IN THE IOWA SUPREME COURT

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

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

FINAL REPLY BRIEF OF APPELLANT

FILED BY:

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STATEMENT OF THE CASE

COMES NOW the plaintiff-appellant, pursuant to Iowa R. App. Pro. 6.903(4), and hereby submits the following argument in reply to the State's brief.

ARGUMENT

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

The State makes a number of arguments in its brief both in response to Appellant's brief and to advocate for the Court to make new law

regarding the statistical analyses Iowa courts should make in effort to determine whether jury venires are comprised of a fair cross-section of the community.

First, the State argues that the trial court effectively granted relief to the defense's challenge of the first jury venire by delaying trial until the next day and calling in additional potential jurors to increase the size and diversity of the jury pool, rendering the first objection to the jury venire moot. *See* State's Br. at 28-29. A finding that the first jury venire was not comprised of a fair cross-section of the community is relevant for at least two reasons in the context of this case, not including the fact that the trial court ruled on the motion both preliminarily on July 10 and as a final ruling regarding the third prong of the *Duren* test on July 11, after the defense presented evidence regarding systematic underrepresentation. Trial Transcript Vol. 1, pp. 35-37; Trial Transcript Vol. 2, p. 25.

The first reason is that the ruling relates to the 90-day speedy trial issue and the untenable position of the defendant after the first jury venire challenge. The defendant, as explained in his brief, was essentially forced to choose whether to start trial past the 90 day speedy trial deadline or else start trial despite the challenge to the jury and a trial court finding that the first two prongs of the *Duren* test had been met. *See* Defendant's Br. at 23-28.

The second reason is that from the first jury pool to the second, only the second prong of the *Duren* test changes. The third prong, dealing with systematic underrepresentation shown through representation in the jury venires over time, remains the same for the first and second jury pool challenge and the trial court found that there was no systematic underrepresentation when it should have found that there was systematic underrepresentation. Trial Transcript Vol. 2, p. 25; *State v. Plain*, 898 N.W.2d 801, 823-24 (Iowa 2017).

Next, the State develops a series of numbers it submits the Court should use in determining whether there was underrepresentation in this case and presents a series of proposals for creating new rules regarding how courts should use statistical analyses in determining underrepresentation and proposes a new statistical analysis which it submits should be used either in addition to or instead of the measures laid out by the Court in *Plain*. *See* State's Br. at 30-64.

There are a number of issues with the way the State develops the series of numbers it then requests the Court to use in determining whether there was underrepresentation. The first issue is that the State presents evidence and argument that was not presented at the trial level and not ruled on by the trial court. The State presents new evidence from online sources

regarding census statistics and age statistics from an organization called the Iowa Data Center. *See* State's Br. at 31-33. The State's arguments regarding how the Court should use statistical analysis, as described in their brief, are nearly wholly new and different arguments than those made by the State at trial. *See* State's Br. at 30-64, Trial Transcript Vol. 2, pp. 8-12. 16-18, 21. Generally, new arguments and evidence presented for the first time on appeal are not preserved or allowed. Issues must ordinarily be presented to and passed upon by the trial court before they can be raised and decided on appeal. *Metz v. Amoco Oil Co*., 581 N.W.2d 597, 600 (Iowa 1998).

Regarding the creation of new numbers to use in analysis, the State also makes unwarranted assumptions that leave the proposed numbers unusable. The State proposes using the number of people in Webster County who marked "two or more races" in an apparent census in the determination of an accurate number representing the number of African-American people in Webster County. The State then uses the assumption that that "racial distribution" of the "multiracial category" is the same "racial distribution" of African-Americans among other races to argue that the number should be reduced from 1.9% to 1.3%. *See* State's Br. at 31. The State provides no basis for this assumption that the "racial distribution" is consistent between "single race" and "multiracial" census question answerers in Webster

County. Furthermore, the State does not explain why, if "multiracial" is a discreet category, that it should only be limited to those whose racial makeup includes African-American. It would seem that if the defendant was both African-American and "multiracial," that the all African-Americans and "multiracial" people should be included in the proposed number.

