ELECTRONICALLY FILED MAY 21, 2018 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
Supreme Court No. 17–1901

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENNETH L. LILLY,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR NORTH LEE COUNTY
THE HONORABLE MARY ANN BROWN, 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

CLINTON BODDICKER
Lee County Attorney

ANDREW PROSSER
Assistant Attorney General

ATTORNEYS FOR PLAINTIFF-APPELLEE FINAL

CERTIFICATE OF SERVICE

On the 21st day of May, 2018, the State served the within Appellee's Brief and Argument on all other parties to this appeal by e-mailing one copy thereof to the respective pro se defendant:

Kenneth Lee Lilly
#6078899
Anamosa State Prison
406 N. High Street
Anamosa, IA 52205

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

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I. Did Lilly Successfully Establish a Prima Facie Case to Show a Violation of His Sixth Amendment Right to Trial By Jurors Drawn from a Fair Cross-Section of the Community?

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II. Was the Evidence Sufficient to Prove That Lilly Aided and Abetted This First-Degree Robbery?

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III. Was the Evidence Sufficient to Prove That Lilly Knew a Dangerous Weapon Would Be Used in That Robbery?

Authorities

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ROUTING STATEMENT

Lilly asks for retention to "answer the question of how to utilize the three statistical tests" described in *State v. Plain*, 898 N.W.2d 801 (Iowa 2017). *See* Def's Br. at 15–16. Another case involving these issues is already on appeal; these two cases should be routed together. *See State v. Veal*, No. 17–1453 (status: briefing). On its own, this appeal is missing important numbers that would be important in analyzing substantial underrepresentation; however, the State's analysis shows none of the missing numbers could plausibly change the outcome.

STATEMENT OF THE CASE

Nature of the Case

Kenneth L. Lilly was tried and convicted on one count of aiding and abetting robbery in the first degree, a Class B felony, in violation of Iowa Code sections 703.1, 711.1, and 711.2 (2017). The evidence established that, on June 29, 2016, Lilly had driven Lafayette Evans to Fort Madison Bank and Trust. Evans brandished a handgun and robbed the bank. Police arrived before Evans could escape, and Evans was killed in an ensuing shootout. Witnesses described a vehicle that resembled Lilly's GMC Suburban, and Lilly repeatedly lied about his whereabouts and activities when questioned by investigators.

In this direct appeal, Lilly argues: (1) his jury was not drawn from a fair cross-section of the community and his pre-trial motion challenging the jury pool on Sixth Amendment grounds should have been granted; (2) the State's evidence was insufficient to support the jury's verdict finding that he was the "drop-off driver" and that he knowingly aided and abetted the robbery; (3) his trial counsel was ineffective for failing to challenge the sufficiency of the evidence showing that he knew Evans would use a dangerous weapon in the course of the robbery; and (4) his trial counsel was ineffective for failing to present non-hearsay evidence to support his theory that pinned the blame on an unknown third party.

Statement of Facts

Around 10:15 a.m. on June 29, 2016, employees at Fort Madison Bank and Trust "were held up by a masked man." TrialTr.V2 p.5.ln.1–p.6,ln.8; State's Ex. 5. Lafayette Evans "came charging through the front door, fired his gun into the ceiling," jumped over the counter, demanded $80,000, and ordered the bank employees into the vault to gather the money. *See* TrialTr.V2 p.13,ln.2–p.25,ln.23. Evans told the bank employees "that he was going to shoot [them] if he didn't get the money." *See* TrialTr.V2 p.25,ln.24–p.29,ln.5.

After Evans obtained a large amount of cash from the bank vault, he turned to leave via the bank's front door—but he did not, because he could see "the f-ing police were there." *See* TrialTr.V2 p.30,ln.15–p.31,ln.17. Instead, Evans left the bank through the back door. *See* TrialTr.V2 p.31,ln.8–p.33,ln.2.

Moments earlier, Joseph Hardin and his wife were headed for Fort Madison Bank and Trust's drive-thru when a larger vehicle pulled up and parked in front of the drive-thru lane. *See* TrialTr.V1 p.216,ln.11–p.219,ln.6. While they waited for that vehicle to move, Joseph saw a man get out of that vehicle and walk into the bank—Joseph noticed that person was pulling a red and black garment over his face and head, and he remarked to Carol that "he's probably going to rob the bank." *See* TrialTr.V1 p.219,ln.7–p.221,ln.20. Then, as they pulled around into the bank's drive-thru, Joseph heard a loud noise that sounded "like a gunshot." *See* TrialTr.V1 p.221,ln.21–p.222,ln.12. When Joseph got to the drive-thru window, the bank employee waved him away—Joseph could see that same man behind the counter and could tell that man was robbing the bank. *See* TrialTr.V1 p.222,ln.13–p.223,ln.14; *see also* TrialTr.V2 p.29,ln.6–24. Joseph called 911. *See* TrialTr.V1 p.223,ln.15–p.224,ln.2; State's Ex. 1.

Fort Madison Police Department Officer Brent Gibbs was one of the police officers who responded to that 911 call. *See* TrialTr.V2 p.42,ln.12–p.49,ln.3. Evans fled southbound, on foot, into a field. *See* TrialTr.V2 p.50,ln.6–p.51,ln.1. Police pursued him, and Evans fired at the pursuing officers. Police returned fire, subdued Evans, and called him an ambulance. *See* TrialTr.V2 p.51,ln.16–p.54,ln.12. Before the ambulance arrived, officers searched Evans and found a two-way radio in his pocket. *See* TrialTr.V2 p.54,ln.13–21; TrialTr.V2 p.90,ln.6–13; State's Ex. 12; ExApp. 49. Evans died from his gunshot wounds. He was not carrying any identification, but he was eventually identified by an analysis of his fingerprints. *See* TrialTr.V2 p.96,ln.1–16.

Investigators discovered that before the robbery, Evans' mother had sent a money order to Lilly's wife, Amber Sawyer. *See* TrialTr.V2 p.96,ln.25–p.97,ln.10. Investigators also discovered Lilly owned an SUV that matched descriptions of the drop-off vehicle. *See* TrialTr.V2 p.97,ln.13–23. Investigators could not locate Lilly until they spotted his vehicle at his residence on July 7. *See* TrialTr.V2 p.97,ln.24–p.98,ln.12. Investigators applied for and obtained search warrants for Lilly's home and vehicles. Lilly was present when the investigators executed the search warrants, and he agreed to a voluntary interview.

See TrialTr.V2 p.98,ln.7–p.99,ln.15; TrialTr.V2 p.165,ln.9–p.166,ln.20; TrialTr.V2 p.212,ln.19–p.214,ln.18. DCI Special Agent Joseph Lestina testified that Lilly said Evans had been staying at Lilly's house, but had "left his residence the night before the bank robbery." *See* TrialTr.V2 p.214,ln.19–p.216,ln.20. As for Lilly's whereabouts during the robbery, Lilly told Agent Lestina that he woke up at about 10:30 or 11:00 a.m., ran some errands, and then drove to Rockford, Illinois. Lilly vacillated between stating his children were with him and saying they were not. *See* TrialTr.V2 p.216,ln.21–p.218,ln.17. Lilly also told Agent Lestina that Evans "had free access to borrowing his vehicle while he stayed with them." *See* TrialTr.V2 p.218,ln.18–p.219,ln.13. Lilly said Evans was talking about suicide on June 28. *See* TrialTr.V2 p.215,ln.2–7.

