IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff—Appellee v. PETER LEROY VEAL, Defendant—Appellant.	)))))))))	Supreme Court No. 17-1453

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

AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT—APPELLANT PETER LEROY VEAL

BRIEF AMICUS CURIAE OF THE
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF
COLORED PEOPLE (NAACP)

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No party or party's counsel authored this brief in whole or in part nor contributed money to fund the preparation or submission of this brief. No other person contributed money to fund the preparation or submission of this brief

STATEMENT OF THE ISSUES

I. **Did The District Court Err in Concluding That There Was No Underrepresentation of African Americans in the Veal Jury Venire and No Systematic Exclusion of African Americans in the Aggregate Webster County Jury Pools?**

II. **Once Defendant Has Established a Prima Facie Case of Underrepresentation and Statistical Disparity Over Time, Should the Burden of Proof Shift to the State to Establish That Its Jury Management Practices Have Been Reasonably Calculated, in Light of Known Best Practices and Available Technology, To Secure an Impartial Jury?**

III. **Did the District Court Err in Its Consideration of Defendant's *Batson* Challenges?**

STATEMENT OF THE CASE
AND
STATEMENT OF THE FACTS

The NAACP adopts the Statement of the Case and Statement of Facts of the appellant Veal, supplemented by the statement in the Brief of the Appellee at page 28 that in addition to "summoning an extra jury panel (which appeared to include more minority representation)," the trial court "reach[ed] 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." Although the District Court delayed Veal's trial by one day so steps could be taken to improve minority representation in the Veal jury pool, the prosecution's strikes for cause and discretionary strikes resulted in a trial jury that was all-white.

INTEREST OF AMICUS

The National Association for the Advancement of Colored People ("the NAACP") is the country's largest and oldest civil rights organization. Founded in 1909, it is a non-profit corporation chartered by the State of New York. The mission of the NAACP is to ensure the political, social, and economic equality of rights of all persons, to advocate and fight for social justice, and to eliminate racial hatred and racial discrimination. In addition to litigation which it has commenced or in which it has been involved, the NAACP has sought and depended upon vigorous enforcement of rights secured to the people by the Nation's and each State's Constitutions.

This appeal raises important issues affecting the administration of the criminal justice system in this State for African Americans and all people of color, as developed below in the Summary of the Argument and in the body of the Brief. For these reasons the NAACP has a very strong interest in the resolution of the issues raised on this appeal.

SUMMARY OF THE ARGUMENT

This Court's landmark opinion in *State v. Plain*, 898 N.W.2d 801 (Iowa 2017), revitalized the Sixth Amendment's guarantee to a criminally accused of an "impartial jury." At stake is a defendant's right to be tried by a jury that represents a fair cross section of the community ("FCS"). In this appeal the State's arguments, if accepted, would significantly undercut the promise of *Plain* and discourage if not thwart the efforts under way to improve our system of jury management in Iowa.

Plain recognized that systematic underrepresentation of African Americans in jury pools and on trial juries raised serious questions about the administration of justice and the appearance of justice. The Court noted substantial racial disparities in Iowa's criminal justice system in terms of arrests and incarceration; and it cited social science research documenting that while all-white and mixed-race juries convicted white and African-American defendants at about the same percentage, all white juries convicted African American defendants 81% of the time while mixed race juries convicted African American defendants only 66% of the time. Where the defendant's race is unrepresented in the jury pool and underrepresentation over

time can be shown, how is counsel to assure defendant that he or she will have his or her guilt or innocence determined by an "impartial jury"? See *United States v. Rogers*, 73 F.3d 774, 775 (8th Cir. 1996). The specter of facing an all-white jury impacts African American and minority defendants in every case—not just in the cases that go to trial—because the fear of facing an all-white jury also adversely affects plea bargaining negotiations in the vast majority of cases resolved with a negotiated plea.

Plain made clear that the fair cross section requirement is rooted in the Impartial Jury Clause of the 6th Amendment rather than the Equal Protection Clause of the 14th Amendment, and therefore a defendant need not prove that the underrepresentation was caused by intentional discrimination on the part of the court system. *Plain* unanimously overruled the exclusive use of the absolute disparity test prescribed by *State v. Jones*, 490 N.W.2d 787 (Iowa 1992), and it recognized that the trial court could apply a combination of the absolute and comparative disparity tests together with testing by means of standard deviation analysis. Incredibly, the State urges "complete abandonment" of the Comparative Disparity

Test and again urges mandatory adoption of an Absolute Disparity Test. The NAACP strongly disagrees with these positions.

