SUPREME COURT NO. 20-1000
BLACK HAWK CASE NO. AGCR207343

IN THE SUPREME COURT OF IOWA

STATE OF IOWA

Plaintiff-Appellee,

v.

KELVIN PLAIN, SR.

Defendant-Appellant.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR BLACK HAWK COUNTY
HONORABLE WILLIAM WEGMAN, DISTRICT COURT JUDGE

FINAL BRIEF FOR APPELLANT

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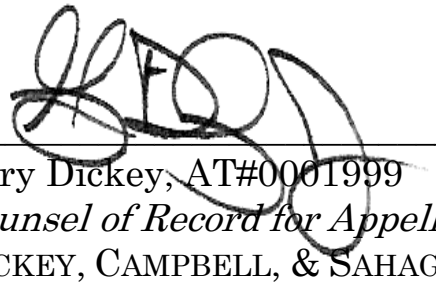

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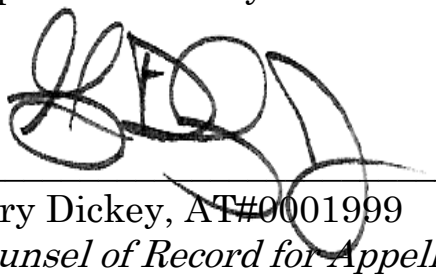

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ROUTING STATEMENT

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

STATEMENT OF THE CASE

In October 2015, an all-white jury found Kelvin Plain, a black man, guilty of one count of first-degree harassment, an aggravated misdemeanor, under Iowa Code sec. 708.7(1)(b). (App. at 9). The district court imposed a two-year prison sentence but suspended it and ordered a term of probation running consecutively after a sentence on a parole violation. (App. at 15). Plain appealed. *See State v. Plain*, 898 N.W.2d 801 (Iowa 2017).

Among the several appellate issues he raised, Plain asserted that the racial composition of the jury pool violated his Sixth Amendment right to an impartial jury. *Id.* at 821. In deciding the issue, the Iowa Supreme Court overruled *State v. Jones*, 490 N.W.2d 787, 792-93 (Iowa 1992), to the extent that it held that absolute disparity was the appropriate test to decide Plain's fair cross section claim. *Plain*, 898 N.W.2d at 826. As a result, the court conditionally affirmed his conviction and remanded to the district court "for development of the record on the Sixth Amendment challenge." *Id.* at 829.

On remand, Plain produced twenty-seven exhibits consisting of deposition testimony, expert reports, and various other documents. (App. at 99). The district court held an evidentiary hearing at which Plain presented testimony from the Black Hawk County jury manager along with a court-appointed expert in jury management practices. (App. at 99). Following the hearing, the court below entered a ruling denying Plain's Sixth Amendment challenge. (App. at 109). Plain appeals that ruling. (App. at 111).

STATEMENT OF FACTS

On August 19, 2015, the Black Hawk County Attorney charged Kelvin Plain by trial information with first-degree harassment following an argument with his neighbor. (App. at 7). Unable to reach a plea agreement, Plain's case proceeded to trial. In 2015, Black Hawk County used a computer program to randomly select residents for jury service. (App. at 460). The program's database was comprised of the Iowa Secretary of State's voter registration list along with the Iowa Department of Transportation's list of individuals with a driver's license or state-

issued identification card. (App. at 460). Updates to the database data occur once a year, usually in July or August. (App. at 466).

Black Hawk County jury manager, Billie Treloar, used the program to generate a pool consisting of panels of one hundred potential jurors for each criminal case expected to go to trial. (11/01/19 Hr'g Tr. at 13, 26-27; App. at 460; 463).[1] Five weeks before the trial dated, she would send a jury summons to each person with a written questionnaire to be completed online or returned in the mail.[2] (11/01/19 Hr'g Tr. at 26-27; App. at 463). Upon return receipt, Treloar entered the questionnaire responses into the database. (App. at 461). If the summons was undeliverable, Treloar attempted to find a new address for the individual. (11/01/19 Hr'g Tr. at 15). If she identified a new address within Black Hawk County, she would enter the change and reissue the summons. (11/01/19 Hr'g Tr. at 15-16). If she

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[1] Treloar took over the jury management duties "three or four years" prior to her deposition in November 2017. (App. at 458).