Surveillance video from local businesses did not match the timeline that Lilly gave investigators during his initial interview. *See* TrialTr.V2 p.222,ln.1–p.223,ln.1. Instead, video recovered from security cameras showed Lilly with a passenger in his vehicle at Casey's General Store at 8:38 a.m. on the morning of the robbery. *See* TrialTr.V2 p.224,ln.24–p.228,ln.21; State's Ex. 35. Additional footage showed that Lilly was at Kempker's True Value Hardware at 9:27 a.m. *See* TrialTr.V2 p.228,ln.22–p.229,ln.19; State's Ex. 34. Finally, footage

from the McDonald's near Fort Madison Bank and Trust showed Lilly bought a small Coca-Cola at the drive-thru window at 10:14 a.m.—and there did not appear to be anybody else with him in his vehicle. *See* TrialTr.V2 p.229,ln.20–p.234,ln.17; State's Ex. 27–31; ExApp. 53–56. Lilly paid with cash and kept the receipt from that transaction. *See* TrialTr.V2 p.232,ln.6–p.234,ln.24; TrialTr.V3 p.19,ln.15–p.20,ln.5; State's Ex. 32; ExApp. 57. During his initial interview, Lilly had told investigators that he went to Casey's and Kempker's much later on in the morning, and he did not tell them he had gone to McDonald's. *See* TrialTr.V2 p.217,ln.20–p.218,ln.17; TrialTr.V2 p.223,ln.2–11.

Investigators conducted a follow-up interview with Lilly on October 25. *See* TrialTr.V2 p.222,ln.1–p.223,ln.1. During the interview, Lilly repeatedly denied that he drove Evans to the bank. *See* TrialTr.V2 p.223,ln.2–p.224,ln.9; TrialTr.V3 p.33,ln.24–p.35,ln.22. Lilly repeated that he believed Evans had "wanted to commit suicide by cop." *See* TrialTr.V2 p.224,ln.10–16.

Officers found a CB radio in Lilly's vehicle, and they discovered it was capable of two-way communications with the hand-held radio recovered from Evans' pocket. *See* TrialTr.V2 p.220,ln.3–p.221,ln.25.

Additional facts will be discussed when relevant.

ARGUMENT

I. Lilly 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* Challenge (9/14/17); App. 7; Order (9/25/17); App. 24; *Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012).

Standard of Review

Review is de novo. *See State v. Plain*, 898 N.W.2d 801, 810 (Iowa 2017); *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)). Lilly has satisfied the first prong, but he cannot establish substantial underrepresentation or systematic exclusion.

A. 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 district court was "not convinced that [it was] capable of properly making such calculations"—and its ruling focused on systematic exclusion instead. *See* Order (9/25/17) at 4–9; App. 27–32. 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.

Roughly 3.0% of Lee County residents are African-American. *See* U.S. CENSUS BUREAU, *QuickFacts: Lee County, Iowa* (2016), https://www.census.gov/quickfacts/fact/table/leecountyiowa/RHI225216; *see also* Order (9/25/17) at 3; App. 26 ("The parties agree that census data discloses that 3 percent of the population of Lee County is Black or African-American."). The 3.0% starting figure is Parameter A.

Lilly provided a printout showing that 3.2% of Lee County is African-American, which appears to use 2013 figures. *See* Def's Ex. B; ExApp. 34; Def's Br. at 45. This figure is outdated—it describes the population of Lee County as it existed *four years before* Lilly's jurors were drawn. In any event, that outdated 3.2% figure is Parameter B.

Courts generally agree that jury pools must be evaluated in relation to the "jury-eligible population." *See Berghuis v. Smith*, 559 U.S. 314, 323 (2010); *see also United States v. Shinault*, 147 F.3d 1266, 1272 (10th Cir. 1998) ("[W]e should compare the percentage of minorities in the qualified wheel to the percentage of minorities in the segment of the general population that is eligible to serve on juries."); *United States v. Rioux*, 97 F.3d 648, 657 (2d Cir. 1996) ("Focusing on the eighteen and over population is a fair and sensible methodology when considering the constitutionality of jury selection."); *United*

States v. Rodriguez, 776 F.2d 1509, 1511 (11th Cir. 1985) (focusing on "the percentage of the group among the population eligible for jury service"); *United States ex rel. Barksdale v. Blackburn*, 639 F.2d 1115, 1124 (5th Cir. 1981) ("[S]tatistics describing the presumptively eligible black juror population, rather than the general black population, provide the proper starting point for an inquiry into racial disparities.").

Analyzing these jury pools with unadjusted census data would produce misleading results because African-Americans in Iowa are disproportionately young.[1] The median age for African-American Iowans is 26.1 years old. For all Iowans, 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.

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[1] In the district court, the State offered an additional adjustment to reflect disproportionate felony conviction rates, which impact rates of voter registration. *See* Resistance (9/14/17) at 4–5; App. 16–17. Since then, it has become clearer that felons still obtain licenses/IDs and still populate Iowa's jury pools, so adjusting parameters on that basis would be inappropriate. During jury selection, any juror with a felony conviction may still be struck for cause under Rule 2.18(5)(a)—but since felons in Iowa still receive jury summons, still respond to juror questionnaires, and still appear for jury service (where they are counted alongside everyone else to assess the racial representativeness of a jury panel), felons count as part of the general population that is eligible to *be selected* for jury service (though not eligible to *serve*).

9.9% of all African-American Iowans are under age 5. For all Iowans, the corresponding figure is 6.4%. *See id.* Assuming a flat distribution (meaning: assuming there are as many 5-year-olds as 25-year olds),[2] we can estimate the percentage of African-American Iowans and the percentage of all Iowans who are too young to be selected as jurors:

Population:	**African-American Iowans**	**All Iowans**
% who are under five years old:	9.9%	6.4%
Median age	26.1 years old	39.7 years old
% who are under median age but *not* under 5 years old	(50% - 9.9%) → 40.1%	(50% - 6.4%) → 43.6%
Range of years from 5 to median	21.1 years	34.7 years
% of that range under 18 years old	(13/21.1) → 61.6%	(13/34.7) → 40.75%
Estimated % under median age who are at least 5 years old but still under 18…	(40.1%/61.6%) → 24.7%	(43.6%/40.75%) → 17.77%
…plus % under 5.	(24.7%+9.9%) → 34.6%	(17.77%+6.4%) → 24.17%
Everyone <u>*over*</u> 18, eligible to be jurors	(100% - 34.6%) → **65.4%**	(100% - 24.17%) → **75.83%**

2 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.

Thus, approximately 75.83% of all Iowans are old enough for jury service. The analogous figure for African-Americans is 65.4%.

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 *eligible* African-American Iowans as a percentage of *eligible* Iowans. Any all-ages parameter can be converted by multiplying it by (65.4%)/(75.83%)—which simplifies to 0.8624. Therefore, if Y% of residents of an Iowa county are African-American, we would expect (Y times 0.8624) percent of *adult* residents of that Iowa county to be African-American. That adult-specific parameter more accurately describes the racial characteristics of adult residents of that county—and only adults are eligible for jury service.

