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THE SUPREME COURT OF IOWA

NO. 20-1000
Black Hawk County No. AGCR207343

STATE OF IOWA.

Plaintiff/Appellee,

vs.

KELVIN PLAIN, SR.

Defendant/Appellant.

Appeal From The District Court
In and For Black Hawk County

The Honorable William Wegman, District Court Judge

Brief Of *Amicus Curiae* NAACP

Russell E. Lovell, II
4055 42nd Street
Des Moines, IA 50310
Phone: (515) 720-3327
AT0004851
russell.lovell@drake.edu

David S. Walker
1922 80th Street
Windsor Heights, IA 50324
Phone: (515) 271-4100
AT0008229
david.walker@drake.edu

COUNSEL FOR AMICUS CURIAE NAACP

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STATEMENT REQUIRED BY IOWA R. APP. P. 6.906(4)(d)

No party or party's counsel authored this brief in whole or in part nor contributed money to fund the preparation or submission of this brief. No other person contributed money to fund the preparation or submission of this brief, as the undersigned Counsel worked pro bono for the NAACP.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the State's "No Aggregation" Proposal Is Unconstitutional as Contrary to *Lilly*, *Duren*, and *Castaneda*, Contrary to the Law of the Case, Inconsistent with Statistical Convention, and Contrary to Real World Experience and Expectations?

II. Was the Underrepresentation in the Black Hawk County Aggregated Jury Panels and on the Defendant's Own Jury Panel Attributable to the System for Compiling Jury Panels and Therefore Constituted Systematic Exclusion?

III. Whether the Judicial Branch Can and Should Take Affirmative Steps So That Fair Cross-Section Principles Are Fully Implemented?

STATEMENT OF THE CASE
AND
STATEMENT OF THE FACTS

The NAACP adopts the Statement of the Case and Statement of the Facts submitted by Appellant Kelvin Plain's Counsel.

INTEREST OF AMICUS

The NAACP is the country's largest and oldest civil rights organization. Founded in 1909, it is a non-profit corporation chartered by the State of New York. The mission of the NAACP is to ensure the political, social, and economic equality of rights of all persons, to advocate and fight for social justice, and to eliminate racial discrimination.

The NAACP Amicus Brief filed in *State v. Veal*, 930 N.W.2d 319 (Iowa 2019), had equal application to *State v. Lilly*, 930 N.W.2d 293 (Iowa 2019) (*Lilly I*), and was referenced nine times by the Court in *Lilly*. This appeal in *State v. Plain II* raises important issues affecting the impartial jury right in this State for Blacks and all persons of color. The NAACP has a strong interest in this appeal.

ARGUMENT

I. DEFENDANT DEMONSTRATED STATISTICALLY SIGNIFICANT UNDERREPRESENTATION IN THE AGGREGATE JURY PANEL DATA; AND THE STATE'S "NO AGGREGATION" PROPOSAL IS UNCONSTITUTIONAL AS CONTRARY TO *LILLY*, *DUREN*, AND *CASTANEDA*, CONTRARY TO THE LAW OF THE CASE, INCONSISTENT WITH STATISTICAL CONVENTION, AND CONTRARY TO REAL WORLD EXPERIENCE AND EXPECTATIONS.

Defendant's Brief demonstrates underrepresentation statistically significant at the 2-standard deviation level based on both the 6-month and 1-year Black Hawk County aggregate juror data. *Taylor v. Louisiana*, 419 U.S. 522 (1975), held that the Sixth Amendment fair cross-section principles are applicable to "jury wheels, pools of names, panels, or venires from which juries are drawn." *Id*. at 538. *Duren v. Missouri,* 439 U.S. 357 (1979), held that a defendant can make out a prima facie fair cross-section claim based on underrepresentation at the jury panel stage even though "there was no indication that underrepresentation of women occurred at the first stage of the selection process." Id. at 669.

