IN THE SUPREME COURT OF IOWA
Supreme Court No. 17–1989

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTOINE WILLIAMS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR FLOYD COUNTY
THE HONORABLE RUSTIN DAVENPORT, JUDGE

APPELLEE'S AMENDED BRIEF

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ROUTING STATEMENT

Williams seeks retention, based on claims that the jury should have been instructed on the amended definition of "reasonable force" (even though the shooting occurred before the effective date of those particular amendments) and that his jury pool/panel did not reflect a fair cross-section of the community. *See* Def's Br. at 1. His first claim can be resolved through application of established legal principles. *See State v. Harrison*, No. 16–1998, 2018 WL 3083869, at *17 (Iowa June 22, 2018); *State v. Chrisman*, 514 N.W.2d 57, 63 (Iowa 1994).

However, on the *Duren* challenge, this case may be appropriate for retention alongside *Veal* (No. 17–1453) and *Lilly* (No. 17–1901), because it raises similar issues requiring clear resolution after *Plain*. Additionally, retention is needed to resolve confusion perpetuated by *State v. Einfeldt*, No. 16–0955, 2018 WL 1980676 (Iowa Apr. 27, 2018). *Einfeldt* papered over conflicting Iowa cases without reconciling them and failed to discuss, mention, or cite Rule 5.405(b) because it found alternative grounds to uphold the exclusion of evidence. *See Einfeldt*, 2018 WL 1980676, at *8–9. But that snarl in Iowa caselaw still exists and must be unwound—otherwise, Iowa lawyers will keep offering specific instances of conduct to prove propensity inferences, like this:

> Your Honor, the jury's going to be called upon to decide who was the first aggressor and whether there's a legitimate claim of self-defense. This is merely to show that the [deceased] victim, who we can't call . . . was not a good person; has a background that would be consistent with how he behaved in this case, which would then support the defense's claim of self-defense.

See TrialTr.V6 p.128,ln.21–p.129,ln.18. That theory of admissibility is logically flawed, expressly forbidden by Rules 5.404 and 5.405(b), and repugnant to Iowa cases that scrutinize the issue. *E.g.*, *Klaes v. Scholl*, 375 N.W.2d 671, 676 (Iowa 1985); *State v. Jacoby*, 260 N.W.2d 828, 837–39 (Iowa 1977). And yet, *Einfeldt* and *Dunson* would support it, without any of the qualifying/limiting language that would remind Iowa lawyers that such evidence must be offered to prove something other than "the victim did a bad thing, so he was a bad person, and so he probably did another bad thing that made it reasonable to kill him." *See Einfeldt*, 2018 WL 1980676, at *8–9; *State v. Dunson*, 433 N.W.2d 676, 680–81 (Iowa 1988). This Court should retain this case, resolve this conflict in its caselaw, and dispel those misconceptions that lead Iowa attorneys to offer plainly impermissible propensity evidence. *See* Iowa R. App. P. 6.1101(2)(b).

STATEMENT OF THE CASE

Nature of the Case

Antoine Williams was charged with first-degree murder, in violation of Iowa Code sections 707.1 and 707.2(1)(a), for shooting and killing Nate Fleming on June 30, 2017.

Williams now appeals, arguing: (1) the trial court erred when it overruled his motion alleging a violation of his right to trial by a jury selected from a fair cross-section of the community; (2) the trial court erred in denying his request to voir dire each potential juror separately on race-related issues; (3) the trial court erred in excluding evidence of Fleming's prior bad acts that were not known to Williams at the time; (4) the trial court erred in refusing Williams' request for a customized jury instruction on implicit bias; and (5) the trial court erred in ruling that Williams could not present a "stand your ground" defense because the shooting preceded the effective date of the relevant provisions.

Statement of Facts

Fleming was driving a red Chevrolet Equinox. He parked it in the Clarkview Apartments parking lot. Williams walked up to his car, shot Fleming at least four times, pulled Fleming out of the car and onto the ground, and then got into Fleming's car and drove away.

Shaun Biehl was inside a nearby apartment; his ex-girlfriend (Joycelyn Simmons) and their daughter lived there. *See* TrialTr.V3 p.6,ln.18–p.8,ln.7; TrialTr.V3 p.10,ln.19–p.11,ln.4. Biehl had seen Williams around the apartment complex, and they both worked at Packers Sanitation Services. Biehl had told Williams about a job opening in Waterloo. *See* TrialTr.V3 p.8,ln.8–p.9,ln.22; TrialTr.V3 p.38,ln.17–p.40,ln.12. Biehl had heard Fleming's name and seen him around, but never met him. *See* TrialTr.V3 p.9,ln.23–p.10,ln.18.

Between 6:00 and 8:00 p.m. on June 30, 2017, while Biehl was playing with his daughter in Simmons' apartment, Fleming came over "[a]bout three, four times" for "[a] couple of minutes" each time, to talk with Simmons. *See* TrialTr.V3 p.11,ln.11–p.13,ln.14. Biehl said Fleming did not appear upset or angry. *See* TrialTr.V3 p.13,ln.15–24.

Biehl put his daughter to bed at about 8:10 p.m., and Biehl and Simmons sat down in the living room to watch TV. Biehl got through one hour-long episode of *The Walking Dead*; Simmons went to bed before the episode was over. *See* TrialTr.V3 p.13,ln.25–p.17,ln.3. Biehl started another episode. Then, he heard two quick gunshots outside. *See* TrialTr.V3 p.15,ln.16–p.18,ln.11. Biehl ran over to the window (which was only about three feet away), pulled the blinds aside, and

saw "Williams was standing up with his arm extended into the truck, driver's side door." *See* TrialTr.V3 p.18,ln.12–p.19,ln.5. Biehl watched as Williams fired "a couple more times." Biehl could see muzzle flashes through the vehicle's windows. *See* TrialTr.V3 p.18,ln.12–p.20,ln.5. They came from Williams' right hand. *See* TrialTr.V3 p.23,ln.2–10. Biehl saw Williams use his left hand to grab Fleming, pull him out of the truck, and throw him on the ground. After Fleming hit the ground, he did not appear to be moving. *See* TrialTr.V3 p.24,ln.3–p.25,ln.2. Then, Williams got into the truck and drove away. By that point, Biehl was already calling 911. *See* TrialTr.V3 p.25,ln.3–10.

When Williams left, Biehl ran outside to try to help Fleming. *See* TrialTr.V3 p.26,ln.3–p.27,ln.18. Biehl saw him "gasping for air" and saw "bullet wounds in his chest area." *See* TrialTr.V3 p.27,ln.19–p.28,ln.6. A group of onlookers started to gather around Fleming. Then, Biehl saw that truck Williams had driven away was coming "right back towards where we were at." Biehl was afraid of Williams after watching him shoot Fleming, so he "told everybody to run." *See* TrialTr.V3 p.28,ln.12–p.29,ln.3. As they ran, Biehl saw Williams drive "right past [them] and towards the other end of the complex," and then Biehl lost sight of him. *See* TrialTr.V3 p.29,ln.4–10.

Simmons and Fleming were friends, and both were interested in dating each other. *See* TrialTr.V3 p.50,ln.7–p.51,ln.4. On the evening of June 30, 2017, while Biehl was at Simmons' apartment, Fleming came to her door "[t]wice," and they spoke for "three to five minutes" each time. *See* TrialTr.V3 p.51,ln.5–p.52,ln.5. Simmons said Fleming was "happy," not upset or angry. *See* TrialTr.V3 p.52,ln.6–p.53,ln.13.

Simmons remembered watching "[s]omething about the zombies" with Biehl, and then going to her bedroom to lay down and rest. *See* TrialTr.V3 p.54,ln.3–p.55,ln.13. She was "half asleep, half awoke"—but then, gunshots jolted her out of bed.

> I heard a few shots. And when I heard them, I got up, and I made my way to the living room. And before I got all the way out of my bedroom, that's when [Biehl] ran towards my bedroom. He said, "Someone just got shot, and I think it was Nate." So that's when I ran to the window, and we seen Mr. Williams standing over Nate's body.

See TrialTr.V3 p.55,ln.14–p.57,ln.14. Simmons saw Fleming laying on the ground, and Williams was standing over Fleming with "the gun pointed down at him." *See* TrialTr.V3 p.58,ln.1–p.59,ln.10. Simmons saw Williams get into the truck, start it, and drive away "really fast." *See* TrialTr.V3 p.59,ln.11–p.61,ln.10. Simmons ran outside. Fleming was conscious when Simmons arrived, but he was losing blood and he quickly lost consciousness. *See* TrialTr.V3 p.61,ln.11–p.62,ln.24.

While Simmons, Biehl, and others gathered around Fleming, "[t]he truck came back" at an "exceedingly fast speed"—Biehl warned everybody to run, and they all ran away. Simmons ran between two of the buildings in the apartment complex. From there, she watched as Williams drove around the apartment complex parking lot, and then accelerated again and drove away. *See* TrialTr.V3 p.64,ln.16–p.66,ln.3.

Simmons had seen Fleming and Williams together during the preceding week—they were "partying together," without any incident. At some point, Fleming had told Simmons that Williams was "very overprotective of [him]." *See* TrialTr.V3 p.74,ln.5–p.76,ln.21. Then, on another occasion, days before the murder, Simmons observed a dispute between Williams and Fleming where "Williams did show a lot of aggression to [Fleming]." *See* TrialTr.V3 p.76,ln.22–p.77,ln.25.

Christopher Eugene Geweke Vierkant was friends with Williams, was close with Williams' family, and had previously lived in the same apartment complex. *See* TrialTr.V3 p.243,ln.1–p.244,ln.4. On June 30, 2017, Vierkant lived in a nearby apartment complex. At about 8:30 or 9:00 p.m., Vierkant left his apartment with some of his friends and walked over to the complex where Williams and Simmons lived. *See* TrialTr.V3 p.244,ln.5–p.246,ln.22.

