ELECTRONICALLY FILED APR 18, 2018 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 17–1453

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PETER LEROY VEAL,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR CERRO GORDO COUNTY
THE HONORABLE RUSTIN T. DAVENPORT, JUDGE

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov

CARLYLE T. DALEN
Cerro Gordo County Attorney

SCOTT D. BROWN
Assistant Attorney General

ATTORNEYS FOR PLAINTIFF-APPELLEE FINAL

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V. Did the Trial Court Err in Denying Veal's Objection to the State's Firearm Expert's In-Court Demonstration?

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VI. Did the Trial Court Err in Finding Veal Had Been Restored to Competency to Stand Trial?

Authorities

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VII. Did the Trial Court Err in Sustaining the State's Objections to Veal's Attempts to Introduce Propensity Evidence About Ron Willis?

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VIII. Did the Trial Court Err in Overruling Veal's Challenge to the Sufficiency of the Evidence?

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IX. Did the Trial Court Err in Overruling Veal's Challenge to the Weight of the Evidence?

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ROUTING STATEMENT

Veal asks for retention to resolve "issues of first impression regarding the process of determining systematic underrepresentation under *State v. Plain*." *See* Def's Br. at 13. The State agrees: after *Plain*, Iowa district courts need additional guidance. *See State v. Plain*, 898 N.W.2d 801, 821–28 (Iowa 2017). As such, the State agrees retention is appropriate. *See* Iowa R. App. P. 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case

Peter Leroy Veal was tried before a jury and convicted on two counts of first-degree murder, a Class A felony, in violation of Iowa Code sections 707.1 and 707.2(a) (2016), and one count of attempted murder, a Class B felony, in violation of Iowa Code section 707.11. The State's evidence established that Veal shot and killed Melinda Kavars, tried to shoot Ron Willis (before his gun jammed), and stabbed Caleb Christensen to death. Veal was sentenced to life without parole.

Statement of Facts

On November 17, 2016, Mason City Police Officer Jennifer Barr heard dispatch report that "Ron Willis said that Peter Veal had shot his cousin and that [Veal] had hit [Ron] on the head with a pistol."

See TrialTr.V3 p.158,ln.5–24. Officer Barr proceeded to the location that dispatch identified. *See* TrialTr.V3 p.158,ln.25–p.159,ln.8. She already knew Veal, and she spotted him walking on the sidewalk. *See* TrialTr.V3 p.161,ln.25–p.162,ln.18. Veal "[m]ade eye contact" with Officer Barr—and then, "he took off running westbound through the houses." *See* TrialTr.V3 p.162,ln.19–p.163,ln.3. Officer Barr reported that she had located Veal, and she tried to pursue him—but it was dark and she lost the trail. *See* TrialTr.V3 p.163,ln.4–p.164,ln.14.

Other officers announced over the radio that they found Veal, and Officer Barr went to their location. When she first saw Veal, he was wearing "a light green coat, jeans, [and] a hat." *See* TrialTr.V3 p.162,ln.19–p.163,ln.3. But by the time Veal was apprehended, he was wearing neither a shirt nor a hat. Officer Barr could also see that his hands were "very bloody." *See* TrialTr.V3 p.164,ln.23–p.165,ln.4.

Officer Barr went back to 1620 North Hampshire, which was the location where Ron Willis had reported a shooting occurred. *See* TrialTr.V3 p.165,ln.12–15; TrialTr.V3 p.167,ln.25–p.168,ln.3. Other officers were already inside, so Officer Barr went to speak with Ron Willis, who was "standing outside in front of [her] patrol car." *See* TrialTr.V3 p.168,ln.4–13.

Ron appeared to be "very shaky" and "very nervous." TrialTr.V3 p.168,ln.14–19. Ron told her that "Peter Veal had shot his cousin" and "tried to shoot [Ron], but the gun didn't work"—and Ron asked her if Caleb Christensen "was still alive." TrialTr.V3 p.168,ln.20–p.169,ln.12.

Mason City Police Officer Josh Stratmann responded to the same report and heard Officer Barr's subsequent report, and he went straight to 1620 North Hampshire. *See* TrialTr.V3 p.187,ln.2–20. He saw Ron Willis outside, who called out to him from across the street and said "his cousin had been shot, somebody was running from the scene, . . . and that his cousin was inside the house." *See* TrialTr.V3 p.187,ln.21–p.188,ln.10. Officer Stratmann had "a brief conversation" with Ron Willis. *See* TrialTr.V3 p.192,ln.23–p.193,ln.7.

> It was clear to me that he was shaken up. He was sobbing, crying. When I went outside he was, like, laying or sitting on the grass off the — off the curb.

See TrialTr.V3 p.192,ln.23–p.193,ln.12. Ron had a head wound, and he stopped the bleeding with a towel. *See* TrialTr.V3 p.193,ln.13–19. Ron told Officer Stratmann that "he heard shots and then he just ran out of the house as fast as he could." *See* TrialTr.V3 p.194,ln.2–9. Officer Stratmann asked Ron to "come to the police department to speak with an investigator," and Ron agreed to do so. *See* TrialTr.V3

p.193,ln.20–p.194,ln.12. Ron made a phone call while they were on the way to the police station; during that call, he informed someone that "he thought Caleb and Melinda were dead," and he was crying. *See* TrialTr.v3 p.211,ln.23–p.212,ln.4.

Mason City Police Lieutenant Ron VandeWeerd responded to the same call and spoke with Ron Willis. Lieutenant VandeWeerd said "it seemed like he was crying and very upset, shaky, pacing." *See* TrialTr.V3 p.214,ln.23–p.217,ln.3. Ron "asked if Caleb was okay, and he said [Veal] had shot his cousin Melinda." TrialTr.V3 p.217,ln.4–15.

Mason City Police Officer Zach Lensing responded to the initial report from dispatch, and he saw Officer Barr's location when she reported Veal "took off westbound running from her." *See* TrialTr.V4 p.182,ln.20–p.183,ln.21. Officer Lensing drove to a location where he thought he might intercept Veal, and he succeeded. *See* TrialTr.V4 p.183,ln.22–p.185,ln.25. Officer Lensing told Veal to "[k]eep [his] hands in the air," and Veal complied. As Officer Lensing approached, he saw Veal had "blood on his shoes." *See* TrialTr.V4 p.186,ln.5–p.186,ln.16; State's Ex. 31–32; CApp. 48. An investigation of the area uncovered various items that Veal had discarded as he fled, including his cap, his green coat, Caleb's cell phone, and "a black folding knife."

See TrialTr.V4 p.186,ln.25–p.198,ln.1; State's Ex. 18–27; CApp. 20. They also found a "blood trail" that followed Veal's path from the location where he was apprehended, to the spot where Officer Barr first located him, and back to the house at 1620 North Hampshire. *See* TrialTr.V4 p.200,ln.11–p.202,ln.12; *see also* TrialTr.V5 p.20,ln.15–p.35,ln.5; State's Ex. 37. Veal did not appear to have any injuries. *See* TrialTr.V4 p.202,ln.18–20. Cerro Gordo County Sheriff's Deputy Matt Klunder was present; he noticed "[Veal] had quite a bit of blood on his pants" and "his body," and "his hands had a lot of blood on them." *See* TrialTr.V4 p.206,ln.18–p.209,ln.1; *see also* TrialTr.V4 p.227,ln.1–25 ("His pants, his shoes, his hands were covered in blood."); TrialTr.V5 p.47,ln.6–p.48,ln.17 (explaining Veal's jeans were "wet" with blood and were placed in a "temporary secured evidence room to dry out"). Deputy Klunder found Veal's shirt near his route; it was "inside-out." *See* TrialTr.V4 p.209,ln.4–p.215,ln.8; State's Ex. 28–30; CApp. 40. Veal had a cut on his hand; Veal "had said at the time that he got cut from jumping a fence," but that seemed inconsistent with the location of the wound. *See* TrialTr.V4 p.217,ln.13–p.220,ln.11. DCI Special Agent Chris Callaway saw Veal had "mist drops" of blood on his face. *See* TrialTr.V5 p.52,ln.4–12.

Caleb's autopsy confirmed that he had sustained "multiple sharp-force injuries," including a notably severe sharp-force injury that severed his "common carotid artery" on the side of his neck and 24 other sharp-force wounds, which together caused his death. *See* TrialTr.V6 p.124,ln.11–p.148,ln.12; State's Ex. 103–09; CApp. 81. Melinda died from a single gunshot wound to her neck and chest, which severed arteries that were "major sources of blood for the brain" and caused death "within minutes." TrialTr.V6 p.166,ln.20–p.183,ln.9.

Before that evening, Ron Willis and Veal were friends. *See* TrialTr.V4 p.31,ln.17–p.32,ln.11. Melinda was Ron's cousin, and the two of them would socialize relatively frequently. *See* TrialTr.V4 p.32,ln.12–p.34,ln.11. Caleb was Ron's "[r]eal good friend," and they saw each other "[a]bout every day." *See* TrialTr.v4 p.35,ln.17–p.37,ln.4. Veal had not met Melinda or Caleb. TrialTr.V4 p.39,ln.20–p.40,ln.21.

Earlier that day, Ron drove to Veal's location and picked him up. *See* TrialTr.V4 p.42,ln.15–p.44,ln.25. They went to a liquor store, and then went to Caleb's house at 1620 North Hampshire. *See* TrialTr.V4 p.42,ln.15–p.47,ln.8. Ron introduced Veal to Caleb. *See* TrialTr.V4 p.47,ln.12–19. After a while, Ron and Peter left Caleb's house and went to the house where Ron was staying with his friend, Gene. *See*

TrialTr.V4 p.49,ln.1–p.50,ln.4. Two of Ron's friends (Todd and Carol) came to hang out with Ron. *See* TrialTr.V4 p.50,ln.9–p.51,ln.12.

Melinda had invited Ron over for leftovers from her early Thanksgiving dinner. *See* TrialTr.V4 p.52,ln.14–p.53,ln.10. After Todd and Carol left, Ron and Veal went to Melinda's. Ron introduced Veal to Melinda, and Melinda served dinner. *See* TrialTr.V4 p.52,ln.14–p.54,ln.7. Ron watched Veal and Melinda use methamphetamine together—he said Veal used a pocketknife to cut it into lines. *See* TrialTr.V4 p.54,ln.8–p.55,ln.22.

After about 40 minutes, they all decided to go to Caleb's house. *See* TrialTr.V4 p.57,ln.10–p.58,ln.15. Caleb was expecting Ron to come back that evening. The four of them hung out in Caleb's living room "just sitting there and drinking," and smoking marijuana. *See* TrialTr.V4 p.61,ln.5–p.65,ln.2; TrialTr.V4 p.138,ln.14–p.140,ln.17.

At some point, Veal got up and "said he wasn't feeling up to par." Ron told Veal to "[g]o and get some fresh air," so Veal went outside. *See* TrialTr.V4 p.66,ln.9–25. Veal was gone for "ten, fifteen minutes." When he came back, he sat down for a moment, then "got up again," came back, and sat back down. *See* TrialTr.V4 p.67,ln.8–19. Then:

> I'm talking to my cousin [Melinda], you know, laughing. Suddenly I hear a pfft (phonetic), a shot; and I seen blood coming out of my cousin's throat.