[2] Not every respondent returns the question with complete information. For example, some individuals do not answer the question about race. (App. at 467).

identified a new address outside of Black Hawk County, she would remit the individual's information to the other jury manager for the other county. (11/01/19 Hr'g Tr. at 15-16). If Treloar identified a new address outside of Iowa, she would mark the individual as disqualified. (11/01/19 Hr'g Tr. at 15-16).

Treloar would mail any individual who failed to respond the initial summons "a reminder letter" three weeks before trial. (Ex. 114, Treloar Depo. at 24). If the person did not appear at trial, Treloar would mail a "failure to appear letter" along with a summons to appear for another jury pool. (App. at 462). After the third failure to appear, the court would order a hearing for the individual to show cause why he or she should not be held in contempt. (App. at 462-463). The punishment following a finding of contempt was usually a monetary fine. (App. at 463).

In preparation for Plain's trial, Treloar mailed summonses to one hundred residents for his jury panel. (11/01/19 Hr'g Tr. at 13). Fifty-six residents responded to the summonses by filling out jury questionnaires. (11/01/19 Hr'g Tr. at 13-14). Three of the responding individuals were excused before the trial started.

(11/01/19 Hr'g Tr. at 13). Forty-nine individuals appeared on the day of trial and checked in with the jury manager. (11/01/19 Hr'g Tr. at 21-22). Of the forty-nine, only one was African-American. (11/01/19 Hr'g Tr. at 18). None of the twenty-three individuals drawn for voir dire were African-American. (Trial Tr. at 106). On this basis, Plain objected to the underrepresentation of African-Americans as it violated his Sixth Amendment right to a jury panel that represents a fair cross-section of the community. (Trial Tr. at 38, 97-98). The district court overruled Plain's objection because he could not show sufficient underrepresentation under the absolute disparity test. (Trial Tr. at 105-106). The all-white jury convicted Plain as charged. (App. at 9). The court imposed a two-year prison sentence but suspended it and ordered a term of probation running consecutively after a sentence on a parole violation. (App. at 15).

After filing a motion for a new trial, which was denied, Plain appealed. (App. at 10; 12). The Iowa Supreme Court agreed with Plain that the district court erred in relying solely on the absolute disparity test to evaluate whether African-Americans were

underrepresented in the jury pool. *See Plain*, 898 N.W.2d at 826 (overruling *Jones* to the extent it held that absolute disparity was the appropriate test of underrepresentation). The court conditionally affirmed Plain's conviction and remanded to the district court for further development of the record. *Id.* at 829.

On remand, Plain renewed his motion for new trial on the basis that African Americans were systematically underrepresented in his jury pool. Following an evidentiary hearing, the district court issued a ruling denying Plain's motion. The court found that African-Americans were a distinctive group in the community. (App. at 99). Next, the court found that Plain demonstrated underrepresentation of African-Americans under article I, section 10 of the Iowa Constitution but not under the Sixth Amendment of the United States Constitution. (App. at 99). Lastly, the court held there was not showing that the underrepresentation was "systematic." (App. at 99).

This appeal ensued.

ARGUMENT

THE UNDERREPRESENTATION OF AFRICAN-AMERICANS IN PLAIN'S JURY PANEL VIOLATED HIS RIGHT TO A JURY THAT REPRESENTS A FAIR CROSS-SECTION OF THE COMMUNITY

Preservation of Error

Plain preserved his Sixth Amendment claim by objecting to the composition of the jury venire and requesting a new panel. (Trial Tr. at 98-100). Plain further preserved error by filing a motion for new trial on remand. (App. at 10).

Plain also preserved error for his claim under Article I, section 10 of the Iowa Constitution seeking relief *State v. Lilly*, 930 N.W.2d 293 (Iowa 2019). (App. at 36-69). The State of Iowa clearly understood Plain's claim to be based on the Iowa Constitution because it analyzed the claim under Article I, section 10. (App. at 23)("The State maintains the racial composition of the jury pool did not violate defendant's Sixth Amendment right *or Article I, Section 10 right* to an impartial jury selected by a fair cross-section of the community"). As did the district court. (App. at 105). While Plain did not originally assert his fair cross-section claim under the Iowa Constitution, the issue was presented to,

and decided by, the district court. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012) (explaining that error is preserved if the court considered the issue and necessarily ruled on it). In any event, the State waived any error preservation objection by not raising it on remand.

Standard of Review

The standard of review for Plain' Sixth Amendment challenge to the composition of the jury is de novo. *Duren v. Missouri*, 439 U.S. 357 (1979).

