

IN THE SUPREME COURT OF IOWA

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

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

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APPELLANT'S REPLY BRIEF AND ARGUMENT

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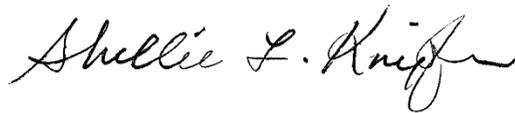
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**CERTIFICATE OF SERVICE**

On the 29<sup>th</sup> day of December, 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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SK/d/12/20

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## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

**I. Lilly's jury pool was more than one 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, 305 (Iowa 2019)

**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.**

### Authorities

State v. Lilly, 930 N.W.2d 293, 307 (Iowa 2019)

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*Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977)

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## STATEMENT OF THE CASE

Appellant Kenneth Lilly, pursuant to Iowa R. App. P. 6.903(4), hereby submits the following argument in reply to the State's brief filed on November 4, 2020.

### ARGUMENT

**I. Lilly's jury pool was more than one 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.<sup>1</sup>**

The State's modified census numbers are not justified. They are arbitrary and have no basis in fact to justify them. Without support for the State's modifications, this court should use the data from the race reports. Statisticians take what is known and apply statistical analysis to evaluate the data. There is no room for arbitrary speculation.

This court recognized the importance of obtaining an amount of data that would result in having a certain degree of

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<sup>1</sup> Also currently pending before the court on an appeal from a remand ruling on the fair cross-section of the jury is State v. Plain, S.Ct. No. 20-1000.

statistical significance. State v. Lilly, 930 N.W.2d 293, 305 (Iowa 2019). Thus, parties look at the data from the recent consecutive jury pools to determine whether the percentage of the group in question was one standard deviation or more below its percentage in the overall population of eligible voters. Id. at 304. The data that is pertinent here is the data kept by the clerks for analysis – the race reports. (Ex. C p.8 (9/1/17 race report); Attachment H (race reports))(Conf. App. p.11; App. pp. 163-92). It provides uniform information for Lee County courts to evaluate representation of distinct groups in the jury pools. The State argues against aggregating the jury pools in prong 2. The State also argues for calculating the number of mixed race African Americans by multiplying the percentage of African Americans by the number of mixed race people. As appealing as that may be, it assumes a correlation that is unknown and has no basis in fact. Lilly has not included mixed races in the calculations because their actual races are unknown and are not included in the race reports.

The State argues against Lilly’s aggregation of data over five years saying it is too remote from the actual jury pool for Lilly himself. But that would only be true if there was a significant change in the jury pools over the five years. But even if one were to recalculate the data in six months, one year, and two years, the State can not show the jury pool is a fair cross-section of the community using the race reports.

The following is a look at the most recent six months:

	<u>Respond</u>	<u>Total</u>
9/1/17		
Known races	55	77
AA <sup>2</sup>	0	0
7/1/17		
Known races	59	76
AA	0	0
5/1/17		
Known races	50	60
<u>AA</u>	<u>0</u>	<u>0</u>
Six months		
Known races	164	213
AA	0	0
Expected Value	2.624	3.408

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<sup>2</sup> “AA” stands for African American.

Standard Deviation	1.6046	1.828
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(Ex. C p.8 (9/1/17 race report); Ex. H (race reports))(Conf. App. p.11; App. pp. 163-92). Regardless of the calculations, there is not fair cross-section of the community for African Americans because there were no African Americans either responding or in the total column (which is those responding to the questionnaire).

Looking at the most recent one year:

	<u>Respond</u>	<u>Total</u>
Six months		
Known races	164	213
AA	0	0
3/1/17		
Known races	63	70
AA	1	2
1/1/17		
Known races	62	70
AA	0	0
11/1/16		
Known races	55	64
AA	0	0

One year		
Known races	344	417
AA	1	2
Expected		
Value	5.504	6.672
Standard		
Deviation	2.32396	2.55869

(Ex. H (race reports))(App. pp. 163-92). Subtracting the standard deviation from the expected value<sup>3</sup> still results in a value beyond one standard deviation of African. For those in the Respond column the expected value was 5.504. When you subtract the standard deviation 2.32396 from the expected value (5.504) you get 3.18004 which is greater than the actual one African American in the Respond column. In other words, one African American falls outside the one standard deviation. Similarly, for the Total column 6.672 (expected value) minus 2.55869 (standard deviation) equals 4.1133 which is greater than the actual two African American

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<sup>3</sup> The expected value is the percentage of voter eligible African Americans (.016) times the total voter eligible population. See Lilly br. p.16.

that appeared in that column.