See TrialTr.V4 p.68,ln.15–p.70,ln.5. Ron had noticed Veal standing up from "the corner of [his] eye" and he saw Melinda get shot, but he did not see where Veal pulled the gun from. *See* TrialTr.V4 p.70,ln.10–p.71,ln.9. After shooting Melinda, Veal pointed the gun at Ron's head and pulled the trigger—but the gun did not fire, so Veal hit Ron in the head with the gun. *See* TrialTr.V4 p.71,ln.10–p.75,ln.24; State's Ex. 36; CApp. 51. As Ron started to run, he saw Veal was trying to dig out the jammed bullet with his knife. *See* TrialTr.V4 p.75,ln.25–p.76,ln.16; *see also* TrialTr.V4 p.142,ln.18–p.143,ln.25.

The lamp that was next to Caleb in the living room was the only light in the house that was on. But as Ron ran through the kitchen, that light went out—and Ron had to unlock the door in total darkness. *See* TrialTr.V4 p.76,ln.17–p.77,ln.17. Luckily, he succeeded. Ron had expected Caleb to follow him; he did not realize Caleb had been stabbed. *See* TrialTr.V4 p.68,ln.15–p.70,ln.5; TrialTr.V4 p.77,ln.18–p.78,ln.1.

When Ron escaped, he ran across the street and called 911, while keeping an eye on Caleb's house. The recorded 911 call was admitted as evidence. TrialTr.V4 p.82,ln.2–p.84,ln.3; State's Ex. 2.

Ron saw Veal leave Caleb's house and run south. *See* TrialTr.V4 p.86,ln.3–23. Ron called Todd and Carol, who came to the scene and tried to calm him down. *See* TrialTr.V4 p.87,ln.2–18; TrialTr.V4 p.162,ln.5–25. Ron spoke with police that evening and gave consent for them to search his car, which was parked outside Caleb's house. *See* TrialTr.V4 p.88,ln.2–p.89,ln.2; TrialTr.V7 p.46,ln.14–p.47,ln.12.

Blood droplets from the trail along Veal's path were collected. *See* TrialTr.V5 p.104,ln.4–p.129,ln.1. There was more blood on the front door to the 1620 North Hampshire residence, but not on the kitchen door that Ron used. *See* TrialTr.V5 p.129,ln.2–p.131,ln.14. Some "potential footwear impressions" in the house were collected. *See* TrialTr.V5 p.140,ln.2–21; State's Ex. 72; CApp. 53. The gun was found with the jammed cartridge inside. *See* TrialTr.V5 p.147,ln.22–p.149,ln.17; State's Ex. 78–80; CApp. 55. One fired cartridge casing was found near Melinda's body. *See* TrialTr.V5 p.151,ln.1–p.152,ln.7; State's Ex. 81–82; CApp. 61. There were also four unfired rounds loaded in the gun's magazine. *See* TrialTr.V5 p.155,ln.14–p.156,ln.14; State's Ex. 121. The blood trail in the house did not track Ron's route, and there was no blood on the door Ron unlocked in the dark. *See* TrialTr.V5 p.156,ln.18–p.160,ln.13; State's Ex. 83–89; CApp. 65.

DNA analysis of fluids/tissue found on the gun itself showed the presence of Melinda's blood on various portions, Ron's skin tissue "[o]n the back of the slide," and an unknown third contributor. *See* TrialTr.V5 p.178,ln.4–p.188,ln.15. DNA analysis of the knife found near Veal's discarded clothing showed the presence of Caleb's blood and an unknown contributor. *See* TrialTr.V5 p.188,ln.16–p.191,ln.6. DNA analysis of the blood on Veal's cell phone, shirt, jeans, and shoes showed that it was a mixture of Veal's blood and Caleb's blood. *See* TrialTr.V5 p.198,ln.7–p.218,ln.1. Footwear impression analysis indicated that bloody footprints in the 1620 North Hampshire house were consistent with Veal's shoes. *See* TrialTr.V6 p.21,ln.1–p.29,ln.8; State's Ex. 32–33; CApp. 47; State's Ex. 86–89; CApp. 71.

DCI firearms expert Victor Murillo tested the gun and examined the cartridges, and he determined "some of the gouges and damage that was done to the outside of the case body" caused the cartridge to swell and grow "a little bit larger," and it jammed the gun because it would not "fit in the chamber correctly." *See* TrialTr.V6 p.63,ln.2–p.6,ln.20. He confirmed the bullet that killed Melinda was fired from the gun recovered at the scene. *See* TrialTr.V6 p.96,ln.2–p.101,ln.5.

Additional facts will be discussed when relevant.

ARGUMENT

I. Veal Cannot Show a Violation of His Right to a Jury Drawn from a Fair Cross-Section of the Community.

Preservation of Error

Error was preserved when this claim was raised and ruled upon. *See* TrialTr.V2 p.23,ln.13–p.26,ln.3; TrialTr.V2 p.38,ln.12–p.39,ln.24; *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

Review is de novo. *See State v. Chidester*, 570 N.W.2d 78, 80 (Iowa 1997).

Merits

In *Plain*, the Iowa Supreme Court confirmed that Iowa follows *Duren* and requires three showings to support any claim alleging unconstitutional underrepresentation of a racial group in a jury pool:

> (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.

Plain, 898 N.W.2d at 821–22 (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)). The trial court found Veal satisfied the first prong, but could not satisfy the other two by making the required showings

of substantial underrepresentation and systematic exclusion. *See* TrialTr.V2 p.23,ln.18–p.25,ln.23. Veal challenges that ruling, and he bifurcates the matter into two separate stages. *See* Def's Br. at 14–23. But there was only one final ruling, and it was not in error.

A. On July 10, 2017, the trial court took action to alleviate potential underrepresentation. Veal can only attack the subsequent ruling on July 11, 2017, that approved the jury pool used to draw his jury.

Of the 100 potential jurors who responded to surveys and were called to appear for jury selection on July 10, 2017, only 87 appeared. *See* TrialTr.V1 p.14,ln.16–p.15,ln.1. At first glance, it appeared none of those 87 were African-American. *See* TrialTr.V1 p.14,ln.23–p.15,ln.10; TrialTr.V1 p.35,ln.8–16. The trial court noted that *Plain* required it to grant Veal's request for additional time and access to data to support his claim of systematic exclusion. *See* TrialTr.V1 p.16,ln.3–p.17,ln.22; TrialTr.V1 p.31,ln.11–p.33,ln.14; TrialTr.V1 p.35,ln.17–p.37,ln.25. But in the meantime, it tried to alleviate the apparent underrepresentation by summoning an extra jury panel (which appeared to include more minority representation) and by reaching out to jurors who responded to surveys but had not appeared (because one was African-American). *See* TrialTr.V1 p.39,ln.13–p.45,ln.6; TrialTr.V1 p.48,ln.9–p.50,ln.14.

Veal pauses the action here to argue "the trial court should have found the first jury pool unconstitutional." *See* Def's Br. at 20–21. But focusing on the apparent underrepresentation that existed on July 10 would ignore the court's successful attempts to diversify the jury pool. On July 11, of the 157 potential jurors who appeared for jury service, five were African-American. *See* TrialTr.V2 p.38,ln.12–p.39,ln.24; *see also* TrialTr.V2 p.216,ln.3–12 (identifying all five by name). The court effectively granted relief on Veal's first motion when it alleviated the apparent disparity through race-neutral means. No violation of the Sixth Amendment or Article I, Section 10 could occur until a jury was selected and sworn—and only the July 11 pool was used to select and impanel a jury to try this case. Any challenge to the July 10 jury pool is moot, cannot state a plausible claim of a constitutional violation, and cannot invalidate the subsequent proceedings. *See, e.g.*, *State v. Washington*, No. 15–1829, 2016 WL 6270269, at *9 (Iowa Ct. App. Oct. 26, 2016) (explaining "the clerk changed the procedure to excuse jurors between the first and second jury summons," and only analyzing "the process to get excused at the time of Washington's trial" to resolve challenge to procedures for excusing potential jurors). Veal's attack on this preliminary ruling that diversified the jury pool is unavailing.

B. There was no substantial underrepresentation.

Substantial underrepresentation is the second *Duren* prong. Movants must establish that "the representation of the group in the jury venires" is not "fair and reasonable in relation to the number of such persons in the community." *See United States v. Weaver*, 267 F.3d 231, 240 (3d Cir. 2001) (citing *Duren*, 439 U.S. at 364).

Before *Plain*, any absolute disparity under 10% could not show substantial underrepresentation. *See State v. Jones*, 490 N.W.2d 787, 792–93 (Iowa 1992), *overruled by Plain*, 898 N.W.2d at 826. After *Plain*, Iowa courts may consider other models/calculations to analyze substantial underrepresentation, in addition to absolute disparity. *Plain*, 898 N.W.2d at 897. But *Plain* offered no further guidance, which created considerable uncertainty. Here, the court had an array of numbers, but was unsure precisely what they meant. *See* TrialTr.V2 p.23,ln.22–p.25,ln.8; TrialTr.V2 p.38,ln.12–p.39,ln.24. This case offers a chance to provide guidance on how to analyze the resultant statistics.

Population parameter: All relevant disparity analyses start by identifying the percentage of the jurisdiction's eligible jurors who belong to the distinctive group. *See Plain*, 898 N.W.2d at 822–23.[1]

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[1] To skip parameter-related math, jump to the table on page 34.

Veal's counsel stated 5.5% of the population of Webster County[2] was African-American, and cited "the United States Census Bureau"—and specifically, "their 2016 version on their website." *See* TrialTr.V2 p.4,ln.20–22; TrialTr.V2 p.7,ln.5–20; *cf*. Court Ex. 2, at 3; App. 41. The only 2016 estimate available from the U.S. Census Bureau states that 4.5% of Webster County's population is African-American. *See* U.S. CENSUS BUREAU, *QuickFacts: Webster County, Iowa* (2016), https://www.census.gov/quickfacts/fact/table/webstercountyiowa/RHI225216. Veal offered no alternative citation, so this analysis starts with the 4.5% figure, labeled Parameter A.

Veal is multiracial. The census data indicates that 4.5% marked "Black or African-American alone." *See id.* An additional 1.9% marked "[t]wo or more races," but it is unclear how many of those people are members of Veal's particular multiracial group. *See id.* Approximately 70% of all non-white, single-race respondents were African-American; if the same racial distribution applied within the multiracial category, an additional 1.3% of the population would be multiracial people who also belong to Veal's distinctive group. That composite starting figure of 5.8% that includes multiracial African-Americans is Parameter B.

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2 *See* Order Granting Change of Venue (6/1/17); App. 24.

The trial court noted that only "appropriate aged individuals" are eligible for jury service and receive jury summons. *See* TrialTr.V1 p.16,ln.9–p.19,ln.11; TrialTr.V2 p.35,ln.8–12. Unadjusted census data produces misleading results because African-Americans in Iowa are disproportionately young. The median age for African-American Iowans is 26.1 years old. For all Iowans, the median age is 39.7 years old. *See* STATE DATA CENTER OF IOWA & IOWA COMM'N ON THE STATUS OF AFRICAN-AMERICANS, *African-Americans in Iowa: 2018*, at 1 (2018) http://www.iowadatacenter.org/Publications/aaprofile2018.pdf. 9.9% of all African-American Iowans are under age 5. For all Iowans, the corresponding figure is 6.4%. *See id.*

If 9.9% of African-American Iowans are 4 years old or younger, then 40.1% of African-American Iowans are between 5 years old and the median age (which is 26.1 years old). Assuming a flat distribution (meaning: assuming there are as many 5-year-olds as 25-year olds),[3] 58.8% of those 40.1% would be in the lower 58.8% of that age range that would be ineligible for jury service (5 to 17) and 41.2% would be in the upper 41.2% of that age range (18 to 26.1). Thus, 58.8% of 40.1%

[3] This assumption probably *underestimates* the "youth skew" for African-American Iowans; the birth rate for African-American Iowans is 20.4 per 1,000, compared to 12.5 per 1,000 for all Iowans. *Id.* at 4.

