth Amendment challenge upon finding that there was "a special hardship" that would "justify" the exemption. *See id.* at 83. *Chidester* did not use any of the vocabulary that typically accompanies intermediate scrutiny, nor did it require the judicial branch to use the least overinclusive means to achieve an important interest—because it applied rational basis, or something like it. *See id.* That made sense—even if farmers were a distinctive group under *Duren*, this was still an exemption that did not exclude potential jurors "on the basis of some immutable characteristic such as race, gender, or ethnic background." *See id.* at 81–82 (quoting *Lockhart*, 476 U.S. at 175); *accord United States v. Terry*, 60 F.3d 1541, 1544 (11th Cir. 1995) (assuming that police officers were a distinctive group under *Duren*, and rejecting Sixth Amendment challenge to categorical exemption "because it is good for the community that they not be interrupted in their work");

*State v. Williams*, 659 S.W.2d 778, 781 (Mo. 1983) (rejecting challenge under Sixth Amendment to statute that excluded all attorneys because "[m]any legitimate objectives justify the exclusion").

In the NAACP's view, that deference to pursuit of legitimate public goals in jury management processes would vanish upon any minimal showing of a disparate racial/gendered impact. In *Chidester*, if farmers were disproportionately white or male, that would confiscate the policy decision about those exemptions and hand it to the Iowa Supreme Court (or even to a federal court), to substitute its judgment about the importance of those localized agricultural concerns and the best policy for addressing them. Claims like Veal's would proliferate—it is hard to imagine any jury-eligibility criterion that *wouldn't* have a disparate impact that exceeds what the NAACP calculated in its brief. Assurances that states are "free to . . . provide reasonable exemptions" would give way to judicial micromanagement of the means chosen to enforce proportional representation, to the hundredth of a percent. *See Duren*, 439 U.S. at 367 (quoting *Taylor*, 419 U.S. at 538). The far better approach is to reserve intermediate scrutiny for the final step of *Duren* claims that target policies operating "on the basis of some immutable characteristic such as race [or] gender." *See Chidester*, 570

N.W.2d at 81–82 (quoting *Lockhart*, 476 U.S. at 175); *Williams*, 264 N.W.2d at 781. For claims that only allege a disparate racial *impact* in operation of race-neutral excusal policies, rational basis should apply.

Even if intermediate scrutiny applies, Rule 2.18(5)(a) survives. Veal discusses a 2018 study of people with felony convictions in Maine, and their self-reported attitudes towards jury service. *See* Def's Br. at 88–89 (discussing James M. Binnall, *Felon-Jurors in Vacationland: A Field Study of Transformative Civic Engagement in Maine*, 71 ME. L. REV. 71 (2018)). That study was limited to 32 interviews with people with felony convictions, who had all self-selected by responding to advertisements for the study. *See* James M. Binnall, *Summonsing Criminal Desistance: Convicted Felons' Perspectives on Jury Service*, 43 L. & SOC. INQUIRY 4, 7 (2018). That small, self-selecting sample does not support drawing any broad or generalizable conclusions.

In another published study—with a much larger sample size—Binnall discovered that 65% of participants with felony convictions "possessed a prodefense/antiprosecution pretrial bias," which led him to conclude "a felony conviction is a statistically significant predictor of a prodefense pretrial bias." *See* James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding*

*Convicted Felons from Jury Service?*, 36 L. & POL'Y 1, 12–16 (2014). In subsequent publications, Binnall has minimized the seriousness of that finding by comparing it to bias among other groups: "on a scale of pre-trial biases, convicted felons are as pro-defense/anti-prosecution as law enforcement personnel are anti-defense/pro-prosecution." *See* James M. Binnall, *Cops and Convicts: An Exploratory Field Study of Jurymandering*, 16 OHIO ST. J. CRIM. L. 221, 230 (2018). But that is not helpful for Veal, who is citing Binnall's work to downplay "concerns that former felons would side with the defense." *See* Def's Br. at 89.

