IN THE IOWA SUPREME COURT

STATE OF IOWA, Plaintiff-Appellee vs. PETER LEROY VEAL, Defendant-Appellant.	No. 17-1453

APPEAL FROM DISTRICT COURT FINAL ORDER OF THE HONORABLE JUDGE RUSTIN DAVENPORT

FINAL BRIEF OF APPELLANT

FILED BY:

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STATEMENT OF THE CASE

Peter Veal was charged with two counts of Murder in the First Degree for the killings of Melinda Kavars and Caleb Christiansen, and one count of Attempt to Commit Murder. Trial Information filed November 23, 2016 p. 1, APP p. 004. A motion for a competency evaluation was filed by defense counsel and competency evaluation was done, said evaluation finding Mr. Veal not competent to stand trial. Application for Psychiatric Evaluation of Defendant at State's Expense filed January 3, 2017, APP Vol. II p. 003; Order for Restoration to Competency filed March 3, 2017, APP Vol. II p. 012. After a second evaluation, Mr. Veal was found competent to stand. Order filed May 23, 2017, APP Vol. II p. 015. Defense counsel at the May 23, 2017 competency hearing requested a new competency evaluation based on new evidence. Transcript of Hearing held May 3, 2017 pp. 13-15. Trial

was set to begin on July 10, 2017, but before voir dire, defense counsel objected to the jury venire because there were no African-Americans in the jury pool and was therefore a violation of Mr. Veal's 6th Amendment right to a fair trial. Trial Transcript Vol. 1 p. 2. The defense requested time to research whether Webster County systematically excluded minorities from their jury pools. Trial Transcript Vol. 1 p. 17. The trial court, cognizant that July 10, 2017 was the last day to begin trial without beginning trial after the 90-day deadline for Mr. Veal's 90-day speedy trial right, found good cause attributable to the defense to move trial back one day so that the defense could do research on the systematic underrepresentation issue. Trial Transcript Vol. 1 p. 35-36.

On July 11, 2017, the defense had concluded a review of the jury questionnaires and determined that over the calendar year 2016, Webster County's jury pools only had 1% African-American members, and they moved to dismiss the charges on speedy trial violation grounds. Trial Transcript Vol. 2 pp. 4-5, 28-31. The trial court denied the motion and found that there was good cause attributable to the defendant for delay and that there was no systematic underrepresentation of African-Americans in Webster County jury pools. Trial Transcript Vol. 2 pp. 25, 32-33.

A second jury panel was called in to increase the number of people in the jury pool and the number of African-Americans in the jury pool. Trial Transcript Vol. 2, pp. 12-13. The jury pool numbers of the two panels combined were four African-Americans out of the 157 members of the jury pool. Trial Transcript Vol. 2, pp. 12-13. The defense objected to this new jury pool on the same grounds as the first jury pool, but the trial court found that the deviation of percentage of African-Americans in the jury pool from the percentage of African-Americans in the Webster County population was acceptable, and that no systematic underrepresentation had been shown, and overruled the objection. Trial Transcript Vol. 2, pp. 24-25.

The defense lodged a *Batson* challenge to the State's striking of the last remaining African-American in the jury pool. Trial Transcript Vol. 3, pp. 117-118. The trial court found that the State's non-discriminatory reason for the strike was credible and denied the defense's challenge. Trial Transcript Vol. 3, p. 124.

At trial, the State presented evidence that Caleb Christiansen was killed by another person stabbing him, and that Melinda Kavars had been killed by a single gunshot wound. Trial Transcript Vol. 6, pp. 147, 178-180. The State also presented evidence that Mr. Veal and Ron Willis, a State witness, were the only two people in the room besides the two murder

victims, and Ron Willis testified that it was Mr. Veal who had shot and killed the first victim, then Mr. Veal attempted to shoot him but the gun jammed, and so he left the house, leaving Mr. Veal and second victim. Trial Transcript Vol. 4, pp. 67-77. Ron Willis testified that he called 911 and later learned that the second victim had been killed. Trial Transcript Vol. 4 p. 77, 82. The State presented evidence that when law enforcement arrived, Ron Willis was near the house in question, and Mr. Veal was found further away from the house and his clothes were bloody. Trial Transcript Vol. 3, pp. 162, 165.

Mr. Veal was convicted on all three counts as charged. Order Regarding Trial, Entering Verdict, and Scheduling Further Hearing filed July 20, 2017, APP p. 032. Mr. Veal was sentenced on September 12, 2017. Judgment and Sentence filed September 12, 2017, APP p. 059. Notice of Appeal was timely filed on September 14, 2017.

ROUTING STATEMENT

This case should not be transferred to the Iowa Court of Appeals pursuant to Iowa R. App. P. 6.1101(2)(c) and (f), because this case involves issues of first impression regarding the process of determining systematic underrepresentation under *State v. Plain*, 898 N.W.2d 801 (Iowa 2017) and

issues presenting substantial questions of enunciating or changing legal principals under the *Duren* and *Plain* lines of cases regarding fair cross sections of the community and minority representation in jury venires.

ARGUMENT

I. The Trial Court Should Have Found the Jury Pools Unconstitutional.

Constitutional issues are reviewed de novo. *State v. Chidester*, 570 N.W.2d 78, 80 (Iowa 1997). Error was preserved by defense counsel's objections to the jury pool. Trial Transcript Vol. 1, pp. 14-15; Trial Transcript Vol. 2, p. 14.

"The Sixth Amendment to the United States Constitution provides that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.' U.S. Const. amend. VI. The right to an impartial jury entitles the criminally accused to a jury drawn from a fair cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 530, 95 S. Ct. 692, 697-98 (1975)." *State v. Plain*, 898, 821 N.W.2d 801 (Iowa 2017).

> "In *Duren v. Missouri*, the Supreme Court defined a three-part test for establishing a violation of the fair cross-section

> requirement. 439 U.S. 357, 364, 99 S. Ct. 664, 668 (1979); *see also State v. Watkins*, 463 N.W.2d 411, 414 (Iowa 1990). Under this three-part test, a defendant can establish a prima facie violation of the fair cross-section requirement by showing
>
> > (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.
>
> *Duren*, 439 U.S. at 364, 99 S. Ct. at 668. If the defendant establishes a prima facie case, the burden shifts to the state to justify the disproportionate representation by proving "a significant state interest" is "manifestly and primarily advanced" by the causes of the disproportionate exclusion. *Id*. at 367-68, 99 S. Ct. at 670."
>
> *State v. Plain*, 898 N.W.2d 801, 822 (Iowa 2017).

"The second prong of the *Duren* test requires that the proportion of the group members in the jury pool is underrepresentative of the proportion of the group members in the community and that the level of deviation from the community proportion be 'unacceptable.'" *Id*.