(23.6%) of African-American Iowans are at least 5 years old, but are still too young for jury service. Adding that 23.6% to the 9.9% who are under 5 years old shows that 33.5% of all African-American Iowans are too young to serve on a jury; only 66.5% are old enough to serve.

For all Iowans, similar calculations can be performed. If 6.4% of all Iowans are younger than 5 years old, then 43.6% of all Iowans are between 5 years old and the median age (39.7 years old). Assuming a flat age distribution, 36.4% would fall in the younger 36.4% of that age range (5 to 17), and 63.6% would be in the upper 63.6% of that range (18 to 39.7) that would be old enough for jury service. Taking 36.4% of 43.6% suggests that 15.9% of all Iowans are somewhere from 5 to 17 years old. When added to the 6.4% of all Iowans who are younger than 5 years old, that means 22.3% are too young to serve. Therefore, approximately 77.7% of all Iowans are old enough for jury service. The analogous figure for African-Americans was 66.5%.

Those two numbers can transform a population parameter that describes *all* African-American Iowans as a percentage of all Iowans into a parameter that describes *adult* African-American Iowans as a percentage of *adult* Iowans (which is important, because only adults can be selected to serve as potential jurors). Any all-ages parameter

can be converted by multiplying it by (66.5%)/(77.7%)—which simplifies to 0.8559.[4] Converting Parameter A to an adult-specific population parameter gives 3.85% (Parameter C), and converting Parameter B yields 4.96% (Parameter D).

Parameter:	**A**	**B**	**C**	**D**
Describes:	Unadjusted census data	Includes multiracial	A converted to adults	B converted to adults
AA % of pop.	4.5%	5.8%	3.85%	4.96%

Absolute disparity: Five of the 157 people on this jury panel were African-American, which is 3.185%. *See* TrialTr.V2 p.38,ln.12–p.39,ln.24; *see also* TrialTr.V2 p.216,ln.3–12 (identifying all five). "Absolute disparity is calculated 'by taking the percentage of the distinct group in the population and subtracting from it the percentage of that group represented in the jury panel.'" *Plain*, 898 N.W.2d at 822 (quoting *Jones*, 490 N.W.2d at 793). Subtracting that 3.185% figure from each parameter produces its absolute disparity.

[4] For example, assume that 50% of Iowans in a particular county are African-American. A sample of 100 from that county would be expected to include 50 African-Americans—but when drawing a sample of 100 *adults* from this county, we should not expect 50% of them to be African-American. Instead, the 50% parameter should be multiplied by 0.8559 to produce 42.8%, which describes the expected percentage of Iowan *adults* in that county who are African-American, accounting for the group's disproportionate youth.

Comparative disparity: "Comparative disparity is calculated by dividing the absolute disparity by the percentage of the population represented by the group in question." *Plain*, 898 N.W.2d at 823. The parameter chosen impacts both the numerator and the denominator in that calculation, and seemingly small variations among parameters often produce extremely large swings in comparative disparity results.

Parameter:	**A**	**B**	**C**	**D**
AA % of pop.	4.5%	5.8%	3.85%	4.96%
Absolute disparity	1.315%	2.615%	0.665%	1.775%
Comparative disparity	29.22%	45.09%	1.727%	35.79%

Standard deviation: Standard deviation is best explained in *Castaneda v. Partida* as "[t]he measure of the predicted fluctuations from the expected value," calculated by multiplying the sample size by the population parameter and by the non-target population parameter, and taking the square root of that product. *See Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). For all parameters, the sample size is 157 and the "observed number" is five.

Parameter:	A	B	C	D
AA % of pop.	4.5%	5.8%	3.85%	4.96%
Non-AA%	95.5%	94.2%	96.15%	95.04%
Standard deviation	2.598	2.929	2.411	2.720
Expected sample value	7.065	9.106	6.045	7.787
Difference (expected−5)	2.065	4.106	1.045	2.787
Difference in SD units	0.7948	1.401	0.4335	1.025

That bottom row is the useful statistic, referred to as a "Z-score." *Castaneda* stated that a Z-score "greater than two or three" means "the hypothesis that the jury drawing was random would be suspect to a social scientist." *See id.*

Cumulative binomial probability (CBP): Each pool/panel is a binomial distribution;[5] randomness/fluctuation can be assessed by computing, for each parameter, the chance of drawing a random sample of 157 potential jurors that includes five African-Americans or fewer.

[5] A binomial distribution refers to results of repeated trials that "can result in just two possible outcomes" with relevant probabilities remaining "the same on every trial." *Binomial Probability Distribution,* STAT TREK (accessed Mar. 23, 2018), http://stattrek.com/probability-distributions/binomial.aspx.

Performing this calculation manually is arduous—but computer tools can automate those calculations based on a string of text. Here, the WolframAlpha input is "5 successes in 157 trials with p=[parameter]."

Parameter:	**A**	**B**	**C**	**D**
AA % of pop.	4.5%	5.8%	3.85%	4.96%
CBP	28.65% [6]	10.24% [7]	43.53% [8]	20.45% [9]

Analysis: *Plain* offers no guidance on what to do next. *See Plain*, 898 N.W.2d at 826–27. The State has five recommendations.

(1) Adopt a 3% threshold for absolute disparity: While absolute disparity alone is insufficient, "district courts may still find the test useful in formulating a generalized analysis of the jury pool." *See United States v. Hernandez-Estrada*, 749 F.3d 1154, 1165 n.6 (9th

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6 *See* WOLFRAMALPHA, "5 successes in 157 trials with p=.045", http://www.wolframalpha.com/input/?i=5+successes+in+157+trials+with+p%3D.045 (result for "5 or less successes"). WolframAlpha also lets users click the "more statistics" button on CBP results pages to display standard deviation figures.

7 *See* WOLFRAMALPHA, "5 successes in 157 trials with p=.058", http://www.wolframalpha.com/input/?i=5+successes+in+157+trials+with+p%3D.058 (result for "5 or less successes").

8 *See* WOLFRAMALPHA, "5 successes in 157 trials with p=.0385", http://www.wolframalpha.com/input/?i=5+successes+in+157+trials+with+p%3D.0385 (result for "5 or less successes").

9 *See* WOLFRAMALPHA, "5 successes in 157 trials with p=.0496", http://www.wolframalpha.com/input/?i=5+successes+in+157+trials+with+p%3D.0496 (result for "5 or less successes").

Cir. 2014). Absolute disparity is simple to calculate and can serve as a "quick dipstick for providing a rough gauge of the representativeness of the jury pool." *See Plain*, 898 N.W.2d at 822.

But any absolute disparity under 3% is just too small to be *substantial* underrepresentation. Iowa courts consistently reject cross-section claims if an absolute disparity figure is near/below 3%. *See State v. Huffaker*, 493 N.W.2d 832, 634 (Iowa 1992) ("A 2.85% absolute disparity is not a substantial deviation."); *State v. Jackson*, No. 09–0462, 2010 WL 624906, at *7 (Iowa Ct. App. Feb. 24, 2010) (same, where "the absolute racial disparity was only 2.3% to 3.1%"); *see also Washington*, 2016 WL 6270269, at *10. Other courts have done the same. *See Berghuis v. Smith*, 559 U.S. 314, 330 n.5 (2010) (collecting cases); *United States v. Orange*, 447 F.3d 792, 798 & n.7 (10th Cir. 2006) (collecting cases); *Delgado v. Dehenny*, 503 F.Supp.2d 411, 425–26 (D. Mass 2001) (collecting cases). This rule fits the prevailing caselaw.

A 3% threshold is low enough to avoid problems that invalidated the 10% threshold from *Jones*—it would not stop African-Americans in Iowa's counties with higher African-American populations from challenging underrepresentation. *See Plain*, 898 N.W.2d at 825.

True, members of minority groups comprising less than 3% of their county's population will be unable to bring cross-section challenges under the Sixth Amendment.[10] But there must be a lower-bound somewhere. *See* Transcript of Oral Argument, *Berghuis*, 559 U.S. 314 (No. 08–1402) (Justice Sotomayor noting that "if a protected group is 1 percent of the population," their total absence is not "going to give rise to any flags," and stating that minimum percentage threshold for recognizable disparity must exist somewhere between 1% and 9% but "I just don't know statistically where"). And 3% absolute disparity is the correct place to draw that line: a distinctive group of less than 3% of the population would be unable to use even *total* absence from any jury pool to prove substantially lower-than-expected representation, because expected levels would not be significantly higher than zero.[11] This 3% absolute-disparity threshold recognizes that "if a statistical analysis shows underrepresentation, but the underrepresentation

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[10] There is no minimum population requirement for a claim under the Equal Protection Clause that challenges *intentional* exclusion of a distinctive group (no matter how small). *See Plain*, 898 N.W.2d at 823 n.9; *United States v. Ovalle*, 136 F.3d 1092, 1099 (6th Cir. 1998).

[11] *See* WOLFRAMALPHA, "0 successes in 100 trials with p=.0295", http://www.wolframalpha.com/input/?i=0+successes+in+100+trials+with+p%3D.0295 (showing that CBP of zero representation of any group comprising 2.95% of the population on a panel of 100 people are above 5%—too high to show statistical significance at $p<0.05$).

does not substantially affect the representation of the group in the actual jury pool, then the underrepresentation does not have legal significance in the fair cross-section context." *Hernandez-Estrada*, 749 F.3d at 1165; *cf. Duren*, 439 U.S. at 370 (stating women comprise a group "of *sufficient magnitude* and distinctiveness so as to be within the fair-cross-section requirement" (emphasis added)).

Additionally, adopting a clear 3% threshold would provide needed guidance to district courts and allow judges to dispose of meritless cross-section challenges more efficiently, with minimal math. *See United States v. Chanthadara*, 230 F.3d 1237, 1257 (10th Cir. 2000) ("Standard deviations are not helpful [when they] merely represent a manipulation of the same numbers that we have held were not sufficient to establish a prima facie violation of the Sixth Amendment."). Rather than spending hours calculating inferential statistics and digging through caselaw for analogous numbers, this bright-line rule would allow Iowa judges to identify unsupported cross-section challenges with one simple test.

Attorneys and judges in Iowa need a clear rule for determining whether a meritorious cross-section claim may exist, and this Court should provide one by adopting a 3% absolute disparity threshold.

(2) Abandon comparative disparity: "[N]o court has been able to articulate or defend the use of a comparative disparity test on any sound statistical basis." *Hernandez-Estrada*, 749 F.3d at 1162–63. Comparative disparity will frequently "overstate the degree of underrepresentation in the case of a small minority population." *Commonwealth v. Arriaga*, 781 N.E.2d 1253, 1265 (Mass. 2003). And "the smaller the group is, the more the comparative disparity figure distorts the proportional representation." *United States v. Hafen*, 726 F.2d 21, 24 (1st Cir. 1984).