However, in each of the State's motions for rehearing in *State v. Lilly*, 930 N.W.2d 293 (Iowa 2019), and *State v. Veal*, 930 N.W.2d 319 (Iowa 2019), the State strenuously resisted this Court's holding in *Lilly* that the determination of underrepresentation under prong 2 must be based on aggregated juror data and could not be restricted to the defendant's own jury pool or panel. *Lilly* at 305. This Court denied rehearing but added the following footnote in *Lilly* that was also

incorporated in *Veal*: "Another question is whether there should be *outer limits on aggregation*, for example, whether aggregation should stop once it covers some period of time or some total number of potential jurors. This issue was not raised in the initial briefing in this case or at oral argument, and therefore, we do not address it here."[1] (Emphasis added.)

A. The State's Proposal Is Contrary to *Lilly, Duren*, and *Castaneda.*

In fair cross-section cases decided since this Court's ruling in *Lilly* and *Veal*, the State has consistently contended that underrepresentation under *Duren/Plain* prong 2 should be determined only on jury data from defendant's own case without consideration of aggregated jury data that provides perspective on the operation of the jury selection process over the six or twelve months preceding trial. The NAACP anticipates it will do so again in this appeal. The State contends that the 2-step fair cross-section underrepresentation determination adopted in *Lilly* should be collapsed into one test, based solely on the data from the Defendant's own jury pool and/or jury panel—with a narrow exception if the Defendant's own pool or panel is too small to allow a showing of 1 standard deviation even when there is no member of the distinctive group in the pool/panel.[2]

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[1] Lilly, 930 N.W.2d at 305 n.7; Veal, 930 N.W.2d at 330 n. 9.
[2] State Appellee's Brief in *State v. Lilly* (Iowa Supreme Court No. 20-0617) (*Lilly II*), at 54 – 57.

Lilly determined that there are two steps to the *Duren/Plain* prong 2 analysis—an individual step that asks whether there was underrepresentation of a distinctive group in defendant's own jury pool, essentially a standing requirement; and a determination as to whether the underrepresentation is reflected in the jury selection system's operation over time.[3] Consistent with *Duren v. Missouri*, 439 U.S. 357 (1979), *Lilly* recognized the latter step requires analysis of aggregated jury data.

Duren's articulation of prong 2 of its prima facie test focused exclusively on aggregated data: "(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. . . ." Id. at 364 (emphasis added). The Court's finding of systemic underrepresentation was based on Jackson County juror data "for the periods June-October 1975 and January-March 1976." Id. at 362. See also *Taylor v. Louisiana*, 419 U.S. 522, 524 (1975) (underrepresentation based on jury data from December 1971 -November 1972).

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[3] "[D]efense counsel must prepare the merits of the fair cross-section claim as to the aggregated data before seeing the jury panel in their client's case." See Russell Lovell and David Walker, *Achieving Fair Cross-Sections on Iowa's Juries in the Post-Plain World: The Lilly-Veal-Williams Trilogy*, 68 Drake L. Rev. 499, 533 and 576-78 (2020) (hereinafter "Trilogy") for full discussion of this counter-intuitive, but critical litigation reality. See also Part II.B(3) infra that this Court should clarify and instruct on this time table.

With regard to the aggregated jury data step to prong 2, *Lilly* held that defendants must establish underrepresentation that is statistically significant at the 1-standard deviation level for Article I, §10 state constitutional claims and 2 standard deviations for Sixth Amendment claims. *Lilly* also made clear that the 1 and 2-standard deviation levels of underrepresentation applied only to step 2, the analysis of the aggregated juror data, and not to the standing determination. *Lilly* at 305. See Trilogy at 499, 533 and 576-78 (2020).

Castaneda v. Partida, 430 U.S. 482 (1977), held that identical aggregation principles apply to Equal Protection challenges to the composition of jury pools. *Castaneda* instructed that the jury data aggregated should be collected "over a significant period of time." *Id*. at 494. In *Castaneda*, the Supreme Court based its decision on aggregated jury pool data over the 11 years preceding the defendant's indictment. While the Court indicated that "dated" data can be challenged if it was not reliable, it made clear the burden of proof was on the State to do so. *Id*. at 496. Just as the State is currently arguing, the *Castaneda* dissent contended that the proper focus should have been on the grand jury that indicted Partida, not on the aggregated grand jury data, and the majority rejected this argument. Id. at 496.

