

IN THE SUPREME COURT OF IOWA

IOWA SUPREME COURT NO. 19-0911

**STATE OF IOWA,
Plaintiff - Appellee,**

vs.

**ANTHONY ALEXANDER MONG,
Defendant - Appellant.**

**APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE WILLIAM P. KELLY,
DISTRICT COURT JUDGE
Polk County No. FECR317295**

APPELLANT'S BRIEF & REQUEST FOR ORAL ARGUMENT

**CATHLEEN J. SIEBRECHT
SIEBRECHT LAW FIRM
222 Fifth Avenue, Suite 100
Des Moines, IA 50309
Phone Number: 515-288-4005
Email: Siebrechtlaw@gmail.com
ATTORNEY FOR APPELLANT**

FINAL BRIEF

PROOF OF SERVICE

On the 25th day of January, 2021, the undersigned hereby certifies that she electronically served the within Appellant's Final Brief on the Iowa Attorney General Criminal Appeals Division for State of Iowa via EDMS. The undersigned further certifies that she served the Defendant/Appellant by mailing a copy thereof to him at the following last known address: Anthony Alexander Mong, #6703464, Clarinda Correctional Facility, 2000 North 16th Street, Clarinda, Iowa 51632.

Respectfully Submitted:

/s/ Cathleen J. Siebrecht

Cathleen J. Siebrecht AT0007320

SIEBRECHT LAW FIRM

222 Fifth Avenue, Suite 100

Des Moines, IA 50309

Phone Number: 515-288-4005

Email: Siebrechtlaw@gmail.com

ATTORNEY FOR APPELLANT

CERTIFICATE OF FILING

I hereby certify that I did file the within Appellant's Final Brief with the Clerk of the Iowa Supreme Court via electronic filing (EDMS) on the 25th day of January, 2021.

Respectfully Submitted:

/s/ Cathleen J. Siebrecht

Cathleen J. Siebrecht AT0007320

SIEBRECHT LAW FIRM

222 Fifth Avenue, Suite 100

Des Moines, IA 50309

Phone Number: 515-288-4005

Email: Siebrechtlaw@gmail.com

ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

ISSUE I:

WAS MONG DENIED THE RIGHT TO AN UNBIASED JURY UNDER THE FEDERAL AND STATE CONSTITUTIONS BECAUSE HIS JURY PANEL WAS NOT A FAIR CROSS-SECTION OF THE COMMUNITY AND HE WAS NOT ALLOWED THE OPPORTUNITY TO SHOW THE UNDERREPRESENTATION WAS DUE TO SYSTEMIC EXCLUSION IN THE SELECTION PROCESS?

ISSUE II:

WHETHER THE DISTRICT COURT ERRED IN DENYING MONG'S MOTION TO COMPEL WITNESS TESTIMONY?

ISSUE III:

WHETHER THERE WAS INSUFFICIENT EVIDENCE OF SPECIFIC INTENT AND THE JURY IMPROPERLY APPLIED TRANSFERRED INTENT?

ROUTING STATEMENT

This case warrants retention by the Iowa Supreme Court because it includes the issues of bias in jury pools and jury panels. This case was concluded just days before the Supreme Court issued the May 2019 *Lilly-Veal-Williams* Trilogy affirming and extending the 2017 *State v. Plain* decision regarding bias in jury panels. *State v. Plain*, 898 N.W.2d 801 (Iowa 2017). *State v. Lilly*, 930 N.W.2d 293 (Iowa 2019). *State v. Veal*, 930 N.W.2d 319 (Iowa 2019). *State v. Williams*, 929 N.W.2d 621 (Iowa 2019). This case presents a substantial issue of first impression as it relates to the extension of *Plain* and the *Lilly-Veal-Williams Trilogy* to jury pools; it presents a fundamental and urgent issue of broad public importance requiring ultimate determination by the Supreme Court; and presents substantial questions of enunciating or changing legal principles. IA R. App. P. 6.1101(2)(b)(c)(d)&(f).

STATEMENT OF THE CASE

Nature of the Case:

Defendant-Appellant, Anthony Alexander Mong, appeals from the judgment, conviction, and sentence following a jury trial for Attempt to Commit Murder, in violation of Iowa Code 707.11(1), a Class B Forcible Felony; Intimidation with a Dangerous Weapon with Intent, in violation of Iowa Code 708.6, a Class C Forcible Felony; Willful Injury Causing Bodily Injury, in violation of Iowa Code 708.4(2), a Class D Non-Forcible Felony; and Going Armed with Intent, in violation of Iowa Code 708.8, a Class D Non-Forcible Felony. (04/08/2019 Forms of Verdict). (05/23/2019 Sentencing Order). (05/30/2019 Notice of Appeal). (App. 62-69,84-88, 89)

The Appellant contends that the jury pool and panel violated his State and Federal Constitutional rights to a fair cross-section of his community, as well as numerous other errors by the trial court and ineffective assistance of trial counsel.

Course of the Proceedings:

Anthony Alexander Mong was charged on September 25, 2018 by trial information in the Iowa District Court for Polk County in Case No. FECR317295 with the following crimes:

Count I: Attempted Murder, in violation of Iowa Code § 707.11(1), a Class B Felony;

Count II: Intimidation with a Dangerous Weapon with Intent Injure / Provoke Fear, in violation of Iowa Code § 708.6, a Class C Felony;

Count III: Felon in Possession of a Firearm, in violation of Iowa Code § 724.26, a Class D Felony;

Count IV: Willful Injury, in violation of Iowa Code § 708.4(1), a Class C Felony; and,

Count V: Going Armed with Intent, in violation of Iowa Code §708.8, a Class D Felony.

