IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. ANTOINE TYREE WILLIAMS, Defendant-Appellant.	SUPREME COURT NO. 21-0158

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

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 20th day of October, 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 Antoine Williams, No. 6620033, Anamosa State Penitentiary, 406 North High Street, Anamosa, IA 52205.

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Whether the district court erred in denying Williams' motion for a new trial: were his Sixth Amendment rights were violated by the systematic exclusion of African American jurors in his jury pool?

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ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issue raised involves a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). Specifically, this case asks the court to resolve the question of how and when to aggregate prior jury pools and whether "run-of-the-mill" jury management practices may prove systematic exclusion when accompanied by proof of unfair and chronic underrepresentation in a Sixth Amendment fair cross-section claim.

STATEMENT OF THE CASE

Nature of the Case: Antoine Williams appeals from the district court's ruling on remand that he was not entitled to a new trial on his fair cross-section claim under the Sixth Amendment to the United States Constitution. Williams was originally convicted of murder in the second degree after a jury trial in the Floyd County District Court.

Course of Proceedings: The State charged Antoine Williams with first degree murder in 2017. (Trial Information) (App. pp. 4-5). A jury convicted Williams of second degree murder, and the court sentenced him to a fifty-year indeterminate prison sentence. (Sentencing Order) (App. pp. 35-38). Williams appealed, and the Iowa Supreme Court affirmed his convictions, but remanded his case for a hearing on whether his jury was drawn from a fair cross-section of the community in violation of the Sixth Amendment. State v. Williams, 929 N.W.2d 621, 629-30 (Iowa 2019). Procedendo issued July 16, 2019. (Procedendo) (App. pp. 39-41).

Hearing on the motion for new trial was held on August 5, 2020. (Hearing Tr. p. 1). The district court denied Williams motion for new trial on January 29, 2021. (Order Following Remand) (App. pp. 83-117). The district court concluded that African-Americans are a distinctive group in the community, but that Williams had not satisfied the second and third prongs of the Duren/Plain test—that African-Americans were

underrepresented in his jury pool or that any underrepresentation was due to systematic exclusion. (Order Following Remand pp. 5-34) (App. pp. 87-116).

Williams filed a timely notice of appeal. (Amended Notice of Appeal) (App. p. 176).

Facts: Antoine Williams was charged and tried for first degree murder for shooting Nate Fleming in Floyd County, Iowa. (Trial Information) (App. pp. 4-5). His trial took place in October 2017. (Order for PSI) (App.pp. 33-34). Although Floyd County "is approximately 2.3% African-American in population. . . . The jury pool of unexcused jurors, however, contained only one African-American. The district court overruled the defendant's motion to strike the jury panel." State v. Williams, 929 N.W.2d 621, 623 (Iowa 2019). Additional facts will be discussed below as necessary.

ARGUMENT

The district court erred in denying Williams' motion for a new trial: his Sixth Amendment rights were violated by the systematic exclusion of African American jurors in his jury pool.

A. Error Preservation. In the original trial, Williams challenged his jury panel, alleging African-Americans were underrepresented in his jury pool in violation of the Sixth Amendment. (Motion to Challenge Jury Panel) (App. pp. 6-8). After a hearing, the district court denied the motion. (Order re: Jury Pool Challenge) (App. pp. 27-32). In the original appeal, the Iowa Supreme Court concluded Williams had not preserved a fair-cross-section claim under Article I Section 10 of the Iowa Constitution and remanded his case for further consideration of his claim under the Sixth Amendment. State v. Williams, 929 N.W.2d 621, 629-30 ns. 1, 2 (Iowa 2019).

On remand, Williams argued that both African-Americans and Hispanics were underrepresented in his jury pool. However, the district court concluded the issue of systematic exclusion of Hispanics had not been preserved, having not been

raised in the original filings or on appeal, and declined to consider it. (Motion to Challenge Jury Panel, Order re: Jury Pool Challenge; Order Following Remand, p. 3) (App. pp. 6-8, 27-32, 85); Williams, 929 N.W.2d at 629-30. Williams also urged that, despite the Iowa Supreme Court's holding to the contrary, a state constitutional claim had been presented at trial. (Professional Statement p. 1) (App. p. 67). However, the district court disagreed and followed the remand order. (Order Following Remand p. 3) (App. p. 85). In this appeal, Williams concedes neither a state claim nor a claim of underrepresentation of Hispanics was preserved in the initial proceedings.

The district court addressed and denied Williams' claim of underrepresentation and systematic exclusion of African-Americans in violation of his rights under the Sixth Amendment of the United States Constitution. (Order Following Remand, p. 3, 34) (App. pp. 85, 116). Error was preserved. Meier v. Senecaut, 641 N.W.2d 532, 537 (Iowa 2002).

B. Standard of Review. Constitutional questions are reviewed de novo. Williams, 929 N.W.2d at 628.

C. Merits. Williams' Sixth Amendment right to a jury pool comprised of a fair cross-section of the community was violated because ineffective jury management practices led to the unfair and unreasonable underrepresentation of African-Americans in his jury pool. Williams urges the court to reconsider its conclusion that a successful Sixth Amendment claim must be supported by a statistical analysis demonstrating the distinct group was underrepresented by two standard deviations. Because this standard is not dictated by United States Supreme Court precedent, the court should heed the expert testimony provided in this case and conclude Williams' claim succeeds because the expert's meta-analysis of the eight jury pools summoned during the year preceding and including Williams' trial demonstrated there was only a .38 percent chance the representation of African-Americans in Williams' jury pool was the result of a truly random selection process.