This Court is fully aware of the three-prong test announced in *Duren v. Missouri*, 439 U.S. 787 (1979). The NAACP believes that the facts in this case and available statistical data demonstrate that the second and third prongs required by *Duren* and *Plain* were satisfied and that the District Court's rulings on the issues of underrepresentation and systematic exclusion were erroneous, resulting in a denial of Veal's right to an impartial jury. Further, the NAACP submits that (1) the State's calculations of underrepresentation are misleading and erroneous, and its assessment of systematic exclusion incomplete and erroneous; and (2) the allocation of the burden of proof to Defendant as to causation once statistically significant underrepresentation over time has been shown is wrong. The State's contentions regarding systematic exclusion are inconsistent with *Plain*, with jury management practices developed by the nation's courts, and with this Court's historic commitment to civil rights. The NAACP also fears that this Court's *Batson* jurisprudence, including *State v. Mootz*, 808 N.W.2d 207 (Iowa 2102), has provided ineffective protection against

discretionary strikes of minority jurors from the trial jury and has therefore impeded the goal of a jury that represents an FCS.

This case provides the Court with the opportunity to provide guidance to the district courts with respect to 1) the implementation of *Plain* and the guarantee of an "impartial jury" and (2) the nature and extent of the inquiry and the record that should be developed when a *Batson* challenge is made. If other grounds raised by Veal on his appeal are insufficient to reverse, the Court should, as it did in *Plain*, only conditionally affirm and should remand the case to the trial court for further development of the record on Veal's 6th Amendment and *Batson* claims.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THERE WAS NO UNDERREPRESENTATION OF AFRICAN AMERICANS IN THE VEAL JURY VENIRE AND NO SYSTEMATIC EXCLUSION OF AFRICAN AMERICANS IN THE AGGREGATE WEBSTER COUNTY JURY POOLS.

The second prong stated by the U.S. Supreme Court in *Duren* requires a showing "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." The NAACP recognizes that counsel and the District Court had little time to grasp all dimensions of the holding in *Plain* and had to hastily obtain and prepare evidence and make statistical calculations with which they were unfamiliar. The District Court correctly took corrective action that increased the number of African Americans in the jury pool, but its ruling on the Defendant's FCS motion made serious errors in the gathering of Census facts and made no attempt to explain its statistical calculations in its written Opinion nor did it explain its cursory conclusion that systematic exclusion had not been proven. App. 032-037.

A. *The District Court's Duren Prong 2 Analysis Is Clearly Erroneous.*

Both the 4.1% and 5.5% African American Census population figures used in the District Court's calculations are clearly erroneous. The 4.1% is drawn from a reference in the *Plain* opinion to 2013 Census data, and that data is too old. https://www.indexmundi.com/facts/united-states/quick-facts/iowa/black-population-percentage#map. No citation is given for the 5.5% Webster County African American population in Exhibit 1, and the NAACP can find no Census data to support it. The 2017 U.S. Census shows a 4.6% "African American alone" percentage for Webster County. https://www.census.gov/quickfacts/fact/table/webstercountyiowa/PST045217.

In making its head count of the jurors in the Veal Jury Pool/Venire the District Court aggregated not only prospective jurors who were "African American only" but also those who were African American *multiracial* or *biracial* in its Veal Jury Pool/Venire count. The District Court counted three African Americans *and* two biracial African Americans, and concluded there were five with African American lineage out of 157, or 3.18%. As a result of this

aggregation, the appropriate statistical comparison should have been to the combined Webster County Census data for "Black or African American only" AND "Two or More Races" (at least for those persons who are multiracial or biracial with one race being African American). The District Court, however, failed to include this biracial component when it made its comparison, and thus the Court's Census errors were compounded. Again, the 4.1% and 5.5% that the Court used only reflected the Census grouping "Black or African American alone;" the Webster County's biracial or multiracial African American population, who are counted in a separate Census grouping for "Two or More Races," were *not* included in the calculation. As a result, the District Court's *and* the State's calculations of underrepresentation are clearly erroneous.

The 2017 Census data shows "African Americans alone" comprise 4.6% of the Webster County general population and "two or more races" comprise 2.1%, for a combined total of 6.7%. If the "two or more races" data were pro-rated as proposed by the State, the "two or more races" percentage would be adjusted downward from 2.1% to 1.5%. The correct comparison required addition of 1.5% to 4.6% for a

combined African American lineage percentage in the community of *6.1%*.

The NAACP submits the following FCS calculations for the Veal Jury Pool/Venire. With five African Americans out of 157 in the Webster County Jury Pool for the week of July 10 and on the Veal Jury Venire, the African American percentage would be .0318 (5/157). We note that the proper focus is on the racial composition of all three Webster County jury pools for the trial week, and not just on the venire assigned to a defendant's case.

Subtracting .0318 from the 6.1% Census data (African American alone-adjusted for Two or More Races) results in an Absolute Disparity of .0292 (.061-.0318). Dividing the Absolute Disparity of .0292 by .061 provides a Comparative Disparity of .478 (.0292/.061). This showing of 47.8% Comparative Disparity is sufficient to make out a prima facie case under *Duren's* second prong even for the most restrictive courts, and easily satisfies the 30% Comparative Disparity showing required by *United States v. Rogers*, 73 F.3d 774 (8th Cir. 1996), which this Court cited favorably in *Plain*.