(09/25/2018 Trial Information). (App.6-8).

On March 14, 2019, the State filed a Notice of Intent to seek the dangerous weapon enhancement pursuant to Iowa Code § 902.7.

(03/19/2019 Notice of Enhancement). (App. 9).

In preparation for trial, the Defense filed a Motion to Compel Witness to Testify, and both the State and the Defense filed Motions in Limine.

(Trans. Trial Vol.1, p.4). (03/29/2019 Defense Motion to Compel Witness).

(03/30/2019 State's Third and Substituted Motion in Limine). (03/31/2019

Defendant's Amended and Supplement Motion in Limine). (App. 10-12,

13-25, ___). On the morning of trial, the Court ruled on the pretrial motions; the State orally moved to dismiss the Felon in Possession of a Firearm charge; and the Court renumbered the counts. (04/02/2019 Count III Dismissal Order). (Jury Instructions). (Trans. Trial Vol.2, p.22). (App. 26-27, 28-61).

Prior to jury selection, the Defense challenged the jury pool as a violation of Mong's right to a fair cross-section of the community. (Trans. Trial Vol.1, p.63). The Court overruled Mong's challenge to the jury pool. (Trans. Trial Vol.1, p.71). The Jury was selected and seated. (Trans. ___).

Trial commenced; evidence was presented; the Court denied Mong's motions for directed verdict and judgment of acquittal; and the jury found Mong guilty on all four remaining charges, with one being a lesser included offense. (Forms of Verdict). (Trans. Vol.3, p.175-185). (App. 62-69).

On May 7, 2019, the Defense filed a Motion for New trial. (05/07/2019 Defense Motion for New Trial). (App. 70-81). On May 23, 2019, the Court denied the Motion for New Trial and proceeded with sentencing. (05/23/2019 Order Denying Motion for New Trial). (App.84-88). Mong was sentenced on the charges as follows:

Count I: Attempt to Commit Murder, 25 years imprisonment with a mandatory minimum of 17 ½ years;

Count II: Intimidation with a Dangerous Weapon with Intent, 10 years imprisonment with a mandatory minimum of 5 years;

Count III: Willful Injury Causing Bodily Injury (a lesser included offense), 5 years imprisonment;

Count IV: Going Armed with Intent, 5 years imprisonment.

The sentences were run concurrent to each other for a total period not to exceed 25 years with a mandatory minimum of 17 ½ years prior to Mong becoming eligible for parole. Additionally, the Court ordered Mong to pay fines in the amount of \$1,000.00 on Count II, \$750.00 on Count III, \$750.00 on Count IV, and a 35% surcharge for each. Finally, Mong was ordered to pay restitution, court costs and \$500.00 toward court-appointed legal fees; engage in a VORP session; and submit a DNA sample. (05/23/2019 Sentencing Order). (Sent. Trans. 5/23/20 p.21-40). (App.84-88).

Mong filed his Notice of Appeal on May 30, 2019. (05/30/2019 Notice of Appeal). (App. 89).

Statement of the Facts:

Anthony Alexander Mong dated Madison Cobb. (Trial Trans. Vol. 2 p.45, 49; 161; Vol. 4 p. 15-16). She lived with her parents, Todd and Heather Hines. Madison's uncle, Shane Woods, and cousin, David Woods, also stayed at the Hines' residence. (Trial Trans. Vol. 2 p.46, 240).

Anthony and Madison's relationship could be described as "on and off". (Trial Trans. Vol.4 p.16) While Anthony and Madison were dating, Anthony was in another relationship with a woman by the name of Rachel Janousek. (Trial Trans. Vol. 2 p.49, 90; Vol. 4 p.18) . Meanwhile, Madison was also seeing another man by the name of Ricco Martin. (Trial Trans. Vol. 2 p.48, 49, 94, 223-224; Vol. 4 p.16) .

Anthony owned a red Cadillac, which was stored at the Hines' residence for Todd to repair. (Trial Trans. Vol. 2 p.56-57, 224; Vol. 4 p.20-21). Eventually Madison and Anthony ended their relationship. (Trial Trans. Vol. 4 p. 23-24). On May 31, 2018, Anthony went to the Hines' residence to retrieve his Cadillac. (Trial Trans. Vol. 2 p.224. Vol. 4 p.23-24). Todd told Anthony that Madison had the keys and title to the vehicle. (Trial Trans. Vol. 2 p.224-225). Because Madison was not at home that day, Todd suggested Anthony return that weekend to retrieve the vehicle, keys and title. (Trial Trans. Vol. 2 p.225). The conversation was cordial, and Anthony agreed to return that weekend. (Trial Trans. Vol. 2 p.224-225).

On June 1, 2018, Anthony drove Rachel to work in Rachel's 2012 Hyundai Sonata. (Trial Trans. Vol. 2 p.78-79). On the way, he stopped to pick up his friend, Brandon Henlon. (Trial Trans. Vol. 2 p.78, 87-88; Vol. 4 p.25-27). After they dropped Rachel off, Anthony and Brandon stopped at

the home where Anthony and Rachel were living, and then sat in the vehicle to smoke marijuana. (Trial Trans. Vol. 4 p.28). Anthony then decided since it was now the weekend and Brandon was with him, it was a good time to go pick up his Cadillac from the Hines' residence. (Trial Trans. Vol. 4 p.28-29) Anthony drove himself and Brandon in Rachel's vehicle to the Hines' residence. (Trial Trans. Vol. 4 p.30). Anthony had the car stereo music playing loudly. (Trial Trans. Vol. 4 p.32). He pulled up to the residence, but before he pulled in the driveway he decided to do a U-turn and park on the street. (Trial Trans. Vol. 4 p.32-33, 55-56). He saw Todd, David, Shane and Ricco standing outside the residence but did not feel he had any issues with any of them. (Trial Trans. Vol. 4 p.49-51).