> Under the third *Duren* prong, a defendant must establish that systematic exclusion of the group caused the underrepresentation of the group. *See Duren*, 439 U.S. at 364, 99 S. Ct. at 668. The third prong "distinguishes between situations where a particular jury venire is nonrepresentative and those situations where the jury venires in a district are continuously nonrepresentative of the community." Coriell, 100 Cornell L. Rev. at 481. To establish systematic exclusion, a defendant must establish the exclusion is "inherent in the particular jury-selection process utilized" but need not show

> intent. *Duren*, 439 U.S. at 366, 99 S. Ct. 669. In other words, the defendant must show evidence of a statistical disparity over time that is attributable to the system for compiling jury pools. Coriell, 100 Cornell L. Rev. at 481. "If there is a pattern of underrepresentation of certain groups on jury venires, it stands to reason that some aspect of the jury-selection procedure is causing that underrepresentation." *Id*.; *accord Duren*, 439 U.S. at 366, 99 S. Ct. at 669-70.
>
> *State v. Plain*, 898 N.W.2d 801, 823-824 (Iowa 2017).

In the present case, there were two points at which objection was made by the defense to the jury pool. The first was on July 10, 2017, relating to the first jury pool which had zero African-Americans out of 87 jury pool members. Trial Transcript Vol. 1, pp. 14-15. The second objection was made on July 11, 2017 to a second jury panel which had four African-Americans in the pool of 157 jury pool members. Trial Transcript Vol. 2, p. 14.

Defense counsel argued in its first objection to the jury pool that the first two prongs of the *Duren* test had been met because the defendant is African-American, African-Americans are a distinct group, and because there were no African-Americans in the jury pool which consisted of 87 people. Trial Transcript Vol. 1, pp. 2, 15-16. Mr. Veal is African-American. Trial Transcript Vol. 1, pp. 2, 21. African-Americans are a distinct group under the *Duren* test. *State v. Jones*, 490 N.W. 2d 797, 792 (Iowa 1992).

Defense counsel presented, regarding the third prong of the Duren test, that Webster County picked their jury pools from voter registration and

driver's license identification lists. Trial Transcript Vol. 1, p. 16. She went on to argue that 32 percent of the state population is excluded from the voter registration list and 27 percent of the population is excluded from the driver's license list. Trial Transcript Vol. 1, pp. 16-17. Defense counsel referred to the need to get information regarding the racial make-up of the driver's license and voter registration pools to compare to the county census data. Trial Transcript Vol. 1, pp. 17, 31-32.

The trial court issued an initial ruling on the objection to the jury pool, finding that the defendant is African-American, that there are no African-Americans in the jury pool, so that the defense had met its burden on the first two prongs of the *Duren* test, and that for the third prong, there was not enough evidence at that time for the defense to meet its burden, but that the defense was granted additional time to determine if there is systematic exclusion. Trial Transcript Vol. 1, pp. 35-36. Defense counsel, at the end of the day, explained to the court that they were going through all the 2016 jury questionnaires to try to determine if there is systematic exclusion because, regarding racial makeup, "We're not sure if the State compiles that. The people we've talked to in Des Moines don't do it. Fortunately, the clerk of court does keep those records, was able to find those; and we're going through 2016 jury questionnaires and looking at how – you know, what the –

the total number was, what the minority count was, to give us an idea whether or not the system that brings these people into the courthouse is fair – a fair cross section of the community." Trial Transcript Vol. 1, pp. 51-52. Defense counsel explained, "That's the only way to do it." Trial Transcript Vol. 1, p. 52.

The next morning, the defense renewed their first objection and motion to strike the jury panel, arguing that there was systematic exclusion. Trial Transcript, Vol. 2, p. 3. Defense counsel stated that the department of transportation and "voter registration" do not keep records of the race of people on their lists and are "blind to race," so the only way for them to determine the racial make-up of the jury pool over time in Webster County was to go through the jury questionnaires, which they did, "into the early morning hours of today." Trial Transcript Vol. 2, p. 4. Their finding was that according to the 2016 census data, Webster County was 5.5 percent African-American, but that the current system for creating jury pools resulted in on 1 percent of the jury pool being African-American. Trial Transcript Vol. 2, pp. 5-7. Defense counsel argued that systematic exclusion had been shown as required under the third prong of the *Duren* test because there was underrepresentation shown in the jury pools over the course of the past year, and because the system used to create the pools was blind to race. Trial

Transcript Vol. 2, pp. 4-5. Defense counsel moved to dismiss the case on the basis that because the requirements of the *Duren* test to show a 6th Amendment violation had been met, any delay is attributable to the State because the State is responsible for providing a jury pool that meets constitutional standards, and therefore there was not good cause to continue trial beyond the 90-day speedy trial limit, especially because after it had been determined that the jury panel failed the first two prongs of the Duren test, the State did nothing to help determine whether there was systematic exclusion. Trial Transcript Vol. 2, pp. 4-5, 22, 28-31.

The trial court found that there was good cause to go beyond 90-days and therefore no violation. Trial Transcript Vol. 2, pp. 32-33. As well, in addressing the 6th Amendment issue, the trial court found that on the basis of the analysis of the jury pool over time that was presented by the defense, that there was not systematic exclusion sufficient to meet the standard of the *Duren* test. Trial Transcript Vol. 2, p. 25. The trial court relied in part on the 1992 Iowa Supreme Court decision in *State v. Jones*, 490 N.W.2d 787 (Iowa 1992), which the trial court found held that the use of "motor vehicle records and voting records" was proper. Trial Transcript Vol. 2, p. 25.

The second objection the defense made to the jury pool was on July 11, 2017, after an additional jury panel had been brought in, which changed

the juror numbers to four African-Americans out of 157 jury pool members. Trial Transcript Vol. 2, pp. 13-14. Defense counsel submitted that the new percentage, 2.5%, was still short of what is required under the second prong of the *Duren* test, and argued that the first and third prongs remained the same under this second objection as they were under the first. Trial Transcript Vol. 2, p. 14-15. The trial court found that the new numbers resulted in an absolute disparity of 3 percent and comparative disparity of "around 50%" and that those numbers were not enough for a prima facie showing under the second prong of the *Duren* test. Trial Transcript Vol. 2, pp. 24-25. The trial court also found the third prong of the Duren test was not met. Trial Transcript Vol. 2, p. 25.

Defendant-Appellant submits that the trial court should have found the first jury pool unconstitutional. The first two prongs of the *Duren* test were met because Defendant is African-American and there were zero African-Americans in the jury pool. The trial court found as much in its initial ruling on the matter. Trial Transcript Vol. 1, pp. 35-36. The third prong should also have been found to have been met by the defense because after the defense was allowed to review the jury pool information contained in the jury questionnaires, they found that for the calendar year 2016, African-Americans comprised only 1% of those jury pools despite

comprising 5.5% of the population of Webster County. They also found that the system used to create the jury pools is "blind to race," or doesn't take race into account in choosing the sources of the lists of potential jurors. Trial Transcript Vol. 2, pp. 4-7.

