IN THE SUPREME COURT OF IOWA
Supreme Court No. 20–1000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KELVIN PLAIN, SR.
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
THE HONORABLE WILLIAM P. WEGMAN, JUDGE

APPELLEE'S BRIEF

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I. Did the trial court err in determining that Plain failed to establish that any level of underrepresentation of African-Americans on his jury pool (or over a relevant period of time) was not attributable to the process that was used to select and summon potential jurors?

Did the trial court err in determining that Plain failed to establish that representation of African-Americans on his jury pool (or over any period of time) was not unfair or unreasonable, relative to the proportion of the jury-eligible population of Black Hawk County that is African-American?

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ROUTING STATEMENT

Plain seeks retention. *See* Def's Br. at 8 (citing Iowa R. App. P. 6.1101(2)(f)). But he failed to establish that any underrepresentation was attributable to some feature of the jury selection process. And his Sixth Amendment challenge to these run-of-the-mill jury management processes was already foreclosed by *Veal*. Consequently, this appeal can be resolved by applying established legal principles from *Veal*, and transfer to the Iowa Court of Appeals is appropriate. *See* Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

Kelvin Plain, Sr., was convicted of first-degree harassment, an aggravated misdemeanor. On his direct appeal, Plain raised several challenges. One of them attacked the ruling on his Sixth Amendment challenge to his jury panel, where he alleged that African-Americans were underrepresented on that panel because of systematic exclusion, in violation of *Duren v. Missouri*. The Iowa Supreme Court rejected his other challenges, but remanded the case to allow Plain to develop the record and litigate that claim further, under new standards for establishing unfair or unreasonable representation. *See generally State v. Plain*, 898 N.W.2d 801 (Iowa 2017).

During the litigation on remand, the Iowa Supreme Court issued its decisions in *State v. Lilly*, 930 N.W.2d 293 (Iowa 2019) and *State v. Veal*, 930 N.W.2d 319 (Iowa 2019), which clarified the applicable standards for these types of challenges.

After discovery, briefing, and an evidentiary hearing, the court denied Plain's motion for new trial. It found that Plain did not show that the level of representation of African-Americans in his jury pool (or in Black Hawk County jury pools over a relevant time period) was unfair or unreasonable. *See* Ruling (7/10/20) at 5–7; App. 103. It also found that Plain failed to establish that any underrepresentation was caused by systematic exclusion, or that it was attributable to some feature of the juror selection process. *See id.* at 7–10; App. 105. Plain now appeals, challenging both components of that ruling.

Facts

The facts of the underlying offense are set out in the decision that resolved Plain's prior appeal. *See Plain*, 898 N.W.2d at 809–10. Those facts are not relevant to this appeal.

Relevant Course of Proceedings

On the morning of trial, Plain objected to the racial composition of the jury pool; he alleged a violation of the Sixth Amendment under

State v. Chidester and *Duren v. Missouri*. *See* TrialTr. 97:22–101:10; TrialTr. 104:6–106:25. Plain's claim was exclusively grounded in the Sixth Amendment. *See* TrialTr. 98:14–25. Under *Duren v. Missouri*, three elements must be proven to "establish a prima facie violation of the fair-cross-section requirement" of the Sixth Amendment:

> (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.

Duren v. Missouri, 439 U.S. 357, 364 (1979).

The trial court found that Plain had failed to prove that claim. *See* TrialTr. 100:11–101:10; TrialTr. 106:9–22. In its opinion on Plain's direct appeal, the Iowa Supreme Court did not disagree, but it slightly altered its approach to those Sixth Amendment claims. On prong #2, it overruled *State v. Jones*, which had required 10% absolute disparity. *See Plain*, 898 N.W.2d at 825–27 (referencing *State v. Jones*, 490 N.W.2d 787, 793 (Iowa 1992)). And on prong #3, it held that "[t]o the extent Plain did not meet his prima facie case" by demonstrating that African-American residents of Black Hawk County who were eligible for jury service were systematically excluded from the jury pool, that

failure of proof was excusable because "he was not provided access to the records" that such a showing would require. *See id.* at 828. Based on that, the Iowa Supreme Court "remand[ed] to the district court for development of the record on the Sixth Amendment challenge," with instructions to grant a new trial if Plain can demonstrate a violation of this Sixth Amendment right. *See id.* at 828–29.

On remand, the parties conducted depositions, and the court appointed Paula Hannaford-Agor as an expert. *See* Order (7/3/18); App. 21. Hannaford-Agor created a "geocoding" model to estimate the racial characteristics of the large percentage of respondents who did not mark their race on their juror questionnaires. *See* Ex. 109 at 1–2; App. 434; HearingTr. 31:24–32:16. Plain offered written reports from two other experts, with statistical analyses of the figures reported by the Black Hawk jury manager and by Hannaford-Agor. *See* Ex. 111 & 113 (Parsa); App. 446, 456; Ex. 127 (Vaughan); App. 127.

At the evidentiary hearing on remand, the Black Hawk County jury manager (Billie Treloar) testified that 100 potential jurors were drawn for Plain's jury pool; she sent a juror questionnaire by mail to the addresses she had for those 100 people. *See* HearingTr. 13:10–16. If any of those juror questionnaires were returned as undeliverable,

Treloar would look for an updated address for that person through "[t]he DOT website and . . . ICIS, Iowa Courts Information System." *See* HearingTr. 7:9–8:5; Ex. 114 at 14:7–14. And sometimes, the post office would return undeliverable mail with an updated address for that recipient. *See* HearingTr. 20:7–16. As a last resort, Treloar would mark that potential juror as "undeliverable." *See* HearingTr. 7:9–8:5.

One hundred people were drawn for Plain's jury pool, but only 56 completed questionnaires were returned (or completed in-person before trial, by potential jurors who appeared on the morning of trial but had not mailed back questionnaires). Some jurors who returned questionnaires subsequently failed to appear. Three respondents had their jury service postponed, before trial. *See* HearingTr. 13:17–14:9. A total of 49 eligible jurors appeared on the morning of Plain's trial. *See* HearingTr. 20:17–22:20.

The State was able to use available records to identify the race of some of the eligible jurors who returned questionnaires but did not mark their race, along with some additional people who were selected for jury service but did not return juror questionnaires. *See* HearingTr. 24:10–23; HearingTr. 55:25–57:25; Ex. AAA; App. 521. Out of the 100 eligible jurors who were selected, there were 84 whose race was

either self-reported or discovered through available records; of those, seven were African-American. *See* HearingTr. 55:25–57:25; Ex. AAA; App. 521. Of the 49 potential jurors who appeared for trial and were part of Plain's jury panel, only one of them was African-American. *See* HearingTr. 18:6–9; HearingTr. 55:25–57:25.

Beyond Plain's jury pool and jury panel, there were also records from other pools and panels. *See* Ex. 103; App. 114 (providing data on jury pools drawn during the six-month period before Plain's trial). Hannaford-Agor's report was based on a dataset of "individuals who were summoned for jury service during the period [from] November 4, 2014 through October 27, 2015." *See* Ex. 109 at 1; App. 434. Both of Plain's experts submitted written reports that analyzed data from periods that spanned either six months or one year. *See* Ex. 111 at 1–2; App. 446 (Parsa); Ex. 127 at 1–2; App. 474 (Vaughan).

The State noted that, in any analysis of the 84 people who were selected from source lists as potential jurors for Plain's jury pool and whose race was known, the level of African-American representation—7 out of 84, or 8.33%—was greater than the average expected level of African-American representation, based on the demographics of the population of eligible jurors in Black Hawk County. *See* Brief in

Resistance (11/30/19) at 2–3; App. 24. Plain argued that he had proven unfair and unreasonable levels of underrepresentation by standard deviation analysis using aggregated data, to establish that the observed levels of representation of African-Americans *over time* were low enough that it became extremely unlikely that such a pattern would occur by chance, as an ordinary by-product of random selection. *See* Brief in Support (12/2/19) at 18–41; App. 47–70; *accord* Ex. 111 at 4–6; App. 449; Ex. 127 at 3–5; App. 476. The State argued against using that aggregated data, because it "raises concerns about standing and actual injury as well as statistical rigor." *See* Brief in Resistance (11/30/19) at 3–4; App. 25. The district court found that, even if it used the aggregated data that Hannaford-Agor analyzed, Plain still failed to establish that representation levels were unreasonably low for a group comprising 7.5% of the jury-eligible population, so he had failed to establish prong #2. *See* Ruling (7/10/20) at 5–7; App. 103.

To establish prong #3, Plain needed to "identify some practice or combination of practices that led to the underrepresentation, and it must be something other than the 'laundry list' the Supreme Court declined to condemn in *Berghuis*." *See Veal*, 930 N.W.2d at 329–30 (citing *Berghuis v. Smith*, 559 U.S. 314, 332 (2010)). Hannaford-Agor

found that African-Americans were selected to receive summons for jury service at a rate that actually *exceeded* their prevalence among all eligible jurors in Black Hawk County. *See* Ex. 109 at 9–12; App. 442 (determining that, in both geocoding models, "African-Americans are summoned for jury service at slightly higher rates relative to their representation in the jury-eligible community"). However, she also found that African-American representation dropped off among the group of people who returned questionnaires, and fell further among the group of people who appeared for jury service. *See id.* at 10–12; App. 443. In terms of causation, Hannaford-Agor determined that the decrease in observed levels of African-American representation "from summoning through reporting is likely due to disproportionately high nonresponse, undeliverable, and failure-to-appear rates" among *all* residents in one specific zip code (50703). *See id.* at 11–12; App. 444. A map in her report shows that zip code 50703 is in Waterloo.