The State's witnesses testified that Todd, David, Shane and Ricco had all been smoking marijuana and were standing outside when Anthony and Brandon arrived. (Trial Trans. Vol. 2 p.55-56, 58, 98-99, 174-175, 240). Neighbor children were jumping on a trampoline nearby. (Trial Trans. Vol. 2 p. 216-217). Anthony drove past the Hines' residence with music "cranked". (Trial Trans. Vol. 2 p.177, 226). Todd then ran inside to get his gun. (Trial Trans. Vol. 2 p.214, 219.) When Todd came back outside, he had his gun in his waistband. Todd tried to draw the gun but it dropped and Rico took it from him. (Trial Trans. Vol. 2 p.217, 228-229, 233). Ricco ran

around the corner of the house. (Trial Trans. Vol. 2 p.233). After he already had retrieved his own gun, and despite the loud music, Todd claimed he could hear Anthony “racking” a gun in the vehicle as he was driving by. (Trial Trans. Vol. 2 p.219-220).

Anthony described that he exited the vehicle with a black cell phone. (Trial Trans. Vol. 4 p.33, 36, 43). As he started approaching the residence, he was texting on the cell phone. When he looked up, he noticed that Todd was fidgeting, and then he realized Todd had a gun, and Ricco grabbed it. (Trial Trans. Vol. 4 p.36, 91). Anthony instinctively lunged behind a large tree for cover when he felt he was going to be shot. (Trial Trans. Vol. 2 p.104-105, 105, 114, 141-142; Vol. 4. 36-37). He heard a shot go off from the direction of where Todd, Ricco and the others were; and then he heard a second shot from behind him. (Trial Trans. Vol. 4 p.37-38, 63-64, 82). He made his way back to the car and drove off. (Trial Trans. Vol. 4 p.38)

A neighbor heard someone say, “No, you’re doing it the wrong way.” (Trial Trans. Vol. 2 p.145). She then heard two gunshots and noticed a Caucasian male with a baseball bat chasing another man around a tree. (Trial Trans. Vol. 2 p.144-145).

Shane testified that when Anthony arrived he wasn’t “too worried” as he “had no beef with him.” There was no conflict between the two of them

and he was not aware of any issues between Anthony and the others. (Trial Trans. Vol. 2 p.244, Vol. 3 p.21-22, 27-28). Shane “turned around to walk back up towards the house and heard a shot” and he was hit on the left side of his back. (Trial Trans. Vol. 2 p.244-245). Ricco was the first one to him. (Trial Trans. Vol. 2 p.246). Shane received medical treatment and was released from the hospital the following day. (Trial Trans. Vol. 2 p.235)

David testified that he was in the garage grabbing a baseball bat when he then heard a gunshot and Todd say “He’s got a gun”. He then heard his dad, Shane, yell “I’m hit. I’m hit.” (Trial Trans. Vol. 2 p.177, 182). David came out of the garage with the bat and chased after Anthony. (Trial Trans. Vol. 2 p.177-178). David never saw Anthony exit the vehicle when he arrived, but he saw him get back into the vehicle as he chased after him. (Trial Trans. Vol. 2 p.182-183).

Todd testified that he was standing in his foyer when he heard two gunshots. He did not see Anthony fire any shots and he did not see Shane get hit. (Trial Trans. Vol. 2 p.220, 228-229, 234). Todd told Shane “Get the fuck in here. They’re shooting at you”. **And Shane responded, “Well, you got me in the back. I’m hit. Help me. Help me.”** (Trial Trans. Vol. 2 p.230).

Ricco told Heather to put Todd's gun upstairs in their room. (Trial Trans. Vol. 2 p.167, 170-171). Although the gun is usually kept in a box, she put it underneath a mattress. (Trial Trans. Vol. 2 p.167, 170-171, 227). She did not witness any of the events unfold. (Trial Trans. Vol. 2 p.162, 167).

Although everyone heard at least one gunshot (if not two), no one claims to have witnessed the actual shooting except Madison's other boyfriend, Ricco. (Trial Trans. Vol. 2 p.101, 181, 183, 221, 228; Vol. 2 p.22).

Heather and Todd both called 911. (Trial Trans. Vol. 2 p.162, 221). They reported that Anthony shot Shane. Todd did not report to law enforcement that he had a gun in his possession during the incident until later that evening while being interviewed at the police station. (Trial Trans. Vol. 2 p.221). He also did not report that they had all been smoking marijuana. (Trial Trans. Vol. 2 p.231). Heather did not report that she hid Todd's gun under a mattress. (Trial Trans. Vol. 2 p.171).