Veal argues that, if known group biases are grounds for excusal, then other groups "should likewise be disqualified from jury service." *See* Def's Br. at 90. The State would also defend the constitutionality of rules authorizing those challenges for cause, if they existed. There is no workable constitutional principle that would bar Rule 2.18(5) from reflecting the prevailing views among drafters and stakeholders about which (race-neutral) characteristics trigger an elevated concern about bias in deliberations. A rule may authorize for-cause challenges based on panelist characteristics that correlate with bias that drafters view as fixed, pronounced, or pernicious, while also declining to authorize challenges based on panelist characteristics that produce a bias that is

considered more malleable or benign. *See United States v. Wood*, 299 U.S. 123, 145–51 (1936). And *this* characteristic—a felony conviction—raises unique concerns about bias, as the district court noted:

> The Legislature could reasonably determine that a person who has suffered the most severe form of condemnation that can be inflicted by the state . . . might well harbor a continuing resentment against "the system" that punished him and an equally unthinking bias in favor of the defendant on trial, who is seen as a fellow underdog caught in its toils. Because these antisocial feelings would often be consciously or subconsciously concealed, the Legislature could further conclude that the risk of such prejudice infecting the trial outweighs the possibility of detecting it in jury selection proceedings. The exclusion of ex-felons from jury service thus promotes the legitimate state goal of assuring impartiality of the verdict.

Ruling (1/29/21) at 15; App. 88 (quoting *Carle v. United States*, 705 A.2d 682, 686 (D.C. 1998), in turn quoting *Rubio v. Superior Court*, 593 P.2d 595, 600 (Cal. 1979) (plurality opinion)). Both Veal and the NAACP argue that individualized voir dire can uncover any actual bias, and that should suffice. *See* Def's Br. at 88–90; Amicus Br. at 34–40. But Binnall interviewed a judge who would disagree: "[I]t's illusory to think that we are effective in teasing out all but the grossest and most obvious prejudices." *See* James M. Binnall, *Exorcising Presumptions? Judges and Attorneys Contemplate 'Felon-Juror Inclusion' in Maine*, 39 JUST. SYST. J. 4, 15–16 (2018). Veal quotes *Jonas* and its warning

"against allowing close issues to creep into the record and threaten the validity of a criminal trial." *See* Def's Br. at 59–60 (quoting *State v. Jonas*, 904 N.W.2d 566, 571–75 (Iowa 2017)). But case-by-case estimations of whether each panelist with a felony conviction is actually or impliedly biased will generate those "close issues." *See* Binnall, *Exorcising Presumptions?*, 39 JUST SYST. J. at 19–21 (noting that judges described processes for determining whether to excuse panelists with felony convictions as "multifactorial" and qualitative). To trial courts, *Jonas*'s warning to avoid "close issues" just means to resolve any "close issue" in the defendant's favor (because there is no appellate review following an acquittal). Rule 2.18(5)(a) avoided that problem with a clear-cut rule—no "close issues" there. That furthered important interests in fairness, finality, and judicial economy.

Bias is not the only concern—there is also probity. Jury service is a staggeringly important duty. A trial can easily be sabotaged by juror malfeasance, or by a juror's intemperate reaction to someone else's deliberate provocations or meddling. *See, e.g.*, *State v. Christensen*, 929 N.W.2d 646, 653–57 (Iowa 2019); *State v. Webster*, 865 N.W.2d 223, 227–31 (Iowa 2015). It is reasonable to excuse a person who was convicted of a serious offense from this sensitive civic duty.

> We . . . find juror probity to be the essence of the system. It refers to a juror's reliability at the outset to fill an important societal role. [W]e think that there is no need to theorize about whether an accused felon is likely to be biased against the government or, on the other hand, whether he is likely to think, from some personal experience, that all persons charged will be likely to lie to avoid conviction and so be biased against the defendant. . . . The important point is . . . that he has, *in fact*, disregarded the law. It is rational and not entirely theoretical to think he could do so again—in favor of one side or the other—if he were a juror.

