IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 19-1919

STATE OF IOWA,
Plaintiff-Appellee

vs.

TYJUAN LEVELL TUCKER,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY, JUDGE WILLIAM P. KELLY

APPELLANT'S FINAL BRIEF AND REQUEST FOR ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF CONTENTS 2

TABLE OF AUTHORITIES 4

STATEMENT OF ISSUES 7

ROUTING STATEMENT 10

CASE STATEMENT 11

STATEMENT OF FACTS 12

ARGUMENT 23

I. TUCKER WAS DENIED THE RIGHT TO A JURY DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY, IN VIOLATION OF ARTICLE I § 10. 24

A. Preservation & Standard of Review 24

B. Argument 25

II. TUCKER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO PRESENT EXPERT EVIDENCE AS TO WHETHER THE JURY MANAGEMENT PRACTICES IN POLK COUNTY RESULTED IN SYSTEMATIC EXCLUSION OF AFRICAN AMERICANS FROM THE JURY POOL. 29

A. Preservation & Standard of Review 29

B. Argument 30

1. Ineffective assistance of counsel claims must be heard on direct appeal where the record is sufficient to resolve the claim… 30

2. Trial counsel provided ineffective assistance by failing to obtain an expert and present evidence on the *Plain/Lilly* violation. 34

III. THE ERRONEOUS EXCLUSION OF TUCKER'S SETTLEMENT DOCUMENTS AS A DISCOVERY SANCTION DENIED TUCKER

THE OPPORTUNITY TO PUT ON A DEFENSE IN VIOLATION OF THE FIFTH AMENDMENT AND ARTICLE I, § 10. 41

A. Preservation & Standard of Review 41

B. Argument 42

IV. THE ERRONEOUS EXCLUSION OF THE FULL VIDEOTAPED ENCOUNTER BETWEEN TUCKER AND THE ARRESTING OFFICERS DENIED TUCKER HIS OPPORTUNITY TO PUT ON A DEFENSE IN VIOLATION OF THE FIFTH AMENDMENT AND ARTICLE I, § 10 49

A. Preservation & Standard of Review 49

B. Argument 50

V. THE EVIDENCE WAS INSUFFICIENT TO CONVICT TUCKER OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER. 53

A. Preservation & Standard of Review 53

B. Argument 54

CONCLUSION 55

ORAL ARGUMENT NOTICE 56

CERTIFICATES 56

TABLE OF AUTHORITIES

Cases

Crane v. Kentucky, 476 U.S. 683 (1986) 8, 42, 49

Duren v. Missouri, 439 U.S. 357 (1979)..... 7, 25, 26

English v. Missildine, 311 N.W.2d 292 (Iowa 1981) 7, 39

Harris v. State, No. 18-0175, 2020 WL 2372097 (Iowa Ct. App. June 5, 2019) 7, 40

In re Guardianship of Matejski, 419 N.W.2d 576 (Iowa 1988) 7, 34

Kendall/Hunt Pub. Co. v. Rowe, 424 N.W.2d 235 (Iowa 1988)... 8, 46

Klouda v. Sixth Judicial Dist. Dept. of Corr. Srvs., 642 N.W.2d 840 (Iowa 2000) 7, 33

Ledezma v. State, 626 N.W.2d 134 (Iowa 2001) 8, 38

Meier v. Senecaut, 641 N.W.2d 532 (Iowa 2002)..... 7, 24

Nguyen v. State, 878 N.W.2d 744 (Iowa 2016) 8, 35

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 9, 42, 49

Schrier v. State, 573 N.W.2d 242 (Iowa 1997) 8, 34

State v. Adams, 554 N.W.2d 686 (Iowa 1996) 10, 55

State v. Albright, 925 N.W.2d 144 (Iowa 2019) 10, 53

State v. Ambrose, 861 N.W.2d 550 (Iowa 2015)..... 8, 36

State v. Brothern, 832 N.W.2d 187 (Iowa 2013)..... 8, 30

State v. Coker, 412 N.W.2d 589 (Iowa 1987) 7

State v. Dalton, 674 N.W.2d 111 (Iowa 2004) 8, 35

State v. Damme, 944 N.W.2d 98 (2020)..... 8, 29

State v. Fox, 491 N.W.2d 527 (Iowa 1992)..... 9, 42, 49

State v. Goff, 342 N.W.2d 830 (Iowa 1983)..... 8, 30

State v. Grant, 722 N.W.2d 645 (Iowa 2006) 10, 54

State v. Hallum, 585 N.W.2d 249 (Iowa 1998) 9, 41

State v. Huser, 894 N.W.2d 472 (Iowa 2017)..... 9, 51

State v. Kuhse, 937 N.W.2d 622 (Iowa 2020) 8, 30

State v. Lilly, 930 N.W.2d 293 (Iowa 2019)..... passim

State v. Neiderbach, 837 N.W.2d 180 (Iowa 2013)..... 9, 41, 49

State v. Ondayog, 722 N.W.2d 778 (Iowa 2006) 8, 29

State v. Plain, 898 N.W.2d 801 (Iowa 2017) 7, 12

State v. Randle, 555 N.W.2d 666 (Iowa 1996) 10, 54

State v. Sanford, 814 N.W.2d 611 (Iowa 2012) 10, 53

State v. Trane, 934 N.W.2d 447 (Iowa 2019) 8, 30

State v. Veal, 564 N.W.2d 797 (Iowa 1997) 9, 41, 45

State v. Veal, 930 N.W.2d 319 (Iowa 2019) 7, 26

State v. Williams, 695 N.W.2d 23 (Iowa 2005)..... 10, 53

Strickland v. Washington, 466 U.S. 668 (1984) 8, 38

Whitley v. C.R. Pharmacy Srv., Inc., 816 N.W.2d 378 (Iowa 2012)... 9, 45

Statutes

Iowa Code § 602.4102 ..... 8, 34

Iowa Code § 607A.3 12

Iowa Code § 814.7 (2004) 8, 31

Iowa Code § 814.7 (2019) 8, 29

Iowa Code § 815.4 ..... 7, 39

Constitutional Provisions

Iowa Const. Art. I, § 10 ..... passim

Iowa Const. Art. V, § 4 ..... 8, 33

Iowa Const. Art. V, § 6 ..... 8, 33

U.S. Const. amend. V 9, 52

U.S. Const. amend. VI ..... passim

Rules

Iowa R. App. P. 6.1101 9

Iowa R. Crim. P. 2.14 ..... 8, 43

Iowa R. Crim. P. 2.20 ..... 6, 38

Iowa R. Evid. 5.104 ..... 8, 43

Iowa R. Evid. 5.106 ..... passim

Iowa R. Evid. 5.401 ..... 8, 42

Iowa R. Evid. 5.402 ..... 8, 42

Other Authorities

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.R. 761 (2011)..... 6, 15

STATEMENT OF ISSUES

I. TUCKER WAS DENIED THE RIGHT TO A JURY DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY IN VIOLATION OF ARTICLE I, § 10.