The Binomial Distribution calculation is the most definitive statistically scientific measurement to determine whether the

presence of just five African Americans (including mixed or bi-racial African Americans) in the Veal Jury Pools/Venire could have happened by random chance when African Americans comprise 6.1% of the Webster County population. That is, what is the probability of only five African Americans in a Jury Pool/Venire when you would have expected there to be 10 African Americans in the Jury Pool (157 x .061=9.58)? The Binomial Distribution result shows a 7.8% probability that random chance could result in only five African Americans in a jury venire out of 157—less than a 10% chance.

In sum, both the Comparative Disparity and the Binomial results provide a strong prima facie showing that Veal's Jury Pool/Venire was not fairly representative of the community, *Duren's* prong 2. This strong showing of underrepresentation is further enhanced when one takes into consideration the overwhelming evidence that Webster County jury pools did not reflect a fair representation of African Americans over the entire year of 2016.

While the District Court engaged in some analysis, it made no written findings regarding calculation of Absolute and Comparative Disparity, and its conclusions in respect of *Duren's* second prong are cursory and merely conclusory.

B. *The District Court's Duren Prong 3 Analysis Is Clearly Erroneous.*

The NAACP contends that the underrepresentation of African Americans on the 2016 Webster County Aggregate Jury Pools is so large and statistically significant that a remand of the case for further proceedings is mandatory. The District Court's conclusion that Defendant failed to satisfy *Duren's* third prong is also cursory and conclusory, without any statistical calculations or legal reasoning. The Court totally ignored Exhibit 1 that summarized the 2016 aggregate Webster County Jury Pool data in Exhibit 1 provided by the Jury Manager.

The State's Brief is noticeably silent in failing to report the results of its own Binomial analysis of the 2016 Webster County Jury Pool data. The State's only comment is misleadingly ambiguous: "The odds of [only 35 African Americans in the jury pool of 2,637] occurring randomly with Parameter D are very low." App. Br.at 57. If by "very low" the State means "infinitesimal," the NAACP agrees.

The NAACP's Binomial Distribution calculation based on the 2016 Webster County Jury Pool aggregate data will assume, as the State contends, that Exhibit 1 did not include any biracial African Americans, that is, to use the Census terminology, it included

"African Americans only." In order that our calculation compares apples to apples, our Binomial Distribution calculation will use the 2017 Census Webster County Report on "African Americans alone" of 4.6% and will not include and therefore make no upward adjustment for the biracial African Americans included in the 2.1% of Webster County's population that are in the Census "Two or More Races" category.

Based on the .046 African American Alone percentage, one would expect random selection to result in approximately 121 African American jurors in the 2016 aggregate Webster County Jury Pool (2,637 x. 046). There were only 35. The Binomial Distribution assumption enables us to determine the probability that such an underrepresentation could occur by random chance. *The binomial result of 5.59E-21 (0.000000000000000000559)*[1] *confirms that the likelihood that the actual result of just 35 African Americans in the 2016 Jury Pool occurred by random chance is infinitesimal.*

The essence of the *Duren* 3d prong is to provide a reliable statistical double check based on recent aggregate jury data from the

[1] The 5.59E-21 is scientific notation.

judicial district in question as to whether the racial representation in the jury venire of the case under consideration is or is not an aberration. The State's silence speaks volumes. The binomial results of the 2016 Webster County aggregate jury pool data belie any assertion that the underrepresentation in the Veal Jury Pool/Venire was an aberration or an anomaly. The binomial results confirm there was very serious and persistent underrepresentation in the Webster County jury pools from which the Veal jury was drawn, and as this Court observed in quoting *Duren*, 439 U.S. at 366: "it stands to reason that some aspect of the jury-selection procedure is causing that underrepresentation." *State v. Plain*, 898 N.W.2d at 824.

C. *There Is a Major Error in the Parties' and District Court's Determination of the Juror Eligible Population.*

There is a major error in the parties' calculations and the District Court's FCS determination that has been totally overlooked. U.S. Census data includes inmates in correctional institutions and counts them as residing in the community in which they are imprisoned. Obviously, prisoners are not eligible for jury service. The information available on the Department of Corrections web page discloses only that the Ft. Dodge Correctional Facility currently houses 1,336 inmates but provided no breakdown as to their race.