Law enforcement discovered a shell casing in the street; and a live round in the vehicle Anthony had driven to the Hines' residence. (Trial Trans. Vol. 3 p.37-38, 44, 54, 65, 79, 166). Todd's gun was not seized by law enforcement until three days later after Todd's second police interview

on June 4, 2018. (Trial Trans. Vol. 2 p.232). Law enforcement did no gunpowder analysis at the scene; on the vehicle that Anthony and Brandon were in; on Todd's gun; or the mattress where the gun was hidden. (Trial Trans. Vol. 3 p.68, 69, 81, 85-86, 88, 101, 167-168). There was no DNA evidence taken from the vehicle or the live round. (Trial Trans. Vol. 3 p.166-167).

Anthony testified that when he was leaving the Hines' residence, he saw that Brandon had a gun in his hand. That was the first Anthony was aware that Brandon had a gun that night. (Trial Trans. Vol. 4 p.39, 59, 81, 90). He and Brandon dropped the vehicle at the house where Brandon and Rachel had been staying. He then realized that Brandon had a gun in his hand. (Trial Trans. Vol. 4 p.39). That night, Anthony stayed at a motel because he was afraid of being shot or someone coming after him. (Trial Trans. Vol. 4 p.39-40). The next day left town to stay with his mother in Las Vegas. (Trial Trans. Vol. 4 p.40). He did not tell anyone, including the police, that Brandon had a firearm in the vehicle that night because he felt that Brandon had saved his life. (Trial Trans. Vol. 4 p.81, 87-88). A warrant was issued for his arrest. Anthony was charged in the Polk County District Court by Trial Information with:

Count I: Attempted Murder, in violation of Iowa Code § 707.11(1), a Class B Felony;

Count II: Intimidation with a Dangerous Weapon with Intent Injure / Provoke Fear, in violation of Iowa Code § 708.6, a Class C Felony;

Count III: Felon in Possession of a Firearm, in violation of Iowa Code § 724.26, a Class D Felony;

Count IV: Willful Injury, in violation of Iowa Code § 708.4(1), a Class C Felony; and,

Count V: Going Armed with Intent, in violation of Iowa Code §708.8, a Class D Felony.

(09/25/2018 Trial Information). (App. 6-8).

It was the State's theory that Anthony intended to shoot Ricco, but missed and shot Shane instead. (Trial Trans. Vol. 5 p.7-34, 71-82). Anthony maintained that he did not have a firearm in his possession during the incident and did not shoot at anyone. (Trial Trans. Vol. 4 p. 41, 74, 77-78, 85). The Defense theory was that Shane was either shot with Todd's gun by Todd or Ricco, or by Brandon. (Trial Trans. Vol. 5 p.35-70). Anthony Mong was not known to possess firearms. (Trial Trans. Vol. 3 p.217). Brandon Henlon, who was known to possess firearms, was at the scene but was deceased at the time of trial. (Trial Trans. Vol. 2 p.89; Vol. 4 p.55, 89). Todd Hines admitted to having a firearm at the scene. Ricco Martin had control of Todd's firearm at the scene. (Trial Trans. Vol. 2 p.217, 228-229, 233).

While preparing for trial, the Defense learned that a witness by the name of Tyrone Hughes would testify that Brandon Henlon told him that he was responsible for the crime, not Anthony Mong. A letter to this effect had apparently been written by Hughes and copies provided to both the Defense and the State (Motion to Compel Witness) (Trial Trans. Vol. 1 p.7) (App.10-12). During a deposition, Hughes refused to answer any questions and asserted his 5th Amendment Right against self-incrimination. (Trial Trans. Vol. 1 p.8). The Defense filed a Motion to Compel Hughes' testimony. (Motion to Compel) (App.10-12). Arguments were made on the record and the trial court denied the Motion to Compel. (Trial Trans. Vol. 1 p.4-15). Therefore, Hughes did not testify at trial. Defense counsel did not submit the deposition transcripts or the letter purportedly written by Hughes as exhibits, and did not otherwise make any offer of proof as to what the Defense believed Hughes would testify to should he be compelled to do so.

The parties were provided with the jury questionnaires on the morning of trial. (Trial Trans. Vol. 1 p.63). Of the forty people on the jury panel, only one indicated race as black and/or African American. (Trial Trans. Vol. 1 p.63). The Defense challenged the jury panel arguing that the Defendant, an African American, was entitled to a representative jury of peers and a fair trial and the pool that he was given was not acceptable.

(Trial Trans. Vol. 1 p.63). The Defense did not have the information available as to how the panel was selected, but urged the Court to find that given only one African-American on the entire panel was proof of systemic exclusion. (Trial Trans. Vol. 1 p.64-65). The Defense asked that a new jury panel be provided, or to provide additional members of the African-American community for the panel. (Trial Trans. Vol. 1 p.65, 69). The Court refused the Defense request. (Trial Trans. Vol. 1 p.69). The State suggested that the jurors are selected from voter registration cards and possibly driver's license records. (Trial Trans. Vol. 1 p.66). The State asked that the Court obtain the total number of African-Americans in the entire jury pool for the week from the Clerk of Court. (Trial Trans. Vol. 1 p. 67-68). The Court requested the Clerk of Court to provide the numbers. (Trial Trans. Vol. 1 p.69-70). The Court's understanding was that 210 people were called for jury duty and 195 people showed up for duty that day, but in order to determine the makeup of the race from that pool, the Defense would have to sort through each juror's biography information to decipher the number. (Trial Trans. Vol. 1 p.70). The Court indicated that the information was not sorted, and could not be sorted. (Trial Trans. Vol. 1 p.70). The Court then denied the motion, finding no systematic exclusion, and proceeded with *voire dire*. (Trial Trans. Vol. 1 p. 71). There was no

other record made of how many African Americans were actually included in the jury pool, or how the pool was selected.