1. United States Supreme Court Precedent. "[T]he American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." Taylor v. Louisiana, 419 U.S. 522, 526, 527 (1975). Accordingly, "the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." Id. at 528. An impartial jury guards against abuse of power and supports public confidence in the fairness of criminal proceedings. Id. at 530.[1]

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

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[1] The Sixth Amendment fundamental right to a jury trial in criminal proceedings applies to the States through the Due Process Clause of the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

Soon after, the U.S. Supreme Court clarified the analysis on Castaneda v. Partida, 430 U.S. 482 (1977). In a habeas action, Partida alleged he was denied due process and equal protection because of gross under-representation of Mexican-Americans on grand juries. Id. at 491. The Court identified three steps for establishing a prima facie claim of an equal protection violation: 1) the excluded group is a recognized and distinct class singled out for different treatment; [2] 2) underrepresentation must be proved by "comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time"; and 3) the selection procedure used is subject to abuse or not racially neutral. Id. at 494-95.

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

The Castaneda Court found Mexican-Americans were a distinctive class and that there was a 40-percentage point differential between their numbers in the population and their numbers among those called for grand jury service over an 11-year period.[3] Id. at 495-96. Finally, the Court found the Texas system of selecting grand jurors to be highly subjective, with Spanish surnames being readily identifiable. Id. at 497. Because the State failed to rebut the presumption of purposeful discrimination, the Court found a denial of equal protection. Id. at 501.

In Duren v. Missouri, the Court created the three-part test that has been used to assess fair cross-section claims under the Sixth Amendment. Duren v. Missouri, 439 U.S. 357 (1979). In Duren, Missouri law automatically granted exemptions from

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

jury service for women who requested them. Id. at 359-60. The Court found the resulting composition of jury venires with less than 15 percent women violated the Sixth Amendment. Id. at 360.

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

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

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

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

held that Duren had established a prima facie claim of a fair cross-section violation. Id. at 367.

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

Finally, in Berghuis v. Smith, the U.S. Supreme Court considered a habeas case in which Smith, who was African-American, alleged a violation of the Sixth Amendment after being convicted by an all-white jury. Berghuis v. Smith, 559 U.S. 314, 319 (2010). African-Americans constituted 7.28

percent of the eligible juror population in the county but only 6 percent of the pool from which Smith's jurors were drawn. Id.

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

The U.S. Supreme Court reversed, finding none of its decisions "clearly established" Smith's claim for relief. Id. at 327. First, the Court noted that "neither Duren nor any other

decision of this Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools." Id. at 329. The Berghuis Court did not take any stance on which of the three methods would be an appropriate measure of underrepresentation, recognizing that the Michigan Supreme Court assumed for the sake of argument such underrepresentation existed. Id. at 329-30.

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

systematic exclusion could be proven through such factors.[4] Id. at 332-33. Because the Michigan Supreme Court decision did not involve an unreasonable application of federal law, the Sixth Circuit erred in reversing it. Id. at 333.

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

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

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

The Plain Court applied the Duren three-prong test and found African-Americans to be a distinctive group. Id. at 822. With respect to calculating underrepresentation, the Court acknowledged it had previously adopted the absolute disparity test but acknowledged flaws with all three measures in use. Id. at 823-26. Ultimately the Court permitted district courts to use multiple analytical models in their analyses. Id. at 826-27. This approach was more consistent with the notion that communities can change over time and courts need the flexibility to address such changes. Id. at 827.

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

The Court re-examined the Sixth Amendment analysis of Plain in State v. Lilly, and also took the opportunity to address the applicable analysis under Article I Section 10 of the Iowa Constitution. State v. Lilly, 930 N.W.2d 293 (Iowa 2019). The opinion deviated from both Plain and Duren in several respects.

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

To calculate the percentage of the minority group in the population, the Court directed trial judges to use the most current census data available but with adjustments. Id. The population should include only jury-eligible members, meaning those 18 years or older who are not state prisoners. Id. at 304-

305. Furthermore, a defendant is not limited to showing underrepresentation in his own pool, but may also rely on aggregated data to show statistical significance. Id. at 305. But if the proportion of a distinctive group in the defendant's jury pool is as large or larger than the proportion of the group in the jury-eligible population, his right to a fair cross-section would not be infringed "and there would be no reason to aggregate data in that event." Id.

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

In State v. Veal and State v. Williams, the Iowa Supreme Court clarified its view of the applicable analysis under the

Sixth Amendment. State v. Veal, 930 N.W.2d 319 (Iowa 2019); State v. Williams, 929 N.W.2d 621 (Iowa 2019).

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

The Court noted that 3.27 percent of Veal's jury pool were African-American and that this was less than both the percentage of African-Americans in Webster County (4.6 percent) and the percentage of African-Americans 18 and older

in Webster County (3.9 percent). Id. The aggregated data from 2016 also suggested the disparity was "statistically significant even under the higher Castaneda threshold." Id. The Court remanded Veal's case to allow for development of the record using the clarified standards. Id. at 330.

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

certain jurors might, however, permit a finding of systematic exclusion under the Iowa Constitution. Id. As with Veal, the Williams case was remanded to allow the parties to develop additional record under the new standards. Id.

3. The remand hearing in this case. Pursuant to the Supreme Court's remand order, the district court held a hearing on August 5, 2020, to consider his Sixth Amendment claim. (Hearing Tr. p. 1). Williams presented testimony about the jury selection system and jury management practices from the Floyd County Jury Manager Elizabeth Hamm; the state court administrator Todd Nuccio; and the IT director for the Iowa Judicial Branch Mark Headlee. He also presented testimony from Grace Zalenski on statistical methods and measures for analyzing the degree of underrepresentation. Finally, Williams presented expert testimony from Professor Mary K. Rose, who summarized findings from contemporary scholarly research on underrepresentation of minority groups on American juries, which included some findings on potential explanations and

solutions. The State cross-examined those witnesses, and called no other witnesses. Both parties stipulated to the admission of remand exhibits.