At the hearing, Hannaford-Agor explained that her model used "geocoding," which is a process that fills in race for respondents who did not mark their race by "inferring race based on zip code." *See* HearingTr. 34:21–35:2; HearingTr. 31:17–32:25. The zip codes that corresponded to Waterloo—50701, 50702, and 50703—accounted for

87% of all African-Americans in Black Hawk County. And one of those three zip codes—50703—accounted for 57% of all African-Americans who lived in Black Hawk County. *See* HearingTr. 31:17–32:25; Ex. 109 at 4; App. 437. The non-response rate for juror questionnaires that were sent to zip code 50703 was about "double" the non-response rate for other zip codes in Black Hawk County. *See* HearingTr. 33:1–35:2; Ex. 109 at 4–5; App. 437 (noting that 50703 was the only zip code with a statistically significant difference in non-response rates, and it was 33.1%—which was "nearly double" the overall rate of 17.1%).

On prong #3, Plain alleged that three jury management practices had contributed to systematic exclusion of African-Americans:

> (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 ("failure to respond"); and
>
> (3) the clear failure to hold accountable through enforcement proceedings those who had responded but failed to appear and report for jury service . . . .

See Brief in Support (12/2/19) at 42; App. 71. But Plain recognized that the Iowa Supreme Court "characterized these as 'run-of-the-mill jury management practices.'" *See id.*; App. 71 (quoting either *Veal*, 930 N.W.2d at 329, or *Lilly*, 930 N.W.2d at 308). That foreclosed any possibility of success on this Sixth Amendment challenge. *See Veal*,

930 N.W.2d at 329–30 (citing *Berghuis*, 559 U.S. at 332); *Plain*, 898 N.W.2d at 828–29 (limiting remand to Sixth Amendment claim).

Even so, the district court ruled on each claim about causation. On Plain's claim about "undeliverables," it noted that Hannaford-Agor concluded "undeliverable summons were not statistically different and were actually lower in Black Hawk County, including zip code 50703, than nationwide." *See* Ruling (7/10/20) at 8; App. 106; HearingTr. 40:25–41:8; HearingTr. 42:24–43:16; HearingTr. 52:9–53:1 (noting national average undeliverable rate is "about 15 percent," compared to 10.5% for all of Black Hawk County on average, and 11.9% for 50703). That relative parity across zip codes with wildly varying demographics meant "undeliverables" did not have any racially disparate impact.

On Plain's claim that alleged that Black Hawk County had been causing underrepresentation by failing follow up with potential jurors who received a jury summons but never responded, the court noted that the jury manager had testified that she *did* follow up by sending a second mailing. *See* Ruling (7/10/20) at 8; App. 106. She had testified:

> I mail out the summonses five weeks before their date to report. The summons indicates that they should mail their questionnaire back within seven days. And after two weeks of having mailed them out, I mail them a reminder letter if — to all the people who haven't returned their questionnaires.

See Ex. 114 at 23:25–24:10. Those procedures already mirrored the recommendations that Hannaford-Agor described. *See* HearingTr. 53:9–16; *see also* HearingTr. 38:11–16 ("Best practices for follow-up involve reaching out and very affirmatively letting the person know that you were supposed to do this thing, you didn't do it, we noticed, and here's your second chance, but you need to do that.").

On Plain's claim that the Black Hawk County jury manager had been systematically excluding African-Americans from participating in jury service by failing to impose any punitive consequences on the potential jurors who failed to respond and failed to appear, the court concluded that Black Hawk County already had a policy of referring "repeat no-shows" to the court for issuance of an order to appear for a contempt hearing. *See* Ruling (7/10/20) at 9–10; App. 107. The court noted that the threshold for triggering that response used to be set at *three* failures to respond or appear, and it had recently been lowered to *two* failures to respond or appear. *See* Ruling (7/10/20) at 9; App. 107; *see also* HearingTr. 8:18–11:20; HearingTr. 23:9–24:9. Even so, that meant Black Hawk County residents would already have known that a failure to respond or failure to appear might carry penalties. *See* Ruling (7/10/20) at 9; App. 107. And the court noted that data from

jury pools that were summoned after that 2018 policy change did not show much improvement in representation levels on jury panels, so any claim of a causal link would seem to be false. *See id.*; App. 107.

After dismissing Plain's claims about potential causation as "largely based on mere speculation," the district court noted that "Hannaford-Agor has generally found that socioeconomic status is the primary cause of individuals failing to respond or report." *See id.* at 10; App. 108. That was accurate; Hannaford-Agor testified that research in this area had shown "if you had someone who was a lower socioeconomic white person and a lower socioeconomic black person, they would be equally likely to fail to appear or fail to respond." *See* HearingTr. 35:3–36:16; *accord* HearingTr. 50:18–51:12. The court held that the underrepresentation that Hannaford-Agor found was attributable to disparities in socioeconomic status among residents that were "beyond the control of the Court" and not attributable to features of the juror selection process or jury management system, and it held that this did not qualify as systematic exclusion. *See* Ruling (7/10/20) at 10; App. 108 (quoting Ex. 130 at 5; App. 483).

Additional facts will be discussed when relevant.

ARGUMENT

I. The district court did not err in rejecting Plain's claim.

Preservation of Error

Error was preserved for any challenges and arguments that Plain raised and that the district court rejected in its ruling. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). This means that he may not advance new theories of systematic exclusion on appeal—he can only argue that the district court erred in rejecting the theories that he advanced below. *See* Brief in Support (12/2/19) at 41–66; App. 70; Ruling (7/10/20) at 8–10; App. 106. The State will discuss Plain's attempts to raise a new claim under the Iowa Constitution in the first section of the argument. *See* Def's Br. at 16.

For the State, error is preserved to defend the basis for the district court's ruling, and to renew arguments that were urged below and offered as alternative grounds for denying Plain's challenge. *See King v. State*, 818 N.W.2d 1, 11–12 (Iowa 2012); *DeVoss v. State*, 648 N.W.2d 56, 61–63 (Iowa 2002).

Standard of Review

Review of a ruling on a fair-cross-section challenge is de novo. *See Lilly*, 930 N.W.2d at 298 (quoting *Plain*, 898 N.W.2d at 810).

Merits

Plain's claim fails on both prong #2 and prong #3. Either is an independently sufficient basis for affirming the district court's ruling.

A. Plain could not raise and cannot renew a separate challenge under Article I, Section 10 of the Iowa Constitution. This remand was limited to his Sixth Amendment claim that was preserved by timely pre-trial objection and renewed on direct appeal.

Plain argues that he preserved error on a challenge under Article I, Section 10 of the Iowa Constitution. *See* Def's Br. at 16. But his pre-trial challenge to the jury panel was exclusively based upon the Sixth Amendment—he did not mention Article I, Section 10, nor the Iowa Constitution. *See* TrialTr. 97:22–101:10; TrialTr. 104:6–106:25. On appeal, the Iowa Supreme Court did not consider any fair-cross-section challenge under the Iowa Constitution—it only considered the preserved Sixth Amendment claim. *See Plain*, 898 N.W.2d at 821–29; *accord Veal*, 930 N.W.2d at 328 n.5 (holding error was not preserved for a claim under Article I, Section 10 when "in the proceedings below, Veal cited *only* the Sixth Amendment, not article I, section 10"). And it specifically directed the court, on remand, to "determine whether Plain's right to a representative jury under the Sixth Amendment was violated." *See Plain*, 898 N.W.2d at 829.

Considering any claim that alleged a violation of Article I, Section 10 would exceed the scope of the remand order and would thus exceed the district court's limited authority in that context.

> When an appellate court remands a case to a trial court for some stated further proceeding, the nature and extent of that proceeding are circumscribed. The authority of the court on remand is limited to the matters specified by the appellate court. *Kuhlmann v. Persinger*, 154 N.W.2d 860, 864 (Iowa 1967). Put another way, the trial court has no authority to act on matters outside the appellate court's mandate.

Winnebago Industries v. Smith, 548 N.W.2d 582, 584 (Iowa 1996).

Plain argues that the district court, on remand, *did* analyze his claim under Article I, Section 10. *See* Def's Br. at 16 (citing Ruling (7/10/20) at 7; App. 105). He cites the district court's observation that he had shown sufficient underrepresentation to carry prong #2 under *Lilly*'s standard for Article 1, Section 10, but not under *Veal*'s standard for the Sixth Amendment. *See* Ruling (7/10/20) at 7; App. 105. But Plain's attempt to infer that this meant that the district court ruled on the merits of an Article I, Section 10 claim is foreclosed by the rest of the written ruling, which ended with this:

> On remand, the court was required to determine whether the racial composition of the jury pool violated Plain's right to a fair trial under the 6th Amendment to the United States Constitution. The court finds it did not.