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State v. Coker, 412 N.W.2d 589 (Iowa 1987)

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)

Iowa Const. Art. I, § 10

Iowa Code § 815.4

Iowa R. Crim. P. 2.20

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English v. Missildine, 311 N.W.2d 292 (Iowa 1981)

Harris v. State, No. 18-0175, 2020 WL 2372097 (Iowa Ct. App. June 5, 2019)

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Klouda v. Sixth Judicial Dist. Dept. of Corr. Srvs., 642 N.W.2d 840 (Iowa 2000)

Ledezma v. State, 626 N.W.2d 134 (Iowa 2001)

Nguyen v. State, 878 N.W.2d 744 (Iowa 2016)

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State v. Lilly, 930 N.W.2d 293 (Iowa 2019)

State v. Ondayog, 722 N.W.2d 778 (Iowa 2006)

State v. Trane, 934 N.W.2d 447 (Iowa 2019)

Strickland v. Washington, 466 U.S. 668 (1984)

U.S. Const. amend. VI

Iowa Const. Art. I, § 10

Iowa Const. Art. V, § 4

Iowa Const. Art. V, § 6

Iowa Code § 602.4102

Iowa Code § 814.7 (2019)

Iowa Code § 814.7 (2004)

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Kendall/Hunt Pub. Co. v. Rowe, 424 N.W.2d 235 (Iowa 1988)

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State v. Hallum, 585 N.W.2d 249 (Iowa 1998)

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Whitley v. C.R. Pharmacy Srv., Inc., 816 N.W.2d 378 (Iowa 2012)

Iowa R. Evid. 5.104

Iowa R. Evid. 5.401

Iowa R. Evid. 5.402

Iowa R. Crim. P. 2.14

U.S. Const. amend. V

Iowa Const. Art. I, § 10.

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Pennsylvania v. Ritchie, 480 U.S. 39 (1987)

State v. Fox, 491 N.W.2d 527 (Iowa 1992)

State v. Huser, 894 N.W.2d 472 (Iowa 2017)

State v. Neiderbach, 837 N.W.2d 180 (Iowa 2013)

U.S. Const. amend. V

Iowa Const. Art. I, § 10.

Iowa R. Evid. 5.106

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State v. Adams, 554 N.W.2d 686 (Iowa 1996)

State v. Albright, 925 N.W.2d 144 (Iowa 2019)

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State v. Williams, 695 N.W.2d 23 (Iowa 2005)

ROUTING STATEMENT

Regarding Issues I and II, Tucker appeals because he was tried by an all-white jury in violation of his right to have a jury drawn from a fair cross-section of the community under the Sixth Amendment and Article I, § 10. Although the Iowa Supreme Court has recently spoken on this issue in *State v. Lilly*, 930 N.W.2d 293 (Iowa 2019), further guidance is needed to this substantial issue of broad public importance. S*ee* Iowa R. App. P. 6.1101(2)(d).

The remaining issues involve the routine application of existing legal principles and are appropriate for transfer to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(3)(a).

CASE STATEMENT

Tyjuan Tucker was charged by trial information with one count of possession of a controlled substance with the intent to deliver – marijuana – in violation of Iowa Code § 124.401(1)(d), a Class D Felony. (App. p. 4). This was Tucker's third such offense enhancing the level of the lesser-included offense to a Class D Felony under Iowa Code § 124.401(5). (App. p. 4). Tucker pled not guilty. (Ord. of Arraignment, Sept. 12, 2018). On June 2, 2019, an amended TI was filed alleging that Tucker was a habitual offender under Iowa Code §§ 902.87 and 902.9(1)(c). (App. p. 9).[1]

The case initially came to trial on June 3, 2019. (Tr. Proc. June 3, 2019). However, the case was continued to August 19, 2019. (App. p. 12). After a three-day jury trial, the jury found Tucker guilty as

[1] Tucker had several court-appointed attorneys below; however, Mr. Jesse Macro was Tucker's attorney during the proceeding on June 3, 2019, the trial beginning August 19, 2019, and the sentencing hearing on November 12, 2019. (Ord. Appt. Jesse Macro, Feb. 1, 2019; Ord. Granting Jesse Macro's Mot. to Withdraw, Nov. 19, 2019).

charged. (App. p. 15). Following the trial, the State withdrew its notice that it was seeking enhancements based on Tucker's prior convictions. (Ord. Granting Mot. to Rescind, Oct. 9, 2019).

Tucker was sentenced and judgment entered on November 12, 2019. (App. p. 20). Tucker was sentenced to five years imprisonment, suspended, and three years of probation. (*Id.* at 1). Tucker was also ordered to pay a $750 fine, a $125 law enforcement initiative surcharge, to complete 100 hours of community service, and up to $250 in court costs.

Tucker filed a timely notice of appeal on November 18, 2019. (App. p. 26).

STATEMENT OF FACTS

When Tucker's case initially came to trial on June 3, 2019, his counsel objected to the composition of the jury pool[2] pursuant to *State v. Plain*, 898 N.W.2d 801 (Iowa 2017) and *Lilly*, 930 N.W.2d 293.

[2] "Jury pool" refers to "the sum total of prospective jurors reporting for service." Iowa Code § 607A.3(6). The "jury panel" means "those jurors drawn or assigned for service to a courtroom, judge, or trial." *Id.* at § 607A.3(10). The term "venire" is used interchangeably with "jury pool" in Iowa Court cases. *See, e.g. Plain*, 898 N.W.2d at 821 n.5.

(Tr. Jury Trial Cont., June 3, 2019, 19:20-20:10).[3] Tucker is African American. (*Id.* at 29:15-18). On June 3, 2019, the percentage of African Americans on the jury pool was 1.27 standard deviations below the percentage of African Americans overall in Polk County. (*Id.* at 22:17-23:13). The court granted a continuance to permit defense counsel to obtain evidence as to the third prong under *Lilly*: whether the disparity between the expected percentage of African Americans on the jury and the actual number of African Americans on the jury was a result of systemic exclusion of African Americans from the jury pool. (*Id.* at 23:20-24:5; 24:12-16; 24:21-25:9; 30:9-20; 31:14-18; *see also* App. p. 12).

On August 18, 2019, the parties again convened for trial. Again, Tucker's counsel objected to the composition of the jury. (TT1 22:19-35:3). The jury pool for August 18, 2019 was made up of 245 potential jurors. (*Id.* at 22:22-24; App. pp. 29, 111)[4]. Of the pool, 238

[3] In this brief, citations to the trial transcript will be designated by either their title (i.e., Sent. Tr.), or "TTX" (Trial Transcript and volume number) pp:ll-ll for citations contained within one page, or pp:ll-pp:ll where the citation covers multiple pages.

[4] Court's Exhibit 1 was a summary of jury questionnaire responses from the 245 potential jurors in the pool. Court's Exhibit 2 was the court's math (agreed on by the parties) demonstrating the standard

total jurors identified their race, with nine identifying as African American or Black, four identifying as "multi-race," two identifying as "other," one identifying as "unknown," and 222 identifying as white. (TT1 22:22-24; *see also* Court Ex. 1). 5.4% of adults in Polk County are African Americans. (TT1 22:24, 25:5-8; Court Ex. 2). The parties agreed that, under *Lilly*, the difference between the expected number and the actual number of African Americans in the jury pool (standard deviation) exceeded the threshold established by the second prong in *Lilly*: a defendant can argue that the jury is not drawn from a fair cross-section if it is greater than one standard deviation from the mean, 930 N.W.2d at 305, and Tucker's pool was 1.19 standard deviations from the mean.[5] (TT1 24:18-21; App. p. 111).

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deviation for the pool as a whole (the top third of the page), the pool excluding those who did not identify their race (the middle third of the page) and the panel assigned to Tucker's courtroom (the bottom third of the page).

[5] The state argued for excluding jurors from the calculation who did not identify a race on the jury questionnaire or who marked "other." However, the standard deviation after excluding those jurors from the calculation was still at 1.10, therefore meeting the minimum threshold for disparity under *Lilly*. (TT Vol. 1 26:9-13).

The panel assigned to Tucker's courtroom included 35 potential jurors, one of whom identified as African American or Black, and one of whom identified as "Hispanic/Latino/Spanish Origins." (App. p. 29 [6]). The remaining 33 jurors identified as white. (App. p. 29). The final jury that was seated was all white. (App. p. 29).