Merits

Trial by jury "is a vital principle, underlying the whole administration of criminal justice." *Ex parte Milligan*, 4 Wall 2, 123 (1866). The jury "is a criminal defendant's fundamental protection of life and liberty against race or color prejudice." *McClesky v. Kemp*, 481 U.S. 279, 310 (1987). The "American concept of the jury trial contemplates a jury drawn from a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). It is "an essential component of the Sixth Amendment right to a jury trial." *Id.* at 528.

The fair cross-section requirement "guards against the exercise of arbitrary power" and serves as a check against the "overzealous or mistaken prosecutor" "in preference to the professional or perhaps overconditioned or biased response of the judge." *Lockhart v. McCree*, 476 U.S. 162, 174 (1986); *Plain*, 898 N.W.2d at 821. "It also helps legitimize the legal system and is critical to public confidence in the fairness of the criminal justice system." *Plain*, 898 N.W.2d at 821. "Finally, it encourages civic participation through the shared administration of justice." *Id.* For Kelvin Plain, these benefits were a mirage.

The empirical data from the months leading up to Plain's trial establishes that African-Americans were systematically underrepresented in Black Hawk County's jury pools. But, it did not have to be that way. The record links the underrepresentation to lower response and appearance rates of potential jurors from the zip code in which 50% of the county's African-Americans reside. The record also establishes that Black Hawk County used several jury management practices at the time that are known to contribute to lower response and appearance rates. This evidence

is more than sufficient to establish a prima facial claim of systematic underrepresentation. Accordingly, Plain is entitled to a new trial.

A. Applicable legal principles

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. amend. VI. The right to an impartial jury entitles the criminally accused to a jury drawn from a fair cross-section of the community. *Taylor*, 419 U.S. at 530. In *Duren*, 439 U.S. at 357, the United States Supreme Court established a three-part test for proving a violation of the fair cross-section requirement. *Id.* at 364. Under *Duren's* three-part test, a defendant can establish a prima facie violation of the fair cross-section requirement by showing

> (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and

(3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

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

Under the first part of the *Duren* test, a community group is distinctive if it contains "a definite, objectively ascertainable membership that constitutes a substantial segment of the population and has common and unique opinions, attitudes, and experiences that cannot be adequately represented by members of the general population." *Plain*, 898 N.W.2d at 822. The requirement to prove membership in a distinctive group provides a nexus to "characteristics that are relevant to constating a jury venire that is representative of the community." *Id.* Under Iowa and federal law, distinctive groups include race, color, religion, sex, national origin, or economic status. *Id.*

The second part of the *Duren* test measures the reasonableness of the distinctive group's representation on jury

venires relative to its size in the community. It "distinguishes between acceptable and unacceptable levels of deviation of a distinctive group on a jury venire." *Id.* (citing David M. Coriell, Note, *An (Un)fair Cross Section: How the Application of Duren Undermines the Jury*, 100 Cornell L. Rev. 463, 480 (2015)). To satisfy this prong, a defendant must offer proof of "a statistically significant underrepresentation" of the minority group in the jury pool or panel. *Lilly*, 930 N.W.2d at 202.

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

defendant must show the percentage of the distinctive group in the jury panel is less than the expected percentage by at least two standard deviations. *State v. Williams*, 929 N.W.2d 621, 630 (2019). A defendant raising a fair cross-section challenge under the article I, section 10 of the Iowa Constitution, however, need only show one standard deviation of disparity. *Lilly*, 930 N.W.2d at 304.

The third part of the *Duren* test requires a defendant to tie the underrepresentation to some aspect "inherent in a particular jury selection process utilized." *Plain*, 898 N.W.2d at 824 (citing *Duren*, 439 U.S. at 366). A defendant need not prove intentional discrimination. *Duren*, 439 U.S. at 668 n.26. But, statistical disparities, even over time, are not enough. *Plain*, 898 N.W.2d at 307. Rather, the defendant must tie the disparity to a particular practice. *Id.* For Sixth Amendment purposes, a defendant must offer more proof than merely "pointing to a host of factors that, individually or in combination, *might* contribute to a group's underrepresentation." *Berghuis v. Smith*, 559 U.S. 314, 332 (2010). Under article I, section 10 of the Iowa constitution,

however, a "policy or practice relating to excusing jurors might amount to systemic exclusion." *Williams*, 929 N.W.2d at 630.