Ruling (7/10/20) at 11; App. 109. This shows that the district court recognized and respected the constraints on the scope of its authority on this limited remand—and, accordingly, its written order ends there, without ruling on any analogous claim under the Iowa Constitution. Assuming that Plain *could* have raised an Article I, Section 10 claim on remand, the lack of a ruling on such a claim means that error was not preserved to raise it on appeal. *See Lamasters*, 821 N.W.2d at 864; *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

If the district court had ruled on a challenge under Article I, Section 10 during this limited remand, it would still be too late to preserve error. Likewise, Plain's argument that the State waived error preservation by not raising it (or by responding to unpreserved claims on their merits) is unavailing. *See* Def's Br. at 16. In *Williams*, the Iowa Supreme Court held that error was not preserved for a claim under Article I, Section 10 because it was not raised and ruled upon before trial—and it did not matter that the Article I, Section 10 claim *was* raised in a motion for new trial and was subsequently ruled upon, after the verdict but before entering judgment. *See State v. Williams*, 929 N.W.2d 621, 629 n.1 (Iowa 2019). That post-verdict ruling did not preserve error because it was already too late to raise that challenge.

> It is true that the district court referred to the Iowa Constitution . . . in denying the motion for new trial at the time of sentencing. However, a motion for new trial is too late to raise a constitutional challenge to the jury panel. *See State v. Johnson*, 476 N.W.2d 330, 333–34 (Iowa 1991) (finding that a constitutional objection to the jury panel was waived when first asserted in a postverdict motion for new trial).
>
> > A post-verdict motion challenging the jury panel simply comes too late to comply with the policies behind the preservation requirement. At the time of defendant's motion, the only corrective action the trial court could have taken would have been to sustain the motion for new trial and conduct a second trial in front of a second jury.
>
> *Id.* at 334; . . . . Accordingly, we hold that Williams waived any article I, section 10 challenge to the jury panel.

Williams, 929 N.W.2d at 629 n.1. And *Williams* also concluded with a similar limited-remand order, "remand[ing] to give Williams a further opportunity to develop his Sixth Amendment fair-cross-section claim." *See id.* at 630. Like Williams, Plain did not raise a challenge under Article I, Section 10 before trial. Unlike Williams, Plain did not raise such a challenge through a pre-judgment motion for new trial or on direct appeal, either. Williams was already too late—so Plain's claim, which was raised even later, cannot possibly be timely. Moreover, it does not matter if the State challenged the timeliness of the untimely post-verdict claim—that was not required in *Williams* or in *Johnson*. *See Williams*, 929 N.W.2d at 629 n.1; *Johnson*, 476 N.W.2d at 332–34

(holding that post-trial challenge to jury panel was untimely and did not preserve error for challenges on appeal, without any need to assess whether error was preserved for arguments that a post-trial challenge was too untimely to preserve error); *accord Top of Iowa Co-op v. Sime Farms, Inc.*, 608 N.W.2d 454, 470 (Iowa 2000) ("In view of the range of interests protected by our error preservation rules, this court will consider on appeal whether error was preserved despite the opposing party's omission in not raising this issue at trial or on appeal.").

To summarize, any claim under Article I, Section 10 was outside the scope of the limited remand order. The district court recognized that, and it only ruled on Plain's Sixth Amendment claim. *See* Ruling (7/10/20) at 11; App. 109. That means error was not preserved for this Court to reach claims under Article I, Section 10 by any ruling on the merits of such a claim. *See Lamasters*, 821 N.W.2d at 564. And even without the clear limitation in that remand order, any claim under Article I, Section 10 that Plain raised for the first time at this remand hearing would have already been untimely—so even if the district court *had* reached and ruled upon the merits of such a claim, this Court would still reject that claim as untimely and unpreserved. *See Williams*, 929 N.W.2d at 629 n.1; *Johnson*, 476 N.W.2d at 334.

B. The district court did not err in finding that Plain failed to establish systematic exclusion for his Sixth Amendment challenge.

Plain cannot show that the district court erred in finding that he failed to prove systematic exclusion, as required by *Veal* and *Duren*.

1. Both *Veal* and *Lilly* rejected the premise that underrepresentation over time, standing alone, can prove systematic exclusion.

On prong #3, Plain starts with a familiar argument: "the results of the standard deviation test alone prove that underrepresentation of African-Americans on Black Hawk County juries was not random" and therefore establishes systematic exclusion. *See* Def's Br. at 33–34. But it is not enough to prove that African-American potential jurors were underrepresented over time. There may be other explanations for that phenomenon that are unattributable to the system used to select and summon eligible jurors. Plain is incorrect to argue that, "as a matter of deductive logic," the only two possible explanations for observed underrepresentation of African-Americans on jury pools over time are (1) systematic exclusion that is attributable to some feature of the jury management process, and (2) random chance. *See* Def's Br. at 38–39. Plain's false dichotomy ignores every other conceivable explanation, including the only explanation that Hannaford-Agor suggested: that

African-Americans are overrepresented among jury-eligible residents with lower incomes, who are (in turn) disproportionately likely to *choose* not to respond to a summons or *choose* not to appear for trial. *See* HearingTr. 35:17–36:14; Ex. 109 at 6; App. 439. Moreover, the entire premise of a "distinctive group" is that belonging to that group is associated with "a common thread or basic similarity in attitude, ideas, or experience" and "a community of interest among members of the group" that is sufficiently unique that "the group's interests cannot be adequately represented if the group is excluded from the jury selection process." *See Ford v. Seabold*, 841 F.2d 677, 681–82 (6th Cir. 1988). Plain cannot allege that there is *something* unique about the African-American experience that makes his trial unfair if none of his potential jurors can bring those experiences to the table, and then simultaneously argue that there is *nothing* unique about the lived experience of African-Americans that could impact the way that they make decisions about whether to respond to a jury summons or whether to appear for jury service (which is an implied premise of his deductive logic). Proof of causation is always required for prong #3—a showing of underrepresentation over time is just "not enough." *See Veal*, 930 N.W.2d at 330 (citing *Lilly*, 930 N.W.2d at 305–08).

Plain's attempts to change the law on this point would fail, even if this Court were writing on a blank slate—and it is not. Plain's claim is also foreclosed by law of the case. The opinion on Plain's last appeal included an unfortunate quotation from a student note, which was sometimes misconstrued as a new holding about the burden of proof on prong #3: that future defendants only had to establish a pattern of underrepresentation, and then simply assert that "it stands to reason that some aspect of the jury-selection procedure is causing that underrepresentation." *See Plain*, 898 N.W.2d at 824 (quoting David M. Coriell, Note, *An (Un)fair Cross Section: How the Application of Duren Undermines the Jury*, 100 CORNELL L. REV. 463, 481 (2015)). But in *Lilly*, the Iowa Supreme Court rejected that characterization of its holding in *Plain*, because that opinion had "repeatedly noted that the defendant had the burden to establish systematic exclusion, not merely underrepresentation." *See Lilly*, 930 N.W.2d at 306 n.8 (citing *Plain*, 898 N.W.2d at 822–24). Therefore, Plain's call to abandon the requirement that he must prove causation for systematic exclusion on prong #3 is already foreclosed by law of the case. *See State v. Ragland*, 812 N.W.2d 654, 658 (Iowa 2012) (quoting *Bahl v. City of Asbury*, 725 N.W.2d 317, 321 (Iowa 2006)) ("[A]n appellate decision becomes the

law of the case and is controlling on both the trial court and on any further appeals in the same case."); *accord State v. Grosvenor*, 402 N.W.2d 402, 405 (Iowa 1987). Even if that prior holding was wrong on the merits, it would still be binding in this case. *See State v. Cromer*, 765 N.W.2d 1, 7 n.4 (Iowa 2009) (noting that a ruling in prior appeal was incorrect, but that "[n]evertheless, this ruling became the law of the case on remand, whether the ruling was right or wrong").

Plain cannot sidestep the burden of establishing a causal link between some feature of the jury management process and patterns of underrepresentation over time. *See Veal*, 930 N.W.2d at 330.

2. *Veal* held that a claim of "systematic negligence" arising from run-of-the-mill jury management practices cannot establish systematic exclusion for a challenge under the Sixth Amendment.

Plain targets run-of-the-mill jury management practices like sending only one round of failure-to-respond letters or declining to refer every failure-to-appear to the court for contempt proceedings. *See* Def's Br. at 36–38. But because he is limited to a challenge under the Sixth Amendment, *Veal* applies—which means that Plain's claims that the observed underrepresentation arose from a failure to update "run-of-the-mill jury management practices" and adopt new practices would not establish systematic exclusion, even if entirely correct. *See*

Veal, 930 N.W.2d at 329–30. *Veal* held that, for a Sixth Amendment fair cross-section claim, "[t]he defendant must identify some practice or combination of practices that led to the underrepresentation, and it must be something other than the 'laundry list' the Supreme Court declined to condemn in *Berghuis*." *See id.* at 330 (quoting *Berghuis v. Smith*, 559 U.S. 314, 332 (2010)). That laundry list included:

> [T]he County's practice of excusing people who merely alleged hardship or simply failed to show up for jury service, its reliance on mail notices, its failure to follow up on nonresponses, its use of residential addresses at least 15 months old, and the refusal of Kent County police to enforce court orders for the appearance of prospective jurors.

