

No. 21-0900
Polk County No. LACL143553

IN THE
SUPREME COURT OF IOWA

MICHAEL SAVALA,
Appellant,

v.

STATE OF IOWA,
Appellee.

*ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
JEANIE K. VAUDT, DISTRICT COURT JUDGE*

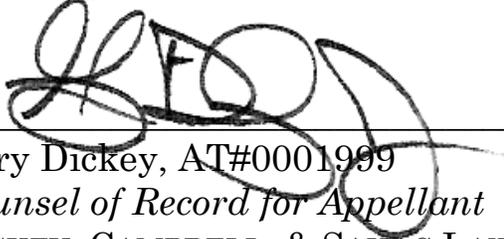
FINAL BRIEF FOR APPELLANT

Gary Dickey
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com
Counsel for Appellant

PROOF OF SERVICE & CERTIFICATE OF FILING

On April 13, 2022, I served this brief on all other parties by EDMS to their respective counsel, and I mailed a copy of this brief to Mr. Savala at his personal residence

I further certify that I did file this brief with the Clerk of the Iowa Supreme Court by EDMS on April 13, 2022.

A handwritten signature in black ink, appearing to read 'G. Dickey', is written over a horizontal line. The signature is stylized and somewhat cursive.

Gary Dickey, AT#0001999
Counsel of Record for Appellant
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com

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STATEMENT OF ISSUES

WHETHER THE DISTRICT COURT ERRED IN DENYING SAVALA ACCESS TO HISTORICAL JUROR DATA TO SUPPORT HIS FAIR-CROSS SECTION CHALLENGE TO THE COMPOSITION OF THE JURY

CASES

Carter v. Jury Comm'n, 396 U.S. 320 (1970)
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11 Iowa Admin. Code § 62.2
Iowa Code § 904.107
Iowa Code § 904.108

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ROUTING STATEMENT

Because this case presents substantial constitutional questions of changing legal principles, the Iowa Supreme Court should retain jurisdiction. Iowa R. App. P. 6.1101(2)(f).

STATEMENT OF THE CASE

Plaintiff Michael Savala filed an employment action against the State of Iowa alleging discrimination on the basis of his age, race, color, and national origin. Specifically, Savala alleged that the Director of the Iowa Department of Corrections, Jerry Bartruff, intentionally refused to complete his performance evaluations for three years despite conducting reviews for Savala's younger, white coworkers. And, because the performance evaluation was a condition to obtaining a raise, Savala claimed he was wrongfully denied an increase in pay that he otherwise would have received.

On the first day of trial, the district court presented Savala with an all-white jury panel. Savala objected that the panel's composition violated his right to a jury made up of a fair cross-section of the community. To support his objection, Savala requested jury venire data for the previous twenty-four months along with an opportunity to examine the jury manager. The district court overruled Savala's objection without providing him an opportunity to acquire the requested information. Following a

five-day trial, the jury returned a verdict in favor of the State of Iowa. This appeal follows.

STATEMENT OF THE FACTS

The Iowa Department of Corrections (“Department”) employs over three thousand employees throughout its nine prisons and eight judicial district departments of corrections services. (Trial Tr. Vol. II at 63:6-8). It maintains custody of over 8,500 offenders housed in its prison system and supervises over 30,000 people in the community on parole, probation or work release. (Trial Tr. Vol. II at 62:18-25 through 63:1-2). “The chief administrative officer for the [D]epartment is the director.” Iowa Code § 904.107. By law, the director is dutybound to “[s]upervise the operations of the institutions under the [D]epartment’s jurisdiction” and “[s]upervise state agents whose duties relate primarily to the [D]epartment.” *Id.* § 904.108(1)(a),(b). To that end, the director shall “[a]dopt rules subject to the board [of corrections], pertaining to the internal management of institutions and agencies under the director’s charge and necessary to carry out the duties and powers” statutorily vested to him or her. *Id.* at

§ 904.108(1)(k). Pursuant to this authority, the Department's director has established a "Central Office" comprised of staff whose responsibility it is to serve as a reference to filed staff for technical support, as auditors of for assuring policy compliance, and as prime resources in each specialty area for the Director. (Trial Tr. Vol. II at 62:3-14).