Elizabeth Hamm explained how jury pools are selected in Floyd County, both at the time of Williams' trial and after changes to the system were made in 2018. At the time of Williams' trial, she explained that paper juror questionnaires were sent out with the summons. (Hearing Tr. p. 140 L. 22-25). She would compile the questionnaires that were returned, and divide them into categories: excused, disqualified, postponed, or good, meaning ready to serve on the jury. (Hearing Tr. p. 136 L. 17 – p. 137 L. 11). She would attach a note on any questionnaire explaining the reason for a requested excusal. Some excusals would be granted as a matter of routine by Hamm, but others would be referred to a judge for approval. She would automatically grant an excusal for anyone who wasn't yet 18 or was a student. But she would not grant "age requests" or "hardship" excusals—instead she would

refer those requests to a judge. (Hearing Tr. p. 137 L. 12 – p. 138 L. 10). In Williams' jury pool, a student was excused. Hamm explained that she granted that excusal automatically because the person was a student attending Wartburg College in Waverly, Iowa. (Hearing Tr. p. 138 L. 11 – p. 139 L. 2). She explained that it was her practice to automatically exclude anyone who provided proof that he or she was a student and never refused to excuse someone who was a student. (Hearing Tr. p. 150 l. 11 – p. 151 L. 15). Distance or location of the school was not taken into account: if the person was a student they were excused. (Hearing Tr. p. 151 L. 23 – p. 152 L. 22).

Under the old system, at the time of Williams' trial, if a person failed to appear for jury service, a "failure to appear" notice would be sent to the potential juror. This notice would advise the person that because they failed to appear, they had a certain amount of time to call the clerk's office to speak with Hamm. When they called, they were either deferred out to the next pool or could be subject to contempt action if there had

been multiple failures to appear. The decision to pursue a contempt action would be made by a judge, although Hamm had only seen that happen a couple of times. Often, she would never hear from the prospective juror at all. (Hearing Tr. p. 143L. 4 – p. 144 L. 3).

Hamm explained that when she received a questionnaire and the person had indicated their race, she would enter that information into the system. She would not second-guess what the juror had indicated as his or her race, and Hamm would not change the designation once they appeared at the courthouse. However, on the paper questionnaires used previously, it was optional for a juror to identify their race. (Hearing Tr. p. 139 L. 19 – p. 140 L. 2; p. 148 L. 13-20). If the summoned jurors did not respond with a questionnaire indicating their race, she did not have a way to keep track of the race of the non-responding jurors—she would mark their race as "unknown." (Hearing Tr. p. 140 L. 5 – 21; 147 L. 23 – p. 149 L. 5).

Hamm explained that under the new system, she enters in the numbers of jurors needed, and the system issues her a random list of names. Postcards are created and sent to the people on the list, which directs them to a website to complete the juror questionnaire. After a certain number of days, she will pull a list of people who have not responded and will send letters to them reminding them of their jury duty. If they don't respond to that letter or show up for their jury date, they will get a failure to appear letter and a judge will decide whether "to proceed with a show cause or not." (Hearing Tr. p. 141 L. 23 – p. 144 L. 10). Her perception was that the new system was resulting in a small increase in the number of responses to the summons. (Hearing Tr. p. 142 L. 2-6).

Mark Headlee, the IT director for the judicial branch, provided more details about the online system implemented in December 2018. (Hearing Tr. p. 120 L. 2-14, p. 123 L.21-p. 124 L.19). Headlee's office maintained the master file for jury management software using source lists from voter registration

records and Department of Transportation licenses and identifications, which were updated annually. (Hearing Tr. p. 120 L. 10 - p. 121 L. 20, p. 125 L. 13-15). The judicial branch had been hoping to add Department of Revenue records as a third source list, but the necessary legislative action required for such a change that had yet to occur. (Hearing Tr. p. 125 L. 24 - p. 126 L. 21).

To create a jury pool, the jury manager enters the number of persons needed for a jury pool into the system, and the computer randomly draws a list of eligible jurors. (Hearing Tr. p. 122 L. 24 - p. 123 L.3). Potential jurors receive a postcard and go to a website to fill out their information. (Hearing Tr. p. 123 L. 4 - p. 124 L. 5). As of December 2018, race identification was no longer an optional part of the questionnaire. (Hearing Tr. p. 124 L. 12 - p. 125 L.5, p. 129 L.1 - p. 130 L.2).

Todd Nuccio, the State Court Administrator with the Iowa Judicial Branch, testified regarding the enactment of the new

policies in 2018. (Hearing Tr. p. 102 L. 1-21). One of the stated goals of the changes was to improve minority representation in jury pools in light of the Court's decisions in Lilly, Veal, and Williams. (Hearing Tr. p. 106 L. 8 - p. 107 L. 25).

The changes made in 2018 included allowing people to add themselves to the master jury list, using postcard summons in lieu of a more detailed letter, using a website to complete questionnaires, requiring cell phone numbers and email addresses to permit electronic reminders, and requiring race identification based on census categories on the questionnaires. (Hearing Tr. p. 108 L. 1 - p. 112 L. 20, p. 113 L. 23 - p. 114 L. 5, p. 116 L. 18 - p. 117 L. 9). The policy changes also included a uniform approach to failures to appear, which included reminders, rescheduling, and ultimately contempts. (Hearing Tr. p. 110 L. 16-25). Nuccio was waiting on a report on the resulting composition of jury panels, but he testified that the anecdotal information he had received from jury managers

indicated the changes were working. (Hearing Tr. p. 112 L. 24 - p. 113 L. 16).

