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THE SUPREME COURT OF IOWA

NO. 21-0144

STATE OF IOWA.

Plaintiff/Appellee,

vs.

PETER LEROY VEAL,

Defendant/Appellant.

Appeal From The District Court
For Cerro Gordo County

The Honorable, Judge Rustin Davenport

Brief Of Amicus Curiae NAACP
AND Request for Oral Argument

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United States Supreme Court

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United States Court of Appeals

United States v. Barry, 71 F.3d 1269 (7th Cir. 1995) 37-38
United States v. Greene, 995 F.2d 793 (8th Cir. 1993) 37-38

Iowa Supreme Court

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Iowa Code Section 607A.3 16

Iowa Rule of Criminal Procedure 2.18(a)(5) ....passim

OTHER AUTHORITIES

American Bar Association, Jurors and Jury Trial Principles, Principle 2.A(5).
https://www.uscourts.gov/sites/default/files/aba_principles_for_juries_and_jury_trials_2005.pdf 39-40

Shamena Anwar, Patrick Bayer, and Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trial*, 127 Q.J. Econ. 1017 (2012) 15-17

Laurie Belin, Bleeding Heartland (June 30, 2017)............................27
https://www.bleedingheartland.com/2017/06/30/branstad-restored-voting-rights-to-just-206-iowans-in-more-than-six-years/

James Binnall, *Twenty Million Angry Men: The Case for Including Convicted Felons in Our Jury System* (2021)..................................12

Iowa Department of Corrections, Quick Facts Report, FY2016 (Sept. 2016)
http://publications.iowa.gov/26530/1/Quick%20Facts%20%20%204th%20Qtr%20FY17.pdfa 26

Iowa Department of Corrections, Prison Recidivism FY2016 (Sept. 2016),
https://doc.iowa.gov/data/prison-recidivism-fy2016................28-29

Francis X. Flanagan, *Race, Gender, and Juries: Evidence from North Carolina*, 61 Journal of Law and Economics 193 (2018)...................18

Brian Kalt, *The Exclusion of Felons from Jury Service*, 53 American U. L. Rev. 65 (2003)..40

Russell E. Lovell & David S. Walker, *Achieving Fair Cross-Sections on Iowa Juries in the Post-Plain World: The Lilly-Veal-Williams Trilogy*, 68 Drake Law Review 499 (2020) 9-10, 21, 36

Sentencing Project, State-by-State Data (2019)
https://www.sentencingproject.org/the-facts/#map ...22, 24, 25, 27

Sentencing Project, Christopher Uggen, Ryan Larson, and Sarah Shannon, *6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016* (October 2016), at 16, Table 4, Estimates of Disenfranchisement African Americans with Felony Convictions, 2016 (Post-Sentence, Iowa). https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf 23, 25-27

U.S. Census, Electorate Profile: Iowa (Jan. 29, 2016) https://www.census.gov/library/visualizations/2016/comm/electorate-profiles/cb16-tps09_voting_iowa.html 24

Michael Zimmer, Charles Sullivan, and Rebecca White, *Cases and Materials on Employment Discrimination* (6th Ed. 2003) 30

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INTEREST OF AMICUS STATEMENT

The NAACP is the country's largest and oldest civil rights organization. Founded in 1909, it is a non-profit corporation chartered by the State of New York. The mission of the NAACP is to ensure the political, social, and economic equality of rights of all persons, to advocate and fight for social justice, and to eliminate racial discrimination.

This appeal in *Veal II* raises important issues affecting the impartial jury right in this State for Blacks and all persons of color. The NAACP's strong interest in this Court's impartial jury fair cross-section jurisprudence is reflected by the NAACP Amicus Briefs in *State v. Veal I)*, 930 N.W.2d 319 (Iowa 2019), *State v. Lilly II* (No. 20-0617), and *State v. Plain II* (No.20-1000), and this Amicus Brief in *State v. Veal II* (No. 21-0144).

ARGUMENT

I. Rule 2.18(5)(a)'s Life-Time Automatic Exclusion from Jury Service of Persons with a Felony Conviction, Including Persons Who Had Their Rights Restored, Constitutes Systematic Exclusion

A. Jury Management Practices

This Court's landmark holding in *State v. Lilly*. 930 N.W.2d 293, 307-08 (Iowa 2019). that the impartial jury guarantee of the Iowa Constitution applied not only to formal policies but also to the court system's jury management practices, was founded upon experience and recognized that negligent jury management practices can just as surely cause underrepresentation of persons of color as policies rooted in explicit or implicit bias. *Lilly* also recognized that that approach could be extended to Sixth Amendment analysis in an appropriate case. This is such a case because lax jury management practices hide the impact of Rule 2.18(5)(a)'s felon-exclusion, which led to the systematic exclusion of African American jurors not only in Veal's case but with regularity.

The instant case demonstrates that monitoring and careful analysis of the court system's jury management practices are necessary to detect and remedy the racial impact of jury procedures that are clearly "policies" covered by fair cross-section case law, but

whose full racial impact would not be apparent without careful examination as to how the formal policy can exacerbate failures to respond and appear at earlier stages of the process—the stuff of jury management.[1] This Court unanimously recognized in *State v. Plain*, 898 N.W.2d 801 (Iowa 2017), it is the court system's responsibility to record, maintain, and make jury data" publicly accessible, and, in *Lilly*, it made clear its responsibility to monitor the various stages of the jury selection process to "identify and correct" jury management practices that are causing underrepresentation. Lilly, at 307-08 The NAACP will demonstrate this synergy between policy and jury management practice is the "persuasive" reason *Lilly* sought for extending the *Lilly* holding and finding *Lilly*'s systematic exclusion holding equally applicable to Sixth Amendment fair cross-section claims.][2]

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[1] Jury management practices and their relevance to securing the fair cross-section of the community required by the Constitution's "impartial jury" guarantee have often been characterized as "run of the mill" or as a "laundry list" and their relevance treated dismissively. That terminology is pejorative and the ensuing approach unfortunate; the NAACP asks the Iowa Supreme Court to reject and discard that terminology.

