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 REPLY BRIEF FOR APPELLANT

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On April 1, 2021, I served this brief on all other parties by EDMS to their respective counsel and mailed a copy to the Appellant at his last known residential address:

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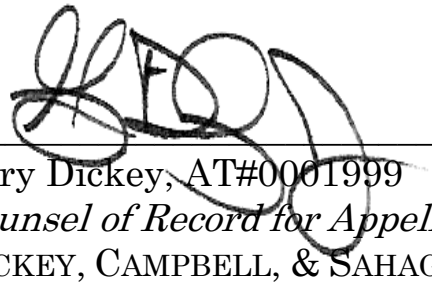

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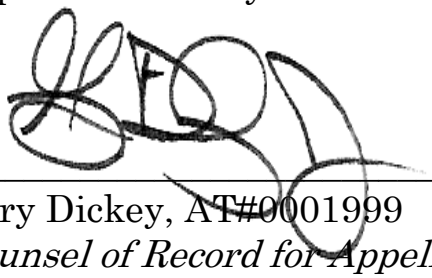

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REPLY ARGUMENT

I. PLAIN'S ASSERTION OF HIS FAIR CROSS-SECTION CLAIM UNDER THE IOWA CONSTITUTION ON REMAND WAS SUFFICIENT TO SATISFY THE PURPOSES OF THE ERROR PRESERVATION RULE

Implicitly raising a white flag as to Kelvin Plain's fair cross-section claim under the Iowa Constitution, the State seeks to deny him relief on error preservation grounds. It places heavy weight on this Court's remand order directing the district court to "determine whether Plain's right to a representative jury under the Sixth Amendment was violated." (State's Br. at 23)(citing *State v. Plain*, 898 N.W.2d 801, 829 (Iowa 2017)). The State's myopic focus on the remand language is not how the error preservation rule works.

"In determining whether error has been preserved, it is important to understand the purpose of [the] error-preservation rules." *State v. Mann*, 602 N.W.2d 785, 791 (Iowa 1999). In explaining the rationale of the error preservation doctrine, this Court has observed:

> The orderly, fair and efficient administration of the adversary system requires that litigants not be permitted to present one case at trial and a different

> one on appeal. One reason is that the trial court's ruling on an issue may either dispose of the case or affect its future course. In addition, the requirement of error preservation gives opposing counsel notice and an opportunity to be heard on the issue and a chance to take proper corrective measures or pursue alternatives in the event of an adverse ruling.

Id. (quoting *State v. Tobin*, 333 N.W.2d 842, 844 (Iowa 1983)). The State does not explain how consideration of Plain's fair cross-section claim under the Iowa Constitution would undermine this rationale. Nor can it claim unfair surprise. The State clearly understood Plain's claim to be based on the Iowa Constitution in the court below 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").

Understandably eager to avoid the merits, the State's error preservation argument fails to account for the unique circumstances of this case. Plain could not possibly have raised his state court argument on systematic exclusion under the Iowa Constitution at trial for three reasons. First, clearly established

precedent foreclosed relief under *Duren's* second prong. *See Plain*, 898 N.W.2d at 826 (overruling *State v. Jones*, 490 N.W.2d 787 (Iowa 1992)). Indeed, the district court did not even address the question of systematic exclusion in deciding on Plain's federal fair cross-section claim because he could not establish underrepresentation under *Jones*. (Trial Tr. at 99-106). Second, this Court did not recognize an independent interpretation of fair cross-section claims under the Iowa Constitutional until *State v. Lilly*, 930 N.W.2d 293 (Iowa 2019), which issued while this case was pending on remand.[1] Third, it is law of the case that Plain "lacked the opportunity" to develop the record related to proof of systematic exclusion "because he was not provided access to the records to which he was entitled." *Plain*, 898 N.W.2d at 829. It is incongruent for the State to argue Plain waived any claim of systematic exclusion under the Iowa Constitution on the one hand when it denied him access to the information necessary to meaningfully raise the issue on the other. *See* Nina W.