The parties proceeded to argue the third prong of *Lilly*: whether the statistical disparity in his jury pool was a result of systemic exclusion of African Americans from the master jury lists. 930 N.W.2d at 305-06. Despite the conversations about hiring an expert during the previous hearing, Defense counsel explained that there would be no expert testimony:

> MR. MACRO: Judge, that is what's in – another inherent problem with the Supreme Court's handling of this issue. I guess I should say that with all due respect because I don't know what a jury pool is going to look like until I get here.
>
> The reality for this, I do not have the ability to hire experts under a court-appointed case until I have a basis to do it. So it causes some inherent, practical problems for an indigent defendant.

[6] The Panel Selection Report is a list of all jurors assigned to Tucker's courtroom, annotated to demonstrate which jurors were dismissed for cause (and why), and which jurors were struck by which party. The Report was cross-referenced with Court Ex. 1 to identify the races of the potential jurors on the panel and of those who sat on the jury.

> With that said, Judge, I am prepared to make an argument solely based upon the fact that we use two sources for our jury pool. We use – voter registration and driver's license, I think, are the two that we use in Iowa.
>
> The problem with only using two of those is the statistical analysis shows that minorities sign up for licenses at a lower rate and also register to vote at a lower rate. So we do have a systematic problem.

(TT1 27:15-28:8). Counsel also referred the court to a law review article[7] relied upon in *Plain* and *Lilly* that analyzed the shortcomings in Iowa's jury list compilation methods and suggested methods for improving the representativeness of Iowa's jury lists. (*Id.* at 28:9-22). The court concluded that Tucker failed to meet his burden of showing that the under-representation of African Americans in the jury pool was caused by the methods for drawing the jury list. (*Id.* at 33:10-35:3).

Jury selection proceeded. Juror No. 27 – the one African-American juror to be assigned to Tucker's case – was excused for cause pursuant to a medical issue over Tucker's objection, and an

[7] 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.R. 761 (2011).

all-white jury was seated. (TT1 77:25-91:7; Panel Selection Report). The trial commenced.

The arresting officers, Brian Joseph and Ryan Garrett, testified that they were working on the "Summer Enforcement Team" or "SET" Patrol. (TT2 47:10-11). The goal of SET is "to patrol high-crime areas and do proactive police work by making traffic stops in that kind of situation." (*Id.* at 43:17-19).

Garrett noticed Tucker sitting in his car in the parking lot of a Burger King on MLK Drive and Hickman Ave, between 10:30 and 10:42 p.m.[8] at night on July 28, 2018. (*Id.* at 47:21-48:12). That particular Burger King location was open 24 hours. (*Id.* at 66:13-16). An unidentified and, during trial, undescribed woman was standing next to Tucker's car. (*Id.* at 48:16-17). The officers observed "that something was exchanged," but they weren't able to tell who was buying or who was selling, or even what was exchanged: just that there was a "hand in the window." (*Id.* at 59:5-18).

[8] Garrett initially testified that the vehicle was observed in the Burger King parking lot at almost 11:00 p.m., but later clarified that the traffic stop occurred at 10:42 p.m., which puts Tucker in the Burger King closer to 10:30 p.m. than 11:00 p.m. (*Id.* at 51:3-5).

Garrett testified that after the police focused on Tucker, Tucker exited the parking lot of the Burger King onto Hickman Ave. (*Id.* at 49:3-18). Hickman Ave was under construction at the time, so that the normal four lanes of traffic was reduced to two lanes. (*Id.* at 49:13-18). Garrett believed that Tucker pulled out of the parking lot without stopping and had cut off a black SUV in the process. (*Id.* at 50:2-9). Garrett and Joseph followed the SUV and eventually caught up with Tucker's vehicle and pulled him over. (*Id.* at 50:7-15). During a search of Tucker's person and his car, an ounce of marijuana, $650 in cash from the console, and a flip phone were seized. (*Id.* at 57:25-58:6; 61-4:8; 62:21-25; *see also* State's Ex. 3, 4).

An edited version of Garrett's chest cam video was admitted at trial as state's Exhibit 2. (TT2 53:25-54:12, Ex. 2). Although the tape was described as being "edited down for brevity," the tape was actually edited to exclude statements referring to the fact that Tucker was previously shot by a law enforcement officer that was not involved in this case. (TT3 12:25-13:8). The portions that were omitted were included one section from approximately 5:50-6:15 of the full video where an officer state's "He's the one that Johnetta shot," from approximately 27:50-29:00 of the full video where officers

are heard discussing Tucker and again mentioning that he was shot. (*Compare* State's Ex. 2, App. p. 29 *with* Court's Ex. 4, Nonedited Version of Body Camera Footage).

The State argued through Exhibit 2 that Tucker reacted badly to the police, supporting its theory that Tucker was distributing, rather than just purchasing marijuana. In an offer of proof, Tucker explained to the court that his reaction was based on his previous experience with the Des Moines Police Department, and that he wanted to submit the entire video of the traffic stop (Court's Ex. 4) to explain his prior experience:

> To answer your question, Mr. Tucker believes it is relevant to show why he's being stopped, the problems he has with law enforcement, and things of that nature.
>
> So it – normally I would suggest that we don't play those types of things in front of a jury because I'm concerned about the prejudicial effect on them.
>
> And in essence, Judge, normally the defendant says to the Court: Judge, I don't want them to know I got shot by a police officer. They could take that the wrong way, that I'm a bad person. Mr. Tucker doesn't believe that. He believes it would be helpful for his case because he wants them to know the entire story. And that's what he wants.
>
> And I think it's his desire to let the jury see what occurred, start to finish, and let them decide if he committed a crime. That's his intention. So we do think it's relevant. It's Mr. Tucker's intention to have it played in its entirety.

(TT3 6:6-25). Tucker argued for admission of the whole video under Iowa R. Evid. 5.106(a). However, the court denied permission to show the jury the entire video. (*Id.* at 17:15-22).

Garrett testified that there was nothing unlawful about Tucker being parked in the Burger King lot, as that location was open 24 hours a day. (TT2 66:13-67:3). Garrett testified that when Tucker drove away, and when he had pulled over and searched Tucker, his first thought was that Tucker had *purchased* the marijuana, not that he was distributing it. In fact, his voice was on the video of the interaction stating "I'm pretty sure he just bought it." (*Id.* at 68:19-69:6). The amount of marijuana found on Tucker was consistent with a personal use amount over a period of time. (*Id.* at 69:7-10; 69:25-70:5).

Garrett testified that the most common evidence of marijuana distribution was not present when Tucker was pulled over. There was no drug packaging of any kind: no "Ziplocs, folded papers, [or] things of that nature where someone could make a smaller amount of marijuana and sell it in smaller quantities." (*Id.* at 70:13-23). Garret testified that "if someone is out selling, . . . they'll have digital scales. And that's if they are – that's if they are breaking down a quantity in

their car, they will have scales and the Ziploc baggies." (*Id.* at 71:6-10). There were no scales in Tucker's car. (*Id.* at 71:21-23). There were no "drug notes" or records of people who owed Tucker money in the car. (*Id.* at 71:24-72:2). Finally, although Tucker's cell phone was seized and examined by Officer Kelly Stuhr, there was no evidence that Tucker was using the cell phone to arrange sales of marijuana. (*Id.* at 163:3-11).

The state's expert witness, Stuhr, testified that the lack of packaging, drug notes, and scales went directly to whether the quantity of marijuana was for personal use or distribution. When asked, "[I]s it consistent that an ounce of marijuana, absent any use of personal smoking devices or other paraphernalia, would that be consistent with personal use or consistent with delivery?" (*Id.* at 164:23-165:3), Stuhr testified, in essence, it depends:

> A. It could be considered, yes.
>
> Q. Considered what?
>
> A. Possession with intent.
>
> Q. Okay. Now, obviously, when you are making that consideration, are you looking at other details surrounding the circumstances?
>
> A. Absolutely.
>
> Q. To what other things would you be looking at?

