

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)
)
 Plaintiff-Appellee,)
)
 v.) S.CT. NO. 20-0617
)
 KENNETH LEE LILLY,)
)
 Defendant-Appellant.)

APPEAL FROM THE IOWA DISTRICT COURT
FOR NORTH LEE COUNTY
HONORABLE MARY ANN BROWN, JUDGE

APPELLANT'S BRIEF AND ARGUMENT
AND
REQUEST FOR ORAL ARGUMENT

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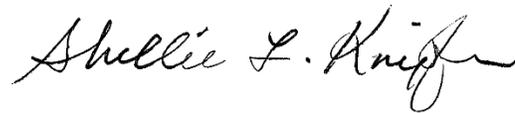
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CERTIFICATE OF SERVICE

On the 18th day of November, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Kenneth Lilly, No. 6078899, Iowa State Penitentiary, 2111 330th Avenue, PO Box 316, Fort Madison, IA 52627-3137.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether Lilly's jury pool was more than 1 standard deviation from the expected number of African Americans in the jury pool, therefore, he established the second prong of the Plain/Duren test for determining whether there was a fair cross-section of the community in his jury pool?

Authorities

State v. Lilly, 930 N.W.2d 293, 298 (Iowa 2019)

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

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1. Lee County

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2. Lee County minus city of Keokuk

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II. Whether the jury selection process disproportionately excludes lower income populations which results in the systematic exclusion of African Americans from jury pools, thereby, establishing the third prong of the Duren/Pain test?

Authorities

State v. Lilly, 930 N.W.2d 293, 298 (Iowa 2019)

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State v. Williams, 929 N.W.2d 621, 630 (Iowa 2019)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court because the issue raised involves a matter on remand from this court regarding the determination of whether Lilly's jury pool was a fair cross section of the community.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by the Defendant-Appellant, Kenneth Lee Lilly, from the trial court's ruling on remand regarding whether he had proven the jury pool was no a fair cross section of the community. The Honorable Mary Ann Brown presided in North Lee County District Court.

Course of Proceedings in the District Court: This court held that the test for determining whether a jury pool is fair and reasonable is whether it is one or more standard deviation below its percentage in overall population of eligible jurors. State v. Lilly, 930 N.W.2d 293, 304 (Iowa 2019). The court remanded the matter for the parties to further

development of the evidence. Id. at 308.

A hearing was held January 23, 2020. (Remand Hearing tr. p.1). Prior to the hearing each party filed briefs in support of his position. (Brief: Calculations & Prong #2 Analysis, 1/21/20; Defendant's Remand Brief, 1/22/20)(App. pp. 63-98). However, the State substantially changed its argument at the hearing by asserting the calculations should also subtract the relevant populations of the city of Keokuk to prove a closer estimate of the population of North Lee County. (Remand Hearing tr p.11 L.3-p.15 L.15, p.86 L.3-89 L.7).

The district court agreed with the State regarding subtracting the relevant populations of the city of Keokuk. (Ruling, pp.6-7, 4/7/20)(App. pp. 202-203). The court went on to find that the number of African Americans in the jury pool was within one standard deviation. (Ruling, p.7)(App. p. 203). Therefore, Lilly's challenge failed under the second prong of the Duren/Plain three prong test. (Ruling, p.7)(App. p. 203). The district court also went on to find that Lilly did

not prove system discrimination in the manner that jury panels were drawn. (Ruling, pp.7-9)(App. pp. 203-205).

Notice of appeal was timely filed. (Notice, 4/8/20) (App. p. 207).

Facts: Any facts relevant to the appeal will be discussed in the argument below.

ARGUMENT

I. Lilly's jury pool was more than 1 standard deviation from the expected number of African Americans in the jury pool, therefore, he established the second prong of the Plain/Duren test for determining whether there was a fair cross-section of the community in his jury pool.

Preservation of Error: Error was preserved by Lilly's argument that the number of African Americans in the jury pool over five years was below more than one standard deviation and the trial court's ruling finding the number African Americans was within one standard deviation of the expected number. (Defendant's Remand Brief, 1/22/20;

1/23/20 tr.¹ p.5 L.14-p.7 L.14, p.52 L.8-p.56 L.16, 58 L.9-p.59 L.21; Ruling, pp. 3-7, 4/7/20)(App. pp. 85-98, 199-203).