[1] The *Lilly* decision applies retroactively to all cases pending on direct review or not yet final. *Morgan v. State*, 469 N.W.2d 419, 422 (Iowa 1991) (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)).

Chernoff, *No Records, No Right: Discovery & the Fair Cross-Section Guarantee*, 101 Iowa L. Rev. 1719, 1774 (2016) ("refusal to allow access to jury selection records cannot be squared with each state's fair cross-section guarantee, whether enshrined in a statute or constitution").

At the end of the day, the State's error preservation argument only kicks the can down the road. The State's withholding of the jury data necessary for Plain to assert a state constitutional claim is precisely the sort of newly discovered evidence that would entitle him to postconviction relief. Iowa Code § 822.2(4); *see Jones v. State*, 479 N.W.2d 265, 274 (Iowa 1991). It makes little sense to avoid addressing the merits on error preservation grounds when the issue undoubtedly will be ripe for collateral review.

On this point, the recent decision in *Jones v. The Glenwood Golf Corp.*, 2021 Iowa Sup. LEXIS 25 (Iowa Mar. 12, 2021), is instructive. In *Jones*, the Court considered whether an injured passenger's release of the responsible driver extinguished his statutory vicarious liability claim against the vehicle's owner.

Both parties agreed that the issue was not preserved for appellate review because the defendant owner did not renew the issue in his motion for directed verdict. *Id.* at *10-11. Nonetheless, the Court decided the issue on appeal because the defendant "would simply renew its legal argument in a motion for directed verdict and judgment notwithstanding the verdict in the new trial." *Id.* at *11. What was true in the *Jones* decision is also true here. If a defendant may assert a previously *unpreserved liability argument* in a case remanded for *a trial limited to damages* as the Court acknowledged in *Jones*, it stands to reason that Plain may assert his previously unpreserved state constitutional claim on remand. In any event, Plain undoubtedly will be able to assert the claim in an application for postconviction relief. Consequently, avoiding Plain's state constitutional claim on appeal runs counter to the error preservation doctrine's rationale of conserving judicial resources.

II. THE STATE CONCEDES THE DISTRICT COURT COMMITTED CLEAR ERROR IN ITS STANDARD DEVIATION CACULATION UNDER THE SECOND PRONG OF *DUREN*

Sensibly, the State concedes—as it must—that the district court's standard deviation calculation "was incorrect." (State's Br. at 64). And, it agrees that Plain has shown underrepresentation of African-Americans in Black Hawk County jury panels in excess of two standard deviations from their representation in the eligible juror population. (State's Br. at 64-65); *see also State v. Veal*, 930 N.W.2d 319, 329 (Iowa 2019) (requiring a downward variance of two standard deviations under the Sixth Amendment). Accordingly, Plain has satisfied *Duren*'s second prong, and the district court's ruling most be reversed on this ground.

Undeterred by precedent, the State argues that standard deviation analysis should be based on the individual jury panel's composition rather than aggregate data. (State's Br. at 65-68). But, the reasoning in *Lilly* still holds sway. "It is unfair to restrict the defendant to the current jury pool that may have as few as seventy-five persons, and then at the same time require the defendant to furnish results that have a certain degree of statistical significance." *Lilly*, 930 N.W.2d at 305. If any retreat from *Lilly* is warranted, it is in favor of a "flexible attitude toward

implementation of the fair-cross-section doctrine" advocated in Justice Appel's concurring opinion. *Id.* at 312-14. That is, the Court should "engage in across-the-board efforts to ensure that our system of jury trials ensures fundamental fairness." *Id.*

Here, Plain showed up for trial with a jury panel that included only a single African-American—*that was not even within the group of potential jurors who participated in voir dire.* In addition, the evidence establishes that underrepresentation of African-Americans on Black Hawk County jury panels was the rule; not the exception. If that is not sufficient to demonstrate underrepresentation, then no case ever will be.