[2] For reasons counsel developed and in Russell Lovell and David Walker, *Achieving Fair Cross-Sections on Iowa Juries in the Post-Plain World: The Lilly-Veal-Williams Trilogy*, 68 Drake Law Review 499, 551-52 and note 291 (2020)(hereinafter "Lovell & Walker"),

B. The Effect of Rule 2.18(5)(a) on Veal's Jury Pool

Rule 2.18(5)(a) has in practice been construed by trial judges across the state as requiring automatic disqualification of persons previously convicted of a felony from jury service when requested by the prosecution. Prosecutors routinely file such motions, and, as the State contends, and the District Court found, this Court's precedent mandates disqualification of felons whenever a prosecutor (or defense counsel) files a challenge for cause under Rule 2.18(5)(a) and establishes that a prospective juror has been convicted of a felony. Dist. Ct. Op. at 14; State's Proposed Order at 22. It is uncontested that district court judges have, without exception, ruled that Rule 2.18(5)(a) required disqualification *even if the prospective juror has had his or her citizenship rights restored*.

The District Court faulted defendant Veal because he "has not shown that felons are disproportionately likely not to appear for jury service . . . ." Dist. Ct. Op. at 14. The District Court found: "Whatever underrepresentation appears in records drawn from responses to juror questionnaires cannot logically be caused by Iowa rules that allow parties to strike felons for cause, because that occurs later in the

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Berghuis v. Smith, 559 U.S. 314 (2010) does not foreclose that construction of the Sixth Amendment.

process . . . and generally does not occur until the prospective jurors arrive for the trial." D. Ct. Op. at 13. But the District Court totally failed to appreciate how the "felon exclusion rule" discouraged juror responses and deterred appearance by those persons to whom it applies. Denial of the right to vote and ineligibility to serve on a jury—because of a felony conviction—have been bedrock law in Iowa for 150 years and more; and just as trying to vote would be a useless or criminal act, showing up for jury service would be a futile gesture, a waste of time, and an invitation for public humiliation—to be stigmatized as a "felon" no matter how many years the individual had returned to and rejoined the community as a citizen.

In *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), a systemic, race-based employment discrimination case, the Court provided the following real world insight:

> "A consistently enforced discriminatory policy can surely deter job applications from those who are aware of it and are unwilling to subject themselves to the humiliation of explicit and certain rejection. * * * *When a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture, he is as much a victim of discrimination as is he who goes through the motions of submitting an application."*

Id. at 365-367 (emphasis added). The teaching of *Teamsters* explains why summoned jurors who are subject to the felon-exclusion

rule fail to respond or appear. The construction of Rule 2.18(5)(a) to require automatic disqualification for life of every person convicted of a felony, including those who have fully discharged their sentences and had their voting rights restored, surely has deterred many, if not most, felons from responding and appearing. Life is challenging enough for persons seeking to reenter society after prison without having "to subject themselves to the humiliation of explicit and certain rejection."[3] Why show up, especially when enforcement is widely known to be so lax?

This case was exceptional in that three felons actually did respond to the juror summons and proceeded through the jury selection process to the voir dire panel stage; it was there that Rule 2.18(5)(a) was applied by the District Court, and each of the three jurors was disqualified because of a felony conviction. As we discuss below, the District Court discounted the huge racial impact of its own

[3] Professor James Binnall himself was called for jury service and affirmatively answered question 5 on the California juror questionnaire about a prior "felony" conviction. The jury manager then "instructed us to stand and proceed to the back of the jury lounge if we had answered 'yes' to question five. I stood, mortified that my criminal record was now on display for all to see." James Binnall, Twenty Million Angry Men: The Case for Including Convicted Felons in Our Jury System at 12 (2021) (hereinafter "Binnall").

disposition of the challenges for cause and the peremptory strike of the African American jurors and failed to appreciate the systematic exclusionary racial impact of Rule 2.18(5)(a) that resulted from its deterrent effect on those certain to be disqualified.

C. The Racial Impact of the Felon-Exclusion Rule at the Voir Dire Panel Stage, the Importance of Which Was Highlighted by the Anwar Study

The record demonstrates that the underrepresentation of African Americans on the Veal voir dire jury panel was caused in significant part by the District Court's grant of the prosecution's challenges for cause: 2 of the 3 African Americans on the jury voir dire panel (66.7%) were struck for cause based on the felon-exclusion rule, compared to only 1 of 31 non-blacks who was struck for cause based on that rule (3.2%). The comparative racial impact on African American jurors of the prosecutor's felony-exclusion "strikes" was an incredible 11:1 (.667/.032) ratio. This was not an aberration; it is consistent with the dramatic racial disparities that have existed in the criminal justice system of Iowa for at least four decades. Our data in the next section shows that 2.18(5)(a) was rendering ineligible a very significant percentage of African Americans convicted of a felony *who had discharged their sentences (including those whose rights had*

been restored), amounting to 7.8% of the African American voting age population at the time of Veal's trial in 2017! The 11:1 black/white ratio in the *Veal* case is without any consideration of felons who were deterred from responding to a juror summons by the prospect of certain disqualification.