*United States v. Barry*, 71 F.3d 1269, 1273–74 (7th Cir. 1995); *see also United States v. Greene*, 995 F.2d 793, 797–98 (8th Cir. 1993) (rejecting Sixth Amendment challenge to felon exclusion because of "the significant governmental interest in having jurors who can be relied upon to perform their duties conscientiously"); *accord United States v. Arce*, 997 F.2d 1123, 1127 (5th Cir. 1993); *Hale v. Shoop*, No. 1:18-cv-504, 2021 WL 1215793, at *18–20 (N.D. Ohio Mar. 31, 2021).

Even so, Rule 2.18(5)(a) never *required* parties to challenge panelists with felony convictions. Arguments about overinclusiveness are unpersuasive because panelists were never excused by automatic operation of Rule 2.18(5)(a)—it required a challenge, and a challenger. If neither party had concerns about a panelist with a felony conviction, that panelist would not be excused. That establishes a fit between the impact of Rule 2.18(5)(a) and the interest that it served.

Are *all* ex-felons untrustworthy? Surely not. But Rule 2.18(5)(a) recognized that the fact of a felony conviction raises such a question, and it may not be answerable with any real degree of confidence in the short time available for voir dire of each individual panelist. That warning from *Jonas* echoes loudly: there is an important interest in leaving no room for a "close issue" about a petit juror's fidelity to the court's instructions and to their oath during the trial, when so much hangs in the balance. And restoration of civil rights by operation of law or passage of time does not put that "close issue" to rest. *See United States v. Boney*, 977 F.2d at 624, 642 (D.C. Cir. 1992) (Randolph, J., concurring and dissenting in part) ("That a felon has been unwilling to conform his conduct raises doubts about his capacity to honor the juror's oath, and to comply with the trial judge's instructions."). Thus, even if Veal established a prima facie claim under *Duren*, and even if Rule 2.18(5)(a) had to withstand intermediate scrutiny, it would be constitutional because it advances an important interest in protecting the probity of the petit jury. *See* Ruling (1/29/21) at 14–15; App. 87–88.

## III. The district court was correct to rule that Veal did not preserve error on a claim about underrepresentation or exclusion of Hispanic people, and that such a claim was beyond the scope of the remand order.

### Preservation of Error

Veal asked the district court to rule on this separate challenge that alleged underrepresentation and exclusion of Hispanic people. The court ruled that Veal failed to preserve error before trial. It also ruled that this challenge was beyond the scope of the remand order. *See* Ruling (1/29/21) at 4; App. 87. That ruling preserves error for Veal to renew his arguments that the district court should have ruled on that claim. *See Lamasters*, 821 N.W.2d at 864 & n.2.

There was no ruling on the merits of this challenge that alleges underrepresentation/exclusion of Hispanic people. If Veal is correct that the district court erred in declining to rule on the merits, then the proper remedy would be to remand with directions to rule on it. *See, e.g.*, *Mannes v. Fleetguard, Inc.*, 770 N.W.2d 826, 831 (Iowa 2009) ("[R]emand is appropriate as the commissioner never ruled on the issue of penalty benefits."); *State v. Allen*, 402 N.W.2d 438, 443–44 (Iowa 1987) (refusing to rule on claim in the first instance on appeal, because it was "[s]itting as a court for the correction of errors").

**Standard of Review**

Rulings on error preservation and the scope of remand orders are reviewed for correction of errors at law. *See Taylor v. State*, 632 N.W.2d 891, 894 (Iowa 2001); Iowa R. App. P. 6.907.

**Merits**

Veal claims that he preserved error on a challenge to exclusion of Hispanic people by raising it before trial, by making a claim about underrepresentation of "all minorities." *See* Def's Br. at 16–17 (citing TrialTr.V2 2:3–6:20). But "all minorities" is not a distinctive group. *See, e.g.*, *United States v. Suttiswad* 696 F.2d 645, 649 (9th Cir. 1982) (finding "non-white" was not a distinctive group for a *Duren* claim because that group "would have diverse attitudes and characteristics which would defy classification"). And a claim about "all minorities" would not have put the State or the trial court on notice that Veal was alleging underrepresentation and exclusion of a group defined by shared Hispanic ethnicity. In Veal's challenge to the combined panel, his counsel said *nothing* about the level of Hispanic representation on that jury panel. They quantified the level of Hispanic representation throughout 2016, but that was their *only* mention of Hispanic people. *See* TrialTr.V2 5:24–6:5. The entirety of their challenge and argument