As they walked, Vierkant saw Williams standing between a dumpster and a tree; he was slowly walking towards a red truck that just parked nearby, with someone in the driver's seat. *See* TrialTr.V3 p.246,ln.23–p.251,ln.5. Vierkant said "hello" to Williams, but Williams did not respond—he appeared to be focused on the truck. *See* TrialTr.V3 p.247,ln.23–p.248,ln.15. Vierkant did not hear any shouting or arguing. *See* TrialTr.V3 p.249,ln.12–22. Vierkant said Williams kept approaching the red truck and was about four feet away from the red truck when Vierkant looked away and kept on walking. *See* TrialTr.V3 p.251,ln.6–p.252,ln.10. Vierkant did not hear anything behind him until "about 15 steps later," when he heard "two bangs"—at which point, Vierkant and his friends ran to their destination and ran inside for safety. *See* TrialTr.V3 p.252,ln.11–p.254,ln.21. Vierkant confirmed that, before the gunshots, he did not hear any loud noises, yelling, or arguing near the vehicle. *See* TrialTr.V3 p.254,ln.12–21.

Officers put out an alert for the red Chevrolet Equinox that Fleming drove and that Williams was driving. *See* TrialTr.V2 p.95,ln.20–p.96,ln.7. On July 3, someone reported an abandoned vehicle in Waterloo. It was the Equinox. *See* TrialTr.V3 p.143,ln.19–p.145,ln.6; TrialTr.V3 p.235,ln.3–p.236,ln.24.

Remarkably, the Equinox did not have bullet holes anywhere in its windows, doors, exterior, or interior. *See* TrialTr.V3 p.280,ln.18–p.285,ln.3; State's Ex. 58–61; ExApp. 40–43; TrialTr.V4 p.68,ln.7–23.

Fleming sustained six gunshot wounds; from their placement, it appeared Fleming could have been shot as few as four times. *See* TrialTr.V3 p.189,ln.12–p.193,ln.20. One of the gunshot wounds showed evidence of gunpowder stippling, which meant it was fired at Fleming from within 3 to 24 inches away. *See* TrialTr.V3 p.194,ln.23–p.196,ln.18. The positioning of the gunshot wounds and the upward trajectory of some bullets that passed through Fleming's body suggested the shooter stood to Fleming's left (outside the truck), pointed the gun at Fleming's chest while firing the first shots, and kept firing additional shots while Fleming "slumped over to the right." *See* TrialTr.V3 p.201,ln.21–p.206,ln.20; TrialTr.V3 p.210,ln.11–p.211,ln.19. Those multiple gunshot wounds were the cause of Fleming's death. *See* TrialTr.V3 p.213,ln.3–p.214,ln.3. Four bullets were recovered from Fleming's body. *See* TrialTr.V3 p.192,ln.7–15.

Investigating officers found two shell casings on the ground at the crime scene. *See* TrialTr.V2 p.72,ln.22–p.73,ln.11; TrialTr.V2 p.132,ln.9–p.133,ln.4; TrialTr.V3 p.274,ln.3–p.276,ln.7.

On July 5, Williams turned himself in to Chicago police. *See* TrialTr.V3 p.175,ln.5–21; TrialTr.V4 p.90,ln.1–21. DCI Special Agent Jon Turbett drove to Chicago to interview Williams on July 7. *See* TrialTr.V4 p.90,ln.22–p.91,ln.22. Williams appeared well-rested and did not appear to be under the influence of alcohol or drugs, and he agreed to speak with Agent Turbett. TrialTr.V4 p.91,ln.23–p.93,ln.14.

Williams said that, on June 30, he went to Tiffany Jones' apartment at about 9:00 p.m., and spent the night there. He said that he woke up the next morning and got a ride to Chicago with a friend. *See* TrialTr.V4 p.96,ln.20–p.98,ln.10. He claimed he was in Chicago on a planned trip to surprise his mother. *See* TrialTr.V4 p.94,ln.8–13.

When asked if he had anything to do with Fleming being shot, Williams said: "No, sir, that's crazy." *See* TrialTr.V4 p.98,ln.11–p.99,ln.6. Williams said he had no reason to be upset with Fleming and had never seen Fleming with a gun. *See* TrialTr.V4 p.99,ln.7–15.

After a while, Agent Turbett asked Williams if he had realized that law enforcement knew that he was involved in Fleming's death. Williams said he figured it out. *See* TrialTr.V4 p.99,ln.21–p.100,ln.19. Williams changed his story, and it became profoundly inculpatory.

Williams described approaching Fleming's car in the parking lot near those apartments, after Fleming had just parked. Williams said that Fleming said something to him, but did not specify what he said:

> [Williams] just said [Fleming] said something that triggered him, and he couldn't tell me anything more than that. He just said that he was triggered.

See TrialTr.V4 p.101,ln.3–p.102,ln.2. Williams told Agent Turbett where he was standing in relation to Fleming: "roughly 2 to 3 feet away from the open window of the car." *See* TrialTr.V4 p.102,ln.3–13. Williams confirmed "[h]e never saw [Fleming] with a gun that night." *See* TrialTr.V4 p.103,ln.4–8. Williams said he dragged Fleming out of the car, threw him on the ground, and drove away immediately. *See* TrialTr.V4 p.103,ln.9–15. He drove to a friend's house, then went to Jones' apartment to see his son and charge his phone before he skipped town. *See* TrialTr.V4 p.103,ln.16–p.104,ln.11. Then he drove to Waterloo in Fleming's car—and, as he drove down the highway, he threw the gun "as hard as he could out the window." *See* TrialTr.V4 p.104,ln.12–p.105,ln.9. Williams left Fleming's car in a public park and went to Dorinda Tonelli and Tristan Walker's house "to try and get a ride to Chicago." *See* TrialTr.V4 p.105,ln.10–23. After they agreed to give him a ride to Chicago, Williams abandoned the keys to

Fleming's car in the parking lot of a nearby Wal-Mart. *See* TrialTr.V4 p.105,ln.24–p.106,ln.8. Williams had found Fleming's cell phone in the car; he broke it and discarded the pieces because "he assumed that would buy him time." *See* TrialTr.V4 p.106,ln.9–p.107,ln.6. Williams had also grabbed two shell casings from inside the car and discarded them in a trash can in Waterloo. *See* TrialTr.V4 p.107, ln.7–p.108,ln.11. With some hesitation, Williams said he bought the gun from Edmond Brown for $100 and had kept it under the sink. *See* TrialTr.V4 p.108,ln.12–p.109,ln.22. He said he threw away the clothes he wore during the shooting because he knew they "would be evidence against [him]." *See* TrialTr.V4 p.109,ln.23–p.110,ln.17.

Williams told Agent Turbett that, earlier that night, Fleming approached a group of people in the parking lot and asked if they were involved with "the beating that he'd received earlier in the month." Williams said he was among that group, and said Fleming told them "You all better not be standing here when I get back." *See* TrialTr.V4 p.110,ln.18–p.111,ln.14. Then, Fleming drove away. Williams said he took that comment to mean Fleming owned a gun and would have it on him when he returned—so Williams went back to his apartment and retrieved his own gun. *See* TrialTr.V4 p.111,ln.12–p.112,ln.16.

Williams said he returned to the parking lot "about an hour later to find [Fleming]." *See* TrialTr.V4 p.112,ln.17–22.

> **THE STATE**: Did you ask him why he came back and walked up on [Fleming] an hour later?
>
> **AGENT TURBETT**: I did.
>
> **THE STATE**: What did he say?
>
> **AGENT TURBETT**: He said, "To see if he'd shoot me? I don't know" — or he said, "To see if he'd pull a gun on me. I don't know, to shoot him, I guess."

TrialTr.V4 p.112,ln.23–p.113,ln.4. Williams accepted responsibility for killing Fleming, apologized for lying about what happened at the beginning of the interview, and affirmed that his confession was the absolute truth. *See* TrialTr.V4 p.113,ln.5–p.114,ln.6. Williams also repeated that "he never saw [Fleming] with a gun even that night," and he never mentioned acting in self-defense or seeing Fleming reach for a gun. *See* TrialTr.V4 p.114,ln.7–16.

At trial, Williams said that right after Vierkant said "hello," Fleming drove into the parking lot "with the music blasting" and squealed to a stop. *See* TrialTr.V6 p.56,ln.16–p.59,ln.3. Williams said he asked Fleming if he was okay, and Fleming responded: "Man, you know what, don't even approach my motherfucking car." TrialTr.V6 p.59,ln.4–p.60,ln.8. Williams said they went back and forth, talking to each other—and then:

> **WILLIAMS**: . . . [Fleming] made a move. He was like, "You know what, fuck that," and he started reaching for what I thought was a gun. So I went in my back pocket. I had to cock the gun. I'm like this (indicating), you know, and then —
>
> **DEFENSE**: You covered your face?
>
> **WILLIAMS**: Yeah. With my head turned. And that's — that's when the shooting happened.

TrialTr.V6 p.62,ln.15–p.63,ln.17; *see also* TrialTr.V6 p.115,ln.3–25. Williams said he pulled Fleming out of the car because he thought Fleming might still reach for a gun and "because the gun I had wasn't firing anymore." *See* TrialTr.V6 p.64,ln.16–p.65,ln.12.

