IN THE SUPREME COURT OF IOWA
Supreme Court No. 21–0158

STATE OF IOWA,
      Plaintiff-Appellee,

vs.

ANTOINE TYREE WILLIAMS
      Defendant-Appellant.

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

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov

RACHEL GINBEY
Floyd County Attorney

SCOTT BROWN
Assistant Attorney General

ATTORNEYS FOR PLAINTIFF-APPELLEE   FINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. **Did the district court err in determining that Williams failed to show that any level of underrepresentation of African-Americans on his jury pool (or over a relevant period of time) was attributable to the process that was used to select and summon potential jurors?**

Did the district court err in adopting the State's approach to analyzing prong #2 of *Duren* and *Veal*, and in finding that Williams failed to show that the level of representation of African-Americans on his jury pool was unfair or unreasonable?

<u>Authorities</u>

Berghuis v. Smith, 559 U.S. 314 (2010)
Duren v. Missouri, 439 U.S. 357 (1979)
Holland v. Illinois, 493 U.S. 474 (1990)
Machetti v. Linahan, 679 F.2d 236 (11th Cir. 1982)
Taylor v. Louisiana, 419 U.S. 522 (1975)
United States v. Chanthadara, 230 F.3d 1237 (10th Cir. 2000)
United States v. Hernandez-Estrada, 749 F.3d 1154
 (9th Cir. 2014)
Lamasters v. State, 821 N.W.2d 856 (Iowa 2012)
McCormick v. Nikkel & Assocs., Inc., 819 N.W.2d 368
 (Iowa 2012)
People v. Smith, 615 N.W.2d 1 (Mich. 2000)
State v. Chidester, 570 N.W.2d 78 (Iowa 1997)
State v. Lilly, 930 N.W.2d 293 (Iowa 2019)
State v. Plain, 898 N.W.2d 801 (Iowa 2017)
State v. Veal, 930 N.W.2d 319 (Iowa 2019)
State v. Williams, 929 N.W.2d 621 (Iowa 2019)
State v. Wilson, 941 N.W.2d 579 (Iowa 2020)
Van Essen v. McCormick Enter. Co., 599 N.W.2d 716
 (Iowa 1999)
Laura T. Kessler, *The Attachment Gap: Employment
 Discrimination Law, Women's Cultural Caregiving, and
 the Limits of Economic and Liberal Legal Theory*, 34 U.
 MICH. J. L. REFORM 371 (2001)

Mary R. Rose & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases*, 2011 MICH. ST. L. REV. 911 (2011)

Mark A. Musick et al., *Much Obliged: Volunteering, Normative Activities, and Willingness to Serve on Juries*, 40 L. & SOC. INQUIRY 433 (2015)

Norbert Hirschauer et al., *Pitfalls of Significance Testing and p-Value Variability: An Econometrics Perspective*, 12 STAT. SURVEYS 136 (2018)

Peter A. Detre, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel*, 103 YALE L.J. 1913 (1994)

MICHAEL O. FINKELSTEIN & BRUCE LEVIN, STATISTICS FOR LAWYERS 193 (3d ed. 2015)

Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 DRAKE L. REV. 761 (2011)

Gail M. Sullivan & Richard Feinn, *Using Effect Size—or Why the P Value Is Not Enough*, 4 J. GRAD. MED. EDUC. 279 (2012)

ROUTING STATEMENT

Williams requests retention. *See* Def's Br. at 6. At the time of this writing, the Iowa Supreme Court has retained appeals in *State v. Lilly*, No. 20–0617, and *State v. Plain*, No. 20–1000. Both appeals are about fair cross-section challenges, and both involve rulings where a district court applied *Lilly/Veal* to a developed record on remand. *See generally State v. Lilly*, 930 N.W.2d 293 (Iowa 2019); *State v. Veal*, 930 N.W.2d 319 (Iowa 2019). This appeal implicates some of the same as-yet-unresolved questions about fair cross-section challenges, and it could be retained and set for argument alongside *Lilly II*, *Plain II*, and *Veal II*. *See* Iowa R. App. P. 6.1101(2)(d), (f).

STATEMENT OF THE CASE

Nature of the Case

This is Antoine Tyree Williams's appeal from a ruling that rejected his Sixth Amendment challenge to his jury panel, on remand from *State v. Williams*, 929 N.W.2d 621 (Iowa 2019). Both parties presented evidence and argument on remand. The district court found that representation of African-Americans on Williams's jury pool was not unfair or unreasonable. It also found that Williams failed to show that patterns of slight underrepresentation over time were attributable to the juror selection system. Williams challenges both findings.

This appeal is different from *Veal II* because Williams is arguing that this Court should adopt an analytical framework that uses Zalenski's method: calculate Z-scores for a series of pools, then use those Z-scores for a meta-analysis to determine whether there is a pattern of underrepresentation over time. *See* Def's Br. at 50–53. But that type of meta-analysis does not help Williams show that the level of underrepresentation in *his* jury pool was unfair or unreasonable. It can help identify the existence of a pattern of underrepresentation— but it says nothing about the degree of that underrepresentation, nor does it help determine whether the level of group representation on any particular jury pool is unfair or unreasonable. In short, Zalenski's meta-analysis is a useful tool for answering a very different question.

It is not strictly necessary to reach the arguments on prong #2 because this challenge also fails on prong #3, for failure to establish systematic exclusion. But it may still be useful to consider arguments about Zalenski's meta-analysis, as a way of clarifying the approach to prong #2 for future challenges under *Lilly* and *Veal*.

Statement of Facts

The evidence at trial proved that Williams killed Nate Fleming. Facts about that underlying offense are not relevant to this appeal.

Course of Proceedings

Before his trial, Williams raised a fair-cross-section challenge under the Sixth Amendment. He alleged that underrepresentation of African-Americans on his jury panel was unfair and was the result of systematic exclusion. *See* Jury Panel Motion (10/2/17); App. 6; *accord* HearingTr. (10/5/17) at 7:12–8:2. The State resisted. *See* Resistance (10/4/17); App. 9. The court denied that motion. *See* Order (10/6/17); App. 27. The trial commenced, and Williams was convicted of second-degree murder. He was sentenced accordingly. *See* Judgment and Sentence (12/8/17); App. 35.

On direct appeal, the Iowa Supreme Court rejected most of Williams's challenges to his conviction. *See Williams*, 929 N.W.2d at 630–38. It remanded "for further consideration of Williams's claim that his jury was not drawn from a fair cross section of the community in violation of the Sixth Amendment," in light of its opinion in *Veal*. *See id.* at 629–30, 638. It specified that Williams had only preserved error on a Sixth Amendment challenge to his jury panel—and not on any claim under Article I, Section 10 of the Iowa Constitution. *See id.* at 629 n.1 ("[W]e hold that Williams waived any article I, section 10 challenge to the jury panel.").

On remand, the parties created a record that included testimony from officials who implemented the system for selecting and summoning potential jurors for Floyd County jury pools/panels.[1] Williams tried to show that changes to the juror management system that were adopted in 2018 (after his trial) had succeeded in reducing underrepresentation of African-Americans, to support his claim that pre-2018 practices had excluded them.

Elizabeth Hamm, the jury manager for Floyd County, testified about procedures that she had followed in 2017: she would pull a randomized list of names from the master list, send jury summons and written questionnaires to those people on the randomized list, and then tabulate their responses when respondents sent them back. *See* RemandTr. 135:25–137:11. In December 2018, they switched to sending postcards with a link to an online questionnaire—but Hamm did not observe much improvement in response rates. *See* RemandTr. 141:23–142:6 ("I don't really see that great of an increase with the new system."). The pre-2018 questionnaires included an optional question about respondent race. That question is now mandatory.

---

[1] The Zoom hearing was partially consolidated with a hearing on remand in *Veal*, 930 N.W.2d 319 (Cerro Gordo County FECR025750).

Hamm testified that if a potential juror did not respond to the initial mailing, then "a letter was sent" to that person. That part was the same, both before 2018 and after 2018. *See* RemandTr. 142:13–143:3. Under the pre-2018 system, if a potential juror was supposed to appear for jury service and failed to appear, "then they received a failure to appear notice." *See* RemandTr. 143:4–7. That was a letter that notified a recipient "that they failed to appear for the trial held on whatever date and they had to call [Hamm's] office by a certain date to speak with [her]." *See* RemandTr. 143:8–22. Those potential jurors would typically be reassigned to a subsequent jury pool—and if there was a second failure to appear, Hamm would notify the judge, and the judge would decide whether to initiate contempt proceedings. *See* RemandTr. 143:8–144:3. Hamm testified that, post-2018, they were handling this "[e]ssentially the same way" as they did before 2018:

> **HAMM**: . . . If you don't [send] a response, you get a non-respond — a nonresponse letter. If you don't appear for a trial, you get a failure to appear letter. And then the second one would be up to the judge on whether they wanted to proceed with a show cause or not.
>
> **DEFENSE**: And have you had more or less or about the same number of people referred —
>
> **HAMM**: It's right around the same.