Consider this: less than 0.5% of Webster County residents are in the "Native Hawaiians or Pacific Islander" category. *See* U.S. CENSUS BUREAU, *QuickFacts: Webster County, Iowa*. Any jury panel without a Pacific Islander has a comparative disparity of 100%—but in Webster County, about 45.5% of jury panels with 157 respondents will not include any Pacific Islanders.[12] Any framework that allowed proof of substantial underrepresentation by comparative disparity would let a Pacific Islander in Webster County strike 45.5% of all possible jury panels of that large size. With 100 potential jurors, that

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[12] *See* WOLFRAMALPHA, "0 successes in 157 trials with p=0.005", http://www.wolframalpha.com/input/?i=0+successes+in+157+trials+with+p%3D0.005.

rises to 60%.[13] But natural fluctuations in random sampling—not constitutionally suspect selection procedures—explains the absence of this group from jury pools. For Pacific Islanders in Webster County, those fluctuations extinguish any real expectation of representation in any particular jury pool. Consequently, comparative disparity is a poor framework for analyzing substantial underrepresentation because it produces false positives—for smaller groups, it routinely reaches 100% without *substantial* underrepresentation. This Court should reject it.

(3) Adopt a 5%-or-lower requirement for cumulative binomial probability (or 1.64-or-higher for Z-scores): Neither absolute nor comparative disparity consider sample size, so neither should be used for anything beyond threshold inquiries. However, both standard deviation and cumulative binomial probability (CBP) have "the advantage of being firmly grounded in statistical theory, and generally applicable to both large and small population groups." *See Hernandez-Estrada*, 749 F.3d at 1163. This Court should hold that, after meeting the 3% absolute disparity threshold, claimants may establish substantial underrepresentation by demonstrating that

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[13] *See* WOLFRAMALPHA, "0 successes in 100 trials with p=0.005", http://www.wolframalpha.com/input/?i=0+successes+in+100+trials+with+p%3D0.005.

observed representation levels are lower than would be expected in 95% of instances where similar jury pools were drawn randomly—which means presenting a CBP of 5% or lower, or a Z-score of at least 1.64.

"[I]f the difference between the expected value and the observed number is greater than two or three standard deviations, then the hypothesis that the jury drawing was random would be suspect to a social scientist." *See Castaneda*, 430 U.S. at 496 n.17. The Court was referencing the "empirical rule" that describes all normal distributions: results on a normal curve will occur between two standard deviations *above* the mean and two standard deviations *below* the mean "with a probability close to the conventional 95% level." *See* Michael O. Finkelstein & Bruce Levin, STATISTICS FOR LAWYERS 116 (3d ed. 2015).

Castaneda's discussion of variance and standard deviation "accepted the idea that the racial results of nondiscriminatory jury selection should have a binomial distribution," and "approve[d] use of the conventional level of statistical significance." *See* STATISTICS FOR LAWYERS at 121 (citing *Castaneda*, 430 U.S. at 496 n.17); *see also Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 311 n.17 (1977). In *Berghuis*, the Court clarified that "neither *Duren* nor any other decision of this Court specifies the method or test courts must use" to

calculate/analyze substantial underrepresentation. *Berghuis*, 559 U.S. at 329. Thus, courts are free to adopt their own tests within the outer boundaries of the Sixth Amendment—as the Fourth Circuit did, when it adopted standard deviation as its primary paradigm for assessing whether underrepresentation is substantial. *See Moultrie v. Martin*, 690 F.2d 1078, 1082–83 (4th Cir. 1982); *cf. Jefferson v. Morgan*, 962 F.2d 1185, 1189 (6th Cir. 1992) ("[C]omparing straight racial percentages is of little value to this court.").

Both *Moultrie* and *Castaneda* use conventional notions of statistical significance to help determine if underrepresentation is substantial enough to be legally significant. *See Castaneda*, 430 U.S. at 496 n.17; *Moultrie*, 690 F.2d at 1082–83. This Court should adopt the same approach—while numerical disparity can draw a bright-line, only paradigms that account for random fluctuations and variance can help determine whether an observed disparity is truly *substantial*.

Approximately 2.5% of all randomly drawn jury pools are underrepresentative enough to arouse concern under *Castaneda*. The State recommends a test that is twice as easy to satisfy: applying a "conventional 95% level" through a *one-tailed* significance test to flag substantially lower-than-expected representation by identifying

results on the lowest 5% of the binomial distribution. When a jury pool is random, there is "a 5% chance that it will be less than the mean by 1.64 standard deviations or more." *See* STATISTICS FOR LAWYERS at 117; *see also id.* at 124–25 (noting "[a] one-tailed test is appropriate when the investigator is not interested in a difference in the reverse direction from that hypothesized," using cross-section challenges to illustrate). Similarly, "[w]hen the normal distribution is used to approximate the cumulative binomial distribution," all results with CBP less than 5% will exhibit "departures of 1.645 standard deviations or more from the expected numbers in the hypothesized direction." *Id.* at 124.[14] When a Z-score is at least 1.64, then CBP is 5% or less (and vice-versa), and observed underrepresentation is statistically significant at $p<0.05$.

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[14] With small samples, concerns may arise about using statistics that describe normal distributions. But most jury pools will normally achieve sufficient sample size to validate these measures under the rule that "both *np* and *n*(1-*p*) must be at least equal to 5 if the normal approximation is to be reasonably accurate." STATISTICS FOR LAWYERS at 119. Applied to this context, *n* is the number of jurors and *p* is the population parameter, and *np* refers to the expected number of jurors from the minority population. Our table on page 24 shows that *np* is above 6 for all four parameters analyzed. Of course, if *p* is too low, probability-estimating measures with any reasonable *n* are invalid—which is another reason to apply a 3% absolute disparity threshold. Adjusted analysis is still possible if *n* is low. *See Moultrie*, 690 F.2d at 1084 & n.10 (discussing adjustments to enable variance/CBP testing for jury pools smaller than 30 people).

The State proposes adopting 5% CBP and/or 1.64 Z-score thresholds because they correspond to $p<0.05$.[15] Why choose $p<0.05$? This is a judgment call. *See* Michael O. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338, 364 (1966) ("Are a critical value of 0.05 and a [false positive rate] of one-in-twenty too large? This is a legal issue for which there can be no firm answer."). *Castaneda* would permit a much stricter test, pegged to "two or three standard deviations"—which are less than $p<0.025$ and $p<0.005$, respectively, for one-tailed tests. *See Castaneda*, 430 U.S. at 496 n.17; STATISTICS FOR LAWYERS at 116. Adopting the State's lenient test will minimize risk of crossing the Sixth Amendment's outer boundaries and will also prompt inquiries into the potential for systematic exclusion in statistically close cases. At the same time, adopting $p<0.05$ will require claimants to make a

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[15] CBP, despite the name, is easy to conceptualize as the odds of selecting a jury panel/pool of any given size with the observed level of minority group representation (or lower). CBP can be calculated quickly using free software like WolframAlpha, which can enable lawyers without math backgrounds to compute it. *Cf.* TrialTr.V2 p.13,ln.14–19 (Court: "[F]or me to do a standard deviation analysis is far beyond anything I can do."). Setting 5% CBP as an alternative to a minimum Z-score will enable non-statisticians to compute inferential statistics that meaningfully resolve these claims.

facially plausible showing that any observed underrepresentation is substantial enough to implicate Sixth Amendment protections and warrant a time-consuming inquiry into jury selection procedures (and risk speedy-trial complaints). All players need articulable standards for calculating substantial underrepresentation after *Plain*—the State will accept one false positive in every twenty post-threshold claims in exchange for unambiguous guidelines for resolving these challenges.[16] A unidirectional, $p<0.05$ test is the most permissive framework that a statistician could use, and the most lenient test the State can propose.

This Court should adopt that lenient test for analyzing claims of substantial underrepresentation and require claimaints to establish a disparity with lower than 5% CBP or a Z-score at/above 1.64.

(4) Confine analysis of substantial underrepresentation to the *current* jury pool, and caution against using prior pools to inflate sample size: The most strident judicial criticism of using standard deviation to assess substantial underrepresentation comes

16 If 20 random pools are analyzed at $p<0.05$, there is a 37.7% chance of finding one false positive and a 26.4% chance of finding more than one. WOLFRAMALPHA, "1 success in 20 trials with p=0.05", http://www.wolframalpha.com/input/?i=1+success+in+20+trials+with+p%3D0.05; *cf*. Randall Munroe, *XKCD: Significant* (Apr. 6, 2011), https://xkcd.com/882/.

from the Michigan Supreme Court, which now specifically *prohibits* such analysis because it concluded that standard deviation measures "the randomness of a given disparity, not the extent of the disparity." *People v. Bryant*, 822 N.W.2d 124, 142 (Mich. 2012). That criticism is well-founded when applied to aggregated data—but it misses the mark when standard deviation and CBP are used to analyze the degree of underrepresentation present in a single jury pool. When applied to *one* particular jury pool, standard deviation and CBP assess both the *degree* and the *significance* of an observed disparity between the expected/actual amount of minority representation among the group. Indeed, when examining a single jury pool, those two concepts are inextricably linked: the difference between expected representation and observed values can be expressed through Z-score (to show the *extent* of the disparity against the backdrop of random fluctuations) or through CBP (to show the likelihood such a disparity is *random*).

But while these measures are excellent for assessing individual jury pools, they lose probative value when applied to aggregated data. *See Hernandez-Estrada*, 749 F.3d at 1163 (quoting Peter A. Detre, Note, *A Proposal for Measuring Underrepresentation in the Composition of the Jury Wheel*, 103 YALE L.J. 1913, 1928 (1994))

("[B]y imagining larger and larger jury wheels, the probability of any degree of underrepresentation arising by chance can be made arbitrarily small."); Megan L. Head et al., *The Extent and Consequences of P-Hacking in Science* at 2 (PLOS Biology 2015), https://doi.org/10.1371/journal.pbio.1002106 (noting "a tiny effect size can have very low p-values with a large enough sample size"); *accord Waller v. Butkovich*, 593 F.Supp. 942, 955 (M.D.N.C. 1984); STATISTICS FOR LAWYERS at 193. Using aggregated data for this prong of *Duren* would ignore the requirement that underrepresentation must be *substantial*, not just statistically significant.

Aggregated data would also allow many claimants to allege constitutional violations without demonstrating injury-in-fact and without proper standing. *See Alons v. Iowa Dist. Ct. for Woodbury Cnty.*, 698 N.W.2d 858, 867–68 (Iowa 2005) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). A defendant whose jury pool/panel is properly representative or only slightly underrepresentative should not be able to manufacture standing by alleging that *other* panels/pools showed more underrepresentation. Aggregating data to analyze the substantiality of underrepresentation would allow uninjured claimants to satisfy *Duren*.

Thus, aggregated data from multiple jury pools "is not, of itself, helpful in establishing underrepresentation under the second prong of the prima facie case, [although] it is of crucial significance in establishing that any existing exclusion was systematic." *See Ford v. Seabold*, 841 F.2d 677, 685 n.6 (6th Cir. 1988). This Court should clarify that aggregated data is useful for resolving that later inquiry, but *not* for assessing substantial underrepresentation.