Michael Savala is fifty-six years old, brown, and Hispanic. (Trial Tr. Vol. III at 85:7-9, 122:19-20). In 1999, the Department hired Savala as general counsel. (Trial Tr. Vol. III at 144:23-25). His duties include management of non-litigation, day-to-day operational legal issues that arise within the Department. (Trial Tr. Vol. III at 134:8-25 through 135:1-6). In addition, he supervises the Department's administrative law judges and jail inspector. (Trial Tr. Vol. III at 142). He also serves as the administrative rules coordinator, public records officer, and oversees the inmate discipline system as well as the internal investigations unit. (Trial Tr. Vol. III at 134:8-23, 152:8-25, 158:15-24). Savala consistently has accepted additional responsibilities above and beyond his regular job duties over the

years. For example, at times he has served as legislative liaison to the General Assembly and Governor's Office. (Trial Tr. Vol. III at 155:125 through 160:1-9). Per Department policy, he is part of the administrative team in the Central office and reports directly to the director. From 1999 to 2014, the Department's director provided Savala with annual performance evaluations in December of each year followed by a merit-based pay raise. (Trial Tr. Vol. III at 149:4-25 through 150:1-5). In all his previous evaluations, Savala's work either "met or exceeded expectations." (Trial Tr. Vol. III at 150:6-7).

Unless he has reached the maximum salary for his paygrade, Savala is eligible for a merit-based pay increase annually. (Trial Tr. Vol. II at 80:1-25 through 83:1-23). In order to obtain the merit-based increase, however, Savala must first receive a performance evaluation from the director along with a recommendation for a raise. (Trial Tr. Vol. II at 80:1-25). Iowa law requires that all state employees receive a "performance evaluation . . . at least every 12 months." 11 Iowa Admin. Code § 62.2(2). Department policy similarly requires annual performance

evaluations. (Trial Tr. Vol. II at 99:12-25 through 101:1-18)(App. at 33).

In January 2015, Governor Terry Branstad appointed Defendant Jerry Bartruff to be the Department's director. (Trial Tr. Vol. II at 61:10-12). From January 2015 to December 2018, Savala reported to Director Bartruff, who served as his direct supervisor. (Trial Tr. Vol. II at 68:9-12)(App. at 32). After Bartruff became director, Savala noticed that he was not being invited to executive staff meetings and strategy retreats that included his younger, Caucasian coworkers. (Trial Tr. Vol. III at 148-49). For example, on one occasion Bartruff invited all the younger Caucasian employees who reported to him to an off-site meeting. (Trial Tr. Vol. III at 149:4-23). When Savala asked Bartruff why he was not included in the off-site meeting, Bartruff responded that he needed someone to "stay behind" at the office and keep an eye on things. (Trial Tr. Vol. III at 149:4-23). Later in 2015, Bartruff advised Savala that he no longer wanted him to supervise employees. (Trial Tr. Vol. III at 142:13-25 through 143:1-13). From 2016 to 2018, Bartruff refused Savala's requests

to meet to discuss the statutorily-required five year review of the Department's administrative rules. (Trial Tr. Vol. III at 153:21-25 through 154:1-21). Yet, Bartruff allowed the younger, Caucasian employees to go into his office at all times of the day, and he would make time for them. (Trial Tr. Vol. III at 19:3-6, 151:13-20).

In October 2015, the Department's human resources officer, Kathy Wolk, emailed Bartuff to notify him that Savala's annual performance review was due at the end of the month. (App. at 38, 39). Savala was not at the top of his salary pay range, and therefore, he was eligible for merit-based salary increases for all three years. (Trial Tr. Vol. II at 89:4-13). As of January 2016, Bartruff still had not conducted Savala's annual review, which in the past had occurred by December of each year. As a result, Savala notified Wolk of the situation, and she suggested he email Bartruff a reminder. (Trial Tr. Vol. III at 150:15-24). On January 26, 2016, Savala sent Bartruff an email stating, "I visited with Kathy and she said to give you a reminder I am in need of my evaluation." (App. at 61). Bartruff did not provide Savala with a response, nor did he complete the requested evaluation. Savala

continued to approach Bartruff at least once every three to four months from 2016 through 2018 to request his annual performance evaluations. (Trial Tr. Vol. III at 151:5-8).