The next unwarranted assumption the State makes is that the median age for African-Americans in Iowa is the same as the median age of African-Americans in Webster County. *See* State's Br. at 32. Again, the State provides no basis for this assumption. The State also explicitly includes in its calculations an assumption that African-Americans' ages in Webster County are flatly distributed around the median age. *See* State's Br. at 32. No basis for that assumption is provided. Ultimately, the State uses these population percentage discounts in service of what it believes to be a more accurate representation of the eligible jurors population in Webster County broken down by race. *See* State's Br. at 32-34.

The State, after making the calculations for the absolute disparity, comparative disparity, and standard deviation tests using numbers that are flawed, as described above, proposes that the Court use something the State terms, "Cumulative binomial probability," or CBP, which the State purports to determine the percentage chance that a given single jury pool's number of

potential jurors who belong to the identified group are the result of random distribution. *See* State's Br. at 36-37. This measure is neither previous considered by Iowa courts nor its mechanizations explained in the State's brief.

Next, the State, in its brief, argues for the Court to adopt five new rules in regard to statistical analysis of underrepresentation. *See* State's Br. at 37-51.

a. Adopt a 3% threshold for absolute disparity.

The State seeks to trade the rights of distinct groups with a population percentage of under 3% to have their distinct group included in any jury pool for the assumed efficiency of adopting a bright-line number in the absolute disparity test. This rule should not be adopted for a number of reasons. First, the State cites to comments made by Justice Sotomayor during oral argument in *Berghuis* in which the Justice says there must be some lower threshold for the absolute disparity test. *See* State's Br. at 39. Of course, comments made during oral argument by one Justice of the Supreme Court does not law make, and the notion that a threshold must exist was not adopted by the Court in *Beghuis*. The notion, as well, is suspect because it does not take into consideration other statistical tests or other indications of underrepresentation. For example, if a distinct group comprising 2.9% of the

population of a particular Iowa county, over the course of decades and thousands of jury venires does not have a single member in a jury pool, it would seem the chance of that being random would be zero.