Defendant-Appellant also submits that the trial court should have found the second pool unconstitutional. For the second jury pool, the first and third prongs of the *Duren* test remain the same, and the second prong analysis is different because the State added a second jury panel to create a larger jury pool, and the second jury pool had four African-Americans out of 157 jury pool members. Trial Transcript Vol. 2, pp. 13-14. This change changed the absolute disparity from 5.5% to approximately 3%, and the comparative disparity from 100% to approximately 55% (3% divided by 5.5%). Of the four African-American members of the jury pool, three made the initial cut of the pool. Trial Transcript Vol. 2, pp. 40-41. Of those three, two were challenged for cause for having felony convictions. Trial Transcript Vol. 2 pp. 62-63, 216; Trial Transcript Vol. 3, pp. 13, 18. Finally, the last African-American member of the jury pool was stricken by the State, resulting in a Batson challenge by the defense. Trial Transcript Vol. 3, pp. 116-17. The trial court overruled the *Batson* challenge, finding there was a non-discriminatory reason for the strike. Trial Transcript Vol. 3, p. 124. It is

submitted that in cases such as this, where there are African-Americans in the jury pool who are stricken for cause or by the State with their discretionary strikes, resulting in no African-Americans on the jury, that that fact may be taken into account when considering the second prong of the *Duren* test. Even if those jury pool members are still used for absolute and comparative disparity calculations under the test, the fact that those jury pool members were either disqualified from participating on the jury or were stricken by the State should be a consideration when the statistical comparisons are close to being beyond a standard deviation.

Defendant-Appellant also submits that the Iowa Constitution guarantees an impartial jury, and that the reviewing court should find that the first and second jury pools in this matter violate the Iowa, as well as, the U.S. Constitution. Iowa Const., Art. I, Sec. 10.

Should the reviewing court find that the trial court should have found that the defense made a prima facie showing under the *Duren* test for the first jury venire, the remedy should be a dismissal of the charges because such a finding would mean that due to the State not providing a constitutional jury pool within the 90-day speedy trial time limit, the 90 day speedy-trial right of the defendant was violated as the result of State action or inaction. This issue is discussed below in Issue II of this brief.

Should the reviewing court find that the defense made a prima facie showing under the *Duren* test for the second jury venire, then the verdict should be overturned and case remanded for a completion of the *Duren* test and finding of whether the second jury pool was unconstitutional.

II. The Court Erred in Denying Defense Counsel's Motion to Dismiss for Violation of the Defendant's Right to 90-day Speedy Trial.

Article I, section 10 of the Iowa Constitution guarantees the right to a speedy trial. This right is codified by Iowa Rule of Criminal Procedure 2.33(2). "We have held that under the rule, a criminal charge must be dismissed if trial is not commenced within ninety days of the charging instrument 'unless the State proves (1) defendant's waiver of speedy trial, (2) delay attributable to the defendant, or (3) 'good cause' for the delay.'" *State v. Taylor*, 881 N.W.2d 72, 76 (Iowa 2016). "The good-cause test under our speedy trial rules relies only on one factor: the reason for the delay." *Id*. at 77. "In order to show waiver, there must be a showing of "an intentional relinquishment or abandonment of a known right or privilege." *Id*. at 78.

Error was preserved by defense counsel's motion to dismiss for violation of right to 90-day speedy trial. Trial Transcript Vol. 2, p. 5, 28.

In this case, trial was set to start on the last day within the 90-day timeframe, July 10, 2017. Trial Transcript Vol. 1, p. 4, 36. The Iowa Supreme Court opinion in *State v. Plain*, 898 N.W.2d 801 (Iowa 2017), was issued 10 days before trial. It was also on June 30, 2017 that the jury questionnaires became available to the defense. Trial Transcript Vol. 1, p. 27. Of the 88 questionnaires, 9 did not indicate the person's race. Trial Transcript Vol. 1, pp. 20, 27. At the pretrial conference on July 7, 2017, the Plain case was discussed and the court admonished counsel to be prepared to recommend to the court the best way to proceed if there is an issue with the jury panel. Hearing Transcript, July 7, 2017 pp. 16-18.

When court convened on July 10 for the start of trial, the one jury panel member who had indicated African-American descent was not present, and none of the jury pool members who had not indicated a race on the questionnaire were African-American. Trial Transcript Vol.1, p. 35. The Court indicated that although the possibility of a *Plain* issue was raised on the previous Friday, July 7, that there was nothing that could be done about it until July 10th, and "it would have been impossible to deal with this matter before the conclusion of the 90 days." Trial Transcript Vol. 1, p. 37. The trial court had extensive discussion of the process by which the defense would be allowed to strike the jury panel under *Plain* and the *Duren* test

from *Duren v. Missouri*, 439 U.S. 357 (1979). *See generally*, Trial Transcript Vol. 1.

The trial court found that under the *Duren* test, there was a distinctive group in the community, African-Americans, and that the jury pool had zero African-Americans, which would lead to consideration of whether the underrepresentation was due to systematic exclusion of the group in the jury selection process. Trial Transcript Vol. 1, p. 35. The trial court found that the defense was entitled to time to research whether the underrepresentation was due to systematic exclusion, but also found that delay of the start of trial in order to conduct that research would be attributable to the defense, which, along with finding there was good cause for delay, led the court to find that Defendant's right to 90-day speedy trial was not violated. Trial Transcript Vol. 1, pp. 35-37.

The next morning, when court re-convened, defense counsel presented their case on systematic exclusion in Webster County, as described in Issue I, above, and the defense counsel moved to dismiss the case on the basis that because the requirements of the *Duren* test to show a 6th Amendment violation had been met, any delay is attributable to the State because the State is responsible for providing a jury pool that meets constitutional standards, and therefore there was not good cause to continue trial beyond

the 90-day speedy trial limit, especially because after it had been determined that the jury panel failed the first two prongs of the *Duren* test, the State did nothing to help determine whether there was systematic exclusion. Trial Transcript Vol. 2, pp. 4-5, 22, 28-31.

The trial court found that there was good cause to go beyond 90-days and therefore no violation. Trial Transcript Vol. 2, pp. 32-33. As well, in addressing the 6th Amendment issue, the trial court found that on the basis of the analysis of the jury pool over time that was presented by the defense, that there was not systematic exclusion sufficient to meet the standard of the *Duren* test. Trial Transcript Vol. 2, p. 25. The trial court relied in part on the 1992 Iowa Supreme Court decision in *State v. Jones*, 490 N.W.2d 787 (Iowa 1992), which the trial court found held that the use of "motor vehicle records and voting records" was proper. Trial Transcript Vol. 2, p. 25.