RemandTr. 144:4–15. The post-2018 policy changes did introduce new reminders over text/e-mail, for potential jurors who provided

that contact information in their questionnaire responses—but Hamm still could not send electronic reminders to potential jurors who never completed their questionnaires (because they had never provided that contact information, in the first place). *See* RemandTr. 144:16–145:21.

State Court Administrator Todd Nuccio also testified. Williams asked him about measures that the Iowa Judicial Branch had taken to attempt to improve minority representation in jury pools. Nuccio was part of the study committee that had issued 13 recommendations for policy changes. He testified that most of those recommended policies had been implemented statewide in December 2018. *See* RemandTr. 102:18–109:15. This included switching from paper questionnaires to postcards with a link to online questionnaires; adding items to that questionnaire to collect the respondent's e-mail and mobile number; and using that information to send automated e-mail/text reminders about upcoming jury service. *See* RemandTr. 107:23–110:6. He also testified that Iowa state courts had implemented a "uniform practice for handling failure to appears" from "reminders and rescheduling all the way to a contempt proceeding." *See* RemandTr. 110:10–112:4. But that kind of policy was already in place before 2018, in Floyd County. *See* RemandTr. 144:4–15. Nuccio also testified that the online juror

questionnaires were now *requiring* respondents to indicate their race. Before 2018, that was optional. *See* RemandTr. 112:5–20. Nuccio did not have any quantitative data that showed improvement in the levels of minority representation, as a result of 2018 policy changes (but he did mention "anecdotal information" from some jury managers who thought that their jury pools seemed more diverse). *See* RemandTr. 112:24–113:14. Nuccio acknowledged that pre-2018 data could not be "used for comparison" to establish that those 2018 policy changes had succeeded in improving racial diversity in Iowa jury pools, because a sizable portion of respondents had declined to mark their race when it was optional—so any apparent improvement could just mean that the modified questionnaires were providing a more complete picture of the same level of racial diversity that had already existed, all along. *See* RemandTr. 113:23–114:13; *accord* RemandTr. 130:14–21.

Judicial Branch IT Director Mark Headlee testified about the process for generating master jury lists, which local jury managers would use to draw eligible local residents for jury service, at random. *See* RemandTr. 120:6–123:3. The source lists that were used in 2017 were the same lists that were still used after the 2018 policy changes. *See* RemandTr. 125:6–126:12; RemandTr. 130:3–13.

Professor Mary Rose testified as an expert witness on the issue of systematic exclusion in juror selection processes. She testified that there is "a general consensus that you want to use something besides a voter registration list," to boost representation of minority groups that register to vote at lower rates—and she testified that "Iowa does that well" by merging its voter registration rolls with DOT records, to produce its master list. *See* RemandTr. 235:12–19. Rose testified that it was important to send out *at least one* follow-up notice or reminder to potential jurors who do not respond to the initial mailing, but she clarified that there was no empirical data to suggest that it would help to send *more than one* follow-up mailing. *See* RemandTr. 262:2–17.

Rose was "aware of several changes" in Iowa's juror selection processes and jury management systems since 2018. She noted that "[t]here is much better record keeping" now that respondents were required to mark their race, "which was not the case generally in 2017." *See* RemandTr. 237:20–238:20. Rose agreed that, from this data, it was not possible to determine whether the 2018 policy changes had actually increased levels of minority representation, or if they simply generated more complete data about levels of minority representation that were relatively stable over time. *See* RemandTr. 249:24–251:11.

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

---

[2] Rose also discussed a 1998 study that followed up with people who chose not to respond to jury summons. In Rose's view, the study found that "a misconception about what jury service will involve" was a predictor of failure to respond/appear. *See* RemandTr. 264:3–265:13; RemandTr. 269:17–270:22. But that was not an accurate description of the study's findings. *See* Robert G. Boatwright, *Why Citizens Don't Respond to Jury Summonses and What Courts Can Do About It*, 82 Judicature 156, 160 (1999) ("[S]ummons non-respondents are not significantly less aware of the nature of jury service . . . .").

Both parties submitted proposed rulings and arguments. *See* State's Proposed Ruling (submitted 8/26/20, filed 2/3/21); App. 118 Def's Proposed Ruling (8/26/20); App. 69; State's Response (9/15/20); App. 73; Def's Response (9/16/20); App. 77.

On prong #3, the district court found Williams failed to carry his burden of establishing a causal connection between any particular feature of the jury selection process or jury management system and underrepresentation of African-Americans in his jury pool. *See* Ruling (1/29/21) at 23–34; App. 105. It noted that Williams was challenging the failure to adopt the December 2018 policy changes before his trial in 2017; his argument was "that recent changes to the process have succeeded in reducing underrepresentation," and that "the state court administrator and the Floyd County jury manager were systematically excluding African-Americans from jury service by failing to adopt policies that have reduced underrepresentation" since late 2018. *See id.* at 27; App. 109. But it noted that most of the best practices that Rose identified were already used in Floyd County, before 2018. *See id.* at 24–25; App. 106–07. It also observed that, because of the change from an *optional* racial identification question to a *mandatory* racial identification question, "the demographic information in 2016 and

2017 was incomplete" and comparing demographic data across those timeframes would not actually establish "that underrepresentation decreased in 2019 relative to 2016 and 2017." *See id.* at 27–28; App. 109–10. And even if underrepresentation had decreased since 2018, that still would not establish systematic exclusion:

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

Id. at 29–32; App. 111–14. The court also noted Williams's argument "raise[d] a practical problem, as accepting this argument as proof of systematic exclusion would penalize and disincentivize attempts to improve representation levels and racial diversity in Iowa jury pools" by treating them as damaging admissions. *Id.* at 32–33; App. 114–15.

Ultimately, the court found "[t]he record supports a conclusion that underrepresentation results from a confluence of factors that are mostly beyond the control of the state court administrator or the Floyd County jury manager, including a variety of factors affecting how individuals make decisions about how to respond to being selected for jury service." *See id.* at 33–34; App. 115–16. This mattered because prong #3 required Williams to prove "a causal relationship between [a] policy, practice, or feature of the jury selection process or jury management system and any observed underrepresentation of African-Americans." Williams failed to prove that, so the district court found that his challenge failed on prong #3. *See id.* at 34; App. 116.

Additional facts, including the facts that pertain to the analysis on prong #2 of Williams's challenge, will be discussed when relevant.

ARGUMENT

I.   **The district court was correct that Williams did not establish a violation of his Sixth Amendment rights under *Duren* and *Veal*.**

Preservation of Error

Error was preserved for any challenges and arguments that Williams raised and that the district court rejected in its ruling. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). Williams did not initially ask the district court to rely on Zalenski's meta-analysis for prong #2. *See* Def's Proposed Ruling (8/27/20) at 2–3; App. 70–71 (arguing Z-score of -0.952 for his jury pool "establishes this prong"). However, in his response to the State's proposed ruling, Williams did defend Zalenski's meta-analysis against the State's critiques. *See* Def's Response (9/16/20); App. 77. The district court's subsequent ruling considered and rejected that advocacy, and it explained why it declined to use Zalenski's meta-analysis to assess the fairness/reasonableness of the level of African-American representation in Williams's jury pool. *See* Ruling (1/29/21) at 10–15; App. 92–97. Thus, error is preserved for Williams's claim that the court erred by declining to use meta-analysis to resolve prong #2. *See Lamasters*, 821 N.W.2d at 864. On prong #3, error is preserved for claims and arguments about the same theories of systematic exclusion that were considered and ruled upon below. *Id.*

Standard of Review

Review of a ruling on a fair-cross-section challenge is de novo. *See Veal*, 930 N.W.2d at 327 (citing *State v. Plain*, 898 N.W.2d 801, 810, 821–29 (Iowa 2017)).

Merits

Iowa courts use *Duren*'s three-pronged test for challenges that allege a violation of the Sixth Amendment fair-cross-section right. To construct a prima-facie claim, the defendant must establish:

> (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.

Lilly, 930 N.W.2d at 299 (quoting *Plain*, 898 N.W.2d at 822, in turn quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). Failure to prove any one of those three prongs is fatal to a *Duren/Veal* challenge.

The district court found Williams failed to establish prong #2 and prong #3. *See* Ruling (1/29/21) at 4–34; App. 86. Both findings are correct, and each is an independently sufficient reason to affirm.

A.   Williams failed to establish systematic exclusion.

Even if Williams established underrepresentation on prong #2, his claim would still fail because he did not prove systematic exclusion.

1. Williams's theories about systematic negligence from neutral, run-of-the-mill jury management practices cannot establish systematic exclusion for a Sixth Amendment challenge.

Williams challenges run-of-the-mill jury management practices like sending only one round of failure-to-respond letters or declining to refer every failure-to-appear to the court for contempt proceedings. *See* Def's Br. at 59–61. But because he is limited to a challenge under the Sixth Amendment, *Veal* applies. Consequently, Williams's claims that a pattern of underrepresentation arose from a failure to abandon "run-of-the-mill jury management practices" and adopt new practices cannot prove systematic exclusion, even if accepted at face value. *See Veal*, 930 N.W.2d at 329–30. *Veal* held that, for a Sixth Amendment fair cross-section claim, "[t]he defendant must identify some practice or combination of practices that led to the underrepresentation, and it must be something other than the 'laundry list' the Supreme Court declined to condemn in *Berghuis*." *See id.* at 330 (quoting *Berghuis v. Smith*, 559 U.S. 314, 332 (2010)). That laundry list included:

> [T]he County's practice of excusing people who merely alleged hardship or simply failed to show up for jury service, its reliance on mail notices, its failure to follow up on nonresponses, its use of residential addresses at least 15 months old, and the refusal of Kent County police to enforce court orders for the appearance of prospective jurors.