B. The number of African-Americans in Plain's jury panel did not fairly and reasonably represent the proportion of African-Americans residing in Black Hawk County

Proper standard deviation analysis under *Lilly* requires two things: (1) the percentage of jury-eligible residents in the distinctive group according to the most current Census data; and (2) aggregate demographic data about previous jurors for a reasonable time period preceding the defendant's trial. *Lilly*, 930 N.W.2d at 304-305. In this case, the first item is easily discernible. Census data shows that jury-eligible African-Americans comprised 7.5% of the Black Hawk County population at the time of Plain's trial. (App. at 475).

The second piece of information is more difficult to discern because Black Hawk County did not require respondents to answer the question concerning race on juror questionnaires prior to January of 2019. (App. at 101). According to the court's appointed expert, Paula Hannaford-Agor, more than half of the

juror questionnaires in the year leading up to Plain's trial lacked information about the respondents' race. (App. at 101; 434).

To aid the court, Hannaford-Agor employed a process called geocoding to create two models for the missing racial data based on its correlation with other known factors such as zip code. (11/01/19 Hr'g Tr. at 32; App. at 434). The first model estimated the racial composition of all jurors based entirely on the correlation between race and zip code from November 4, 2014, through October 27, 2015. (App. at 101). The second model estimated the racial composition only for jurors who did not report their race on the questionnaires over the same time period. (11/01/19 Hr'g Tr. at 3; App. at 441). In other words, the second model used actual data to the extent it was available and used geocoding only for the missing data. Hannaford-Agor explained that by modeling for only the unknown data, "Model 2 is likely to generate the more accurate estimates." (Ex. 109 at 11).

Relying on Hannaford-Agor's models, Plain retained Drake University Professor of Statistics, Dr. Amy Vaughan, to conduct the standard deviation analysis required by *Lilly*. Dr. Vaughan

performed calculations on two sets of data. She used data from Black Hawk County juror questionnaires for the six months preceding Plain's trial whose respondents identified their race in their answers. (App. at 474-475). She performed four standard deviation calculations: (1) African-Americans summoned for any jury pool, (2) African-Americans in jury panels, (3) Mixed race African-Americans summoned for any jury pool, and (4) Mixed race African-Americans in jury panels. (Ex. 127 at 2-4)(App. at 475-477). Her results are summarized below:

	# Summoned who identified race	# African-Americans Reporting	# African-Americans Expected	Standard Deviation (African-Americans Alone)	Standard Deviation (Mixed Race African-Americans)
# in Jury Pools	8,269	510	625	4.78	6.09
# on Jury Panels	1,696	83	128	4.15	4.69

Using Hannaford-Agor's twelve months of data from Model 2, Vaughan performed six additional standard deviation calculations: (1) African-Americans summoned, (2) Mixed race African-Americans summoned, (3) African-Americans responding to the summons; (4) Mixed race African-Americans responding to the summons; (5) African-Americans reporting for jury service,

and (6) Mixed race African-Americans reporting for jury service. (Ex. 127 at 4-5). The results of these calculations are below:

	Hannaford-Agor Model 2	# African-Americans	# African-Americans Expected	Standard Deviation (African-Americans Alone)	Standard Deviation (Mixed Race African-Americans)
# Summoned	21,653	1,599	1,728	0.96	3.24
# Responding	11,131	746	842	3.41	4.98
# Reporting	6,983	421	528	4.83	6.02

(App. at 477-478).

Regardless of data set, the underrepresentation of African-Americans reporting for jury service and making their way onto jury panels substantially exceeds *Lilly's* threshold of one standard deviation. *Lilly*, 930 N.W.2d at 304. The standard deviation test results also satisfy the Sixth Amendments threshold of two standard deviations. *Veal*, 930 N.W.2d at 329. Accordingly, Plain passes the second part of the *Duren* test.

Rather than rely upon Vaughn's calculations, the district court conducted its own standard deviation analysis *sua sponte*. In analyzing the Hannaford-Agor's modeling for the number of African-Americans reporting for jury service, the court below explained:

> During the time period that Hannaford-Agor reviewed, she also discovered a decline from the number of Blacks/African-Americans being summoned to the number that report for trial. Hannaford-Agor's 2 models concluded that between 7.4% (model 1) and 6.0% (model 2) of the jurors reporting for trial were Black/African-American. This is also true of the information from Plain's Exhibit B, which showed that in the first 6 months of 2019, 6.94% of reporting jurors were Black/African-American.
>
> Averaging Hannaford-Agor's findings (6.7%) results in a finding just below the 6.94% found for the first 6 months of 2019. Using either 6.7% or 6.94% results in a standard deviation just over 1. Under the 6th Amendment, Plain's claim would fail at the reporting stage as the standard deviation is below 2. It does, however, just meet the showing needed under Article 1, Section 10 of the Iowa Constitution.