The jury was selected and trial proceeded. At the close of the State's evidence the Defense moved for a directed verdict and judgment of acquittal. (Trial Trans. Vol. 3 p.175). The Defense argued that there was not sufficient evidence to generate a jury question; that there was not sufficient evidence that there was a serious injury; and that the element of intent related to each alleged crime was lacking. (Trial Trans. Vol. 3 p.175-179). The motion was denied. (Trial Trans. Vol. 3 p.172-185).

After the close of the Defense case, the Defense renewed its motion for directed verdict and judgment of acquittal. (Trial Trans. Vol. 4 p.101-102). The Court again denied the Defense motion. (Trial Trans. Vol. 4 p.103-104).

The case was submitted to the jury and the jury returned a verdict of guilty on Count I: Attempt to Commit Murder; Count II: Intimidation with a Dangerous Weapon with Intent; Count III: Willful Injury Causing Bodily Injury (a lesser included offense); and Count IV: Going Armed with Intent. (Forms of Verdict). (App.62-69).

The Defense filed a Motion for New Trial on May 7, 2019. (Motion for New Trial) (App.70-81). It argued again that the evidence was

insufficient to the convict Mong; that the Court erred in allowing the State to introduce hearsay evidence through the bodycam video and 911 calls because it caused the jury to improperly consider statements made by Ricco Martin and Heather Hines; the Court erred in finding the jury panel was representative; the Court erred in excluding Tyrone Hughes as a witness; the Court erred in granting the State's relevancy objections as to testimony regarding Brandon Henlon's use of firearms; that the verdict was contrary to the weight of the evidence; and that the jury could not have convicted the Defendant without improperly applying "transferred intent". (Motion for New Trial). (Sentencing Trans. p. 2-9) (App. 70-81). The Court denied the Motion for New Trial and sentenced Anthony to a concurrent to each other for a total period not to exceed 25 years with a mandatory minimum of 17 ½ years prior to becoming eligible for parole. (Sentencing Trans. p. 19) (Order Denying Motion for New Trial). (Sentencing Order). (App.82-83, 84-88.

On May 30, 2019, the Defense filed a Notice of Appeal. (Notice of Appeal) (App.89).

Additional facts are discussed as necessary in the following arguments.

ARGUMENT

ISSUE I: MONG WAS DENIED THE RIGHT TO AN UNBIASED JURY UNDER THE FEDERAL AND STATE CONSTITUTIONS BECAUSE HIS JURY PANEL WAS NOT A FAIR CROSS-SECTION OF THE COMMUNITY AND HE WAS NOT ALLOWED THE OPPORTUNITY TO SHOW THE UNDERREPRESENTATION WAS DUE TO SYSTEMIC EXCLUSION IN THE SELECTION PROCESS.

Standard of Review:

As a constitutional question, claims of systematic exclusion of a distinctive group from a jury pool are reviewed de novo. *State v. Plain*, 898 N.W.2d 801, 810 (Iowa 2017). *State v. Halstead*, 791 N.W.2d 805, 806 (Iowa 2010).

A claim of ineffective assistance of counsel also implicates constitutional rights, and therefore the review by the Appellate Court is de novo. *State v. Cart*, 602 N.W.2d 818, 820 (Iowa 1999).

Preservation of Error:

Mong preserved error by challenging the jury pool as a violation of his right to a fair cross-section of the community prior to the start of trial, and through his timely filed Motion for New Trial. (Trans. Vol.1, p.63-71). (05/07/2019 Defense Motion for New Trial). (App.70-81). The Court

overruled Mong's challenge and Motion for New Trial. (Trans. Vol.1, p.71). (05/23/2019 Order Denying Motion for New Trial). (App. 82-83). Error was further preserved through timely filing of Notice of Appeal. (05/30/2019 Notice of Appeal). (App. 89).

In the event this Court finds error was not preserved, Mong asserts his trial counsel was ineffective. *State v. Tobin*, 333 N.W. 2d 842, 844 (Iowa 1983). Mong can raise error as ineffective assistance despite trial counsel's failure to preserve error. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). Ineffective assistance claims are an exception to the normal rules of error preservation. *Id.* If a claim of ineffective assistance of counsel is raised on direct appeal from the criminal proceedings, the Court may address it if the record is adequate to decide the claim. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

Merits:

The Court called one pool of jurors. African-Americans were underrepresented in the jury panel as only one was identified as African-American. Mong challenged the pool and requested the Court to alleviate the problem by calling a new panel or adding additional African Americans to the panel. The Court declined. Initially, it appeared that the Court was

going to allow the Defense to further explore how the pool and panel were selected; however no further record was made and the Court denied the Defense motion.

Mong, an African-American, was denied his right to an impartial jury of his peers under both the Sixth and Fourteenth Amendments to the United States Constitution and article 1, section 10 of the Iowa Constitution because of the systemic exclusion of African-Americans from the jury pool in Polk County. The current system of obtaining jury lists, whatever that may be, fails to pull sufficient numbers of minorities. Accordingly, the trial court should have used its authority to remedy the situation. For example, it could have continued to pull jury pools until one demonstrated a fair cross-section; or pulled from other current, more comprehensive lists of residents within the county to create a list more reflective of a fair cross-section of the community; changing venue if a fair cross-section could not be obtained; or, ultimately dismissing the trial information against Mong for a failure to be able to try him from a constitutional jury pool. Therefore, Mong's convictions must be reversed and the matter remanded for a new trial.