The District Court's discussion of empirical studies reporting the distrust that many African Americans have for the judicial system[4] is a reality the NAACP sadly can confirm. Can there be any doubt that the full racial impact of Rule 2.18(5)(a) in the *Veal* case undoubtedly was even greater? With the peremptory strike of the remaining African American juror, defendant Veal's case was tried to an all-white jury.

The data demonstrating that Rule 2.18(5)(a) was the primary reason there were no African Americans on the voir dire jury panel is of particular significance, because the Anwar Study, cited in *State v. Plain*, found that inclusion of one or more African Americans in the voir dire panel diminished the risk of a biased verdict in cases involving African American defendants even when the actual seated trial jury did not include any African Americans. *State v. Plain*

[4] D .Ct. Op. at 17-18.

summarized research[5] by Shamena Anwar and co-authors as finding "where there was one or more black jurors, black and white defendants had roughly equal rates of conviction; however, all-white juries convicted African-American defendants 81% of the time and white defendants only 66% of the time." *State v. Plain*, 898 N.W.2d 801, 825-26 (Iowa 2017). The actual findings of the Anwar Study were slightly more nuanced, because it examined the correlation between the racial diversity *on the voir dire jury panel* from which the seated jury was chosen and conviction rates, using data from two Florida counties.

Confusion has arisen as to the Anwar Study's precise findings because Anwar uses the term "jury pool" in a colloquial way throughout even though that term also refers to a very specific stage in the multi-stage jury selection process. The Anwar Study's focus on the voir dire panel stage is confirmed in its description of the data it studied: "Our data set consists of all felony trials for which jury selection began in Sarasota and Lake Counties, Florida, during 5.5- and 10-year periods, respectively, in the 2000s. The data are

[5] Shamena Anwar, Patrick Bayer, and Randi Hjalmarsson, The Impact of Jury Race in Criminal Trial, 127 Q.J. Econ. 1017, 1027-28 (2012) (hereinafter "Anwar Study").

unusually rich in providing information on the age, race, and gender not only for each of the 6–7 members of the seated jury but also for the approximately 27 members of the *jury pool* for the trial from which the seated jury is selected."[6]

In its Appellee's Brief in *Lilly I* (No. 17-1901), at 64-68, the State summarized: "Anwar's team found that racial disparities in conviction rates disappeared when the *jury panel* contained at least one African-American, 'regardless of whether they are actually seated on the trial jury.'" *Id*. at 64 (quoting Anwar at 1035). The State clearly appreciated that Anwar's use of the "jury pool" term was equivalent to an Iowa "jury panel" because the State's Brief refers—not once or twice, but ten times—to Anwar's findings as demonstrating the importance of having a black person on the jury "panel." *Id*. at 64-68. However, in its Appellee's Brief in *Lilly II* (No. 20-0617), the State's discussion of the Anwar Study forgot that it was the correlation of having a black person *on the voir dire panel* that was the safeguard the Anwar Study found against a biased verdict. Instead, the State in *Lilly II* exclaims:

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[6] *Id*. at 1019 (emphasis added). Iowa Code Section 607A.3 distinguishes "jury pool" from a "panel." The "panel" subjected to voir dire from which the jury is drawn in a specific case is much smaller than the "pool."

> "Why does it matter it is *only total absence from a jury pool* that affects conviction rates? For one thing, it informs the State's view that a fair-cross-section challenge arising from a group's total absence from a jury pool is a unique situation that raises special concerns . . . . But when the actual jury pool contains one member of that distinctive group, that unique concern disappears . . . . Moreover, if the actual jury pool and the distinctive group are large enough that a non-zero expectation of representation exists—without aggregation—then . . . the court should assess the actual jury pool to analyze prong #2."

Id. at 60 (emphasis in original).

The Anwar Study provides support for fine-tuning the *Lilly* standing test, making it specifically applicable to the defendant's voir dire panel's composition (the "jury pool" which the Anwar Study analyzed). Such an approach is administratively feasible and is consistent with the Anwar Study findings, which have relevance to jurisdictions such as Iowa where there are only small numbers of blacks and other racial minorities, and their presence on the voir dire panel can operate as a safeguard against biased verdict results. Their presence on the seated jury, of course, can provide even greater assurance of an unbiased verdict.[7]

[7] While the NAACP believes that the inclusion of black jurors on the voir dire panel can have a positive impact in mitigating the implicit bias of other jurors, we are highly skeptical of, and view as aberrational, the Anwar Study's conclusion that racial diversity on the voir dire panels "entirely eliminated" the racial disparity in conviction

Below we will examine the empirical analysis of aggregated data, based on highly respected Sentencing Project reports, Iowa Department of Corrections (DOC) reports, and other social science sources and reports, that demonstrate Iowa's felon exclusion policy has disproportionately excluded African Americans from Iowa's juries over the years, a corollary of longstanding racial disparities in the Iowa criminal justice system—referenced by the Court itself in *State v. Plain*—that consistently have been among the worst in the nation. It is important to conceptualize that the prospective jurors who have actually been struck pursuant to a formal Rule 2.18(5)(a) challenge represent only the tip of the iceberg in terms of the full systematic exclusionary impact of Rule 2.18(5)(a).