(5) Specify that, when provided by the parties, credible estimates regarding populations of *eligible jurors* should be used in place of census figures: The State recommends using Parameter D because it incorporates multiracial people, and then excludes people who are too young to be eligible for jury service. Courts generally agree that jury pools must be evaluated in relation to the "jury-eligible population." *See Berghuis*, 559 U.S. at 323; *see also United States v. Shinault*, 147 F.3d 1266, 1272 (10th Cir. 1998); *United States v. Rodriguez*, 776 F.2d 1509, 1511 (11th Cir. 1985); *United States ex rel. Barksdale v. Blackburn*, 639 F.2d 1115, 1124 (5th Cir. 1981). Without eligibility-adjusted population parameters, the *Duren* inquiry starts from inherently unrealistic expectations about representation that truly random selection will rarely fulfill.

Plain's only complaint about standard deviation was that "[m]easures of the standard deviation presume randomness; however, the chances of drawing a particular jury composition are not random, in part because 'the characteristics of the general population differ from a pool of qualified jurors.'" *Plain*, 898 N.W.2d at 823 (quoting *Hernandez-Estrada*, 749 F.3d at 1163). *But see Hernandez-Estrada*, 749 F.3d at 1163 n.4 (observing that "this criticism is not unique to standard deviation analysis"). Eligibility-adjusted parameters address that concern; this Court should encourage their use where available.

Application: Here, the trial court correctly concluded that its disparity analysis produced "relatively low numbers," and the rate of African-American representation was generally "comparable to the general population." *See* TrialTr.V2 p.23,ln.18–p.25,ln.8; TrialTr.V2 p.38,ln.12–p.39,ln.24. The State recommends Parameter D, but the choice of parameter will not change the result. No absolute disparity for any parameter hits 3%, so Veal fails the bright-line threshold test. Moreover, these results are above 5% CBP and below 1.64 Z-score—this observed underrepresentation is consistent with natural/expected random sampling fluctuations. Therefore, Veal cannot establish substantial underrepresentation.

Parameter:	**A**	**B**	**C**	**D**
Describes:	Unadjusted census data	Includes multiracial	A converted to adults	B converted to adults
AA % of pop.	4.5%	5.8%	3.85%	4.96%
Absolute disparity	1.315%	2.615%	0.665%	1.775%
Z-score	0.7948	1.401	0.4335	1.025
CBP	28.65%	10.24%	43.53%	20.45%

Veal proposes that "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 fact may be taken into account when considering the second prong of the *Duren* test." *See* Def's Br. at 21–22. But that argument is foreclosed by *Holland v. Illinois*, 493 U.S. 474, 477–86 (1990), and Veal's plea for a new approach was not pressed or ruled upon below. *See* TrialTr.V3 p.11,ln.6–p.18,ln.24. Moreover, for-cause challenges and peremptory strikes were not systematically applied to exclude African-Americans—the State removed other potential jurors through the same race-neutral means, applied in a race-neutral way. *See* TrialTr.V3 p.11,ln.24–p.12,ln.5; TrialTr.V3 p.120,ln.4–10. There is no reason to analyze post-voir dire numbers.

Finally, Veal asks this Court to reach a different result under Article I, Section 10 of the Iowa Constitution. *See* Def's Br. at 22. However, "the protection granted by the Iowa Constitution with respect to the composition and selection of the jury panel is coextensive with that of the Sixth Amendment." *Chidester*, 570 N.W.2d at 81 n.1. Veal offers no argument supporting a departure from precedent on that point, and this Court should not craft that advocacy on his behalf. *See State v. Hicks*, 791 N.W.2d 89, 97–98 (Iowa 2010); *Hyler v. Garner*, 548 N.W.2d 864, 876 (Iowa 1996).

C. There was no evidence of systematic exclusion.

"[D]isproportionate exclusion of a distinctive group from the venire need not be intentional to be unconstitutional, but it must be systematic." *See Randolph v. California*, 380 F.3d 1133, 1141 (9th Cir. 2004). Veal attempts to show systematic exclusion with aggregated data collected from jury questionnaires returned in 2016. *See* Def's Br. at 18–22. However, Veal's aggregated data has critical gaps. Even if it did not, aggregated data on representation levels over time is not enough, standing alone, to prove systematic exclusion is inherent in a race-blind selection process. Finally, this selection process has already survived indistinguishable challenges, in Iowa and elsewhere.

1. Veal's aggregated data omits key information.

Veal argues that systematic exclusion was shown because "for the calendar year 2016, African-Americans comprised only 1% of those jury pools despite comprising 5.5% of the population." *See* Def's Br. at 20–22. Veal obtained and catalogued jury questionnaires from 2016, showing that out of 2,637 questionnaires where the respondent indicated his/her race, only 35 marked African-American. *See* Court Ex. 2 at 3; App. 41. But that tally excludes multiracial respondents, along with 19.6% of respondents who chose not to indicate their race. *Id.* There is no reason to assume that, if the respondents who did not mark their race were identified, the same disparity would still persist. *See United States v. Shine*, 571 F.Supp.2d 589, 598–99 (D. Vt. 2008) (finding no showing of substantial underrepresentation, and noting that "[o]f the returned jury questionnaires a substantial number of responders elected not to answer the race and ethnicity questions").

Because Veal's data cannot describe the race of a large group of respondents, Veal cannot establish persistent underrepresentation beyond any observed underrepresentation in his own jury pool. Thus, his attempt to show systematic exclusion is facially deficient.

2. *Evidence of consistent disparity, standing alone, cannot show that systematic exclusion is inherent to a race-blind process used to draw jury pools.*

Veal must show that underrepresentation of African-Americans was "inherent in the particular jury-selection process utilized." *See State v. Fetters*, 562 N.W.2d 770, 777 (Iowa Ct. App. 1997) (quoting *Duren*, 439 U.S. at 366). But Veal has not shown African-Americans are systematically (or even disproportionately) excluded from neutral source lists used to generate jury pools—specifically voter registration, driver's licenses, and non-driver IDs. *See, e.g.*, TrialTr.V1 p.16,ln.3–p.17,ln.22 ("We do not know the makeup of racial disparity between the two pools that they pull from."); TrialTr.V2 p.20,ln.7–p.21,ln.5 ("It's not only excluding minorities, it's excluding 30 percent of the population if you go by the numbers.").

Plain remarked that systematic exclusion can be shown through "evidence of a statistical disparity over time that is attributable to the system for compiling jury pools." *See Plain*, 898 N.W.2d at 824. If the word "attributable" is emphasized, that statement is true. But *Plain* opined that "[i]f 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." *See id.*

(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)). That is *not* how it works, and it is absolutely critical that this Court recognize the distinction.

"Generally speaking, when jury-selection systems have been found to be constitutionally underrepresentative on the basis of statistical showings of underrepresentation, objective selection criteria such as voting registration and drivers' licenses, as were used in this case, are not present." *State v. Dixon*, 593 A.2d 266, 272 (N.J. 1991); *accord Ramseur v. Beyer*, 983 F.2d 1215, 1233 (3d Cir. 1992). Some early cases found systematic exclusion based solely on showings of persistent disparity/underrepresentation because they examined juror selection processes that were not race-blind. *E.g.*, *Alexander v. Louisiana*, 405 U.S. 625, 630 & n.9 (1972) (noting "one in 20,000" chance of observed underrepresentation, but clarifying "we do not rest our conclusion that petitioner has demonstrated a prima facie case of invidious racial discrimination on statistical improbability alone, for the selection procedures themselves were not racially neutral"); *Garcia*, 991 F.2d at 492 (noting *Castaneda* found consistent disparity would establish deliberate exclusion in "highly subjective" decisions

within a key-man system, but *Castaneda* "did not hold that numerical underrepresentation is a substitute for systematic exclusion" for any race-blind "random selection process"); Finkelstein, *The Application of Statistical Decision Theory*, 88 HARV. L. REV. at 364–65 (noting underrepresentation in *Avery v. Georgia*, 345 U.S. 559 (1953) was barely statistically signficant and concluding "the Court's intuitive evaluation of the probabilities was influenced by its knowledge that the colored ticket system furnished a way to discriminate and suggested an intent to do so"). Here, jury pools were created using source lists that were "blind as to race," which means Veal cannot jump from showing a persistent disparity to concluding that someone involved is deliberately/systematically excluding members of his minority group. *See* TrialTr.V2 p.4,ln.7–19. Veal must *prove* his claim of causation.

Veal's data, if accepted at face value, shows 35 respondents were African-American out of 2,637 respondents who marked race. *See* Court Ex. 2; App. 39. The odds of that occurring randomly with Parameter D are very low.[17] But any inference of systematic exclusion

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[17] *See* WOLFRAMALPHA, "35 successes in 2637 trials with p=0.0496", http://www.wolframalpha.com/input/?i=35+successes+in+2637+trials+with+p%3D0.0496 (result for "35 or less successes").

"may be successfully rebutted by testimony of responsible public officials if that testimony establishes the use of racially neutral selection procedures." *Woodfox v. Cain*, 772 F.3d 358, 381 (5th Cir. 2014) (quoting *Guice v. Fortenberry*, 722 F.2d 276, 281 (5th Cir. 1984)). Veal admits these lists are race-blind, which means this case resembles *Israel v. United States*.

> Although both parties presented statistical documentation of the less-than-satisfactory representation of African Americans on jury venires over the period studied, no evidence was presented to show that this was the result of any policy or practice that could be deemed to constitute systematic exclusion of African Americans from jury service . . . . The underrepresentation of African Americans appears to be attributable to external factors—undeliverable mail or the choices of individual prospective jurors not to respond to their summonses or not to appear for service—not to systematic exclusion existing in the jury-selection process.

109 A.3d 594, 604–05 (D.C. 2014). Even if Veal's data established a persistent racial disparity among potential jurors who responded to a summons/questionnaire, that would not imply systematic exclusion because, when the amount and racial distribution of non-respondents is unknown, "it is impossible to know how much of the proportion of members of different racial and ethnic groups 'fall out' of the process and at which stage." *See Weeks v. State*, 396 S.W.3d 737, 744–45 (Tex. Ct. App. 2013); *see also Bates v. United States*, 473 Fed. App'x 446,

451–52 (6th Cir. 2012) (finding no systematic exclusion because "[t]here is no evidence that undeliverable questionnaires affected African-Americans to a greater degree than any other community.").

If non-response rates for African-American residents were known and were inexplicably high, underrepresentation would likely be attributable to individual respondents' decision-making, and that would not show systematic exclusion. *Orange*, 447 F.3d at 799–800; *United States v. Murphy*, No. 94-CR-794, 1996 WL 341444, at *5 (N.D. Ill. June 18, 1996) (holding evidence that minority respondents "failed to respond to jury notices at a much higher rate" than other groups "does not create a constitutional violation by the government"); *State v. Williams*, 525 N.W.2d 538, 543 (Minn. 1994) (explaining that systematic exclusion means showing "unfair or inadequate selection procedures used by the state rather than, *e.g.*, a higher percentage of 'no shows' on the part of people belonging to the group in question"). Conversely, if undeliverable rates were disproportionately high for African-American respondents, then underrepresentation would be produced by "outside forces" and "demographic changes"—it still would not be inherent in the means used to select potential jurors. *See United States v. Rioux*, 97 F.3d 648, 658 (2d Cir. 1996).