Williams said he was not honest with Agent Turbett because he "hadn't slept" and was lying to protect his friend Edmond Brown, who sold him the gun. *See* TrialTr.V6 p.74,ln.7–p.76,ln.17; TrialTr.V6 p.85,ln.16–p.92,ln.4. Williams could not explain away the inculpatory version of events he gave Agent Turbett after realizing that police knew he was involved in shooting Fleming. *See* TrialTr.V6 p.92,ln.17–p.103,ln.20. After extensive discussion, Williams claimed he was high on crack cocaine during the interview, after about 36 hours in jail. *See* TrialTr.V6 p.103,ln.21–p.104,ln.15. Williams also said he never got a chance to tell Agent Turbett that he was acting in self-defense during their 270 minute interview. *See* TrialTr.V6 p.107,ln.21–p.108,ln.19.

Edmond Brown considered Williams a close friend. *See* TrialTr.V4 p.19,ln.16–20; TrialTr.V4 p.173,ln.13–20. Brown had seen Williams with a handgun, sometime in late 2016 or early 2017. *See* TrialTr.V4 p.19,ln.21–p.21,ln.3. Brown insisted that he did not own a gun and did not give Williams a gun—and he was surprised Williams would say that he had. *See* TrialTr.V4 p.173,ln.13–p.174,ln.7.

Additional facts will be discussed when relevant.

ARGUMENT

I. Williams Cannot Prevail on Any Claim Under Duren.

Preservation of Error

Error was preserved when the trial court ruled on Williams' motion to challenge the jury panel. *See* Order (10/6/17); App. 46; *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)). Williams satisfies the first prong, but he cannot establish substantial underrepresentation or systematic exclusion.

A. African-Americans are a distinctive group.

Williams alleged that substantial underrepresentation of African-Americans on Floyd county jury pools/panels was caused by systematic exclusion. *See* Jury Panel Motion (10/2/17); App. 16. African-Americans are a distinctive group for *Duren* purposes. *See Peters v. Kiff*, 407 U.S. 493, 498 (1972); *cf. Barber v. Ponte*, 772 F.2d 982, 999 (1st Cir. 1985) (noting that "distinctive group" prong intends "to give heightened scrutiny to groups needing special protection, not to all groups generally," and rejecting *Duren* challenge that alleged underrepresentation and exclusion of jurors under 34 years old).

Williams purports to satisfy the first *Duren* prong because *he* is African-American. *See* Def's Br. at 36–37. That is not relevant to the *Duren* analysis—indeed, *Duren* involved a male defendant challenging underrepresentation and exclusion of women from jury pools/panels. *See Duren*, 439 U.S. at 360–64; *accord Peters*, 407 U.S. at 495–500 (holding "the existence of a constitutional violation does not depend on the circumstances of the person making the claim"). Calls to relax standards for proving underrepresentation or exclusion under *Duren* must recognize that such challenges are available to *all* defendants—even those who have historically benefitted from privileged status.

This is important to mention because *Plain* inadvertently perpetuated a misconception that "a defendant must show she has 'characteristics that are relevant to constituting a jury venire that is representative of the community.'" *See Plain*, 898 N.W.2d at 822 (quoting David M. Coriell, Note, *An (Un)fair Cross Section: How the Application of* Duren *Undermines the Jury*, 100 CORNELL L. REV. 463, 480 (2015)).[1] This explains *Plain*'s focus on using *Duren* as a tool for redressing or minimizing persistent race-based disparities on various measures of health, wealth, and success. *See id.* at 825–26 & n.10. But *Duren* is an ill-fitting and unwieldy tool for that worthy undertaking because *any* defendant may invoke *Duren*. This Court must ensure that procedures and standards for assessing *Duren* challenges remain suitable for application to *all* criminal prosecutions, not just those against defendants from historically disadvantaged minority groups. Indeed, applying *Duren* differently based on each defendant's race offends foundational constitutional principles of equal protection.

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[1] That misstatement relied on the same student note that produced *Plain*'s erroneous statement 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 Plain*, 898 N.W.2d at 824 (quoting Coriell, Note, *An (Un)fair Cross Section*, 100 CORNELL L. REV. at 481).

B. There was no substantial underrepresentation.

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

All assessment of substantial underrepresentation starts with determining the percentage of the jurisdiction's eligible jurors who belong to the distinctive group. *See Plain*, 898 N.W.2d at 822–23. The State has concerns about use of unmodified census statistics because "the characteristics of the general population differ from a pool of qualified jurors." *See id.* at 823 (*United States v. Hernandez-Estrada*, 749 F.3d 1154, 1163 (9th Cir. 2014)); *cf.* State's Resistance (10/4/17) at 3–6; App. 21–24 (arguing that raw census figure "did not account for the disproportionate youth of Iowa's African-American populations, so it would cause any observer to overestimate the amount of potential jurors they should expect to be African-American"); Order (10/6/17) at 2; App. 47. But using the 2.3% figure from the census produces similar results in this case, so the State will adopt 2.3% as the relevant population parameter.

Williams argues "only the members of the jury pool that actually appear and are available for service on the jury panel are appropriately counted." *See* Def's Br. at 39 n.1. This is important because Williams uses this as grounds to omit from his calculations one African-American potential juror who responded, self-identified as African-American, and was excused "because the individual was attending college away from home." Order (10/6/17) at 2; App. 47. Williams could exclude that juror from his calculations if he alleged exclusion arising from exercise of the court's discretionary authority to excuse jurors from service on "a finding of hardship, inconvenience, or public necessity." *See* Iowa Code § 607A.6; *Chidester*, 570 N.W.2d at 83–84; *cf. McGinnis v. Johnson*, 181 F.3d 686, 691 (5th Cir. 1999) (rejecting claim that "excusal of three African-American venirepersons violated the Equal Protection Clause" when "nothing in the record suggests that racial bias motivated the excusal"). But his argument on systemic exclusion, at trial and on appeal, blames underrepresentation on source lists that "exclude large segments of the population" from receiving jury summons. *See* Def's Br. at 43–45; Jury Panel Motion (10/2/17) at 2; App. 17. And every potential juror who was excused received a jury summons—there is no reason to omit them in assessing

the degree of African-American underrepresentation that results from the specific exclusion-causation theory Williams advances, especially in the absence of any allegation that hardship excusals are granted in patterns that contribute to underrepresentation or exclusion. Because the system for contacting and communicating with potential jurors is the target of Williams' challenge, it is appropriate to credit the system with securing responses from every eligible juror who *did* respond, hardship excusals notwithstanding. Thus, the State recommends the trial court's numbers, set out in its order. *See* Order (10/6/17) at 2–4; App. 47–49 (calculating that "two African-Americans were part of the original pool sample and self-identified as African-American," out of a total of "138 individuals who responded to their summons and who self-identified their ethnicity"). Ultimately, it should not matter which numbers are used; the State will analyze both sets.

Nine potential jurors who responded in those two pools declined to self-identify on race/ethnicity. *See* Order (10/6/17) at 2; App. 47. The State will not include them in calculations, and will discuss that record deficiency under systematic exclusion—but it must be noted that, if even *one* of those nine potential jurors was African-American, the degree of observed underrepresentation almost drops to zero.

Williams cannot prove substantial underrepresentation with that gap in the data surrounding the racial composition of his jury pool/panel. *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").

Here are figures for absolute disparity, comparative disparity, and standard deviation, as explained in *Plain*, 898 N.W.2d at 822–23:

TABLE 1	**Using trial court's numbers**	**Using Williams' numbers**
Observed representation	1.45% (2 jurors out of 138)	0.77% (1 jurors out of 130)
Absolute disparity (2.3% - observed)	0.85%	1.53%
Comparative disparity (absolute/2.3%)	37.0%	66.6%
Standard deviation √(sample)(2.3)(97.7)	1.761	1.709
Expected representation	3.17 jurors (2.3% of 138 jurors)	2.99 jurors (2.3% of 130 jurors)
Observed deviation from expected	1.17 jurors (expected - 2 observed)	1.99 jurors (expected - 1 observed)
Z-Score (Deviation/SD)	0.664	1.164

Williams calculates these statistics correctly using his numbers, but he calculates standard deviation without using it for Z-Score. *See* Def's Br. at 38–42. Standard deviation is not impacted by the level of representation observed—no matter how many potential jurors are African-American, the standard deviation for a panel of 130 people in Floyd County is always 1.709. Standard deviation is only useful in evaluating underrepresentation if used to compute Z-Score, which assesses the observed disparity against the background randomness inherent to random sampling and random selection of potential jurors. *See, e.g.*, Michael O. Finkelstein & Bruce Levin, STATISTICS FOR LAWYERS 105–06, 116–117 (3d ed. 2015) (noting Z-Score is nearly universal and "shows the rapidity with which deviant values become improbable"). "[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." *Castaneda v. Partida*, 430 U.S. 482, 496 n.17 (1977). This references the "empirical rule" describing normal distributions: results 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* STATISTICS FOR LAWYERS at 116.

Castaneda's use of the empirical rule for 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). This is the best approach. Numerical disparity can draw a bright-line, but only paradigms that account for random fluctuations and variance can help determine whether an observed disparity is truly *substantial*. *See Castaneda*, 430 U.S. at 496 n.17; *Jefferson v. Morgan*, 962 F.2d 1185, 1189 (6th Cir. 1992) ("[C]omparing straight racial percentages is of little value to this court."); *Alston v. Manson*, 791 F.2d 255, 257–58 (2d Cir. 1986) (noting *Castaneda*-type analysis "is ideally suited for shedding light on this issue because it reveals the possible role of chance and works well where a small sample is involved, as here"); *Moultrie v. Martin*, 690 F.2d 1078, 1082–83 (4th Cir. 1982) ("One of the principal reasons for using a standard deviation analysis and hypothesis testing is that it is axiomatic in statistical analysis that the precision and dependability of statistics is directly related to the size of the sample being evaluated.").