b. Abandon Comparative Disparity

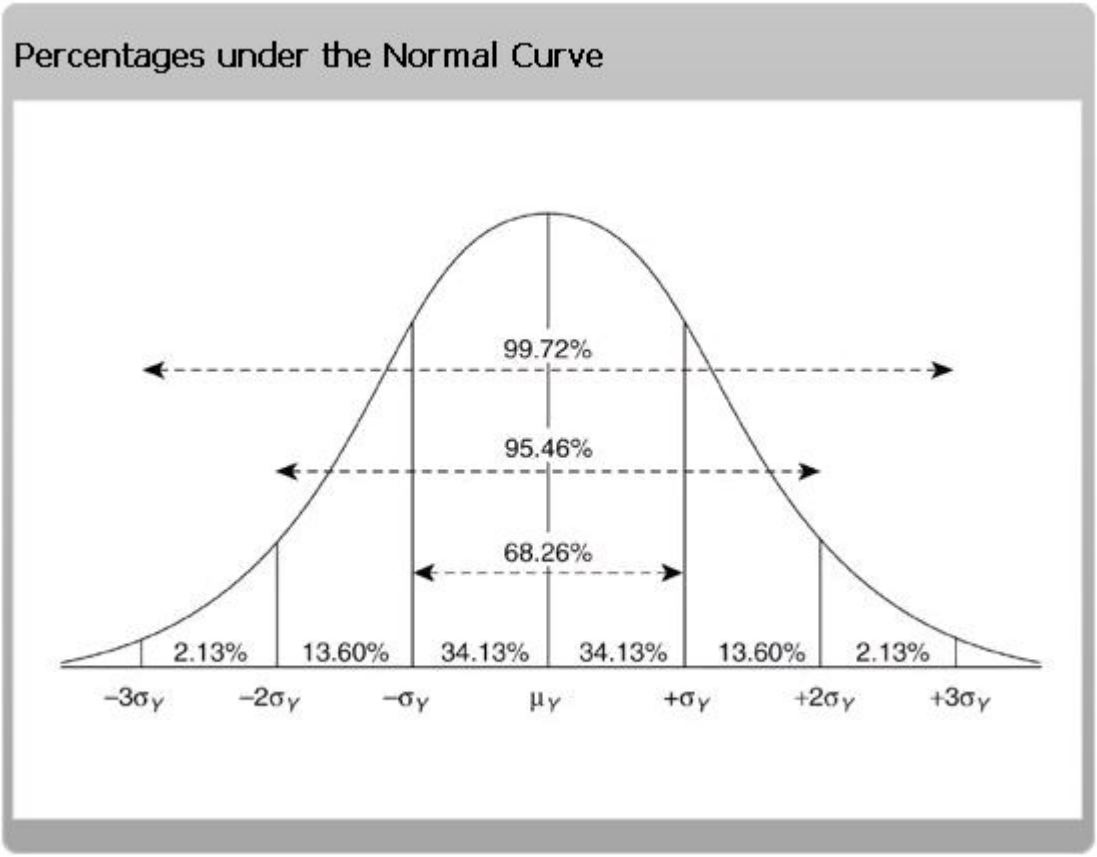
The State requests that the Court abandon the comparative disparity measure altogether. *See* State's Br. at 41. The State argues that it should be forbidden because of a claimed tendency to overstate underrepresentation in cases with a "small minority population." *See* State's Br. at 41. The State then gives examples in which there are zero members of the distinct group in a given jury pool, resulting in a 100% comparative disparity. *See* State's Br. at 41. The State seems to imply that Iowa courts would be confused by this test when there are zero members of the distinct group in a given jury pool and potentially make a decision based on the large comparative disparity number. As *Plain* makes clear, comparative disparity is one measure that may be considered by the court, but is not the sole measure. *State v. Plain*, 898 N.W.2d 801, 826-27 (Iowa 2017). As well, comparative disparity, like absolute disparity, is a fairly simple measurement that is not hard to comprehend and is unlikely to cause confusion about what the results mean. Judges in Iowa, in a case in which there are zero members of the small distinct group in the jury venire would presumably recognize that the

comparative disparity measure does not add much useful information to their decision, and would focus on other measures, such as the size of the pool and the likelihood of drawing a jury pool with zero members of that distinct group. To forbid that measure from being considered would deny judges a useful tool in cases in which the distinct group is not so small and in which there are not zero members of the group in the jury pool.

c. Adopt a 5%-or-lower requirement for cumulative binomial probability (or 1.64-or-higher for Z-scores).

The State next submits that the court should adopt another bright-line rule for standard deviation and CBP tests. *See* State's Br. at 42-47. Perhaps the primary problem with the State's suggestion, and its argument that standard deviation and CBP are the best measures of underrepresentation because they are "firmly grounded in statistical theory," is that these measures are meaningless unless you assume that there is no systematic underrepresentation and assume normal distribution. If the median number, presumably the expected value of the number of people who are members of the distinct group in the jury pool, is not that expected value, then the distribution does not follow the model the State proposes and the actual deviation and actual probability of a given number reflecting a chance draw are not accurate.

So, if we were to graph this problem, it would look something like this:



The above would represent a normal distribution as contemplated by the State with the assumption that the center vertical line represents the mean and the median of the given distribution. The State's method would be accurate in its deviations and percentages if the median equals the expected value of the number of members of the distinct group that is present in the jury venires. However, if the mean or median line does not equal the expected value of the number of members of the distinct group that is present in the jury venires, then the entire bell curve shifts, and the deviation

and CBP numbers are no longer accurate. If for example, the mean or median number is one standard deviation below the expected value, then in a one-tailed significance test in which the actual number of members of the jury pool is two standard deviations below the mean, the result of the State's proposed test would be a 13.6% CBP number, nearly three times the State's proposed threshold, while the actual number would be a 2.13%, well below the State's proposed threshold. In the present case, for example, the defense presented evidence that during 2016, African-American jury pool members totaled approximately 1% of the jury pool, but African-Americans were 5.5% of the population in Webster County. Trial Transcript Vol. II p. 6. So, assuming that the true mean and median, represented by the expected number of jury pool members who are members of the distinct group is 1 out of 100, or 1%, then the State's calculations of CBP numbers are inaccurate, because they use expected probabilities of success of 0.45, .058, .0385, and .0496, based upon the assumption that the mean and median line of the distribution bell curve reflects the African-American population percentage of Webster County, rather than the observed population percentage of African-Americans in Webster County jury pools over time.

An analogy that might be used is that of a biased coin or loaded dice. For a coin, you will have a bell curve such as the one above that will show

you the distribution of possible results of multiple coin flips, and standard deviations representing the percentage chance of a particular result, but if the coin is biased, and instead of creating a 50% chance of heads on each flip, creates a 70% chance, then the bell curve will re-center itself from around the 50% line to the 70% line, and the predicted distribution will likewise be adjusted. There will still be a reasonable chance that in a given number of flips, the results will be half heads and half tails, but there is not a 50% that that will happen.

The State's proposed measure only measures the standard deviation and CBP *if* the mean and median of the bell curve is the expected value rather than the actual value. The results give only theoretical deviations or percentages, and should be thought of as, "If the actual mean and median coincides with the expected value, then the standard deviation from that number or percentage according to CBP would be *x*." So, one might say that courts are determining whether there is underrepresentation by deciding, "whether or not the system for creating jury pools is fair and actually draws a fair cross-section of the community that aligns with the expected values based on population numbers, and, if the system were fair, your given chance at drawing this particular jury pool would have been *x*%, and we deem *x*% to either be a satisfactory approximation of the risk involved in a

fair system or not." Because it is possible to determine statistically, using aggregated data of the composition of jury pools over time (so long as the method of creating the jury pools has not changed during that period), whether the mean and median of the distribution of that system matches the expected value based on population, we can determine whether the system truly renders a fair cross-section of the community.

If it does not, then every product of that system, each individual jury venire, is the result of a biased system, and we are not, with a standard deviation or CBP measure figuring out how likely was the jury pool draw, but using the likelihood of getting that draw in a fair system to determine whether there is prejudice in the difference between the actual draw and a hypothetical fair draw.

The result of the State's proposed system, in situations such as the present one where it has been demonstrated that the mean and median of the distribution bell curve is not the expected value, but is less than the expected value, is that you will have a threshold of 2.5% of jury pools that would be expected to be found underrepresentative statistically using a standard deviation or CBP calculation which would actually capture a larger percentage of jury pools because of the skewed or shifted actual distribution. As well, because of the shifted bell curve, the crown of that curve, and the

actual mean and median, would lie somewhere left of the expected value and "ideal" or "theoretical" mean and median, and you would have a disproportionate number of jury pools that are somewhat underrepresentative, but not so underrepresentative as to be more than one standard deviation from the "expected" mean and therefore not challengeable under most courts' measures.

Also, the State cites *Castaneda*, 430 U.S. at 496 n.17, for the proposition that "two or three" standard deviations would be a reasonable bright line threshold. However, the text of the cited footnote does not seem to be intended to be a suggestion that such a rule would be logical or legal.