(App. at 104-105). This is incorrect on multiple levels.

For reasons that are as unexplained as they are unexplainable, the court used an average of Hannaford-Agor's data from Model 1 and Model 2 in its analysis. (App. at 104-105). There simply is no rational basis in the record to average the data from two models. Hannaford-Agor did not recommend it. (App. at 434-445). Nor did Vaughn. (App. at 474-478). *Nor did the State*. (App. at 23-29). And for good reason—Hannaford-Agor made clear that the model extrapolating only missing data, Model 2, "is likely

to generate the more accurate estimates." (App. at 444). It is counterintuitive to average a more accurate dataset with a less accurate one. Yet, that is precisely what the court below did.

The district court compounded the error with faulty arithmetic. Even assuming an African-American population of 6.7% in jury panels, the result would still be greater than two standard deviations. As Vaughn set forth in her report, the equation to determine the number of standard deviations between the expected number of jurors and actual jurors is as follows:

$[(x-y) * \sqrt{n}] / \sqrt{[x * (1-x)]}$ where:

x = percent of African-Americans in the county

y = percent of African Americans in jury panels

n = total number of residents in jury panels

In this case, x = 7.5%, y = 6.7%, and n = 6987.[3] The calculation follows in four steps:

Step 1: $[(.075-.067) * \sqrt{6987}] / \sqrt{[.075 * (1-.075)]}$

[3] "6987" represents the average of Hannaford-Agor's Model 1 and Model 2 numbers for the total number of jurors in panels from Tables 6 and 9 of her report. (App. at 441-442). The calculation is (6,991 + 6,983)/2 = 6,987.

Step 2: [.008 * 83.58828] / √.069375

Step 3: .668706 / 26.33913

Solution: 2.538831

Thus, even using the average of Hannaford-Agor's models, the underrepresentation exceeds the threshold established in *Veal* for Sixth Amendment claims.[4] The district court's finding that using 6.7% "results in a standard deviation just over 1" is clear error.[5] (App. at 105).

The district court's underrepresentation analysis offers a cautionary tale about strict adherence to standard deviation as

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[4] Plain also introduced an expert report from Drake University statistics professor Rahul Parsa. (App. at 446; 456). Parsa calculates the standard deviation test slightly differently:

Z = (o – NP) / √[NP(1-P) where

o = number of African Americans in jury panels (.067 * 6987)
NP = expected number of African Americans (.075 * 6987)
P = percentage of African Americans in county (.075)

The result is the same: -2.538831.

[5] The district court's reference to the average of African-American residents serving on jury panels in 2019 is even more puzzling. (App. at 105). Comparative analysis of the average percentage of minority jurors over two different points in time is not part of the standard deviation methodology adopted in *Lilly*.

the *sine qua non* for satisfying *Duren's* second prong. "Time and time again, in volume after volume of federal reporters, judges and lawyers make a mess of statistical analysis, which consequently subverts the goals of the relevant legal principles." Colleen P. Fitzharris, Note, *Can We Calculate Fairness and Reasonableness? Determining What Satisfies the Fair Cross-Section Requirement of the Sixth Amendment*, 112 Mich. L. Rev. 489, 519 (2013). On top of that, the analysis often must take place on the first day of trial when defense counsel is simultaneously tasked with preparing to litigate motions in limine, participate in voir dire, and give an opening statement. In an ideal world, defense attorneys would receive juror information weeks in advance and readily have access to months of aggregate jury pool demographic information. That world, however, is several standard deviations away from reality. Most often, criminal cases are not confirmed definitively until the week before trial is set to begin.[6] Likewise, juror assignments are often last-minute affairs.

[6] This is particularly true for misdemeanor cases where the court, prosecutor, and defense counsel each may have multiple trials confirmed for the same day. Add to that the uncertainties of

Except in the most serious felony offenses, it is unrealistic to expect defense counsel to be able to review the jury venire information, obtain the aggregate empirical data, and retain an expert witness to evaluate underrepresentation and its systematic causes in that short timeframe.[7] More likely than not, defense counsel will make only superficial objections or no objection at all. In the words of one commentator, the "fair cross-section requirement should not also be subverted due to slavish adherence to statistical thresholds." *Id.*

C. Black Hawk County's jury management practices at the time of Plain's trial contributed to the systematic underrepresentation of African Americans on his jury panel

The court below held that Plain did not satisfy the third part of the *Duren* test because he did not present "expert testimony

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witness availability and the prospect of plea negotiations, and the notion of a "trial date" becomes a very fluid concept.