It appears from the record, at least according to the Assistant County Attorney, that Polk County may draw its jurors from lists of driver's license records and voter registrations. The Iowa Code provides for additional

sources but does not require them. “A jury manager may use any other comprehensive list of persons residing in the county which the state court administrator or the jury manager determines are useable for the purpose of a juror source list.” Iowa Code § 607A.22(2) (2017).

Both the United States and the Iowa Constitution guarantee a criminal defendant the right to a trial “by an impartial jury.” U.S. Const. amend VI; Iowa Const. art I, § 10. While these provisions use identical language, the Iowa Supreme Court jealously protects its authority to follow an independent approach under our state constitution. *State v. Ochoa*, 792 N.W.2d 260, 267 (Iowa 2010). The court’s approach to independently construing provisions of the Iowa Constitution that are nearly identical to the federal counterpart is supported by Iowa’s case law. See *State v. Ochoa*, 792 N.W.2d 260, 267 (Iowa 2010); *State v. Cline*, 617 N.W.2d 277, 285 (Iowa 2000). Even where a party has not advanced a different standard for interpreting a state constitutional provision, the court may apply the standard more stringently than federal case law. *State v. Bruegger*, 773 N.W.2d 862, 883 (Iowa 2009).

“The right to an impartial jury entitles the criminally accused to a jury drawn from a fair cross-section of the community.” *State v. Plain*, 898 N.W.2d 801, 821 (Iowa 2017). The United States Supreme Court

believed that a jury representing a cross-section of the community enables “the commonsense judgment of the community [to serve] as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge.” *State v. Plain*, 898 N.W.2d 801, 821 (Iowa 2017) (quoting *Taylor*, 419 U.S. at 530). Such juries are “critical to public confidence in the fairness of the criminal judicial system.” *State v. Plain*, 898 N.W.2d 801, 821 (Iowa 2017) (quoting *Taylor*, 419 U.S. at 530).

In *Plain*, this Court applied the *Duren* three-part test for determining whether there was a violation of the Sixth Amendment fair cross-section requirement. *State v. Plain*, 898 N.W.2d 801, 821-829 (Iowa 2017).

Under this three-part test, a defendant can establish 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;
- 3) That this underrepresentation is due to systemic exclusion of the group in the jury-selection process.

If the defendant establishes a prima facie case, the burden shifts to the state to justify the disproportionate representation by proving “a significant state interest” is “manifestly and primarily advance” by the causes of the disproportionate exclusion. *State v. Plain*, 898 N.W.2d 801, 821-822 (Iowa 2017) (quoting *Duren*, 439 U.S. at 364, 367-68 (1979)).

The issue of whether Mong, an African-American, was from a distinctive group was not questioned. The representation of the group is not fair and reasonable in relation to the number of such persons in the community: In order to establish the second prong the accused must show that “the proportion of group members in the jury pool is under-representative of the proportion of group members in the community.” *State v. Plain*, 898 N.W.2d 801, 821-822 (Iowa 2017). Three statistical tests have been used by the Supreme Court to measure representation and help determine what levels of underrepresentation are permissible: a) absolute disparity, (b) comparative disparity, and/or c) standard deviation. *State v. Plain*, 898 N.W.2d 801, 821-822 (Iowa 2017) (citing *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1160 (9th Cir. 2014)). Each test has its own advantages and short comings. *State v. Plain*, 898 N.W.2d 801, 822-823 (Iowa 2017).

Mong's case is nearly identical to Plain. On the first day of trial, both objected to the racial composition of the jury pool, alleging a violation of the Sixth Amendment right to an impartial jury. The jury pools were both clearly underrepresented. Neither were able to present any evidence of systematic exclusion because the jury manager did not provide them with the data on the jury pools that were requested.

Mong attempted to obtain the information he was entitled to receive, and it was never provided. "Because what constitutes a fair cross-section of the community is a fluid concept, a flexible approach for determining when a racial disparity rises to the level of a constitutional violation is warranted." *State v. Plain*, 898 N.W.2d 801 (Iowa 2017). *Plain* further held that defendants are entitled to access the information needed to enforce their constitutional right to a jury consisting of a representative cross-section of the community. *State v. Plain*, 898 N.W.2d 801 (Iowa 2017).

This Court's May 2019 *Lilly-Veal-Williams* Trilogy affirming and extending the 2017 *State v. Plain* decision shows that we have made progress toward achieving representative jury pools. *State v. Plain*, 898 N.W.2d 801 (Iowa 2017). *State v. Lilly*, 930 N.W.2d 293 (Iowa 2019). *State v. Veal*, 930 N.W.2d 319 (Iowa 2019). *State v. Williams*, 929 N.W.2d 621 (Iowa 2019).

The only data that we have in Mong's record is that, according to Defense counsel, the most recent census records for Polk County, Iowa demonstrates that seven percent of the population is African-American. Two hundred and ten people were called for jury duty. There were one hundred and ninety-five people that reported that day. The jury panel consisted of forty people; and only one indicated race as black and/or African American. (Trial Trans. Vol. 1 p.63, 64, 70). The Court indicated that in order to determine the makeup of the race from the entire pool, the Defense would have to sort through each juror's biography information to decipher the number because the information had not been and could not have been sorted. The Court then just gave up and moved on. (Trial Trans. Vol. 1 p.70).