It was not until September 11, in response to the NAACP's request, that the DOC provided a racial breakdown of inmates in the Ft. Dodge Facility from 2010 through 2018. That data will require much closer examination than time now permits, but the number of African Americans imprisoned in Ft. Dodge are reported to range from 362 of 1,179 (30.7%) in 2010 to 446 of 1,313 (33.9%) in 2017. For purpose of the instant case's FCS analysis, all prisoners regardless of race need to be subtracted from the Webster County general population data to achieve juror-eligible population. Since African Americans are disproportionately represented in the Ft. Dodge prison data, the NAACP acknowledges that subtraction of prisoners from the Webster County general population data will reduce the percentage that African Americans will comprise of the Webster County "juror eligible population." It appears likely to reduce the 6.1% African American general population percentage by at least 2%.

This is not a matter for hasty determination now, but instead for proof carefully developed on remand, including other evidence and Census data that can finetune the "juror eligible population" determination, and then for recalculation of the showing of underrepresentation with the assistance of a statistical expert.

NAACP Counsel's preliminary statistical calculations using juror eligible data (that has subtracted all prisoners) continue to show statistically significant systemic underrepresentation in the aggregate 2016 Webster County jury data—far beyond the 95% level of significance for which the State contends. Defendant is entitled to a full surrebuttal opportunity to examine the new evidence as to the Ft. Dodge inmates and any other relevant evidence related to determination of the Webster County juror-eligible population. The NAACP also wishes to put the Court on notice of its view that when courts do use "juror-eligible data" in their FCS calculations (as opposed to the general population Census data upon which courts typically determine the FCS prima facie case), much lower Comparative Disparity thresholds are appropriate. Courts that have set .40-50 thresholds when general population data has been used have done so, in significant part, because of their awareness that these percentages were overinclusive.

D. *The Court Should Reject the State's Recommendations of a 3% Absolute Disparity Test, Abandonment of the Comparative Test, and 95% Level of Significance in Standard Deviation Analysis.*

Because the *Plain* Court was unanimous on its FCS analysis, it comes as a surprise that the State is seeking to overturn the core of

Plain in the Veal and Lilly appeals—but, make no mistake, the Appellee's Brief is a frontal assault on *Plain*. The State doesn't substantively address the Comparative Disparity Test results as applied to Veal's case and contends that that test should be abandoned in favor of its Absolute Disparity Test. The State declines to report the stunning Binomial Distribution results on the Webster County 2016 aggregate data, but instead asserts the defendant's statistical proof must establish "substantial underrepresentation" and must meet the 95% probability of statistical significance to establish systematic exclusion—a heightened proof standard required only in cases alleging an Equal Protection violation. App. Brief, at 42-47.

This Court got it right in *Plain*. The NAACP urges this Court to repudiate the State's effort to dilute the defendant's 6th Amendment rights by inserting Equal Protection principles into the analysis. The FCS test stated in both *Duren* and *Plain* is identical: whether the jury venire is "fairly representative of the community." Neither *Duren* nor *Plain* uses the term "substantial underrepresentation." The State's persistent use of this terminology[2] mistakenly implies a heightened evidentiary showing that neither *Duren* nor *Plain* requires. Finally,

[2] Pages 2, 28, 30, 38, 41, 42, 44, 47, 50, 51, and 54.

the NAACP notes that several of the State's attempts to rebut the statistical evidence supporting Defendant Veal's prima facie case are based on suppositions and manipulations that the State characterizes as "juror-eligible data." None of this "evidence" was presented to the District Court, and the Defendant has properly objected to the submission of such evidence on appeal.

1. *The Comparative Disparity Test is Best Suited for States Like Iowa.*

The Supreme Court in *Berghuis v. Smith*, 559 U.S. 314 (2010), was asked to set a bright line minimum Absolute Disparity threshold, and it declined to do so, and so should this Court. *Plain* accurately described the Absolute Disparity Test as a preliminary "dipstick." Its most important function is its role as the first calculation in the Comparative Disparity Test, the test that the social science community and most courts conclude is best suited to determine the extent or degree of underrepresentation in the jury pool. The 8th Circuit's *United States v. Rogers* decision explains that while both tests are arithmetically easy, "the comparative disparity calculation provides a more meaningful measure of systematic impact *vis-à-vis* the 'distinctive' group: it calculates the representation of African Americans in jury pools relative to the African-American community

rather than relative to the entire population." 73 F.3d at 777. It establishes the percentage of the minority group that has not been included in the jury pool; the higher the percentage, the worse the jury system is performing.

In *Berghuis* the famous Social Scientist Amicus Brief made a convincing case that the Comparative Disparity Test is the best measurement of underrepresentation when the proportion of the minority group in the jury-eligible population is less than 10%, which is almost always the case in Iowa. *See also* Paula Hannaford-Agor and Nicole L. Waters, *Safe Harbors from Fair Cross Section Challenges? The Practical Limitations of Measuring Representation in the Jury Pool,* 8 Journal of Empirical Legal Studies 762, 766. The Social Scientists Brief acknowledged that the Comparative Disparity Test "is not without its limitations. It can overstate the underrepresentation of *very* small groups. That is, when a group is particularly small, the loss of even a few expected members in the jury pool can result in a substantial comparative disparity." *Id.* at 33. The Social Scientists Brief pointed out that when distortion results with the test, the minority group size is typically less than one percent, *Id.* at 33 n.23, and the distortion can be "easily overcome, simply by

raising the level of comparative disparity required for small cognizable groups."