D. Veal's Challenge to the Felon-Exclusion Rule as Systematic Exclusion Requires Elimination of the Three Jurors with Felony Convictions from the Jury Pool Count in Determining Standing.

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rates on trial juries that did not include any black jurors. That conclusion is inconsistent with the more comprehensive Flanagan Study in North Carolina that found that the conviction rate for black male defendants increases as there are fewer black males on the trial jury. Francis X. Flanagan, Race, Gender, and Juries: Evidence from North Carolina, 61 Journal of Law and Economics 193, 204-05 (2018).

The District Court declined "to exclude the panelists who had felony convictions . . . from the quantitative calculations to assess the representativeness of the jury pool."[8] That conclusion conflicts with the holding of *State v. Williams*: "A policy or practice relating to excusing jurors might amount to systematic exclusion. . . . If a defendant wishes to try to prove that it does, the defendant should not be foreclosed from doing so by a rigid rule that calculates the pool based on who was summoned, rather than who actually appeared."[9] Since Rule 2.18(5)(a) is a "policy [] relating to excusing jurors [that] might amount to systematic exclusion," the District Court erred when it refused to exclude the three jurors with felony convictions (two of whom were African American) in its jury count for purposes of determining the Defendant's standing.

When calculated as *Williams* requires, the African American percentage of the Veal pool falls from 3.27% (5/153=.0327) to 2% (3/150=.020). The combined African American jury-eligible Census population for Webster County—whether it be 3.02% as calculated by Expert Zalenski or 2.4% – 2.6% as calculated by the State—exceeds

[8] Dist. Ct. Op. at 8.
[9] State v. Williams, 929 N.W.2d 621, 630 (Iowa 2019) (citation omitted).

the 2% Veal jury pool, satisfying the standing component of the *Duren/Plain* prong 2.

E. The District Court Erred in Applying Standard Deviation Analysis to Defendant's Own Jury Pool Rather Than Just Comparing the Percentage of African Americans on Defendant's Jury Pool to the Percentage of African Americans in the Jury-Eligible Population of Webster County.

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. But standard deviation analysis was *not* to be applied to the defendant's own jury pool because, as a result of small numbers, it could mask or hide systemic underrepresentation.

In contrast to the standard deviation calculation he made to determine underrepresentation based on the aggregate jury data, Justice Mansfield made a straight-forward comparison to determine standing: "Veal's pool contained only five African-Americans out of 153 potential jurors. This 3.27% figure is below the percentage of African-Americans in Webster County (4.6%) and also below the percentage of eighteen-and-over African-Americans in Webster

County (3.9%).” Veal, 930 N.W.2d at 329. *See generally* Lovell & Walker, at 566-71, 576-78.

The District Court rejected Grace Zalenski’s meta-analysis of each jury pool in the aggregate data as inconsistent with *Veal I*, and made no analysis of the aggregated jury pool data for Webster County. The District Court embraced the State’s argument applying standard deviation analysis to the defendant’s own jury pool and held that aggregated jury data need not be considered. In doing so, the District Court disregarded and revised this Court’s holdings in *Veal* and *Lilly,* and it committed clear error. In *Veal I* this Court remanded the case to the District Court with instructions to apply standard deviation analysis to the aggregated Webster County jury pool data from the “first six months of 2017” (in addition to the calendar year 2016 data). The District Court’s ruling is not only wrong but directly contrary to the law of the case.

II. The Aggregated Data Demonstrates Statistically Significant Racial Impact of Rule 2.18(5)(a) on Post-Sentence African Americans Who Had Discharged Their Sentences, After Adjustment for Projected Out-of-State Moves, Deaths, and Recidivism, and Confirms Their Systematic Exclusion from Jury Service

A. Total African American Disenfranchisement Rate

The Sentencing Project "compiles state-level criminal justice data from a variety of sources" and its "State-by-State Data" Report's chart, titled Iowa "Felony Disenfranchisement (2016)," shows 52,012 Iowans were denied the right to vote because of a felony conviction as of 2016.[10] The 52,012 felons who were disenfranchised constituted 2.17% of Iowa's voting age population (VAP). Among them were 6,879 African Americans, who constituted 9.84% of the African American VAP. Id. The Sentencing Project's total felony disenfranchisement rate includes all persons with a felony conviction—not only those who have discharged their sentences but also those in prison and jails, on probation and parole, and otherwise under criminal supervision.

Iowa's African American total disenfranchisement rate was *the worst in the nation in 1980* at 12.6% of their voting age population and has consistently been among the highest in the nation over the

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[10]Sentencing Project, State-by-State Data (2019) https://www.sentencingproject.org/the-facts/#map (last visited on June 14, 2021). "Racial/Ethnic Disparity in Imprisonment (2014): Black : White ratio, 11.1.

past 40 years.[11] By 2016 the Iowa total disenfranchisement rate for African Americans had declined to 9.84% of their VAP, as a result of the 2005 Vilsack and 2009 Culver Executive Orders restoring voting rights to those who had discharged their sentences, but it was still among the highest in the nation. Sentencing Project, Christopher Uggen, Ryan Larson, and Sarah Shannon, 6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016 (October 2016), at 16, Table 4, Estimates of Disenfranchisement African Americans with Felony Convictions, 2016 (Post-Sentence, Iowa). https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf (last visited June 13, 2021)(hereinafter "6 Million Lost Voters." The 2016 disenfranchisement rate of 9.84% for African Americans is more than 450% greater than the overall disenfranchisement rate for Iowa—9.84%/2.17%! The 6,879 disenfranchised African Americans constituted 13.23% of the 52,012