> A. If they have paraphernalia along with the drugs. If they have drug notes, money, packaging material, all of those things that we've talked about.

(*Id.* at 165:9-20). Stuhr also testified that, in her experience, she has "seen cases where there's an ounce of marijuana and its for personal use." (*Id.* at 165:21-24). Finally, Stuhr's testimony about the street value of an ounce of marijuana was wildly inconsistent. On direct, she testified that an ounce of marijuana could sell for $600-$1,000. (*Id.* at 162:21-25). On cross examination, she admitted that this was actually the price for a pound of marijuana (16 ounces) and that an ounce could sell for $150-$300. (*Id.* at 17015:23).

After Tucker was arrested, Officer Ryan Steinkamp returned to the Burger King parking lot to look for the woman seen near Tucker's car, but did not find her. (TT2 90:23-97:4). However, Steinkamp admitted he did not seek to obtain surveillance cameras from the Burger King. (*Id.* at 98:9-10).

Regarding the $650.00 found in the console, this was from a recent legal settlement, and not from the sale of marijuana. Tucker submitted evidence that he had received a $6,800 settlement, leaving him with $3,923.68 after his attorneys' fees and medical bills were paid. (App. p. 112). However, Tucker was prevented from putting this

documentary evidence before the jury as a discovery sanction. (TT2 115:13-15). As a result, he had to take the stand to explain this situation. (*See, e.g.* TT2 115:4-12 (the court: "I think Mr. Macro makes a good point in that Mr. Tucker is allowed to present his defense. There's nothing that prohibits Mr. Tucker from testifying about the settlement. But to submit those documents that were not complied with under a court order or the rules would appear to be – it would impact our whole process of authentication, identification, and preparation that goes into these cases."). Tucker testified that he cashed the check that he received from this settlement, then used some of the cash from his settlement to buy the car he was driving when he was pulled over and that the rest of the cash in his car was what was left after making a down payment. (TT3 44:3-47:11).

Ultimately, the jury found Tucker guilty as charged and the matter was set for sentencing. Judgment entered on November 11, 2019. This appeal followed. Additional facts may be discussed below.

ARGUMENT

Tyjuan Tucker appeals the guilty verdict and judgment against him because (1) he was tried by a jury that was not drawn from a fair cross-section of the community, (2) through multiple rulings, he was

denied the right to put on a defense, and (3) the evidence was insufficient to convict him of possession of a controlled substance with intent to distribute. The fair cross-section violation alone is sufficient to overturn the judgment against Tucker and grant him a new trial; however, the court should address all errors raised by Tucker because, combined, they deprived Tucker of his right to a fair trial. In addition, because the evidence against him was not sufficient to convict him of possession with intent to deliver a controlled substance, the case against Tucker must be dismissed.

I. TUCKER WAS DENIED THE RIGHT TO A JURY DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY IN VIOLATION OF ARTICLE I, § 10.

A. Preservation & Standard of Review

This issue was preserved when trial counsel objected to the composition of the jury under *Lilly* and *Plain*, (TT I at 18:7-16; 22:22-23:10), and the court found that Tucker did not establish that the underrepresentation of African Americans in the jury pool was a result of their systemic exclusion from the pool. (*Id.* at 35:1-3). *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on

appeal."). Constitutional errors are reviewed de novo. *Lilly*, 930 N.W.2d 298.

B. Argument

Tucker was tried by a jury that was drawn from a pool that did not adequately represent the community. Of the 245 potential jurors in the panel, nine identified as African American or Black, four identified as "multi-race," two identified as "other," one identified as "unknown," 222 identified as white, and seven did not respond to the race question on the jury questionnaire. (App. p. 29). The parties agreed that the pool was 1.19 standard deviations from the mean, based on 5.4% of adults in Polk County being African American. (App. p. 111). The panel assigned to Tucker's courtroom had one person who identified as African American, one person who identified as "Latino/Hispanic/Spanish Origin," and 33 people who identified as white. (App. p. 29). The final jury was all white. (App. p. 29).

"The Sixth Amendment [and Article I, § 10] right to an impartial jury entitles the criminally accused to a jury drawn from a fair cross-section of the community." *Lilly*, 930 N.W.2d at 299. A defendant can establish a fair cross-section violation by demonstrating:

> (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.

Plain, 898 N.W.2d at 822 (citing *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). African Americans are a distinctive group in the community. Under the test established in *Lilly*, the jury pool from which Tucker's jury panel was drawn did not reasonably represent the proportion of African Americans in Polk County. (TT Vol. 1 24:18-21). Under Article I, § 10,[9] Tucker made it to the third step of the analysis under *Lilly*, and that is the only prong at issue here.

Under the "systematic exclusion" prong, the defendant must demonstrate that the disparate representation of the distinctive group in the jury pool is a result of the court administration's jury management practices. *Lilly*, 930 N.W.2d at 307. Specifically: "run-of-the-mill jury management practices such as the updating of

[9] In *State v. Veal*, the Iowa Supreme Court noted that, for a claim brought exclusively under the Sixth Amendment, a greater standard deviation is needed before a defendant can move on to step three of the *Duren/Plain/Lilly* analysis. 930 N.W.2d 319, 328 (Iowa 2019). In light of *Veal*, Tucker is advancing a claim solely under the Iowa Constitution.

address lists, the granting of excuses, and the enforcement of jury summonses can support a systematic exclusion claim where the evidence shows one or more of those practices have produced underrepresentation of a minority group." *Id.* at 308.

The first two prongs under the test in *Lilly* were undisputed. (TT1 22:18-24, 25:5-8). There was a sufficient disparity between the number of African Americans in the community and on the jury to raise the fair-cross-section violation, and Tucker is indisputably African American. The only issue disputed at the hearing was the third prong: whether the disparity was tied to systematic exclusion of African Americans from the jury pool.

Tucker met his burden under the "systematic exclusion" prong to show that the disparate representation within the jury pool was a result of the court administrations jury management practices. Relying on the Hannaford-Agor article, Tucker put forth the following evidence and argument:

- Iowa uses two sources – voter registration and driver's licenses – to form the jury pool. (TT1 27:25-28:4).
- Minorities sign up for driver's licenses and register to vote at a lower rate than non-minorities. (*Id.* at 28:5-8).

- The Iowa Supreme Court has held that jury management practices – such as using only the above-two sources to form the jury pool – can amount to systematic exclusion for the purposes of Art. I, § 10 of the Iowa Constitution. (*Id.* at 28:9-15, discussing the Iowa Supreme Court's adoption of Hannaford-Agor's argument that jury management practices can result in systematic exclusion; *referring to Lilly*, 930 N.W.2d at 307-308).
- Hannaford-Agor recommended looking at more sources to develop the jury pool list, including unemployment data, worker's compensation data, and other lists where lower income and minority names are more likely to appear. (*Id.* at 28:16-22).

This evidence met the standard put forth in *Lilly*. Tucker identified a "specific practice" that "leads to systematic underrepresentation of a distinctive group." 930 N.W.2d at 308. If African Americans are less likely to be on the only two lists that Polk County uses to form its jury pool, then African Americans are less likely to be in the jury pool. Alternative practices, such as using other data sources, can increase the likelihood that African Americans will appear on the jury pool.

Tucker's Article I, § 10 right to be tried by a jury drawn from a fair cross-section of the community were violated. The conviction must be vacated, and the case must be remanded for a new trial. *Lilly*, 930 N.W.2d at 308.