[7] Plain's experience is a case in point. Procedendo in Plain's first appeal issued on July 24, 2017. (App. at 18). The evidentiary hearing on remand did not take place until November 1, 2019. The district court did not issue its ruling *until eight months later*. (App. at 99). Three expert witnesses were involved—two of which had to revise their initial reports. At the end of all of it, the State, the defendant, and the district court all arrived at difference results using the standard deviation method.

showing the 'precise point' the jury system caused underrepresentation." (App. at 108). In this regard, the court cherry-picked language from the *Lilly* decision to formulate a distorted standard. The full passage in *Lilly* from which the court lifted provides:

> [T]he failure of courts to mitigate the underrepresentation through effective jury system practices is itself a form of systematic exclusion.
>
> 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 (emphasis added). Under the correct standard, a defendant asserting systematic underrepresentation arising from jury management practices need only show the exclusion occurs during the juror qualification process and "a plausible explanation" how the practices contributed to the result.

Id. Plain offered credible evidence to support both these requirements.

For starters, the results of the standard deviation test alone prove that underrepresentation of African-Americans on Black Hawk County juries was not random. By design, the test reveals whether the underrepresentation is "the result of random chance." Fitzharris, Note, 112 Mich. L. Rev. at 506. "If the underrepresentation is not the result of random chance, *then that suggests systematic exclusion*." *Id.* (emphasis added).[8]

The standard deviation test results also show that the underrepresentation was not a one-off. It occurred over time regardless of whether six-month or twelve-month data sets were analyzed. More importantly, the standard deviation results using Hannaford-Agor's data grow larger at every phase after the initial summons stage. That makes perfect sense considering Black Hawk County used a computer program to identify prospective

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[8] Indeed, the chief criticism of using the standard deviation test to analyze *Duren's* second prong is that it measures systematic error rather than underrepresentation. *Id.* (citing Richard M. Re, *Jury Poker: A Statistical Analysis of the Fair Cross-Section Requirement*, 8 Ohio St. J. Crim. L. 533, 550-51 (2011)).

jurors at random. The underrepresentation occurred in responding to the summonses and appearing for trial.

Not surprisingly, the underlying data supports this conclusion. For example, Hannford-Agor's geocoding analysis reveals that three zip codes, 50701, 50702, and 50703, account for 87% of all African-Americas that reside in Black Hawk County. (11/01/19 Hr'g Tr. at 32). Zip code 50703 alone is home to 50% percent of African-Americans in the county. (11/01/19 Hr'g Tr. at 32). In the year leading to Plain's trial, residents from zip code 50703 had (1) higher rates of undeliverable summonses; (2) lower response rates; and (3) higher failure to appear for jury service compared to Black Hawk County as a whole.

For example, 13.4% of jury summonses mailed to residents in 50703 were returned as undeliverable whereas only 12% of jury summonses mailed countywide were returned undelivered. (App. at 438). As for response rates, 17.2% of individuals summoned from 50703 failed to respond compared to only 8.9% for the

entirety of Black Hawk County.[9] In other words, the zip code in which half of the African-American population resides failed to respond at twice the rate at which they were summoned. Hannaford-Agor concluded that this data point was "statistically significant." (11/01/19 Hr'g Tr. at 42-43). Collectively, zip codes 50701, 50702, and 50703 represent 56.8% of all jurors summoned, but they account for 70% of all jurors that failed to respond to the summonses. (App. at 438). Hannaford-Agor testified that "the failure to respond rate specifically from 50703 . . . was likely contributing to the underrepresentation of African-Americans in the jury pool." (11/01/19 Hr'g Tr. at 46).

The underrepresentation carried through to the appearance stage. Of the residents who responded, 43% of those from 50703 failed to appear while only 37% of all county residents failed to appear. (App. at 438). Individuals from zip code 50703 represented 17.1% of those receiving jury summonses, they made up 33.1% of those who failed to respond. (App. at 438).

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[9] On this point, Hannaford-Agor testified that the 33.1% non-response rate for residents of 50703 represented nearly double its proportion of summonses.