Grace Zalenski, a statistical consultant with a B.A. in mathematics with an emphasis in statistics and applied math, as well as a master's degree in civil engineering including graduate work on statistical analysis of data, testified for Williams. (Hearing Tr. p. 167 L. 3 – p. 168 L. 5). She analyzed data obtained from the Floyd County jury manager for Williams' jury pool as well as the jury pools for the year preceding Williams' trial. (Hearing Tr. p. 168 L. 6-14). She analyzed each jury pool for the year, identifying the representation of both African-American and Hispanics, calculating both z-scores and p values for each pool. She separately calculated the relative representation of African-Americans both with and without counting the potential juror who was excused from service because she was a student. (Hearing Tr. p. 169 L. 19 – p.177 L. 24; Def. Exs. WR-A, WR-B, WR-C, WR-D, WR-E, WR-F, WR-G) (Ex. App. pp. 5-11). She then conducted a meta-

analysis of the data regarding the eight jury pools called during the year preceding and including Williams' trial. (Hearing Tr. p. 184 L. 17 – p. 185 L. 5) (Def. Ex. WR-L) (Ex. App. p. 16). She explained:

> So the reason I analyze historical data is to look for a pattern of underrepresentation because it is very difficult, almost – and – well, potentially, not almost – it can be prohibitively difficult with small population proportions to demonstrate a significant degree of underrepresentation in jury one jury pool; but even, you know, with – even with a relatively small sample size, it becomes easier to see patterns. And what I'm really looking for in a statistical analysis of this issue is I try to separate the random variation that we would expect to see when jury pools are drawn with a systematic pattern of underrepresentation. So I assess that.

(Hearing Tr. p. 185 L. 6-17).

Zalenski's meta-analysis involved a "one sample t test." Specifically, a one sample t test

> takes the sample, the single sample that I have that's the eight jury pools from the historical data; and the metric that I'm assessing here is their z-scores. So I take that set of z-scores; and I compare that, through this statistical test, to a hypothetical totally representative selection process.
>
> So with a totally representative unbiased selection process, even though we would expect to see potentially a significant amount of variation in

> representation of any – any group, including African-Americans, we would expect that representation to evenly weigh in both directions, so we expect the mean z-score to be approximately zero.

(Hearing Tr. p. 186 L. 3-16).

This analysis indicated that, including two African-Americans from Williams' jury pool, there is "approximately a .38 percent chance that this set of eight samples was drawn using – in a way that makes them an unbiased representation of the community." (Hearing Tr. p. 186 L. 17 – p. 188 L. 4) (Def. Ex. WR-L) (Ex. App. p. 16). Her analysis of the representation of Hispanics indicated there was a 1.8 percent chance the pools were drawn in an unbiased way. (Hearing Tr. p. 188 L. 18- p. 189 L. 8).[5]

Zalenski explained that she considered her meta-analysis to be a more "statistically rigorous" method of addressing the issue of underrepresentation than simply combining past jury

[5] To compare the jury pools to the Floyd County population, Zalenski utilized the Citizen Voting Age Population estimate from the census bureau. (Hearing Tr. p. 190 L. 14 – p. 191 L. 3) (Def Ex. WR-O) (Ex. App. p. 19).

pools and calculating the standard deviation on a single aggregated pool.

> I think that just aggregating – aggregating jury pools only so that you can reach a particular threshold is – is not a statistically rigorous way of the addressing the problem; and I think it's a – you know, I think it's – it's kind of bending over backwards at a cost in order to preserve the use of negative two standard deviations as a threshold when I don't believe that is a reasonable threshold to use.
>
> So there – you know, there – there are a number of issues with – with that aggregation. One of the other problems is that if you aggregate jury pools, all of a sudden you can't do the sort of meta-analysis that I do, so it would make it much harder for you to demonstrate a historical pattern.
>
> But I don't think it's statistically rigorous to have, you have – I'm trying to think of a pithy way to put this; but, you know, you're kind of hacking at one way for one purpose and another way for another purpose. It doesn't seem like a – it doesn't seem like a rigorous approach to me.

(Hearing Tr. p. 223 L. 20 – p. 224 L. 21). She was questioned about whether her approach "diluted" the impact of the makeup of the defendant's jury pool by conducting the analysis on all the pools from the preceding year:

> Q. I'm sorry. I'm going to -- just got to ask this question. So the other seven pools that you analyzed in your meta-analysis, they -- they avoid that

problem of not having anything to do with this jury pool? I guess I'd -- Right? Is that not the same problem that you just described?

A. No, it's not, because -- So you -- Maybe I should -- should try to make the distinction between what you're calling aggregation, which is taking the defendant's jury pool and then adding other jury pools to make a large super jury pool. But, you know, I mean, as I've said, I have a number of issues with that, one of which is that it's not a real jury pool. It has no, like -- You know, it's -- it's sort of a false sample in that it's not really used in that -- in that way.

What I'm talking about is more – possibly the -- Maybe an analogy is the best way to -- to illustrate this. So think about, like, the scientific method, you know. You -- In order to -- in order for a conclusion to be rigorous, you have to prove not only that something happens, but that you can repeat it happening. So what I -- what I refer to as meta-analysis is an attempt to distinguish from aggregation of jury pools, which is a way that I've seen these challenges conducted, where you just combine all the jury pools into one super sample. What I prefer to do is take the jury pools, whatever size they are – because practically speaking, that's how they're used, and those limitations -- or those -- the size of jury pools has other constraints that we don't necessarily have control of – I prefer to treat those -- that -- that set of jury pools as a sample and see if we can repeat -- and see if we can – can identify a -- a pattern or come up with -- see if there's any statistical evidence for a pattern by looking at repeated samples. Does that make sense?

Q. Right. With a focus on detecting a pattern?

A. Well, sure, because that's the point of statistics as a discipline.

(Hearing Tr. p. 225 L. 17 – p. 226 L. 25).

In response to a question from the court, she further clarified the justification for her approach, as opposed to merely aggregating the jury pools:

> THE COURT: All right. Let me jump in here because I got a little lost in the last discussion. You said you don't want to just throw a bunch of jury pools together to get one super pool; but I don't understand that, because aren't we taking eight pools and adding them together in order to get the numbers that we're working with? Can you explain that to me a little bit better.
>
> THE WITNESS: Sure, yeah. Yeah, so that's -- that is kind of the key and one of the trickiest distinctions here, so this is -- this is something that I -- I do try to emphasize. So the difference is in -- I'm going to -- I'm going to call them aggregation versus meta-analysis. So aggregation would be if I say, okay, I have a jury pool of 130 people, but that's not quite big enough for me to say anything conclusive because there's a decent chance that with the small population proportion of African-Americans, a random sample might not include any African-Americans. And it wouldn't be -- You know, there might be a small chance, like a 10 percent chance or

a 5 percent chance; but it wouldn't be unheard of. It's certainly possible for
unlikely things to happen.