See id. at 329 (quoting *Berghuis*, 559 U.S. at 332). Many of Williams's allegations of systematic exclusion are identical to items on that list, including his argument that Floyd County's jury management process caused underrepresentation by failing to follow up on non-responses or by failing to ensure that potential jurors would face consequences for failing to respond or failing to appear. *See* Def's Br. at 59–63. Any such arguments are foreclosed by *Veal*, which rejected the claim that "run-of-the-mill jury management practices can constitute systematic exclusion under the Sixth Amendment." *See Veal*, 930 N.W.2d at 329.

Williams concedes that the district court was correct to rule that any claim under the Iowa Constitution was not preserved before trial and was outside the scope of the remand order from his prior appeal. *See* Def's Br. at 9–10. That is why Williams does not use the phrase "systematic negligence" anywhere in his brief. But the substance of his argument on prong #3 is still about systematic negligence—which becomes unmistakably clear when he block-quotes *Lilly*'s explanation of the underlying theory behind systematic-negligence claims. *See* Def's Br. at 62–63 (quoting *Lilly*, 930 N.W.2d at 307 (quoting Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims*

Must Be Expanded, 59 DRAKE L. REV. 761, 790–91 (2011))). Williams

is making the same argument that run-of-the-mill jury management

practices could have been optimized to reduce underrepresentation,

and that any local jury manager (or state court administrator) who

was exercising reasonable care in October 2017 would have identified

and implemented those specific optimizations before Williams's trial.

This is the same kind of systematic-negligence claim that *Veal* already

foreclosed under the Sixth Amendment. The district court was correct

to rule that it "cannot give rise to a Sixth Amendment challenge." *See*

Ruling (1/29/21) at 23; App. 106 (quoting *Veal*, 930 N.W.2d at 329).

Williams recognizes that *Veal*'s holding about challenges to

run-of-the-mill jury management practices is fatal to his claim, so he

argues that *Veal* relied on a misreading of *Berghuis* and *Duren*. *See*

Def's Br. at 53–56. But those arguments stretch *Duren* well past its

breaking point, while failing to recognize the implications of *Berghuis*.

Williams says that *Duren* held that a prima facie claim requires

nothing beyond proof of "a pattern of underrepresentation coupled

with an identification of practices leading to underrepresentation." *See*

Def's Br. at 55–56 (citing *Duren*, 439 U.S. at 366). Williams needs

Duren's holding to be about policies "leading to underrepresentation"

because his challenge is that "[t]he prior jury management practices of Floyd County led to . . . underrepresentation." *See* Def's Br. at 56. But *Duren* did not invalidate any neutrally applicable, run-of-the-mill jury management policies for "leading to underrepresentation" as a second-order consequence. Rather, *Duren* dealt with a rule that, by its express terms, applied only to women *because* they were women, and funneled them out the juror selection process (or, more accurately, expressly gave them permission to funnel themselves out). *See Duren*, 439 U.S. at 360–61. The observed pattern of underrepresentation was not a second-order consequence that arose from interaction between neutrally applicable, run-of-the-mill jury management practices and social, economic, or cultural conditions. *See id.* at 367 & n.25 (noting that existence of automatic opt-out exemption for women meant that "[t]he resulting disproportionate and consistent exclusion [of] women" at all stages after the initial canvass "was quite obviously" attributable to that gender-based exemption, and rejecting an argument that other neutral exemptions were the cause of underrepresentation of women when similar neutral exemptions had not produced similar disparities on a master jury wheel in the federal district court for the same area). *Duren* was about an automatic opt-out exemption from jury service

that Missouri *only* offered to women. *Duren* described a pattern of underrepresentation of women on Missouri jury pools, but it was not describing a second-order effect of an ordinary policy that required *every* potential juror to choose whether to fulfill their obligation to respond to a jury summons and appear for jury service. Rather, that disparity was a direct consequence of a policy that expressly granted women—and only women—an opportunity to opt out of jury service, with no penalty and no further inquiry. *See id.* at 370 (warning that categorical exemptions from jury service were likely unconstitutional if they were "expressly limited" to distinctive groups); *accord Machetti v. Linahan*, 679 F.2d 236, 242 (11th Cir. 1982) (citing *Duren*, 439 U.S. at 366–67) (considering similar automatic exemption for women and applying *Duren*'s holding: "that the existence of an opt-out system, as embodied by statute" expressly specifying that opt-out was available to all women and only to women, "in conjunction with the resulting disproportionate and consistent exclusion of women from the final jury pool was prima facie evidence of systematic exclusion of women"). *Duren* did not hold that litigants can prove a constitutional violation by identifying practices that are neutral or ordinary, but "that lead to underrepresentation" by some indirect effect. *See* Def's Br. at 55–56.

26

If *Duren* had meant to enable proof of systematic exclusion by identifying neutral, run-of-the-mill jury management practices "that lead to underrepresentation" as a second-order consequence of their ordinary operation, then it would not have included reassurances that neutral exemptions for caregiving parents were likely constitutional:

> We recognize that a State may have an important interest in assuring that those members of the family responsible for the care of children are available to do so. An exemption appropriately tailored to this interest would, we think, survive a fair-cross-section challenge. . . . We also repeat the observation made in *Taylor* that it is unlikely that reasonable exemptions, such as those based on special hardship, incapacity, or community needs, "would pose substantial threats that the remaining pool of jurors would not be representative of the community."

Duren, 439 U.S. at 370 (quoting *Taylor v. Louisiana*, 419 U.S. 522, 534 (1975)). Williams's reading would render that an empty promise. If women were more likely to be caregiving parents (or more likely to qualify for other neutral exemptions that were mentioned in *Taylor*), then they would qualify for those neutral exemptions more often, and that would naturally "lead to underrepresentation" over time. In 1979, when *Duren* was decided, a gender disparity in caregiving would have been an obvious fact of American life.[3] No reasonable jurist or lawyer

---

3   Even as late as 1996, data from the Bureau of Labor Statistics showed that 75% of working-age Americans who were not working and

would have believed that an exemption for caregiving parents could be implemented without disproportionately excusing women from jury service, as a second-order consequence of that neutral policy. If *Duren* said what Williams wants it to say (that systematic exclusion can be proven by identifying second-order consequences of neutral, run-of-the-mill jury management policies and practices), then *Duren* could not have given any reassurances that commonplace exemptions for "members of the family responsible for the care of children" would "survive a fair-cross-section challenge"—to the contrary, it would have been clear that those caregiver exemptions *could not* survive. *See id.*

Much like the neutral, run-of-the-mill policies that Williams is challenging here, those caregiver exemptions would tend to produce underrepresentation of a distinctive group in practice, by interaction

---

not looking for work were women. 70% of those women said that was because they were "taking care of home or family" instead. Only 8% of men who were not working or looking for work gave that as a reason. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *Issues in Labor Statistics: Who's Not Working?*, Summary 98-4, at 1 (May 1998), https://www.bls.gov/opub/btn/archive/whos-not-working.pdf; *cf.* Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J. L. REFORM 371, 378–88 (2001) (discussing data and research on gender disparities in caregiving, and also citing scholarship that "has highlighted the social, political, and spiritual importance of family caregiving work for women of color").

with social and cultural realities that cannot be attributed to features of a juror selection process and that neither courts nor jury managers could eliminate by fiat. If *Duren* supported Williams's challenge, then *Duren* would have expressed skepticism about the constitutionality of those neutral caregiver exemptions. Instead, it expressly disclaimed any interest in invalidating them. *See id.* This shows that Williams's critique of *Veal*'s reading and application of *Duren* is invalid. *Veal* was right to recognize this limitation on claims under *Duren* and the Sixth Amendment. *See Veal*, 930 N.W.2d at 329 (quoting *Berghuis*, 559 U.S. at 333, and *Duren*, 439 U.S. at 370).

Berghuis held that the Michigan Supreme Court's decision that rejected Smith's fair-cross-section claim under the Sixth Amendment was "consistent with *Duren*." *See Berghuis*, 559 U.S. at 333. In that underlying decision, the Michigan Supreme Court had held that "the influence of social and economic factors on juror participation does not demonstrate a systematic exclusion of African-Americans." *See People v. Smith*, 615 N.W.2d 1, 3 (Mich. 2000); *accord id.* at 12–13 (Cavanagh, J., concurring) (rejecting systematic exclusion theories that alleged "disparate effects" as consequence of neutral practices, where any disparity would be "attributable to outside social forces

29

rather than systematic exclusion of black prospective jurors"). It is true, as Williams points out, that *Berghuis* included a footnote that stated that the Court was not deciding "whether the impact of social and economic factors can support a fair-cross-section claim." *See Berghuis*, 559 U.S. at 333 n.9; *accord* Def's Br. at 54 n.7. But it still held that the Michigan Supreme Court's holding that rejected those challenges was "consistent with *Duren*" and that it did not violate any principle that *Duren* had established—either "clearly" or less so. *See Berghuis*, 559 U.S. at 327, 332–33. Most of the holding in *Berghuis* was about Smith's failure to establish causation—but it also explained that neutral exemptions would likely be constitutional, even if Smith *had* proven that they were causally linked to underrepresentation:

> In *Taylor*, we "recognized broad discretion in the States" to "prescribe relevant qualifications for their jurors and to provide reasonable exemptions." 419 U.S. at 537–538. And in *Duren*, the Court understood that hardship exemptions resembling those Smith assails might well "survive a fair-cross-section challenge," 439 U.S. at 370.