Altogether, these statistics show that the exclusion occurred at two points—the response and reporting stages.

Plain identified three deficient jury selection practices that contributed to the underrepresentation of African-Americans on jury panels: (1) the failure to update address lists when summons were returned "undeliverable;" (2) the failure in any effective way to follow up on summoned jurors for whom there was no response to the summons; and (3) the clear failure to hold accountable through enforcement proceedings those who had responded but failed to appear and report for jury service. (App. at 71). With respect to jurors who failed to respond, Hannaford-Agor testified that some portion of the summonses were delivered an address, but the person had moved and did not receive it. To reduce the failure to respond rates, courts can update their master juror lists through the United States Postal Service's National Change of Address ("NCOA") database. (11/01/19 Hr'g Tr. at 38-39). Regularly using the NCOA can reduce the number of undelivered summonses by 10% to 15%. (11/01/19 Hr'g Tr. at 38-39). Black Hawk County did not use the NCOA to update its master lister of

potential jurors. (11/01/19 Hr'g Tr. at 7-8). Hannaford-Agor testified that had Black Hawk County used the NCOA in 2015, it would have reduced the failure to respond rate for those residents who provided forwarding addresses. (11/01/19 at 40-41). Hannaford-Agor testified that "the single biggest predictor of whether a person fails to respond to a jury summons or appeal at trial was the expectation of what would happen if they did not." (11/01/19 Hr'g Tr. at 45). Prior to when Treloar became jury manager, Black Hawk County did not even attempt to sanction residents who failed to response or appear for jury service. (App. at 462). After Treloar took over, they only initiated an enforcement action after the third strike. Even then, the most severe sanction was a fine. (App. at 463). Hannaford-Agor identified a two-strikes approach to enforcement as a "best practice" for managing the rate of non-responses. (11/01/19 Hr'g Tr. at 38). According to her, "[c]ourts that have consistent and timely follow-up on nonresponsive and failure to appear rates typically have [rates that] are 24 to 46 percent lower than courts that do nothing." (11/01/19 Hr'g Tr. at 46).

In the end, all roads in the record lead to Black Hawk County's jury practices as the culprit. Hannaford-Agor's testimony about how these practices reduce response and appearance rates was unimpeached. In her opinion, "a court that fails to actually take [steps to do the] best practices to address [failure to appear] rates is actually engaging in negligent jury system management, *and that itself is systemic management*." (11/01/19 Hr'g Tr. at 49-40)(emphasis added). Tellingly, the State offered no contrary expert testimony in defense of the county's practices. Nor did the State even attempt to offer a non-systematic explanation for the underrepresentation of African-Americans. As a matter of deductive logic, jury management practices did not cause the exclusion of African-Americans, the only alternative explanation would be random chance. Yet, we know from the standard deviation test results that the persistent underrepresentation could not be the result of simple chance.

To recap Plain proved all of the following:

1. Underrepresentation of Black Hawk County African-Americans on jury panels was far from random;

2. The underrepresentation of African-Americans increased from the summons-stage to the reporting-stage through to the appearance-stage;

3. The response and appearance rates from the Black Hawk County zip code in which 50% of African-Americans reside were lower than the county as a whole; and

4. Black Hawk County used jury management practices that are known to reduce response and appearance rates.

This evidence is more than sufficient to provide "a plausible explanation of how the operation of the jury system resulted" in the exclusion of African-Americans. *Lilly*, 930 N.W.2d at 307. Indeed, the Court in *Duren* found similar evidence concerning jury management practices sufficient to show systematic underrepresentation:

> Finally, in order to establish a prima facie case, it was necessary for petitioner to show the underrepresentation of women, generally and on his venire, was due to their systematic exclusion in the jury-selection process. Petitioner's proof met this requirement. His undisputed demonstration that a large discrepancy occurred not just occasionally, but in every weekly venire for a period of nearly a year manifestly indicates that *the cause of underrepresentation was systematic – that is, inherent in the particular jury-selection process utilized.*

Duren, 439 U.S. at 366 (emphasis added). Accordingly, the district court's ruling must be reversed.