Cumulative binomial probability (CBP) helps to conceptualize *Duren*-related numbers by expressing them as the chance of drawing a random jury panel with observed levels of representation (or lower). Calculating CBP manually is arduous—but tools like WolframAlpha can automate those calculations based on a string of text.

TABLE 2	**Using trial court's numbers**	**Using Williams' numbers**
WolframAlpha input text	"2 successes out of 138 trials with p=.023"	"1 success out of 130 trials with p=.023"
CBP result	38.25% [2]	19.72% [3]

Using Williams' numbers, 19.72% of all randomly drawn panels of 130 potential jurors in Floyd County will exhibit similar or lower levels of African-American representation. For the court's numbers, 38.25% of random panels of 138 potential jurors in Floyd County will exhibit similar or worse representativeness. These results show that the observed underrepresentation cannot be labeled "substantial."

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[2] *See* WOLFRAMALPHA, "2 successes out of 138 trials with p=.023", http://www.wolframalpha.com/input/?i=2+successes+in+138+trials+with+p%3D.023 (result for "2 or less successes"). WolframAlpha also lets users click the "more statistics" button on CBP results pages to display standard deviation figures.

[3] *See* WOLFRAMALPHA, "1 success out of 130 trials with p=.023", http://www.wolframalpha.com/input/?i=1+success+in+130+trials+with+p%3D.023 (result for "1 or less successes").

Approximately 2.5% of all randomly drawn jury pools are underrepresentative enough to arouse concern under *Castaneda*. The State recommends a test that is twice as easy to satisfy: applying a "conventional 95% level" through a one-tailed significance test to flag substantially lower-than-expected representation by identifying results on the lowest 5% of the binomial distribution. When a jury pool is random, there is "a 5% chance that it will be less than the mean by 1.64 standard deviations or more." *See* STATISTICS FOR LAWYERS at 117; *see also id.* at 124–25 (noting "[a] one-tailed test is appropriate when the investigator is not interested in a difference in the reverse direction from that hypothesized," using cross-section challenges to illustrate). Similarly, "[w]hen the normal distribution is used to approximate the cumulative binomial distribution," all results with CBP less than 5% will exhibit "departures of 1.645 standard deviations or more from the expected numbers in the hypothesized direction." *See id.* at 124.

When Z-Score is at least 1.64, CBP is 5% or less (and vice-versa), and underrepresentation is substantial enough to implicate *Duren*. Here, neither Z-Score nor CBP surpass those thresholds, so the level of underrepresentation is not substantial. *See* Order (10/6/17) at 3–4; App. 48–49. Williams cannot sustain a prima facie case under *Duren*.

This illustrates the wisdom of a 3% absolute disparity threshold. Floyd County's standard jury pools are smaller than the composite "double pool" that was summoned for this case. *See* HearingTr. (9/8/17) p.4,ln.12–p.8,ln.22 (suggesting use of multiple jury panels because of pretrial news coverage, and noting that, in Floyd County, "[w]e only call in usually one panel of 75 people, so you're looking at maybe 60 showing up"); *accord* MotionEx.D; ExApp. 7. Whenever 75 people are summoned for service in Floyd County, where 2.3% of eligible jurors are African-American, that jury pool has a 17.4% chance of containing zero African-Americans.[4] Thus, no underrepresentation on jury pools/panels of reasonable size (especially for rural counties, which have fewer simultaneous jury trials and use smaller jury pools) can be "substantial" when the distinctive group is smaller than 3% of the county's population. Normal fluctuations will produce racially homogenous jury pools about once in every five pools/panels—but that cannot be substantial underrepresentation because the expected level of minority representation is not substantially larger than zero.

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4 *See* WOLFRAMALPHA, "0 successes out of 75 trials with p=.023", http://www.wolframalpha.com/input/?i=0+successes+in+75+trials+with+p%3D.023.

That absolute disparity threshold would be consistent with Iowa cases and other cases that assess underrepresentation by absolute disparity. *See State v. Huffaker*, 493 N.W.2d 832, 634 (Iowa 1992) ("A 2.85% absolute disparity is not a substantial deviation."); *Berghuis v. Smith*, 559 U.S. 314, 330 n.5 (collecting cases); *United States v. Orange*, 447 F.3d 792, 798 & n.7 (10th Cir. 2006) (collecting additional cases).

Whatever framework or statistical tool is applied, the trial court was correct: the underrepresentation observed on this jury panel was not substantial. *See* Order (10/6/17) at 4 ("[H]aving two African-Americans in the potential pool when there should be two to three African-Americans in the potential pool is not disproportionate."). Williams insists substantial underrepresentation was shown because "each jury pool back to January 2013 consisted of, at most, a single African-American." *See* Def's Br. at 43 (citing MotionEx.D; ExApp. 7). Even if that historical data showed persistent underrepresentation (and large amounts of responses omitting race make that untenable), Williams would need to show *his* constitutional rights were violated by establishing substantial underrepresentation on *his* jury pool/panel. He is clearly unable to do so. *See* Def's Br. at 39 (noting disparity is "unlikely to be sufficient" under *Duren*). Thus, his claim fails.

C. There was no evidence of systematic exclusion.

"[D]isproportionate exclusion of a distinctive group from the venire need not be intentional to be unconstitutional, but it must be systematic." *See Randolph v. California*, 380 F.3d 1133, 1141 (9th Cir. 2004). Exclusion must be "inherent in the particular jury-selection process utilized." *See Plain*, 898 N.W.2d at 824 (quoting *Duren*, 439 U.S. at 366). But Williams has not shown that African-Americans are systematically (or even disproportionately) excluded from race-neutral source lists used to generate jury pools—specifically voter registration, driver's licenses, and non-driver IDs. *See* Iowa Code § 607A.22(1).

Williams tabulated jury pool reports from 2013 through 2017, but 452 out of 1,404 jurors declined to mark their race/ethnicity. *See* MotionEx.C at 3; ExApp. 5. Only 32 of those 452 race-unknown jurors would need to be African-American to reach 2.3% representativeness throughout that period and erase the aggregate disparity entirely. And there is no way to know if African-American jurors were more likely, less likely, or equally likely to leave race/ethnicity blank, in comparison to other respondents. This aggregated data does not suffice to establish persistent underrepresentation. And even if it could, "ethnic 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)); *accord Rivas v. Thaler*, 432 Fed. App'x 395, 402–03 (5th Cir. 2011); *Hernandez-Estrada*, 749 F.3d at 1166; *People v. Burgener*, 62 P.3d 1, 20 (Cal. 2003); *People v. Smith*, 615 N.W.2d 1, 14 (Mich. 2000).

"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). Iowa caselaw recognizes "[t]he use of only the voter registration list and a motor vehicle operator's list" does not establish systematic exclusion. *See Huffaker*, 493 N.W.2d at 834; *see also Thongvanh v. State*, 494 N.W.2d 679, 683–84 (Iowa 1993). Other courts generally agree. *See 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).

Williams only theory of systematic exclusion is that source lists were inadequate and "exclude large segments of the population." *See* Def's Br. at 44–45. But he has not shown disproportionate exclusion of African-Americans from those lists, and he cannot establish that African-Americans in Floyd County are disproportionately likely to satisfy no condition that would trigger inclusion on the master list. Moreover, the committee recommendations cited by Williams stated "the master jury list" produced after merging all source lists "should encompass 85% of the total adult population." *See* RECOMMENDATIONS OF THE COMMITTEE ON JURY SELECTION (Mar. 2018), at 10. The data that Williams submitted shows that 34.8% of all Floyd County residents are not registered to vote, and 24.8% do not have a driver's license. *See* MotionEx.C at 3–4; ExApp. 5–6. But those numbers are fantastic, because 22.9% of Floyd County residents are under the age of 18 (and cannot register to vote); and assuming a flat age distribution, about 20% would be under the age of 16 (and could not get a driver's license). *See* U.S. CENSUS BUREAU, *QuickFacts: Floyd County, Iowa* (2017), https://www.census.gov/quickfacts/fact/table/floydcountyiowa/PST045217. Thus, more than 90% of adult residents should be included, surpassing the 85% benchmark by a comfortable margin.

Williams cannot show underrepresentation is "inherent in the particular jury-selection process utilized." *State v. Fetters*, 562 N.W.2d 770, 777 (Iowa Ct. App. 1997) (quoting *Duren*, 439 U.S. at 366). His only causation theory does not allege a disproportionate exclusion of African-American residents, relative to other residents. Even though "there may be better ways to select potential jurors, this does not mean the current method systematically excludes African-American jurors." *See* Order (10/6/17) at 5; App. 50; *accord State v. Williams*, 525 N.W.2d 538, 543 (Minn. 1994). Thus, Williams cannot establish any constitutional imfirmity under *Duren*.

II. The Court Did Not Abuse Its Discretion in Choosing Normal Voir Dire over Individualized Voir Dire on Race-Related Issues.

Preservation of Error

Williams requested individualized voir dire on racial issues for the first 34 potential jurors on the panel. *See* Motion for Individualized Voir Dire (10/8/17); App. 52; TrialTr.V1 p.206,ln.12–p.208,ln.4. The ruling that denied his request preserved error for this argument.

Standard of Review

Challenges about voir dire are reviewed for abuse of discretion. *See State v. Martin*, 877 N.W.2d 859, 865 (Iowa 2016).