> This Court should require 15 percent comparative disparity, except where the distinct group is less than 10 percent, in which case the Court should use 25 percent. * * * Using this two-tiered standard for comparative disparity achieves the method's advantage of adequately quantifying the extent of a group's underrepresentation, while minimizing the possibility that underrepresentation of small distinct groups will be overstated.

Id. at 33-34 (citation omitted).

Nonetheless, the State latches onto the minor imperfection that can occur when the numbers of a minority group are minute. The State's Pacific Islander example shows how distortion can occur when the minority group population is incredibly minute (only .001 of the Webster County population, or 0.1%), but it proves too much. App. Brief at 41. The concern about distortion does not arise in the instant case where it is undisputed the African American population exceeds 4%, nor would it arise in any of the seven counties with the largest African American populations as their African American populations easily exceed the 1% or 2% threshold when distortion can become a problem. As the Social Scientists Brief points out, there are fine-tuned tools to address the distortion concern in a future case should it arise.

2. *The State's Proposed 95% Level of Statistical Significance Is Wrong.*

The State errs when it argues, relying upon *Castenada v. Partida,* 430 U.S. 482 (1977), that a prima facie FCS case should be rejected if the Binomial Distribution does not show a 95% level of statistical significance. Appellee's Brief, 36-47. Let's be perfectly clear. The Binomial result of 5.59E-21 (0.000000000000000000559) based on the 2016 aggregate Webster County jury pool data far, far, exceeds the 95% level of statistical significance urged by the State. The NAACP also notes that that was a measure of scientific certainty early on embraced by the Supreme Court in Equal Protection cases that required proof of intentional racial discrimination, such as *Castenada*. However, *Castenada* is wholly inapposite as FCS claims arise under the 6th Amendment and proof of intentional discrimination is not required.[3] As *Plain* noted and documented, courts that have addressed the

[3] Duren v. Missouri, 439 U.S. 357, 368n.26 (1979); State v. Plain, 898 N.W.2d 801, 823-24, n.9 (Iowa 2017). Even in Equal Protection and Title VII cases requiring proof of intentional discrimination, the Supreme Court has walked back from *Castenada*. Bazemore v Friday, 478 U.S. 385 (1986): "A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather his or her burden is to prove discrimination by a preponderance of the evidence."

question have concluded that Equal Protection principles do not apply in 6th Amendment FCS cases and therefore the statistical measures such cases require should not apply in a 6th Amendment FCS case.

II. ONCE DEFENDANT HAS ESTABLISHED A PRIMA FACIE CASE OF UNDERREPRESENTATION AND STATISTICAL DISPARITY OVER TIME, THE BURDEN OF PROOF SHOULD SHIFT TO THE STATE TO ESTABLISH THAT ITS JURY MANAGEMENT PRACTICES HAVE BEEN REASONABLY CALCULATED, IN LIGHT OF KNOWN BEST PRACTICES AND AVAILABLE TECHNOLOGY, TO SECURE AN IMPARTIAL JURY.

The State also contends that *Plain* can't mean what it says when the Court held that systematic exclusion can be established with proof of statistical evidence over time. App. Brief at 55-56. The State contends that there are many cases, including the *Castenada* case again, that required defendants to prove not only underrepresentation and statistical disparity over time but also which feature of the jury system is causing the underrepresentation. App. Brief 57-64.

Plain made clear that systematic exclusion distinguishes between situations "where a particular jury venire" (*e.g.*, the Veal jury

venire/pool) "is nonrepresentative and those situations where the jury venires in a district" (2016 aggregate Webster County jury pool data) "are continuously nonrepresentative of the community." 898 N.W.2d at 824. The Court held that prong 3 requires that "the defendant must show evidence of a statistical disparity over time that is attributable to the system for compiling jury pools. 'If there is a pattern of underrepresentation of certain groups on jury venires, it stands to reason that some aspect of the jury-selection procedure is causing that underrepresentation.'" *Id.* (citations omitted).[4]

Once the defendant has made out the prima facie case as to underrepresentation both in the defendant's juror venire and in the system, the State should bear the burden of showing that its system of jury management was adequately calculated and implemented to fulfill its constitutional and statutory responsibility. The burden of proof is properly placed on the party having the superior access to evidence about the fact in question. *Gomez v. Toledo*, 446 U.S. 635

[4] N David Coriell, *An (Un) Fair Cross Section: How the Application of Duren Undermines the Jury*, 100 Cornell. L.Rev. 463, 481 (2015); Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 Hastings L.J. 141, 151-52 (2012).