II. TUCKER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO PRESENT EXPERT EVIDENCE AS TO WHETHER THE JURY MANAGEMENT PRACTICES IN POLK COUNTY RESULTED IN SYSTEMATIC EXCLUSION OF AFRICAN AMERICANS FROM THE JURY POOL.

A. Preservation & Standard of Review

Claims of ineffective assistance of counsel "are not bound by traditional error-preservation rules." *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006). Ineffective assistance of counsel claims are reviewed de novo. *Id.*

Iowa Code § 814.7 (2019) no longer permits claims of ineffective assistance of counsel to be decided on direct appeal.[10] However, for

[10] In a recent case, *State v. Damme*, 944 N.W.2d 98 (2020) the Iowa Supreme Court applied the new bar on ineffective assistance of counsel claims on direct appeal to some of Ms. Damme's claims. *Id.* at 103 n.1. The *Damme* court did not consider constitutional challenges to the new provisions of Iowa Code § 814.7, as those challenges were not raised by Ms. Damme's counsel. *See* Final Br. of Appellant, *State v. Damme*, 19-1139, at 20-22 (Jan. 7, 2020). The Iowa Supreme Court has recently retained at least one other case that raises these constitutional issues. *See* Notification of Sup. Ct.

the reasons discussed below, this court should nevertheless hear Tucker's claim. Where a defendant brings an ineffective assistance of counsel claim on direct appeal, the court must first "decide whether the appellate record is adequate to determine the claim. If not, the claim will be preserved for postconviction relief." *State v. Brothern*, 832 N.W.2d 187, 192 (Iowa 2013) (citation omitted). If the record is adequate, claims of ineffective assistance of counsel are reviewed de novo. *See State v. Kuhse*, 937 N.W.2d 622, 627 (Iowa 2020).

B. Argument

1. Ineffective assistance of counsel claims must be heard on direct appeal where the record is sufficient to resolve the claim.

Traditionally, the courts have preserved ineffective assistance of counsel claims for postconviction relief proceedings. *State v. Trane*, 934 N.W.2d 447, 465 (Iowa 2019). However, an important exception to this rule has been maintained for cases where has been for cases where the appellate record is adequate to determine the claim. *See, e.g. State v. Goff*, 342 N.W.2d 830, 837-38 (Iowa 1983) ("[T]his is not

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Retention, *State v. Tyjaun Levell Tucker*, 19-2082 (June 30, 2020). Counsel for Tucker is representing him in both cases, and has used the same argument regarding the availability of ineffective assistance of counsel claims on direct appeal here.

a case in which postconviction proceedings are necessary to develop the circumstances further regarding the failure of defense counsel . . . .”). In short, the ineffective assistance of counsel is so obvious from the record in some cases that to delay adjudication of the claim is to do an injustice.

Senate File 589 ignores the need for justice in claims of obvious ineffective assistance of counsel by effectively shutting the door on any such claim until postconviction proceedings commence. The previous version of § 814.7(2)-(3) provided:

> A party may, but is not required to, raise an ineffective assistance claim on direct appeal from the criminal proceedings if the party has reasonable grounds to believe that the record is adequate to address the claim on direct appeal.
>
> If an ineffective assistance of counsel claim is raised on direct appeal from the criminal proceedings, the court may decide the record is adequate to decide the claim or may choose to preserve the claim for determination under chapter 822.

Iowa Code § 814.7 (2004). This version of the statute struck an appropriate balance in cases where the ineffective assistance of counsel claim was so obvious that it would be an injustice to make a defendant wait – often while serving a sentence – until postconviction relief to have his claim heard. It allowed the appeals courts to quickly

remedy denials of counsel that fundamentally undermined a defendant's conviction, while allowing the courts to appropriately delay cases that simply were not ready to be decided. This version of the statute recognized that the courts, and not the legislature, were in the best position to determine when an ineffective assistance of counsel claim is ready to be decided.

By contrast, Senate File 589 purports to make a judgment that no claim for ineffective assistance of counsel is ever strong enough to be decided on direct appeal, regardless of the consequences to defendants whose rights were violated:

> An ineffective assistance of counsel claim in a criminal case shall be determined by filing an application for postconviction relief pursuant to chapter 822. The claim need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes, *and the claim shall not be decided on direct appeal from the criminal proceedings*.

Iowa Code § 814.7 (2019) (emphasis added). With the italicized words, the legislature improperly strips the courts of jurisdiction to hear an otherwise valid claim, which is within the court's traditional and appropriate jurisdiction: to correct errors at law. Iowa Code § 602.4102(1).

By forcing the courts to delay adjudication of valid and obvious ineffective assistance of counsel claims that could be resolved on direct appeal, Senate File 589 violates the separation of powers doctrine. "The separation-of-powers doctrine is violated 'if one branch of government purports to use powers that are clearly forbidden or attempts to use powers granted by the constitution to another branch." *Klouda v. Sixth Judicial Dist. Dept. of Corr. Srvs.*, 642 N.W.2d 840, 842 (Iowa 2000) (citation omitted). The doctrine means that one "branch of government may not impair another in the performance of its *constitutional* duties." *Id.*

Art. V, § 4 of the Iowa Constitution provides the jurisdiction of the Iowa Supreme Court:

> The supreme court shall have appellate jurisdiction only in cases in chancery, and shall constitute a court for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe; and shall have power to issue all writs and process necessary to secure justice to parties, and shall exercise a supervisory and administrative control over all inferior judicial tribunals throughout the state.

Likewise, Art. V, § 6 provides for the jurisdiction of the district court:

> The district court shall be a court of law and equity, which shall be distinct and separate jurisdictions, and shall have jurisdiction in civil and criminal matters arising from their

> respective districts, in such manner as shall be prescribed by law.

While the Iowa Constitution provides that limitations on the manner of the courts' jurisdiction can be prescribed by the legislature, the legislature cannot *deprive* the courts of their jurisdiction. *In re Guardianship of Matejski*, 419 N.W.2d 576, 577 (Iowa 1988) (citation omitted); *Schrier v. State*, 573 N.W.2d 242, 244-45 (Iowa 1997).

Iowa Code § 602.4102(1) describes the Iowa Supreme Court's jurisdiction in criminal matters: the appeals courts are "a court for the correction of errors at law." The Iowa Courts of Appeals have a constitutional duty to protect a defendant's right to effective assistance of counsel under the Sixth Amendment to the U.S. Constitution and Art. I, § 10 of the Iowa Constitution. Senate File 589 prevents them from doing so. For the same reasons as discussed above in section III.A., the amendments to § 814.7 should be rejected as a violation of the separation of powers doctrine. *Klouda*, 642 N.W.2d at 260.

2. Trial counsel provided ineffective assistance by failing to obtain an expert and present evidence on the *Plain/Lilly* violation.

The U.S. and Iowa Constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. amend. VI, Iowa Const. art. I, § 10. To prove a claim for ineffective assistance of counsel, a defendant must show (1) that that counsel failed to perform an essential duty and (2) that prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Ledezma v. State*, 626 N.W.2d 134, 141-42 (Iowa 2001) (en banc).

To prove a breach of an essential duty, a defendant "must show that counsel's performance was deficient," that is, that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The court must consider "whether counsel's assistance was reasonable considering all the circumstances." *Id.* at 688; *Nguyen v. State*, 878 N.W.2d 744, 752 (Iowa 2016). Counsel's performance is measured "against the standard of a reasonably competent practitioner with the presumption that the attorney performed his duties in a competent manner." *State v. Dalton*, 674 N.W.2d 111, 199 (Iowa 2004).