So the -- the aggregation approach is to take our jury pool of 130 and the next jury pool of 80 and the next jury pool of 70 and just add them together and – as well as adding each of the categories of minorities.

So, say, okay, now that we've done our aggregation, we have a jury pool of 1,000 with 10 African-Americans or 20 African-Americans, whatever, and see what the likelihood of that result is. So that's aggregation.

What I've done is, instead, say, okay, so we have jury pools ranging in size from 60 to 130, but there's a set size that they tend to be. So what I'm going to do is look at the representation of African-Americans in each of those jury pools because that is -- that is the relevant unit, is a single jury pool, not a whole bunch of jury pools put together. For any one trial you're -- you're constrained to one jury pool and whatever representation it has.

So what I do is say, okay, well, I have 130 people with two African-Americans, 70 people with zero African-Americans, 85 people with one African-American, et cetera, and look at that -- look at that as a whole population -- a whole set of jury pools that have natural variability in the degree of representation that they have but then perform a statistical analysis to see if -- like, the t tests that I referred to before.

So that analysis is what -- is what enables me to say whether or not there is a -- there is a pattern of underrepresentation.

If you aggregate jury pools and you say, okay, I have a -- I have -- I have 1,000 people and 20 African-

> Americans, you still only get one number. It might be -- You know, it -- it's going to average out, to a certain extent, like the -- The underrepresentation in one pool is going to be cancelled out by the overrepresentation in another pool. But I'm not trying to mask the effect of that natural random variation, because random variation is to be expected in sampling. All I'm trying to do is figure out if, beyond random expected variation, there is some consistent pattern of underrepresentation that we can separate out from expected random fluctuation. And you can only do that by using a set of jury pools as a sample, as opposed to a single aggregated pool.

(Hearing Tr. p. 227 L. 6 – p. 229 L. 20).

Williams also presented testimony from Mary Rose, an associate professor of sociology at the University of Texas as Austin. She holds a Ph.D. in sociology and her work focuses on jury decision-making and jury representation and participation. (Hearing Tr. p. 232 L. 10 – p. 233 L. 21). She testified that her research has indicated that underrepresentation of minorities is a "chronic, not a temporary feature of most all jurisdictions" she's considered. (Hearing Tr. p. 234 L. 21 – p. 235 l. 8). Her current research focus is on the "places in the system where we are losing minority jurors." (Hearing Tr. p. 235 L. 9-11). Her research has indicated that

certain techniques would help improve minority representation on juries. Her recommendations include relying on more expansive jury lists—the worst being relying solely on voter registration lists. Further she blamed felon disenfranchisement for exclusion of minorities and encouraged the summoning jurors randomly, providing reminders to potential jurors about their service, and consistently and fairly enforcing failures to appear as ways to improve minority representation. (Hearing Tr. p. 235 L. 12 – p. 236 L. 15).

She testified that upon reviewing the demographic information regarding the jury pools in Floyd County from before and after 2019, she could see that the minority representation had improved with the later jury pools. (Hearing Tr. p. 237 L. 4 – p. 238 L. 3). She testified it was difficult to pinpoint one particular change that could account for the increase in minority representation, but largely credited "more forms of outreach and better record keeping and any improvements that have been made to how people are

summoned." (Hearing Tr. p. 238 L. 4-23). Her review of the data indicated that the increase in minority representation coincided with the policy changes that were made in December 2018. (Hearing Tr. p. 238 L. 24 – p. 239 L. 14).

When questioned about her own research indicating "basically African-Americans are about 40 percent as likely to report that they are either very willing or somewhat willing to – to serve on a jury compared with whites," she explained that this resistance to participating in the judicial system could be effectively combatted by the court's consistent and regular enforcement of summons: signaling "that this is an order that is cared about and taken seriously." (Hearing Tr. p. 241 L. 6 – p. 246 L. 21). She noted that people's unwillingness or interest in serving on a jury was more than just personal or cultural attitudes about wanting to be involved in the judicial system, but also concerns about "income and support" affect their willingness to appear for unpaid, open-ended service. (Hearing Tr. p. 246 L. 22 – p. 247 L. 11).

The district court asked for proposed rulings from both parties. (Hearing Tr. p. 272 L. 11 – p. 273 L. 2). The court adopted the State's proposed ruling and denied Williams' Sixth Amendment challenge. (Order Following Remand) (App. pp. 83-117). The court concluded that despite additional arguments made on remand, Williams had not preserved an article I, section 10 claim nor a claim that Hispanics were underrepresented. Further the court concluded that any consideration of those claims would exceed the scope of the remand order. (Order Following Remand, p. 3) (App. p. 85). As for the substance of Williams's Sixth Amendment claim, the district court concluded as follows:

Distinctive group: African-Americans are a distinctive group within the community, and Williams had met this first prong of the Duren test.