Duren, *Castaneda*, *Lilly*, and *Veal* make clear that evaluation of the jury system's data over time for statistically significant underrepresentation is central to

step 2 of the prong 2 inquiry. *Lilly*'s instruction regarding aggregation of juror data is clearly contrary to the State's no aggregation/minimalist aggregation proposal. *Lilly* gave only one qualification: "What the parties cannot do, of course, is tip the scales in an aggregate analysis by including some earlier jury pools but not other, more recent jury pools." *Id.* at 305 (footnote omitted); see also *State v. Veal*, 930 N.W.2d at 330.

B. The State's Proposal is Contrary to the Experts' Testimony and Statistical Convention.

Defendant's statistical experts, Professor Rahul Parsa and Professor Amy Vaughan, based their initial statistical analyses on the prospective jurors in the Black Hawk County aggregate jury pools and jury panels during the 6 months immediately preceding Plain's October 2015 trial who identified their race: 8,269 in jury pools and 1,696 persons in the jury panels. The jury manager had summoned 14,034. Court-appointed expert Paula Hannaford-Agor based her geocoding and statistical analysis on 1-year aggregated jury pool data immediately preceding Plain's trial. 20,086 persons were summoned; 11,124 persons who were found to be qualified; and 6,979 persons who reported for jury duty. Hannaford Agor Report, Defendant's Ex. 109 at p.5, Table 3.

All three experts—Parsa and Vaughan in their Expert Reports, and Hannaford-Agor in her testimony—stated that more data was better, providing a higher degree of certainty as to statistics and a clearer understanding of how a jury

selection process operates. Court-appointed expert Hannaford-Agor explained why she based her study on the 1-year dataset:

> Q: Is there a reason that you used the dataset that was closer to a year long?
> A: This was to look—specifically I had requested a year's worth of data just because I like –the larger the datasets, the more accurate and the more reliable the findings will be.

Tr. p. 30, l. 25, p. 31, ll. 1-5. The District Court noted Professor Parsa's testimony that because the number of persons in the aggregate jury pool and jury panel data was large, the fact that there were considerable numbers of nonrespondents on the "race" question on the juror questionnaires did not in any way undercut the validity of Professor Parsa's statistical calculations.

Professor Vaughan, in researching the issue raised by the State, reviewed Lin, Lucas, Shmueli, *Too Big to Fail: Large Samples and the p-Value Problem*, Information Systems Research, Articles in Alliance (2013), in which the authors state that concern can arise in samples that "include tens of thousands of observations," and point to "over 10,000 publicly available feedback text comments . . . in eBay," "108,333 used vehicles," "175,714" reviews from Amazon, and "3.7 million records." *Id.* at 1. These statisticians discuss an example involving 500,000 observations and note some have "suggest[ed] that the threshold p-value should be adjusted downward as the sample size grows . . . [but] there have been no proposed rules of thumb in terms of how such adjustments should be made." *Id*. at 11.

Professor Vaughan rejected the State's argument on two grounds. First, Vaughan pointed out that the "maximum sample size concern" only arises when there are "extremely large sample sizes . . . of hundreds of thousands or more," and none of the calculations she made were based on a sample even approaching such sizes:

> 28. There is no agreed upon maximum sample size in the field of statistics. Statistically, larger sample sizes are desirable because they provide more statistical power, more closely approximate the population, have smaller standard errors, and reduce the sampling variability. It is often acknowledged that at extremely large sample sizes, many tests may be found significant. But, those are often at samples of hundreds of thousands or more. None of the sample sizes upon which I based my calculations, neither the 6-month jury data nor the 1-year jury data (Hannaford Agor Report), even approach such extremely large sample size numbers, and, therefore, no maximum sample size concern is presented here.

Vaughan Report, ¶28. Second, Vaughan observed that those who have expressed the maximum sample size concern do not suggest anything remotely like the "no aggregation/minimalist aggregation" "remedy" that the State has proposed:

> 29. It has been suggested that the threshold p-value could be adjusted downward as the sample size grows (Leamer 1978, Greene 2003), however to date there have been no proposed rules of thumb in terms of how such adjustments should be made. Lantz (2013) and Shmueli, Lin, and Lucas (2013) also offer confidence intervals as alternatives to p-values for this purpose since they will narrow as the sample size grows which merely offers an estimate that is more precise. All of my Black Hawk County jury pool and jury panel calculations that pass the 2 standard deviation test would also pass an even stricter 3 standard deviation test if one would so desire an alternative to tighten criteria.