Scope of Review: Lilly argues his jury panel was not a fair cross-section of the community as required by the federal and state constitutions. Constitutional challenges are reviewed de novo. Lilly, 930 N.W.2d at 298.

Merits: Lilly was denied his State constitutional right to his jury pool be a fair cross-section of the community. No African Americans served on Lilly’s panel and no African Americans were in the jury pool. Id. at 299; (Tr. p.30 L.6-9). Analyzing the past five years of jury pools for the district and applying Lilly, Lilly has shown that African Americans represent a standard deviation of greater than one.

A. Background.

In Lilly this court expanded on its analysis and holding in State v. Plain, where the court adopted the Duren v. Missouri three-part test for determining whether there was a violation of

¹ Hereinafter simply referred to as “Tr.”

the fair cross-section requirement. Lilly, 903 N.W.2d at 299-308; see Duren v. Missouri, 439 U.S. 357 (1979); State v. Plain, 898 N.W.2d 801, 822 (Iowa 2017). Under the Plain/Duren test a prima facie violation of the fair cross-section is established upon a showing:

- (1) that the group alleged to be excluded is a “distinctive” group in the community;
- (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and
- (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Lilly, 930 N.W.2d at 299 (quoting Plain, 898 N.W.2d at 821-822 (quoting Duren, 439 U.S. at 364, 367-68 (1979))). To prove the second prong the court, Plain held the parties could use multiple analytic models: absolute disparity, comparative disparity, or standard deviation. Plain, 898 N.W.2d at 827.

Lilly rejected this fluid approach in favor of only using standard deviation. Lilly, 930 N.W.2d at 302. The court concluded that absolute disparity and comparative disparity

were not acceptable statistical methods for the task at hand.

Id. “[S]tandard deviation analysis appears to get at the heart of the matter – i.e., ‘the probability that the disparity between a group’s jury-eligible population and the group’s percentage in the qualified jury pool is attributable to random chance.’”

Id. (quoting Berghuis v. Smith, 559 U.S. 314, 324 n.1 (2010)).

Under the Iowa Constitution, article 1, section 10, this court held the second prong of Duren/Plain is met where there is one standard deviation “—in other words, the percentage of the group in the jury pool must be one standard deviation or more below its percentage in the overall population of eligible jurors.” Id. at 304.

This court instructed the parties use the most current census data available that reflects people eligible for jury service. Id. Thus, people eighteen or older and people not incarcerated. Id. at 304-05. This court also instructed defendants may use a statistically significant sample by including earlier jury pools, as opposed to only the current

jury pool. Id. at 305. The court did not set outer limits on the aggregation since it was not raised by the parties in the initial briefing. Id. at 305 n.7.

B. Standard deviation for known race populations.

The first step is determining the percentage of eligible African American jurors in Lee County. As noted in Lilly, the parties need to deduct from the total populations in question the number of ineligible persons such as those under 18 years of age and incarcerated persons. Another ineligible population that was not discussed in Lilly is non-citizens 18 years and older. After subtracting the non-eligible populations from the total population of all races and the total population of African Americans, then divide the eligible African American population by the eligible total population to determine the expected percentage of African Americans summoned for jury service.

1. Lee County

Total pop. Lee County	34,785	(Def. B-2)
Minus under 18 (3880+3644)	<u>- 7,524</u>	(Def. B-2)
	27,261	
Minus prison pop. Ft. Madison	<u>- 700</u>	(Def. C)
	26,561	
Minus non-citizens 18 & over	<u>- 133</u>	(Def. B-2)
Eligible voters Lee County	26,428 ²	
Total pop. AA Lee County	872	(Def. B-3)
Minus under 18 AA (75+91)	<u>- 166</u>	(Def. B-3)
	706	
Minus prison pop. Ft. Madison	<u>- 283</u>	(Def. C)
	423	
Minus AA non-citizens 18 & over	<u>- 0</u>	(Def. B-2)
Eligible AA voters Lee County	423	
Percentage (423/26428)	.0160	%

(Defs. B-2 (total pop.), B-3 (African American pop.))(App. pp. 104-107).