Parameter A, when converted into an adult-specific parameter, gives 2.59% as the percentage of adult Lee County residents who are African-American, which is Parameter C. Converting Parameter B into an adult-specific parameter yields 2.76%, which is Parameter D

Parameter:	**A**	**B**	**C**	**D**
Describes:	Unadjusted 2016 data	Unadjusted 2013 data	A converted to adults	B converted to adults
AA % of pop.	3.0%	3.2%	2.59%	2.76%

This jury pool: Lilly argues that "no African-Americans were selected for the jury pool of 125 people." *See* Def's Br. at 43. But Lilly's statement is incorrect in two ways. First, the present record contains nothing to indicate how many respondents returned questionnaires for this particular jury pool, nor any record of how many appeared for jury service. Lilly cites to Dawn Willson's testimony that she obtains 125 randomly selected names to send out juror questionnaires when she generates a jury pool. *See* HearingTr. (9/22/17) p.5,ln.6–p.6,ln.9. But the longitudinal data indicates that, in every round, some of those questionnaires are undeliverable and others elicit no responses. *See* Def's Ex. A; ExApp. 4. By the State's count, the total amount within the "responded," "excused," and "deferred" categories for jury pools ranged from 75 (in 562121101 and 562130101) to 115 (in 562140701). Second, there is no record on racial attributes of any potential juror who marked "unknown," and one of the potential jurors who returned a jury questionnaire indicated she was "white/black." *See* TrialTr.V1 p.185,ln.11–p.186,ln.21. So at least one of the potential jurors who had returned a juror questionnaire was African-American, and there may have been others who were African-American and did not mark race. *See* HearingTr. (9/22/17) p.12,ln.21–p.13,ln.11.

This record deficiency is fatal to Lilly's attempts to demonstrate substantial underrepresentation. The large percentage of "unknowns" (who were never asked to clarify their racial characteristics) renders it impossible to know how many potential jurors were African-American, even if everyone who reported for jury duty *appeared* to be Caucasian. *See* TrialTr.V1 p.185,ln.11–p.186,ln.21. And, even assuming this Court could determine *none* of these potential jurors were African-American, the absence of any record showing the total number of potential jurors who returned questionnaires or reported for jury service would render it impossible to enter a denominator to calculate absolute disparity and impossible to enter sample size to calculate standard deviation.

The court's pre-trial ruling focused on systematic exclusion, because it found itself similarly unable to render a meaningful ruling before "the jurors actually, physically appear in the courtroom on the morning of trial." *See* Order (9/25/17) at 3–5; App. 26–28. That prong alone can resolve Lilly's challenge, so preserving/remanding is not strictly necessary. However, if this Court finds systematic exclusion, it should preserve this claim for PCR or order a limited remand on this issue so that both parties can develop a record with numerical data that enables intelligible analysis of susbstantial underrepresentation.

For the purposes of illustrating the correct way to analyze substantial underrepresentation, the State will assume that single "white/black" person is the only African-American among those potential jurors who returned questionnaires and will assume that response rates matched the five-year maximum, at 115 respondents. *See* Def's Ex. A at 18; TrialTr.V1 p.185,ln.11–p.186,ln.21.

Absolute disparity: "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.'" *See Plain*, 898 N.W.2d at 822 (quoting *Jones*, 490 N.W.2d at 793). Assuming that one out of 115 potential jurors was African-American, that is 0.87% of the panel. Absolute disparity is equal to the population parameter, minus 0.87%.

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.	3.0%	3.2%	2.59%	2.76%
Absolute disparity	2.13%	2.33%	1.72%	1.89%
Comparative disparity	71%	72.8%	66.4%	68.5%

Standard deviation: Standard deviation is "[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. *See Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). Here, the assumption is that sample size is 115 and "observed number" is one.

Parameter:	A	B	C	D
AA % of pop.	3.0%	3.2%	2.59%	2.76%
Non-AA%	97.0%	96.8%	97.41%	97.24%
Standard deviation	1.829	1.887	1.703	1.757
Expected sample value	3.45	3.68	2.979	3.174
Difference (expected−1)	2.45	2.68	1.979	2.174
Difference in SD units	1.34	1.42	1.16	1.24

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.* The State will elaborate on that later.

Cumulative binomial probability (CBP): Each pool/panel is a binomial distribution;[3] randomness/fluctuation can be assessed by computing, for each parameter, the chance of drawing a random sample of 115 potential jurors that includes one African-American (or fewer). Performing this calculation manually is arduous—but computer tools can automate those calculations based on a string of text. Here, the WolframAlpha input is "1 success in 115 trials with p=[parameter]."

Parameter:	**A**	**B**	**C**	**D**
AA % of pop.	3.0%	3.2%	2.59%	2.76%
CBP	13.72% [4]	11.4% [5]	19.85% [6]	17.06% [7]

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3 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 Apr. 30, 2018), http://stattrek.com/probability-distributions/binomial.aspx.

4 *See* WOLFRAMALPHA, "1 success in 115 trials with p=.03", http://www.wolframalpha.com/input/?i=1+success+in+115+trials+with+p%3D.03 (result for 1 or less successes"). Each results page also has a "more statistics" button at the bottom that allows users to confirm the expected average value and the standard deviation.

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: Even courts that have retreated from exclusive reliance on absolute disparity still recognize the fact that "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 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%

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5 *See* WOLFRAMALPHA, "1 success in 115 trials with p=.032", http://www.wolframalpha.com/input/?i=1+success+in+115+trials+with+p%3D.032 (result for "1 or less successes").

6 *See* WOLFRAMALPHA, "1 success in 115 trials with p=.0259", http://www.wolframalpha.com/input/?i=1+success+in+115+trials+with+p%3D.0259 (result for "1 or less successes").

7 *See* WOLFRAMALPHA, "1 success in 115 trials with p=.0276", http://www.wolframalpha.com/input/?i=1+success+in+115+trials+with+p%3D.0276 (result for "1 or less successes").

absolute disparity is not a substantial deviation."); *State v. Washington*, No. 15–1829, 2016 WL 6270269, at *10 (Iowa Ct. App. Oct. 26, 2016) ("We do not believe 2.3% is 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%"). Other courts have done the same. *See Berghuis*, 559 U.S. at 330 n.5 (collecting cases); *United States v. Orange*, 447 F.3d 792, 798 & n.7 (10th Cir. 2006) (collecting cases). This rule fits 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 larger 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.[8] 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

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[8] 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).

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 *total* absence from a large jury pool to prove substantially lower-than-expected representation, because expected levels would not be significantly higher than zero.[9] This 3% absolute-disparity threshold recognizes that "if a statistical analysis shows underrepresentation, but the underrepresentation 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)).

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9 *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 cumulative binomial probability of observing *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).

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 Orange*, 447 F.3d at 799 (if preliminary disparity calculations "fall within our accepted range, a court need not look further into other statistical methods"); *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 only distorts the statistical analysis because it

"overstate[s] the degree of underrepresentation in the case of a small minority population." *Commonwealth v. Arriaga*, 781 N.E.2d 1253, 1265 (Mass. 2003). Moreover, "the smaller the group is, the more the comparative disparity figure distorts the proportional representation." *See United States v. Hafen*, 726 F.2d 21, 24 (1st Cir. 1984).

Consider this: less than 0.5% of Lee County residents are in the "Native Hawaiians or Pacific Islander" category. *See* U.S. CENSUS BUREAU, *QuickFacts: Lee County, Iowa*. Any jury panel without a Pacific Islander would have a comparative disparity of 100%—but in Lee County, about 56.18% of jury panels with 115 respondents will not include *any* Pacific Islanders.[10] Any framework that allowed proof of substantial underrepresentation by comparative disparity would let a Pacific Islander in Lee County strike 56.18% of all possible jury panels of that large size. With 100 potential jurors, that figure rises to 60%.[11] But their absence would not be the result of constitutionally suspect selection procedures—just natural fluctuations in random sampling.