Berghuis, 559 U.S. at 333. As such, it was not unreasonable to reject Smith's contention "that jury-selection-process features of the kind on [his] list can give rise to a fair-cross-section claim" under *Duren* and the Sixth Amendment. *See id.*; *cf. Lilly*, 930 N.W.2d at 318 (McDonald, J., concurring in part) (collecting cases that reached similar holdings).

Smith's "laundry list" included neutral, run-of-the-mill practices that are indistinguishable from practices that Williams challenged on remand in this case, including "failure to follow up on nonresponses" and failure "to enforce . . . the appearance of prospective jurors." *See Berghuis*, 559 U.S. at 332. *Berghuis* forecloses Williams's claim that *Duren* requires this Court to find systematic exclusion upon proof that neutral, run-of-the-mill jury management practices "led to" disparities in minority representation levels as a second-order consequence that the judicial branch should have noticed and (somehow) rectified. *See* Def's Br. at 56; *Veal*, 930 N.W.2d at 329 (quoting *Berghuis*, 559 U.S. at 314, 332–33). That is a systematic-negligence claim. *Veal* held that this kind of claim cannot establish a Sixth Amendment violation, and that holding was correct. Thus, Williams's challenge must fail.

2. Even if systematic negligence could be used to establish systematic exclusion for a claim under the Sixth Amendment, this claim would still fail because Williams never proved causation.

Williams argues that he showed that post-2018 policy changes *caused* an upswing in levels of minority representation on jury pools. *See* Def's Br. at 56–64. He is wrong. At best, he had testimony from Rose that she reviewed the data and found a *correlation*: an upswing in minority representation levels in 2019, compared to 2016 and 2017.

See RemandTr. 237:4–239:7. But Rose later admitted that the data

did not actually establish that representation levels had improved:

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

See RemandTr. 249:19–251:11. The district court agreed that it was

unable to infer that representation levels actually improved (even if

2019 data seemed to show higher representation levels) because the

pre-2018 data contained a significant amount of blank responses to

the question on respondent race. *See* Ruling (1/29/21) at 27–29; App.

109. Williams's response to that part of the district court's ruling is that

he "had no ability, let alone obligation, to obtain [that] information,"

and that "[his] inability to do so is a creation of the courts' failure to

keep such records." *See* Def's Br. at 63–64. But Williams cannot blame the judicial branch for his decision to construct his advocacy around an unfounded assertion that *this specific data* established that pre-2018 jury management policies were a source of systematic exclusion, and that recent tweaks to those policies had produced more representative jury pools. Williams chose to rely on this data to make empirical claims that it simply does not support; it is not unfair to point that out. *See, e.g., Lilly*, 930 N.W.2d at 306–08 (holding that "the defendant must prove that the practice has caused systematic underrepresentation," even for a claim under *Lilly* that alleges systematic negligence). The district court was correct that this data did not prove what Williams claimed it could prove, and to refuse to overlook that failure of proof.

A litigant could try to fill that gap with evidence or argument to support favorable inferences from those blank responses on race in the pre-2018 data. But this record foreclosed that, too. Rose agreed that there are some generalizable patterns in non-response rates on racial identification questions—and in some contexts where minority respondents hold certain attitudes, they are disproportionately likely to decline to indicate their race. *See* RemandTr. 251:12–254:5; *accord* Ruling (1/29/21) at 28–29; App. 110 (citing Mary R. Rose & Jeffrey B.

Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases*, 2011 MICH. ST. L. REV. 911, 926 & n.67 (2011)). That means it is impossible to assume that non-responses on race identification in pre-2017 data were proportionally distributed among racial groups. It also means that any apparent improvement in representation levels in the 2019 data was at least equally likely (if not more likely) to support the alternative conclusion that the new version of the juror questionnaire simply gathered more complete data about an otherwise-unchanged population of potential jurors.

Williams argues that causation should be inferred or presumed because "changes adopted in 2018 were the type of changes likely to increase minority representation." *See* Def's Br. at 61–62. But most of the policies that Rose described as measures that would have increased minority representation levels were already in place in 2017, either in Floyd County or statewide. *See* RemandTr. 235:12–236:5; RemandTr. 262:2–263:4; Ruling (1/29/21) at 24–25; App. 106. Hamm testified that, before 2018, she was already mailing out a follow-up reminder to all potential jurors who failed to respond to the first round of mailings. *See* RemandTr. 142:13–144:15. Potential jurors were already drawn at random, from a master list that combined voter registration rolls with

DOT records. *See* RemandTr. 121:8–123:3. Rose's testimony did not offer any reason to conclude that any of the post-2018 policy changes had significantly improved minority representation on jury pools, or that failing to implement those specific policies in Floyd County before December 2018 could amount to systematic exclusion.

In his arguments about prong #2, Williams repeats Zalenski's assertion that "[t]he point of statistics" is to detect patterns. *See* Def's Br. at 50–51 (quoting RemandTr. 227:1–3). So it is worth noting that his proof of correlation—a pattern—relied solely and entirely on Rose's testimony describing an unquantified "improvement" that she found in comparing pre-2018 data to post-2018 data. *See* RemandTr. 237:4–239:14. Rose knew how to quantify effects in data and test results for statistical significance. *See, e.g.*, RemandTr. 243:25–245:14. But Rose did not provide any analysis that would have quantified that effect or established statistical significance for any such "improvement." And Williams retained Zalenski as an expert statistician; her focus was on analyzing data to detect patterns. *See* RemandTr. 227:1–3. Williams could have obtained and offered a statistical analysis that would have quantified the apparent difference in minority representation levels between 2017 jury pools and 2019 jury pools. Maybe that would have

enabled him to make arguments that he had *actually shown* that the 2018 policy changes had eliminated the practices that had previously caused underrepresentation. He may even have been able to show a dramatic improvement that would have diminished the plausibility of the competing inference that any apparent gains could be attributed to more complete data collection on respondent race (although Rose, who saw the post-2018 data, was unable to rule out that explanation). *See* RemandTr. 249:19–251:11. But Williams never did that. He only offered a qualitative opinion from Rose, who admitted that she could not even infer correlation from this data—much less causation. *See id.*

Now, Williams argues that it is unfair to require him to prove causation at all, because the judicial branch was only *requesting* that jurors mark their race (instead of *requiring* it). *See* Def's Br. at 63–64. This is a double-layered claim of systematic negligence: Williams says that the judicial branch was negligent in failing to anticipate that an optional racial-identification question would lead to gaps in the data that Williams would later need, to prove that *other* neutral practices had led to disparities in minority representation levels that someone should have predicted and prevented (or noticed and cured). But he has also failed to prove causation for *that* claim, as well. He provided

no evidence (quantitative or otherwise) to support an inference that more complete data would have supported his substantive challenges. Williams is not pointing to a near-complete quantitative analysis that *could* prove causation, if a court draws certain reasonable inferences from incomplete data. Nor is he providing any reason why this Court should infer that more complete data would prove his point. Indeed, he provided nothing to undercut the State's evidence that there can be non-random patterns in non-response on race-identification questions and that African-Americans may have been *overrepresented* among pre-2018 respondents who made the decision not to mark their race. *See* RemandTr. 251:12–254:5; *accord* Rose & Abramson, *Data, Race, and the Courts*, 2011 MICH. ST. L. REV. at 926 & n.67; Ruling (1/29/21) at 28–29; App. 110. The only evidence in this record that would help identify which inferences to draw from incomplete data was evidence suggesting that more complete data might have shown *better* levels of African-American representation before 2018, which would have been fatal to Williams's attempts to prove causation through a correlation between 2018 policy changes and improvements in levels of minority representation on jury pools. So Williams failed to show that, if not for gaps in pre-2018 data, he would have been able to establish prong #3.