Plain repeatedly cited *United States v. Rogers*, which expressed a different view of *Duren* in dicta: that *Duren* "found a prima facie cross-section violation based largely on numerical evidence." *See United States v. Rogers*, 73 F.3d 774, 776 (8th Cir. 1996); *but see United States v. Johnson*, 973 F.Supp. 1111, 1116 n.11 (D. Neb. 1997) (noting *Rogers* lacks authority as precedent). But when the petitioner in *Berghuis* made a similar claim about language from *Duren*, the Court rejected any suggestion that "the burden of proving causation [was] on the State" when it resisted claims of systematic exclusion. *See Berghuis*, 559 U.S. at 332–33. *Berghuis* reaffirmed that claimants have "the burden of proving that the underrepresentation 'was due to [group members'] systematic exclusion in the jury-selection process.'" *Id.* at 332 (quoting *Duren*, 439 U.S. at 366).

Other courts would overwhelmingly reject that dicta from *Plain*. "A defendant does not discharge the burden of demonstrating that the underrepresentation was due to systematic exclusion merely by offering statistical evidence of a disparity. A defendant must show, in addition, that the disparity is the result of an improper feature of the jury selection process." *People v. Burgener*, 62 P.3d 1, 20 (Cal. 2003); *accord Rivas v. Thaler*, 432 Fed. App'x 395, 402–03 (5th Cir. 2011);

Ford, 841 F.2d at 685; *United States v. Garcia*, 991 F.2d 489, 492 (8th Cir. 1993); *United States v. Guy*, 924 F.3d 702, 706 (7th Cir. 1991); *Hernandez-Estrada*, 749 F.3d at 1166; *Randolph*, 380 F.3d at 1141; *Israel v. United States*, 109 A.3d 594, 604–05 (D.C. 2014); *People v. Smith*, 615 N.W.2d 1, 14 (Mich. 2000); *State v. Robles*, 535 N.W.2d 729, 733 (N.D. 1995); *St. Cloud v. Class*, 550 N.W.2d 70, 77 (S.D. 1996); *State v. Jenne*, 591 A.2d 85, 88–90 (Vt. 1991); *Walton v. Ballard*, No. 14–0196, 2015 WL 571031, at *14–15 (W.Va. Feb. 9, 2015).

As a result, even if Veal's data were helpful, it would not be enough because it would not show that exclusion is "inherent in the particular jury-selection process utilized." *Fetters*, 562 N.W.2d at 777 (quoting *Duren*, 439 U.S. at 366). While historical data can be useful to demonstrate a persistent disparity, it is never enough to prove inherent systematic exclusion in a race-blind/race-neutral process—Veal needed to show a causal link between the procedures used to generate jury pools and the relevant/observable disparity. Even when statistically significant disparities emerge in aggregated jury pool data, "[d]iscrepancies resulting from the private choices of potential jurors" do not prove systematic exclusion—and Veal has failed to foreclose or undermine that explanation. *See Orange*, 447 F.3d at 799–800.

3. Veal's causation theory for systematic exclusion has already been rejected in Iowa and elsewhere.

Veal's argues that the source lists created systematic exclusion because they are "blind to race." *See* Def's Br. at 18–21.

Iowa caselaw recognizes "[t]he use of only the voter registration list and a motor vehicle operator's list" does not establish "systematic exclusion of blacks in the jury selection process." *Huffaker*, 493 N.W.2d at 834; *see also Thongvanh v. State*, 494 N.W.2d 679, 683–84 (Iowa 1993); *Washington*, 2016 WL 6270269, at *11. And *Plain* did not overrule the holding from *Jones* that use of those source lists would not prove that any disparity was "due to a systematic exclusion of African-Americans in the jury selection process." *See Jones*, 490 N.W.2d at 793–94; *see also State v. Miles*, 490 N.W.2d 798, 798 (Iowa 1992) (noting *Jones* found "no constitutional or statutory violation in compiling jury pools"); TrialTr.V2 p.25,ln.9–23. Pointing to these race-blind lists does not establish systematic exclusion.

Other courts generally agree. *See Ramseur*, 983 F.2d at 1233; *United States v. Warren*, 16 F.3d 247, 251–52 (8th Cir. 1994); *People v. Henriquez*, 406 P.3d 748, 763 (Cal. 2017); *State v. Jackson*, 836 N.E.2d 1173, 1192–93 (Ohio 2005); *cf. United States v. Cecil*, 836 F.2d 1431, 1447–48 (4th Cir. 1988) (collecting cases).

Veal's criticism about race-blindness in the source lists only makes sense as an argument for specific inclusion (or specific deletion of non-minority names). However, "when race is the predominant factor in [juror selection] there must be a compelling governmental interest for such action and the means chosen must be narrowly tailored to meet that interest"—and some well-intentioned efforts at specific inclusion measures have still failed strict scrutiny, invalidating numerous trials in their wake. *See Ovalle*, 136 F.3d at 1104–07.

Iowa's jury selection lists omit race by design, to eliminate any possibility of racial discrimination in sending out juror questionnaires and generating jury pools/panels. A fortunate effect of this approach is that it insulates Iowa's jury managers from allegations that they intentionally chose not to select jurors from certain racial groups. Aggregated statistics like Veal's could raise such an inference, if the system had not made it *literally* impossible for anyone to exclude potential jurors based upon race. Veal's suggestion that jury managers should receive racial data and monitor the racial composition of each jury pool/panel would open the door to speculative allegations of invidious discrimination and invalidate jury pools/panels where no actual exclusion occurred. This Court should reject this poison pill.

"[E]thnic and racial disparities between the general population and jury pools do not by themselves invalidate the use of [source] lists and cannot establish the systematic exclusion of allegedly under-represented groups." *United States v. Rodriguez*, 581 F.3d 775, 790 (8th Cir. 2009) (quoting *United States v. Morin*, 338 F.3d 838, 844 (8th Cir. 2003)). Veal's aggregated data is plagued with gaps—but even if it were not, it would not be independently sufficient to prove systematic exclusion was somehow inherent in the selection process. Therefore, Veal's fair-cross-section claim fails.

II. Veal's Speedy Trial Rights Were Not Violated.

Preservation of Error

Error was preserved. *See* TrialTr.V2 p.28,ln.8–p.33,ln.10.

Standard of Review

"[T]he court's application of procedural rules governing speedy trial" is reviewed for correction of errors at law. *State v. Miller*, 637 N.W.2d 201, 204 (Iowa 2001). "We review a district court's determination whether the State carried its burden to show good cause for the delay for abuse of discretion." *State v. McNeal*, 897 N.W.2d 697, 703 (Iowa 2017).

Merits

Veal asserts he was not brought to trial "within 90 days after indictment" as required by Rule 2.33(2)(b). *See* Def's Br. at 23.

At Veal's specific request, trial was scheduled for the very last possible day within 90-day speedy trial: July 10, 2017. *See* Motion to Continue Trial (5/24/17); App. 17; Response (5/24/17); App. 19; Order to Continue (5/25/17); App. 21. Then, also at Veal's request, the trial was continued until the next day so counsel could request "racial numbers" on voter registration and DOT licenses. *See* TrialTr.V1 p.16,ln.3–p.17,ln.22; TrialTr.V1 p.30,ln.7–p.33,ln.14. The court specifically confirmed that Veal was "asking for additional time to do further discovery or present further arguments on this matter" and "extend this case past 90 days." *See* TrialTr.V1 p.36,ln.7–p.37,ln.25.

By requesting that additional time, Veal "actively participated in the events which delayed" his trial; he cannot "take advantage of that delay to terminate the prosecution." *State v. Zaehringer*, 306 N.W.2d 792, 795–96 (Iowa 1981); *accord State v. Finn*, 469 N.W.2d 692, 694 (Iowa 1991). Active participation in the delay is reason enough to reject this claim.

Additionally, the trial court determined Veal's day-of-trial motion to strike the jury panel created good cause for a short delay. *See* TrialTr.V1 p.37,ln.2–25. "Generally, a defendant must accept the passage of time that is reasonably necessary for a court to hear and rule on dispositive pretrial motions." *State v. Winters*, 690 N.W.2d 903, 908 (Iowa 2005); *accord State v. Donnell*, 239 N.W.2d 575, 579 (Iowa 1976). Only "a comparatively weak reason" would be needed to support this one-day delay. *State v. Orte*, 541 N.W.2d 895, 898 (Iowa Ct. App. 1995). Here, there was a good reason for this delay: the court granted relief in response to Veal's first jury pool challenge, which necessitated a one-day delay to summon a more representative pool. And because failing to explore this challenge would moot the result of any subsequent trial, Veal's motion was good cause to delay trial while he gathered necessary data. *See Plain*, 898 N.W.2d at 827–29.

Veal blames the State for "failure to pull representative jury pools in Webster County." *See* Def's Br. at 26–27. This just repackages his *Duren* challenge. Moreover, Veal's counsel did not need to wait to see the jury before requesting data—they could have prepared the necessary background research to support this challenge after mentioning the issue at the pretrial hearing, three days earlier. *See*

TrialTr.V1 p.27,ln.3–23. Likewise, Veal could have requested those jury questionnaires at that pretrial hearing, allowing him ample time to tabulate them before trial. *See* Def's Br. at 27–28; TrialTr.V1 p.51,ln.3–p.52,ln.6; TrialTr.V2 p.4,ln.1–19. Delay from Veal's failure to prepare his challenge is not attributable to the State, and Veal cannot show the trial court abused its considerable discretion in finding good cause. *See McNeal*, 897 N.W.2d at 707–08 & n.2.

III. Veal's *Batson* Challenge Was Properly Overruled.

Preservation of Error

Error was preserved. *See* TrialTr.V3 p.115,ln.20–p.124,ln.11.

Standard of Review

Rulings on *Batson* challenges are reviewed de novo. *See State v. Keys*, 535 N.W.2d 783, 785 (Iowa Ct. App. 1995).

Merits

When Veal raised his *Batson* challenge to the State's strike against Satchet Humphrey, the prosecutor gave this explanation:

> Ms. Humphrey is the daughter of Sessions Harper. I prosecuted Sessions Harper for three class A felonies . . . .
>
> The allegation is that Mr. Veal killed two people. . . . [H]e may be blaming a — a second person, may be blaming Ron Willis . . . .

> And Ms. Humphrey raised that issue with me concerning the fairness and what she thought about the trial of her father, Sessions Harper, whenever she said somebody else might have been involved.
>
> I can tell you right now, in the Sessions Harper case, no one else was involved. We had strong physical evidence against him that he was the sole perpetrator of those three crimes. That's what concerns me about Ms. Humphrey. I think those are race-neutral reasons to strike her.

See TrialTr.V3 p.118,ln.8–p.120,ln.3. The court agreed this was "a sufficient nondiscriminatory reason for striking that juror," and it overruled the *Batson* challenge. *See* TrialTr.V3 p.124,ln.2–11.

"[A] juror's interactions with law enforcement and the legal system are a valid, race-neutral reason for a peremptory challenge." *State v. Mootz*, 808 N.W.2d 207, 219 (Iowa 2012); *see also State v. Veal*, 564 N.W.2d 797, 807 (Iowa 1997) (upholding similar strike).

Veal argues "the potential juror's answers during voir dire negated any legitimate concern the prosecutor might have had about 'latent hostility' towards him." *See* Def's Br. at 31. But neutral answers can still conceal deep, unconscious bias—and the parties could expect lingering feelings to be evoked and exacerbated by the prosecutor's participation throughout this week-long trial. Indeed, Veal raised a for-cause challenge to a potential juror whose friend was murdered—that juror initially said he could be fair and impartial. *See* TrialTr.V3

p.63,ln.16–p.68,ln.4. Veal delved beyond that facially plausible answer for the same reason that motivated the State's peremptory challenge: reasonable skepticism of assurances of impartiality on matters that would naturally hit close to home for that particular juror.