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[10] *See* WOLFRAMALPHA, "0 successes in 115 trials with p=0.005", http://www.wolframalpha.com/input/?i=0+successes+in+115+trials+with+p%3D.005.

[11] *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.

For Pacific Islanders in Lee County, those fluctuations extinguish any real expectation of representation in any particular jury panel/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 any showing of *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 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. This test comports with *Castaneda* and balances relevant interests.

"[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); *accord 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. Any random pool has "a 5% chance that [its representation] 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.[12] 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 $p<0.05$.

The State proposes adopting 5% CBP and/or 1.64 Z-score thresholds because they correspond to $p<0.05$.[13] Why choose $p<0.05$?

[12] 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 $n(1\text{-}p)$ 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. Of course, if p is too low, then any 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).

[13] 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

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 facially plausible showing that any observed underrepresentation is substantial enough to implicate Sixth Amendment protections and warrant a collateral pre-trial inquiry into jury selection procedures.

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quickly using free software like WolframAlpha. Iowa lawyers without math backgrounds can compute CBP using a simple text input, print the CBP results page, and offer that printout into evidence during a pre-trial hearing on the defendant's fair cross-section challenge. Setting 5% CBP as an alternative to a minimum Z-score will enable non-statisticians to compute inferential statistics that meaningfully resolve these claims.

All players need articulable standards for calculating substantial underrepresentation after *Plain*—and the State is willing to accept one false positive in every twenty post-threshold claims in exchange for unambiguous guidance for trial courts facing these challenges.[14] 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 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."

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[14] 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/.

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."); *Waller v. Butkovich*, 593 F.Supp. 942, 955

(M.D.N.C. 1984) ("Even small underrepresentations can be statistically significant if the sample size is large enough."); *accord* STATISTICS FOR LAWYERS at 193 ("When large samples are involved even small differences can become statistically significant, but nevertheless may not turn legal litmus paper."); 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"). Using aggregated data ignores the requirement that underrepresentation must be *substantial* to satisfy *Duren*, not just statistically significant. A miniscule effect may become significant over years of aggregated data, but it would still be insubstantial.

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.

See, e.g., *State v. Smith*, No. 16–1881, 2017 WL 4315058, at *3 (Iowa Ct. App. Sept. 27, 2017) (holding, when group was overrepresented in jury pool, Smith "cannot establish the second element of the *Duren* test" because "Smith cannot demonstrate underrepresentation in the jury pool for his case"). 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 C because it uses the most recent data available, 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*

Shinault, 147 F.3d at 1272; *Rodriguez*, 776 F.2d at 1511; *Blackburn*, 639 F.2d at 1124. 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: The State recommends using Parameter C because it converts the up-to-date census data into an adult-specific population parameter. In any event, the choice of parameter will not change the result: no absolute disparity hits 3%, so Lilly's claim fails the bright-line threshold test. Also, these results are above 5% CBP and below 1.64 Z-score, which means this variance is not substantial—it is a natural by-product of expected fluctuations in random sampling.

Parameter:	**A**	**B**	**C**	**D**
Describes:	Unadjusted 2016 data	Unadjusted 2013 data	A converted to adults	B converted to adults
AA % of pop.	3.0%	3.2%	2.59%	2.76%
Absolute disparity	2.13%	2.33%	1.72%	1.89%
Z-score	1.34	1.42	1.16	1.24
CBP	13.72%	11.4%	19.85%	17.06%

Lilly's claim that "using multiple tests will avoid the pitfalls of a test understating or overstating a statistical disparity" is no comfort when his solution is to eyeball the numbers without doing any math. *See* Def's Br. at 42–44. Each test provides a different way to describe observable reality—but some descriptions are useful, and some are not. The State submits this Court needs to adopt a clear framework that explains how to perform this analysis after *Plain*, and it must enable more sophisticated analysis than just "feeling out" these numbers. Certainly, this Court should endorse the use of whatever assortment of statistical tools it needs for meaningful analysis of numerical data. But any statistical test that does not meaningfully contribute to that analysis should be scrapped. This multi-step analytical framework for assessing underrepresentation is *useful*, and this Court should adopt it.

B. 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). Lilly attempts to show systematic exclusion with aggregated data from jury questionnaires from 2012 through 2017. *See* Def's Br. at 44–47. However, this 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. This aggregated data omits key information.

The race reports generated by the Lee County jury manager are somewhat confusing, because the number of jurors among categories rarely adds up to the total for each row/column. *See* Def's Ex. A; ExApp. 4. Some "excused" values are higher than the "respond" values in the same row, so they must refer to separate groups. Disqualifications are *non*-eligible jurors. *See* Hearing (9/22/17) p.13,ln.24–p.14,ln.18.

By the State's calculations, here are the potential jurors who responded by sending in questionnaires, plus those excused/deferred:

Pool No.	Caucasian	African-American	Hispanic	All others, incl. "other"	Unknown (Unmarked)	**TOTAL**
562160901	55	0	2	0	34	**91**
562161101	62	0	1	1	40	**104**
562170101	67	0	1	0	24	**92**
562170301	65	2	0	0	33	**100**
562170501	58	0	0	2	32	**92**
562170701	72	0	3	1	25	**101**
562120901	56	0	4	1	19	**80**
562121101	47	1	0	1	26	**75**
562130101	47	1	0	0	27	**75**
562130301	52	0	3	1	23	**79**
562130501	54	0	1	2	29	**86**
562130701	50	1	1	1	29	**82**
562130901	63	1	1	0	24	**89**
562131101	57	0	0	0	27	**84**
562140101	52	0	2	1	35	**90**
562140301	61	0	0	2	22	**85**
562140501	66	1	1	2	18	**88**
562140701	82	1	2	1	29	**115**
562140901	54	1	2	0	24	**81**
562141101	68	0	0	0	14	**82**
562150101	63	0	0	2	29	**94**
562150301	70	2	3	1	26	**102**
562150501	57	0	1	3	30	**91**
562150701	63	1	0	1	32	**97**
562150901	63	1	1	1	23	**89**
562151101	57	0	3	1	33	**94**
562160101	61	0	2	0	32	**95**
562160301	59	0	1	1	36	**97**
562160501	73	1	3	0	26	**103**
562160701	61	0	4	0	29	**94**
TOTAL	**1815**	**14**	**42**	**26**	**830**	**2727**

More than 30% of all respondents declined to mark their race. There is no way to know if African-American respondents marked "unknown" more/less often than others. *See* HearingTr. (8/22/17) p.13,ln.4–14.

Lilly has offered nothing to substantiate his assumption that patterns of racial underrepresentation observed among those respondents who *did* mark their race would persist among respondents who did not. *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"); *cf*. Order (9/25/17) at 4–5; App. 27–28 ("Until the jurors actually, physically appear in the courtroom on the morning of trial, no one will know what their race is."). Nobody knows who was really drawn.

Because this data cannot describe the race of a large group of respondents, Lilly 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.

To demonstrate systematic exclusion, Lilly 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 Lilly 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.*, HearingTr. (8/22/17) p.24,ln.9–16. *Plain* stated 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. When the word "attributable" is emphasized, that statement is true. But *Plain* also 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*, 80 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 Lilly cannot jump from showing a persistent disparity to concluding that someone involved is deliberately/systematically excluding members of his minority group. Instead, Lilly must *prove* his claim of causation.