Unfair or Unreasonable Representation: The district court concluded Williams had failed to meet his burden on this prong. The district court found that under Veal, for a claim under the

Sixth Amendment to succeed, "a defendant must show that the level of representation on their jury pool falls . . . at least *two* standard deviations below the expected average level." (Order Following Remand, p. 9) (App. p. 91). The court performed the corresponding calculations on Williams jury pool, both with and without the juror who was excused prior to reporting and concluded Williams had failed to establish a standard deviation of at least -2. (Order Following Remand, p. 9-10) (App. pp. 91-92).[6]

To address the so-called "small numbers" problem, the court rejected Zalenski's proposal of conducting a meta-analysis of several jury pools to establish that the underrepresentation was not the result of expected random deviation. (Order Following Remand, p. 12-14) (App. pp. 94-95). Instead, the court adopted the State's proposed solution that if a defendant's jury pool is "big enough to create a fair

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[6] The court calculated a z-score of -.3219 if the excused juror was not included and a z-score of -.951 if she were. (Order p. 9-10) (App. pp. 91-92).

expectation of some non-zero representation *on that pool*, then this Court should find that the defendant carried their burden on prong #2 if that expectation of non-zero representation was not met, and it should reject a claim on prong #2 if that expectation *was* met." (Order Following Remand, p. 15) (App. p. 97). No aggregation, of any kind, would be necessary in this situation. (Order Following Remand, p. 15) (App. p. 97). In the alternative, if a defendant had an expectation of non-zero representation that was not met and could not be met with the size of the jury pool, then past jury pools would be aggregated one at a time, "working backwards in time, until total absence of African-Americans from that aggregated group would be more than two standard deviations away from the average expected level of African-American representation." (Order Following Remand, p. 16-17) (App. pp. 98-99). Utilizing that technique, the court calculated a z-score of -.819, also failing the Veal test. The court concluded Williams' proposed meta-analysis conflated the inquiries between prongs #2 and #3, as well as

permitted the makeup of past jury pools to "drown out the impact of Williams' own jury pool." (Order Following Remand, p. 19-21) (App. pp. 101-103).

Systematic Exclusion. The court also concluded Williams had failed to establish that any underrepresentation of African-Americans on his jury pool was the result of systematic exclusion. Instead, the court concluded Williams' complaints about the jury selection procedures amounted only to a "laundry list" of "run-of-the-mill jury management practices" that was found to be insufficient in Berghuis. (Order Following Remand, p. 23) (App. p. 105). Further the court concluded Williams had not proven that the changes implemented in 2018 actually caused the apparent increase in minority representation on jury pools, rather the court concluded it was just as likely due to the collection of more accurate data regarding the race of jurors because the question regarding race was made mandatory as part of the changes to the jury selection procedures or that it was attributable to research indicating

that African-Americans are less likely to respond to a jury summons. (Order Following Remand, p. 27-32) (App. pp. 109-114).

4. Williams established a Sixth Amendment violation and the district court erred by concluding otherwise. To establish a violation of his right to a jury drawn from a fair cross-section of the surrounding county under the Sixth Amendment, Williams must prove: (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. State v. Plain, 898 N.W.2d 1, 821–22 (Iowa 2017) (quoting Duren v. Missouri, 439 U.S. 357, 364 (1979)).

a. *Distinctive Group*. The issue of whether African-Americans are a distinctive group within the

community has never been disputed in this case. See State v. Williams, 929 N.W.2d 621, 629-630 (Iowa 2019). The State has conceded the issue below. (State's Proposed Ruling, p. 11) (App. p. 128).

b. Unfair and Unreasonable Underrepresentation. To determine whether a distinctive group is unreasonably underrepresented among jury pools, the Iowa Supreme Court has indicated the first consideration is whether the percentage of a minority group in the defendant's pool is less than the percentage of the minority group in the population using the most recently available census data. State v. Lilly, 930 N.W.2d 293, 304 (Iowa 2019); State v. Veal, 930 N.W.2d 319, 329 (Iowa 2019). Only jury-eligible persons are to be considered, so persons under the age of 18, noncitizens, and those who are incarcerated must be removed from the analysis. State v. Lilly, 930 N.W.2d 293, 304-05 (Iowa 2019); State v. Veal, 930 N.W.2d 319, 329 (Iowa 2019).

In Veal, the Court started with a simple comparison of the percentage of African-Americans in Veal's pool and the percentage of African-Americans in Webster County. State v. Veal, 930 N.W.2d at 329. It did not conduct a standard deviation calculation in this initial step—the court conducted a standard deviation analysis on the aggregate pools. Id. See also State v. Lilly, 930 N.W.2d at 305 (Iowa 2019) ("the defendant must show that he or she has suffered a constitutional wrong . . . 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.").

In this case, the jury-eligible African-American population of Floyd County was 1.8%. (Def. Ex. WR-M) (Ex. App. p. 17). Williams' jury pool was 1.45% African-American jurors (2 AA/B jurors/138 total jurors = .01449). A straight comparison of the two percentages reveals African-Americans were

underrepresented in Williams' jury pool, satisfying the threshold inquiry of Lilly/Veal.

In Williams, the Iowa Supreme Court reiterated that "For Sixth Amendment purposes, the defendant must . . . show that the percentage of the group in the jury pool is less than this expected percentage by at least two standard deviations." Williams, 929 N.W.2d at 630. "Pools may be aggregated, so long as pools closer in time to the trial date are not omitted when earlier pools are included" to help "solve the 'small numbers' problem." Id.

The expert testimony of statistician, Grace Zalenski, challenges the Court's conclusion about aggregation as an appropriate solution to the "small numbers" problem. Zalenski testified that the aggregation of prior jury pools into one super jury pool was not a statistically sound method of analyzing the issue of underrepresentation. Put plainly, like "the scientific method, you know. You -- In order to -- in order for a conclusion to be rigorous, you have to prove not only that

something happens, but that you can repeat it happening." (Hearing Tr. p. 226 L. 9-12). This is because "[t]he point of statistics as a discipline" is to detect patterns. (Hearing Tr. p. 227 L. 1-3). Additionally, she critiqued the aggregation of multiple jury pools into one super pool because it dilutes the actual representation in the jury pool at issue.