This argument offers a good reason for this Court to walk back its recognition of systematic negligence as a viable claim under *Lilly*. Using a standard-deviation threshold of (Z ≤ -1.0) under *Lilly* means that, for any given distinctive group, about 16% of all claimants will be able to carry their burden of proof on prong #2, due to expected variability in random sampling. *See* Ruling (1/29/21) at 9; App. 91.[4] *Lilly* said that its lower threshold for prong #2 was workable because claimants "must still trace the disparity to some practice or practices." *See Lilly*, 930 N.W.2d at 304. But every systematic-negligence claim will include Williams's alternative theory: that any failure of proof on prong #3 is because the judicial branch was systematically negligent for failing to collect data on some dimension that *would have* proven systematic exclusion or systematic negligence. The practical effect of

---

[4]   Of course, *any* defendant can raise a challenge that alleges underrepresentation and exclusion of *any* group. *See, e.g., Holland v. Illinois*, 493 U.S. 474, 477 (1990). A defendant has a 16% chance of being able to establish prong #2 for *each* distinctive group that exists. For any jurisdiction where Y distinctive groups exist, the probability that a given defendant will be able to carry their burden on prong #2 for *at least one* claim under *Lilly* is about [1 − (84%)^Y]. Even if there were only six distinctive groups—men, women, Hispanic people, Asian people, African-American people, and white people—about 64.9% of all jury pools would enable a defendant to establish Z ≤ -1.0 for at least one of them. The share of *Lilly* challenges where prong #3 controls the outcome is therefore much, much greater than 16%.

recognizing systematic negligence as the basis for a claim under any constitutional provision is to relieve defendants of their obligation to establish causation for any theory of systematic exclusion/negligence. *Lilly* ostensibly demands proof of causation on prong #3, even for a claim of systematic negligence. *See id*. at 305–08. But Williams still insists that the unavailability of data to support his chosen theory of systematic negligence is, in itself, proof of systematic negligence. *See* Def's Br. at 63–64. And if he lacks empirical data to prove *that*, then that is systematic negligence, too. *Lilly's* common-sense rule requiring proof of causation cannot coexist with this kind of demand for relief on "a claim that everyone agrees [was] lost as a matter of law." *See Veal*, 930 N.W.2d at 368 (McDonald, J., concurring in part).

All of this makes it important to reject Williams's argument that this Court should conclude that he established causation for his theory of systematic negligence because he *would have* proven causation, if he had better data on respondent race for pre-2018 jury pools. *See* Def's Br. at 63–64. It is just as likely that more complete data from pre-2018 jury pools would have *foreclosed* proof of causation. Almost all of the policies and practices that Rose identified as effective ways to reduce levels of minority underrepresentation were already in place

in Floyd County during 2017. *Compare* RemandTr. 142:13–144:15, *with* RemandTr. 262:2–263:4; *accord* Ruling (1/29/21) at 24–25; App. 106. Also, Williams did not provide any quantitative statistical analysis of the more complete data from post-2018 jury pools, which he *did* have. *See* RemandTr. 237:4–12. This is like the failure of proof in *Berghuis*, where evidence that particular officials "*believed* that the assignment order created racial disparities" was inadequate; that did not constitute actual proof of systematic exclusion because "the belief was not substantiated by Smith's evidence." *See Berghuis*, 559 U.S. at 330–31; *accord Smith*, 615 N.W.2d at 3 (finding Smith "simply failed to carry his burden of proof" on systematic exclusion because he did not introduce quantitative evidence of minority representation levels); *id*. at 12 (Cavanagh, J., concurring) (holding that Smith failed to carry his burden of proof on claim that "siphoning" jurors to district courts caused systematic exclusion because "[n]o evidence has shown that district court juries contained more, fewer, or a number approximately equal to the number of minority jurors appearing in circuit court"). So even if proof of systematic negligence *could* establish a violation of the Sixth Amendment, Williams's challenge would still fail because he did not establish causation on any of his systematic-negligence theories.

3. Zalenski's meta-analysis shows an apparent pattern of underrepresentation over time, which is relevant on prong #3—but not determinative.

Zalenski's meta-analysis was a one-tailed t-test that used data from eight jury pools (including Williams's jury pool) to determine whether there was a pattern of underrepresentation over time. This statistical test was done by taking Z-scores for those eight jury pools, then finding the probability that normal variance in random sampling would produce that array of Z-scores. If that probability was too low, it would establish that the "true mean is not equal to 0." *See* Remand Ex. L; X-App. 16. In other words, it would mean something other than random sampling was pushing African-American representation levels away from the expected average level of 1.85%, and that they actually clustered around a different "true average." *See* Remand Ex. H; X-App. 12; RemandTr. 193:8–196:10. This statistical analysis did not really say anything about the *degree* or *magnitude* of underrepresentation in those jury pools, except that it was enough to rule out variability in random sampling as its only cause. *See* RemandTr. 209:20–210:19.

All remarks about this meta-analysis should be taken with the caveat that Zalenski was analyzing pre-2017 data that included many responses where potential jurors did not mark their race. Indeed, for

the pool drawn in May 2017 (pool number 341170501), only 12 of 25 respondents indicated their race. *See* Remand Ex. A; X-App. 5. As discussed above, there are valid reasons to doubt any assumption that "unknowns" are equally distributed among different racial groups, and to doubt any conclusion that a significant level of underrepresentation can be identified in this data with so many "unknown" responses. *See* RemandTr. 249:24–254:5; Ruling (1/29/21) at 27–29; App. 109–11.

Setting that caveat aside, Williams is correct that Zalenski's meta-analysis would show "the likelihood of the underrepresentation [over the course of a year] occurring randomly was only .38 percent." *See* Def's Br. at 61 (citing RemandTr. 184:17–185:5). Unlike Williams's argument on prong #2, this uses Zalenski's meta-analysis correctly: to show that a pattern of underrepresentation over time cannot plausibly be attributed to the expected level of variability in random sampling. But that only proves *something* is creating a non-random pattern of underrepresentation. It does not prove that the juror-selection system is to blame, which is why "statistically significant disparities alone are not enough." *See Lilly*, 930 N.W.2d at 305–07 & n.8. A meta-analysis can help identify when underrepresentation is non-random enough to qualify as "systematic"—but it is not, in itself, proof of "exclusion."

Rose conceded that almost every failure to respond/appear is ultimately attributable to a decision made by an individual person with their own attitudes, beliefs, and experiences. *See* RemandTr. 243:6–248:20.[5] Rose's research found that African-Americans were "about 40% as likely" as Caucasians to be willing to serve on a jury, even after controlling for an extensive array of factors. *See* RemandTr. 241:15–246:1 (discussing Musick et al., *Much Obliged*, 40 L. & SOC. INQUIRY at 450 & 457); *accord* Ruling (1/29/21) at 29–30; App. 111 (noting that Rose still agreed that the finding was consistent with other research). Rose had also analyzed data where race was known *before* juror questionnaires were sent or returned; that data showed that African-Americans respondents were choosing not to respond at disproportionately high rates, and that persisted "across years." *See* RemandTr. 254:6–257:4; *cf.* Rose & Abramson, *Data, Race, and the Courts*, 2011 MICH. ST. L. REV. at 938 (noting this is non-response to "a jury form presumably delivered," not returned as undeliverable).

---

[5] The sole exception, in Rose's view, would be failures to respond or appear that are attributable to undeliverable mail. *See* RemandTr. 247:12–248:20. Williams did not allege that any underrepresentation was caused by undeliverable mail, nor did he identify anything that a judicial branch employee could have or should have done differently to reduce incidences of non-response due to undeliverable mail. *See* Ruling (1/29/21) at 31; App. 113.

Williams offered nothing to refute the evidence that there are broad social conditions that manifest in patterns of decision-making among individual respondents, causing underrepresentation that is not attributable to features of the systems used to select, contact, and summon potential jurors. Instead, he argues that failing to calibrate incentives and penalties to change those decision-making patterns is a form of systematic exclusion. *See* Def's Br. at 62–63. He is incorrect. At best, it would be systematic negligence—and even that would still require proof that the judicial branch had control over the factors that caused disproportionate non-response rates. *See, e.g.*, *McCormick v. Nikkel & Assocs., Inc.*, 819 N.W.2d 368, 372–73 (Iowa 2012) (quoting *Van Essen v. McCormick Enter. Co.*, 599 N.W.2d 716, 720 n.3 (Iowa 1999)) (canvassing negligence cases to extract "a common principle" that "liability is premised upon control"). At the very least, Williams would still have to prove there was something that the judicial branch could have done (and did not do) that would have solved the problem. He did not. He never identified a specific array of incentives/penalties that would be more effective at encouraging participation, nor did he establish that any reasonable recalibration of incentives and penalties would cause a meaningful or significant drop in underrepresentation.

To summarize: Williams only alleged systematic negligence from neutral, run-of-the-mill jury management policies, which cannot establish systematic exclusion for a Sixth Amendment challenge. *See Veal*, 930 N.W.2d at 329–30 (quoting *Berghuis*, 559 U.S. at 332). He did not prove causation to support his systematic-negligence theories; he did not actually prove that representation levels improved in 2019, so he failed to establish any correlation (much less causation) to link the 2018 policy changes to an actual reduction in underrepresentation. And although Zalenski's meta-analysis could be relevant on prong #3, it could not establish that any pattern of apparent underrepresentation was attributable to the jury management system, and evidence in this record provided strong support for the alternative inference that any pattern of underrepresentation "results from a confluence of factors that are mostly beyond the control of the state court administrator or the Floyd County jury manager"—not from systematic exclusion. *See* Ruling (1/29/21) at 29–31; App. 111. The district court was right to find Williams failed to establish prong #3 and to reject his challenge.