² Trial counsel calculated the total eligible population by just using race charts for each specific race. (Def. B-3 (African American population), Defs. B-5 (Native American population), B-6 (Asian population), B-7 (some other race alone population), B-8 (Hispanic population), B-9 (white population))(App. pp. 106-117). On appeal appellate counsel used the Total population chart to calculate the eligible voters. (Def. B-2 (Total population))(App. pp. 104-105). The differences were miniscule.

Turning to the Race Report created by the jury manager and looking at the “Total” column that represents all jurors who answered the questionnaires, there were 1939 people for known races. (Attachment H (race report))(App. pp. 163-192). One would expect there to be 31 African Americans in the Total column, but instead only 14 African Americans answered the questionnaires ($1939 \times .016 = 31.024$). The standard deviation is the square root of 1939 times .016 times .984 ($\sqrt{N \text{ people} \times \text{percentage} \times (1 - (1 \times \text{percentage}))}$), which is 5.52. (Attachment H (race report))(App. pp. 163-192). So 5.52 is one standard deviation from the expected number of 31.024 African American jurors which is 25.504. Instead, there were only 14 African American in the Total column – almost two whole standard deviations below the one standard deviation.

Looking at the “Response” column that represents people who actually appeared in court for jury duty, there was a total

of 1573 of all known races.³ (Attachment H (race report))(App. pp. 163-192); (Tr. p.49 L.16-20). Over five years only 10 people claimed to be African American. One would have expected 25.168 African Americans (1573 x .016). The standard deviation is the square root of 1573 times .016 times .984 to equal 4.976 ($\sqrt{(N \text{ people} \times \text{percentage} \times (1 - (1 \times \text{percentage})))}$). One standard deviation from 25.168 (mean/expected value) equals 20.192. Again, only 10 African Americans appearing for the jury pool results in a standard deviation well beyond one.

Thus, both the Total columns and the Response columns reveal of a standard deviation of more than one deviation from

³ This court has explained circumstances when a dismissed juror should not be counted. In State v. Williams an African American juror was pre-excused from even coming to the court house. 929 N.W.2d 621, 630 (Iowa 2019). Under the Iowa Constitution a policy or practice relating to excusing jurors might amount to systematic exclusion. Id. “If a defendant wishes to try to prove that it does, the defendant should not be foreclosed from doing so by a rigid rule that calculates the pool based upon who was summoned, rather than who actually appeared.” Id.

the expected value, satisfying the second prong of the requirements under Duren/Plain as modified by Lilly.

2. Lee County minus city of Keokuk

Lilly was tried in Lee County which has the quirk of being divided into North and South Lee County. However, the population maps do not discern between the populations of North and South Lee County. There is a population chart for the city of Keokuk in South Lee County. (Attachment K (Keokuk population tables))(App. pp. 193-196). The State argued that the court should deduct the specified populations of the city of Keokuk in South Lee County to better estimate the populations in North Lee County. Lilly submits that such calculation would be too arbitrary and skewed. Assuming a greater number of African American live in the urban areas such a Keokuk, the State's proposal fails to account for the higher population of whites in the rural areas. The State offered to double the percentage of African Americans but that is still an arbitrary number without any basis.

II. The jury selection process disproportionately excludes lower income populations which results in the systematic exclusion of African Americans from jury pools, thereby, establishing the third prong of the Duren/Pain test.

Preservation of Error: The defendant preserved error by arguing there was systematic exclusion and the court's denial thereof. (Defendant's Remand Brief, pp. 9-14; Tr. p.6 L.3-p.9 L.2, p.61 L.20-p.73 L.12)(App. pp. 93-98).

Scope of Review: Lilly argues his jury panel was not a fair cross-section of the community as required by the federal and state constitutions. Constitutional challenges are reviewed de novo. State v. Lilly, 930 N.W.2d at 298.

Merits: The practice of using limited sets of master lists, specifically the lists of registered voters, driver's licenses, and nonoperator identification, is leaving out certain minority races such as African Americans in Lee County. African Americans in Lee County fall disproportionately in the lower income range which results in them not participating in the jury pools. The cause of the problem lies in the economics of

certain minority populations that leads to them being under represented in the jury pools. It becomes mismanagement when the courts and jury managers fail to address the problem even though they are aware of it.