In January of 2018, Savala consulted with the Department's human resources director, Susie Pritchard, and learned for the first time that Bartruff completed evaluations for three younger, Caucasian, Central Office employees that directly reported to him. (Trial Tr. Vol. III at 172:11-25 through 173:1-25). As a result, the three younger, Caucasian, Central Office employees received pay increases, and Savala did not. (Trial Tr. Vol. III at 168:18-25 through 169:1-19). Despite Savala's repeated requests, Bartruff refused to complete performance evaluations for him for calendar years 2015, 2016, and 2017. (Trial Tr. Vol. III at 166:15-20).

Recognizing that he was not getting anywhere with Bartruff or the Department's human resources officers, Savala complained of discrimination based on his age, race, and national origin directly to the Office of Governor Kim Reynolds and Lt. Governor Adam Gregg. (Trial Tr. Vol. III at 175:4-25 through 179:1-15).

Thereafter, Savala complained to the Iowa Department of

Administrative Services. (Trial Tr. Vol. III at 179:16-25 through 180:1-15). He also raised his complaint before the Iowa Board of Corrections. (Trial Tr. Vol. IV at 6:16-25 through 7:1-20). On April 9, 2018, Savala filed his administrative complaint with the Iowa Civil Rights Commission. The Department did not even bother to respond. (Trial Tr. Vol. III at 45:3-6, 183:8-25 through 185:1-25).

In May 2018, Bartruff finally completed the delinquent performance evaluations from 2015, 2016, and 2017, entitling Savala to a merit pay increase. (App. at 40, 46, 53). Altogether, Savala lost approximately \$29,000 due to the three-year delay. (Trial Tr. Vol. III at 45:7-25 through 48:1-15)(App. at 60). In November of 2018, the Department's human resources notified Bartruff that Savala's annual performance review was coming due. On December 11, 2018, Bartruff announced that he would be retiring. Bartruff left on December 27, 2018, without giving Savala the courtesy of completing his annual performance evaluation for the year. (Trial Tr. Vol. IV at 12:8-14).

On November 7, 2018, the Iowa Civil Rights Commission issued Savala a right-to-sue letter. (App. at 17). On February 4, 2019, Savala commenced this instant action against the State of Iowa asserting claims of discrimination on the basis of his “age, race, color, or national origin.” (App. at 12). Following a five-day trial, the jury returned a verdict in favor of the State of Iowa. (App. at 24). On June 1, 2021, the district court entered judgment in favor of the State of Iowa. (App. at 27). Savala filed a timely notice of appeal. (App. at 29).

ARGUMENT

THE DISTRICT COURT ERRED IN REFUSING TO ALLOW SAVALA THE OPPORTUNITY TO MAKE HIS RECORD IN SUPPORT OF HIS FAIR-CROSS SECTION CHALLENGE TO THE COMPOSITION OF THE JURY

Error Preservation

Savala preserved error by objecting to the jury pool composition on the basis that there were no Latino jurors in violation of his constitutional right to a fair cross-section of the community. (Trial Tr. Vol. I at 6:1-25 through 7:1-6).

Scope and Standard of Review

The standard of review for Savala's constitutional challenge to the composition of the jury is *de novo*. *State v. Lilly*, 930 N.W.2d 293, 298 (Iowa 2019) ("We review constitutional issues *de novo*").

Analysis

On the first day of trial, the parties appeared for voir dire, and there were no Latino jurors in the venire. Savala, who is Latino, objected to the composition of the venire on the basis that it violated his right to a jury that represents a fair cross-section of the community:

MR. DICKEY: Your Honor, we would object to the jury pool composition based on an underrepresentation of Latinos in the jury population.

As I look at it, of the 24, only one of the jurors has indicated a mixed race. The remaining 23 jurors or, I guess, 21 now, are white. Mr. Savala has a constitutional right to a fair cross-section of his community.

According to the 2010 United States census information that I have, the Polk County demographic makeup for Latinos in 2010 was 7.58. According to the United States census [ACS] 2019 population estimate, that's now up to 8.7 percent. Under either scenario, we

would expect to see two Latino jurors if we had a truly reflective pool.

I had asked for this information last week so that we could do the analysis, if necessary, and I understand that's just not how things are administered in Polk County.

So I'm making the objection. I'm requesting from the Court -- I can work with Ashley or whoever has access to the last 12 months -- I guess we're going to have to go back 24 months because we haven't had jury trials for a year -- so that we can do the analysis of systemic underrepresentation. I don't know how long that will take to get to me.

What I would propose is we do the voir dire, and then I can do the analysis perhaps overnight or this afternoon, and then at some point we'll have to take testimony from the jury clerk on how we got this jury pool.