> If you aggregate jury pools and you say, okay, I have a -- I have -- I have 1,000 people and 20 African-Americans, you still only get one number. It might be -- You know, it -- it's going to average out, to a certain extent, like the -- The underrepresentation in one pool is going to be cancelled out by the overrepresentation in another pool. But I'm not trying to mask the effect of that natural random variation, because random variation is to be expected in sampling. All I'm trying to do is figure out if, beyond random expected variation, there is some consistent pattern of underrepresentation that we can separate out from expected random fluctuation. And you can only do that by using a set of jury pools as a sample, as opposed to a single aggregated pool.

(Hearing Tr. p. 229 L. 7-20).

The United States Supreme Court has not addressed the "small numbers" problem that the Iowa Supreme Court has been wrestling with since Plain. Indeed, in Burghuis, the U.S. Supreme Court stated "neither Duren nor any other decision of

this Court specifies the method or test courts must use to measure the representation of distinctive groups in jury pools." Berghuis v. Smith, 559 U.S. at 329. In Veal, the Iowa Supreme Court acknowledged as much and did it's best to predict how the U.S. Supreme Court would handle a Sixth Amendment claim. See Veal, 930 N.W.2d at 328-330 ("In Castaneda v. Partida, the United States Supreme Court seemingly endorsed two to three standard deviations as an appropriate threshold under the Fourteenth Amendment, and we are not persuaded the Supreme Court would adopt a more lenient standard under the Sixth Amendment.") Williams respectfully argues that the Iowa Supreme Court reconsider its prior conclusion about how to establish the second prong under the Sixth Amendment now that it has the benefit of expert testimony regarding a more statistically rigorous method of determining underrepresentation.

Zalenski's meta-analysis of the eight jury pools in the year leading up to and including Williams' trial indicated that, even

including both African-Americans summoned for Williams' jury pool, the likelihood that the pools were drawn in a truly random and unbiased way is .38 percent. (Hearing Tr. p. 186 L. 17 – p. 188 L. 4) (Def. Ex. WR-L) (Ex. App. p. 16).

Therefore, Williams has demonstrated that African-Americans were unfairly and unreasonably underrepresented on his jury pool and satisfied the second prong.

c. Systematic Exclusion. The United States Supreme Court has not fully clarified what constitutes "systematic exclusion" for purposes of the Sixth Amendment. In Duren v. Missouri, the Court held that Duren's "undisputed demonstration that a large discrepancy occurred not just occasionally but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic—that is, inherent in the particular jury-selection process utilized." Duren v. Missouri, 439 U.S. 357, 366 (1979). The Court also noted that Duren had established where in the process the exclusion occurred –

after they were summoned and were either allowed to request an exemption or presumed to have requested an exemption. Id. at 366-67. The Court found that Duren had established a prima facie claim of a fair cross-section violation. Id. at 367.

In the habeas case of Berghuis v. Smith, however, the Court indicated it had not set any particular standard for establishing systematic exclusion. Berghuis v. Smith, 559 U.S. 314, 319 (2010). When Smith pointed to a variety of factors that might lead to underrepresentation, the Court noted its precedent had not "clearly established" a prima facie claim of systematic exclusion could be proven through such factors.[7] Id. at 332-33. Because the Michigan Supreme Court decision did not involve an unreasonable application of federal law, the Sixth Circuit erred in reversing it. Id. at 333.

In its assessment of the appropriate Sixth Amendment analysis, the Iowa Supreme Court held that "statistically

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

significant disparities alone are not enough. Rather, the challenger must tie the disparity to a particular practice." State v. Lilly, 930 N.W.2d 293, 307 (Iowa 2019). For purposes of Article I Section 10, those practices could include "run-of-the-mill jury management practices" such as updating address lists, the granting of excuses, and the lack of enforcement of summons. Id. Citing to Berhguis, the court did not believe these practices would qualify to establish systematic exclusion under the Sixth Amendment. State v. Veal, 930 N.W.2d 319, 329 (Iowa 2019).

However, Berghuis simply held that federal precedent did not "clearly establish" that merely "pointing to a host of factors that, individually or in combination, might contribute to a group's underrepresentation" was adequate to establish systematic exclusion. Berghuis, 559 U.S. at 332-33. Berghuis did not hold that such factors were irrelevant or that they could never amount to systematic exclusion under the Sixth Amendment. Duren, meanwhile, held that a pattern of

underrepresentation coupled with an identification of practices leading to underrepresentation was adequate to support a fair-cross-section claim. Duren v. Missouri, 439 U.S. at 366.

The prior jury management practices of Floyd County led to the chronic, unfair and unreasonable underrepresentation of African-Americans in jury pools at the time of Williams' trial.

In December 2018, various changes were made to the jury management practices used statewide with the stated goal of improving minority representation in light of Lilly, Veal, and Williams. (Hearing Tr. p. 102 L. 18 – p. 104 L. 24; p. 106 L. 8 – p. 107 L. 25). The changes included allowing people to add themselves to the master jury list, using postcard summons instead of a more detailed letter, using a website to complete questionnaires, requiring cell phone numbers and email addresses to permit electronic reminders, and requiring race identification based on census categories on the questionnaires. (Hearing Tr. p. 108 L. 1 - p. 112 L. 20, p. 113 L. 23 - p. 114 L. 5, p. 116 L. 18 - p. 117 L. 9, p. 123 L. 4 - p. 125 L. 5; p. 145 L.

1-8). The changes also included implementing a uniform policy for handling failures to appear, starting with reminders and rescheduling and eventually escalating to a contempt hearing. (Hearing Tr. p. 110 L. 16-25). State Court Administrator Todd Nuccio was waiting on a report on the resulting composition of jury panels, but he testified that the anecdotal information he had received from jury managers indicated the changes were working. (Hearing Tr. p. 112 L. 24 - p. 113 L. 16).

These practices were not in place at the time of Williams' trial in October 2017. (Hearing Tr. p. 102 L. 18 – p. 104 L. 24). Instead, the Floyd County jury manager mailed paper summons in letter format, including a questionnaire. (Hearing Tr. p. 140 L. 22-25). The questionnaires requested demographic information but did not require respondents to identify their race. (Hearing Tr. p. p. 148 L. 13-20).