D. The Iowa Supreme Court should reconsider its bright-line rule that jury management practices can never satisfy the third part of the *Duren* test under the Sixth Amendment

A central refrain in *Plain* and its progeny is that the fair cross-section analysis must remain flexible to meet the realities of our criminal justice system. *See Plain*, 898 N.W.2d at 827 ("what constitutes a fair cross-section of the community is a fluid concept"); *see also Lilly*, 930 N.W.2d at 307 (expressing willingness to reconsider the persuasive value of best practices when "more data about what those practices are and their effectiveness"). For twenty-five years, the Iowa Supreme Court perpetuated an incorrect interpretation of federal law pertaining to fair cross-section claims without any scrutiny. *Id.* at 311 (Appel, J., concurring). The Court is about to embark on a similar path with its interpretation of the *Berghuis* decision.

In *Veal*, the Court interpreted *Berghuis* to hold that "run-of-the-mill jury management practices" cannot constitute systematic exclusion under the Sixth Amendment. *Veal*, 930 N.W.2d at 329.

This seemingly bright-line rule misreads *Berghuis*. As an initial matter, the Court overlooked the fact that *Berghuis* was an appeal from a habeas petition filed pursuant to 28 U.S.C. section 2254. *Berghuis*, 559 U.S. at 320. Accordingly, the question presented was whether the Michigan state courts' denial of Smith's fair cross-section claim "was contrary to or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). The Court in *Berghuis* did not decide *de novo* whether the host of jury management practices urged by Smith could prove systematic exclusion. Instead, constrained by AEDPA deference,[10] the Court simply concluded that its prior "decisions did not address factors of the kind Smith urge[d]." *Berghuis*, 559 U.S. at 321.

Setting aside the distinguishable procedural context in which *Berghuis* arose, the holding was not nearly as far-reaching as the *Veal* decisions suggest. The Michigan Supreme Court held

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[10] "While the term 'deference' is used nowhere in [section 2254(d)(1)), permitting state courts' decisions to stand regardless of whether a federal reviewing court would concur in them exemplifies deference." Monique Anne Gaylor, Note, *Postcards from the Bench: Federal Habeas Review of Unarticulated State Court Decisions*, 31 Hofstra L. Rev. 1263, 1267-78 (2003).

that Smith failed to satisfy *Duren's* third prong because he failed to demonstrate a causal link between the identified jury management practices and the underrepresentation of African-American jurors. *Michigan v. Smith*, 615 N.W.2d 1, 3 (Mich. 2000). In short, Smith "failed to carry his burden of proof in this regard." *Id.* The Court in *Berghuis* agreed, observing that "Smith's evidence gave the Michigan Supreme Court little reason to conclude that the [jury management practices] had a significantly adverse impact on the representation of African-Americans on Circuit Court venires." *Berghuis*, 559 U.S. at 331. As the Court explained, it takes more to make out a prima facie case than merely "pointing to a host of factors that, individually or in combination, *might* contribute to a group's underrepresentation. *Berghuis*, 559 U.S. at 332. These passages make clear that the *Berhuis* decision rests more on the quantum of Smith's proof (or lack thereof) rather than the type of proof.

The bright-line rule in *Veal* also is incompatible with the holding in *Duren*. "To show the 'systematic' cause of the underrepresentation, Duren pointed to Missouri's law exempting

women from jury service, *and to the manner in which Jackson County administered the exemption*." *Berghuis*, 559 U.S. at 319 (emphasis added)(explaining the *Duren* decision). Specifically, Duren challenged the practice of allowing women a second opportunity to claim an exemption at the summons stage as well as the presumption of exempting women who did not respond to the summons. *Duren*, 439 U.S. at 366-67. "Concluding that no significant state interest could justify Missouri's explicitly gender-based exemption, this Court held the law, *as implemented in Jackson County*, violative of the Sixth Amendment's fair-cross-section requirement." *Berghuis*, 559 U.S. at 319-20 (emphasis added). For these reasons, this Court should reconsider and overrule its holding in *Veal* that jury management practices cannot establish systematic underrepresentation under *Duren's* third prong.

CONCLUSION

For the reasons articulated herein, Kelvin Plain asks this Court to reverse his conviction and remand to the district court for a new trial.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's proof brief was $17.25, and that that amount has been paid in full by me.

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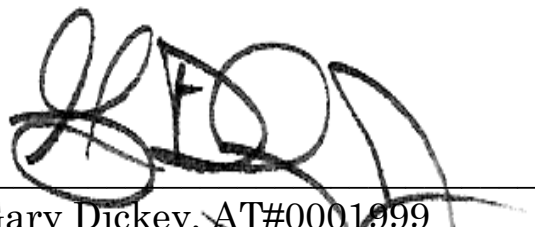

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