Because Mong was denied the information he sought, and because he did not have the benefit of the refinements to the Duren/Plain standards under the *Lilly-Veal-Williams* Trilogy, at a minimum, this case must be remanded for development of the record on the Sixth Amendment challenge.

The Appellant further submits that this Court should take this case as an opportunity to continue to extend fair cross-section jurisprudence to apply not just to jury pools, but also to jury panels. The jury panel stage should also constitute a fair cross-section; this is especially true when the only

information a Defendant is provided regarding the race of his jury is that which he can decipher from his assigned panel.

ISSUE II: THE DISTRICT COURT ERRED IN DENYING MONG'S MOTION TO COMPEL WITNESS TESTIMONY.

Standard of Review:

Decisions to admit or exclude evidence is reviewed for an abuse of discretion. *State v. Russell*, 893 N.W.2d 307, 314 (Iowa 2017). Reversal is warranted when the court exercised discretion on grounds or reasons clearly untenable or to an extent clearly unreasonable. *State v. Alberts*, 722 N.W.2d 402, 408 (Iowa 2006).

Constitutional claims regarding the right to compulsory process is reviewed de novo. *State v. Russell*, 897 N.W.2d 717, 724 (Iowa 2017).

A claim of ineffective assistance of counsel implicates constitutional rights, and therefore the review by the Appellate Court is de novo. *State v. Cart*, 602 N.W.2d 818, 820 (Iowa 1999).

Preservation of Error:

Mong preserved error through raising the issue in his Motion to Compel; arguing it at hearing; raising the issue again in his Motion for New

Trial; and finally through filing of his Notice of Appeal. (Motion to Compel) (Motion for New Trial). (Notice of Appeal). (App. 10-12, 70-81, 89) Mong can raise error as ineffective assistance despite trial counsel's failure to preserve error. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). Ineffective assistance claims are an exception to the normal rules of error preservation. *Id.* If a claim of ineffective assistance of counsel is raised on direct appeal from the criminal proceedings, the Court may address it if the record is adequate to decide the claim. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

Merits:

Mong's situation is unlike that of the Defendant in the recently decided Iowa Supreme Court Case of *State v. Heard*, 934 N.W.2d 433 (Iowa 2019). In *Heard*, the Defendant admitted that he reason for his motion to compel a witness to testify was so that the witness would assert his Fifth Amendment right and the jury would therefore infer guilt in the witness. Here, Mong only wanted to compel Hughes to testify because Hughes had information regarding Brandon Henlon's involvement with the shooting.

The privilege against self-incrimination extends to answers that "would furnish a link in the chain of evidence needed to prosecute the

claimant for a ... crime.” Hoffman v. United States, 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L.Ed. 1118 (1951). A witness cannot claim privilege “unless he has reasonable cause to apprehend danger from a direct answer.” State v. Parham, 220 N.W.2d 623, 627 (Iowa 1974). “The trial court has the discretion to decide if the witness has grounds to assert the privilege against self-incrimination and may require the witness to answer if it clearly appears to the court that he is mistaken.” State v. Heard, 934 N.W.2d 433, 440 (Iowa 2019).

The trial court made no inquiry as to whether Hughes had the grounds to assert the privilege against self-incrimination. Therefore, the trial court erred and Mong’s convictions should be reversed and remanded.

ISSUE III: THERE WAS INSUFFICIENT EVIDENCE OF THE ELEMENT OF SPECIFIC INTENT TO SUPPORT MONG’S CONVICTIONS.

Standard of Review:

“Sufficiency of the evidence claims are reviewed for correction of errors at law. The jury’s verdict is binding upon a reviewing court unless there is an absence of substantial evidence in the record to sustain it. Evidence is substantial if it would convince a rational trier of fact the

defendant is guilty beyond a reasonable doubt. When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record.” State v. Hennings, 791 N.W.2d 828, 832-33 (Iowa 2010).

Preservation of Error:

Error was preserved by Mong through his motions for directed verdict and judgment of acquittal; raising the issue again in his Motion for New Trial; and through the timely filing his Notice of Appeal. (Motion for New Trial) (Notice of Appeal) (App. 70-81, 89).

Merits:

The only witness that testified he saw Mong shoot a gun on June 1st was Ricco Martin, the man that was also fumbling to gain control to a firearm himself. The man who was also dating Mong’s girlfriend. This is not enough to convince a rational trier of fact the defendant is guilty beyond a reasonable doubt.

Further, the jury instructions, and therefore the law in this case, specifically required that the jury find that Mong specifically intended to do

certain acts to Shane Woods as opposed to a general person in order for the jury to find Mong guilty of the crimes alleged, except for the lesser included offenses of Assault in Instruction No. 24 and Assault Causing Bodily Injury in Instruction No. 31.

ATTEMPT TO COMMIT MURDER:

“A person commits the offense of attempt to commit murder when, *with the intent to cause the death of another person* and not under circumstances which would justify the person’s actions, the person does any act by which the person expects to set in motion a force or chain of events which will cause or result in the death of the other person.”
Iowa Code 707.11(1). (Emphasis added).

However, Jury Instruction No. 18, and therefore the law in this case, provided:

In Count I, the State must prove all the following elements of Attempt to Commit Murder:

1. On or about June 1, 2018, the Defendant, Anthony Alexander Mong shot Shane Woods with a firearm.
2. By his acts, the defendant, Anthony Alexander Mong expected to set in motion a force or chain of events which could have caused or resulted in the death of Shane Woods.
3. When the defendant acted, *he specifically intended to cause the death of Shane Woods.*

If the State has proved all of these elements, the defendant is guilty of attempt to commit murder.