Merits

The trial court has wide discretion over the voir dire process, and Iowa courts have generally rejected challenges alleging that reasonable limitations on voir dire unfairly prevented defense counsel from detecting and exposing racial prejudices. *See State v. Windsor*, 316 N.W.2d 684, 686 (Iowa 1982) (rejecting challenge to handling of voir dire on racial prejudice that asserted a right to "more specific and detailed interrogation" on the topic, noting "the style and sufficiency of the interrogation" was committed to the trial court's discretion in exercising control over trial process); *see also State v. Oshinbanjo*, 361 N.W.2d 318, 321 (Iowa Ct. App. 1984) ("In view of the nature of the case and the questioning that was permitted, we hold that it was not an abuse of discretion for the trial court to deny defendant's request to individually question prospective jurors out of the presence of the other jurors."). Williams argues that "circumstances of his case" and "scholarship that has developed" on racial bias since *Windsor* establish an abuse of discretion. *See* Def's Br. at 49–52. But this case is nowhere close to the racially incendiary facts of *Windsor*, which involved a black defendant accused of raping a white woman. *See Windsor*, 361 N.W.2d at 686 (noting "the difference in race between

the defendant and victim and the nature of the alleged offense"). Here, there are no inflammatory elements of cross-racial victimization. *See Rosales-Lopez v. United States*, 451 U.S. 182, 193 (1981) (plurality op.) (finding absence of special circumstances rendering limits on voir dire inappropriate when case did not involve "a violent criminal act with a victim of a different racial or ethnic group"). This is not a special case.

As for scholarship, Williams makes contradictory claims about implicit bias. Williams argues that individual voir dire was necessary because jurors would "likely be embarrassed to admit biases in front of a large group of people." *See* Def's Br. at 51. But he also argues that implicit bias is "reflexive and instinctual" and that it operates beneath conscious awareness—so jurors could never *admit* implicit bias, even in individual voir dire. *See* Def's Br. at 50–51; *see also* Def's Br. at 73. And Williams offers no reason to believe jurors concealed overt bias during normal voir dire, or any reason to believe those biased jurors would reveal their hidden prejudices in individualized voir dire.

The problem with Williams' claim is that normal voir dire can effectively explore issues of racial bias, and it seemed effective here. Indeed, Williams' counsel's discussion of racial issues during normal voir dire elicited thoughtful responses from the potential jurors and

culminated in an apparent consensus that any racialized influence on deliberation would not be tolerated and would be reported to the court. *See* TrialTr.V1 p.214,ln.8–p.221,ln.13. Research suggests that asking potential jurors about racial prejudice during voir dire is effective, even if the jury is racially homogenous and no jurors are disqualified.

> Compared with participants in the race-neutral condition, participants who answered race-relevant jury selection questions were less likely to vote guilty before deliberating and gave lower estimates of the likelihood of the Black defendant's guilt. From a practical standpoint, these findings suggest that even if voir dire is limited in its ability to identify biased individuals, it may influence prospective jurors by reminding them of the importance of rendering judgments free from prejudice.

Samuel R. Sommers, *On Racial Diversity and Group Decision Making*, 90 J. PERSONALITY & SOC. PSYCH. 597, 602–06 (2006);[5] *accord* Jennifer S. Hunt, *Race, Ethnicity, and Culture in Jury Decision Making*, 11 ANN. REV. L. & SOC. SCI. 269, 273–74 (2015)

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[5] This study also observed that "the influence of racial diversity was not limited to processes of information exchange, as Whites' *predeliberation* judgments also varied by group composition." *See id.* at 606–10 (emphasis added). This supports the hypothesis that achieving some racial diversity *on the panel* can have the same effect as that level of diversity on the petit jury. *See* Shamena Anwar et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1046 (2012) ("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.").

(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"); 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"). There is nothing that suggests juror responses during normal voir dire were insincere, and no basis for Williams to claim individualized voir dire was needed.

Finally, Williams criticizes the trial court for considering the amount of time required to conduct individualized voir dire for all 34 potential jurors. *See* Def's Br. at 52. But this was a legitimate concern, especially when that would push jury selection into the next morning and the trial court was specifically concerned that multi-day voir dire would risk losing potential jurors from exposure to pretrial publicity or from failure to appear. *See* TrialTr.V1 p.207,ln.13–25. Moreover, the court still would have considered individualized voir dire, if there were "more cause shown for doing that." *See* TrialTr.V1 p.208,ln.1–4. This exercise of discretionary authority in managing the trial process

was reasonable, especially considering there was no basis for believing that normal voir dire would be inadequate for raising and discussing racial bias and exposing overt racial prejudice. *See* Sent.Tr. p.4,ln.2–9 ("During jury selection nothing appeared to suggest that the attorneys were unable to determine potential biases on the part of the jury.").

Even if Williams established an abuse of discretion, he would need to show prejudice from the potential for unexposed racial bias among jurors to affect the result. *See Rosario-Lopez*, 451 U.S. at 193 (rejecting challenge where there was not "a reasonable possibility that the jury's determination would be influenced by racial prejudice"). Williams argues that he "presented a credible claim of self-defense." *See* Def's Br. at 53–54. But it was irreparably undermined by his own statements to Agent Turbett—he explained that he shot Fleming because he was "triggered" by something Fleming said, not because he was threatened. *See* TrialTr.V4 p.101,ln.3–p.102,ln.2. Moreover, Williams repeatedly stated that "[h]e never saw [Fleming] with a gun that night." *See* TrialTr.V4 p.103,ln.4–8; TrialTr.V4 p.114,ln.7–16.

Williams told Agent Turbett that he grabbed two shell casings from *inside the car* and discarded them in Waterloo. *See* TrialTr.V4 p.107,ln.7–p.108,ln.11. This corroborates eyewitness testimony from

Biehl, who saw "muzzle flashes" from *inside* Fleming's vehicle, at the end of Williams' right arm, when the second round of shots was fired. *See* TrialTr.V3 p.18,ln.12–p.20,ln.5; TrialTr.V3 p.23,ln.2–10. Officers found two shell casings on the ground at the crime scene, and Biehl heard a short pause between two rounds of shots—which suggests Williams began firing as he closed distance, with his arm extended towards Fleming *outside* the car, then fired additional shots with his arm extended *inside* the car, as Fleming slumped over to the right. *See* TrialTr.V3 p.20,ln.23–p.21,ln.6; *see also* TrialTr.V3 p.210,ln.11–p.211,ln.19 (discussing trajectories of bullet wounds through Fleming, both downwards and upwards); *cf.* TrialTr.V6 p.169,ln.11–p.171,ln.12 (noting evidence from autopsy and from Fleming's blood in the truck "supports a finding that Mr. Fleming's body was slumped to the right when he was shot"). This shows Williams fired gratuitous shots that had no conceivable purpose other than to execute Fleming *after* he was already disabled, which disproves the justification defense:

> [A]n ingenious argument is advanced by defendant's counsel in support of the claim that Hoover was in the act of striking the defendant when [Hoover] was shot. . . . But, however plausible the theory may be, it cannot overcome the well-established physical fact that the shot was fired at the back of the deceased, and some distance from him, and at a time when he was making no resistance . . . .

State v. Weston, 67 N.W. 84, 85 (Iowa 1896). And Williams closed in and extended his arm into the vehicle to fire at point-blank range—which explains the stippling, and negates any claim that Williams fired wildly in self-defense while unable to see what Fleming was doing. *See* TrialTr.V3 p.195,ln.7–p.196,ln.18; TrialTr.V3 p.205,ln.22–p.206,ln.20.

Williams told Agent Turbett that he returned to the parking lot to find Fleming, to initiate a confrontation, and "to shoot him." *See* TrialTr.V4 p.112,ln.23–p.113,ln.4. Williams had no plausible defense in light of his admissions to Agent Turbett, which aligned with both the physical evidence and the eyewitness testimony. Thus, Williams cannot show prejudice and cannot escape a finding of harmless error.

III. The Trial Court Was Correct to Exclude Evidence of Fleming's Prior Bad Acts That Were Unknown to Williams During the Shooting.

Preservation of Error

This argument was raised and ruled upon. *See* Motion in Limine (10/3/17) at 5–9; App. 41; HearingTr. (10/5/17) p.30,ln.11–p.35,ln.11; TrialTr.V4 p.134,ln.15–p.138,ln.12. TrialTr.V6 p.125,ln.6–p.135,ln.20.

Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. *See State v. Huston*, 825 N.W.2d 531, 536 (Iowa 2013).

Merits

Consider an argument that the State cannot and did not make: Williams was a criminal, so he likely shot Fleming without justification. Williams already had "felony or theft convictions" in multiple states. *See* Motion in Limine (10/2/17); App. 13; *accord* Criminal History (7/19/17). Those specific instances of criminal conduct establish his propensity for criminality and support the inference that he acted in accordance with that character trait by killing Fleming in cold blood. Because Williams offered character evidence to establish that he had peaceful character traits, Rule 5.404(a)(2)(A)(i) allowed the State to offer evidence to rebut that showing—the State could exhaustively chronicle every nefarious act Williams ever committed in rebuttal and could vigorously urge the jury to conclude Williams had a propensity to commit crimes and infer that he probably committed this crime too.

That hypothetical argument is impermissible for three reasons. First, although Rule 5.404(a)(2)(A)(i) allows proof of pertinent traits to establish and argue inferences that Williams acted in accordance with those traits, Rule 5.404(b) still prohibits use of "[e]vidence of a crime, wrong, or other act" to advance that theory. *See* Iowa R. Evid. 5.404(b). Second, Rule 5.405 only allows proof of character traits by

specific instances of conduct in two situations: on cross-examination of a character witness, or when the trait "is an essential element of a charge, claim, or defense." *See* Iowa R. Evid. 5.405. Third, and perhaps most importantly, the rationale behind both of those rules that render such evidence inadmissible (before any balancing under Rule 5.403) is that even when Williams puts his character at issue and argues that he was a peaceful person who would be unlikely to initiate this fight, specific instances of his conduct are still only marginally relevant to most disputes over pertinent character traits, for three sub-reasons:

> (1) A single act may have been exceptional, unusual, and not characteristic and thus a specific act does not necessarily establish one's general character; (2) although the [defense] is bound to foresee that the general character of the [defendant] may be put in issue, it cannot anticipate and prepare to rebut each and every specific act of violence; and (3) permitting proof of specific acts would multiply the issues, prolong the trial and confuse the jury.