Veal argues for a "very high standard" for *Batson* challenges to striking the final minority group member on a panel, because "facially non-discriminatory reasons may be used as a proxy for discrimination based on race." *See* Def's Br. at 31–33 (citing *State v. Miller*, No. 16–0331, 2017 WL 1088104, at *3 (Iowa Ct. App. Mar. 22, 2017)). *Miller* involved white jurors who could have been struck on identical grounds, but were not. *See Miller*, 2017 WL 1088104, at *4. Veal did not argue and cannot show that any flimsy pretext was applied in racially disparate manner. *See* TrialTr.V3 p.122,ln.16–p.124,ln.1. Moreover, *Miller* was only skeptical of using *generalized* negative feelings about law enforcement as proxies for race; before discussing that strike, *Miller* upheld a different strike against an African-American juror with unique and particularized negative experiences with police that were relevant to that specific case. *See Miller*, 2017 WL 1088104, at *1–2 (accepting "race-neutral explanation" when underlying facts "were similar enough to the negative experience the juror had with law

enforcement to concern the State about having the juror empaneled"). The State struck Ms. Humphrey because of concerns about unique, particularized negative feelings towards the prosecutor, arising out of facts that bore resemblance to the facts ultimately at issue in this case. "[I]f she were white, this would be a no-brainer preemptory challenge to take her off because of that connection." *See* TrialTr.V3 p.122,ln.2–7.

Veal cannot overcome the "great deference" given to the finding that credited the prosecutor's race-neutral explanation. *See State v. Griffin*, 564 N.W.2d 370, 375 (Iowa 1997) (quoting *State v. Knox*, 464 N.W.2d 445, 448 (Iowa 1990)). Thus, his *Batson* challenge fails.

IV. There Was No Prosecutorial Misconduct That Could Have Prejudiced Veal or Rendered His Trial Unfair.

Preservation of Error

Veal's counsel did not object or move for mistrial when the prosecutor elicited and dispelled the misconception that "we would have to have more evidence in a murder case than we would in someone who sells alcohol to a minor." *See* TrialTr.V2 p.169,ln.5–p.170,ln.10. The motion for mistrial was not made until it was too late to qualify offending remarks or prohibit follow-up inquiries. *See* TrialTr.V2 p.208,ln.22–p.210,ln.14. Veal's counsel also did not move

for a mistrial based on the disagreement over State's Exhibit 1. *See* TrialTr.V4 p.80,ln.3–p.82,ln.1; TrialTr.V4 p.90,ln.19–p.95,ln.21.

"A mistrial motion must be made when the grounds therefor first became apparent." *State v. Jackson*, 422 N.W.2d 475, 479 (Iowa 1988) (quoting *State v. Cornelius*, 293 N.W.2d 267, 269 (Iowa 1980)). Error was not preserved on these two challenges.

Veal's remaining arguments generally correspond to objections timely raised below. *See* TrialTr.V8 p.89,ln.16–p.90,ln.24; TrialTr.V8 p.91,ln.13–p.96,ln.5. The rulings on those claims preserved error.

Standard of Review

"Trial courts have broad discretion in ruling on claims of prosecutorial misconduct and we review such rulings for an abuse of discretion." *State v. Jacobs*, 607 N.W.2d 679, 689 (Iowa 2000); *accord State v. Anderson*, 448 N.W.2d 32, 34 (Iowa 1989).

Merits

"We find an abuse of discretion only where there is misconduct and the defendant was so prejudiced by the misconduct as to deprive him of a fair trial." *Jacobs*, 607 N.W.2d at 689. None of these claims identify misconduct; even if they did, Veal could not show prejudice.

The reference to selling alcohol to minors in voir dire was discussing the obvious disparity in seriousness of conduct, not the severity of punishment; it successfully illustrated how the concept of "proof beyond a reasonable doubt" applies equally in all prosecutions, to dispel misconceptions that the State "would have to have more evidence in a murder case." *See* TrialTr.V2 p.169,ln.5–p.170,ln.10; *see also* TrialTr.V2 p.209,ln.9–24. The State needed to identify jurors who could not understand that concept, so it could strike them. "[W]ide latitude is necessarily allowed counsel in examining the jurors for the purpose of advising him as to how to exercise his peremptory challenges." *State v. Tubbs*, 690 N.W.2d 911, 915 (Iowa 2005) (quoting *Raines v. Wilson*, 239 N.W. 36, 37 (Iowa 1931)).

The discussion on State's Exhibit 1 was a simple disagreement, confined to disputed facts. Jurors expect lawyers on opposing sides to disagree with each other in court. Nothing about that conversation could be characterized as misconduct or as prejudicial. *See* TrialTr.V4 p.80,ln.3–p.82,ln.1. Veal has not shown otherwise. *See* Def's Br. at 37.

The prosecutor's rebuttal opened with a personal anecdote as an illustration, and he used defense counsel's name when referring to arguments that defense counsel made. *See* TrialTr.V8 p.89,ln.16–

p.90,ln.24; TrialTr.V8 p.91,ln.13–p.96,ln.5. Veal does not argue that the anecdote was inappropriate because the prosecutor injected any prejudicial material from outside the record. *See* Def's Br. at 38. Instead, Veal claims the rebuttal "disparage[d] defense counsel by name" and belittled his closing arguments. *See* Def's Br. at 37–40. This is not misconduct because those statements were about *arguments* and were not personal attacks.

Characterizing an argument does not characterize the speaker. "A lawyer is entitled to characterize an *argument* with an epithet as well as a rebuttal." *State v. Schneider*, No. 14–1113, 2015 WL 2394127, at *7 (Iowa Ct. App. May 20, 2015) (emphasis added) (citing *Williams v. Borg*, 139 F.3d 737, 745 (9th Cir. 1998)). Prosecutors have considerable latitude in arguments; such statements are permissible when "made to attack the defense's theory of the case rather than defense counsel personally." *State v. Coleman*, No. 16–0900, 2018 WL 672132, at *7–8 (Iowa Feb. 2, 2018). The prosecutor's rebuttal characterized defense *arguments*, and did not cross that line.

If there was misconduct, it was not prejudicial. Veal attacks statements and arguments that are insignificant "in the context of the overwhelming evidence" against him. *State v. Greene*, 592 N.W.2d

24, 33 (Iowa 1999); *State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006) ("The most important factor under the test for prejudice is the strength of the State's case."). The jurors were instructed that arguments were not evidence, which mitigates any potential for prejudice. *See* Jury Instr. 6; CApp. 102; *accord State v. Musser*, 721 N.W.2d 734, 756 (Iowa 2006). And any objectionable comments were collateral to the central issues in the case, and limited to arguments. *See Carey*, 709 N.W.2d at 559. Thus, even if there was misconduct, Veal was not prejudiced and the court did not abuse its discretion in declining to declare a mistrial. *See* Sent.Tr. p.4,ln.25–p.6,ln.22.

V. The District Court Did Not Err in Permitting the State to Present a Demonstration of How a Similar Firearm Operates, Which Helped Explain What Happened.

Preservation of Error

Error was preserved. *See* TrialTr.V6 p.3,ln.4–p.5,ln.23; TrialTr.V6 p.47,ln.14–p.57,ln.6.

Standard of Review

The trial court's ruling allowing the use of a demonstrative exhibit is reviewed for abuse of discretion. *See McNeal*, 897 N.W.2d at 703; *State v. Thornton*, 498 N.W.2d 670, 674 (Iowa 1993).

Merits

The State sought permission to let Murillo use a similar firearm from the DCI reference collection (with a dummy cartridge) to show how Veal's gun had functioned, which helped explain how it jammed when he attempted to shoot Ron. *See* TrialTr.V6 p.47,ln.14–p.56,ln.17. The actual gun had been subject to extensive forensic analysis, which left it covered with caustic/carcinogenic chemicals. *See* TrialTr.V6 p.3,ln.17–22; TrialTr.V6 p.49,ln.2–19; TrialTr.V6 p.70,ln.14–20.

The trial court found the demonstration would "assist the jury in understanding some of the issues in this case" relating to the gun, and it noted that relevant differences between the gun from the scene and demonstration gun from the reference collection "can be brought out in examination of the witness." *See* TrialTr.V6 p.56,ln.18–p.57,ln.1. Murillo explained that the gun had jammed because of imperfections in the cartridge; his explanation involved a verbal description of the internal mechanics of the gun. *See* TrialTr.V6 p.64,ln.9–p.67,ln.20. Murillo supplemented that explanation with the same demonstration from the offer of proof. *See* TrialTr.V6 p.70,ln.21–p.80,ln.4.

"Demonstrative evidence is usually received if it affords a reasonable inference on a point in issue." *Thornton*, 498 N.W.2d at

674 (citing *State v. Henderson*, 268 N.W.2d 173, 179 (Iowa 1978)). Veal argues "[t]he 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." *See* Def's Br. at 42. But Ron testified that Veal pointed the gun at him and pulled the trigger—and nothing happened. *See* TrialTr.V4 p.71,ln.10–p.72,ln.20. Without understanding how the gun chambered/fired cartridges, jurors would naturally wonder how that imperfect cartridge jammed the gun *after* Veal successfully fired the shot that killed Melinda—and that would render Ron's testimony more difficult to believe. But seeing a cartridge "in the chamber of the pistol" and watching how the slide mechanism would "pick up the next cartridge off the top of the magazine and chamber it" after each shot would help explain how an imperfection that caused the second cartridge to get "stuck in the chamber" could allow Veal to fire one shot—but not two. *See* TrialTr.V6 p.76,ln.11–p.78,ln.21; TrialTr.V6 p.83,ln.20–p.89,ln.17; State's Ex. 92; CApp. 79. Thus, the demonstration was relevant to show that Ron's account of events was "physically possible." *See Thornton*, 498 N.W.2d at 675.

Veal argues that relevance was "outweighed by the prejudice that the gun demonstration created by providing an inaccurate

portrait of what happened at the scene of the crime." *See* Def's Br. at 41–43. But the firearm used to kill Melinda was fired at least once; the demonstration showed how the next cartridge would have been chambered after that. *See* TrialTr.V6 p.76,ln.11–p.78,ln.21. Murillo established that his reference firearm operated just like the real gun, in all pertinent respects—including the manner in which ammunition "will cycle through the pistol." TrialTr.V6 p.50,ln.12–p.51,ln.18; *see also* TrialTr.V6 p.71,ln.14–p.72,ln.1. Veal's counsel was unable to identify any difference between the two firearms that would affect the relevance of the demonstration. *See* TrialTr.V6 p.54,ln.11–p.55,ln.6; TrialTr.V6 p.104,ln.6–25. Those differences were brought out in Murillo's testimony, foreclosing any possibility of confusion. *See McNeal*, 897 N.W.2d at 709 (finding no abuse of discretion from admission of replica sledgehammer that was identified as replica).

Finally, Veal argues the demonstration had "potential to goad the jurors into overmastering hostility." *See* Def's Br. 42–43 (quoting *State v. Ward*, No. 16–0027, 2017 WL 1278288, at *5 (Iowa Ct. App. Apr. 5, 2017) (Vaitheswaran, J., concurring specially)). But none of the theatrics identified in Judge Vaitheswaran's concurrence in *Ward* were present in Murillo's demonstration. *See* TrialTr.V6 p.70,ln.21–

p.80,ln.4. Moreover, this demonstration helped explain a critical part of Ron's testimony about what happened—unlike *Ward*, where the demonstration reinforced proof of specific intent. *See Ward*, 2017 WL 1278288, at *4 (majority opinion).