Defendant-Appellant submits that as of July 10, 2017, the 90th day for 90-day speedy trial purposes, African-Americans were underrepresented in the jury pool and to use that jury venire would have violated Defendant's right to fair trial. Therefore, although the defense asked for time to research the systematic exclusion of African-Americans in Webster County jury pools, that delay was not attributable to the defense, but was attributable to the State, because it was the State's failure to pull representative jury pools

in Webster County that ultimately put the defendant in the position of having to either go ahead on the 90th day with a jury pool containing no African-Americans and violative of his constitutional rights, or else request additional time in order to research systematic exclusion and have his right to speedy trial violated. It is an untenable position that the defendant found himself in through no fault of his own. After the first two prongs of the *Duren* test were found by the trial court, any delay in trial as the result of the defense needing to determine if there is also systematic underrepresentation should not be attributable to the defendant, but should be attributable to the State, because at that point, there is good cause to believe that the subject jury venire violates the defendant's 6th amendment rights, and it is necessary to take that last step to determine if the jury venire does create such a violation.

Furthermore, the defense may not have had to request additional time had the data they needed to determine systematic underrepresentation, which is in control of the State, been readily available to them, or had State personnel assisted in retrieving or reviewing pertinent information. The defense noted that racial make-up data was not available for driver's license information or voter registration information, and that in order to determine Webster County jury venire racial make-up over time, they had to review

individual jury questionnaires into the early morning hours. Trial Transcript Vol. 1, pp. 51-52, Trial Transcript Vol. 2, p. 4. As well, the State did nothing to assist the trial court in determining whether there was a systematic exclusion of African-Americans from the jury venire. Trial Transcript Vol. 2, p. 31. Just as the defendant in *Plain* did not have the opportunity to access the needed information to determine systematic underrepresentation, the defendant here was not allowed opportunity to process the information needed to determine systematic underrepresentation in a timely manner, essentially the time available to two attorneys in the course of one day. *See State v. Plain*, 898 N.W.2d 801, 827-828 (Iowa 2017).

III. The Trial Court Should Have Sustained Defense Counsel's Batson Objection to the State Striking the Last Remaining African-American in the Jury Panel.

The Equal Protection Clause prohibits prosecutors from using peremptory strikes to remove potential jurors solely on account of their race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), 6th Amendment to the U.S. Constitution, 14th Amendment to the U.S. Constitution, Iowa Const. art. I, §§ 6, 9, 10. Constitutional claims are reviewed de novo, and in review of Batson challenges, the trial court is given deference to determine the true

motive of an attorney in making strikes. *State v. Mootz*, 808 N.W.2d 207, 214 (Iowa 2012). "Under our *Batson* jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination." *Id*. at 215.

Error was preserved by defense counsel's timely objection and request for trial court review of the State's strike. Trial Transcript Vol. 3, p. 117.

In this case, after the State had struck for cause all African-American potential jurors from the jury pool except for one, the State used their last peremptory strike against the remaining African-American potential juror. Trial Transcript Vol. 3, pp. 117-118. The defendant is African-American. Trial Transcript Vol. 1, p. 2. The State responding to defense counsel's challenge, stated, "assuming we get past the first prong" of establishing a pattern or practice of excluding potential jurors based on race, that they had race-neutral reasons for using that strike. Trial Transcript Vol. 3, p. 118. The reason was that the prosecutor had prosecuted the potential juror's father for a class A felony, and he was worried about "latent hostility" towards him on

the part of the juror. Trial Transcript Vo. 3, pp. 118-120. The Court questioned the State about the potential juror's responses to questions about her memory of the trial and her relationship with her father, in which the potential juror had stated that she wasn't close to her father and that this situation would have no effect on her ability to execute her duties to be impartial. Trial Transcript Vol. 3, pp. 120-121. The potential juror had stated that she believed the sentence her father received was fair, that he was treated fairly by the prosecutor or State, that she would not hold anything against the prosecutor, she did not recognize the prosecutor as someone involved in her father's prosecution before the State brought it up, and, generally, that she had no relationship with her father and the prosecutor's involvement in his prosecution would not affect her in her ability to be impartial. Trial Transcript Vol. 2, pp. 72-76.

Defense counsel argued that the juror appeared to be candid during questioning and it did not appear that she would have a problem judging the present case separately and distinctly from her father's. Trial Transcript Vol. 2, p. 122. Defense counsel went on to say that especially in light of the lack of racial diversity on the jury panel and the fact that this was the last minority potential juror on the panel, that the Court should give higher scrutiny to the strike. The Court overruled the defense's objection and

allowed the State's strike to stand, finding that the State's given reason was a sufficient non-discriminatory reason to strike the juror and finding that "There's no provision that we're supposed to have, you know, a racially diverse jury panel in countervailance of our other rules of jury selection." Trial Transcript Vol. 2, p. 124. The trial court made no mention of whether it found the potential juror to be credible during voir dire questioning.

Defendant-Appellant submits that the trial court should have sustained the defendant's objection to the State's use of a peremptory strike against the last African-American potential juror on the panel, and should have found that the potential juror's answers during voir dire negated any legitimate concern the prosecutor might have had about "latent hostility" towards him. Should the Court find that the State's reasoning for exercising the strike was legitimately non-discriminatory, Defendant-Appellant requests that the Court re-consider level of scrutiny a court gives the State's non-discriminatory rationale in a situation such as the present one, where the State uses a peremptory strike on the last remaining minority potential juror, and adopt defense counsel's suggestion that the court hold the State to a "very high standard" in such circumstances. The rule seems to be that so long as the State provides a non-discriminatory reason for exercising the strike, even if that reason seems minor or of no real consequence, the strike

is upheld. Defendant-Appellant submits that the court in this type of situation should look at all the circumstances surrounding the strike and determine not only whether there exists an articulable non-discriminatory reason for the strike, but also whether that reason is "weighty" enough, or reasonable enough, to overcome the concern that some facially non-discriminatory reasons may be used as a proxy for discrimination based on race. *See State v. Miller*, No. 16-0331 slip op. at 6-7 (Iowa Ct. App. March 22, 2017).

In this case, the State used as its non-discriminatory reason that he feared "latent hostility" from the African-American potential juror because the prosecutor had been involved in the prosecution of the potential juror's father, a person with whom the potential juror had no ongoing relationship. This reasoning could be stated generally as, "the prosecutor fears bias because he prosecuted a relative of the potential juror." This reasoning seems to fit into that category of facially non-discriminatory reasoning that disproportionately implicates African-American potential jurors. *Id*. at 7-8. As that court stated:

> A significantly higher percentage of people of color have arrest records due to the disproportionate number of stops, searches, and arrests of people of color." Vida B. Johnson, *Arresting* Batson*: How Striking Jurors Based on Arrest*

> *Records Violates* Batson, 34 Yale L. & Pol'y Rev. 387, 389 (Spring 2016). Additionally, "Black people are more likely to have friends and family who are Black. As a result, Black jurors are more likely than White jurors to have friends and family who have been arrested." *Id*. The logical next step is that someone who has been arrested themselves or had someone they care about be arrested is more likely to have negative views of law enforcement. *Id*. at 407. While using potential jurors' response about law enforcement appears to be race-neutral, it is likely to have a disparate impact on potential black jurors. *See id*. at 389 ("Judges and prosecutors then use the existence of prior arrests of the jurors or the jurors' friends or family to strike these prospective jurors, in effect producing juries whose racial compositions are whiter than that of the respective communities."); *see also Hernandez v. New York*, 500 U.S. 352, 376 (1991) (Stevens, J., dissenting) ("An avowed justification that has a significant disproportionate impact will rarely qualify as a legitimate, race-neutral reason sufficient to rebut the prima facie case because disparate impact is itself evidence of discriminatory purpose.").
> *Id*.