Looking at the most recent two years:

	<u>Respond</u>	<u>Total</u>
One year		
Known races	344	417
AA	1	2
9/1/16		
Known races	47	57
AA	0	0
7/1/16		
Known races	54	60
AA	0	0
5/1/16		
Known races	60	78
AA	1	1
3/1/16		
Known races	51	63
AA	0	0
1/1/16		
Known races	73	69
AA	0	0
11/1/15		
Known races	57	63
<u>AA</u>	<u>0</u>	<u>0</u>
Two year		
Known races	686	807

AA	2	3
Expected Value	10.976	12.912
Standard Deviation	3.281798	3.593

(Ex. H (race reports))(App. ). Again, the actual number of African Americans who fall within the Respond column or the Total column fall outside the one standard deviation. One standard deviation from 10.976 is 7.694 ( $10.976 - 3.282 = 7.694$ ) which is more than the two African Americans. One standard deviation from 12.912 is 9.319 ( $12.912 - 3.593 = 9.319$ ) which is more than three African Americans.

While the State criticizes the use of five years of data, the reality is the more data that can be gathered generally the better for the statistical analysis. By including multiple jury pools, a person should be able to gain a more accurate understanding of the racial make-up of the jury pools. Nor would aggregating additional data be diluting the current data. The State worries that aggregating the data may drown out

recent successes. But that is not the issue in the present case. The most recent six months had no African Americans in the Respond or Total columns. And if there was a significant change from earlier jury pools it would be very easy to catch in reviewing the data. In such cases the one could modify the calculations to reflect a successful trend in the data.

The State later argues that aggregation should only be allowed where the jury pool and distinctive group are too small to enable the analysis of solely that pool and group. State's br. p. 55. The State's solution is

that aggregation of data should be calibrated to solve that problem and to enable analysis: it should continue until the aggregated sample becomes large enough to give rise to an expectation of a fair and reasonable level of representation that *would not be* met if the distinctive group were totally absent from the aggregate sample – and once that point is reached, no further data should be aggregated.

Id. (emphasis in original) Lilly submits this approach is too ad hoc and creates the danger of data being manipulated.

That in turn would undercut the public's confidence in the analysis and in the courts. Confidence in the courts and the judicial system is part of the basis for the cross-section of the community requirement. So whatever method of data collecting and analysis use, it needs to be relatively uniform and understandable to a non-statistician.

Based on the above and Lilly's initial brief, Lilly has established that a standard deviation of more than one deviation from the expected value, satisfying the second prong of the requirements under Duren/Plain as modified by Lilly.

**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.**

Lilly recognized "that jury management practices *can* amount to systematic exclusion for purposes of article 1, section 10" of the Iowa Constitution. State v. Lilly, 930 N.W.2d 293, 307 (Iowa 2019); compare State v. Veal, 930 N.W.2d 319, 329 (Iowa 2019)(stating that run-of-the-mill jury

management practices would not constitute systematic exclusion under the Sixth Amendment). This court went on to say:

*Although the socioeconomic factors that contribute to minority underrepresentation in the jury pool do not systematically exclude distinctive groups, the failure of the courts to mitigate the underrepresentation through effective jury system practices is itself a form of systematic exclusion.*

Lilly, 930 N.W.2d at 307 (emphasis added) (quoting Paula Hannaford-Agor, Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded, 59 Drake L. Rev. 761, 790-91 (2011)). “If a practice that leads to systematic representation of a distinctive group in jury pools can be identified and corrected, there is no reason to shield that practice from scrutiny just because it is relatively commonplace.” Id. at 307-08. Still the defendant has the burden of proving the practice has caused systematic underrepresentation. Id. at 308.

The State argued that Lilly has failed to show that the

use of voter and DOT lists caused the systematic exclusion of African Americans. State's Br. p.21. But the courts and jury managers *know* the current lists of voter registration, Iowa Department of Transportation motor vehicle operators, and DOT nonoperators identification are not adequate in summoning minority populations. Which is why it formed the Committee on Jury Selection. The Iowa Supreme Court's Committee on Jury Selection recommended expanding the lists source to including income tax filers lists and unemployment lists. Recommendations of the Committee on Jury Selection, Div. III (March 2018)(at <https://www.iowacourts.gov/collections/41/files/499/embed/Document/>). The Committee noted that income filer lists and unemployment lists "have been shown to contain more accurate juror addresses." Id. The Committee also recommended the office of the supreme court administrator look into adding lists from the housing authorities and Child Support Recovery Unit. Id. Using lists that at known to

result in under representation of African American is no different than having a faulty computer program that wrongfully excludes a particular group.

Finding that the use of only voter registration and DOT lists is insufficient does not impose “an open-ended obligation on lower courts to follow unspecified ‘known best practices,’ whatever those best practices may turn out to be.” Lilly, 930 N.W.2d at 307. In fact, the responsible party for creating the jury lists is the supreme court administrator in Des Moines. Iowa Code § 607A.22. The IT Director obtains voter and DOT lists which get merged and creates the overall jury pool that the counties use. (9/22/17 tr. p.17 L.2-21). The lower courts need only recognize that the current practice is causing systematic exclusion. Though section 697A authorizes the supreme court administrator or the district court jury manager to use any other current comprehensive lists of persons residing in the county, no Iowa court has appeared to do so. See id.