B. Williams failed to show that underrepresentation of African-Americans on his jury pool was unfair or unreasonable, in relation to their prevalence among jury-eligible residents of Floyd County.

On prong #2, the district court adopted most of the reasoning and analysis from the State's proposed ruling. *See* State's Proposed Ruling (8/26/20) at 29–56; App. 146–73; Ruling (1/29/21) at 4–22; App. 86–104. Williams is not arguing that any of its math was incorrect. Williams also does not argue that the numerical analysis should have excluded the potential juror who returned a juror questionnaire and was then excused, because she was a student. *See* Def's Br. at 49–50 (using 1.45% as the observed level of representation on this jury pool because there were two African-Americans among 138 respondents). Instead, Williams argues that the district court erred in focusing its prong #2 analysis on his actual jury pool, instead of using Zalenski's meta-analysis. *See* Def's Br. at 48–53. This challenge fails because Williams's jury pool *should* be the focus of the analysis on prong #2. The State's analytical framework enabled the district court to assess whether the level of underrepresentation on Williams's jury pool was unfair or unreasonable. It was not. Zalenski's meta-analysis is not the correct analytical tool to use in analyzing prong #2 because it answers a very different question, and because it is not judicially manageable.

1.	**The State's analytical framework enables courts to identify and solve a "small numbers problem." This fulfills the Iowa Supreme Court's promise to create space for claims that allege total exclusion of smaller groups, while avoiding absurd results.**

In *Lilly*, the Iowa Supreme Court did not agree with the State

that it should reject aggregated jury pool data for prong #2 in *all* cases.

See Lilly, 930 N.W.2d at 305. That was because it would be "unfair" to

reject challenges from all defendants whose jury pool were too small to

produce the "degree of statistical significance" that prong #2 required.

See id. That holding was consistent with *Plain*, which overruled *Jones*

and repudiated its rule that proof on prong #2 must always include a

showing of 10% absolute disparity. *Jones* was unacceptable because a

challenge to underrepresentation or exclusion of a group comprising

less than 10% of the jury-eligible population would always fail, "even if

the exclusion of [members of that group] was total and systemic." *See*

Plain, 898 N.W.2d at 825–26. The through-line is that a framework

for prong #2 must permit a defendant to use an amount of data that

can establish statistical significance from *total* underrepresentation,

even if the distinctive group is not large enough that its total absence

from a single jury pool is unfair or unreasonable—in other words, cases

with a "small numbers problem." *See Williams*, 929 N.W.2d at 630.

But other challenges involve jury pools and distinctive groups that are large enough to avoid that problem altogether. The way to identify those challenges is to ask: given the size of the jury pool and the prevalence of the distinctive group among jury-eligible residents of this community, would the *total absence* of the distinctive group from this jury panel be unfair and unreasonable, under the operative standard for prong #2? If so, then any failure to establish prong #2 is never due to a small-numbers problem—it is because the jury pool has *too many members of the distinctive group* for the defendant to show the level of underrepresentation that *would be* unfair, unreasonable, and constitutionally meaningful. In other words, those challenges fail because there is a non-zero level of representation that meets/exceeds the quantifiable threshold for fairness/reasonableness. Those litigants should not be able to repackage their challenges by aggregating prior jury pool data, in search of datasets that support their challenges (and obscure the actual fairness/reasonableness of their own jury pools).

This case illustrates the difference: Williams had a jury pool that included two African-Americans among 138 people. This would meet any expectation for a fair and reasonable level of African-American representation, even under *Lilly* (Z = -0.3219). *See* Ruling (1/29/21)

at 9–10; App. 91–92. And it was a *non-zero* level of representation.

A "small numbers problem" exists where a distinctive group is absent from the defendant's jury pool, and where that absence is not enough to establish an unfair or unreasonable level of underrepresentation on prong #2 (because quantitative analysis would find that such a result—having no members of that group on that jury pool—is still within the range of fair and reasonable outcomes that random sampling would be expected to produce, for a jury pool of that size in that county). But in cases like this, where the distinctive group is *not* totally absent from the actual jury pool, the small-numbers problem disappears. It is still true that the expected level of representation on this jury pool was so low that a total absence of African-Americans would not be enough to satisfy prong #2, under *Veal* (Z = -1.597). *See* Ruling (1/29/21) at 10; App. 92; RemandTr. 191:4–192:7. But there was a *non-zero* level of African-American representation on this jury pool—and that effectively moots any small-numbers problem. This was not a situation where a defendant showed that a distinctive group was totally absent from his jury panel, but where a quantitative threshold for underrepresentation was too high for that result to be unfair or unreasonable. Rather, this challenge failed because this jury pool *did* include African-Americans,

and that *non-zero* level of actual representation was enough to meet any quantifiable expectation of fair and reasonable representation on any jury pool of 138 people in Floyd County, under *Veal* or *Lilly*.

A small-numbers problem exists where a distinctive group is totally absent from a jury pool, and where standard-deviation analysis without aggregation would find that any prong #2 expectations for fair and reasonable representation on that jury pool were still met. In that situation, it is proper to analyze aggregated data on prong #2. But if a *non-zero* level of actual representation meets or exceeds expectations of fair and reasonable representation on a particular jury pool, then aggregated data is not needed. As the district court explained, such a defendant "may have had an expectation of representation that was mathematically indistinguishable from zero, but that expectation was exceeded when one (or more) members of the distinctive group were included on the jury pool." *See* Ruling (1/29/21) at 18–20; App. 100.[6]

---

[6] If Williams's jury pool had not included any African-Americans, then it would be correct to aggregate data from prior jury pools until the combined sample gave rise to a fair and reasonable expectation of non-zero representation, under the applicable standard for prong #2. The district court's ruling followed the correct steps to assemble and analyze the aggregate sample ($Z = -0.819$), as an alternative basis for rejecting Williams's claim—before correctly finding that aggregation was "superfluous" here. *See* Ruling (1/29/21) at 16–19; App. 98–01.

The State's concerns about using aggregated data arise, in part, from the formula for standard-deviation analysis: SD = $\sqrt{n*p*(1-p)}$. If sample size grows by X, standard deviation only increases by $\sqrt{X}$—so smaller effects can yield outlier Z-scores. This is why statisticians and researchers who want to determine whether observed differences between groups are attributable to actual differences (or just to noise in random sampling) prefer larger samples for significance testing—a large sample can shrink the range of differences that could result from random sampling, allowing researchers to find statistical significance in extremely small deviations from a null hypothesis. *See* MICHAEL O. FINKELSTEIN & BRUCE LEVIN, STATISTICS FOR LAWYERS 193 (3d ed. 2015) (noting "[w]hen large samples are involved even small differences can become statistically significant"). That can make sense in cases where a distinctive group is a *very* small part of the jury-eligible population, and where total exclusion of that group produces such a small disparity that it can only reach statistical significance in a much larger sample. But for a defendant like Williams, aggregating prior jury pool data is just "manipulation" to find a dataset that lifts the focus away from the fair and reasonable level of representation on their own jury pool. *See United States v. Chanthadara*, 230 F.3d 1237, 1257 (10th Cir. 2000);

accord United States v. Hernandez-Estrada, 749 F.3d 1154, 1163 (9th Cir. 2014) (quoting Peter A. Detre, Note, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel*, 103 YALE L.J. 1913, 1928 (1994)) ("[B]y imagining larger and larger jury wheels, the probability of any degree of underrepresentation arising by chance can be made arbitrarily small."). On prong #3, aggregated data might be useful in determining if there is a non-random difference between the population of jury-eligible residents and the "population" of people who respond/appear for jury service. With that aggregated data, even a very small difference between those populations with respect to the prevalence of distinctive group members can be detected and can be shown to be non-random.[7] Whether aggregated into one large sample or kept as multiple distinct samples (like in Zalenski's meta-analysis), prior jury pool data can be used to identify non-random patterns in representation levels over time. But an individual jury pool may be fair and reasonable, even if prior jury pools were not. Any defendant whose jury pool was fair and reasonable has no entitlement to relief.

---

[7]   Of course, it is not surprising that some non-random patterns in human behavior are correlated with belonging to a distinctive group. *See, e.g.*, *State v. Chidester*, 570 N.W.2d 78, 82 (Iowa 1997) (noting one mark of a distinctive group is a commonality of "ideas, attitudes, or experiences" or a "peculiar common sense" unique to that group).