First, there is a significant difference between two and three standard deviations, and the *Castaneda* court says that two *or* three standard deviations would indicate to a "social scientist" that the notion the jury pool drawing was random would be suspect. It seems a very general, imprecise statement that is not meant to create any precedent, just an approximate idea of how standard deviation relates to the likelihood of randomness. Using CBP percentages seems to put standard deviation into more layman's terms which does away with the necessity to explain how standard deviations are related numerically to probability, which seemed to be the point of the footnote. Certainly a layperson would be able to understand that a 95%

chance that a particular jury pool draw was not attributable to randomness would cause the layperson to determine that the draw is suspect. The footnote also implies that the two or three standard deviations thresholds would only be looked at in conjunction with other statistics and evidence. So, where the State seeks to use *Castaneda* to draw a threshold at where a jury pool draw would "arouse concern," it is submitted that the State is misinterpreting the point of the *Castaneda* footnote. See State's Br. at 43, 44, 46; *Castaneda*, 430 U.S. at 496 n.17.

Finally, the State mentions the risk of a "false positive" and pegs that risk at 5%, writing that at a probability of 95% that a given draw is not random, and the State is "willing" to give up the predicted 5% "false positive," which in this context means the 5% of predicted draws that would be considered not random and therefore underrepresentative and violative of a defendant's right to a fair trial under the State's proposed new rules but which are in fact random. State's Br. at 47. The State seems to be suggesting that its position should be that only a 100% probability of non-randomness is satisfactory, and that there should be no "false positives" in an ideal test. Because we are dealing in relatively small numbers, and in whole numbers, the effective number of jury pool members that would satisfy a threshold of

100% would be zero, because shortly after three standard deviations, you are dealing with less than one-percent chance of randomness.

Furthermore, the State's reasoning is flawed. The State's calculated probability of a particular draw being non-random is based on a fair, or expected, distribution. The State uses the percentage of the population of the distinct group as the mean and median line of the bell curve, or center of the distribution. But, if there is a fair distribution, then the jury pool would not be stricken, because it would not meet the requirement under the third *Duren* prong. The State's model only works if there is no systematic underrepresentation, but if there is no systematic underrepresentation, then the jury will not be struck. So, it is impossible to get a "false positive" under the State's formulation.

As well, looking at the number of defendants who get a new jury pool when the old one was random is the exact backwards way that this issue should be looked at. Blackstone's famous quote regarding criminal law is that "It is better that ten guilty persons escape than that one innocent suffer," but the State would like us to know that it is willing to let no more than one "innocent" jury pool "go" for every twenty "guilty" pools. *See* Daniel Epps, The Consequences of Error in Criminal Justice, 128 HARVARD L. REV. 1065, 1067 (2015) quoting 4 William Blackstone, Commentaries at 352.

Why not use Blackstone's formula, and set the threshold at 10% chance of non-randomness instead of the State's proposed 95%? That would allow the defendant to challenge the jury pool and new jury pools to be drawn for any jury pool that has a 10% chance of being non-random. It certainly seems that for Blackstone, a 10% chance that a person's rights would be denied would be the outer threshold for risking the denial of a person's rights, even if it meant that for every one actually non-random jury pool that is stricken, ten actually random jury pools are stricken.

d. Confine analysis of substantial underrepresentation to the *current* jury pool, and caution against using prior pools to inflate sample size.

The State here suggests that courts not use data from prior jury pools, or jury pools over time, to determine whether a particular jury pool underrepresentative. State's Br. at 47-50. The State goes on to assert that standard deviation and CBP are "excellent" for assessing individual jury pools (a notion the Defendant strongly disagrees with, because of the inherent assumption that the jury pool is drawn from a fair cross section of the community, which invalidates the whole point of using these calculation to determine actual probability), and that the use of prior jury pool numbers over time is not useful to determine whether a particular jury is

underrepresentative and in fact can cause the court to find constitutional violations where there is no "injury-in-fact" and where the defendant has no "proper standing." State's Br. at 48-49.