To prove prejudice, a defendant must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

> The likelihood of a different result must be substantial, not just conceivable. A defendant must show the probability of a different result is sufficient to undermine confidence in the outcome. This standard requires us to consider the totality of the evidence, identify what factual findings would have been affected, and determine if the error was pervasive or isolated and trivial.

State v. Ambrose, 861 N.W.2d 550, 557-59 (Iowa 2015) (cleaned up).

Here, *if* the appellate court determines that counsel's argument and reference to the Hannaford-Agor article were insufficient to meet the standard put forth in *Lilly*, counsel provided ineffective assistance when he failed to secure an expert and provide additional evidence as to the third prong of the test under *Lilly*.

The Iowa Supreme Court in *Lilly* made it clear the type of proof that a defendant would have to present to succeed in their fair cross-section challenge to the composition of the jury under based on jury management practices:

> Litigants alleging a violation of the fair cross section requirement would still have to demonstrate that the underrepresentation was the result of the court's failure to practice effective jury system management. *This would almost always require expert testimony concerning the*

> *precise point of the juror summoning and qualification process in which members of distinctive groups were excluded from the jury pool and a plausible explanation of how the operation of the jury system resulted in their exclusion.* Mere speculation about the possible causes of underrepresentation will not substitute for a credible showing of evidence supporting those allegations.

Lilly, 930 N.W.2d at 307 (citing Hanaford-Agor, *supra*) (emphasis added). From the prior proceeding where the parties met for a jury trial and ultimately had to continue the case because of a potential *Lilly* violation, it was clear that trial counsel needed to hire an expert to prepare for a potential future *Lilly* violation. First, the Court

> suggest[ed] that we continue this case to a jury week in the future which would allow Mr. Macro to secure the type of expert he requires, reconvene for trial, and look at our jury pool at that time. If there is no issue with the standard deviation, we could simply proceed to trial. If there is a number with the standard deviation, Mr. Macro, on behalf of his client, would be postured to make the record he deems to be necessary.

(Tr. Proc. June 3, 2019 24:21-1). Trial counsel was in agreement:

> We would concur with the Court's suggestion that we set this matter down or be continued to a date to allow an expert to review our practices here in Polk County. It may not be necessary. We may get to the point where we look at the numbers again and they fall within the standard deviation; however, if they are not, then we will be properly prepared to go forward in this matter based upon the statistical data of that date.

(*Id.* at 30:9-17). Trial counsel also suggested some potential experts that may be willing to work with him to litigate the fair cross-section issue:

> THE COURT: Do you have any sense, Jesse, as to what you would work under?
>
> MR. MACRO: My thought process would be – my guess is Russ Lovell and David Walker have the data and are somewhat prepared to do this for Polk County already. I don't know that sir, as a fact, but they wore the Amicus brief [in *Lilly*].
>
> THE COURT: They did. I know both Russ & Dave, and they have long – especially Russ Lovell, Professor Lovell, has long had an interest in this issue, and I think that would be a good way to make the record.
>
> It just seems to me that at some point, this would have to be done.

(*Id.* at 31:12-25).

Despite these signals as to what needed to be done between June 3, 2019, and August 19, 2019, counsel did not obtain an expert witness to assist with a potential *Lilly* violation. He did not have any statistical evidence in support of the objection available for trial on August 19, 2019, such as reports on the composition of previous jury pools throughout the year, to see if the underrepresentation of African Americans was consistent or a fluke. He did not have any

evidence in support of his motion beyond the Hanaford-Agor law review article and his professional statements.

When counsel is put on notice of the issue, failure to properly support an objection to the jury panel constitutes a breach of duty under *Strickland* and *Ledezma*. A defendant has a fundamental constitutional right to be tried by a jury that represents a fair cross-section of his peers. Art. I, § 10. A defendant can only protect this right if counsel objects to the composition of the jury. The failure to prepare for an objection in this case despite clear guidance that expert testimony would be needed amounts to a failure to object.

Counsel should have petitioned the district court for an expert – at state expense using the procedures set forth in Iowa Code § 815.4 and Iowa R. Crim. P. 2.20 – to obtain and review data on Polk County's jury management practices and form an opinion as to whether those practices systematically excluded African Americans from the jury pools. All that is needed to secure an expert for an indigent defendant like Tucker is to make an application to the court arguing that "the defendant is financially unable to provide compensation" and the witness is "necessary to an adequate defense of the case." Iowa R. Crim. P. 2.20; *see also English v. Missildine*, 311

N.W.2d 292 (Iowa 1981) (indigent defendants entitled to expert witnesses at state expense, if the witness is reasonably necessary for the defense). Judge Blink, in the first proceeding, implicitly stated that such a request would be approved. (Tr. Proc. June 3, 2019 24:21-25:1). In the unexpected event that the request for an expert witness was denied, trial counsel could have filed an interlocutory appeal to obtain the expert witness. *See, e.g. Harris v. State*, No. 18-0175, 2020 WL 2372097 (Iowa Ct. App. June 5, 2019) (considering an interlocutory appeal from a district court's ruling denying defendant's motion for expert witness at state expense).

Tucker was prejudiced by trial counsel's failure to put on additional evidence as to the third prong under *Lilly*. As the trial court noted,

> Now, this Court was not provided any specific evidence that these lists of practices that are mentioned in Law Review articles and as detailed by Mr. Macro, that they would actually improve minority jury representation. This Court doesn't have any proof that any of those ideas actually would improve minority jury representation.
>
> The court in *Lilly* did hold that jury management practices can amount to systematic exclusion, but this Court does not find the allegations amount to evidence of systematic exclusion.

> The Court heard the arguments made by Mr. Macro on behalf of Mr. Tucker, that his rights to an impartial jury were violated, but the Court has not found sufficient evidence to prove that.

(TT1 33:19-34:9).

In short, without additional evidence before it, the court could not consider Tucker's valid objection. Tucker was tried by a jury that was not drawn from a fair cross-section of the jury, and he was deprived of the opportunity to prove that this was a result of systemic issues with Polk County's jury management system. Trial counsel's failure to retain an expert and prepare for the impending fair cross-section violation prejudiced Tucker's challenge. Tucker was harmed by this failure. As a result, the judgment against Tucker must be vacated, and he must be granted a new trial.

III. THE ERRONEOUS EXCLUSION OF TUCKER'S SETTLEMENT DOCUMENTS AS A DISCOVERY SANCTION DENIED TUCKER THE OPPORTUNITY TO PUT ON A DEFENSE IN VIOLATION OF THE FIFTH AMENDMENT AND ARTICLE I, § 10.

A. Preservation & Standard of Review

This issue was preserved when the state objected to Tucker admitting the settlement letter (App. p. 112) into evidence because it was not previously disclosed (TT2 108:14-109:7), Tucker resisted (*Id.*

at 109:9-110:14), and the court ordered that the letter would be excluded as a discovery sanction. (*Id.* at 111:23-115:15).

Generally, discovery sanctions and evidentiary errors are reviewed for an abuse of discretion. *State v. Veal*, 564 N.W.2d 797, 810-11 (Iowa 1997), overruled on other grounds in *State v. Hallum*, 585 N.W.2d 249 (Iowa 1998) (discovery sanction); *State v. Neiderbach*, 837 N.W.2d 180, 190 (Iowa 2013) (evidentiary error). But, when a court's rulings deny a defendant the right to present a defense in violation of his due process rights under the Fifth Amendment and Article I, § 10, review is de novo. *See State v. Fox*, 491 N.W.2d 527, 530 (Iowa 1992); *Pennsylvania v. Ritchie*, 480 U.S. 39, 56 (1987) (adopting due process analysis for a criminal defendant's "right to put before the jury evidence that may influence the determination of guilt."). An analysis of whether the error was harmless applies to the improper exclusion of evidence in violation of the accused's right to present a defense. *See Crane v. Kentucky,* 476 U.S. 683, 691 (1986).