Williams argues that this approach is inconsistent with *Veal* because *Veal* "did not conduct a standard deviation calculation in [the] initial step" where it determined that African-Americans did not appear to be *overrepresented* on Veal's jury pool, and it "conducted a standard deviation analysis on the aggregate pools" later on. *See* Def's Br. at 49 (citing *Veal*, 930 N.W.2d at 329). But that discussion in *Veal* was just an overview of the quantitative data that was in the record—it was not a holding that courts must use 18 months of aggregated data to analyze prong #2. Indeed, both *Veal* and *Lilly* expressly declined to identify a maximum sample size where aggregation should end, and neither opinion identified a minimum sample size where aggregation would become necessary. *See Veal*, 930 N.W.2d at 330 & n.9; *Lilly*, 930 N.W.2d at 305 & n.7. The only guidance that *Veal* and *Lilly* gave on aggregated data was a principle of analytical integrity—that parties cannot "tip the scales in an aggregate analysis" by cherry-picking data that supports their theory, while excluding data from the same period that would cut against it. *See Lilly*, 930 N.W.2d at 305; *accord Veal*, 930 N.W.2d at 330 ("[A]ggregate data cannot be gathered selectively"). But if opposing lawyers—each with a duty of zealous advocacy—are presented with an arbitrary choice between aggregated datasets that

produce different results on prong #2, each will urge the district court to analyze the dataset that produces their preferred result. This is not a problem under the State's approach, which sets clear guidelines for when to use aggregated data (to solve a small-numbers problem) and how much data to aggregate (just enough to solve that problem). *See* Ruling (1/29/21) at 11; App. 93 (citing State's Pre-Hearing Brief (7/6/20) at 11–21; App. 52–62); *accord id.* at 16–18; App. 98–100. But nobody can articulate a principled framework for deciding how much data to aggregate in cases *without* a small-numbers problem, because *any* aggregation is always "tipping the scales." If the actual jury pool is sufficient to enable standard-deviation analysis, any argument that prong #2 should focus on some *other* data will always be an attempt to "tip the scales"—to prevail by steering the court to a different dataset. The State's approach is superior because it anchors the analysis on prong #2 to the defendant's actual jury pool whenever possible, by limiting the use of aggregated data on prong #2 to challenges that present a small-numbers problem. *See* Ruling (1/29/21) at 13; App. 95 (noting that advocates can offer different aggregate datasets that present a district court with "an outcome-determinative choice . . . and no principled reason to choose one over the other"). This would also

prevent *the State* from aggregating prior jury pool data on prong #2, to refute a successful showing of unfair and unfair representation in the defendant's actual jury pool. *See id.* at 16; App. 98 ("Both parties should be limited to analyzing the jury pool that was actually drawn and used, if it is sufficiently large to enable analysis."). This is not a framework that is designed to guarantee that challenges will fail—rather, it enables district courts (and litigants) to reach consistent, principled conclusions about whether any given challenge has merit.

Most importantly, this approach has validity—it tests for the presence of an unfairly or unreasonably low level of representation in the *actual jury pool* from which the defendant's petit jury was drawn (and if a small-numbers problem requires more data, this approach uses the aggregate dataset with the least possible dilution). Williams wants to analyze other jury pools to bolster his claim, but that cannot change the reality that his actual jury pool was fair and reasonable— "more than a quarter of Floyd County jury pools *should* look like this." *See id.* at 15 (citing WOLFRAMALPHA, "2 successes in 138 trials with p=0.01815", https://www.wolframalpha.com/input/?i=2+successes +in+138+trials+with+p%3D0.01815); App. 97. This is the approach that asks the right question and provides a principled way to answer it.

This is the final missing piece on prong #2. This Court should adopt the State's approach. It should hold that district courts should only aggregate data when a defendant is challenging total absence of a distinctive group from their own jury pool, and when that total absence is not enough to meet the applicable standard-deviation threshold on prong #2. It should hold that, in those cases where aggregated data is necessary, district courts should aggregate data until the total absence of that distinctive group would satisfy prong #2, because that is when the small-numbers problem disappears.[8] And it should hold that, in all other cases, Iowa courts should apply a standard-deviation test to the *actual jury pool* to determine if it is fair and reasonable, for prong #2. This approach fulfills the promise to establish a route to vindicating fair-cross-section rights via challenges to total exclusion of very small distinctive groups in homogenous counties, while properly focusing on the fairness and reasonableness of the level of representation in the actual jury pool, whenever possible. This is the approach to prong #2 that this Court has been waiting for. It should wait no longer.

---

[8]   District courts can use an equation to find minimum aggregate sample size, or they can check after adding each prior jury pool. *See* Ruling (1/29/21) at 16–18; App. 98–100; Remand Ex. 104; X-App. 4; *accord* RemandTr. 200:9–206:11.

2. The district court was correct that Zalenski's meta-analysis answers a different question and that it is not practical or consistent in application.

Williams's advocacy is different from the arguments that other defendants have raised on prong #2 in *Lilly II*, No. 20–0617; *Plain II*, No. 20–1000; and *Veal II*, No. 21–0144. In those appeals, defendants argue that the district court should have aggregated a large amount of prior data into a single sample, and then calculated a single Z-score. That would not work for Williams.[9] Instead, he argues that this Court should overrule *Veal* and adopt Zalenski's meta-analysis as the metric for prong #2. *See* Def's Br. at 50–53. The district court explained why it rejected Zalenski's meta-analysis in favor of the State's approach to applying *Veal*'s standard-deviation analysis. *See* Ruling (1/29/21) at 11–22; App. 93–104. Williams does not engage with that reasoning— he only reprises Zalenski's criticism of the State's approach. Half of the criticism is that *any* aggregation is improper because it "dilutes the actual representation in the jury pool at issue." *See* Def's Br. at 51 (citing RemandTr. 229:7–20). In response, the district court said:

---

[9]   Zalenski's dataset included eight jury pools, 506 respondents, and 5 African-Americans among them. *See* Remand Ex. A; X-App. 5. The expected value over that period (1.815% of 506 people) is 9.184. The standard deviation for that aggregated dataset would be 3.003, and his claim would fail under *Veal* (Z = -1.393).

Allowing wide ranging aggregate data . . . would drown out the impact of Williams' own jury pool—much like the meta-analysis, it would not make much of a difference whether African-Americans were totally absent, underrepresented, perfectly represented, or overrepresented on Williams' jury pool. It would be unjust if claimants with over-representative jury pools could carry their burdens on prong #2 by reference to underrepresentation on *other* jury pools, and it would be similarly unjust if claimants whose jury pools were significantly underrepresentative failed on prong #2 due to overrepresentation on recent jury pools (which could not affect the fairness or unfairness of their own trial). Of course, the use of aggregated data still lifts the focus away from the claimant's jury pool in those cases where a distinctive group is totally absent and where the group's population and the jury pool are too small to give rise to a fair expectation of non-zero representation on that particular jury pool. Because the only alternative is to simply let the claim fail for inability to produce a sufficiently low Z-score, it is fair to aggregate data in that very limited class of cases. . . . But in all other cases, because this statistical analysis can determine whether *that jury pool* was unfair or unreasonable, opening the door to analysis of any other jury pool data would only complicate and confuse matters, open up endless contentions about the proper universe of data to analyze, and distract from the ultimate question of whether *that* jury pool made *that* trial unfair and violated *that* litigant's constitutional rights.

. . . [T]he State's approach offers some neutral, knowable boundary on what data should be analyzed and some articulable standard for what litigants must be able to show through that analysis (which litigants may meet or may not meet). The State has offered a framework where it will be possible to identify the pertinent dataset without protracted argument about statistical methods in every individual case . . . [and] provided the better guidance on how to implement *Veal* and *Lilly*.

Ruling (1/29/21) at 20–21; App. 102–03. All of that was entirely correct.

Williams also reprises another criticism from Zalenski: that limiting the prong #2 analysis to his own jury pool would make it impossible to establish a pattern of underrepresentation, and that "'[t]he point of statistics as a discipline' is to detect patterns." *See* Def's Br. at 50–51 (quoting RemandTr. 227:1–3).[10] But Williams did not need to show a pattern of underrepresentation to carry his burden on prong #2. Instead, he had to show that his jury was drawn from a jury pool with an unfair, unreasonable level of underrepresentation. *See, e.g.*, *State v. Wilson*, 941 N.W.2d 579, 593 (Iowa 2020) ("The *Plain/Duren* right applies to the jury pool."); *Plain*, 898 N.W.2d at 822 (explaining that prong #2 requires showing that "the proportion of group members in the jury pool" was unfair or unreasonable). The district court was right that Zalenski's meta-analysis was "an elegant way to answer a very different question," and also that "it cannot help assess the statistical importance of the degree of underrepresentation in *this particular jury pool*—which must be a focus of this analysis" on prong #2. *See* Ruling (1/29/21) at 14; App. 96.

---

[10] That correctly describes a broad swath of the discipline, but it is incomplete. It would be more accurate to say: the point of statistics as a discipline is "describing data and drawing inferences from [data]." *See* FINKELSTEIN & LEVIN, STATISTICS FOR LAWYERS at 1.

Zalenski made it clear that she was using her meta-analysis to answer the question that she thought was the important one: whether there was a non-random pattern of underrepresentation over time. *See* RemandTr. 184:17–185:5; Remand Ex. L; X-App. 16. The fairness or reasonableness of the level of representation on Williams's actual jury pool was not her concern—even to the point where it would not change Zalenski's conclusion or the outcome of her meta-analysis if African-Americans had been totally absent from Williams's jury pool, or represented on his jury pool in perfect proportion to the group's size and prevalence among jury-eligible residents, or even *over*represented on Williams's jury pool. *See* RemandTr. 194:25–197:6 and RemandTr. 220:25–227:3; *accord* Ruling (1/29/21) at 13–14; App. 95–96 (noting her testimony that "Williams' jury pool could have contained far *more* African-American panelists than expected, and that overrepresentation would not have any real effect on the results of her meta-analysis, its p-value, or her ultimate conclusion"). This means the meta-analysis is a tool without validity—it does not test the fairness or reasonableness of the level of underrepresentation in the defendant's actual jury pool. It can identify a non-random pattern of apparent underrepresentation over time, but that is only relevant on prong #3—not on prong #2.