(1980). This principle may not always be controlling, but it should weigh heavily when a constitutional right as fundamental as the right to an impartial trial is at stake and the needed information is within the knowledge and control of a governmental entity. Constitutional rights were at stake in *Gomez,* and its allocation of the burden of proof on the issue of good faith is relevant to the instant case. *Gomez* held that a plaintiff in a §1983 action need not allege and prove that the government defendant acted in bad faith; proof of the defendant officer's good faith would, however, be an affirmative defense. The Court's rationale for allocating the burden of proof to the government defendant was that the information as to good faith was peculiarly within the knowledge and control of the government defendants.

The State cites several federal cases that appear to require the defendant to prove causation of underrepresentation, but many of the cases cited are among those that erroneously imported Equal Protection principles into the 6th Amendment FCS analysis and are therefore distinguishable. What is clear are the realities. Not only does the Iowa Court System control all the information, its information is so incomplete that to shift the burden of proving causation to the defendant would almost certainly be

insurmountable. The Iowa Court System has paid insufficient attention to FCS issues for twenty-five years: juror questionnaires have indicated that answering the race and ethnicity question was "optional," resulting in a significant number of "Unknowns;" jury managers' records are woefully incomplete; what records that have been created are not posted on a public Internet web site or otherwise accessible by defense counsel and the public; and neither local jury managers nor State Court Administration monitor the jury selection process with an eye to determining racial impact. As a result, the defendant and usually appointed counsel are put in a position on the day of trial of having to make the FCS challenge once they have observed the jury venire, and defense counsel may have to attempt, as here, on the spur of the moment to quickly go through thousands of court records and juror questionnaires; and no experts are instantly available.

The State relies upon caselaw that holds that underrepresentation due to socio-economic factors is nonsystematic exclusion for which the court system has no responsibility. Paula Hannaford-Agor has served as the Director of the Center for Jury Studies of the National Center for States Courts for nearly thirteen

years. Hannaford-Agor's article, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded,* 59 Drake. L. Rev. 761 (2011) (hereinafter "Drake ") summarizes the pre-*Plain* case law, provides a thoughtful, data-driven assessment of existing jury management best practices, and recommends that central to the 6th Amendment systematic exclusion determination should be whether underrepresentation is the result of jury management negligence. Hannaford-Agor contends the caselaw relied upon by the State "perpetuat[es] the misconception that courts have no responsibility to address causes of underrepresentation other than those" affirmatively caused by the system itself, *id.* at 764; is obsolete, having been contradicted by jury management practices developed by the nation's courts; and actually operates as "a disincentive" to implementation of effective jury management practices. *Id.*

While "courts have no control over whether an individual chooses to register to vote, . . . courts do have control over which source lists to use in compiling the master jury list" (*id.* at 779); while courts do not have control over how often people move, courts do have control over how often they update the jury lists using readily

available and inexpensive technology; while court do not have control over prospective jurors' responses to jury summons, courts do have control over the excusal process, the issuance of second summons, the enforcement of orders to appear, and so forth. The Center for Jury Studies' experience confirms that the nation's court systems have developed jury management practices that are effective, efficient, and able to satisfy the 6th Amendment's requirements.

> Over the past forty years, [trial] courts have implemented a number of effective practices to ensure an inclusive and representative master jury list and to minimize undeliverable, nonresponse and failure-to-appear, and excusal rates. All of these techniques demonstrably improve the demographic representation of the jury pool. The vast majority of courts employ these techniques on a routine basis.

Id. at 764.

The NAACP acknowledges that *Berghuis* has some dismissive language about "process factors" and arguably suggests the defendant in *Duren* had identified, at least in general, the cause of the underrepresentation. The *Berghuis* case is freighted with Federalism concerns, as it involved a federal court in a habeas proceeding reviewing a state court affirmance of a murder conviction; and the federal court's jurisdiction is limited to those circumstances when there has been a violation of a "clearly established" constitutional

right. It was not surprising that *Berghuis* found that that difficult standard set by Congress had not been met when, in truth, there was no "clearly established law" at the time or now about what the Federal Constitution requires of State Courts in terms of jury management.

The NAACP notes that *Berghuis* did not in any way expressly qualify the *Duren* systematic exclusion test; we submit it still stands and that it does not require proof of causation as part of the prima facie case. If *Berghuis* causes concern, we advocate that the Court should decide the FCS issues under Article I, §10 of the Iowa Constitution and provide a more protective standard than the 6th Amendment. We also submit there is ample authority to take this step under the Court's supervisory power over the trial courts under Article V, §4 of the Iowa Constitution. It is the State's obligation to provide for a jury that will be drawn from a fair cross section of the community no less than it is to provide the assistance of counsel.