See id. at 329 (quoting *Berghuis*, 559 U.S. at 332). Most of Plain's theories of systematic exclusion are identical to items on that list, including his arguments that Black Hawk County jury management caused underrepresentation by failing to follow up on non-responses and/or by failing to ensure that potential jurors faced consequences for failing to respond or failing to appear. *See* Def's Br. at 36–38. And his theory about high rates of "undeliverables" is analogous to complaints about "reliance on mail notices" or "use of residential addresses at least 15 months old." *See Veal*, 830 N.W.2d at 829 (quoting *Berghuis*, 559 U.S. at 332). Plain recognizes that holding is fatal to his challenge, so he argues that it should be overruled. *See* Def's Br. at 40–44.

Plain argues that this limitation misreads *Berghuis* and *Duren*. *See* Def's Br. at 40–44. But *Duren* did not involve a run-of-the-mill jury management practice—it dealt with a rule that, by express terms, funneled potential jurors out of the system on the basis of gender. *See Duren*, 439 U.S. at 306–61; *accord id.* at 367 & n.25 (explaining that existence of automatic exemption for women meant "[t]he resulting disproportionate and consistent exclusion from women" at all stages after the initial canvass "was quite obviously" attributable to that rule, especially when typical exemptions did not produce similar disparity on master jury wheel in the federal district court for the same area). *Berghuis* held that the Michigan Supreme Court had not applied an unreasonable view of *Duren* when it held that "the influence of social and economic factors on juror participation does not demonstrate a systematic exclusion of African-Americans." *See People v. Smith*, 615 N.W.2d 1, 3 (Mich. 2000); *accord Berghuis*, 559 U.S. at 332–33. And it cautioned against inferring that "jury-selection-process features of the kind on Smith's list can give rise to a fair-cross-section claim." *See Berghuis*, 559 U.S. at 333. After all, the Court had already recognized "broad discretion in the States" to prescribe juror qualifications and implement their own jury management processes. *See id.* (quoting

Taylor v. Louisiana, 419 U.S. 522, 537–38 (1975)). *Veal* was correct to read *Duren* and *Berghuis* to bar Sixth Amendment challenges that allege systematic exclusion arising out of second-order consequences of facially neutral "run-of-the-mill jury management practices." *See Veal*, 930 N.W.2d at 329–30 (quoting *Berghuis*, 559 U.S. at 332). And as Justice McDonald's opinion in *Lilly* observed, courts in many other jurisdictions have reached a similar conclusion. *See Lilly*, 930 N.W.2d at 318 (McDonald, J., concurring in part) (collecting cases). Neither the majority opinion in *Lilly*, nor Plain, nor amicus NAACP identify any countervailing authority that could support Plain's call to overrule that holding in *Veal*. Because Plain's theories of systematic exclusion cannot support a Sixth Amendment challenge under *Veal*, they can be rejected without further analysis.

3. Even under *Lilly*, this record does not establish any causal link between underrepresentation and systematic negligence in jury management.

Plain repeatedly attempts to re-define *Lilly*'s explanation of the burden of proof on prong #3 to require only a "plausible explanation" of how a jury management practice causes underrepresentation, as if *Lilly* held that ordinary notice pleading would be enough to invalidate every jury trial in Black Hawk County. *See* Def's Br. at 33, 39. But a

"plausible explanation" is never a *sufficient* condition for proving a systematic-negligence claim—rather, both *Lilly* and Hannaford-Agor described it as one of several *necessary* parts of this unique theory:

> 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 (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)). And *Lilly* repeated that, to prove a claim of systematic negligence, "the defendant must *prove* that the practice has *caused* systematic underrepresentation." *See id.* at 308 (emphasis added). Even under this rubric, Plain's challenge would fail, because the record *forecloses* any proof of causation for his theories.

Plain is correct that he was able to identify the specific stages of the jury management process where African-American representation levels fell below expectations, based on Hannaford-Agor's report:

TABLE 1 Hannaford-Agor's findings on levels of African-American representation	Model 1 results	Model 1 compared to 7.5%	Model 2 results	Model 2 compared to 7.5%
Summoning stage	8.6%	+1.1%	8.0%	+0.5%
Qualified juror stage	7.7%	+0.2%	6.7%	-0.8%
Reporting stage	7.4%	-0.1%	6.0%	-1.5%

See Ex. 109 at 10; App. 443.[1] Usually, it is impossible to categorize non-respondents by race. But here, the geocoding analysis offered a range of possible distributions. Model 1 "assigns probabilities for race . . . to all records in the Jury Pool and Jury Panel Datasets based on the ZCTA [zip code] associated with each record." *See* Ex. 109 at 5. Model 2 does the same thing, but it only assigns race for respondents whose race was not otherwise known. For all respondents whose race *was* known from their questionnaire responses (or other sources), it uses that data instead, and it does not include persons of known race in calculating a probabilistic distribution of demographic and racial characteristics among *other* potential respondents. *See* Ex. 109 at 5;

[1] Plain adopts that 7.5% figure for the jury-eligible population. *See* Def's Br. at 23 (citing Ex. 127 at 2, ¶9–11; App. 475) ("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. 438; *accord* Ex. 109 at 8; App. 441 (explaining that Model 2 "estimates the racial and ethnic composition of the jury pool only for jurors whose race or ethnicity was not reported on the qualification questionnaire; racial and ethnic data for jurors who provided their race/ethnic self-identification were included as is"). The differences between these models will be relevant later. For now, it is enough to note that *both* models show that African-American representation among potential jurors whose names were drawn from the master list *exceeded* 7.5%, which was the level of African-American representation among all jury-eligible residents of Black Hawk County. *See* Ex. 109 at 10; App. 443. That foreclosed any claim that systematic exclusion was caused by underinclusive source lists, or any other mechanism "at the summoning stage." *See* Ruling (7/10/20) at 6; App. 104; *accord* Ex. 109 at 9–12; App. 442 (explaining that, in both geocoding models, "African-Americans are summoned for jury service at slightly higher rates relative to their representation in the jury-eligible community").

Hannaford-Agor only found apparent underrepresentation in the responding stage (when potential jurors returned questionnaires) and in the reporting stage (when potential jurors appeared for trial). *See* Ex. 109 at 10; App. 443. But those findings correlated with an

important data point: declining representation of African-Americans in those stages was correlated with declining participation on the part of *all* potential jurors who resided in zip code 50703:

> Across all status categories and ZCTAs, only one instance of a statistically significant anomalous proportion occurs—specifically, the rate at which individuals in ZCTA 50703 (Waterloo) fail to respond to the jury summons is nearly double the summoning rate (33.1% compared to 17.1%), resulting in a smaller proportion of jurors who were deemed qualified and available for service (Responded). A similar decrease occurs in the proportion of jurors who reported for service from ZCTA 50703, suggesting that jurors from that ZCTA are more likely to fail to appear or to be excused from appearing. Because more than half of the African-American population in Black Hawk County resides in ZCTA 50703, the decrease in the proportion of individuals from this ZCTA from summoning to qualified and available (Responded), and from qualified and available (Responded) to Reported may coincide with a commensurate decrease in African-American representation in the jury pool.

Ex. 109 at 4–5; App. 437. That effect seemed to be limited to 50703, even though there were three other zip codes in Black Hawk County where at least 4% of jury-eligible residents were African-American—specifically 50702 (8.0%), 50707 (6.2%), and 50701 (4.8%). *See* Ex. 109 at 4–5 & tbl. 3. For those zip codes, there was no similar drop-off in response rates. The group of potential jurors who appeared for trial reflected a disproportionate drop-off in participation from 50703, but there was no similar drop-off for residents of 50702, 50707, or 50701.

See Ex. 109 at 5 & tbl 3; App. 438. If a drop-off in participation at the response stage and appearance stage had been caused by some feature of the process with a unique effect on African-American respondents, there would be similar (albeit smaller) effects on participation rates for other zip codes where some significant portion of eligible residents were African-American, and they would not follow the same patterns as participation rates from the seven Black Hawk County zip codes where none of the jury-eligible residents were African-American (or the two zip codes where between 1% and 2% of jury-eligible residents were African-American). *See* Ex. 109 at 4–5 & tbl 2–3; App. 437. But that is not what the data showed—and, accordingly, Hannaford-Agor determined it was "specifically the failure to respond rate in 50703" that was "reducing the representation of African-Americans in the countywide jury pool." *See* HearingTr. 36:15–37:1; *accord* Ex. 109 at 10; App. 443 (finding that "the decrease in Black/African-American representation" during stages of the process that require some action from potential jurors "is likely due to the disproportionately high nonresponse and failure-to-appear rates for ZCTA 50703").