Defendant-Appellant submits that the Court should find that the trial court should have sustained the Batson objection and requests the Court order a new trial.

IV. Prosecutorial Misconduct

Prosecutorial misconduct that denies a defendant a fair trial is a violation of due process. *State v. Graves*, 668 N.W.2d 860, 867 (Iowa 2003). Due process is guaranteed by the 14th Amendment to the U.S. Constitution

and Article I, Section 9 of the Iowa Constitution. Constitutional claims are reviewed de novo. *State v. Rogerson*, 855 N.W.2d 495, 498 (Iowa 2014).

These claims were preserved by timely objections made by defense counsel.

To find prosecutorial misconduct, the Court must find proof of misconduct and prejudice resulting in denial of a fair trial. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). Bad faith on the part of the prosecutor is not a necessary finding. *Id.* In determining prejudice the court considers the severity and pervasiveness of the misconduct, the significance of the misconduct to the central issues in the case, the strength of the State's evidence, the use of cautionary instructions or other curative measures, and the extent to which the defense invited the misconduct. *Id*.

Impermissible prosecutor conduct during opening and closing statements includes such things as misstating the evidence presented at trial or creating evidence, engaging in name-calling and disparaging the defense, and inflaming the prejudices of the jury. *State v. Shanahan*, 712 N.W.2d 121, 139-40 (Iowa 2006). It is improper for the prosecution to disparage the accused's defense as a "sham" or a "scam." *U.S. v. Sanchez*, 176 F.3d 1214, 1224 (9th Cir. 1999). Prosecution suggestions that defense counsel manufactured a false defense before, or even during, trial are entirely

impermissible. *See, e.g., Davis v. Zant*, 36 F.3d 1538 (11th Cir. 1994) (murder-one conviction reversed); *Bruno v. Rushen*, 721 F.2d 1193 (9th Cir. 1983) (per curium), cert. denied, 469 U.S. 920 (1984) (murder-one conviction reversed). Similarly, accusing defense counsel of misleading the jury by raising "non-issues" or "false issues" is prohibited. *U.S. v. Rodrigues*, 159 F.3d 439, 449 (9th Cir. 1998). Any such "gratuitous attack on the veracity of defense counsel," is reversible error if not corrected since "the trial process is distorted." *Id*. at 449-50, 451.

First, in this case, the prosecutor made reference to the crime of selling alcohol to minors and compared it to the charges in this case, saying to a potential juror during voir dire, "So obviously when you compare the two, that's, you know, certainly minor compared to -- to a murder. Would you agree?" Trial Transcript Vol. 2, p. 169. Defense counsel moved for a mistrial, arguing that the comments referred to the severity of the potential punishment and improper. Trial Transcript Vol. 2, p. 210. The trial court denied the motion, finding that the prosecutor's actions didn't rise to the level requiring a mistrial. Trial Transcript Vol. 2, p. 169. It is improper to invite the jury to speculate regarding potential penalties that may be imposed after a conviction. *State v. Hanes*, 790 N.W.2d 545, 549-550 (Iowa 2010). Here, the prosecutor invited the jury pool to compare the potential

punishment for the charged crimes with that of a much lesser offense of providing alcohol to a minor. The jury pool was asked to think about the potential punishments faced by Defendant if he was convicted. Speculating about or considering potential punishments has a tendency to confuse or distract a jury, and invitation to speculate or consider, such as the invitation here, was improper. See *Id*. Defendant-Appellant submits that for situations such as this, in which the jury has been exposed to information that has a high likelihood of creating prejudice, that the reviewing court use the test for prejudice outlined in *Hanes*, in which the reviewing court presumes prejudice unless and until it is established by the State that prejudice did not occur. *Id*. at 550-551. Here, the jury convicted on all counts and although the prosecutor characterized the potential punishment as more severe than the punishment for providing alcohol to a minor, the invited speculation leads to the probability that the jurors' speculation led them to incorrect conclusions regarding the potential sentence. Planting in the jurors' mind the anchor of a minor punishment, the prosecutor, in effect, invited the jurors to under-calculate the potential sentence. The two class "A" felonies in this matter carried the harshest sentence in Iowa, and any jury speculation that the punishment might be lighter could influence the thinking of the jury about the consequences of their verdict. The reviewing court should find that the

prosecutor improperly invited the jury to speculate about and consider potential punishments in this matter, and that the rebuttable presumption of prejudice cannot be overcome, and should reverse and remand.

Second, the State improperly disparaged defense counsel and defense counsel's arguments. During trial, after the State offered their exhibit 1, the defense objected and asked to review the exhibit, stating that they had not seen it. The State responded, "They've – they've had this drawing forever." Trial Transcript Vol. 4, p. 81. Then the State, after the defense responded that they had not seen this exhibit, said, "That's not true." Trial Transcript Vol. 4, p. 81. Later, at the next recess, the State admitted that the defense had not seen that exhibit, but had only seen an earlier version that had subsequently changed. Trial Transcript Vol. 4, p. 92-93.

During the State's rebuttal closing, the State made the following statements about defense counsel and the defense's arguments, "The second thing is an illustration. I have a -- I have a daughter. She's out of Iowa State now. She's -- she's out of college. She's working. She lives in California. But whenever she was in high school and she was upset about me -- with me about something -- I can't remember what the subject matter was -- and she kind of broke into this cross- examination of her dad. And her name is Sara. So Sara would ask me, well, was she -- she – I wasn't letting her do

something, or whatever it was she disagreed with, so she would pose this question. She'd go, "Really, Dad? Really?" And then that was kind of the next question whenever I said, "This is why we're not going to do it." "Really, Dad? Really?" And I -- and I told her -- I said, "Sara," I said, "I'm okay with you not agreeing with me; but if you're going to cross-examine your dad, you need to have some substance, right, in the -- in the question that you're asking." And what I've heard a lot of over the last almost two hours that Mr. Kloberdanz was up here is, "Well, that's strange" and, "What's up with that?" A lot of the things that were raised that were issues --" Trial Transcript Vol. 8, pp. 89-90. This statement was interrupted by an off the record sidebar. Trial Transcript Vol. 8, p. 90. The statement clearly disparages defense counsel by name and accuses his closing arguments as lacking substance and empty, like a non-response response.