The NAACP contends that just as technology advances often make administrative concerns obsolete, the nationwide judicial experience that has been gained in improved jury management practices, coupled with the advent of inexpensive lap top computers, big data developments, and other technology advances, have

rendered obsolete the pre-*Plain* caselaw that, although seldom expressed, reflected deep concerns as to whether court administrators could meet more than minimal standards.

The NAACP rejects the State's contention that defendant must prove causation. Proof by the State that its jury management practices have been reasonably calculated, in light of known best practices and available technology, to secure an impartial jury should be a threshold showing required of the State once defendant has made out the prima facie FCS case.[5]

III. THE DISTRICT COURT ERRED IN ITS CONSIDERATION OF DEFENDANT'S *BATSON* CHALLENGES.

Whether the promise of *Plain* has been fulfilled will be measured by whether Iowa's *trial* juries reflect and are drawn from a fair cross-section of the community. All the efforts this Court is making to ensure a representative jury pool at the front end of the selection process can be lost by one or two discretionary strikes in the

[5] We note there is authority for making the holding we are seeking only prospective. State *ex rel.* State v. Sine, 594 S.E.2d 314, 321 (W.Va. 2004); People v. Hubbard, 552 N.W.2d 493, 504-505 (Mich. Ct. App. 1996), *overruled on other grounds by* People v. Bryan, 822 N.W.2d 124 (Mich. 2012), *and* People v. Harris, 845 N.W.2d 477 (Mich. 2014); State v. Long, 499 A.2d 264, 273-274 (N.J. Super. Ct. Ch. Div. 1985).

final seating of jurors. Discretionary strikes have a longstanding tradition, but this Court's recognition in *State v. Mootz*, 808 N.W.2d 207 (Iowa 2102), that such a strike is, "by its very nature, capricious and arbitrary" should make clear that the defendant's constitutional rights should not be subordinated to this statutory right when the alleged race-neutral reason for a strike has a significant racial impact. That principle should guide this Court's disposition of the instant case.

The Supreme Court's opinions in *Foster v. Chatman*, 136 S. Ct. 1737 (2016) and *Pena-Rodriguez v. Colorado*, 137 S.Ct. 855 (2017), are directly relevant to the disposition of the *Batson* challenges in the instant case. In *Foster* the Court required trial courts to engage in a searching inquiry of the prosecutor's demeanor and stated justifications for striking jurors of color, including a comparative juror analysis to determine whether the stated race-neutral reasons for striking black jurors were in fact even-handedly applied to white jurors. In *Pena-Rodriguez* the Court stated emphatically that [t]he jury is to be a "criminal defendant's fundamental 'protection of life and liberty against race or color prejudice,'" and it held that a juror's

racially biased comments *during deliberations*, if reflected in his or her vote, can require the trial court to overturn a jury verdict.

There is a growing, national consensus that the procedural protections to implement *Batson* have proved ineffective because, rather than focusing on the defendant's right to a jury that reflects a fair cross-section of the community, courts have required proof that the strike was intentionally discriminatory and have failed to recognize that a strike based on implicit bias is just as invidious and has the same impact as a purposeful strike. In consequence, commentators and courts have urged a much more rigorous analysis of a prosecutor's asserted race-neutral justification for a strike and that a comparative juror analysis *be* required in every case. *See* SYMPOSIUM, *Batson at Twenty-Five: Perspective on the Landmark, Reflections on Its Legacy*, 97 Iowa L. Rev. 1393-1744 (2012); *City of Seattle v. Erickson*, 398 P.3d 1124 (Wash. 2017); *State v. Miller,* 899 N.W.2d 741 (Ia. Ct. App. 2017) (recognizing racially disproportionate impact of questions about "negative experience with law enforcement" and requiring as a result careful consideration of "all relevant circumstances" coupled with comparative juror analysis); Washington General Rule 37 (2018). The Washington

Supreme Court has been the national leader in the reconsideration of *Batson* procedure since *Saintecalle v. State*, 309 P.3d 325 (Wash. 2013); and its new General Rule 37 and more recent decision in *Erickson* warrant careful consideration. In *Erickson* the Court fashioned a bright line "that the trial court must recognize a prima facie case of discriminatory purpose when the sole member of a racially cognizable group has been struck from the jury." 398 P.3d at 1132.

This Court's opinion in *Mootz* failed to recognize the racial impact of the "negative experience with law enforcement" questions. It merely "encouraged" and did not require trial judges to make written findings in ruling on *Batson* challenges or to conduct a searching examination of the prosecution's race-neutral reasons for the challenge. In these respects *Mootz* requires modification to be consistent with the requirement of *Foster* and *People v. Gutierrez*, 395 P.3d 186 (CA 2017), that trial judges write a "sincere and reasoned" opinion when deciding *Batson* challenges. In Veal's case the District Court's brief treatment of defendant's *Batson* challenges assumed that articulation of a race-neutral reason by the prosecutor

concluded the *Batson* analysis. This is clear error under *Batson* and *Mootz*.