[11] "By 1980, the African American disenfranchisement rate already exceeded 10 percent of the adult population in states such as Arizona and Iowa. . . . The figure also indicates that several Southeastern states disenfranchised more than 5 percent of their adult African American populations at that time." Id. Variation by Race, Figure 6, African American Felony Disenfranchisement Rates, 1980 (12.6%), and Figure 7, African American Felony Disenfranchisement Rates, 2016 (9.8%).

disenfranchised Iowans—whereas African American comprised only 3.2% of the state's VAP.[12]

In 2020, prior to Governor Reynolds's August 5 Executive Order, the African American total disenfranchisement rate had risen again to 11.37%. The Sentencing Project, State-by-State Data, Iowa data: https://www.sentencingproject.org/the-facts/#map?dataset-option=SIR (last visited June 16, 2021). Iowa's total number of disenfranchised African Americans was 7,263, out of a total 34,227 disenfranchised Iowans. Id. The Iowa African American total disenfranchisement rate in 2020 was more than 7 times the overall disenfranchisement population rate of 1.48% of VAP (.1137/.0148=7.68). Id. Disenfranchised African Americans comprised 21.2% of all those disenfranchised (7,263/34,227=0.212), compared to their VAP of 3.2%.

Iowa's Total African American Disenfranchisement Rate		
1980	2016	2020
12.6%	9.84%	11.37%

[12] U.S. Census, Electorate Profile: Iowa (Jan. 29, 2016) https://www.census.gov/library/visualizations/2016/comm/electorate-profiles/cb16-tps09_voting_iowa.html (last visited June 10, 2021).

B. Post-Sentence African American Disenfranchisement Rate

Since every Iowan who has been convicted of a felony and has discharged his sentence will be subject to automatic exclusion from jury service based upon Rule 2.18(5)(a), the NAACP submits the total disenfranchisement rate is relevant to this Court's decision, as exclusion represents the inevitable consequence of one's conviction. Nonetheless, the NAACP appreciates the fine tuning of jury pool and Census data that this Court required in *Lilly* and *Veal*; therefore, Part II.B's examination of the aggregated data will narrow its focus to whether Rule 2.18(5)(a) caused significant racial disparities among felons who have discharged their sentences and who, but for Rule 2.18(5)(a) would have been eligible for juror service. The Sentencing Project calibrated the Iowa data it reported on year 2016, and its "post-sentence" felons category enables the very focused analysis needed. https://www.sentencingproject.org/the-facts/#map?dataset-option=FDR. The Sentencing Project 2016 Report,, "6-Million Lost Voters" reports Iowa felons who were "post-service" in 2016 and the significant racial disparities caused by Iowa's felony disenfranchisement policy is apparent.

As of 2016, 23,976 Iowa felons who had discharged their sentences during the Branstad years of 2011-2016 were still disenfranchised; of this group 1,434 were African Americans,[13] or 5.98%.[14] It is important to underscore that because of Rule 2.18(5)(a), the number of felons *excluded from jury service* at the time of Veal's trial was far, far greater than the 23,976 who couldn't vote—in addition, Rule 2.18(5)(a)'s life-time ban continued to *disqualify from jury service* the 115,325 felons whose voting rights had been restored

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[13]6 Million Lost Voters: (October 2016), at 15-16, Table 3 (Estimates of Disenfranchisement with Felony Convictions, 2016 (Post-Sentence, Iowa), and Table 4 (Estimates of Disenfranchisement African Americans with Felony Convictions, 2016 (Post-Sentence, Iowa). https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf (last visited June 13, 2021).

[14] The NAACP assumes arguendo the accuracy of the 5.98% African American percentage of those who had discharged their sentences, although it is surprisingly low as African Americans comprised 18.2% of those persons under criminal supervision of the Iowa DOC in 2016. The Iowa DOC Quick Facts Report shows there were 6,953 Blacks under DOC criminal supervision on June 30, 2017: Prison, 2,101 ; Community-Based Corrections, 4,852. The total number of persons under DOC criminal supervision was 38,303: Prison, 8,367; Community-Based Corrections, 29,936 http://publications.iowa.gov/26530/1/Quick%20Facts%20%20%204th%20Qtr%20FY17.pdfa (last visited on June 13, 2021). The NAACP notes that the percentage of African Americans under criminal supervision was three times the percentage of disenfranchised African Americans who had discharged their sentences as of 2016!

during the period from 2005 – 2015[15] by virtue of the Vilsack-Culver Executive Orders and another 206 whose rights were restored by Governor Branstad.[16] The Sentencing Project did not provide a racial breakdown of the 115,325 felons whose right to vote was restored by Vilsack and Culver, nor did the Branstad Administration as to those whose voting rights were restored by him. To estimate the number of African Americans among the 115,531 (115,325+206) whose voting rights were restored but still excluded from jury service, the NAACP bases its projection on the very conservative 5.98% African American percentage of Iowans who had discharged their sentences but were still disenfranchised in 2016: (a) 115,325 x .0598=6,896; (b) 206 x .0598=12. By adding these two projections to the 1,434 disenfranchised African Americans, the NAACP

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[15] Executive Order No. 42 of Governor Tom Vilsack, on July 4, 2005, restored voting rights to felons who had served their time, and it was renewed by Vilsack's successor, Governor Chet Culver. The Sentencing Project reported all restoration between the period of 2005-2015 as 115,325, and almost all occurred before January 14, 2011 when Governor Branstad rescinded the Vilsack-Culver Orders. 6 Million Lost Voters, 2016, Disenfranchisement and Restoration of Civil Rights, page 13, Table 2: https://www.sentencingproject.org/wp-content/uploads/2016/10/6-Million-Lost-Voters.pdf (last visited June 13, 2021).