Id. ¶29. The issue the State has been raising is a mirage. To the extent it has any validity at all, it only arises when the sample sizes are huge—in the hundreds of thousands—and the numbers involved in either the 6-month or 1-year aggregation in the instant case pale in comparison. The State's implication that defendant and the NAACP are seeking "limitless aggregation" is frivolous.[4]

Effective January 2019 the OSCA implemented a new statewide Jury Management Policy with the result that 15% fewer persons are sought for jury duty each month in Black Hawk County and higher than 90% of those reporting disclose their race. (11/1/19 Hr'g Tr. at p.25, ln.19—p.27, ln.7). There is every reason to think these steps are improving efficiency statewide and thereby reducing the number of persons called for service; for example, a 15% reduction of the 14,034 persons summoned from April-October 2015 suggests only 11,929 may need to be summoned for a similar 6-month period of 2021 in Black Hawk County. With appropriate flexibility for rural districts with relatively few jury trials, such as the North Lee judicial district in the *Lilly* case, the NAACP submits the traditional use of six to twelve months juror data provides the appropriate outer limit of aggregation and provides a neutral, uniform, easy to administer guideline for courts and jury managers to follow.

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[4] State Appellee's Motion for Rehearing, *State v. Veal*, *supra* note 2, at 10; see also State Appellee's Brief in *Lilly II*, at 52.

The risk of manipulation of juror data that warranted a caution from this Court in both in *Lilly* and in *Veal* was far less than the risk posed by the selectivity inherent in State's current proposal. To use the words of *Castaneda v. Partida*, the State's "no aggregation/minimalist aggregation" proposal would create a "selection procedure that is susceptible to abuse." 430 U.S. at 494. At the very time voir dire is scheduled to begin, the State is proposing that the trial judge is to make many different binomial calculations, involving considerable exercise of discretion in the aggregation of several additional jury panels. *Lilly* contemplates that the standard deviation analysis of the aggregated data will have been occurred a week or more in advance of the trial date in a considered pre-trial setting, and when needed with expert assistance. A major policy factor for the fair cross-section principle is furthering the appearance of fairness of the judicial system--the State's proposal, were it to be adopted, could seriously undermine the community's confidence in the integrity and fairness of the jury selection process.

The State's minimalist aggregation component of its proposal is contrary to statistical convention. It violates general statistical norms to manipulate the rules for selecting the sample size by relying on the results of what you're looking for. Essentially, that is what the State's "minimalist aggregation" proposes; and it is contrary to the principle of statistics that a sample must be selected based on

criteria other than the ones you are analyzing.[5] As a practical matter, even when a defendant would "succeed" in demonstrating 1-standard deviation underrepresentation based on "no/minimalist aggregation," the district judge would remain unconvinced and skeptical due to the exceptionally limited amount of data upon which it was based. Is the underrepresentation characteristic of the system? Or was it a fluke? It's a question of precision. The State proposes to make the measure of fairness less precise—actually, far less precise—and this would allow unfairness to be hidden in a cloud of doubt caused by their preferred imprecision.

C. The State's Proposal, By Significantly Increasing the Defendants' Evidentiary Burden, Violates Defendants' Sixth Amendment Rights.

State v. Cline, 617 N.W.2d 277, 285 (Iowa 2000), recognized that "this court cannot interpret the Iowa Constitution to provide less protection than that provided by the United States Constitution. . . ." In truth, that is what the State is proposing, imposing a burden of proof on defendants that is inconsistent with statistical convention and is contrary to and more difficult to prove than what the U.S. Supreme Court has required under its Sixth Amendment fair cross-section and Fourteenth Amendment jurisprudence. Application of the standard deviation test

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5 Denes Szucs, *A Tutorial on Hunting Statistical Significance by Chasing N,* 7 Frontiers in Psychology 1 (2016): "[R]esearchers may violate the data collection stopping rules of null hypothesis significance testing by repeatedly checking for statistical significance with various numbers of participants." See also id. at 4.

only to the defendant's own jury pool/jury panel would increase the defendant's evidentiary burden due to the very small sample size limitation, and therefore is unconstitutional both under the Sixth Amendment and under Article 1, Section 10 of the Iowa Constitution.