Next, the State commented on defense counsel's use of the term "tragedy" for the killings, saying, "Mr. Kloberdanz characterized this as a horrible tragedy. Well, I would disagree with this. You know what a horrible tragedy is? When an infant dies in its crib for no reason. When a father of three, driving home from work, his car slides off the highway and is killed in a crash for no reason. This is not a horrible tragedy, this is a

cold-blooded killing. It is a brutal, senseless murder and a near-miss on Ron Willis. That's the proper way to characterize what occurred." Trial Transcript Vol. 8, p. 91. This seemingly continues to disparage defense counsel by name. The State then said, "At the end of Mr. Kloberdanz's statement – at his closing argument to you, he told quite a story. Wow. What was all of that based on? Nothing. What -- You would have thought Mr. Kloberdanz was there, the way he told that story. That Ron Willis got hit in the head with the lamp, that he switched clothes with Peter Veal, that he did all those things. Holy cow. Wow." Trial Transcript Vol. 8, pp. 91-92. This statement was again followed by a sidebar off the record and then an objection outside the presence of the jury. Trial Transcript Vol. 8, p. 92. The statements, again, disparage defense counsel by name and belittle the defense's closing arguments as made up and false.

Defense counsel had filed a motion in limine before trial requesting that the State refrain from such characterization. Motion in Limine filed July 2, 2017, p. 3, APP p. 029. In the State's response, they agreed to not use any improper argument in closing. Response to Defendant's Motion in Limine filed July 7, 2017, APP p. 030. Defense counsel also filed a post-trial motion for new trial based upon the prosecutorial misconduct. Motion for New Trial and In Arrest of Judgment filed August 18, 2017, APP p. 044. The trial court

overruled defense counsel's objection during closing and also denied the post-trial motion for new trial. Trial Transcript Vol. 8, pp. 95-96; Order Denying Motion in Arrest of Judgment and Motion for New Trial filed September 12, 2017, APP p. 052.

Defendant-Appellant submits that the prosecutorial misconduct described above went to the core of the defense by belittling the defense attorney and the closing arguments, indicating to the jury to not take the defense seriously. This denied Defendant a fair trial and the reviewing court should find that a new trial is necessary and remand this case for new trial.

V. The Trial Court Should Have Granted Defense Counsel's Objection to the Gun Demonstration.

Admission or exclusion of demonstrative evidence rests largely within the trial court's discretion and is therefore reviewed for abuse of discretion. *State v. Thornton*, 498 N.W.2d 670, 674 (Iowa 1993).

Error was preserved by defense counsel's timely objection to the demonstration. Trial Transcript Vol. 6, p. 55.

The State presented a demonstration of how a gun similar to the one recovered from the crime scene functioned. Trial Transcript Vol. 6 pp. 72-80. During an offer of proof for the demonstration, defense counsel objected

to the demonstration because the demonstration did not use the same gun as was recovered from the scene, but instead a similar gun which operated a little bit differently, because the demonstration would not be an accurate recreation of what allegedly happened or how the gun allegedly functioned because it was alleged that the gun from the scene jammed, and therefore would not be "helpful" to the jury and would give the jury an inaccurate idea of what happened at the scene. Trial Transcript Vol. 6, pp. 54-55. The witness described the differences in function as the safety and magazine operating differently. Trial Transcript Vol. 6, pp. 50-51. The State responded to defense counsel's objection by saying that the purpose of the demonstration was to show the jury how this "size and caliber" gun loads and operates. Trial Transcript Vol. 6, p. 56. The Court overruled the objection, stating, "I find that the proposed demonstration will assist the jury in understanding some of the issues in this case, you know, how the gun is loaded and --- and would operate. Any differences, I think, don't go to that. They also can be brought out in any examination of the witness. So I --- I don't think that the demonstration's going to be misleading or confusing to the jury. For those reasons, the demonstration will be allowed." Trial Transcript Vol. 6, pp. 56, ln. 18 through 57 ln. 1.

Defendant-Appellant submits that defense counsel's objection amounted to a challenge to the relevance of the demonstration, seeing as how the gun alleged to be the murder weapon was not used, the gun that was used operated differently from the gun from the scene, and that there was a concern for prejudice because the demonstration would give the jury an inaccurate idea of what happened at the scene of the crime. Simply demonstrating how a gun operates is of little or no relevance in this case because there was no dispute over how the gun operated. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Iowa R. Evid. 5.401. Irrelevant evidence is inadmissible. Iowa R. Evid. 5.402. The dispute was over who fired the gun, and an operation demonstration provides no information on that issue, nor any issue or fact of consequence in this case. Even if there is some minimal relevance, it is outweighed by the prejudicial effect of the demonstration. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Iowa R. Evid. 5.403. With such little probative value,

it was outweighed by the prejudice that the gun demonstration created by providing an inaccurate portrait of what happened at the scene of the crime and the "potential to goad the jurors into overmastering hostility." *See State v. Ward*, No. 16-0027 slip op. at 11 (Iowa Ct. App. April 5, 2017)(Vaitheswaran, concurring specially); *see also State v. Winfrey*, No. 1-653/10-0304 slip op. at 8-9 (Iowa Ct. App. Nov. 9, 2011), *State v. Williams*, 525 N.W.2d 847, 850 (Iowa 1994).

Defendant-Appellant submits that allowing the gun demonstration resulted in prejudice because there was not overwhelming evidence of guilt presented at trial and this error, when considered with other errors and prosecutorial misconduct alleged in this appeal, cumulatively renders the trial unfair under the 6th Amendment to the U.S. Constitution and Article 1 Section 10 of the Iowa Constitution and violated the right to due process under the 5th Amendment to the U.S. Constitution and Article 1 Section 9 of the Iowa Constitution, and affected the verdict of the jury.

VI. The Trial Court Erred in Denying Defense Counsel's Motion for a New Competency Evaluation at the May 23 Hearing.

The standard of review for trial court decisions on competency to stand trial is de novo. *State v. Lyman*, 776 N.W.2d 865, 871 (Iowa 2010).

If at any stage of a criminal proceeding it reasonably appears that the defendant is suffering from a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense, further proceedings must be suspended and a hearing had upon that question. Iowa Code Section 812.3.

Error was preserved by defense counsel's request for a new competency evaluation at the May 23 hearing, which was denied by the trial court.

The trial court, after receiving a second competency evaluation which determined that Mr. Veal was not unable to appreciate the charges, understand the proceedings, or assist effectively in his defense due to a mental disorder, held a hearing on the matter and determined that Mr. Veal was competent to stand trial. Transcript of Hearing held May 23, 2017 pp. 18-19. During that hearing the defense presented testimony of Mr. Veal's mother, who observed Mr. Veal, since his return from the second competency evaluation, to exhibit unusual behavior, to be paranoid, and to be rocking back and forth. Transcript of Hearing held May 23, 2017 pp. 6-8. Defense counsel added that Mr. Veal had not had appropriate responses to counsel's questions, had asked no questions of counsel, that there continue to be hallucinations for which no one knows the cause, that Mr. Veal seemed

to have a difficult time concentrating, and that medication is an issue. Transcript of Hearing held May 23, 2017 pp. 13-15.

Defendant-Appellant submits that the reviewing court should find that enough question regarding the second evaluation and enough new evidence or indication of unresolved or new competency concerns was brought to light that a new competency evaluation should have been ordered. Defendant-Appellant requests that should the reviewing court find that the trial court should have ordered a new competency evaluation, that this case be remanded to the district court for a new trial.