B. Argument

Tucker was charged with possession of marijuana with intent to distribute. The evidence indicating his "intent to distribute" was

the vague interaction with an unidentified, undescribed female allegedly observed in a Burger King parking lot, the cash found in his car, the quantity of marijuana found on his person, and his reaction to being pulled over by law enforcement. Tucker's defense focused on defeating or weakening this evidence. Tucker had a solid, reliable explanation for where the cash came from, demonstrating that it was proceeds from a settlement, and not proceeds from distributing marijuana. (App. p. 112). The court did not let him put that evidence in front of the jury, forcing him to testify instead. This error was not harmless.

First, the evidence – Court Ex. 3, a letter demonstrating the amount and source of the settlement – was relevant. Evidence is relevant if it tends to make a fact in issue more or less likely. Iowa R. Evid. 5.401. All relevant evidence is admissible, unless excluded by another rule or statute. Iowa R. Evid. 5.401, 5.402. The state claimed that the cash in Tucker's car represented marijuana proceeds. The fact that Tucker had recently received a large settlement made it less likely that the cash in the vehicle represented marijuana proceeds.

The evidence was also reliable. The letter was printed on letterhead from an attorney's office in Des Moines, Iowa. (App. p.

112). It described the amount of the settlement, the payor, and the amounts of the settlement retained in payment of fees by Tucker's personal injury attorneys. (App. p. 112). Attached were various invoices explaining the source and division of the settlement. (App. p. 114 – 119). If given the opportunity, counsel would have been able to lay the foundation that the exhibit was a business record, of the type normally used for settling a client's account with a law firm after a personal injury settlement. Tucker could have testified on the preliminary foundation issues without waiving his right to testify or not testify under the Fifth Amendment. *See* Iowa R. Evid. 5.104(a) ("the court must decide any preliminary question about whether . . . evidence is admissible"); 5.104(d) ("By testifying on a preliminary question [i.e., foundation for admissibility of an exhibit, a defendant in a criminal case does not become subject to cross-examination on other issues in the case."); 5.104(c) ("The court must conduct any hearing on a preliminary question so that the jury cannot hear it if . . . a defendant in a criminal case is a witness and so requests.").

The evidence was not excluded pursuant to a rule of evidence, but rather as a discovery sanction. When a party fails to comply with a discovery order or the rules outlined in Iowa R. Crim. P. 2.14, the

court has the discretion to impose a discovery sanction, including (1) ordering the party to make the discovery available for inspection, (2) granting a continuance, (3) prohibiting the party from introducing evidence not previously disclosed, or (4) any other such order deemed necessary and in the interest of justice. Iowa R. Crim. P. 2.14(6)(c). In choosing an appropriate discovery sanction, courts are to consider "(1) the circumstances surrounding the violation; (2) the prejudice, if any, resulting from the violation; (3) the feasibility of curing any prejudice; and (4) any other relevant information." *Veal*, 564 N.W.2d at 811. "Generally, a continuance is considered to be the 'traditionally appropriate remedy' for a claim of surprise at trial." *Whitley v. C.R. Pharmacy Srv., Inc.*, 816 N.W.2d 378, 389 (Iowa 2012) (citation omitted).

The "circumstances surrounding the violation" were not favorable to Tucker, but a late disclosure very rarely occurs under circumstances that reflect well upon the late discloser. There were mitigating factors in Tucker's failure to timely disclose the evidence. First, the state knew that Tucker claimed the cash came from a recent settlement because he said as much to the arresting officers. Tucker explained this information to law enforcement while he was

being arrested, and law enforcement testified that Tucker talked about his settlement as he was being arrested. (TT2 78:18-79:2). Despite having knowledge of the settlement and claiming that the cash was drug proceeds, law enforcement conducted no investigation into the settlement to confirm Tucker's version of the events. (*Id.* at 80:11-81:24).

Tucker explained that he provided the settlement letter to one of his prior attorneys. (*Id.* at 109:11-13). Tucker had multiple prior attorneys on this case before Mr. Macro, who represented him at trial. (*See* Appearance, Thomas Hurd, Aug. 6, 2018; Ord. to Withdraw & Appoint Counsel Lucas Taylor, October 15, 2018; Appearance; Arach J. Wilson III, December 27, 2018; Ord. Appointing Jesse Macro, Feb. 1, 2019). The reason that the letter was not timely disclosed was attributed to the shuffling of files between multiple attorney's offices; Tucker did not intentionally hide evidence from the state. (TT2 80:11-81:24). Tucker had informed the law enforcement officers the cash was from a settlement. (TT2 78:18-79:2). *C.f. Kendall/Hunt Pub. Co. v. Rowe*, 424 N.W.2d 235, 240 (Iowa 1988) (in civil cases, "drastic" sanctions may be more appropriate where the failure to comply with a discovery order is "the result of willfulness, fault, or bad faith.").

The prejudice resulting from the violation was slight, and easily cured. The state's only argument regarding prejudice was that it was surprised by the disclosure, that it did not have notice. (TT2 109:1-4). But the state had been aware throughout the course of the investigation and case that Tucker claimed the cash came from a settlement, it simply did not have the letter to back that claim up. (*See, e.g.* TT2 109:24-110:2 ("This information and the name of the lawyer comes up at the end of one of the officer's videos. As to the settlement, one of the officers are [sic] talking about it.")). The state chose not to pursue evidence that would demonstrate Tucker's innocence in its investigation.

Further, the letter was from a local law firm. (App. p. 113 (listing a Des Moines address, email addresses and phone numbers for counsel)). The court stated (without further elaboration) that the case had been "pending for a long time" and "[a] continuance does not seem appropriate." (TT2 114:21-22). But, it would have been the work of less than a day to confirm the exhibit's authenticity. The letter contained all of the information the state needed to investigate it, and to argue whether or not it was reasonable that the cash in Tucker's car came from the settlement. A continuance of one day, or

even an afternoon, would have adequately cured the prejudice to the state. Prohibiting Tucker from using that evidence altogether went further than necessary to cure the prejudice.

The exclusion of the evidence was particularly egregious in this case because it denied Tucker the opportunity to rebut the state's case as to intent to distribute marijuana with credible evidence. The exclusion of the letter was not harmless. The case against Tucker was weak. There was no paraphernalia in his vehicle – no drug notes or ledgers, no scales, no packaging materials for the marijuana. The investigating officers never found the woman who was supposedly purchasing marijuana from Tucker in the Burger King parking lot – indeed, they didn't definitively see anything change hands before they decided to pursue Tucker. Initially, they thought the woman was selling to Tucker.

Although large amounts of cash can be associated with controlled substance distribution, an innocent explanation for that cash can negate that association. Without the settlement letter, Tucker's explanation of the cash depended solely on his own testimony, with no corroboration. If the evidence had been admitted,

the jury would have very little evidence from which intent to distribute could be inferred.

A defendant who has evidence for his defense should be permitted to put it on. The exclusion of the evidence was unreasonable and not harmless, and it denied Tucker his rights under the Fifth Amendment and Article I, § 10. The judgment against Tucker must be vacated, and the case must be remanded for a new trial.

IV. THE ERRONEOUS EXCLUSION OF THE FULL VIDEOTAPED ENCOUNTER BETWEEN TUCKER AND THE ARRESTING OFFICERS DENIED TUCKER HIS OPPORTUNITY TO PUT ON A DEFENSE IN VIOLATION OF THE FIFTH AMENDMENT AND ARTICLE I, § 10.