It has been the practice of the district courts to solely use the lists provided by the Supreme Court Clerk's Office in Des Moines. The North Lee County clerk types in the desired number for a two-month jury pool and the program produces a list of North Lee County residents for the jury pool.

(9/22/17 tr. p.5 L.3-19). The names are drawn from lists of voter registrations and the department of transportation's driver's licenses and nonoperator's licenses. (9/22/17 tr. p.7 L.4-8, p.17 L.19-24, p.24 L.17-22). See Iowa Code § 607A.22(1) (as amended 2017). The problem, however, is that these lists result in underrepresentation of African Americans in defendants' jury pools.

Voter registration rolls typically underrepresent African-Americans and Latinos. Unrepresentative source lists mean that the jury selection system is unrepresentative from the start, and subsequent

stages of the jury selection process each reflect the initial racial and ethnic underrepresentation.

Nina W. Chernoff, Black to the Future: The State Action Doctrine and the White Jury, 58 Washburn L.J. 103 (2019).

This court in Lilly held that “jury management practice can amount to systematic exclusion for purposes of [the Iowa Constitution] article 1, section 10.” Lilly, 930 N.W.2d at 307. But the defendant must prove that the management practice *caused* systematic representation. Id. at 308. “[R]un-of-the-mill jury management practices such as the updating of address lists, the granting of excuses, and the enforcement of jury summons can support a systematic exclusion claim where the evidence shows one or more of those practices have produced underrepresentation of a minority group.” Id.

In order to show causation of systematic discrimination, trial counsel looked for commonality between different racial groups and their participation in the jury pools. Using Lee County census population charts, trial counsel determined the standard deviations for African Americans, Hispanics, Asians,

Native Americans, whites, and people of “some other races alone” and developed bell curves to demonstrate standard deviations. (Def. B-2 (total population); Def. B-3 (African American population); Def. B-5 (Native American population); B-6 (Asian American population); Def. B-7 (some other race population); Def. B-8 (Hispanic population); Def. B-9 (White population), Defs. D-G (bell curves for each race))(App. pp. 104-117, 119-122). Two groups were underrepresented on the jury pools: African Americans and Hispanics. The standard deviation of African Americans was discussed in Division I above.

Hispanics had a standard deviation of 7.137. They made up 2.70 percent of the jury eligible population in Lee County. (Defs. B-2 (total population), B-8 (Hispanic population); C⁴ (prison population))(App. pp. 104-105, 114-115, 118). So it would be expected that 52.35 Hispanics

⁴ Trial counsel combined the Black (Hispanic) and White (Hispanic) populations in making his calculations. (Defendant’s Remand Brief, p.4 n.12)(App. p. 88).

would be part of the jury pool. However, only 42 jurors identified as Hispanic. (Attachment H (race records))(App. pp. 163-192). This was a 1.5 standard deviation outside expected number. Thus, Hispanics were being underrepresented according to Lilly. (Def. F (Hispanics bell curve))(App. p. 121). Asian Americans, Native Americans, Whites, and other races all had more jurors than expected. (Defendant's Remand Brief, pp.7-8)(App. pp. 91-92).

So what is the difference between the two groups that affects their participation in the jury process? A review of the various census data shows economics is the cause of the racial disparities between the different groups. The system is not racist per se, but the lists from which the jury pools are drawn fail to reach those of lower incomes. In turn, racial groups that fall disproportionately in the lower incomes are not participating in the jury pools. The 2017 per capita incomes were:

<u>Race</u>	<u>per capita income past 12 months</u>
African Americans	\$ 13,586
Hispanics	\$ 21,558
Whites	\$ 24,854
Asians	\$ 56,072

(Defs. H-1 (African Americans' income), H-2 (Hispanics' income), H-3 (Whites' income), H-4 (Asians' income))(App. pp. 123-126).