VII. The Trial Court Erred in Rulings Limiting the Evidence Regarding State Witness Ron Willis Allowed at Trial.

Evidence regarding potential motive or bias of a State witness implicates the confrontation clause of the 6th Amendment to the U.S. Constitution. *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986). The Iowa Constitution also guarantees the right to be confronted by witnesses called against you. Iowa Const. Art. I, Sec. 10. Constitutional claims are reviewed de novo. *State v. Rogerson*, 855 N.W.2d 495, 498 (Iowa 2014).

The standard for the reviewing Court for evidence admission decisions is abuse of discretion. *State v. Sallis*, 574 N.W.2d 15, 16-17 (Iowa 1998).

Relevant evidence is defined as, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa Rule of Evidence 5.401. Evidence which is not relevant is not admissible. Iowa Rule of Evidence 5.402. Evidence that is irrelevant is inadmissible under Iowa Rule of Evidence 5.402.

Iowa Rule of Evidence 5.404(b) governs the admission of evidence of prior bad acts, and for a Court to allow such evidence, it must find that the evidence was not offered for the purpose of proving the character of the person and that the person acted in a particular instance in conformity with that character, and that the evidence is relevant to a legitimate, disputed factual issue, that there is clear proof the individual against whom the evidence is offered committed the bad act, and that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. Iowa Rule of Evidence 5.404(b); *State v. Putman*, 848 N.W.2d 1, 8-9 (Iowa 2014).

Error on the following issues was preserved timely objections by defense counsel which were overruled or by objections made by the State which were sustained by the trial court, or otherwise by rulings of the trial court made during on-the-record discussion with counsel.

After an offer of proof regarding State witness Ron Willis' drug use and pending drug charges Willis was facing in Minnesota, the trial court sustained the State's relevancy objection and did not allow the defense to present that evidence. Trial Transcript Vol. 4, pp. 102-109. The trial court also limited the information about Mr. Willis' 2009 felony drug conviction that the defense could ask him about, such as whether the charge was originally a class B felony for distribution of a controlled substance. Trial Transcript Vol. 4, pp. 111-116. The defense also requested permission to ask Ron Willis about the outcome of a recent misdemeanor possession charge, because that charge could have been enhanced to a felony level charge with Willis' prior convictions, and Willis somehow did not serve or was not sentenced to the mandatory minimum two days in jail required upon conviction of that charge. Trial Transcript Vol. 4, pp. 120-121. The defense also requested permission to ask Willis, or alerted the court of its intention to ask, about why he has not been charged with felony possession of a controlled substance and felon in possession of a firearm. Trial Transcript

Vol. 4, pp. 121. After discussion, the trial court ruled that the defense could not ask about the recent conviction, could not ask about potential felony charges for the marijuana possession and gun possession, but could only ask about the fact that marijuana was found in Willis' car, which was already in the record through prior testimony. Trial Transcript Vol. 4, pp. 120-126.

The defense also inquired of the trial court about questioning Willis regarding his possession of a gun. Trial Transcript Vol. 4, pp. 126-127. The trial court ruled that the defense could ask about whether Willis possessed a gun that night. Trial Transcript Vol. 4, p. 127.

When the defense was presenting evidence, the court limited testimony regarding Ron Willis allegedly raping Misty Buckley. Trial Transcript Vol. 7, pp. 18-19, 58-67. The trial court also prevented Buckley from testifying that she was scared of Ron Willis. Trial Transcript Vol. 7, p. 66-67.

The trial court also sustained the State's objection to the defense asking Misty Buckley if the victim bought his drugs from Ron Willis. Trial Transcript Vol. 7, pp. 55-56. This information was relevant to motive for Ron Willis to kill the victim. The trial court sustained a State objection to the question the defense asked Misty Buckley about whether the victim had a drug problem. Trial Transcript Vol. 7, p. 57. This information was relevant

to whether there was a motive for Willis to kill the victim related to their drug business, such as whether, having a drug problem, the victim might have owed Ron Willis money for drugs the victim could not afford. The defense questioned Buckley about the victim's money situation and potential drug debt later in the direct examination, and the court again sustained the State's objection to that testimony on the basis of relevance. Trial Transcript Vol. 7, pp. 70-71.

One of the issues at trial was drug use. There was no motive presented by the State for why Mr. Veal would have killed the two victims. The defense, essentially, sought to establish reasonable doubt as to who killed the two victims by presenting evidence and argument regarding Ron Willis' relationships with the victims, including evidence regarding drug use by Willis and the victims, evidence that Willis sold drugs to the victims, and evidence that Willis and one of the victims had had a falling out after Willis had allegedly raped the victim's ex-girlfriend. The trial court limited the evidence regarding Willis and drugs and the rape accusation. In some instances, the court drew a line between testimony that there was a rift in Willis' and the victim's friendship, which was allowed, and what the rift was about, which was not allowed. The problem here is that simply presenting evidence regarding a rift does not speak to the potential severity of the

allegation, and it minimizes what could have been very great animosity between the two. The defense's argument, which was that Ron Willis committed murder in part because of this "rift," was necessarily made less credible because of the limitation on testimony regarding the alleged rape. This limitation also opened the door for the State to minimize the rift, which it did. See, e.g. Trial Transcript Vol. 7, p. 31, ln. 23-25, in which the State refers to the rift as "a disagreement or a little scuff, or whatever you want to call it."

Also, the defense sought to present evidence regarding the possibility that the State was giving Willis very favorable treatment with Willis' criminal charges and potential criminal charges. Such evidence would indicate that although there may not be a formal agreement between the State and Willis to give him favorable treatment in exchange for testifying against Mr. Veal, that Willis understood that he was getting very favorable treatment, and could surmise that not doing what he perceived the State to want him to do would put that favorable treatment in jeopardy, including the State bringing felony charges for felon in possession of a firearm and possession of a controlled substance third or subsequent offense.

Defendant-Appellant submits that the limitations the trial court put on the evidence, as described above, had the effect of making Willis' testimony

seem more credible than it otherwise would have had the evidence in question been presented. Willis' testimony was key to the State's case, and without it, or with it being severely discounted by the fact-finder for lack of credibility, the result of the trial likely would have been different. At least the very least, without Willis' testimony, such elements in the murder charges such as malice aforethought and premeditation, would have no basis, because there would have been no credible description of what happened in the house. As well, the attempted murder charge is very nearly entirely based on Willis' testimony.

The reviewing court should find that the trial court erred in limiting evidence regarding Ron Willis' drug use, drug sales,

VIII. The Trial Court Erred by Denying Defense Counsel's Motions for Judgment of Acquittal.

Review of a district court's ruling on a motion for judgment of acquittal is for correction of errors at law. *State v. Corsi*, 686 N.W.2d 215, 218 (Iowa 2004). A sufficiency-of-the-evidence test is used for motions for judgment of acquittal. *State v. Shanahan*, 712 N.W.2d 121, 134 (Iowa 2006).