(Trial Tr. Vol. I at 6:1-25 through 7:1-6). The State resisted the objection on the basis that a plaintiff in a civil case does not have a constitutional right to a jury representative of the community:

MR. LANGHOLZ: It's the State's position that such a constitutional challenge is not recognized by Iowa law.

State v. Plain and *State v. Lilly*, the two cases discussing that, are criminal cases that rest upon the Sixth Amendment of the Constitution in Article I, Section 10, the right to an impartial jury. That has been recognized by the U.S. Supreme Court and Iowa Supreme Court for criminal defendants.

That right has not been extended to civil trials. The Sixth Amendment and Article I, Section 10 do not apply to civil trials. The Iowa Constitution civilly just protects the right to trial by jury. The Seventh Amendment provides their right to trial by jury but does not contain the same right to a fair cross-section of the jury [sic].

And the State's position is that the analysis Mr. Dickey proposes is unnecessary to conduct here.

(Trial Tr. Vol. I at 7:7-25 through 8:1). The court summarily overruled Savala's objection and denied him access to the information about the jury pool as well as an opportunity to examine the jury manager:

THE COURT: Mr. Dickey, I note your objection. I tend to agree with the State on this. I don't think there is anything that I need to provide the plaintiff at this point related to this trial. And I understand you're making a record, and you should. So I'm overruling the objection.

(Trial Tr. Vol. I at 8:4-9).

A. The right to a jury trial guaranteed under the Fifth and Seventh Amendments necessarily includes the right to a jury that represents a fair cross section of the community

The district court is simply wrong that civil litigants do not possess a constitutional right to jury that represents a fair cross-

section of the community. “The American tradition of trial by jury, considered in connection with *either criminal or civil proceedings*, necessarily contemplates an impartial jury drawn from a cross-section of the community.” *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 220 (1946) (emphasis added) (citing *Smith v. Texas*, 311 U.S. 128, 130 (1946); *Glasser v. United States*, 315 U.S. 60, 85 (1942)). “For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government.” *Smith*, 311 U.S. at 130.

While not expressly enumerated in the United States Constitution, the right to a jury representing a fair cross-section of the community flows from the Due Process Clause. *United States v. Olson*, 473 F.2d 686, 688 (8th Cir. 1973). The “very idea of a jury” is “a body truly representative of the community, composed of the peers or equals of the person whose rights it is selected or summoned to determine.” *Carter v. Jury Comm’n*, 396 U.S. 320, 330 (1970). That means a jury “of his neighbors, fellows,

associates, [and] persons having the same legal status in society as that which he holds.” *Id.* Not surprisingly, several federal circuit courts of appeals have found the right to an impartial jury in civil cases to be inherent in the Fifth and Seventh Amendments. *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 514-15 (10th Cir. 1998); *McCoy v. Goldston*, 652 F.2d 654, 657 (6th Cir. 1981); *Kiernan v. Van Schaik*, 347 F.2d 775, 778 (3rd Cir. 1965). The “right to a jury trial in a civil case would be illusory unless it encompassed the right to an impartial jury.” *Casias v. United States*, 315 F.2d 614, 615 (10th Cir. 1963). Thus, the “denial of trial by an impartial jury is also the denial of due process.” *Id.*

Several state courts have similarly held that “the requirement of impartiality inheres in any provision granting the right to a jury trial.” *Miami v. Cornett*, 463 So.2d 399, 402 (Fla. Ct. App. 1985). “[T]he systematic exclusion of jurors at any state of the selection process in *either criminal or civil proceedings* solely on the basis of group bias is constitutionally impermissible.” *Holley v. J & S Sweeping Co.*, 143 Cal. App. 588, 593 (Cal. Ct. App. 1983) (emphasis added). For this reason, it is “absolutely

clear that the requirement that the pool of jurors for the venire be composed of a cross section of the community *applies to both civil and criminal trial alike.*” *Williams v. Coppola*, 1986 Conn. Super. LEXIS 44 (Conn. Super. Ct. Dec. 10, 1986).

Because the district court incorrectly held that Savala did not have a constitutional right to a jury representing a fair cross-section of the community, remand is required.

B. The absence of any minorities in Savala’s jury panel was *prima facie* evidence of systematic underrepresentation sufficient to justify the request for the historical jury data and examination of the jury manager

In *Duren v. Missouri*, 439 U.S. 357 (1979), the United States Supreme Court established a three-part test for proving a fair cross-section of the community violation. Under *Duren’s* three-part test, a litigant establishes a prima facie violation of the fair cross-section requirement by showing

- (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.