The incomes falls almost in the same order as the standard deviations of each racial group in their jury pool appearances, except Asians do not have as much a positive standard deviations as whites. African Americans were almost two standard deviations below the one standard deviation from the mean. (Def. D (African Americans bell curve))(App. p. 119). Hispanics were half a standard deviation below one standard deviation. (Def. E (Hispanics bell curve))(App. p. 120). Asians were not quite one standard deviation above one standard deviation. (Def. F (Asians bell

curve))(App. p. 121). Finally, the standard deviation for whites was five deviations above one deviation. (Def. G (Whites bell curve))(App. p. 122).

There are similar results when looking at the household incomes for these four racial groups. Out of 301 African American households over one third have an income of less than \$10,000. (Def. J-1 (African American household incomes))(App. pp. 127-128). There were no African American households earning more than \$75,000. Id. Hispanic household income ranged from \$0 to \$124,999. ((Def. J-2 (Hispanics' household income))(App. pp. 129-130). Both these groups failed to meet the desired deviations for the jury pools. However, Whites and Asians had more people than expected on the jury pools. Their household incomes also reflected higher incomes. Twenty out of 76 Asian households had incomes over \$200,000. Over half of all Asian households earn \$50,000 to \$79,999. (Def. J-4 (Asian household incomes))(App. pp. 133-134). White households

had a range of incomes. Notably, almost half of the White households had an income of over \$50,000. (Def. J-3 (White household incomes))(App. pp. 131-132).

A review at the poverty level data from the census revealed that African Americans overwhelmingly lived at higher poverty rate than other races. Almost 46 percent of African Americans over 18 years of age lived in poverty in Lee County. (Def. K-1 (African American poverty status))(App. pp. 135-136). Hispanics, Whites, Asians fared much better. Hispanics only had a six percent poverty rate for those 18 and over. (Def. K-2 (Hispanic poverty status))(App. pp. 137-138). Whites had a 13 percent poverty rate. (Def. K-3 (White poverty status))(App. pp. 139-140). And Asians had not quite a three percent poverty rate. (Def. K-4 (Asian poverty status))(App. pp. 141-142).

The use of the current lists, knowing that they underrepresent African Americans, is a jury management practice that is amounting to systematic exclusion for

purposes of the Iowa Constitution article 1, section 10. The Iowa Code provides that the jury manager may supplement the source list with other lists.

1. The appointive jury commission or the jury manager shall use both of the following source lists in preparing grand and petit jury lists:

a. The current voter registration list.

b. The current motor vehicle operators list.

2. The appointive jury commission or the jury manager may use any other current comprehensive list of persons residing in the county, including but not limited to the lists of public utility customers, which the appointive jury commission or jury manager determines are useable for the purpose of a juror source list.

3. The applicable state and local government officials shall furnish, upon request, the appointive jury commission or jury manager with copies of lists necessary for the formulation of source lists at no cost to the commission, manager, or county.

* * *

Iowa Code section 607A.22 (2017)(emphasis added). The jury managers and the court have the authority, and the duty, to expand the source lists to eliminate the continuing exclusion

of African Americans from the jury pools.

Systematic exclusion exists where the use of a particular jury process that makes social and economic factors relevant to whether a juror would appear for the jury pool and that method disproportionately impacts African Americans. The fact that the current method for calling people for jury service is how it has always been done is not sufficient to disprove systematic exclusion. Paula Hannaford-Agor, Systematic Discrimination in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must be Expanded, 59 Drake L. Rev. 761, 777 (Spring 2011)(discussing Harris). “The question of whether minority underrepresentation is caused by social economic factors or by the policies and practices employed by the court in the jury underlies virtually all cases alleging underrepresentation of minorities.” Id.

“The decisions requiring the accused to show systematic, purposeful discrimination do not square with others which condemn discrimination stemming from negligence or inertia. *The latter*

recognize that official compilers of jury lists may drift into discrimination by not taking affirmative action to prevent it. In formulating a panel for a grand jury endowed with the criminal indictment function, officials must adhere to a standard more stringent than mere abstention from intentional discrimination; they have an affirmative duty to develop and pursue procedures aimed at achieving a fair cross-section of the community.”

People v. Harris 679 P.2d 433, 446 (Cal. 1984)(emphasis added); see Hannaford-Agor, at 777-78 (discussing Harris).