That drop-off in participation from 50703 was not attributable to undeliverable mail. The rate of undeliverables for 50703 was only

slightly above average for Black Hawk County; it was still far below the national average, and it came nowhere close to explaining 50703's disproportionate failure-to-respond rate. *See* Ex. 109 at 5 & tbl. 3; App. 438. Hannaford-Agor testified that the undeliverable rate for 50703 was only 11.9%. When she was asked about the 19% figure in table 3, she explained that it meant that undeliverables from 50703 accounted for 19% of Black Hawk County's undeliverable summons. *See* HearingTr. 52:9–53:1. But 50703 also accounted for 17.1% of all people who were drawn for jury service. *See* Ex. 109 at 5 & tbl. 3; App. 438. Hannaford-Agor analyzed that data, and she concluded that "the proportion of summonses . . . returned undeliverable from that zip code was not statistically different from the proportion of people summoned" who were from that zip code. *See* HearingTr. 47:15–23; *accord* HearingTr. 42:24–43:16.[2] Whatever was disproportionately

[2] Hannaford-Agor did note that one study using juror data from St. Louis had suggested a different kind of "undeliverable" may exist, where mail is delivered to a listed address but the intended recipient cannot be found there. *See* HearingTr. 43:17–44:19. But she stated that it was not possible to determine whether that was happening in 50703 or anywhere else in Black Hawk County, from the data she had. *See* HearingTr. 44:20–45:2. In any event, if the resident moved out of Black Hawk County or passed away, that person should not be counted as an eligible juror to begin with, and failure to deliver a summons to that person cannot help show that the jury management process is excluding or underrepresenting people who *were* eligible residents.

reducing participation among potential jurors in zip code 50703, it was happening after they were selected for jury service and after the jury summons and questionnaire arrived at their listed address.

At that point, the argument devolves into speculation about *why* eligible jurors in 50703 failed to respond and failed to appear at disproportionately high rates. No clear answer emerges from this record of adjudicative facts. There is no evidence of any difference in policy or practice towards residents of this particular zip code. While it is true that potential jurors who did respond or did not appear were not hit with automatic fines or jail time, that was also the case for *all* residents of Black Hawk County (not just residents of 50703). Nor is there a factual record to support other claims about the population of 50703, beyond racial demographics—that population may differ from other Black Hawk County populations in specific ways that impact willingness to participate in jury service (which might be correlated with race, or might not). Hannaford-Agor suggested one possibility that may have an impact on response rates:

Any person whose mailing is a "phantom undeliverable" should not have been included in calculating the eligible population, and failing to include those people cannot invalidate the resulting jury pool.

> I did not specifically look at socioeconomic factors in my analysis. But to the extent that, speaking more generally nationally and in other studies that I've done, there is a strong correlation between minority status of being African-American or being Hispanic and lower socioeconomic status, because those are highly correlated together that it's the lower socioeconomics might — my, you know, my best judgment would be the lower socioeconomic status of persons living at that zip code is probably contributing to the failure to respond and failure to appear rate.

See HearingTr. 35:17–36:7; *accord* Ex. 109 at 6; App. 439 (observing that there are non-random patterns in data on "the racial composition of jury pools," and giving this example: "empirical research suggests that nonresponse, undeliverable, excusal and failure-to-appear rates are highly correlated with socioeconomic status"). That was just an assumption without support in the record—Plain did not offer any evidence as to average wealth/income levels by zip code (or by race). But assuming that is correct, it still would not establish a causal link between any particular jury management practice (or any feature of the juror-selection process) and uniquely low response rates from eligible jurors in zip codes with those particular characteristics. *See State v. Fetters*, 562 N.W.2d 770, 776–77 (Iowa Ct. App. 1997) (noting that systematic exclusion requires proof that underrepresentation was attributable to "the particular jury-selection process utilized").

Hannaford-Agor's report found that the observed pattern of underrepresentation of African-Americans on Black Hawk County jury pools was not attributable to inadequate source lists and was not caused by undeliverable mail. Instead, it was specifically attributable to lower response rates from zip code 50703, which happened to have a much higher concentration of African-American residents. But the other Black Hawk County zip codes with African-American residents did not show commensurate drops in their overall response rates. Hannaford-Agor's best guess was that zip code 50703 probably had a greater concentration of low-income residents. Even if true, it would describe a potential correlation, at best. Plain needed to establish that some feature of Black Hawk County's jury management process was *causing* underrepresentation of African-Americans on its jury pools. *See Lilly*, 930 N.W.2d at 308; *accord id.* at 306 n.8 (discussing *Plain*, 898 N.W.2d at 822–24). Plain failed to make that showing. As such, even if Plain could raise a challenge under *Lilly*, it would still fail.

4. In 2015, Black Hawk County was already using the single most effective method for reducing nonresponse rates: sending follow-up letters for every failure to respond and failure to appear.

The district court noted that Plain's systematic-exclusion theory was challenging a failure to do something that, in fact, had been done:

> Plain cites to page 15 of the deposition of [jury manager Billie Treloar] to state that "[t]hose who failed to respond and whose summons had been returned 'undeliverable' were noted but were not the subject of further action." (Defendant's brief, 12/2/19, page 55) (emphasis added). This is a misstatement of Treloar's testimony in regard to those who failed to respond. Treloar's testimony in relation to those who failed to respond was clear. Treloar sent out jury summons five weeks before the trial date. For those who had not responded, she would send out a second notice three weeks before the trial date.

Ruling (7/10/20) at 8; App. 106 (citing Ex. 114 at 24:4–10).

Plain did attempt to recalibrate his challenge to allege a failure to follow up with potential jurors who *did* send back a questionnaire, then failed to appear. But in her deposition (which was taken in 2017, before implementation of new practices in December 2018), Treloar described what she did for all potential jurors who failed to appear:

> **Q**: Looking at your handbook, the people who don't check in, then, do they go into some special pile?
>
> **A**: Yes. I go through the list of all the people who didn't check in, make sure I have a correct address for them. If I do, then they get a failure to appear letter.
>
> **Q**: And you know that you've got a correct address because there was no returned mail. Is that how you know?
>
> **A**: No. I go through the list — if they responded to the questionnaire, they get a failure to appear. If there's a red line through their name and they just never responded to the questionnaire, I'll go look for a new address. And if it's correct, they get a failure to appear letter. If it's not, then I will update their address, reschedule them, put them into a different pool.

Ex. 114 at 17:6–24. Treloar was the jury manager at the time of Plain's trial, and she was following this procedure. *See* Ex. 114 at 17:25–19:1. She was already mailing follow-ups to potential jurors who failed to respond, and sending failure-to-appear letters to any potential jurors who failed to appear (except those who never got a jury summons, due to an incorrect mailing address). *See* HearingTr. 8:18–24; *accord* Ex. 114 at 17:6–24, 23:25–24:10.

Plain's argument on appeal is that Black Hawk County made significant improvements in African-American representation levels since December 2018, by switching to a new slate of practices where potential jurors who failed to appear or failed to respond are set for a contempt hearing after *two* consecutive failures, instead of three. *See* Def's Br. at 38–40. But the only direct result of that was an increase in the number of hearings and penalties for contempt. *See* HearingTr. 23:14–24:9. Hannaford-Agor was not familiar with the practices that Black Hawk County was using in 2015—but she testified about what the prevailing research on jury management practices had shown:

> What the National Center for State Courts recommends in terms of best practices is that . . . within two to three weeks after the person should have responded to the jury service or should have appeared for jury service, if they're been given a date, that the court follow up with a notice or a second summons very explicitly pointing out

> that the person was supposed to have responded or was supposed to have appeared, that they have not done so, that these are the — you know, listing out the penalties for failure to respond or failure to appear and directing the person to comply with whatever directions there are, . . . but essentially the follow-up. Best practices for follow-up involve reaching our and very affirmatively letting the person know that you were supposed to do this thing, you didn't do it, we noticed, and here's your second chance, but you need to do that.

See HearingTr. 37:7–38:16. Specifically, she said that "courts that have consistent and timely follow-up on nonresponse and failure to appear" have nonresponse and failure to appear rates that are approximately "24 to 46 percent lower than courts that do nothing." *See* HearingTr. 46:2–10. Of course, Black Hawk County was not doing "nothing"—it was sending follow-up letters, sending failure-to-appear letters, and setting repeat no-shows for contempt hearings. And Hannaford-Agor's testimony matched NCSC research that attributed those specific gains to the *second* round of mailings—or the *first* round of follow-ups:

> Sending a second notice or second summons to the non-responsive or FTA juror is the single most efficient and cost-effective method of follow-up. NCSC research on summons enforcement programs found that FTA rates are 24 to 46 percent lower in courts that send a second notice/summons compared to courts that do not use this approach.

See NAT'L CTR. FOR STATE COURTS, *Jury Managers' Toolbox: Best Practices for Jury Summons Enforcement* (2009), http://www.ncsc-

jurystudies.org/__data/assets/pdf_file/0020/6149/fta-best-practices.pdf. Hannaford-Agor's testimony was about the effect of a second mailing (or first follow-up)—which was already incorporated into Black Hawk County's jury management policies in 2015—and Plain did not offer evidence to establish any reason to expect a jump in representation levels from a third mailing (or second follow-up).

Plain may argue that the number of follow-ups does not matter, and that what matters is that "the single biggest predictor of whether or not a person failed to respond or failed to appear for jury service was their expectation about what would happen if they didn't." *See* HearingTr. 45:3–46:10. But Hannaford-Agor did not describe a link between that expectation of probable consequences and the likelihood of actual enforcement. Instead, she said it was important for the letter providing notice of failure-to-respond or failure-to-appear to notify recipients of the potential adverse consequences by describing them. *See* HearingTr. 37:7–38:16. Plain did not establish that the content of those failure-to-respond or failure-to-appear letters was insufficient to put recipients on notice of those potential consequences, nor did he offer evidence to show that changing the letters in some specific way would have improved levels of African-American representation.