See State v. Jacoby, 260 N.W.2d 828, 838 (Iowa 1977) (quoting *Henderson v. State*, 218 S.E.2d 612, 615 (Ga. 1975)).

Williams appreciates those rules, as applied to him. *See* Motion in Limine (10/2/17) at 1; App. 13. But he argues that he should still be allowed to offer analogous "specific instances of conduct" evidence to prove *Fleming's* character and raise identical propensity inferences about *Fleming's* probable conduct. *See* Def's Br. at 58–63. It should be

immediately apparent that Williams is playing with fire. The State is not enthused about making the hypothetical argument it described—but evidentiary rules must apply even-handedly, and prosecutors will present all admissible evidence tending to support essential allegations (especially in first-degree murder prosecutions, where justice demands vigorous prosecution to the fullest extent the law will permit). Absent a constitutionally-based or rule-based distinction, Williams' approach would enable the State to argue and prove guilt by propensity. If that is unacceptable, then Williams' claim must be unacceptable as well. Even the State is entitled to even-handed application of "evidentiary rules that are designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *See State v. Countryman*, 573 N.W.2d 265, 266 (Iowa 1998) (quoting *State v. Losee*, 354 N.W.2d 239, 242 (Iowa 1984)). The State prefers that such arguments remain off-limits to both sides (and suspects that preference is widely shared).

Fortunately, Rules 5.404 and 5.405 prohibit both Williams and the State from using evidence of specific instances of conduct to prove character traits to prove later conduct in accordance with those traits. The only exception is when character is an essential element that must be proven—like in a defamation claim or entrapment defense, where

failure to prove the relevant character trait would foreclose success on the claim, charge, or defense at issue. *See* Iowa R. Evid. 5.405(b); *State v. Hebeler*, No. 00–0377, 2001 WL 736025, at *8 (Iowa Ct. App. June 13, 2001) (quoting *United States v. Keiser*, 57 F.3d 847, 856 (9th Cir. 1995)) ("The relevant question should be: *would proof, or failure of proof, of the character trait by itself actually satisfy an element of the charge, claim, or defense?* If not, then character is not essential and evidence should be limited to opinion or reputation.").

Williams relies on *State v. Dunson*, which skipped that analysis. *See* Def's Br. at 61–62. *Dunson* disregarded the "essential element" language in Rule 5.405(b) and relied on *Shoemaker*, which applied California evidence rules (which expressly *allow* such evidence). *See State v. Dunson*, 433 N.W.2d 676, 680–81 (Iowa 1988); *see also Jacoby*, 260 N.W.2d at 838 (noting the "minority rule permitting evidence of specific acts unknown to the defendant, to show the victim was the aggressor" took hold in California "following a 1967 change in its Evidence Code"); *State v. Fish*, 213 P.3d 258, 268–69 (Ariz. Ct. App. 2009) (distinguishing California because its rules "expressly allow specific act evidence to show the character of the victim of a crime and to prove action in conformity with that character"). That

failure was made obvious when *Dunson* concluded "the evidence in question was material to several elements of [Dunson's] defense"—but Dunson's relevance theories leveraged the victim's character trait as circumstantial evidence to prove some *other* fact that mattered to the murder charge or justification defense. *See Dunson*, 433 N.W.2d at 681. Because conclusive proof of that trait would not indisputably resolve any part of a charge/defense, it was not an "essential element" under Rule 5.405(b) and could not be proven through evidence of specific instances of conduct. *See, e.g.*, *Klaes v. Scholl*, 375 N.W.2d 671, 676 (Iowa 1985) ("[O]nly when character or a trait of character is an operative fact determining the parties' rights and liabilities are specific instances of conduct a proper method of proving character.").

Dunson's mistake has been perpetuated by recent Iowa cases where Rule 5.405(b) was not raised or argued. *See State v. Shearon*, 449 N.W.2d 86, 87 & n.1 (Iowa Ct. App. 1989) (noting Rule 5.405(b) was not raised below or on appeal, and assuming its applicability); *State v. Webster*, 865 N.W.2d 223, 243 (Iowa 2015) (quoting from *Shearon*, 449 N.W.2d at 88 but omitting caveat about Rule 5.405(b) and failing to mention "essential element"). *Webster* was silent on the scope of Rule 5.405(b) as an exception to Rule 5.404(b).

Williams quotes *Einfeldt*, which states: "[I]f the accused asserts he or she acted in self-defense, specific instances of the victim's conduct may be used to demonstrate his or her violent or turbulent character." *See* Def's Br. at 63 (quoting *Einfeldt*, 2018 WL 1980676, at *8). But *Einfeldt* does not cite Rule 5.405, which governs acceptable *methods* of proving character and expressly limits proof of character traits by specific instances of conduct to "essential element" situations. *See Einfeldt*, 2018 WL 1980676, at *8; Iowa R. Evid. 5.405. *Einfeldt* cited two Iowa cases instead. First, it cited *Webster*, which (as discussed) did not analyze a challenge to the method of proving a character trait under Rule 5.405. *See Einfeldt*, 2018 WL 1980676, at *8; *Webster*, 865 N.W.2d at 243. Then, it cited *Jacoby*—but *Jacoby* painstakingly explains the distinctions and limitations that the State has described, that Williams challenges, and that *Einfeldt* ignored. *See Jacoby*, 260 N.W.2d at 836–39. *Einfeldt* may not have needed to discuss the issue, because it upheld exclusion under Rule 5.403—but this Court should not let this confusion persist for another term, and it should untangle this snarl by overruling *Dunson* and clarifying *Einfeldt* and *Webster*.

Doing so would align Iowa with the vast majority of other courts that apply the federal rules of evidence or similar state rules. *See, e.g.*,

United States v. Gulley, 526 F.3d 809, 817–19 (5th Cir. 2008); *United States v. Gregg*, 451 F.3d 930, 933–35 (8th Cir. 2006); *United States v. Keiser*, 57 F.3d 847, 856 (9th Cir. 1995); *Perrin v. Anderson*, 784 F.2d 1040, 1044–45 (10th Cir. 1986); *Allen v. State*, 945 P.2d 1233, 1239–24 (Ala. Ct. App. 1997); *Fish*, 213 P.3d at 268–69; *McClellan v. State*, 570 S.W.2d 278, 280 (Ark. 1978); *Tice v. State*, 624 A.2d 399, 401–02 (Del. 1993); *Brooks v. State*, 683 N.E.2d 574, 576–77 (Ind. 1997); *City of Red Lodge v. Nelson*, 989 P.2d 300, 303 (Mont. 1999); *State v. Newell*, 679 A.2d 1142, 1144–45 (N.H. 1996); *State v. Jenewicz*, 940 A.2d 269, 281 (N.J. 2008); *State v. Kelly*, 685 P.2d 564, 570–71 (Wash. 1984); *State v. Woodson*, 382 S.E.2d 519, 524 n.5 (W.Va. 1989).

Iowa's leading commentator on evidence law agrees.

> [A] claim of self-defense does not involve proof of character or a trait of character *as an essential element of the defense*. Self-defense can be proven in many instances without introduction of any character evidence. Indeed, a victim can possess a peaceful character and still be the aggressor in a confrontation. Likewise, a victim can possess a violent character and not be the aggressor in a particular deadly encounter.
>
> [. . .]
>
> [U]nless a defendant claims to have known about the victim's violent conduct (and therefore acted reasonably in using defensive force), a defendant seeking to admit evidence of a victim's character to support self-defense should only be permitted to use reputation or opinion evidence, not specific instances of the victim's conduct.

Laurie Kratky Doré, 7 IA. PRAC. SERIES: EVIDENCE §§ 5.404:3(A)(1) & 5.405:2. This Court should seize this opportunity to address the issue.

Williams could still offer evidence of any facts he knew about Fleming at the time of the shooting to establish the reasonableness of his belief that deadly force was necessary. *See Jacoby*, 260 N.W.2d at 838–39 (quoting 40 Am.Jur.2d, *Homicide*, § 306 at 575 (1968)); TrialTr.V6 p.22,ln.4–21. But the plain text of Rules 5.404 and 5.405 prohibited him from using specific instances of Fleming's conduct to prove Fleming's character traits for propensity-related inferences, because character is not an essential element of a self-defense claim. *See Scholl*, 375 N.W.2d at 676; *Jacoby*, 260 N.W.2d at 837–38. Thus, the trial court's ruling was correct and should be affirmed.

Alternatively, exclusion can be upheld on Rule 5.403 balancing. Williams argues there would be no "mini-trials" because the records were simple lists of prior convictions. *See* Def's Br. at 64–66. But the parties disputed the meaning of those records, so they must not have been self-explanatory. *See* TrialTr.V6 p.129,ln.19–p.131,ln.20; *see also* TrialTr.V6 p.134,ln.11–18 ("I can barely understand this."). There is almost zero probative value—convictions for unspecified assault are not relevant to show any propensity to threaten deadly force. *See*

State v. Hutchins, No. 15–0544, 2016 WL 4051601, at *7 (Iowa Ct. App. July 27, 2016) (affirming exclusion of evidence of other assault under Rule 5.403 because it was "at best only marginally relevant," and "the potential for confusion was high, given the reference to a separate criminal matter"); *cf. United States v. White Horse*, 316 F.3d 769, 776 (8th Cir. 2003) ("[T]he trial court retains wide discretion to exclude evidence that would result in a 'collateral mini-trial' because both sides characterize the event at issue differently."). And the risk for jury confusion was high, considering that Williams had testified extensively about his own prior knowledge of Fleming's conduct that *would* potentially impact the reasonableness of Williams' belief that deadly force was reasonable and necessary. *See* TrialTr.V6 p.19,ln.17–p.26,ln.25; TrialTr.V6 p.54,ln.24–p.55,ln.5. Delving into evidence of Fleming's prior conduct that was to unknown to Williams would risk inaccurate imputation of that knowledge to Williams and could lead to confusion among jurors as to which incidents of Fleming's conduct were known to Williams, and which were not. Thus, the court did not abuse its discretion in identifying "a 403 problem" with this evidence. *See* TrialTr.V6 p.135,ln.14–20 (noting "evidence in this case regarding what the defendant knew and believed" was "what's relevant").