“[S]ome appellate courts have indicated a *willingness to question* officials’ reliance on voter registration lists if defendants can prove that such reliance regularly results in underrepresentation of a distinct group. This willingness is particularly prevalent in jurisdictions where voter registration is the exclusive source for jury pools.” Alexis Hoag, An Unbroken Thread: African American Exclusion from Jury Service, Past and Present, 81 La. L.R. 1, 17 (2020) (citing United States v. Weaver, 267 F.3d 231, 244–45 (3d Cir. 2001)(emphasis added) (“[I]f the use of voter registration lists over time did have the effect of sizably underrepresenting a particular class or group on the jury venire, then under some circumstances, this could constitute a violation of . . . the Sixth Amendment.”)(cited with approval in State v. Savage, 970 F.3d 217, 260 (3<sup>rd</sup> Cir. 2020); Bryant v. Wainwright, 686 F.2d 1373, 1378 n.4 (11th Cir. 1982) (“[I]f the use of voter registration lists as the origin for jury venires were to result in a sizeable underrepresentation of a particular class or group

on the jury venires, then this could constitute a violation of a defendant's 'fair cross-section' rights under the Sixth Amendment."). While the Weaver court indicated a willingness to question the official's reliance on voter registration lists, the Weaver failed to make a showing of exclusion over time. Weaver, 267 F.3d at 244 (Weaver also failed to establish unreasonable and unfair representation under the second prong).

In the present case Lilly has shown that over five years the jury pool has resulted in unreasonable and unfair representation of African Americans. "Metaphorically speaking, there has to be a statute of limitations on how long a District can lament the undesirability of the underrepresentation of minorities in its jury pools without feeling compelled to act with imagination to do better." Hannaford-Agor, Systematic Negligence... at 777 (quoting United States v. Green, 389 F. Supp. 2d 29, 40 (D. Mass. 2005) (quoting Jeffrey Abramson, Report on Defendant's

Challenge to the Racial Composition of Jury Pools in the Eastern Division of the United States District Court for the District of Massachusetts 64-65 (2005)). It seems generally agreed that voter list and DOT lists fail to achieve fair and reasonable representation of certain minority populations. See Recommendations of the Committee on Jury Selection, Div. III (March 2018)(recommending incorporation of additional sources for master jury list)(at <https://www.iowacourts.gov/collections/41/files/499/embed/Document/> ); Nina W. Chernoff, Black to the Future: the State Action Doctrine and the White Jury, 58 WBNLJ 103, 117 (2015)(“Voter registration rolls typically underrepresent African-Americans and Latinos.”); David M. Coriell, An (Un)fair Cross Section: How the Application of Duren Undermines the Jury, 100 Cornell L. Rev. 463, 477 (2015); Hannaford-Agor, Systematic Negligence..., at 772, 780. The courts, including court administration and jury managers, are using a system for creating jury pools that are unreasonable and unfair in

representation of minorities in the community. Yet, they continue using these limited lists. That is systematic exclusion of African Americans.

The State also argues Lilly fails to show his suggested lists will resolved the problem. But it's not Lilly burden to resolve the problem. That is the government's burden. It is only Lilly's duty to show that his right to have a fair cross-section of the community in his jury pool has not been met. "Once the defendant 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 the significant state interest. Duren v. Missouri, 439 U.S. 357, 368 (1979); see Castaneda v. Partida, 430 U.S. 482, 494-95 (1977)(Equal protection challenge alleging discrimination against Mexican-Americans in the selection of a grand jury. "Once the defendant has shown substantial

underrepresentation of his group, he has made a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case.”). Here the State has not shown any such interest, therefore, Lilly is entitled to a new trial.

Racial equality in the courts and elsewhere has been at the forefront of recent current events. This summer the supreme court chief justices adopted a resolution in support of racial equality. (as of 12/23/20 can be found at [https://ccj.ncsc.org/\\_\\_data/assets/pdf\\_file/0017/51191/Resolution-1-In-Support-of-Racial-Equality-and-Justice-for-All.pdf](https://ccj.ncsc.org/__data/assets/pdf_file/0017/51191/Resolution-1-In-Support-of-Racial-Equality-and-Justice-for-All.pdf)). The resolution noted that too many persons of color lacked confidence in the fairness of the courts and the criminal justice system. (Id. p.1). Fixing how the courts select the jury pools so that minority populations see themselves reflected in the jury pools would be a start.

Therefore, Lilly requests this court to find that the current method of creating jury pools disproportionately excludes certain populations which has resulted in the

systematic exclusion of African Americans.

### **CONCLUSION**

For the reasons stated above and in the initial brief, the defendant respectfully requests this court to reverse the ruling of the district court, reverse his conviction, and remand for a new trial.

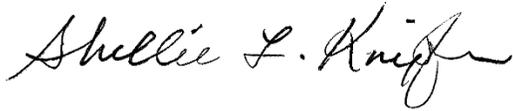
### **ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Reply Brief and Argument was \$2.00, and that amount has been paid in full by the Office of the Appellate Defender.

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REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR  
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This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

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