First, the State's argument ignores the fact that whether the system of jury pool selection consistently creates underrepresentative jury pools is very significant information in determining whether one particular jury pool is underrepresentative. An argument could be made that when there is systematic underrepresentation, every jury pool is tainted, because the entire set of distribution probabilities shifts downward, resulting in every jury pool having less probability of including members of the distinct group than if the system was fair. The State couches this argument in terms of "injury" and "standing" and suggests that if the expected median number of jury pool members of the distinct group is actually present in the jury, or the actual presence is "slightly" below the expected median number, then there is no "injury" because actual number is or is close to the expected number. The State conflates what is "properly representative" with having the individual jury pool match the expected median number of jury pool members of the distinct group, and by doing so precludes a claim that there is a violation of the right to a jury pool comprised of a fair cross-section of the community when the system for creating jury pools never includes more jury pool

members of the distinct group than the median number. Defendant submits that such a claim could be made and should not be precluded, and the State's suggestion that aggregate data be excluded from consideration in order to prevent such a claim only serves to give the courts fewer numerical tools to decide the issues at hand in order to preclude a perceived hypothetical claim the State does not wish the court to consider.

What the State seems to mean by "standing" is that defendants whose individual jury pool would be found to not to be underrepresentative under the second *Duren* prong, would somehow be able to make a claim under *Duren* with a finding under only the first and third prong. The State relies for this notion on the idea that a defendant must show a "substantial" underrepresentation for the second prong, and that "substantial" means something more than "statistically significant." The bogeyman in this instance for the State seems to be a fear that if it turns out that the system used to create jury pools is a little bit underrepresentative, that that fact could be found by using jury pool data over time, and that that fact could be used to claim that because the system does not produce fair jury pools, that any number fewer than the expected median number would be cause to find underrepresentation. The State, rather than address this issue head on, and allowing such an argument to be considered and adjudicated by the court

system, proposes that it be precluded from being raised at all by excluding from court consideration the data needed to make such a claim. Furthermore, Defendant submits that the underpinning for the State's argument, that "substantial" underrepresentation be shown and that such underrepresentation be more than "statistically significant," is incorrect and is not part of the *Duren* test as set out in *Plain*. *State v. Plain*, 898 N.W.2d 801, 822-23 (Iowa 2017).

Defendant also submits that *Duren's* second and third prong are interrelated and aggregate data can be very significant in the determination of whether a particular jury pool is underrepresentative. The State cites *Hernandez-Estrada*, 749 F.3d at 1163 for the proposition that a danger of using aggregated jury pool data would be the increased probability that demonstrated underrepresentation would be found to be non-random as the data set increases (as if it would be bad for the court to have this information to use in its consideration), but in that case, the court refers to alternative statistical tests, such as the "disparity of risk" test, which appears to require a number be assigned to the "particular underrepresentation alleged." *Hernandez-Estrada*, 749 F.3d at 1163-64. Excluding aggregated data from court consideration would preclude such a test or any other test, even those firmly grounded in statistical theory and excellent at measuring aspects of

jury pool data relevant to the courts' consideration of underrepresentation, if the test required data on the jury pool composition over time. What excluding aggregated data would do is limit the courts' consideration to only those statistical analyses preferred by the State and preclude certain arguments that the State fears would show underrepresentation from being made.

e. Specify that, when provided by the parties, credible estimates regarding populations of *eligible jurors* should be used in place of census figures.

Here the State seeks to justify its use of discounted population numbers based upon faulty assumptions about age distribution of African-Americans in Webster County and about the distribution of particular "races" among "multiracial" people, along with the presumption that the group, "multiracial" people, must be further broken down into more specific "races" that constitute each "multiracial" person in that group. State's Br. at 50. As described above, Defendant submits that the State's proposed parameters are unusable and are not any more likely to reflect jury-eligible population than the numbers presented at trial in this case.

f. Application of the State's proposed new rules.