Arguments about the meta-analysis, similarly, are not about the actual jury pool from which Williams's jury was drawn. That is why, for the purposes of the argument in his brief, Williams does not need to argue that the excused student should not have been counted. *See* Def's Br. at 50–53. Because he is relying on Zalenski's meta-analysis, his own jury pool is almost entirely irrelevant—which indicates that this meta-analysis is asking and answering the wrong question.

If Zalenski *had* focused her inquiry on Williams's jury pool, she would have used a standard-deviation analysis and calculated a single Z-score to do it. Indeed, she did that for each individual jury pool in her meta-analysis, before using those Z-scores to look for a pattern in the levels of representation over time, relative to an expected average. *See* RemandTr. 168:15–23 (confirming Z-score was "one of the main measurements" that she used "to assess the representativeness of a particular racial group on a jury pool"); RemandTr. 169:19–170:6 (explaining that, for each jury pool, she "calculated the Z-scores to determine how — how expected that degree of representation was"). This undercuts Williams's criticism of the State's approach for using the same standard-deviation analysis to assess the representativeness of individual jury pools, relative to expectations. *See* Def's Br. at 50.

Another big problem with Zalenski's meta-analysis is that, when it reports a high level of confidence that there is a non-random pattern of underrepresentation over time, it does not say anything about the *magnitude* of the effect. *See* RemandTr. 209:9–212:12; RemandTr. 218:1–12. A litigant might use a large meta-sample to establish that there is a consistent pattern of a tiny degree of underrepresentation. With a large enough meta-sample, a miniscule disparity can achieve statistical significance with an impressive degree of confidence. *See* Norbert Hirschauer et al., *Pitfalls of Significance Testing and p-Value Variability: An Econometrics Perspective*, 12 STAT. SURVEYS 136, 149–50 (2018) ("[A]ny effect, even if very small and irrelevant, eventually becomes statistically significant in large samples."); Gail M. Sullivan & Richard Feinn, *Using Effect Size—or Why the P Value Is Not Enough*, 4 J. GRAD. MED. EDUC. 279, 279–80 (2012) ("Sometimes a statistically significant result means only that a huge sample size was used."). But having absolute confidence in the existence of a non-random pattern does not establish that it produced any effect that was large enough to become unfair, unreasonable, or constitutionally meaningful. Indeed, small non-random patterns *should* emerge from large meta-samples— all jury pools are composed of real people, who behave non-randomly.

The most interesting and illuminating part of Zalenski's work was the group of exhibits showing distribution curves, which help "visualize how our actual [meta-]sample data was distributed and how it compares to a normal distribution" around expected average levels of representation. *See* Remand Ex. H; X-App. 12 (showing the distribution curves for the specific challenge that was preserved and is argued in Williams's brief); RemandTr. 178:8–181:4. This helps to illustrate the nature of the problem with the meta-analysis. Zalenski is showing that the *true* average level of representation on jury pools in Floyd County is lower than the expected average. Her key finding is that there is only an 0.38% probability that any similar meta-sample of jury pools would produce similar results by random chance, through expected variability in random sampling. *See* Remand Ex. L; X-App. 16; RemandTr. 185:25–188:4; *accord* Def's Br. at 52–53. The curve that describes the distribution of these jury pools around the *true* average, Zalenski concludes, is shifted to the left. *See* Remand Ex. H; X-App. 12; RemandTr. 196:3–10. A non-random pattern of lower-than-expected representation is relevant on prong #3. But the level of representation on Williams's jury pool is close to the *expected* average ($Z = -0.3219$), and well within the range of fair results on the *expected* distribution.

See RemandTr. 197:7–198:9 (identifying the tick mark in Exhibit H that represents Williams's jury pool, and noting that the Z-score is "negative but not very strongly so"). So in the world that Williams is asserting a right to demand—a world with *no* non-random influences on levels of representation on jury pools, including human behavior— the perfect random system could produce *this same jury pool*, and it would be fair and reasonable. Indeed, it *should* produce this jury pool or a less representative jury pool, more than a third of the time. *See* RemandTr. 198:16–199:24 (explaining "unbiased, random sampling" would give each defendant "about a 37 chance of getting two or fewer African-Americans" on a jury pool of 138 people drawn from a county where 1.815% of the jury-eligible population is African-American).

That is the real problem with this meta-analysis: for prong #2, it does not matter if the *true* average level of representation is lower than the expected average, because this inquiry is about vindicating a right to a level of representation that is fair and reasonable in relation to the *expected* average. The approach to prong #2 under *Veal/Lilly* could be visualized as a canopy, centered on the expected distribution, sheltering a range of "fair and reasonable" representation levels that are both common enough and close enough to that expected average.

Cf. Ruling (1/29/21) at 8–9; App. 90–91 (using an example of a typical normal distribution, with shaded areas corresponding to *Lilly*/*Veal*). Zalenski's meta-analysis plots a series of jury pools on the X-axis, and shows that the true curve that predicts or describes those results is not the same as the expected curve. But that does not change the fact that Williams's jury pool was "under the canopy" drawn by *Veal* (and *Lilly*), because it was fairly and reasonably close to an ideal expected average. Williams would have no right to a more representative jury pool, even under a perfect system with a perfect random distribution and without any non-random patterns in representation levels, whatsoever. *See id.* at 14–15; App. 96–97 (noting this level of representation on a jury pool of this size would be expected to occur quite often in a perfect system where levels of representation "formed a perfect normal distribution around a 1.815% average"). This jury pool was fair and reasonable in relation to *ideal* expectations, which is the focus of the inquiry under prong #2. Zalenski's meta-analysis is about testing data from other jury pools to determine if those ideal expectations are realistic in light of patterns in that data over time—"which is just not the same thing." *See id.* at 14; App. 96. That is the overarching conceptual problem with using meta-analysis on prong #2: it is simply irrelevant here.

Beyond conceptual problems, Williams's argument that this Court should accept this kind of meta-analysis as proof on prong #2 creates significant practical problems, too. Here are three of them.

First, most lawyers and judges would likely be unable to conduct this kind of meta-analysis. It seems to require calculating standard deviations for each jury pool, putting *those* into a formula in Excel (or more specialized statistics software), and then interpreting the results. *See* RemandTr. 185:19–187:9; Remand Ex. L; X-App. 16. An approach for prong #2 that would require litigants and courts to rely on expert statisticians to gauge the merits of *every* challenge at the earliest stage would be burdensome, time-consuming, and costly.

Second, and relatedly, it is impossible to run this meta-analysis without historical data on prior jury pools. Even if everyone mastered the statistical tools to the point where they could run these calculations during a short recess, raising a fair-cross-section challenge would still require a district court to pause the proceedings, so that everyone can gather data on *other* jury pools—even when it should be clear that the makeup of the jury pool *for those proceedings* is fair and reasonable.

Third, after both parties present their dueling meta-analyses, courts would have no way to decide between competing meta-samples.

66

Zalenski decided to analyze eight jury pools. Why not nine? Or seven? Zalenski admitted "reasonable statisticians could disagree on the right number of samples to use in this analysis." *See* Ruling (1/29/21) at 12; App. 94. Even if all lawyers and judges could run this meta-analysis without expert assistance, parties would still need expert statisticians to explain why the court should choose their preferred meta-samples, favoring their respective positions. And after that testimony came in, district courts would have no principled way to resolve that dispute about which meta-sample it should use for prong #2 meta-analysis.

The district court summarized these practical problems that would arise under any approach that used Zalenski's meta-analysis, and would render it impractical, inconsistent, and unworkable:

> There are profound judicial economy interests that weigh against any proposal that would require the parties and the district court to re-litigate this issue and consult expert statisticians to identify the proper dataset to analyze for every single claim under *Lilly* or *Veal*.

See Ruling (1/29/21) at 12–13; App. 95–96. This Court should heed that warning and reject any approach to prong #2 that uses meta-analysis. Instead, it should adopt the State's approach, which makes it "possible to identify the pertinent dataset without protracted argument about statistical methods in every individual case." *See id.* at 21; App. 103.

CONCLUSION

"A sound formula for assessing underrepresentation of minorities in our jury pools must provide meaningful protections of the right to an impartial jury." *See Plain*, 898 N.W.2d at 826. The State's approach to prong #2 fulfills that promise, while still avoiding absurd, impractical results. The district court was correct to adopt it, and it was correct that Williams failed to prove his Sixth Amendment claim on remand. This Court should affirm the district court's ruling.

REQUEST FOR NONORAL SUBMISSION

This case should only be set for oral argument if it is retained and submitted before *Lilly II, Plain II*, and *Veal II* are decided.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
louie.sloven@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

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

- This brief has been prepared in a proportionally spaced typeface using Georgia in size 14 and contains **13,625** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: October 20, 2021

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
louie.sloven@ag.iowa.gov