If the State has failed to prove any one of the elements, the defendant is not guilty of attempt to commit murder and you will then consider the offense of assault with intent to inflict serious injury as explained in Instruction No. 19.

(Jury Instructions) (App. 28-61). (Emphasis added.)

There was absolutely no evidence presented to the jury that Mong intended to cause the death of Shane Woods. None. That was not even the theory of the State's case against Mong. The State's theory was that he intended to shoot Ricco Martin. There was no evidence to support Mong's conviction of Attempt to Commit Murder.

INTIMIDATION WITH A DANGEROUS WEAPON:

“A person commits a class “C” felony when the person, with the intent to injure provoke fear or anger *in another*, shoots, throws, launches, or discharges a dangerous weapon at, into, or in a building, vehicle, airplane, railroad engine, railroad car, or boat, occupied by another person, or within an assembly of people, and thereby places the occupants or people in reasonable apprehension of serious injury or threatens to commit such an act under circumstances raising a reasonable expectation that the threat will be carried out.”
Iowa Code 708.6. (Emphasis added.)

Again, there is a major difference in the jury instructions.

Instruction No. 23 provides:

In Count II, the State must prove all of the following elements of Intimidation with a Dangerous Weapon with Intent:

- 1) On or about June 1, 2018, the defendant, Anthony Alexander Mong, intentionally shot a dangerous weapon within an assembly of people;
- 2) *Shane Woods* actually experienced fear of serious injury and his fear was reasonable under the existing circumstances;
- 3) The defendant shot the dangerous weapon *with the specific intent to injure or cause fear or anger in Shane Woods.*

If the State has proved all three of these elements, the defendant is guilty of intimidation with a dangerous weapon with intent. If the State has proved elements 1 and 2, but not element 3, the defendant is guilty of the offense of intimidation with a dangerous weapon without intent. If the State has failed to prove any one of these elements, you will then consider the offenses of assault as explained in Instruction No. 24. (Jury Instructions) (App.28-61).

There is no evidence in this record that Shane Woods experienced fear of a serious injury. To the contrary, Shane testified that when Mong arrived he wasn't "too worried" as he "had no beef with him." There was no conflict between the two of them and he was not aware of any issues between Anthony and the others. (Trial Trans. Vol. 2 p.244, Vol. 3 p.21-22, 27-28). Shane "turned around to walk back up towards the house and heard a shot" and he was hit on the left side of his back. (Trial Trans. Vol. 2 p.244-245). There is no evidence that he experienced fear of serious injury. Further, as argued above, there was no evidence that Mong intended to injure or cause fear in Shane. They had no issues with one another. The State did not even theorize that Mong had such intent.

WILLFUL INJURY CAUSING BODILY INJURY

Any person who does an act which is not justified and which is intended to cause serious injury to another commits willfull injury, which is punishable as follows . . . a class “D” felony, if the person causes bodily injury to another. Iowa Code 708.4 (Emphasis added).

Jury Instruction No. 17 provides:

In Count III, the State must prove all of the following elements of willful injury causing bodily injury:

1. On or about June 1, 2018, the defendant, Anthony Alexander Mong shot a firearm at Shane Woods.
2. The defendant *specifically intended to cause a serious injury to Shane Woods*.
3. Shane Woods sustained a bodily injury as a result of the defendant’s actions.

If you find the State has proved all of the elements, the defendant is guilty of willful injury causing bodily injury. If the State has failed to prove any one of the elements, you should go on to consider the offense of assault causing serious injury as set out in Instruction No. 29.

Once again, there was no evidence even presented by the State to cause a rational trier of fact to believe that Mong specifically intended to cause a serious injury to Shane Woods.

For these reasons, this Court must reverse Mong’s convictions.

CONCLUSION

Mong's constitutional rights to an unbiased jury was denied. His right to present his defense including the right to compel witnesses to testify was denied. The evidence was insufficient to convict Mong of any of the crimes charged. For the reasons set forth herein, the Appellant respectfully requests that this Court reverse the Defendant's conviction, or remand for a new trial.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant hereby requests to be heard at oral argument upon submission of this case.

Respectfully Submitted:

/s/ Cathleen J. Siebrecht

Cathleen J. Siebrecht AT0007320

SIEBRECHT LAW FIRM

222 Fifth Avenue, Suite 100

Des Moines, IA 50309

Phone Number: 515-288-4005

Email: Siebrechtlaw@gmail.com

ATTORNEY FOR APPELLANT

COST CERTIFICATE

I, Cathleen J. Siebrecht, hereby state that the actual cost of printing the foregoing Appellant's Brief was the sum of \$0.00 as it is electronically submitted.

Respectfully Submitted:

/s/ Cathleen J. Siebrecht

Cathleen J. Siebrecht AT0007320

SIEBRECHT LAW FIRM

222 Fifth Avenue, Suite 100

Des Moines, IA 50309

Phone Number: 515-288-4005

Email: Siebrechtlaw@gmail.com

ATTORNEY FOR APPELLANT

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/s/ Cathleen J. Siebrecht

Cathleen J. Siebrecht AT0007320
SIEBRECHT LAW FIRM
222 Fifth Avenue, Suite 100
Des Moines, IA 50309
Phone Number: 515-288-4005
Email: Siebrechtlaw@gmail.com
ATTORNEY FOR APPELLANT

Date: 01/25/2021