Plain argued that the proof of the efficacy of these new practices is in the data on African-American representation levels on jury pools in Black Hawk County, after the policy changes in December 2018. *See* Brief in Support (12/2/19) at 61–65; App. 90 (citing Appendix B to Brief (12/2/19); App. 97). His argument was that data from the first six months of 2019 had conclusively established the effectiveness of a December 2018 policy change, which worked by making the residents of Black Hawk County (with its approximate population of 130,000) more concerned about the likely consequences of failing to respond to a jury summons. But it is extremely unlikely that setting 8 or 9 people for contempt hearings each month would change the behavior of any significant number of Black Hawk County residents who otherwise would have ignored a jury summons. There is no reason to think that ordinary laypeople would have paid enough attention to this issue that replacing a three-strikes policy with a two-strikes policy could cause a noticeable drop in non-response rates within a six-month timeframe, especially when this change only subjects a small number of people to a relatively small penalty. Even if 2019 data showed what Plain said that it showed, his causation theory would still be unpersuasive—any improvement would likely be attributable to other post-2018 changes.

5. Courts applying *Duren* have always held that systematic exclusion cannot be shown through proof of patterns in choices made by individuals who each decide not to participate in jury service.

Optimizing a jury selection process is one thing; determining whether there was a violation of Plain's fair cross-section right under the Sixth Amendment is another. Hannaford-Agor concluded that the pattern of underrepresentation of African-Americans on jury panels in Black Hawk County was attributable to the fact that some people who received jury summons *chose* not to participate. *See* HearingTr. 51:1–6 (agreeing "the cause of any underrepresentation would be an individual's failure to respond to the summons."). Those choices are not attributable to processes for selecting them; contacting them; or responding to their decisions not to participate, after the fact. Courts applying *Duren* have repeatedly held that "[d]iscrepancies resulting from the private choices of potential jurors do not represent the kind of constitutional infirmity contemplated by *Duren*." *See United States v. Orange*, 447 F.3d 792, 799 (10th Cir. 2006); *accord Bates v. United States*, 473 Fed. Appx. 446, 451 (6th Cir. 2012); *United States v. Cecil*, 836 F.2d 1431, 1447 (4th Cir. 1988); *Israel v. United States*, 109 A.3d 594, 604–05 (D.C. 2014). This is not systematic exclusion under the Sixth Amendment, so Plain cannot establish prong #3 under *Veal*.

6. Patterns of underrepresentation are widespread. Researchers generally attribute this to factors that are beyond any court's control, and there is no silver-bullet solution. That is not systematic exclusion; it is not even systematic negligence.

The December 2018 policy changes were, in part, the result of work by a task force that attempted to identify ways to improve levels of minority representation on Iowa juries. *See* HearingTr. 9:23–11:9; Ex. 107; App. 426.[3] Most of the task force recommendations have now been implemented in most Iowa counties. Black Hawk County is no exception. Both the 2019 data and Hannaford-Agor's analysis of the data from 2014–2015 establish that African-American residents were never really underrepresented on source lists—it only appeared that was the case, because some respondents chose not to answer the optional questionnaire items that related to race. Hannaford-Agor solved that problem by using geocoding. *See* Ex. 109 at 1–6, 10; App. 434, 443. The 2019 data came from a new questionnaire, which now asks every respondent to indicate their race. *See* Appendix B to Brief

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[3] That task force report cites the same NCSC research finding that Hannaford-Agor cited: that "FTA rates are 24% to 46% lower in courts that send a second notice/summons compared to courts that do not." *See* RECOMMENDATIONS OF THE COMMITTEE ON JURY SELECTION at 23–24 (Mar. 2018), *available at* https://www.iowacourts.gov/collections/41/files/499/embedDocument/.

(12/2/19) at 1; App. 97. Both sets of data showed that theory about underrepresentation was unfounded. African-American participation did not drop below expected average levels until later in the process:

TABLE 2 African-American representation by stage of process	Hannaford-Agor's data, Model 1	Hannaford-Agor's data, Model 2	Data from January 2019 to June 2019
Summoning state	8.6%	8.0%	---
Qualified juror stage	7.7%	6.7%	10.85%
Reporting stage	7.4%	6.0%	6.94%

See Ex. 109 at 10; App. 443; Appendix B to Brief (12/2/19) at 1–2; App. 97. Even with the assistance of NAACP counsel, Plain's only suggestion on how to improve representation of African-Americans was that Black Hawk County should implement policies that *were implemented* in 2018. But that only produced a 1% uptick in levels of African-American representation (and even that assumes that Model 2 accurately estimates the racial characteristics of potential jurors who appeared for jury service in 2015, which may not be true). Even now, there is still a pattern of underrepresentation, and it persists at levels that (under the NAACP's aggregated analysis) would satisfy prong #2 under *Lilly* for every jury trial held in Black Hawk County in 2019. *See* Amicus Br. at 14–19; Appendix B to Brief (12/2/19) at 2; App. 98.

Plain's challenge is in a strange place. On one hand, he insists that Black Hawk County was systematically excluding people from jury service in 2015 by failing to adopt policies that it subsequently adopted in 2018 (or had already adopted). He argues that it is obvious that failure to adopt those policies was causing underrepresentation, because research shows that those policies improve response rates. But his proof of the efficacy of those policies involves data from 2019 (after Black Hawk County had already adopted every policy on his list) which shows a similar pattern of underrepresentation on jury panels. Plain was clearly wrong when he claimed that mail was not reaching African-American residents of Black Hawk County—they appear to be receiving their jury summons and answering the online questionnaire at rates exceeding their prevalence among the jury-eligible population. And he was incorrect when he argued that the two-strikes policy that Black Hawk County adopted in December 2018 would put an end to underrepresentation of African-Americans on jury panels (or even reduce it enough to foreclose aggregated-data challenges under *Lilly*).

Now, Plain and the NAACP offer no new solutions—but they still argue that Plain established systematic exclusion because he can point to a non-random pattern of underrepresentation over time.

A diverse group of stakeholders—including Black Hawk County and this Court—have studied, proposed, and implemented policies to address this pattern of underrepresentation. The collective efforts of Iowa's task forces and committees have resulted in adoption of new jury management processes that have improved access to data about Iowa juries, while reducing the overall non-response rate to enable jury managers to summon fewer people for each pool and panel. *See* HearingTr. 25:17–27:7. Still, the NAACP argues that Black Hawk County should have adopted *other* practices that would have ended underrepresentation of African-Americans on Iowa juries—and that its silver-bullet policies are not just identifiable, but are already used by "the 'vast majority of courts . . . on a routine basis." *See* Amicus Br. at 22–23 (quoting Hannaford-Agor, *Systematic Negligence*, 59 DRAKE L. REV. at 764). But most of the proposals in the amicus brief are either parts of the post-2018 policy changes, or new ways to enable lawyers to access and analyze jury data—they do not offer new ways to actually improve minority representation. Similarly, the recent article in the Drake Law Review does not offer a new path forward or identify any policies that Iowa courts have negligently failed to adopt. *See generally* Lovell & Walker, *Trilogy*, 68 DRAKE L. REV. 499 (2020).

As Hannaford-Agor noted, the source of underrepresentation is that some people who receive jury summons *choose* not to participate. *See* HearingTr. 51:1–6 (agreeing "the cause of any underrepresentation would be an individual's failure to respond to the summons."). In the aggregate, researchers can detect patterns in those decisions, which often include a correlation between a tendency to ignore jury service and lower levels of income and wealth. Some researchers believe that African-American respondents are less likely to appear for jury service because—and only because—they are disproportionately likely to be less affluent. Under this theory, if it were possible to equalize wealth and income, that would eliminate underrepresentation. *See, e.g.*, Nina W. Chernoff, *Black to the Future: The State Action Doctrine and the White Jury*, 58 WASHBURN L. J. 103, 123–24 (2019) ("[W]hen income is controlled for, the response rate for African-Americans and Latinos is the same as whites."); Hannaford-Agor, *Systematic Negligence*, 59 DRAKE L. REV. at 774 & n.71 (summarizing results of 1998 study that found "a low-income white person was just as likely as a low-income black person to fail to appear for jury service"). But other researchers find that attitudes towards jury service among African-Americans are consistently more negative than attitudes among other groups, even

after controlling for income, wealth, age, level of education, amount of hours worked per week, and a variety of other factors. *See* Mark A. Musick et al., *Much Obliged: Volunteering, Normative Activities, and Willingness to Serve on Juries*, 40 L. & SOC'Y INQUIRY 433, 442–52 & tbl.3 (2015). This finding has persisted through decades of research:

> The race effect [described above] is consistent with a broader pattern of results showing that African Americans experience less support for and a greater sense of alienation from the legal system (e.g., Hagan, Payne, and Shedd 2005), including, apparently, greater reservations about serving as a decision maker. Consistent with past research looking at people who have served (Shuman and Hamilton 1992; Rose 2005; Denver 2011), the lower level of willingness to serve among African Americans . . . was unique to African Americans (i.e., Hispanics did not differ from whites in the final model).

Id. at 457; *accord* Hannaford-Agor, *Systematic Negligence*, 59 DRAKE L. REV. at 774 n.71 (noting "significant attitudinal difference regarding jury service between blacks and whites . . . when education, income, and jurisdiction were controlled" in 1998 study, discussed earlier).