Error was preserved by moving for judgment of acquittal at the close of the State's case and by written motion post-verdict, both of which were

considered and denied by the trial court. Motion for New Trial and in Arrest of Judgment filed August 18, 2017, APP p. 044, Order Denying Motion for Arrest of Judgment and Motion for New Trial filed September 12, 2017, APP p. 052.

Trial counsel moved for a directed verdict of acquittal at the close of the State's evidence. Trial Transcript Vol. 7, pp. 3-10. Counsel argued that that it was not shown that Mr. Veal ever handled the gun or the knife, that there was not sufficient evidence of malice aforethought for either death, that there was not sufficient evidence Mr. Veal acted willfully, deliberately, premeditatively, and with specific intent for either death, that there was not sufficient evidence that Mr. Veal acted by reason of a sudden violent and irresistible passion resulting from serious provocation for either death, and that there was not sufficient evidence that Mr. Veal acted recklessly regarding either death. Trial Transcript Vol. 7 pp. 3-8. Trial counsel also argued in support of the motion that there was not sufficient evidence that Mr. Veal ever pointed the gun at Ron Willis, that his actions set into motion a chain of events which would cause or result in Ron Willis' death, that Mr. Veal had any specific intent to cause the death of Ron Willis, that Mr. Veal displayed a dangerous weapon in a threatening manner to Ron Willis, or that

any action by Mr. Veal was done with specific intent to cause serious injury. Trial Transcript Vol. 7, pp. 9-10.

The trial court denied the motion, finding that there was sufficient evidence presented during the State's case on each element of the crimes, but the trial court noted that there was not a lot of evidence presented regarding malice aforethought and premeditation. Trial Transcript Vol. 7, pp. 11-12.

Trial counsel renewed their motion for a judgment of acquittal after the verdict by written motion. Motion for New Trial and In Arrest of Judgment filed August 18, 2017 p. 3. Trial counsel asserted in that motion that Ron Willis' testimony regarding the elements of the crimes charged was not credible and that the State did not present sufficient evidence of those elements. Motion for New Trial and In Arrest of Judgment filed August 18, 2017 p. 3, APP p. 046.

Appellant-Defendant submits that the trial court should have granted the motion in arrest of judgment for those reasons trial counsel explained at the close of the State's presentation of evidence and for the reasons explained in the written motion, as described above. Trial Transcript Vol. 7 pp. 3-10; Motion for New Trial and In Arrest of Judgment filed August 18, 2017 p. 3, APP p. 046.

IX. The Trial Court Erred by Denying Defense Counsel's Motion for New Trial.

Motions for new trial asserting the verdict is contrary to the weight of the evidence are reviewed for abuse of discretion. *State v. Ary*, 877 N.W.2d 686, 706 (Iowa 2016). A motion for new trial is analyzed using a weight-of-the-evidence standard. *Id.* The weight-of-the-evidence standard is different from a sufficiency-of-the-evidence standard, in part, because the Court is required to consider credibility of witnesses. *Id*.

Trial counsel filed a motion for new trial after the verdict, alleging that the verdict was contrary to the evidence. Motion for New Trial and In Arrest of Judgment filed August 18, 2017 p. 4, APP p. 047. In that motion, trial counsel made the argument that the testimony of Ron Willis was not credible, and that evidence was presented at trial indicating that Ron Willis was in fact the person who committed the killings in this case. Motion for New Trial and In Arrest of Judgment filed August 18, 2017 p. 3, APP p. 046. The trial court denied the motion. Order Denying Motion for Arrest of Judgment and Motion for New Trial filed September 12, 2017, APP p. 052. Error was preserved by trial counsel's timely filed motion and the denial of the motion by the trial court.

Defendant-Appellant submits that when the evidence is weighed according to the weight of the evidence standard, and Ron Willis' testimony is appropriately discounted for not being credible, that the greater evidence points to Mr. Veal not being the person who committed any crimes, but Ron Willis committing the killings. Ron Willis had a prior felony conviction (Trial Transcript Vol. 4, p. 128), testified differently at his depositions and at trial (Trial Transcript Vol. 4, pp. 145, 157, 177), was not charged by the State with felony possession of a controlled substance or felon in possession of a firearm despite plenty of evidence to do so (Trial Transcript Vol. 4, pp. 156, 159-161), presumably in order to keep Ron Willis' cooperation with the State as a witness against Mr. Veal, and Ron Willis had allegedly raped one of the victim's girlfriend, which pointed to animosity between Ron Willis and the victim (Trial Transcript Vol. 4, pp. 172-173). Ron Willis also testified about being followed by, and other people being followed by, "creepy crawlies" which were watching him all the time, and that "And everybody told me to stay on my meds. It wasn't – I don't need meds. What I see, I see." Trial Transcript Vol. 4, pp. 173-74.

Ron Willis was not credible, he had animosity with one of the victims, appeared to be getting unusually outstanding treatment from the State on potential criminal charges, and Willis' DNA was found on the handle and

the slide of the gun (Trial Transcript Vol. 5, pp. 184-185, 186). The trial court should have found that the weight of the evidence did not support any conviction for Mr. Veal and should have granted a new trial.

CONCLUSION

The Reviewing Court should remand the case to the district court with instructions to finish the *Duren* test should the Court find that the defense made a prima facie showing regarding the first or second jury venire under the *Duren* test. The Reviewing Court should find that there was not good cause attributable to the defendant to start trial beyond the 90-day limit and vacate the verdict and judgment and dismiss the case. The Reviewing Court should vacate the verdict and judgment and remand for new trial for violation of *Batson*, error in the trial court's ruling allowing the gun demonstration, prosecutorial misconduct, and error in evidentiary rulings regarding State witness Ron Willis. The Reviewing Court should vacate the verdict and judgment and remand for competency evaluation should it find the trial court erred in denying defense counsel's request for a competency evaluation. The Reviewing Court should vacate the verdict and judgment and remand for entry of a judgment of acquittal if it finds the trial court erred in denying the motion for a judgment of acquittal. The Reviewing Court

should vacate the verdict and judgment and remand for new trial should it find the trial court erred in denying the motion for new trial.

REQUEST FOR ORAL SUBMISSION

Appellant requests oral submission because this case involves significant issues of both Iowa and U.S. Constitutional law, including questions raised by the recent decision *State v. Plain*, 898 N.W.2d 801 (Iowa 2017) about the process of determining systematic underrepresentation in violation of *Duren*. It would benefit the Court to be able to question the attorneys in this matter regarding the arguments made in their respective briefs.

CERTIFICATION OF COSTS

Appellant has accrued actual costs of 0 for printing and duplicating necessary copies of this brief in final form.

Respectfully submitted,

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PROOF OF SERVICE
AND CERTIFICATE OF FILING

The undersigned certifies that on the 25th Day of April, 2018, I served this document, Appellant's final brief, by EDMS to all parties electronically.

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