> 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) ("[T]he fact that certain groups of persons called for jury service appear in numbers unequal to their proportionate representation in the community does not support Rivas's allegation that Dallas County systematically excludes them in its jury selection process."); *Ford*, 841 F.2d at 685 ("We do not believe that the selection of jurors from a neutral master list, without more, can be construed as 'systematic exclusion' as defined in *Duren* merely because the percentage of women selected does not precisely mirror the percentage of women in the entire community."); *United States v. Garcia*, 991 F.2d 489, 492 (8th Cir. 1993) ("Garcia has not made any showing that African-Americans or Hispanics are systematically excluded from the jury-selection process. A numerical

disparity alone does not violate any of Garcia's rights and thus will not support a challenge to the Iowa Plan."); *Hernandez-Estrada*, 749 F.3d at 1166 ("[W]hile Hernandez has introduced significant evidence regarding underrepresentation of African Americans and Hispanics in the qualified juror pool, he has failed to provide evidence that this underrepresentation is due to the system employed . . . , and has therefore failed to establish a prima facie case under *Duren*."); *Randolph*, 380 F.3d at 1141 ("If underrepresentation by itself were sufficient to support a holding of unconstitutionality, the second and third prong of *Duren* would effectively collapse into one inquiry."); *People v. Smith*, 615 N.W.2d 1, 14 (Mich. 2000) ("[S]tatistics alone cannot prove systematic exclusion."); *State v. Robles*, 535 N.W.2d 729, 733 (N.D. 1995) (finding no systematic exclusion where "Robles has offered no explanation how the process results in systematic exclusion of Hispanics from the county's jury venires").

Any inference of systematic exclusion that arises from Lilly's raw numbers "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)). Testimony established these lists were 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 Lilly'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 Rioux*, 97 F.3d at 658; *see also Israel*, 109 A.3d at 604–05.

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). The law is clear: Lilly has the burden of proving systematic exclusion, and statistics showing a persistent disparity are not enough—he must show causation as well, and his causation theory must establish the *government* is responsible for systematically excluding African-Americans from jury service.

Thus, even if Lilly's data was 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 is sometimes useful to demonstrate a persistent disparity, it can never be enough to prove systematic exclusion is inherent in a race-blind/race-neutral process—

Lilly 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 Lilly has failed to foreclose or undermine that explanation. *See Orange*, 447 F.3d at 799–800.

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

Lilly's only argument alleging any cause of systematic exclusion attacks the source lists for potential jurors. *See* Def's Br. at 46–47.

Iowa caselaw recognizes "[t]he use of only the voter registration list and a motor vehicle operator's list" does not systematic exclude African-Americans from the jury selection process. *See Huffaker*, 493 N.W.2d at 834; *see also Thongvanh v. State*, 494 N.W.2d 679, 683–84 (Iowa 1993). Indeed, *Plain* did not overrule the holding from *Jones* that attacking those source lists, without more, would not establish "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) (observing that *Jones* identified "no constitutional or statutory violation in compiling jury pools"). Pointing to these source 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).

The State Court Administrator's office is the entity that has "control over what source lists are used to compile a master jury list." RECOMMENDATIONS OF THE COMMITTEE ON JURY SELECTION (Mar. 2018), at 10 [hereinafter RECOMMENDATIONS]. Lilly argues that Lee County was systematically excluding minority segments of the population from jury service by failing to replace those SCA-supplied juror lists with lists from another source, "such as income tax filers and persons receiving unemployment compensation." *See* Def's Br. at 46–47. But there is no indication that would fix an underrepresentation problem, unless observed underrepresentation is mostly due to undeliverable jury summons. *See* RECOMMENDATIONS, at *10 ("Although not always yielding significant increases in the overall number of eligible jurors, income tax and unemployment lists have been shown to contain more accurate juror addresses."). The risks of unilateral action to replace the SCA-supplied juror lists far outweigh any potential benefits—if

the substitute lists are challenged as underinclusive, non-random, or otherwise defective, then every case tried before a jury populated with names drawn from that list would be infected with fatal error. *See, e.g.*, *United States v. Ovalle*, 136 F.3d 1092, 1104–09 (6th Cir. 1998).

Certainly, this Court can take supervisory action in accordance with recommendations laid out in the task force report—some of its recommendations offer fresh solutions to stubborn problems. But that does not mean failure to predict/adopt any specific recommendation establishes systematic exclusion or renders this trial unconstitutional. In rejecting a similar challenge, the Minnesota Supreme Court stated:

> While the evidence fails to establish systematic exclusion, the evidence—both anecdotal and statistical—indicates that there is some underrepresentation in fact. That the underrepresentation is not the result of systematic exclusion does not justify complacency or satisfaction with the inclusiveness of the system. That the United States Constitution and the Minnesota Constitution require only that underrepresentation not be the result of systematic exclusion does not mean that the system of selection is perfect. We intend to use our supervisory power over the trial courts to insure that the systems used are increasingly inclusive in the hope that the faces of the people in the jury room will soon mirror the faces of the people in the community at large.

Williams, 525 N.W.2d at 544. This Court should strive for diversity and inclusion, but it should also recognize that *nothing* in this case bears any resemblance to unconstitutional systematic exclusion.

"[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)). Lilly'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. Use of these neutral source lists cannot establish systematic exclusion. Therefore, Lilly's fair-cross-section claim fails.

C. The Duke study cited in *Plain* does not say what *Plain* says that it says.

This does not fit into the fair cross-section framework, but Lilly block-quotes *Plain*'s discussion of one particular study to support his claim that minority defendants "cannot get a fair trial before Iowa's white juries." *See* Def's Br. at 31 (citing *Plain*, 898 N.W.2d at 825–26). *Plain* described a study showing "that having just one person of color on an otherwise all-white jury can reduce disparate rates of convictions between black and white defendants." *Plain*, 898 N.W.2d at 825–26. That description misstates the study's findings—and its *real* findings are interesting in light of Lilly's claim that he did not receive a fair trial.

See Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017 (2012). This study, like all research, is not perfect; its authors also used the same data set to demonstrate similar effects on conviction rates based on average *age* of seated jurors (which they did not control for in their race-focused study). *See* Shamena Anwar et al., *The Role of Age in Jury Selection and Trial Outcomes*, NAT. BUREAU ECON. RES. (2012), http://www.nber.org/papers/w17887.pdf. More importantly for this discussion: note that Anwar's team found that racial disparities in conviction rates disappeared when the jury panel contained at least one African-American, "*regardless of whether they are actually seated on the trial jury*." *See* Anwar et al., *The Impact of Jury Race*, 127 Q.J. ECON. at 1035. Somehow, *all* jurors deliberate and render verdicts differently if the panel includes an African-American, even if the petit jury does not. Anwar suggests that African-Americans may be struck for being defense-friendly and "replaced on the jury by white jurors with similar attitudes towards the case"—in theory, the presence of an African-American on the jury panel would be similar to having an additional pro-defendant Caucasian. *See id.* at 1041–45. But African-American potential jurors were *more* likely to be seated; they were not being struck at disproportionate rates or intercepting

strikes intended for potential jurors who "lean defendant." *See id.* at 1029–30. If African-Americans clustered at the "lean defendant" end of the "juror disposition" distribution Anwar describes, they would draw strikes from prosecutors at higher rates—and they would surely impact conviction rates more sharply when *seated* than when merely *summoned* for jury service. Whatever causes the effect Anwar found must be happening whenever an African-American is on a jury panel, regardless of whether he/she is seated, struck, or simply not selected. *Id.* at 1046 ("Strikingly, the coefficients that characterize the black–white conviction rate gap when there is at least one black member seated on the jury are almost exactly the same size as the estimated impact of having at least one black potential juror in the pool.").