Assuming that any underrepresentation of African-Americans is solely attributable to decision-making patterns that are associated with lower income (and not with race), it would be logical to explore ways to alleviate economic pressures that deter jury service. But jurors in Iowa are already paid well, compared to jurors in other states. *See*

IOWA JUDICIAL BRANCH, *Jury Service: FAQ* (last accessed Feb. 9, 2021), https://www.iowacourts.gov/iowa-courts/jury-service/ (explaining that jurors receive $30 per day, which increases to $50 per day for each day of jury service after seven days, and are also "reimbursed for round trip travel between their home address and the courthouse as well as parking expenses"); Hannaford-Agor, *Systematic Negligence*, 59 DRAKE L. REV. at 787 & n.152 (noting that a juror compensation policy is above-average if jurors are paid more than $22 per day at a flat rate, and more than $32 per day at graduated rate). Iowa law also prevents employers from firing or retaliating against an employee for missing work for jury service. *See* Iowa Code § 607A.45. It is not clear where to go from here. In any event, it would be quite cruel to identify financial hardship as a significant cause of failure to respond/appear, and then penalize those same people with harsh fines or jail time. *Cf.* Hannaford-Agor, *Systematic Negligence*, 59 DRAKE L. REV. at 796 & n.193 (noting "[d]raconian enforcement" may be counterproductive).

Moreover, re-calibrating the array of carrots and sticks may not have much effect on decision-making patterns of potential jurors with lower incomes. Research on poverty suggests that "the cognitive toll of being poor" can change how people respond to incentives. *See* Alice

G. Walton, *How Poverty Changes Your Mind-Set*, CHI. BOOTH REV. (Feb. 19, 2018), https://review.chicagobooth.edu/behavioral-science/2018/article/how-poverty-changes-your-mind-set. In other words:

> Being poor means coping not just with a shortfall of money, but also with a concurrent shortfall of cognitive resources. The poor, in this view, are less capable not because of inherent traits, but because the very context of poverty imposes load and impedes cognitive capacity. The findings, in other words, are not about poor people, but about any people who find themselves poor.
>
> How large are these effects? . . . Put simply, evoking financial concerns has a cognitive impact comparable with losing a full night of sleep. In addition, similar effect sizes have been observed in the performance . . . of chronic alcoholics versus normal adults . . . . [T]he effects we observed correspond to ~13 IQ points. These sizable magnitudes suggest the cognitive impact of poverty could have large real consequences.

Anandi Mani et al., *Poverty Impedes Cognitive Function*, 341 SCIENCE 976, 980 (2013). This suggests that a real solution must go beyond just recalibrating incentives to make it "rational" to choose to participate.

Other research suggests that patterns of underrepresentation are (at least partially) attributable to negative attitudes towards the judicial system. *See, e.g.*, Musick et al., *Much Obliged*, 40 L. & SOC'Y INQUIRY at 458 (noting a strong effect of race on attitudes towards jury service and warning "the troubled relationship between some minority communities and the legal system" would be "not easily fixed"); Mary

R. Rose & Jeffrey B. Abramson, *Data, Race, and the Courts: Some Lessons on Empiricism from Jury Representation Cases*, 2011 MICH. ST. L. REV. 911, 950 (2011) (noting that non-response rates tended to be "greater in cities, towns, or zip codes with high concentrations of African-Americans" and identifying "mistrust of the criminal justice system" as a possible factor); *cf.* Brando Simeo Starkey, *Black Folk Must Stop Trying to Avoid Jury Duty*, THE UNDEFEATED (Oct. 4, 2017), https://theundefeated.com/features/black-folk-must-stop-trying-to-avoid-jury-duty/ (providing accounts from African-American lawyers about experiences with African-American panelists and noting that they had described "a mindset of negativity around jury duty" among people who viewed the criminal justice system "through a racial lens"). Researchers have not identified any sure-fire way to change negative attitudes towards the judicial system among minority communities, which do not appear to be attributable to any single policy or event.

Still, the NAACP claims that the "vast majority of courts" have adopted policies that solved this problem. *See* Amicus Br. at 22–23. Empirically, that is false. Both underrepresentation on jury pools and high non-response rates among African-Americans who are drawn for jury service are problems that still plague most American courts. *See*

Mary R. Rose et al., *Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts*, 15 J. EMPIRICAL LEGAL STUD. 378, 399–402 (2019) (noting that data from across the country shows "the ubiquity of underrepresentation in jury pools" that is "reliably likely to occur both across the system and across time"); Jeffrey Abramson, *Jury Selection in the Weeds: Whither the Democratic Shore*, 52 U. MICH. J. L. REFORM 1, 38–39 (2018) (noting non-response rates tend to "spike among minority groups" in data from multiple jurisdictions).

It is incorrect to claim that Iowa courts are choosing not to solve this problem. The true causes of disproportionate failure-to-respond and failure-to-appear rates among specific communities seem to be deeply rooted in broader social realities that already exist *before* the jury management system's earliest interactions with potential jurors whose names are drawn for jury service. Those pre-existing fault lines cannot realistically be redressed by any county court or jury manager. Even under a systematic negligence theory, the existence of a pattern of underrepresentation on jury pools or panels in Black Hawk County does not prove that underrepresentation was caused by failure to adopt a hypothetical silver-bullet solution—especially when nobody is able to identify one. Thus, Plain could not satisfy prong #3, even under *Lilly*.

C. Plain also could not show that the number of African-American people in his jury pool was low enough that it was unfair or unreasonable, for the purposes of his Sixth Amendment claim.

The geocoding model and Hannaford-Agor's report provide an excellent backdrop for discussions of systematic exclusion. Plain also wants to use Hannaford-Agor's models to assess prong #2. But all of Hannaford-Agor's models used a full year of pool/panel data, from November 2014 through October 2015. *See generally* Ex. 109; App. 434. Aggregated data is useful for determining whether there are patterns over time, and statistical analysis of that aggregated data is useful for determining the probability (or improbability) of finding a similar pattern at random. But it is rarely helpful on prong #2. If this Court cannot resolve this challenge on prong #3, it should reject the use of aggregated data to create artificial statistical significance. *See* Brief in Resistance (11/30/19) at 3–4; App. 25.

1. African-Americans were overrepresented among the eligible jurors who received a summons for jury service on the date of Plain's trial.

Out of the 100 eligible jurors whose names were drawn, there were 84 whose race was either self-reported or discoverable through available records. Of those 84 people, seven were African-American. *See* HearingTr. 55:25–57:25; Ex. AAA; App. 521; HearingTr. 24:10–23.

That level of representation—7 out of 84, or 8.33%—was greater than the average expected level of African-American representation, based on population demographics of eligible jurors in Black Hawk County. *See* Brief in Resistance (11/30/19) at 2–3; App. 24. That forecloses any challenge to the jury pool at the summoning stage because Plain cannot show that representation of African-Americans among people whose names were drawn for his jury pool was unfair or unreasonable. *See Lilly*, 930 N.W.2d at 305.

Hannaford-Agor's analysis of aggregated data also showed that African-Americans were overrepresented at the summoning stage. *See* Ex. 109 at 9–12; App. 442 (calculating that "African-Americans are summoned for jury service at slightly higher rates relative to their representation in the jury-eligible community"). Using aggregate data would not improve a claim of underrepresentation at that stage.

2. There was one African-American person among 49 potential jurors who appeared for trial. Plain could carry prong #2 under *Lilly*—but not *Veal*.

Because neither his own pool nor the aggregate data showed underrepresentation at the summoning stage, Plain no longer alleges any constitutional violation arising from that particular stage. Now, he only alleges that he proved his claim that African-Americans were

excluded and underrepresented in the stages that involved returning questionnaires and appearing for jury service. *See* Def's Br. at 25–30.

Out of the 100 people who were summoned for this jury pool, 56 questionnaires were returned. *See* HearingTr. 13:17–14:9. Then, 49 potential jurors appeared for trial and were part of Plain's panel. Only one person on that panel was African-American. *See* HearingTr. 18:6–9; HearingTr. 20:17–22:20; HearingTr. 55:25–57:25. One other person who was African-American had returned a questionnaire, but he did not appear for trial. *See* Ex. 101 at 52; App. 113; Ex. AAA at 1; App. 521. Based on that, and using the 7.5% population figure that Plain uses in his brief, the math works out like this:

TABLE 3 Standard deviation analysis of Plain's actual pool/panel	56 people who sent back questionnaires, including 2 who were African-American	49 people who appeared for trial, including 1 who was African-American
Average level of representation expected (n * 7.5%)	4.2	3.675
Standard deviation √{7.5% * 92.5% * n}	1.971	1.844
Difference between observed level and average expected level [x - (n * 7.5)]	-2.2	-2.675
...divided by SD	Z = -1.116	Z = -1.451

Based on those Z-scores that are between -1 and -2, these are both results that are between one and two units of standard deviation below the average expected level of representation. This would enable Plain to carry his burden on prong #2 for a claim under *Lilly*, but he cannot carry his burden on prong #2 under *Veal*'s stricter rubric. *See Veal*, 930 N.W.2d at 329; *Lilly*, 930 N.W.2d at 304.