A. Preservation & Standard of Review

This issue was preserved when the state moved to exclude the full video (TT3 3:17-5:1), Tucker made an offer of proof as to the contents of the excluded video and argued that it was admissible (*Id.* at 5:3-19, 6:1-7:14), and the court ruled that it was not admissible. (*Id.* at 14:10-17:22).

Evidentiary rulings are reviewed for an abuse of discretion. *Neiderbach*, 837 N.W.2d at 190. But where, as here, a defendant challenges the exclusion of evidence as a violation to his due process

right to put on a defense, review is de novo. *Fox*, 491 N.W.2d at 530; *Ritchie*, 480 U.S. at 56. Harmless error analysis applies. *See Crane*, 476 U.S. at 691.

B. Argument

The complete video of the interaction between Tucker and law enforcement officers was admissible pursuant to Iowa R. Evid. 5.106. As discussed above, Tucker's strategy at trial was to attack the various assumptions the law enforcement officers made to support the conclusion he was distributing marijuana. One of those assumptions was based on Tucker's reaction when officers searched his shorts. As seen on state's exhibit 2 (and Court's exhibit 4), when officers realized Tucker had something in his shorts, he began to yell for help, causing a scene and repeatedly asking the officers while they were grabbing him. (App. p. 111 at 3:15-5:00). The officers thought this was suspicious. But, in the broader context of Tucker's experience with law enforcement, having previously been shot by an officer as an African American, the reaction is more understandable.

Iowa R. Evid. 5.106 provides:

> a. If a party introduces all or part of an act, declaration, conversation, writing, or recorded statement, an adverse party may require the introduction, at that time, of any

> part or any other act, declaration, conversation, writing, or recorded statement that in fairness ought to be considered at the same time.
>
> b. Upon an adverse party's request, the court may require the offering party to introduce at the same time with all or part of the act, declaration, conversation, writing, or recorded statement, any other part or any other act, declaration, conversation, writing, or recorded statement that is admissible under rule 5.106(a). Rule 1.506(b), however, does not limit the right of any party to develop further on cross-examination or in the party's case in chief matters admissible under rule 5.106(a).

Iowa's "rule of completeness" is broad. *See, e.g. State v. Huser*, 894 N.W.2d 472, 507 (2017) ("[T]he rule of completeness in Iowa Rule of Evidence 5.106 might be characterized as posing an open-the-door concept."). The evidence offered under the rule of completeness need not necessarily be admissible, although "the rule cannot be simply used as an 'end run around the usual rules of admissibility.'" *Id.* at 509 (citing 7 Laurie Kratky Doré, *Iowa Practice Series™: Evidence* § 5.106:1, at 94; and *United States v. Castro-Cabrera*, 534 F. Supp. 2d 1156, 1161 (C.D. Cal. 2008)). All the rule requires is "a demonstration that additional evidence is necessary to a proper understanding of the *admissible primary evidence*. *Id.* (citing Doré at 95, emphasis supplied).

The primary evidence in this case involved (1) Tucker's reaction to a search of his person while he was handcuffed, and (2) law enforcement's explanation that his reaction led them to believe Tucker was distributing marijuana. The secondary evidence – the reason Tucker had a reaction in the first place – was available within the same document (the video). The evidence was admissible under Iowa R. Evid. 5.106 because "in fairness," it ought to have been considered with the primary evidence to show why Tucker reacted the way he did.

This evidence was necessary to Tucker's defense. At trial, he was faced with the difficult task of explaining his unusual behavior during the police search. He had relevant evidence – the fact that he had prior bad interactions with the police – that went to that issue. He was denied the opportunity to put on evidence towards this prong of his defense. This was error. The exclusion of this evidence was unreasonable and not harmless, and it denied Tucker his rights under the Fifth Amendment and Article I, § 10. Because the error was not harmless, the judgment against Tucker must be vacated and the case must be remanded for a new trial.

V. THE EVIDENCE WAS INSUFFICIENT TO CONVICT TUCKER OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER.

A. Preservation & Standard of Review

This issue was preserved when Tucker made a motion for judgment of acquittal at the close of the state's evidence (TT2 176:16-178:18), which was denied, and when Tucker made a motion for directed verdict prior to closing argument, which was also denied. (TT 49:25-57:4). *See State v. Albright*, 925 N.W.2d 144, 150 (Iowa 2019) (sufficiency of the evidence challenge is preserved by making a motion for judgment of acquittal).

A challenge to the sufficiency of the evidence is reviewed for correction of legal error. *State v. Sanford*, 814 N.W.2d 611, 615-16 (Iowa 2012). A verdict will be upheld

> if substantial evidence supports it. Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. Substantial evidence must do more than raise suspicion or speculation. We consider all record evidence, not just the evidence supporting guilt, when we make sufficiency-of-the-evidence determinations. However, in making such determinations, we also view the evidence int eh light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence.

State v. Williams, 695 N.W.2d 23, 27 (Iowa 2005) (citations omitted).

B. Argument

Considering all of the evidence in the light most favorable to the state, there was not substantial evidence to support the verdict. Tucker was found possessing a little under one ounce of marijuana, and $650 cash in his car. When officers first observed Tucker, they believed that the unidentified woman by his car was distributing marijuana to him, not that Tucker was distributing marijuana. Stuhr testified that one ounce of marijuana could be consistent with personal use. The marijuana was wrapped in one package, rather than separate packages for resale. *See, e.g. State v. Grant*, 722 N.W.2d 645, 648 (Iowa 2006) (evidence was sufficient to show intent to distribute where quantity of methamphetamine, although not inconsistent with personal use, was packaged in smaller baggies for apparent redistribution). The law enforcement officers agreed that much of the common indicia of dealing marijuana was missing in this case: there were no scales, no wrappers, no packaging, no drug notes, or ledgers. Tucker's cell phone was searched, and it contained no evidence that he was distributing marijuana. There was no evidence of controlled buys against Tucker. *C.f. State v. Randle*, 555 N.W.2d 666 (Iowa 1996) (recent history of controlled buys was substantial

evidence to support jury's verdict of possession with intent to distribute).

The only physical evidence that was consistent with an intent to distribute was the cash. Tucker had a reasonable explanation for the cash – it was the change leftover after he purchased a car from the proceeds of a cashed a settlement check. *C.f. State v. Adams*, 554 N.W.2d 686, 694 (Iowa 1996) (large amounts of *unexplained* cash are consistent with intent to distribute).

The cash was not dispositive evidence of intent to distribute. The quantity of marijuana was not dispositive evidence of intent to distribute. Ultimately, law enforcements' belief that Tucker intended to distribute the marijuana he was found with was based on assumptions with no support. This is not substantial evidence to support the jury's verdict. The verdict must be reversed, and the case must be dismissed.

CONCLUSION

Tucker was convicted by a jury that was not drawn from a fair cross-section of the jury, in violation of his rights under Article I, § 10, of the Iowa Constitution. This failure is particularly concerning considering Tucker was denied his due process right to put on a

defense and was convicted on less than substantial evidence that could easily be outweighed or explained by the wrongfully excluded evidence. As a result, the judgment against Tucker must be reversed. If the court finds that there was insufficient evidence to support the verdict, the conviction must be vacated. However, a finding in favor of Mr. Tucker on any of the other grounds raised requires a new trial.

ORAL ARGUMENT NOTICE

Counsel requests oral argument.

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CERTIFICATES

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 14,000 words); excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table

of contents, table of authorities, statement of the issues, and certificates. This brief contains 9,769 words.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P.6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in font size 14, Bookman Old Style.

I hereby certify that on December 22, 2020, I did serve Defendant-Appellant's Page Proof Brief on Appellant by mailing one copy to:

Tyjuan Tucker
Defendant-Appellant

___/S/ *Andy Dunn*_____
Dated: December 22, 2020
Andy Dunn