Williams asserts prejudice from that evidentiary ruling because "given [his] interest in his own criminal trial for first degree murder, his testimony will certainly be treated with skepticism by a jury." *See* Def's Br. at 65. Skepticism of Williams' testimony was inevitable, given its fantastical nature and its stark departure from the account Williams gave to Agent Turbett. Moreover, the excluded evidence would not directly corroborate anything Williams said that he knew about Fleming—and there was no shortage of evidence from other witnesses about Fleming's character that *did* corroborate the claims Williams was making about Fleming's general character traits. *See* TrialTr.V4 p.160,ln.9–22; TrialTr.V5 p.43,ln.24–p.49,ln.13; TrialTr.V5 p.54,ln.15–p.56,ln.9. Williams cannot show a need for evidence of Fleming's prior acts; it would be cumulative with other evidence of Fleming's character that was already admitted. Finally, this evidence would not change what Biehl, Simmons, and Vierkant saw, or the medical examiner's testimony about the trajectories of the bullets, or the complete absence of facts supporting any self-defense narrative in the account Williams gave Agent Turbett. Therefore, Williams cannot prevail because "overwhelming evidence of guilt" means that any error was harmless. *See State v. Parker*, 747 N.W.2d 196, 210 (Iowa 2008).

IV. The Court Did Not Abuse Its Discretion in Declining to Give a Customized Implicit Bias Instruction.

Preservation of Error

Williams requested a jury instruction on implicit bias. The court rejected his request because a standard instruction already discussed "setting aside stereotypes, biases, and prejudice" in the same manner. *See* TrialTr.V6 p.138,ln.24–p.139,ln.11. That ruling preserved error.

However, the requested jury instruction is not in the record. Williams reproduces the AIJ Proposed Instruction. *See* Def's Br. at 69–70 (quoting ABA, *Achieving an Impartial Jury Toolbox* at 17–20, https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.authcheckdam.pdf). But his motion for new trial stated that Williams requested "a jury instruction regarding race switching." *See* Motion for New Trial (12/3/17) at 2; App. 63. That appears to refer to a different instruction in the AIJ report. *See* ABA, *AIJ Toolbox* at 21–22. It is impossible to know what instruction Williams requested from this record, so it is impossible to assess his present claim that rejecting his request was an abuse of discretion.

Standard of Review

When a requested jury instruction "is not required or prohibited by law, we review for abuse of discretion." *Plain*, 898 N.W.2d at 816.

Merits

A trial court must give a requested instruction that correctly states applicable law "when the concept is not otherwise embodied in other instructions." *See State v. Marin*, 788 N.W.2d 833, 837–38 (Iowa 2010) (quoting *Summy v. City of Des Moines*, 708 N.W.2d 333, 340 (Iowa 2006)). The concepts embodied in a typical implicit bias instruction were present in Jury Instruction 5, which cautioned jurors to "avoid decisions based on generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases." *See* Jury Instr. 5; App. 54. Williams argues this is "entirely different" because implicit bias refers to "bias that is subconscious and unintentional," and this instruction describes something conceptually different. *See* Def's Br. at 72–73. But the essential concept is the same (especially in the instruction's admonition not to rely on "gut feelings"), and so is the remedy: both Jury Instruction 5 and the AIJ Proposed Instruction ask jurors to "evaluate the evidence carefully" and focus "solely on the evidence." *See* Jury Instr. 5; App. 54; ABA, *AIJ Toolbox* at 17–20 & n.73 (noting that "reducing cognitive loads and taking the time to be reflective are helpful for de-biasing"). Williams cannot obtain reversal because implicit bias was effectively addressed in the instructions submitted.

See Plain 898 N.W.2d at 817 (encouraging district courts to address implicit bias but refusing to "mandate a singular method of doing so").

Even if no other instruction conveyed the same idea, Williams could not prevail because an implicit bias instruction "does not concern a material issue because it is not outcome determinative; therefore, it is not required." *See Plain*, 898 N.W.2d at 816. Here, unlike in *Plain*, the trial court did not mistakenly believe that it had no authority to give a customized implicit bias instruction—it merely stated the fact that this particular instruction had "not been reviewed by the Iowa Jury Instruction Committee or by any of the Iowa courts" before rejecting it as duplicative. *See* TrialTr.V6 p.138,ln.24–p.139,ln.11. This was not "virtually identical" to *Plain*—the trial court understood it had discretionary authority to submit the instruction, if it chose to. *See* Def's Br. at 71–72. There was no abuse of discretion here.

Finally, instructional error "does not warrant reversal unless it results in prejudice to the complaining party." *See Plain*, 898 N.W.2d at 817 (quoting *State v. Hoyman*, 863 N.W.2d 1, 7 (Iowa 2015)). Williams argues that "[u]nlike *Plain*, this case does not involve strong evidence of guilt." *See* Def's Br. at 74–75. But, unlike *Plain*, Williams confessed to shooting Fleming without any fear of imminent harm. *See*

TrialTr.V4 p.101,ln.3–p.102,ln.16; TrialTr.V4 p.110,ln.18–p.114,ln.16. And the position of blood in the truck matched the medical examiner's inference from the bullets' trajectories: that Williams initially fired at Fleming while Fleming was sitting up (with a downward trajectory), and then fired from close range as Fleming slumped over to the right (with an upward trajectory through Fleming's body). *See* TrialTr.V3 p.18,ln.12–p.23,ln.10; TrialTr.V3 p.195,ln.7–p.196,ln.18; TrialTr.V3 p.210,ln.11–p.211,ln.19; TrialTr.V4 p.60,ln.5–p.61,ln.9 (discussing Fleming's bloodstains found on center console and passenger side); State's Ex. 88–92; ExApp. 44–48; *cf.* TrialTr.V6 p.169,ln.11–p.171,ln.12. This forecloses any reasonable belief of imminent danger, particularly for the shots fired from close range, while Fleming was slumped over.

Williams testified that, when he fired, he covered his face and turned his head away. *See* TrialTr.V6 p.62,ln.15–p.63,ln.17; *see also* TrialTr.V6 p.115,ln.3–25. But Williams fired at least four shots, and every single bullet hit Fleming and lodged in his body—investigators found no bullet holes *anywhere* in the vehicle. TrialTr.V3 p.280,ln.18–p.285,ln.3; State's Ex. 58–61; ExApp. 40–43; TrialTr.V4 p.68,ln.7–23. When Williams' arm was outside the truck (and ejected shell casings onto the ground), he successfully fired through the aperture of the

driver's side window and hit Fleming; then, with his arm extended into the vehicle through the window, he shot Fleming twice more. This remarkable accuracy illustrates that Williams' testimony about firing wildly with his face covered and turned away was abjectly false, and the jury could infer that Williams was misrepresenting the facts because the truth would not exonerate him. *See 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."); *see also Jones v. State*, No. W2014-02516-CCA-R3-PC, 2015 WL 9485919, at *9 (Tenn. Ct. Crim. App. Dec. 29, 2015) (foreclosing any claim of *Strickland* prejudice when the defendant "shot the victim three times with exceptional accuracy, once in the head and twice in the chest, although he claimed he was not aiming," and provided a pre-trial confession "that made no reference to 'self-defense.'").

The evidence against Williams was truly overwhelming, with "testimony and corroborative physical evidence and photographs" that provided "strong evidence of guilt," supplemented by Williams' full confession to Agent Turbett. *See Plain*, 898 N.W.2d at 815–17. Therefore, even if rejecting Williams' proposed instruction was an abuse of discretion, "the error was not prejudicial." *See id.* at 817.

V. The Trial Court Did Not Err in Prohibiting Williams from Invoking "Stand Your Ground" Amendments to Advance His Justification Defense for a Shooting That Preceded the Effective Date of That Enactment.

Preservation of Error

At trial, Williams argued the relevant date for determining whether the legislation was in effect was the date he was charged, not the date of the crime. *See* TrialTr.V4 p.116,ln.6–p.119,ln.22 (Defense: "I agree that the law was not retrospective; but the fact is, my — our client wasn't charged until the morning of July 1st, when the law was in effect, and so he should be able to use that — that part of the defense in his case in chief."); Motion for New Trial (12/3/17) at 2; App. 63 ("This law was approved by the legislature and the Defendant should have received the full effect of this law as he was charged the day it took effect."). Now, Williams raises a new claim: that relevant amendments should apply retrospectively. *See* Def's Br. at 77–81. This is not the same argument raised and ruled upon below. Error was not preserved for this specific challenge.

Standard of Review

This is an issue of statutory interpretation. Review is for errors at law. *See State v. Coleman*, 907 N.W.2d 124, 134 (Iowa 2018).

Merits

Williams argues he was entitled to present a defense based on 2017 amendments to the Iowa Code that changed the law on reasonable force. *See* Def's Br. at 77–81. Williams' argument is that section 4.13(2)—the "ameliorative amendment clause"—should apply because the relevant 2017 amendments "reduce[d] the penalty" for specific acts. His argument fails because section 4.13(2) applies to sentencing and punishment, and does not apply when the legislature redefines the elements of a crime or a defense.