Having determined that economics is a substantial factor in the jury pool participation, the question is what sources can alleviate this shortcoming? See id. at 779-88 (offering a list of alternatives). Such possible lists could be recipients of SNAP (Supplemental Nutrition Assistance Program). Over half of all African America households participated in SNAP according to the 2017 census. (Def. L-1 (African American SNAP))(App. pp. 143-144). Whereas, only 15 percent of Hispanics and 16 percent of Whites received SNAP benefits. (Def. L-2 (Hispanic SNAP), Def. L-3 (Whites SNAP))(App. pp. 145-148). No Asian households received SNAP. (Def. L-4 (Asian SNAP))(App. pp.

149-150).

Another possible list source could be to use subscriber lists for internet subscriptions or cellular phone plans. Sixty-five percent of African Americans had a broadband internet subscription in Lee County. (Def. M-1 (African American internet subscriptions))(App. pp. 151-152). Eighty-three percent of Hispanics, 78 percent of Whites, and 91 percent of Asians had broadband internet in Lee County. (Def. M-2 (Hispanics with internet), Def M-3 (Whites with internet), Def. M-4 (Asians with internet))(App. pp. 153-158).

Utility bills and property taxes are another possible source. Though African American homeownership is only forty percent, it would round out people who are missing from existing lists. (Def. N-1 (African American owner/renter))(App. p. 159). Hispanic, White, and Asian households had homeownership rates in the mid to high seventy percent. (Def. N-2 (Hispanic owner/renter), N-3 (Whites owner/renter), N-4 (Asian owner/renter))(App. pp. 160-162).

Lilly has established the third prong, that the jury selection process disproportionately excluded lower income populations which resulted in the systematic exclusion of African Americans. It was mismanagement to not supplement the jury lists when it was well known that the existing lists underrepresented African Americans.

Lilly believes he has established systematic exclusion of African Americans. However, Lilly agrees with the NAACP that, upon a showing of underrepresentation in the jury pools, the burden should be shifted to the State to show that government did not engage in systematic discrimination.

Lilly, 930 N.W.2d at 305-06. It is virtually impossible to find the specific management problems or errors causing a denial of a defendant's right to a fair cross-section of the community. The management violations are invisible to defendants. Nina W. Chernoff, No Records, No Right: Discovery & the Fair Cross-Section Guarantee, 101 Iowa L. Rev. 1719, 1725-29 (July 2016); see also Juries: Last Week Tonight with John

Oliver (Aug. 16, 2020) (can be found at <https://www.dailymotion.com/video/x7vmkoo>)(WARNING: contains some profanity)(a satirical news show commenting on the inequities of jury system and offering possible resolutions). The court/government is the only entity with access and knowledge of the mechanics of the jury pool selection process. Chernoff, No Records, No Right, at 1733-34. That is why the burden to prove or disprove the third prong should shift to the State. Lilly asks the court to reconsider in holding in Lilly requiring the defendant to show the underrepresentation was caused by some aspect of the system. See Lilly, 930 N.W.2d at 306.

State's burden to prove State's Interest was Waived.

Now that Lilly “has made a prima facie showing of an infringement of his constitutional right to a jury drawn from a fair cross section of the community, it is the State that bears the burden of justifying this infringement by showing attainment of a fair cross section to be incompatible with a

significant state interest.” Duren, 439 U.S. at 368. The State bears the burden of proving “that a significant state interest be manifestly and primarily advanced by those aspects of the jury-selection process. . . that result in the disproportionate exclusion of a distinctive group.” Id. at 367-68. The State failed to make any such showing in the district. It is now barred from trying to prove it has a significant state’s interest at stake. State v. Williams, 929 N.W.2d 621, 629, fn.1 (Iowa 2019)(Williams waived Iowa Constitution argument where failed to timely raise the argument in the district court). Instead, this court must reverse Lilly’s conviction and remand for a new trial.

CONCLUSION

For the reasons stated above, the defendant respectfully requests this court to vacate the district’s court ruling, reverse the defendant’s convictions, and remand for a new trial.

ORAL SUBMISSION

Counsel requests to be heard in oral argument.

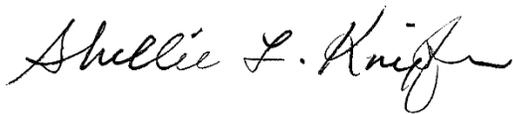
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