Finally, Veal's citation to *State v. Winfrey* illustrates that, even if the court should have prohibited the demonstration, that would "not amount to reversible error" because "there was no dispute that a gun was used in the crimes," so any error would be harmless. *See State v. Winfrey*, No. 10–0304, 2011 WL 5387263, at *5 (Iowa Ct. App. Nov. 9, 2011); *see also Ward*, 2017 WL 1278288, at *3.

VI. Veal Was Competent to Stand Trial.

Preservation of Error

Error was preserved. *See* Order (5/23/17); HearingTr. (5/23/17) at 18,ln.15–p.19,ln.11.

Standard of Review

Competency rulings are reviewed de novo. *See State v. Lyman*, 776 N.W.2d 865, 873 (Iowa 2010).

Merits

Initially, Veal was "not competent to stand trial but [was] a candidate for restoration." *See* Order (1/4/17); App. 9; Report

(2/28/17) at 1; CApp. 5. The court ordered Veal transferred to the IMCC forensic psychiatric hospital for restorative treatment. *See* Order (3/3/17); App. 12. The first follow-up reports found that Veal was "competent to stand trial after restoration," so the court ruled Veal was competent to stand trial and un-suspended the proceedings *See* Comp.Ex. 1 (5/23/17) at 1; CApp. 9; HearingTr. (5/23/17) p.18,ln.15–p.19,ln.11; Order (5/23/17); App. 15.

Veal argues that "enough new evidence" of "unresolved or new competency concerns was brought to light" at the May 23 hearing and "a new competency evaluation should have been ordered." *See* Def's Br. at 43–45. Veal's new evidence is testimony from his mother, who had fifteen-minute visitations with him on two occasions after he was discharged from treatment; she said Veal was acting strangely in different ways during each visit. *See* HearingTr. p.6,ln.3–p.10,ln.24.

"A history of mental illness standing alone, . . . does not mean the defendant is incompetent." *State v. Edwards*, 507 N.W.2d 393, 395 (Iowa 1993) (citing *Jones v. State*, 479 N.W.2d 265, 270 (Iowa 1991)). Even if Veal's mother's testimony could establish mental illness, that would not prove incompetency, which requires "a mental disorder which prevents the defendant from appreciating the charge,

understanding the proceedings, or assisting effectively in the defense." *See Lyman*, 776 N.W.2d at 874 (quoting Iowa Code § 812.3(1)). And her observations would not refute the experts' findings of competency, which are supported by extensive observations of Veal's faculties and his ability to access memories and discuss abstract concepts, including memories/concepts relating to this case. *See* Comp.Ex. 1, at 3–5; CApp. 11; Comp.Ex. 2, at 2–5; CApp. 15. Those expert reports establish that Veal was fully capable of appreciating the charges against him, understanding the proceedings, and assisting in his defense. Therefore, there was no remaining question as to Veal's competency, and the court did not err in finding Veal was competent to stand trial.

VII. The District Court Did Not Err in Excluding Irrelevant Character Evidence About Ron Willis.

Preservation of Error

Veal's brief cites to the record for rulings that overruled his objections and preserved error. *See* Def's Br. at 46–49.

Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. *See State v. Putman*, 848 N.W.2d 1, 8 (Iowa 2014).

Merits

"Other crimes, wrongs, or acts evidence cannot be used to show the [witness] has a criminal disposition and, therefore, was more likely to have committed the crime in question." *State v. Nelson*, 791 N.W.2d 414, 425 (Iowa 2010). Veal offers a mix of different kinds of evidence about Ron: that he dealt drugs to Caleb, that he was charged with an unrelated Class B felony offense, that he had unrelated drug charges in Minnesota, that he allegedly raped Misty, and that he would have faced serious criminal penalties if charged with possession of marijuana. *See* Def's Br. at 46–51. Most of that evidence bears no logical connection to Veal's non-character relevance theory—it does not establish Ron had a motive to kill Caleb. *See, e.g.*, *State v. Harrington*, No. 03–0915, 2005 WL 723891, at *5–8 (Iowa Ct. App. Mar. 31, 2005) (concluding "the time gap between the prior and present crimes, together with the weakness of any similarities, leaves the evidence with very little, if any, probative value and tips the scale in favor of exclusion of the evidence"). Moreover, none of it establishes any explanation for why Ron would kill Melinda, why he would bring Veal along, or why he would spare Veal after killing both Caleb and Melinda. *See State v. Hardy*, 492 N.W.2d 230, 234 (Iowa Ct. App. 1992); *State v. Shearon*, 449 N.W.2d

86, 88 (Iowa Ct. App. 1989). Evidentiary rules apply even-handedly, and Veal's impermissible propensity evidence was properly excluded.

Veal argues these rulings "had the effect of making [Ron]'s testimony seem more credible than it otherwise would have." *See* Def's Br. at 50–51. Ron's testimony was credible because of how he *acted*, despite his potential exposure to criminal charges, and because it was supported by an overwhelming amount of physical evidence. None of the excluded evidence could have changed the outcome, so any error was harmless. *State v. Ritchison*, 223 N.W.2d 207, 212 (Iowa 1974).

VIII. The Evidence Was Sufficient to Support Conviction.

Preservation of Error

Error was mostly preserved through Veal's motion for judgment of acquittal. *See* TrialTr.V7 p.3,ln.8–p.12,ln.12. Though Veal's counsel purported to address all elements of the charges, he contested the key mens rea elements by arguing the State failed to prove identity. *See* TrialTr.V7 p.4,ln.13–21; TrialTr.V7 p.7,ln.5–13. Error is not preserved to attack proof on those elements beyond proof of identity. *See State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996).

Standard of Review

"Sufficiency of evidence claims are reviewed for a correction of errors at law." *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012).

Merits

A challenge to the sufficiency of the evidence represents an argument that the evidence presented, even if believed in its entirety, could not prove all of the elements required for a particular charge. *See State v. Hutchison*, 721 N.W.2d 776, 780 (Iowa 2006).

If believed, Ron's testimony proves Veal shot and killed Melinda, tried to shoot Ron in the head, and was the only person left with Caleb before Caleb was found stabbed to death. *See* TrialTr.V4 p.68,ln.15–p.78,ln.1. Overwhelming evidence supported Ron's version of events, including Veal's flight from police and the presence of Caleb's blood all over Veal's clothing and Veal's path through the house (along with the absence of Caleb's blood on Ron and along Ron's escape route). Even standing alone, Ron's "direct eyewitness testimony establishing the elements of the crime [was] sufficient to generate a jury question." *State v. Keys*, No. 15–1991, 2017 WL 1735617, at *9 (Iowa Ct. App. May 3, 2017). "The jury is free to believe or disbelieve any testimony as it chooses." *See Thornton*, 498 N.W.2d at 673. Veal cannot show

this direct and circumstantial evidence was insufficient to support reasonable inferences that he committed all three crimes charged.

IX. The Trial Court Did Not Abuse Its Discretion in Determining That the Weight of the Credible Evidence Supports Veal's Convictions.

Preservation of Error

Error was preserved. *See* Motion for New Trial (9/18/17); App. 44; Sent.Tr. p.8,ln.20–p.10,ln.15.

Standard of Review

The ruling denying the motion for new trial is reviewed for abuse of discretion. *State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006) (quoting *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003)). Overruling this challenge is only an abuse of discretion if the evidence preponderated heavily against the verdict. *See Reeves*, 670 N.W.2d at 202 (quoting *State v. Ellis*, 578 N.W.2d 655, 658–59 (Iowa 1998)).

Merits

The trial court determined "more credible evidence supports the guilty verdicts than supports any of the alternative verdicts." *See* Sent.Tr. p.10,ln.8–15. Veal's challenge is aimed at Ron's credibility. *See* Def's Br. at 54–55. But listen to Ron's 911 call. *See* State's Ex. 2. He is out of breath and panicked, and he clearly knows that Melinda

was shot (but does not seem to know that Caleb is dead). Veal argued Ron set him up by killing Melinda and Caleb, convincing Veal to wear his bloodied clothes, and calling 911 to portray himself as a victim. *See* TrialTr.V8 p.74,ln.12–p.81,ln.21. But if Ron had framed Veal, he would have been ready to recite the address to the 911 operator. *See* State's Ex. 2 at 0:29–0:58. He also probably would have cleared all contraband out of his car, which he had driven to the crime scene. *See* TrialTr.V8 p.97,ln.1–p.99,ln.22. Multiple police officers testified Ron was visibly upset when they arrived. *See* TrialTr.V3 p.168,ln.14–19; TrialTr.V3 p.193,ln.8–12; TrialTr.v3 p.211,ln.23–p.217,ln.3. The jury watched Ron struggle through his testimony, and could rationally reject any theory that Ron could have planned this murder, convinced Veal to play along, and fooled the police. *See, e.g.*, *State v. Paredes*, 775 N.W.2d 554, 568 (Iowa 2009) ("[A] a court must be careful not to usurp the role of a jury by making credibility determinations that are outside the proper scope of the judicial role.").

Moreover, Veal's speculative argument cannot explain away the evidence corroborating Ron's account and showing Veal's culpability. Ron, unlike Veal, was not covered in blood. *See* TrialTr.V7 p.47,ln.13–p.49,ln.17; State's Ex. 122; CApp. 95. Ron's skin tissue was found

“[o]n the back of the slide” of the gun, which was consistent with the head injury he sustained and with his testimony that Veal clubbed him with the gun after it jammed. *See* TrialTr.V4 p.71,ln.10–p.75,ln.24; TrialTr.V5 p.178,ln.4–p.188,ln.15; State’s Ex. 36; CApp. 51. Veal discarded a knife as he fled. *See* TrialTr.V4 p.186,ln.25–p.198,ln.1; State’s Ex. 27; CApp. 37. Caleb’s DNA was found on that knife. *See* TrialTr.V5 p.198,ln.7–p.200,ln.10. Veal’s reaction to police presence—specifically, his attempt to ditch his bloodied clothes and the knife—demonstrates he was aware that he committed these murders and undermines any claim that he mindlessly followed Ron’s directions. *Compare* TrialTr.V8 p.82,ln.12–p.83,ln.17, *with* TrialTr.V4 p.186,ln.25–p.198,ln.1; TrialTr.V4 p.209,ln.4–p.215,ln.8; State’s Ex. 28–30; CApp. 39. And Veal had small droplets of blood on his face, suggesting he was within splattering distance when Caleb was stabbed. *See* TrialTr.V5 p.52,ln.4–12. Even if Veal’s claim about swapping clothes with Ron after Ron killed Caleb and Melinda had some facial plausibility and some basis in the evidence (which it does not), it would still be foreclosed by persuasive evidence corroborating Ron’s account.

“The district court has broad discretion in ruling on a motion for new trial.” *Reeves*, 670 N.W.2d at 202. Veal cannot show any abuse of that discretion. Thus, Veal’s challenge fails.

CONCLUSION

This Court should affirm.

REQUEST FOR ORAL ARGUMENT

The State believes oral argument would help resolve issues relating to math, random sampling, and systematic exclusion.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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LOUIS S. SLOVEN
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Louie.Sloven@ag.iowa.gov