Anwar reluctantly acknowledges another possibility: "The presence of black jurors in the pool might also affect trial outcomes indirectly if pretrial interactions among members of the jury pool alter the attitudes of the white jurors who are ultimately seated." *See id.* at 1041 n.31. There seems to be no other plausible explanation for the impact that a single African-American person on the jury panel has on the subsequent deliberations of an all-white jury—*exposure* to diverse voices in voir dire must be defraying some implicit prejudice.

This aligns with contemporary academic research on the topic. *See, e.g.*, Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. & SOC. SCI. 269, 273–74 (2015) (summarizing research showing that "most individuals believe that it is important to be egalitarian, so they try to avoid bias when they are aware of the potential influence of race"); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1143 (2012) ("When the case is racially charged, jurors—who want to be fair—respond by being more careful and thoughtful about race and their own assumptions and thus do not show bias in their deliberations and outcomes."); Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias*, 7 PSYCHOL. PUB. POL'Y & L. 201, 220–25 (2001) (reporting findings that "[w]hen race was made salient in the experimental trial, Whites demonstrated no signs of discrimination, apparently because the racial content of the trial activated a motivation to appear nonprejudiced"). Theoretically, even when fluctuations in random sampling produce an all-white panel, it should be possible to simulate Anwar's outcome-equalizing effect of racial diversity on the jury panel by prompting a thoughtful discussion of racial issues. *See* Sommers & Ellsworth, 7 PSYCHOL. PUB. POL'Y & L. at 221 (noting "[e]mpirical evidence suggests that even expectations

surrounding the racial composition of a jury are sufficient to influence jurors' predeliberation decisions," and that "asking potential jurors about their beliefs regarding the fairness of the criminal justice system or the pervasiveness of racism in society at large may also make race more salient" and neutralize the impact of implicit bias on outcomes).

This was worth discussing because Lilly's trial counsel explored racial issues with the jury during voir dire. *See* TrialTr.V1 p.158,ln.18–TrialTr.V1 p.173,ln.5. He asked the panel to consider the fact that "we have no black potential juror in this pool." TrialTr.V1 p.158,ln.21–24. He solicited the panel's opinions on racism in contemporary America, and he confirmed that "everyone agrees racism exists." *See* TrialTr.V1 p.158,ln.25–p.163,ln.1. And he explained and explored the concept of implicit bias, and elicited agreement from potential jurors that biases should not affect their verdict. *See* TrialTr.V1 p.163,ln.2–p.166,ln.7. Everyone seemed to agree with the potential juror who offered this:

> I would say that the color of your skin shouldn't matter, you know. Doesn't matter if you're white, black, Asian, African American. It doesn't matter. We're all human beings[.]

TrialTr.V1 p.164,ln.16–p.165,ln.2. And cautionary jury instructions on implicit bias were given repeatedly throughout the trial. *See* TrialTr.V1 p.182,ln.24–p.183,ln.4; Jury Instr. 11A; App. 33.

Again, this is not part of the *Duren* analysis. But the State is troubled by the suggestion that jury trials become inherently unfair whenever race-neutral random selection of potential jurors creates a jury panel that does not include a person from this specific segment of the population (which is often a small segment, and one that may include fewer eligible jurors than raw census figures would suggest). If Lilly can construct a meritorious *Duren* claim, he should prevail—but the racial composition of this pool/panel/jury does not establish any *inherent* unfairness. And even the research Lilly cites via *Plain* shows that all-white juries *can* deliver outcomes that are comparable to diverse juries under circumstances like these, when they confront racial issues and guard against implicit bias throughout the trial. *See* Anwar et al., *The Impact of Jury Race*, 127 Q.J. ECON. at 1041 n.41; *see also* Sommers & Ellsworth, 7 PSYCHOL. PUB. POL'Y & L. at 220–25. Lilly deserved a fair trial, and there is no reason to believe that he did not receive one. Therefore, this Court should reject Lilly's challenge.

II. The Evidence Was Sufficient to Support Conviction.

Preservation of Error

Error was preserved to challenge the State's proof of identity and proof of participation. *See* TrialTr.V2 p.54,ln.1–p.56,ln.11.

Error is not preserved to attack the State's proof that Lilly knew Evans would use a dangerous weapon. *See, e.g.*, *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996). Since Lilly raises that challenge as an ineffective-assistance claim, an appellate court may address the claim on direct appeal "when the record is sufficient to permit a ruling." *See State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005). Strategic imperatives may explain attorney conduct that otherwise resembles breach of duty, and it is generally premature to find breach without a factual record on strategic considerations. *See, e.g.*, *State v. Shorter*, 893 N.W.2d 65, 82–83 (Iowa 2017); *see also State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978) ("Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned."). The State will treat Lilly's challenge with that caveat, and reiterate it where appropriate.

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).

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Thorndike*, 860 N.W.2d 316, 319 (Iowa 2015).

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).

A verdict withstands a sufficiency challenge if it is supported by substantial evidence. "Evidence is substantial if it would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." *See State v. Hennings*, 791 N.W.2d 828, 823 (Iowa 2010) (quoting *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008)). "We view the evidence in the light most favorable to the verdict and accept as established all reasonable inferences tending to support it." *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995).

A. The evidence was sufficient to support a finding that Lilly was driving the drop-off vehicle.

Both Joseph Hardin and Kelly Bergman saw Lilly's vehicle at Fort Madison Bank and Trust, just before the robbery. Hardin was not paying close attention to the vehicle's characteristics at the time—but he was able to identify it from the L&L security camera footage, which showed both the drop-off vehicle and Hardin's blue truck. *See* TrialTr.V1 p.224,ln.13–p.229,ln.1; State's Ex. 6.

Kelly Bergman was exiting from the bank's drive-thru when "a vehicle stopped and obstructed her turn." *See* TrialTr.V1 p.247,ln.16–p.249,ln.14. It was an older vehicle with "two-toned" coloring, and it was equipped with a feature that Bergman found unusual:

> What stood out to me was it had a fan clipped to the rearview mirror, a black fan, and it just caught my eye 'cuz it was just an odd thing to see in a vehicle.

See TrialTr.V1 p.249,ln.15–24. That fan was distinctly silhouetted against the windshield, and was clearly visible to anyone behind the vehicle. *See* State's Ex. 24; ExApp. 51. Bergman saw the occupants, and she said "[t]he driver was a larger black man who kind of filled the seat, had sunglasses on." *See* TrialTr.V1 p.249,ln.25–p.251,ln.3. Bergman also identified the drop-off vehicle and her own vehicle on the L&L footage. *See* TrialTr.V1 p.253,ln.3–p.254,ln.7; State's Ex. 6. Bergman specifically remembered the obtrusive dashboard fan—which was found in Lilly's vehicle, just as Bergman had described it. *See* TrialTr.V1 p.249,ln.15–24; TrialTr.V1 p.257,ln.20–p.258,ln.9; TrialTr.V1 p.263,ln.6–14; State's Ex. 23; ExApp. 50.