II. THE UNDERREPRESENTATION IN THE BLACK HAWK AGGREGATED JURY PANELS AND ON THE DEFENDANT'S OWN JURY PANEL WAS ATTRIBUTABLE TO THE SYSTEM FOR COMPILING JURY PANELS, AND THEREFORE CONSTITUTES SYSTEMATIC EXCLUSION.

For Kelvin Plain's right to an impartial jury to have been denied him, the underrepresentation must have been the result of "systematic exclusion," *Duren, at* 364, something "inherent in the particular jury-selection process utilized." *Id.* at 366. Or as this Court has emphasized, underrepresentation must have been "*attributable to the system for compiling jury pools.*" *Lilly*, at 306, adding emphasis and quoting *Plain*, at 824. The Court left no doubt that it rejected the socioeconomic explanation as the basis to absolve courts from fulfilling their constitutional responsibility:

> Although the socioeconomic factors that contribute to minority underrepresentation in the jury pool do not systematically exclude distinctive groups, the failure of courts to mitigate the underrepresentation through effective jury system practices is itself a form of systematic exclusion.

Id. at 307 (quoting Paula Hannaford-Agor, *Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded*, 59 Drake L. Rev. 761, 790 (2011)) (hereinafter "Hannaford-Agor").

Citing Hannaford-Agor's testimony, the District Court concluded that "socioeconomic status" was "the primary cause of individuals failing to respond or report" and that that was beyond the control of the court and non-systematic. In doing so, the District Court used the wrong lens with which to assess Defendant Plain's fair cross-section claim, as it failed to follow the *Lilly* Court's view of the court's responsibility to ameliorate socioeconomic factors. See Trilogy at 550-51.

We acknowledge there is caselaw that has only found systematic exclusion when there has been "active discrimination" or "affirmative government action." See Trilogy at 543-48. When individuals fail to respond to a summons and answer a jury questionnaire or fail to appear on the day summoned, these courts have held that those are individual or private choices and not something "inherent in the particular jury-selection process utilized." *Id.* and cases cited at 545-46 & nn.254-259. Commonly, and as found by the trial court, "socioeconomic" factors over which the court has no control are said to characterize such respondents. In consequence, these courts have concluded that jury management practices do not constitute systematic exclusion, often citing—in what the NAACP agrees with

Appellant's Counsel is a misreading—*Berghuis v. Smith*, 539 U.S. 293 (2010). See Trilogy at 551-552 & n. 291.

The District Court failed to grasp Hannaford-Agor's larger point, made in her testimony and in her scholarship cited by this Court in *Lilly*, that the existing caselaw "perpetuat[es] the misconception that courts have no responsibility to address causes of underrepresentation other than those" affirmatively caused by the system itself and is obsolete, having been contradicted by jury management practices developed by the nation's courts, and actually operates as "a disincentive" to the implementation of effective jury management practices. Hannaford-Agor at 764.

Hannaford-Agor's great insight was applied to the jury selection process: While "courts have no control over whether an individual chooses to register to vote, . . . courts do have control over which source lists to use in compiling the master jury list"); while courts do not have control over how often people move, courts do have control over how often they update the jury lists using readily available and inexpensive technology; while court do not have control over prospective jurors' responses to jury summons, courts do have control over the excusal process, the issuance of second summons, the enforcement of orders to appear, and so forth. *Id.* at 779-88. The NCSC Center for Jury Studies' experience confirmed that the "vast majority of courts" have developed jury management

practices that are effective, efficient, and able to satisfy the Sixth Amendment's requirements and "employ these techniques on a routine basis:"

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

Hannaford-Agor at 764.

This Court in *Lilly* found Hannaford-Agor's research, experience, and reasoning persuasive under its independent authority to construe the "impartial jury" clause of Article I, §10 of the Iowa Constitution. *Lilly* held "that jury management practices can amount to systematic exclusion for purposes of article I, section 10 . . . where the evidence shows that one or more of those practices have produced underrepresentation of a minority group." 930 N.W.2d at 307-08. *See* Trilogy at 548-51.