was exclusively focused on levels of African-American representation. *See* TrialTr.V2 3:13–26:3. His written submission that tabulated data from prior jury pools only provided a census figure for one particular population in Webster County, and it only calculated the percentage of *marked* responses from that same population: African-Americans. *See* Court Ex. 2 (7/27/17) at 3; App. 18; *accord* Motion for New Trial (8/18/17) at 1–3; App. 21–23. Veal's actual challenge was only alleging underrepresentation and exclusion of African-Americans.

Moreover, Veal acknowledges that the trial court did not rule on any claim alleging underrepresentation and exclusion of any group except African-Americans. *See* Def's Br. at 16–17. To preserve error on any other claim, Veal needed to get a ruling on it. *See Lamasters*, 821 N.W.2d at 864 & n.2. Veal did not do that. The trial court's rulings were exclusively concerned with Veal's actual challenge, which alleged underrepresentation and systematic exclusion of African-Americans. *See* TrialTr.V2 23:13–26:3; TrialTr.V2 33:13–40:20; Order Regarding Trial (7/20/17) at 1–3; App. 11–13. Even if Veal really had been trying to raise a challenge about Hispanic representation on his combined jury panel, the undisputed fact that the trial court never ruled on that challenge would foreclose any argument that error was preserved.

Veal's alternative argument is that the Iowa Supreme Court's remand order was broad and was not limited to challenges about underrepresentation and exclusion of African-Americans. *See* Def's Br. at 18 (quoting *Veal*, 930 N.W.2d at 330) ("The Court remanded 'to offer Veal an opportunity to develop his arguments that his Sixth Amendment right to an impartial jury trial was violated.'"). But other parts of *Veal* and *Williams* made it clear that the scope of remand was limited to *the same challenges* for which error had been preserved—each opinion specified that the defendant could develop arguments in support of preserved Sixth Amendment challenges, but they could not raise already-unpreserved challenges under Article I, Section 10. *See Veal*, 930 N.W.2d at 328 n.5; *Williams*, 929 N.W.2d at 629–30 & n.1; *accord In re Marriage of Davis*, 608 N.W.2d 766, 769 (Iowa 2000) (quoting 5 Am.Jur.2d *Appellate Review* § 782, at 452 (1995)) (noting that lower courts "need not read the [remand] mandate in a vacuum" and "may examine the rationale of the appellate opinion in order to discern the meaning of language in the [remand] mandate").

"[A] motion for new trial is too late to raise a constitutional challenge to the jury panel." *Williams*, 929 N.W.2d at 629 n.1 (citing *Johnson*, 476 N.W.2d at 333–34). Logically, remand was also too late

to raise this new *Duren* claim—it "simply c[ame] too late to comply with the policies behind the preservation requirement," because "the only corrective action the [remand] court could have taken would have been to sustain the motion for new trial and conduct a second trial in front of a second jury." *See id.* (quoting *Johnson*, 476 N.W.2d at 334).

The stated intent of the remand order was to permit Veal to "develop his arguments" in support of the same challenge—which he needed to do, to have any chance of establishing systematic exclusion. *See Veal*, 930 N.W.2d at 330. That order was worded to exclude the unpreserved challenge that was raised in Veal's direct appeal. *See Veal*, 930 N.W.2d at 328 n.5. The district court was right to infer that the remand order also excluded Veal's additional new challenge that had not been raised—or even mentioned—at any point during the trial or direct appeal. *See* Ruling (1/29/21) at 4; App. 87. Thus, it did not err in declining to rule on this claim, and Veal's challenge fails.

## CONCLUSION

Veal failed to establish underrepresentation, and he failed to prove systematic exclusion. The State respectfully requests that this Court reject Veal's challenges and affirm the district court's ruling.

## CONDITIONAL REQUEST FOR ORAL ARGUMENT

If retained, this case should be set for oral argument. Otherwise, nonoral submission is appropriate.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

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

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