Lilly's false statements to investigators strengthened the case against him. He initially claimed that he did not wake up until after the robbery had already begun. *See* TrialTr.V2 p.216,ln.21–p.218,ln.17.

That turned out to be false—Lilly had run those errands much earlier than he initially claimed, and he was accompanied by a passenger who wore a white shirt (just like Evans). *See* TrialTr.V2 p.217,ln.20–p.218,ln.17; TrialTr.V2 p.222,ln.1–p.223,ln.1; State's Ex. 35; App. ---. The jury was entitled to weigh the evidence of Lilly's involvement in light of "the fact that when defendant was interrogated by the police he gave false and misleading evidence." *State v. Harris*, 589 N.W.2d 239, 242 (Iowa 1999); *accord State v. Odem*, 322 N.W.2d 43, 47 (Iowa 1982) ("A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt.").

Lilly argues that he could not possibly have traveled from the bank to the McDonald's in time to make a purchase at the exact time noted on the receipt. *See* Def's Br. at 57–58. But different systems use different timestamps, and there is no reason to believe cash registers at McDonald's would synchronize with the 911 dispatch system for the purpose of enabling down-to-the-minute accuracy. *Cf.* TrialTr.V2 p.7,ln.4–18; TrialTr.V2 p.34,ln.18–p.35,ln.4 (noting bank timestamps are known to be "off just a few minutes"). What the McDonald's receipt shows is that Lilly was driving his Suburban near the bank, right after an identical vehicle dropped Evans off. *See* State's Ex. 32; ExApp. 57.

"[C]ircumstantial evidence is as probative as direct evidence." *State v. Hearn*, 797 N.W.2d 577, 580 n.1 (Iowa 2011). Identifications of Lilly's vehicle, combined with Lilly's proximity to the bank when Evans was dropped off (and Lilly's attempt to conceal those facts), provided substantial evidence from which a rational fact-finder could infer that Lilly was the driver of the vehicle that had dropped Evans at Fort Madison Bank and Trust, just before the robbery. *See, e.g.*, *State v. Lindsey*, No. 17–0761, 2018 WL 1433528, at *4 (Iowa Ct. App. Mar. 21, 2018) (finding sufficient evidence to support conviction when defendant "was explicitly asked if he had been anywhere else and denied it, even though his vehicle had been captured on security cameras on the west side of town"). Thus, Lilly's challenge fails.

B. Circumstantial evidence, including Lilly's demonstrably false statements to investigators, supported an inference that he knew Evans was about to rob the bank when he drove Evans there.

Beyond identity, Lilly argues that "there was still no evidence that Lilly knew or consented to Evans robbing the bank." *See* Def's Br. at 60–61. But Lilly would have no reason to lie about his whereabouts if he dropped Evans off at the bank without any nefarious purpose. Moreover, Evans was wearing black electrical tape on his hands, to cover up his distinctive tattoos. *See* TrialTr.V2 p.162,ln.17–25.

Eyewitnesses who watched Evans enter the bank did not see him stop to apply that tape *outside* the bank, and the security video does not show him applying it *inside* the bank—he must have applied it earlier, and Lilly would have seen the tape (or the conspicuous gloves, which would have been out of place in June) while he drove around town running errands with Evans in his passenger seat. *See* TrialTr.V1 p.219,ln.7–p.221,ln.20; TrialTr.V1 p.249,ln.25–p.251,ln.3. And the snowmobile mask that Evans wore was such an unambiguous flag that Hardin instantly grew suspicious and remarked to his wife that Evans was "probably going to rob the bank." *See* TrialTr.V1 p.219,ln.7–p.221,ln.20; TrialTr.V2 p.88,ln.7–p.89,ln.13; State's Ex. 9; ExApp. 48. The jury could conclude Lilly had lied to police about his whereabouts because he had no plausible explanation for his conduct, other than the incriminating truth: that he helped Evans commit this robbery.

This was made crystal clear in the State's closing argument:

> So what did the defendant know when he dropped Mr. Evans off? Now, he was asked by Special Agent Lestina in the second interview on October 25 of last year: Hey, we know you're the drop-off driver . . . . We want to give you an opportunity to explain to us whether you really knew that Mr. Evans was about to commit a bank robbery 'cuz maybe you just thought he was going in there to cash a check.

> Wisely, [Lilly] says: I didn't drop him off. I didn't drop him off. Remember when he answered that question? And why was it wise for him not to say that? All you have to do is think of what — about what I've already said: What was Mr. Evans wearing when he got out of the vehicle? Sunglasses, a long-sleeved shirt in the middle of June, a necktie, gloves on his hands, tape over the tattoos on his fingers, the ski mask, a huge — this huge radio stuffed in his pocket.
>
> [. . .]
>
> The person who dropped this guy off at the bank could have no doubt what the heck was about to happen. This guy wasn't wearing a pair of sweat pants, I got to go in and cash a check. This guy's wearing a ski mask and gloves and, you know, decked out like a — I don't know, just this crazy uniform to conceal his identity. Is that circumstantial evidence of what Mr. Lilly knew? Heck, yeah. Was it pretty darn convincing about whether he knew what was about to happen? Heck, yeah, unless he's the most unobservant person on the planet Earth.

See TrialTr.V3 p.182,ln.9–p.183,ln.17; *see also* TrialTr.V2 p.223,ln.2–p.224,ln.9; TrialTr.V3 p.33,ln.24–p.35,ln.22. Evidence of a defendant's "'presence, companionship, and conduct before and after the offense is committed ' may be enough from which to infer a defendant's participation in the crime." *See State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994) (quoting *State v. Miles*, 346 N.W.2d 517, 520 (Iowa 1984)). Here, there is no other rational inference to draw.

Lilly argues Evans was too smart to involve Lilly when "[h]e was clearly tied to the Lilly residence and the Lilly family in general." *See*

Def's Br. at 59–60. But that explains the quick jaunt to McDonald's (for a soda that could have been purchased at Casey's, just as easily), and it explains why Lilly kept the receipt for that $1.39 transaction from June until October: Lilly knew he needed to make a purchase *during* the robbery to establish an alibi, before returning to retrieve Evans after the robbery and help him escape. Then, when Lilly realized that his quasi-alibi was insufficient, he fabricated a new narrative and picked a time "that was after the robbery was already over or his part in it, the drop-off"—which helps to demonstrate that Lilly *knew* what time Evans arrived at the bank. *See* TrialTr.V3 p.183,ln.21–p.184,ln.9. Lilly had also fled to Rockford after the robbery and stayed there for more than a week. *See State v. Ash*, 244 N.W.2d 812, 816 (Iowa 1976) ("Evidence of flight may be considered in determining guilt or innocence."). Lilly's many attempts to distance himself from Evans, to disclaim exclusive use of his vehicle, to fabricate narratives/timelines that were proven false, and to skip town in the immediate aftermath of the robbery gave rise to an inference that Lilly *knew* there was no innocuous explanation for his participation—he knew Evans had been unambiguously outfitted for a bank robbery and, as a result, he knew he could never make a credible claim that he was an unwitting patsy.

"Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury [is] free to reject certain evidence, and credit other evidence." *Sanford*, 814 N.W.2d at 615 (quoting *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006)). Here, the jury could reject all of the defense evidence and infer that Lilly's fabrications showed he possessed knowledge he could not have had without involvement in driving Evans to the bank before the robbery, and could *then* infer that Lilly would not be involved in driving Evans to the robbery (and developing his McDonald's alibi nearby) unless he expected to be duly compensated for taking on such a significant risk. *See State v. Galvan*, 297 N.W.2d 344, 349 (Iowa 1980) (quoting *State v. Lott*, 255 N.W.2d 105, 107 (Iowa 1977), *overruled on other grounds by State v. Allen*, 633 N.W.2d 752, 756 (Iowa 2001)) (affirming on aiding-and-abetting theory when evidence showed the defendant "'associate[d] himself with the venture,' that he participated in it as something he wished to bring about, that he sought by his own action to make it succeed"). Moreover, the two-way radio Evans was carrying enabled communication with anyone who had a similar CB radio—and Lilly had one in the vehicle that matched descriptions provided by the witnesses who saw Evans walk into the bank, outfitted for the robbery.

See TrialTr.V2 p.90,ln.6–13; TrialTr.V2 p.220,ln.3–p.221,ln.25; State's Ex. 12; ExApp. 49. The jury could infer that the plan was to use the two-way radios to coordinate pickup, before the plan went awry. This evidence is plainly sufficient to support an inference that Lilly was an active participant in this robbery, and his challenge fails.

C. Unlike *Henderson*, this record strongly supports an inference that Lilly would have known that Evans would use a handgun to rob the bank.

To establish ineffective assistance of counsel, "a defendant must typically show that (1) counsel failed to perform an essential duty and (2) prejudice resulted." *State v. Keller*, 760 N.W.2d 451, 452 (Iowa 2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). Both elements must be proven, and failure to prove a single element is fatal to the claim. "If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

Lilly's argument is that his counsel should have advanced the same claim that prevailed in *State v. Henderson*: that Lilly may have agreed to participate in a robbery, but he did so without knowledge that Evans would use a dangerous weapon, and therefore Lilly was only willingly participating in *second-degree* robbery. *See* Def's Br. at

61–69; *State v. Henderson*, 908 N.W.2d 868, 875–79 (Iowa 2018). However, unlike in *Henderson*, this record contains no evidence that could support an inference that Evans and Lilly planned to rob the bank through any other means, and it contains no evidence to suggest that Lilly ever thought Evans would rob the bank without using a gun. Indeed, one pivotal difference between these two fact patterns is that Henderson was a *get-away* driver, while Lilly was the *drop-off* driver. *Compare Henderson*, 908 N.W.2d at 875 (noting "Henderson was not with them at that point" and did not see "Anderson handing the gun through the window of the BMW to either Plummer or Mallett" because "Henderson had already driven to his spot"), *with* TrialTr.V2 p.79,ln.25–p.80,ln.11. Lilly would have watched Evans walk inside—unlike in *Henderson*, nobody handed Evans a handgun after Lilly had already taken his marching orders and moved into position.

Additionally, in *Henderson*, there was a "meeting of the minds" surrounding a plan to use a threatening note—which made it possible to pull off a robbery without the use of any weapon whatsoever. *See Henderson*, 908 N.W.2d at 870–71. But here, there was no note—and Evans fired his handgun into the air, right after he entered the bank. *See* State's Ex. 5; TrialTr.V2 p.36,ln.6–12. "Of course, knowledge can

be proved by circumstantial evidence." *See Henderson*, 908 N.W.2d at 878 (citing *State v. McDowell*, 622 N.W.2d 305, 308 (Iowa 2011)). A rational fact-finder could infer that Evans would not have fired shots if he thought there was any real chance that his accomplice might flee (or decide not to return) when he heard the sound of gunfire.

Because the record supports a rational inference that Lilly knew that Evans was going to use a gun in the course of his bank robbery, this hypothetical motion for judgment of acquittal on that element would have been meritless, and trial counsel had no duty to raise it and could not prejudice Lilly by declining to do so. Therefore, Lilly cannot establish his trial counsel was ineffective.

III. Lilly Cannot Show His Trial Counsel Was Ineffective for Failing to Present Non-Hearsay Evidence That Might Have Supported His Defense.

Preservation of Error

Appellate courts may address ineffective-assistance claims on direct appeal "when the record is sufficient to permit a ruling." *See Wills*, 696 N.W.2d at 22. However, strategic considerations may explain attorney conduct that would otherwise resemble breach, and it would be premature to find breach on this claim without developing a record on counsel's strategy through a PCR action.

Standard of Review

Claims of ineffective assistance of counsel are reviewed de novo. *Thorndike*, 860 N.W.2d at 319.

Merits

Again, Lilly must show both breach and prejudice to prevail on this ineffective-assistance claim. And again, neither can be shown. Lilly agrees with the district court that his trial counsel was offering hearsay evidence for the truth of the matter asserted, and he argues "[c]ounsel could have avoided the hearsay objection simply by calling and questioning the Rivers Inn employee" to help prove that "one of these people from Alabama may have been the driver of the vehicle that dropped Evans off at the bank." *See* Def's Br. at 69–82.

Lilly cannot show breach without demonstrating that the witness could have been subpoenaed and would have provided the testimony about those guests that Lilly would view as favorable. Lilly would also have to show that witness would not been susceptible to cross-examination that would have *undermined* his defense, because that would add a strategic dimension to counsel's decision not to call that particular witness. *E.g.*, *State v. Heuser*, 661 N.W.2d 157, 166 (Iowa 2003); *Heaton v. State*, 420 N.W.2d 429, 431–32 (Iowa 1988).

And regarding prejudice, Lilly's assertion that "[d]efense counsel's breach prevented him from showing the jury that there were other highly likely suspects for the driver of the vehicle" requires him to substantiate that claim—which requires a record that is not available on this direct appeal. *See* Def's Br. at 84–85.

Part of Lilly's analysis on breach is his suggestion that a Rivers Inn employee could lay foundation for admission of a log-in book as a record of regularly conducted business under Rule 5.803(6). But the log-in book would only be useful for the entry that was populated with information provided by these specific patrons, who are not employees of the hotel and do not regularly keep hotel log-in books. *See, e.g.*, *United States v. McIntyre*, 997 F.2d 687, 699 (10th Cir. 1993) ("The owner of the Magic Carpet Motel testified that the log was kept in the regular course of business. However, the owner also testified that an employee of the motel filled in the log based on information received from the guest. Because the motel employee relied on information received from the guest in compiling the log, the record poses a hearsay problem."); *accord United States v. Vigneau*, 187 F.3d 70, 75–77 (1st Cir. 1999). This illustrates the need to develop the record before adjudicating this claim.

Lilly cannot advance a plausible ineffective-assistance claim on this record, without proof of what those missing witnesses would say.

> Assuming without deciding that trial counsel did breach an essential duty in failing to further investigate to determine if the allegedly impeaching evidence in fact existed, we find the record lacking in any substantial evidence of what would have been discovered or what the witnesses' testimony would have been had there been no breach. Jessop has thus failed to prove that but for counsel's breach the outcome of the trial would probably have been different. This claim of ineffective assistance fails on the prejudice prong.

Jessop v. State, No. 01–1333, 2002 WL 31761711, at *3 (Iowa Ct. App. Dec. 11, 2002); *see also Gear v. State*, No. 08–1150, 2009 WL 1886839, at *3 (Iowa Ct. App. July 2, 2009) (rejecting failure-to-investigate claim because "Gear has presented no evidence—expert or otherwise— in support of his assertion" that investigation would have borne fruit). Therefore, this claim must be preserved for PCR.

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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Dated: May 18, 2018

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