[16] See Bleeding Heartland (June 30, 2017), https://www.bleedingheartland.com/2017/06/30/branstad-restored-voting-rights-to-just-206-iowans-in-more-than-six-years/ (last visited June 16, 2021].

preliminarily estimates there were 8,342 African American felons (1,434+6,896+12=8,342) among the 139,507 (23,976+115,325+206=139,507) who had discharged their sentences and yet were ineligible for jury service per Rule 2.18(5)(a), at the time of Veal's trial in July 2017

Of the 8,342, the NAACP recognizes that some, perhaps many, may have moved out of state, some may have passed away, and some, unfortunately, may have committed new crimes and been returned to prison. With regard to the latter, there are 2016 Iowa DOC reports that provide a basis upon which to estimate a recidivism rate of 20.4% in the years leading up to 2017.[17] The NAACP has been unable

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[17] See Iowa DOC, Prison Recidivism FY2016 (Sept. 2016) https://doc.iowa.gov/data/prison-recidivism-fy2016.
"The recidivism rate is the percent of offenders released from prison or work release who returned to prison within three years. The releases tracked are paroles, discharges due to end of sentence, and sex offender releases to special sentence supervision." See also "Recidivism: New Convictions vs. Technical Returns," which enables one to remove those whose parole was revoked for a technical violation from the recidivism calculation, and focus only on recidivism of those who had served time and committed a new crime. The average of "New Conviction" recidivism from FY12 through FY2016 was 20.42%. We based our projection on this 20.4% recidivism rate since (1) the DOC report on "New Convictions vs. Technical Returns" did not provide a break down by race, and (2) the DOC Report, "Recidivism Down for African American Offenders in Most Locations," found that "[f]or the past four years, there has been

to find data upon which to project the number who may have moved out of state or died; we have estimated that number to be approximately fifteen percent, which the NAACP thinks is high. When the NAACP factors in the recidivism/moves/deaths within this group, it projects a downward adjustment of 35%: 8,342 x .35=2,919.7; subtracting 2,920 from 8,342, produces an estimated 5,422 African American felons who had discharged their sentences—the vast majority of whom had their voting rights restored—yet were subject to disqualification from jury service per Rule 2.18(5)(a). The 5,422 African Americans constituted 7.8% of the State's African American voting age population (VAP).

If the percentage of African Americans who were disqualified by Rule 2.18(5)(a) had been proportionate to their 3.2% of Iowa's African American voting age population of 69,892 (VAP), they would have numbered 4,464 (139,507 x .032); instead, the felon-exclusion rule disqualified 5,422 African Americans, 958 more than expected. Was the over-representation caused by Rule 2.18(5)(a) statistically

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no statistically significant difference in recidivism rates between non-Hispanic Whites and Blacks."

significant? This can be determined by using binomial distribution standard deviation analysis:

(1) O =5,422; N=139,507; and P=.032.
(2) The difference between the actual and expected results: O–NP = [(5,422-(139,507)(.032)]=5,422-4464.2=957.8
(3) The standard deviation is the square root of (N –(1-P) or the square root of [(139,507(.032)(1-.032)]=square root of [4464.2)(.968)]=square root of 4321.4=65.7
(4) The Z-score is 957.8/65.7=+14.6.

The "positive" Z-score of +14.6 indicates that the 5,422 post-sentence disenfranchised African Americans far, far exceeded the expected outcome of 4,464 African Americans. With an outcome greater than 14 standard deviations from the expected, the null hypothesis that being excluded from jury service is unrelated to being African American is rejected as it is far, far greater than the 2 standard deviation threshold of *Lilly* and *Veal*. In terms of probability, there is essentially zero chance of this result in a random selection process. See generally Michael Zimmer, Charles Sullivan, and Rebecca White, *Cases and Materials on Employment Discrimination* 244-45 (6th Ed. 2003).

The NAACP contends that under *Duren* none of the 139,507 who had discharged their sentences, and especially those who had their rights restored, should have been barred from jury service. The

NAACP further notes that barring 5,422 African Americans from jury service significantly contributed to the systemic underrepresentation of African Americans on Iowa's jury pool and panels. Most assuredly, the widespread community knowledge of the reality of life-time exclusion deterred most felons who had discharged their sentences, regardless of race, from responding to a jury summon, but the racial impact on African Americans was exacerbated because of the longstanding racial disparities in the Iowa criminal justice system.[18]

III. Rule 2.18(5)(a)'s Lifetime Exclusion from Jury Service Is Not "Appropriately Tailored," and the District Court Erroneously Based Its Ruling Upholding the Rule on the "Rationally Related" Standard

In *Duren* the United States Supreme Court held that once underrepresentation of a distinctive group attributable to systematic exclusion had been shown, the Constitution "requires that a

[18] The NAACP submits there is a second court system policy that exacerbates the exclusionary effect of Rule 2.18(5)(a). The Iowa juror questionnaire has a question inquiring about "every criminal conviction except traffic offenses." While the question is not intended to send a chilling message, the NAACP fears it also works as a deterrent to juror participation not only for those with a felony conviction, but also for those with misdemeanor convictions. In our experience most individuals will draw the conclusion that any criminal conviction except traffic offenses will disqualify them from jury service.