There was apparently no uniform or consistent excusal policy: some excusals would be granted as a matter of routine

by the jury manager, but others would be referred to a judge for approval. The jury manager would automatically grant an excusal for anyone who wasn't yet 18 or was a student. But she would not grant "age requests" or "hardship" excusals—instead she would refer those requests to a judge. (Hearing Tr. p. 137 L. 12 – p. 138 L. 10). If a person failed to respond to the initial summons letter, a follow-up letter would be sent. If they further failed to respond and did not appear for a jury trial, a "failure to appear" notice would be sent to the potential juror. The juror then had a set amount of time to call the clerk's office and explain their failure to appear. If they called, they were either deferred out to the next pool or could be subject to contempt action if there had been multiple failures to appear. The decision to pursue a contempt action would be made by a judge, although that apparently happened rarely. (Hearing Tr. p. 143 L. 4 – p. 144 L. 3).

If the juror chose to indicate their race on the juror questionnaire, the jury manager would enter that information

into the system. Once it was entered, based on what the person identified as their race on the questionnaire, it was not changed. However, on the paper questionnaires used previously, it was optional for a juror to identify their race. (Hearing Tr. p. 139 L. 19 – p. 140 L. 2).

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

She testified that upon reviewing the demographic information regarding the jury pools in Floyd County from before and after 2019, she could see that the minority representation had improved with the later jury pools. (Hearing Tr. p. 237 L. 4 – p. 238 L. 3). She testified it was

difficult to pinpoint one particular change that could account for the increase in minority representation, but largely credited "more forms of outreach and better record keeping and any improvements that have been made to how people are summoned." (Hearing Tr. p. 238 L. 4-23). Her review of the data indicated that the increase in minority representation coincided with the policy changes that were made in December 2018, confirming the anecdotal information received by state court administration. (Hearing Tr. p. 238 L. 24 – p. 239 L. 14).

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

Rose recognized Iowa's recent requirement for race identification and the resulting increase in response to that question. (Hearing Tr. p. 249 L. 19 - p. 251 L. 1). Rose said courts should be summoning randomly, using more reminders, and using more than just voter registration records as a source list. (Hearing Tr. p. 262 L. 2 - p. 263 L. 18). She testified online questionnaires tend to increase participation across the board. (Hearing Tr. p. 268 L. 8 - p. 269 L. 9).

Additionally, Zalenski's analysis demonstrated a consistent and chronic underrepresentation of African-Americans in the Floyd County jury pools during the year preceding and including Williams' trial. (Def. Ex. WR-F, WR-G) (Ex. App. pp. 10-11). Her meta-analysis indicated that the likelihood of the underrepresentation occurring randomly was only .38 percent. (Hearing Tr. p. 184 L. 17 – p. 185 L. 5) (Def. Ex. WR-L) (Ex. App. p. 16).

This evidence is proof of systematic exclusion prior to the changes in 2018. The changes adopted in 2018 were the type

of changes likely to increase minority representation, as they were intended to, in light of Lilly, Veal, and Williams. (Hearing Tr. p. 106 L. 8 - p. 107 L. 25). Despite the district court's conclusion that the increase in minority representation was likely the result of "social conditions evolv[ing] over time," it is much more likely that that changes that were specifically designed to increase minority representation – changes that have been shown to increase participation elsewhere – were the actual cause of an increase in minority representation. (Order Following Remand p. 20) (App. p. 102).

Furthermore, while a defendant must identify where in the system minority jurors are being excluded, the State is not excused from its obligations by referring to socioeconomic factors outside of the court's control. (Order Following Remand, pp. 18-20) (App. pp. 100-102). The Iowa Supreme Court has adopted the position of expert Paula Hannaford-Agor:

> Although the socioeconomic factors that contribute to minority underrepresentation in the jury pool do not systematically exclude distinctive groups, the failure of courts to mitigate the underrepresentation

> through effective jury system practices is itself a form of systematic exclusion.

Lilly, 930 N.W.2d at 307. Improved attempts to address non-responsiveness, such as using simpler postcard summons, providing online access, sending additional reminders, are likely to address some of these socioeconomic concerns and increase minority representation. (Hearing Tr. p. 235 L. 12 - 236 L. 15, p. 268 L. 8 - p. 270 L. 16).

Given that race identification was optional prior to the 2018 changes, the district court considered the demographic information obtained prior to the change to be "incomplete." (Order, p. 16) (App. p. 98). While a concern over lack of record-keeping on racial identification prior to 2017 is understandable, it is not due to any fault of Williams. (Order Following Remand p. 16) (App. p. 98). Williams had no ability to require potential jurors to identify their race prior to 2018—only the court system could have done that. It is unfair to fault Williams for not providing the race of every single juror in all pools when he had no ability, let alone obligation, to obtain the information. To

the extent the district court placed the burden on Williams to provide such information, one must recognize Williams' inability to do so is a creation of the courts' failure to keep such records. It would seem odd to find Williams has not proven systematic exclusion when it is the system that hinders his ability to do so. Cf. State v. Plain, 898 N.W.2d 801 (Iowa 2017) ("the constitutional fair cross-section purpose alone is sufficient to require access to the information necessary to prove a prima facie case).

5. Summary. Williams has established that African-Americans were significantly, unfairly and unreasonably underrepresented in his jury pool. The exclusions were the result of systemic causes, specifically ineffective jury management practices. His right to a fair cross section under the Sixth Amendment to the United States Constitution has been violated.

CONCLUSION

Defendant-Appellant Antoine Williams was denied his right to a jury comprised from a fair cross-section of the community under the Sixth Amendment to the United States Constitution. His conviction, sentence, and judgment should be vacated and his case remanded to the district court for a new trial.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $4.76, and that amount has been paid in full by the Office of the Appellate Defender.

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

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