Defendant submits that for the reasons described above in response to each proposed new rule, that the Court should reject the State's argument and find that there was a violation of Defendant's rights under the 6th Amendment to the U.S. Constitution as described in the Defendant's brief. Furthermore, the State suggests that Defendant's proposal regarding consideration of the State using their discretionary strikes to eliminate all African-Americans from the jury in the *Duren* test is precluded by *Holland v. Illinois*, 493 U.S. 474, 477-86 (1990). However, *Holland* deals with a direct challenge to the exclusion of African-Americans from the petit jury as violative of the 6th Amendment. The suggestion here is that such exclusion may be a consideration when determining the underrepresentation of a distinct group from the jury venire; a consideration in a larger test, not the sole consideration. As a practical matter, a slight underrepresentation is increased, or is more impactful, when there is an expectation or an actual occurrence of the State proceeding to enlarge the underrepresentation by using its strikes to eliminate the members of the distinct group present on the jury venire from the petit jury. Perhaps ironically, the State also submits that because consideration of the State's strikes was not advocated below nor ruled upon by the trial court, that it should not be considered now. The bulk of the State's brief presents argument and evidence not presented below nor

ruled upon by the trial court, and should the Court find that such arguments of that station are precluded, then Defendant asks that the State's, as well as Defendant's, "new" arguments be precluded.

g. Systematic Exclusion

The State first challenges the jury pool information presented by the defense as omitting too much "key" information. State's Br. at 53-54. Should the Court find this argument convincing, then it should also find the State's new evidence, if not already excluded for being presented for the first time on appeal, sufficiently devoid of "key" information so as to be unusable. The State's omission of any evidence of the age distribution particular to Webster County or for assuming a linear distribution of ages Iowa's African-Americans, or for assuming how the make-up of "multiracial" persons breaks down should be sufficient to render it inaccurate and unusable. Particularly, the State's argument that one cannot assume the racial distribution of those who did not self-identify in the questionnaire, after basing its numbers on extrapolated data that assumes an unknown distribution, including the distribution of particular races that make up "multiracial" persons who chose not to elaborate on those particular races on whatever questionnaire or other method used to gather the cited census data, seems to be the pot calling the kettle black.

Next, the State seemingly seeks to convince the Court to reconsider *Plain* regarding whether aggregated data can alone meet the standard for the third *Duren* prong. State's Br. at 53, 55-61. Defendant submits that the Court knew what it meant and meant what it wrote when it wrote 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." *Plain*, 898 N.W.2d at 824 (quoting David M. Coriell, Note, *An (Un)fair Cross Section: How the Application of* Duren *Undermines the Jury*, 100 CORNELL L. REV. 463, 481 (2015)).

To require that defendants identify a particular problem with the jury pool creation system would potentially make proving systematic underrepresentation onerous, if not impossible, even in cases in which it is a near mathematical certainty that the underrepresentation in the jury pools over time is not random. For example, in this case, it may be that the reason that Webster County's jury pools are systematically underrepresentative is related to the disproportionate number of African-Americans who are arrested, convicted of crimes, and incarcerated in Iowa. *See Plain*, 898 N.W.2d at 826. Felony convictions preclude a person from voting in Iowa, and if there are a disproportionate number of African-Americans in Webster County who are convicted felons and are not on the voter rolls, that could be

part of the explanation. Also, controlled substance possession convictions result in driver's license suspensions, and criminal convictions usually entail fines and costs that, if unpaid, could lead to driver's license suspensions. If there are a disproportionate number of African-Americans in Webster County who do not have a driver's license due to disproportionate rate at which Iowa convicts African-Americans of controlled substance possession and other crimes resulting in unpaid fines, then that could be part of the reason.

However, proving such a cause would be near impossible for a defense attorney conducting a criminal trial. It would likely entail conducting a survey of Webster County residents that would be statistically accurate (so a statistician would need to be employed) and would require significant time and costs to complete. As well, should a State actor seek to exclude African-Americans or another distinct group from jury venires, that person would not necessarily need to figure out a particular mechanism of discrimination, but through trial and error could happen upon a system of exclusion and keep it, so long as it is "facially neutral." Furthermore, the notion that using systems that are "blind to race" are just as problematic as intentionally discriminatory systems if, once it is shown that the particular system creates underrepresentative jury pools,the system is not thereafter

altered. Omission of action in the face of a discriminatory jury pool creation system is the same as intentionally implementing such a system.