significant state interest be manifestly and primarily advanced" by that aspect of the jury-selection process disproportionately excluding members of the distinctive group.[19] And reaffirming its holding in *Taylor v. Louisiana*,[20] the Court was quite explicit in describing the test for measuring the constitutionality of that aspect of the jury-selection process causing disproportionate exclusion of the distinctive group: "The right to a proper jury cannot be overcome on merely rational grounds."[21]

In *Duren* the State of Missouri granted women an automatic exemption from jury service upon request and provided women additional opportunities to decline service by returning the summons or simply failing to report for jury duty. It was not an absolute bar—unlike Rule 2.18(5)(a)—but it reduced representation of women on juries from 50% to on average 15%. The State justified doing so on grounds of women's family responsibilities for the care of children. The Court rejected the State's argument. It explained that the Constitution's guarantee of a fair cross-section of the community "requires that States exercise proper caution in exempting broad

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[19] 439 U.S. at 364.
[20] 419 U.S. 522 (1975).
[21] *Duren v. Missouri*, 439 U.S. at 364, quoting *Taylor v. Louisiana,* 419 U.S. at 534.

categories of persons from jury service" because inevitably they involved some degree either of overinclusiveness or underinclusiveness. Any exemption, any aspect of the jury-selection process causing disproportionate exclusion, has to be "appropriately tailored" to the State's claimed interest. Some women have childcare responsibilities but others no longer have them, nor ever had them, or have other means of fulfilling them. A broad, across-the-board exemption could not be justified when it resulted in defendants not having a jury pool and jury panel representing a fair cross-section of the community. Individualized assessments would have to be made before exemption or excusal could be ordered.

Likewise, Rule 2.18(5)(a)'s absolute exclusion of felons who have discharged their sentences is not "appropriately tailored" to the State's asserted interest in an impartial jury or, as the District Court characterized it, "protecting the probity of juries," as it excludes even those who have had their full citizenship rights restored. *Duren v. Missouri* made clear that individualized juror assessment was required rather than across-the-board exemptions or exclusions. Later cases of the Supreme Court confirmed that approach. Writing

for the Court in *Lockhart v. McCree*[22] and subsequently as the Chief Justice in *Holland v. Illinois*,[23] Justice Rehnquist focused on key details of the Arkansas challenge for cause process in a death penalty case that it upheld against a fair cross-section claim. Pointing out the individualized determination of each person struck for cause as decisive, *Lockhart* emphasized that those who opposed the death penalty in Arkansas can still serve "in other criminal cases"[24] and even can serve in death penalty cases "so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law."[25] In *Holland* Chief Justice Rehnquist reemphasized *Lockhart*'s "fundamental principle" that "[i]t does not violate [the fair cross-section] requirement [] to disqualify a group for a reason that is related 'to the ability of members of the group to serve as jurors *in a particular case*.'"[26]

The normal challenge for cause process involves individualized questioning as to a prospective juror's impartiality in that particular

[22] 476 U.S. 162 (1986).
[23] 493 U.S. 474 (1990).
[24] *Lockhart*, at 176.
[25] Id.
[26] *Holland*, at 483 (emphasis was the Court's)(citations omitted).

case, such as was done in *Lockhart* and in *State v. Jonas*.[27] The individualized juror inquiries into a prospective juror's impartiality made in *Lockhart* and *Jonas* stand in stark contrast to the process that occurs under Rule 2.18(5)(a), where the only inquiry is whether the prospective juror has previously been convicted of a felony. Once that fact is established, the prospective juror is disqualified without any inquiry into his or her ability to be impartial in that particular case. As in the instant case, the District Court does not take into consideration how long it has been since the person was released from supervision, the seriousness of the person's offense, its relevance to the charges in the instant case, evidence of the person's rehabilitation and reintegration into the community, acceptance and discharge of responsibilities, or even whether the person's right to vote has been restored. The disqualification of the three jurors with felony convictions in the *Veal* case had nothing to do with whether each juror could be impartial and fair in this particular case. Furthermore, unlike the Arkansas procedure upheld in *Lockhart*, Rule 2.18(5)(a) at the time of Veal's trial constituted an across-the-board bar of every person with a felony conviction from participation

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[27] 904 N.W.2d 566, 569-70 (Iowa 2017).

as a juror forever. Unlike the procedure in *Lockhart*, in which disqualification was only for a particular case, Rule 2.18(5)(a) is a life-time bar from jury service even if one's citizenship rights have been restored.

This is wholesale, indiscriminate, systematic exclusion. A ruling that Rule 2.18(5)(a) constitutes systematic exclusion under *Duren/Pla*in prong 3—that its automatic disqualification of every person who has discharged his or her felony sentence *without any examination of their ability to serve impartially in a particular case* violates the fair cross-section requirement of the Sixth Amendment's Impartial Jury guarantee—is consistent with each of the three purposes served by the fair cross-section recognized in *Taylor* and *Lockhar*t.[28] That does *not* mean that a prospective juror previously convicted of a felony cannot be challenged for cause. Such a juror might bear ill will or be prejudiced against the prosecution or law enforcement. But it does mean that there must be individualized inquiry into the question of partiality through traditional voir dire questioning, as would be the case with any prospective juror.

[28] *See* Lovell & Walker, at 504-05.