The essence of the State's argument is this Court should nonetheless affirm as the reason given by the prosecution for the strike of S.H. is so reasonable that an exception should be crafted from the sincere and reasoned opinion requirement for the trial judge. However, the record does not substantiate the prosecutor's fear that the final African American juror S.H. might have a latent bias against him and ignores the strong proof that race was a motivating factor—the prosecution's strike of all three African American jurors, the prosecutor's failure to ask questions of S.H. that could have substantiated, or removed, his concern, the trial judge's failure to assess the demeanors of the prosecutor and S.H., the apparent racial impact of the strikes for cause, and the absence of any persuasive reason for the strike of juror E.L. but race. [6]

[6] *Gutierrez* and *People v. Smith*, 417 P.3d 662, 4 Cal.5th 1134 (2018), recognize a very narrow exception to the "sincere and reasoned" written opinion requirement: "Some neutral reasons for a challenge are sufficiently self-evident, if honestly held, such that they require little additional explication." 395 P.3d at 203. But this exception cannot be applicable when a strong prima facie *Batson* case arises, including the inexorable pattern of strikes that removed each of the African American jurors.

As *Erickson* held, the strike of all three African American jurors alone should establish the *Batson* prima facie case. Likewise, *Plain* advised trial judges to be pro-active in addressing implicit bias. The NAACP urges the Court to make clear that being proactive includes a searching examination of discretionary strikes and strikes for cause pursuant to Rule 2.18 when they involve jurors of color.

Although the District Court recognized that Rule 2.18(5)'s authorization to strike an ex-felon for cause is not mandatory, Tr. Vol. III, p. 18, line 13, the Court erred in considering each of the prosecutor's strikes for cause and the discretionary strike of S.H. in isolation and not in the context of the apparent pattern of strikes of African American jurors. Two African Americans were struck for cause, D.F. and E.L. The fact that one Caucasian juror was also struck does not foreclose a *Batson* claim because discrimination can still exist if the prosecution exercised its cause strikes predominantly against African Americans. *See Quick v. Donaldson Co., Inc.*, 90 F.3d 1372 (8th Cir. 1996).

The NAACP is particularly concerned about the prosecution's strike of E.L. for cause. E.L. had a burglary-larceny conviction many years ago and also had a DUI-3d conviction in 2008. There was no

consideration as to whether the Vilsack-Culver Executive Orders that restored the rights of all ex-offenders who had served their time applied to E.L.'s convictions. Surely if these Orders restored one's right to run for public office, as they do, it can be inferred they restored the right to serve on a jury. Although there was no indication of any legal problems since 2008, there was no inquiry about E.L's rehabilitation and citizenship since he was discharged or whether the crimes had any real relationship to the person's veracity and impartiality at the time of jury selection.

The NAACP is acutely concerned—especially in Iowa with its racial disparities in arrests and incarceration—that the likelihood is high that many, indeed most, African Americans will have had a "negative experience with law enforcement" or an experience included among the race-neutral reasons listed in Washington Supreme Court Rule 37 as "presumptively invalid" because of their racially disproportionate impact. Without the searching scrutiny urged by the NAACP the Constitutional and statutory right to an impartial trial drawn from a fair cross section of the community will be denied too often to African Americans.

The NAACP submits this Court should go one step further and recognize that *Batson*'s "fundamental error" was its focus "on lawyer colorblindness rather than on jury impartiality or diversity" and that "*Batson*'s problems cannot be solved by merely tinkering with it." Felder Fayard, *Why Batson Misses the Point*, 97 Iowa L. Rev. 1713, 1735 (2012); *Erickson* (Stephens, Fairhurst, Gonzalez Conc.). The NAACP urges this Court to invoke its independent authority under the Iowa Constitution, specifically Article I, §§1, 6, and 10, and its supervisory authority over the trial courts, Article V, §4, and "replace[] the rationale behind the *Batson* rule with Sixth Amendment reasoning, [thereby] allow[ing] judges to affirmatively protect jury diversity by guarding against a skewing of the cross-section." Id. at 1743.

CONCLUSION

For the reasons expressed in *Erickson*, reversal and a new trial are required in this case. If the Court concludes it would otherwise affirm the conviction, it should remand for full reconsideration of the FCS and *Batson* issues, and Amicus prays that the Court instruct that the NAACP be allowed to participate as *Amicus Curiae* on remand.

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CERTIFICATE OF SERVICE and CERTIFICATE OF FILING

The undersigned certifies that on September 14, 2018, I served this document, Motion for Leave to Appear *Amicus Curiae* for the NAACP and To File Brief in Support of Defendant—Appellant Peter Leroy Veal, by EDMS to all parties electronically.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d), 6.903(1)(g)(1), and 6.906(4) because it has been prepared in a proportionately spaced typeface using Georgia in size 14 point and contains, 6,992 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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