Id. If a movant establishes a prima facie case, the burden shifts to the non-movant to justify the disproportionate representation by proving a “significant” interest that is “manifestly and primarily advanced” by the causes of the disproportionate exclusion. *Id.* at 367-68.

Iowa courts employ the standard deviation test to measure underrepresentation. *Lilly*, 930 N.W.2d at 302-303; *see also State v. Veal*, 930 N.W.2d 319, 328-30 (Iowa 2019). “Standard deviation is calculated by analyzing a sample . . . for randomness and fluctuations.” *State v. Plain*, 898 N.W.2d 801, 823 (Iowa 2017). The percentage of the distinctive group in the general population is determined by using the most recent United States Census data adjusted to show only those who are legally eligible for jury service. *Lilly*, 930 N.W.2d at 304-305. Jury panel information may be aggravated so long as data closer in time is not omitted with the earlier panels are considered. *Id.* at 305.

In this case, the district court presented Savala with a venire *with no minority jury members* – let alone any potential Latino jurors. (Trial Tr. Vol. I at 6:1-25). According to the 2010

U.S. Census data, Latinos make up 7.58% of the population of Polk County. See <http://censusviewer.com/county/IA/Polk/2010> (last accessed 11/09/21) (Trial Tr. Vol. I at 6:9-15). The most recent American Community Survey (“ACS”) conducted by the United States Census Bureau shows that the percentage of Latinos in Polk County has grown to 8.4% as of 2019. See https://data.census.gov/cedsci/table?tid=ACSDP5Y2019.DP05&g=0400000US19_0500000US19153 (last accessed 11/09/21). On its face, the jury composition suggests underrepresentation of Latinos. Using the most recent ACS data, there was an absolute disparity of 8.4%. See *Plain*, 898 N.W.2d at 823 (“The lower the resulting percentage [of absolute disparity], the more representative the jury pool”). There was a comparative disparity of 100%. See *id.* (“The higher the comparative disparity percentage, the less representative the jury pool”). Based these widely-recognized statistical tests, Savala’s trial counsel properly requested the court to order production of the historical jury data so that he could conduct the proper standard deviation analysis. (Trial Tr. Vol. I at 6:20-25).

The district court’s refusal to provide Savala with access to the historical jury information constitutes clear error. Litigants “are entitled to access the information needed to enforce their constitutional right to a jury trial by a representative cross-section of the community.” *Plain*, 898 N.W.2d at 828. To the extent that Savala did not meet his prima facie case, it is because “he lacked the opportunity to do so because he was not provided access to the records to which he was entitled.” *Id.* at 829. The “cross-section requirement would be without meaning if a [movant] were denied all means of discovery in an effort to assert that right.” *State ex. rel. Garrett v. Saitz*, 594 S.W.2d 606, 608 (Mo. 1980). “Indeed, without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge.” *Test v. United States*, 420 U.S. 28, 30 (1975).

CONCLUSION

For the reasons set forth above, Michael Savala asks this Court to remand to the district court. On remand, the district court shall provide Savala with reasonable access to records necessary to evaluate whether Latinos were systematically

underrepresented in his jury panel. *See Plain*, 898 N.W.2d at 829.

Following the development of the record, the district court shall

consider Savala's fair cross-section of the community claim. *Id.*

REQUEST FOR ORAL ARGUMENT

Savala requests to be heard in oral argument.

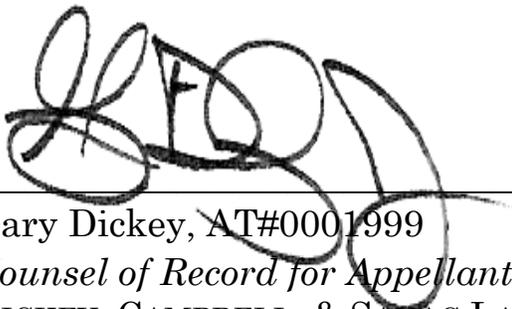
COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's brief was \$9.75, and that that amount has been paid in full by me.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and the type-volume limitation of Iowa R. 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 Century in 14 point and contains 3,491 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



Gary Dickey, AT#0001999
Counsel of Record for Appellant
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com