3. With aggregated data, Plain would probably carry prong #2 under *Veal*.

Plain criticizes the district court for averaging the estimates from Hannaford-Agor's two alternative models, in its arithmetic for prong #2. *See* Def's Br. at 27–28. But it makes some sense. Model 2 assumes that, *after* counting every person who marked their race, the demographic breakdown of everyone who *did not* mark their race can be probabilistically assigned based on the overall demographics of the zip code where they live. *See* Ex. 109 at 5, 8; App. 438. The problem is that this overestimates representation of groups that are more likely to mark their race (by counting their actual responses *and* assigning a percentage of all respondents who did not mark race). By doing that, it underestimates representation of everyone else. On the other hand, Model 1 ignores responses on race entirely, and uses only geocoding; that is also unsatisfying because it ignores responses that *were* given.

The best approach to these geocoding models is probably somewhere in the middle. Averaging the two models is a good way to recognize that a response that identifies a juror's race effectively "checks off" a person that the geocoding model expected to see (and it should not count that person again when it produces an estimate of who *else* it expected to see, among the people who did not mark their race), while still incorporating data from real responses that were actually given.

That dispute is mostly academic, because Plain is correct when he points out that the district court's math was incorrect. *See* Def's Br. at 28–29. On that aggregated data from an entire year of jury pools and jury panels, Plain would probably carry prong #2.

TABLE 4 Standard deviation analysis of Plain's aggregated data	Model 1: 514 out of 6,991 people	Average: 467.5 out of 6,987 people	Model 2: 421 out of 6,983 people
Average level of representation expected (n * 7.5%)	524.3	524.0	523.7
Standard deviation √{7.5% * 92.5% * n}	22.022	22.016	22.010
Difference between observed level and average expected level [x - (n * 7.5)]	-10.3	-56.5	-102.7
...divided by SD	Z = -0.468	Z = -2.566	Z = -4.666

Using Model 2 or an average of the two models would allow Plain to carry prong #2 under *Veal*—and error was not preserved for any argument that the district court should have only used Model 1 (instead, the State urged it not to use aggregated data for prong #2). *See* Brief in Resistance (11/30/19) at 3–4; App. 25. So, yet again, if this Court cannot resolve this challenge on prong #3, it must decide whether to use a year's worth of aggregated data to analyze prong #2.

4. It is better to analyze Plain's actual jury pool and jury panel, rather than other aggregated data.

The State's approach to this has been outlined in other briefs. *See, e.g.*, *State v. Lilly*, No. 20–0617 (status: retained). The NAACP's brief critiques the State's approach and advances its own view: that either a year or six months of data is the right amount to analyze. *See* Amicus Br. at 14–20. All of the NAACP's arguments are based on a fundamental misunderstanding of the task at hand. Prong #2 is not about determining whether there is a pattern of underrepresentation on jury pools or jury panels *over time*, nor is it about determining if the population of people who appear for jury service *over time* differs from the population of eligible jurors. While academics like Parsa, Vaughan, and Hannaford-Agor generally prefer to work with larger sample sizes, that is because they are usually testing a hypothesis. The

NAACP's arguments would be great reasons to include more patients in each group in an experimental drug trial, or to assemble additional groups of crash-test dummies to plow into barriers at exciting speeds. When the question is whether an independent variable (like the drug versus the placebo, or a specific configuration of safety gear) produces a non-random effect on a dependent variable (like patient outcomes or passenger survivability), more data can only help. In that context, Vaughan is right: a non-astronomical sample size is never too large. *See* Ex. 127 at 5; App. 478. On prong #3, an aggregated sample can enhance the statistical power of a hypothesis-testing measure. But finding statistical significance through that analysis does not equate to finding any meaningful level of underrepresentation—instead, it disproves the alternative "null hypothesis" that would attribute the observed underrepresentation over time to random sampling noise. If the question is whether an apparent pattern of underrepresentation is random or non-random, Vaughan is right: more data is better.

But on prong #2, that is not the question that is being asked. Rather, the question is whether African-American representation on *this panel* or *this pool* was unfair or unreasonable. The reason to use a standard deviation test is to have benchmarks for what that means,

in relation to the size of the jury pool or panel. It is much better than absolute disparity or comparative disparity because the "unfairness" or "unreasonableness" of any particular level of underrepresentation is linked to the size of the pool or panel. If Plain *did* have a jury panel of 6,983 people, with only 421 who were African-American, that would be unfair *to him* and unreasonable *for that panel*. But that is because, with that many people, the range of "reasonable" expected results from random sampling would shrink dramatically. Plain would even be able to satisfy prong #2 under *Lilly* with 501 African-Americans among his 6,983 panelists, which is an absolute disparity of only 0.325%.[4]

Statisticians like Parsa and Vaughan prefer large sample sizes because larger samples can enable hypothesis testing for very small non-random effects, like that one. If the experimental drug is slightly more effective or if the new safety restraint improves survivability by a tenth of a percentage point, a large sample size can show that those small-but-meaningful differences are non-random (although claims about causation would still need to be supported by showing that the experimental design did not introduce other non-random confounds).

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[4] Under *Veal*, Plain could satisfy prong #2 with as many as 479 African-American panelists. That absolute disparity would be 0.640%.

But that was not Plain's jury panel. What matters on prong #2 is whether Plain's *actual* jury panel was within the range of results that would be expected to occur reasonably often by random selection of eligible jurors (although we know that jurors are humans, and the existence of non-random patterns in their decision-making does not automatically establish unfairness). The NAACP argues "[t]he issue that the State has been raising is a mirage." *See* Amicus Br. at 17. But here is the NAACP, inviting this Court to vacate Plain's conviction on the basis of aggregated data that renders *his* jury panel irrelevant.

If 7.5% of eligible jurors are African-American, then observed levels of representation on randomized panels of 49 people would cluster around an average of 3.675 African-Americans, like this:

TABLE 5 Most common results	Probability of that result on a 49-person panel, p = 7.5%
0 African-Americans	2.19%
1 African-American	8.71%
2 African-Americans	17.0%
3 African-Americans	21.5%
4 African-Americans	20.1%
5 African-Americans	14.7%
6 African-Americans	8.71%
7 or more African-Americans	7.17%

The single most likely result is the highest representation level that does not exceed the average expectation: 3 African-Americans on that panel of 49 people. That would be a very reasonable and fair level of representation on a panel of 49 people in Black Hawk County, with a Z-score of -0.366. But to the NAACP, it is "unfair and unreasonable" because of what happened on *other* jury panels, months earlier. Their aggregated data analysis would look like this:

TABLE 6 Analysis of Plain's aggregated data, with a fair panel added	Average: 470.5 out of 7,036 people	Model 2: 424 out of 7,032 people
Average level of representation expected (n * 7.5%)	527.7	527.4
Standard deviation √{7.5% * 92.5% * n}	22.093	22.087
Difference between observed level and average expected level [x - (n * 7.5)]	-57.2	-103.4
...divided by SD	Z = -2.589	Z = -4.681

Both Z-scores got *worse* when this reasonable panel was added in. This demonstrates that this concern is not a "mirage." The NAACP's aggregated data analysis simply does not help determine if a particular pool or panel was fair and reasonable, and it should be rejected.

One final point: Plain criticizes the standard deviation analysis by complaining that aggregate data from prior jury pools or jury panels will rarely be available on the morning of trial. *See* Def's Br. at 30–32. That critique illustrates the problem with aggregated data analysis: it de-links the prong #2 inquiry from the actual jury pool or panel. With the State's proposed limits on aggregation, it will become possible to analyze the *actual jury pool* in most cases (or, alternatively, it will be possible to calculate the minimum pool size that can support analysis in advance of trial, and summon at least that many people). The State hopes to enable district courts to use simple math (or a helper tool) to crunch already-knowable numbers about the people who responded to the jury summons or the people who appeared for jury service on *that* particular morning, to get an immediate result on prong #2. When a jury panel falls just short of average expected representation levels, a trial court should be able to use math to identify that slight deviation as an ordinary by-product of random sampling, determine that it is still fair and reasonable under *Lilly*, and proceed with trial without the need for any protracted analysis of aggregated data.[5] Alternatively, if

[5] Of course, any offer of proof on prong #3 will always require historical data and witnesses to establish the existence and causes of a particular pattern of underrepresentation, which will still take time.

the actual pool or panel falls too far below expectations, the trial court will be able to *know* that; it can either give the parties time to develop a factual record that would enable a ruling on prong #3, or take some proactive corrective measure (like calling an additional pool or panel, or simply re-rolling a new pool or panel). *See, e.g.*, *Veal*, 930 N.W.2d at 326; *State v. Washington*, No. 15–1829, 2016 WL 6270269, at *1–2 (Iowa Ct. App. Oct. 26, 2016). Thus, the State's approach to prong #2 is not just the only approach that is actually tailored to answering the relevant question—it is also the only approach that addresses Plain's concerns about efficiency and judicial economy by making it possible to determine whether the jury pool is fair and reasonable by *looking at the jury pool itself*, in almost every scenario. This Court should reject calls to require district courts to analyze unspecified amounts of aggregated data, and it should adopt the State's approach instead.

CONCLUSION

Plain failed to prove his Sixth Amendment claim on remand, and this Court should affirm the district court's ruling.

REQUEST FOR NONORAL SUBMISSION

If retained, this case should be set for oral argument.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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