Section 4.13(2) specifically applies when the legislature reduces a "penalty, forfeiture, or punishment." *See* Iowa Code § 4.13(2). But in section 4.13(1)(c), the legislature stated that "reenactment, revision, amendment, or repeal of a statute does not affect . . . [a]ny violation of the statute *or* penalty, forfeiture, or punishment incurred in respect to the statute." *See* Iowa Code § 4.13(1)(c) (emphasis added). Note the disjunctive phrasing: a "violation of the statute" must mean something other than a "penalty, forfeiture, or punishment," to avoid surplusage. *See Thomas v. Gavin*, 838 N.W.2d 518, 524 (Iowa 2013) ("Normally we do not interpret statutes so they contain surplusage."); *see also* Iowa Code § 4.4(2) ("The entire statute is intended to be effective.").

Moreover, the legislature did not include any language referring to a "violation of the statute" in the ameliorative amendments clause; that omission is presumed to be a deliberate expression of legislative intent. *See, e.g.*, *Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 649 (Iowa 2013) (quoting *Meinders v. Dunkerton Cmty. Sch. Dist.*, 645 N.W.2d 632, 637 (Iowa 2002)) (discussing principle of *expressio unius est exlusio alterius*—"legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned"). Only section 4.13(1)(c) applies here.

The Iowa Supreme Court recently considered the issue of retroactive application of amendments that redefined criminal offenses in *State v. Harrison*. If 2016 amendments to chapter 711 that created a misdemeanor offense of third-degree robbery had applied retroactively, the jury would have needed to be instructed on the difference between felony robbery and misdemeanor robbery, in order to assess whether the robbery in question would give rise to liability for felony murder. *See State v. Harrison*, No. 16–1998, 2018 WL 3083869, at *17 (Iowa June 22, 2018). But such an instruction was not necessary because the amendments redefining certain conduct as misdemeanor robbery were presumed to have prospective application and were not given

retroactive application by any language in the legislative package that would subvert the presumption of prospective-only application:

> In 2016, approximately two years after Harrison committed the robbery at issue, Iowa Code section 711.3A went into effect. This Code section codified third-degree robbery—a misdemeanor that could not serve as a predicate for felony murder. *See* [Iowa Code § 711.3A (2017)]. Harrison now argues this change in the Code should be applied to him retroactively and the jury should have been instructed on the types of assault that would constitute forcible felony robbery.
>
> Iowa Code section 4.13(1) provides that "[t]he reenactment, revision, amendment, or repeal of a statute does not affect ... the prior operation of the statute or any prior action taken under the statute." Iowa Code § 4.13(1)(a). Section 4.13 "does not require that the characterization of the crime of which [the defendant] is convicted be changed." *State v. Chrisman*, 514 N.W.2d 57, 63 (Iowa 1994). It is a well-settled law that substantive amendments to criminal statutes do not apply retroactively. . . . Since third-degree robbery did not exist in the Iowa Code at the time of Harrison's offense, Harrison was not entitled to a jury instruction differentiating between felony robbery and misdemeanor robbery.

Harrison, 2018 WL 3083869, at *17. Because Williams' argument is indistinguishable from the argument rejected in *Harrison*, it should be rejected for the same reasons: Iowa had no "stand your ground" justification defense in effect at the time of this shooting, so Williams was not entitled to present such a defense at his trial.

"[T]he statute in force at the time of the commission of an offense governs the character of the offense and, generally, the punishment prescribed thereby." *State ex rel. Abrogast v. Mohn*, 260 S.E.2d 820, 824 (W.Va. 1979), *cited in Chrisman*, 514 N.W.2d at 63. Section 4.13 "gives a defendant the benefit of a more lenient sentence; it does not require that the characterization of the crime of which he is convicted be changed." *See Chrisman*, 514 N.W.2d at 63; *see also Harrison*, 2018 WL 3083869, at *17. The legislature did not make its revisions to chapter 704 retroactive—indeed, it did not even include those revisions to chapter 704 in its list of provisions that it "deemed of immediate importance" that would be given effect upon enactment, rather than waiting until July 1, 2017. *See* 2017 Iowa Acts ch. 69, § 50; Iowa Code § 3.7(1); *see also* Iowa Code § 4.5 ("A statute is presumed to be prospective in its operation unless expressly made retrospective."). The legislature's decision not to make "stand your ground" provisions effective upon enactment is an indisputably unambiguous expression of legislative intent to make those defenses unavailable for shootings that occur between the enactment date and the default effective date.

Williams alternatively points to section 704.13 as "implementing a procedure to establish the defendant's immunity separately from a

criminal trial." *See* Def's Br. at 80–81. Williams never attempted to invoke such a procedure—he only sought to present a defense that leveraged *substantive* changes affecting justification/self-defense, during his criminal trial. *See* TrialTr.V4 p.116,ln.6–p.119,ln.22. The provisions modifying substantive law to create "stand your ground" defenses are not procedural, and section 4.5 applies with full force. *See, e.g.*, *State v. Truesdell*, 679 N.W.2d 611, 618 (Iowa 2004) ("As a legislative change, the amended statute is applied prospectively. This means the conduct of Truesdell in this case must be judged under the statute that existed at the time of the offense.").

Even if "stand your ground" provisions applied retroactively, there would be no possibility of a different result if Williams had been permitted to argue "stand your ground" and if jurors were instructed accordingly. Indeed, jurors were instructed that Williams could be "wrong in his assessment of the danger" and still act in self-defense "as long as there [was] a reasonable basis" for believing deadly force was reasonably necessary. *See* Iowa Code § 704.1(2) (2018); Jury Instr. 36; App. 57 ("If in the defendant's mind the danger was actual, real, imminent, or unavoidable, even though it did not exist, that is sufficient if a reasonable person would have seen it in the same light.");

Jury Instr. 37; App. 58 ("It is not necessary that there was actual danger, but the defendant must have acted in an honest and sincere belief that the danger actually existed."). And there was no possibility that Williams could invoke the "no duty to retreat" provisions because he could not prove he was "not engaged in illegal activity"—he told Agent Turbett that he was going armed with intent to use it to inflict serious injury on Fleming. *See* Iowa Code § 704.1(3) (2018); *see also* Iowa Code § 708.8; TrialTr.V4 p.112,ln.23–p.113,ln.4. And beyond the new "stand your ground" provisions and beyond all the other evidence that establishes harmless error, there is an additional piece of evidence that proves Williams "started or continued the incident" and disproves any possible version of his justification defense: Vierkant's testimony. *See* Jury Instr. 35; App. 56; *accord* Iowa Code § 704.6(2) (2018).

Vierkant saw Williams standing between a dumpster and a tree, and saw him walk slowly towards a red truck that just parked nearby—and Vierkant did not hear any commotion until the first gunshots, fifteen steps later. *See* TrialTr.V3 p.246,ln.23–p.254,ln.21. Williams testified about some escalating confrontation that led him to believe Fleming was furious and was about to shoot him. *See* TrialTr.V6 p.56,ln.16–p.63,ln.17; TrialTr.V6 p.115,ln.3–25. But Vierkant heard

nothing of the sort—and he was less than fifteen paces away. If there were any precipitating confrontation that would have created any reasonable basis for believing that Fleming was about to act in anger (especially given the testimony about Fleming's loud, brash behavior) Vierkant would have heard it. *See, e.g.*, TrialTr.V4 p.160,ln.9–22; TrialTr.V5 p.54,ln.15–p.55,ln.8; TrialTr.V6 p.26,ln.1–25.

Beyond that, Vierkant described Williams "[s]lowly walking" towards Fleming's vehicle, *after* that earlier encounter with Fleming where Williams was purportedly led to believe his life was in danger. *See* TrialTr.V3 p.247,ln.10–p.250,ln.1. Williams testified that he was fearful about Fleming's threat to shoot him when Fleming returned, but Williams sought Fleming out to initiate another confrontation—which indicates that Williams was not actually afraid for his life. *See* TrialTr.V6 p.108,ln.20–p.113,ln.7 ("[I]f you were expecting him to come back to that place and shoot you, why didn't you leave?"). Williams armed himself, approached Fleming with deliberate focus, shot Fleming multiple times at close range with flawless accuracy, threw Fleming out of the vehicle, skipped town, abandoned the truck, destroyed evidence, and lied about his involvement to police—there is no plausible self-defense claim here, under any set of instructions.

Indeed, even without the "stand your ground" amendments, the jury was instructed that Williams had no duty to seek out any alternative to deadly force "[i]f the alternative course of action involved risk to his life or safety, and he reasonably believe[d] that." *See* Jury Instr. 38; App. 59. If Williams approached Fleming with peaceful intentions, and subsequently formed a reasonable belief that Fleming was about to shoot him unless he shot Fleming first—which is the same showing Williams would need to make to justify deadly force under the 2017 "stand your ground" amendments—the jury would have acquitted him. *See* Iowa Code § 704.1(1) (2018) (defining reasonable force as "that force and no more which a reasonable person, in like circumstances, would judge to be necessary to prevent an injury or loss and can include deadly force if it is reasonable to believe that such force is necessary to avoid injury or risk to one's life or safety"). No jury that rejected Williams' justification defense on these facts and instructions would reach a different result if "stand your ground" had applied.

Thus, even if Williams was correct about retroactive application of the law, this Court would still affirm Williams' conviction because "the record affirmatively establishes there was no prejudice." *See State v. Hanes*, 790 N.W.2d 545, 550–51 (Iowa 2010).

CONCLUSION

The State respectfully requests this Court reject Williams' challenges and affirm his conviction.

REQUEST FOR NONORAL SUBMISSION

This case should be set for nonoral submission. In the event argument is scheduled, the State asks to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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