III. PLAIN PRODUCED SUFFICIENT EVIDENCE TO ESTABLISH A PLAUSIBLE EXPLANATION OF HOW THE OPERATION OF THE BLACK HAWK COUNTY COURT SYSTEM RESULTED IN THE EXCLUSION OF AFRICAN-AMERICANS

In light of the State's concession of error as to *Duren's* second prong, the fighting issue that remains on appeal is whether the underrepresentation was the product of systematic exclusion of African-Americans. Resolution of that issue requires this Court to decide what it means to "systematically" exclude minority

populations from a jury panel. In *Duren v. Missouri*, 439 U.S. 357 (1979), the United States Supreme Court provided the answer by explaining that underrepresentation is systematic if it is "inherent in the particular jury-selection process utilized." *Id.* at 366. This threshold showing is satisfied by identifying the precise point of the process at which exclusion of minorities occurs coupled with a "plausible explanation of how the operation of the jury system resulted in their exclusion." *Lilly*, 930 N.W.2d at 307.

Unsatisfied with this low standard of proof, the State hones in on the language in *Lilly* explaining that a "defendant must prove that the practice caused systematic underrepresentation." (State's Br. at 35); *Lilly*, 930 N.W.2d at 307. To say that a practice "caused" exclusion of African-Americans means the same as saying it "resulted in their exclusion." *See Burrage v. United States*, 571 U.S. 204, 211 (2014) (explaining that the phrase "results from" imposes a requirement of "actual" or "but-for" causality). The rub for the State is that *Duren*, by its terms, merely imposes a "prima facie" standard of proof. *Duren*, 439 U.S. at 364-65. Prima facie evidence is that which is "sufficient to

render reasonable a conclusion in favor of the allegation [the party] asserts." *Prima Facie Case*, *Black's Law Dictionary* at 1189-90 (6th ed. 1990). It is not proof by a preponderance of the evidence, nor is it proof beyond a reasonable doubt.

Here, Plain produced sufficient evidence to render a reasonable conclusion that the underrepresentation of African-Americans resulted from a combination of Black Hawk County's jury management policies. Specifically, he identified three practices that contributed to the 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; 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). As to these practices, his expert testified that "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).

Additionally, the statistical analysis confirms the underrepresentation was systematic in the sense that it was persistent and non-random. *See Systematic*, https://www.merriam-webster.com/dictionary/systematic#usage-1 (lasted accessed Mar. 25, 2021) ("marked by thoroughness and regularity"). Indeed, the results of the standard deviation test are better understood by quants as a measure of systematic exclusion; not underrepresentation. Richard M. Re, *Jury Poker: A Statistical Analysis of the Fair Cross-Section Requirement*, 8 Ohio St. J. Crim. 533, 549 (Spring 2011). It is undisputed that African-Americans were substantially underrepresented over a twelve-month period while Black Hawk County operated under the same jury management policies. The only reasonable inference from this evidence is that the underrepresentation of African-Americans was inherent in those policies.

Faced with an evidentiary record that is decidedly against it, the State pursues three dead ends. First, the State makes the

remarkable suggestion that African-Americans are solely to blame for their underrepresentation in Black Hawk County jury panels. (State's Br. at 28-29). Second, it claims that African-Americans' "private choices" not to appear for jury duty cannot be the basis for systematic exclusion. (State's Br. at 49). Third, the State downplays Plain's challenges as mere "run-of-the-mill" jury management practices. (State's Br. at 31). Each of these arguments is meritless.

Even if it is reasonable to assume that African-Americans consciously choose to avoid jury service, that assumption only strengthens Plain's fair-cross section claim. Answering a juror summons is not something an individual may "choose" to ignore. Instead, person who fails to respond to jury duty without sufficient cause may be punished for contempt. Iowa Code § 607A.36. Thus, African-Americans may only *choose* to ignore the summons or *choose* not to appear for trial only if the trial court *chooses* to ignore enforcement of the summons.