The District Court in the instant case upheld[29] Rule 2.18(5)(a)'s across-the-board exclusion on grounds the exclusion was "rationally related" to the State's interest in the probity of jurors, citing *United States v. Greene*[30] and *United States v. Barry*.[31] These federal Court of Appeals opinions are the leading federal cases involving equal protection and fair cross-section challenges to the felon-exclusion rule in Federal Courts.[32] Both *Greene* and *Barry* applied a "rational relationship" test and upheld the federal rule.

But the short answer to the District Court, and to the Courts of Appeals in *Barry* and *Greene,* is that defendant Veal's right to an impartial jury is grounded in the Sixth Amendment, not the Equal Protection Clause. *Duren* made clear the Sixth Amendment fair cross-section analysis requires the intermediate scrutiny test. *Greene* recognized the rational basis standard didn't apply to the fair cross-section claim, but unpersuasively concluded that *Duren* required

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[29] Dist. Ct. Op. at 14-15.
[30] 995 F.2d 793 (8th Cir. 1993).
[31] 71 F.3d 1269 (7th Cir. 1995).
[32] Congress enacted a felon-exclusion rule that governs jury trials in Federal Court: 28 U.S.C. §1865(b)(5) "deem[s] any person qualified to serve on grand and petit juries in the district court unless he . . . . (5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored."

"only a small step" up in the government's justification to uphold the Federal law[33] and *Barry* generally embraced the *Green* analysis. *Greene* and *Barry* not only failed to apply *Duren*'s intermediate scrutiny standard to the State's asserted justification but also ignored *Lockhart*'s concern that prospective jurors not be eliminated by broad categorical stereotypes when problem jurors can be identified and struck for cause during voir dire.

The NAACP submits that, to the extent that the *Green*e and *Barry* decisions retain any continuing vitality, it is because of the federal rule's[34] exception for those felons whose civil rights have been restored. Congress recognized that when a high governmental authority, such as a Governor, a President, or a State or Federal legislative body, has restored one's civil rights after serving one's sentence, any concerns about probity or the integrity of the justice system are eliminated, or, to the extent some doubts may linger, those can be addressed through the individualized voir dire and a strike for cause, as in *Lockhart*. In the decade prior to Veal's trial Governor Vilsack's and Governor Culver's Executive Orders restored the rights of 115,325 people who had fully discharged their sentences; given the

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[33] Id. at 798 (quoting *Duren*, 439 U.S. at 368 n. 26) (citation omitted).
[34] See n.32, *supra,* for the text of 28 U.S.C. §1865(b)(5.

longstanding racial disparities in the Iowa criminal justice system, it is likely the 115,325 included no fewer than 7,000 and perhaps as many as 23,000 Africans Americans. All of the 115,325 were still excluded from eligibility for jury service—in Iowa's State Courts. They were, however, eligible to serve in Iowa's Federal courts, because the Federal rule expressly allows felons whose civil rights have been restored to serve on a jury.

In contrast, Iowa Rule 2.18(5)(a) has excluded all felons for life, *including those whose rights have been restored.* In refusing to recognize that the restoration of felons' civil rights by the Governor and the voir dire procedures satisfied the governmental interests in juror probity and the integrity of the jury system, the Iowa courts' practice has clearly run afoul of *Duren*'s intermediate scrutiny standard. The State's valid governmental interests can be accomplished through a nuanced, individualized screening out of individual jurors who have anti-government or anti-law enforcement bias through the voir dire process, as required in *Lockhart* and recommended by the American Bar Association, Jurors and Jury Trial Principles., Principle 2.A(5).

https://www.uscourts.gov/sites/default/files/aba_principles_for_juries_and_jury_trials_2005.pdf.

To paraphrase *Duren*, excluding all felons because of the potential bias of some is "insufficient justification." Yes, "it may be burdensome to sort out those who should be [disqualified for cause] from those who should serve. But that task is performed in the case of [all prospective jurors] and the administrative convenience in dealing with [felons] as a class is insufficient justification for diluting the quality of community judgment represented by the jury in criminal trials."[35] Professor Kalt succinctly explained why Rule 2.18(5)(a) is fatally flawed: "The problem is that the typical state statute makes no effort to distinguish between good and bad felon jurors. The solution is to avoid blanket exclusion in favor of a more nuanced system." Brian Kalt, *The Exclusion of Felons from Jury Service*, 53 American U. L. Rev. 65, 88 (2003). In point of fact, what Kalt suggests is the individualized screening of persons previous convicted of a felony that *Duren* requires.

[35] Duren at 369.

CONCLUSION

The Court should reverse the District Court and hold that Defendant/Appellant Peter LeRoy Veal is entitled to a new trial.

REQUEST TO PARTICIPATE IN ORAL ARGUMENT

Counsel for Amicus Curiae NAACP requests to be participate in oral argument.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d), 6.903(1)(g)(1), and 6.906(4) because it has been prepared in a proportionately spaced typeface using Georgia in size 14 point and contains 6,970 words excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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CERTIFICATE OF FILING AND CERTIFICATE OF SERVICE

The undersigned certifies that on Friday, January 18, 2021, he filed this Brief of *Amicus Curiae* NAACP with the Clerk of the Iowa Supreme Court and on all other parties by EDMS to their respective counsel. On the 21st day of June, 2021, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Peter Veal, No. 6202982, Iowa State Penitentiary, 2111 330th Avenue, P.O. Box 316, Fort Madison, IA 52627.

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