Here, the system should have been known to create underrepresentative jury pools due to previous challenges and analysis, yet the system had not been changed, showing that this system underrepresentation was in fact intentional. Trial Transcript Vol. 2, p. 5, ln. 1-4. Again, if the State inadvertently happens upon a discriminatory system, race-blind or not, and is alerted to the underrepresentative numbers, as was the case here, and decides to keep it, then the State is culpable. Also, other case decisions citing with approval the use of voter ID or Driver's License lists should not be taken to immunize the use of those lists from challenge for all time. The composition of distinct groups in those lists can vary year to year and county to county, and, should the court decide that the use of those lists can never be challenged, than a State actor seeking to discriminate against distinct groups would only have to seek to alter the composition of those lists, and such discrimination would be protected under the State's argument.

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

The State argues that there was good cause for delay and that Defendant's challenge to the jury panel necessitated the delay. State's Br. at 65-67. The State also submits that the defense could have requested the jury questionnaires at the pretrial hearing, and had additional time to analyze the systematic underrepresentation. State's Br. at 67. The State's argument regarding the availability of the jury questionnaires is misguided. The pretrial hearing occurring the Friday before the Monday start date of the trial took place in Mason City and began at 2:38 p.m., not Fort Dodge, where the questionnaires were located. The defense could not have gotten those questionnaires before or after the pretrial hearing, and could not have gotten them over the weekend before trial, because the clerk's office in Fort Dodge would not have been open. *See* Transcript of Hearing, July 7, 2017, p. 1. Furthermore, the particular jury venire questionnaires were in fact being examined by the defense but due to the number of questionnaires in which the person did not indicate race, it was unknown whether there would be a challenge to the jury venire or not. *See* Transcript of Hearing, July 7, 2017, p. 17. Beyond that, Defendant requests that the Court find for the Defendant on this issue for the reasons explained in Defendant's brief.

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

Defendant requests that the Court find for the Defendant on this issue for the reasons explained in Defendant's brief.

IV. Prosecutorial Misconduct

Defendant requests that the Court find for the Defendant on this issue for the reasons explained in Defendant's brief.

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

Defendant requests that the Court find for the Defendant on this issue for the reasons explained in Defendant's brief.

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

Defendant requests that the Court find for the Defendant on this issue for the reasons explained in Defendant's brief.

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

Defendant requests that the Court find for the Defendant on this issue for the reasons explained in Defendant's brief.

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

Defendant requests that the Court find for the Defendant on this issue for the reasons explained in Defendant's brief.

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

Defendant requests that the Court find for the Defendant on this issue for the reasons explained in Defendant's brief.

CONCLUSION

The Reviewing Court should remand the case to the district court with instructions to finish the *Duren* test should the Court find that the defense made a prima facie showing regarding the first or second jury venire under the *Duren* test. The Reviewing Court should find that there was not good

cause attributable to the defendant to start trial beyond the 90-day limit and vacate the verdict and judgment and dismiss the case. The Reviewing Court should vacate the verdict and judgment and remand for new trial for violation of *Batson*, error in the trial court's ruling allowing the gun demonstration, prosecutorial misconduct, and error in evidentiary rulings regarding State witness Ron Willis. The Reviewing Court should vacate the verdict and judgment and remand for competency evaluation should it find the trial court erred in denying defense counsel's request for a competency evaluation. The Reviewing Court should vacate the verdict and judgment and remand for entry of a judgment of acquittal if it finds the trial court erred in denying the motion for a judgment of acquittal. The Reviewing Court should vacate the verdict and judgment and remand for new trial should it find the trial court erred in denying the motion for new trial.

CERTIFICATION OF COSTS

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

Respectfully submitted,

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PROOF OF SERVICE
AND CERTIFICATE OF FILING

The undersigned certifies that on the 13th Day of April, 2018, I served this document, Appellant's reply brief, by EDMS to all parties electronically. I served this document on the above date to:

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/s/Dylan J. Thomas_____04/13/2018_____
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