Billie Treloar testified that prior to becoming the jury manager, Black Hawk County did not event attempt to sanction

individuals who did not respond or appear for jury duty. (App. at 462). After Treloar took over, the county initiated an enforcement action only after the third strike. Even then, the most severe sanction was a fine. (App. at 463). In other words, Black Hawk County adopted a *de facto* policy of exempting any African-American who failed to respond to a summons or appear for jury duty. That is no different than the constitutionally infirm practice in *Duren* of granting "an automatic exemption from jury service for any women requesting not to serve." *Duren*, 439 U.S. at 359.

The State's suggestion that underrepresentation of African-Americans attributed to their private choices cannot give rise to a fair cross-section claim is merely an attempt to smuggle in equal protection principles where they do not belong. "[I]t is no defense to a cross section-challenge for jury officials to assert that their policies are race neutral, or that the system was not designed to exclude, or that jury officials undertook affirmative efforts to make the jury pool representative, or that selection is done by a computer, which is incapable of discrimination." Nina Chernoff and Joseph Kadane, *The 16 Things Every Defense Attorney*

Should Know About Fair Cross-Section Challenges, 37 Champion 14, 15 (Dec. 2013). "The Sixth Amendment fair cross-section claim is not concerned with discrimination; it is only concerned with whether the system has *produced* a representative jury pool, whether by accident or design." *Id.* "In the context of a fair cross-section claim, inadvertent, unknown, or benign decisions can establish a constitutional violation." *Id.*; *see also Lilly*, 930 N.W.2d at 314 (Appel, J., concurring) ("As we seek to develop our Iowa law on fair cross section, we should make sure we do not conflate fair cross section and equal protection concepts).

Lastly, the State's view that Black Hawk County's deficient jury management practices are run-of-the-mill and cannot constitute systematic exclusion is doubly flawed. For starters, the practices are clearly sufficient to give rise to a fair cross-section violation under the Iowa Constitution. *Lilly*, 930 N.W.2d at 308. More importantly, the State's Sixth Amendment argument hinges upon a misreading of the decision in *Berghuis v. Smith*, 559 U.S. 314 (2010). As noted, *Omotosho v. Giant Eagle, Inc.*, 997 F. Supp.

2d 792 (N.D. Ohio 2014), *Berghuis* is a case more about AEDPA deference than it is about the Sixth Amendment:

> The Supreme Court's subsequent reversal of the Sixth Circuit's decision, noted previously, must be explained. Because *Berghuis* was brought to federal court as a *habeas corpus* petition, the Sixth Circuit was constrained to apply the deferential standards set forth under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), to determine whether the Michigan Supreme Court unreasonably applied clearly established federal law as determined by the United States Supreme Court. The Michigan Supreme Court held that the influence of social and economic factors on juror participation does not demonstrate a systematic exclusion of African-Americans and rejected the petitioner's fair cross section claim. The Sixth Circuit disagreed and held that the Michigan Supreme Court unreasonably applied clearly established federal law. The United States Supreme Court reversed; it concluded that the Sixth Circuit had committed several errors, one being its determination that the matter was clearly settled under Supreme Court precedent. Although the Supreme Court held that the law was not clearly established, it left open the question of 'whether the impact of social and economic factors can support a fair-cross-section claim.' Because the Sixth Circuit's affirmative answer to the question was not reversed, it cannot be overlooked.

Id. at 804, n.6 (citations omitted); *see also Bates v. United States*, 473 F.3d Appx. 446, 451 (6th Cir. 2012) ("we found a systematic exclusion when a jury selection process provided 'opt out' procedures resulting in the consistent underrepresentation of

African-Americans"). For this reason, *Berghuis* is neither authoritative, nor is it persuasive authority on the issue.

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.

COST CERTIFICATE

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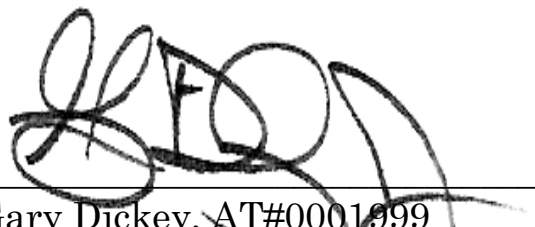

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