In Iowa the research and experience that persuaded this Court in *Lilly* have been reenforced by progress made by OSCA and the courts and jury managers on implementation of new and improved jury management practices. The testimony of Billie Treloar confirmed that progress. In helping to secure jury pools and panels reflecting a fair cross-section of the community, this progress is a crucial step forward for the courts in their commitment to racial justice and equality, and their commitment "to examine what systemic change is needed to make equality

under the law an enduring reality for all, so that justice is not only fair to also but also is recognized by all to be fair." Resolution 1 of the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (CSCA) (July 2020). https://ccj.ncsc.org/__data/assets/pdf_file/0029/42869/07302020-Racial-Equality-and-Justice-for-All.pdf. The CCJ-CSCA commitments were a welcome renewal of a commitment to racial justice that, to be candid, many people of color thought had faded.

In *Lilly* and through the Judicial Branch's work in developing and implementing its Jury Management Policy, the Judicial Branch has taken a pro-active role toward *Duren/Plain's* prong 3. The NAACP applauds that role and urges this Court to reaffirm the commitment it made in *Lilly. See* Trilogy at 551, 584-601. This Court realized that just as technology advances often make administrative concerns obsolete, the nationwide judicial experience that has been gained in improved jury management practices, coupled with the advent of inexpensive lap top computers, big data developments, and other technology advances, have rendered obsolete the pre-*Plain* caselaw that, although seldom expressed, reflected deep concerns as to whether court administrators could meet more than minimal standards. This rationale is fully applicable to the "impartial jury" clause of the Federal Constitution and should inform its construction as well. Therefore, as Appellant has contended, this Court should construe the Sixth

Amendment to embrace the same progressive standard this Court fashioned in *Lilly*.

The Defendant has succinctly summarized the extensive evidence demonstrating statistically significant underrepresentation at the "Failed to Respond" stage of the selection process with regard to jury-eligible residents of ZTCA 50703. Therefore, the NAACP will only selectively address key facts that warrant further emphasis as to racial impact and the negligence of the court system's jury management practices in failing to ameliorate that racial impact.

Failures to Respond. In the year preceding the Plain trial, the Jury Manager summoned 20,086 persons for jury duty, 3,435 (17.1%) of whom resided in ZCTA 50703. Of those summoned, 1,784 "Failed to Respond"—33.1% of the nonrespondents (591) were residents of ZTCA 50703. Hannaford-Agor emphasized that the ZTCA 50703 "Failed to Respond" rate of 33.1% was statistically significant, nearly double the 17.1% that 50703 residents represented among those summoned. Among the Black Hawk County jury-eligible population, ZCTA 50703 is where 56.5% of African Americans have concentrated to live. They comprise 30.7% of the jury-eligible population of 50703—*more than four times the County's overall African American jury-eligible population of 7.5%.* Given that over half of the County's African American jury-eligible population resided there, Hannaford-Agor concluded "that it was the failure to respond rate

specifically from 50703 that was likely contributing to the underrepresentation of African Americans in the jury pool." (11/1/19 Hr'g Tr. at p.46).

There was very little enforcement of jury summons in Black Hawk County in 2015 and prior years. The Jury Manager would send those who failed to respond a "reminder letter" advising them that if they failed to appear when notified to report without providing a sufficient cause, the court "may issue" a show cause order. Only after a third failure to appear would a contempt hearing be scheduled. Even then, if no jury was actually impaneled, a failure to appear didn't count as a failure. (11/1/19 Hr'g Tr. p. 8, ln. 9 through p. 9, ln. 7.) Jury Manager Treloar testified that for the two to three years before Plain's trial while she was Jury Manager, there were only 10 to "maybe" 20 contempt hearings a year (*Id*. at p. 11, lns. 14-20; p. 23, ln. 14 through p. 24, ln. 3) and none before she took office. (Defendant's Ex. 114 [2017 Deposition of Billie Treloar] at p.17, ln. 25--p.18, ln. 16)

Hannaford Agor and others' studies indicated that as many as 50% of so-called "failures to respond" are actually "undeliverables," where the summons is left at a home from which the prospective juror has moved and the summons is simply ignored or discarded by the person then living at that address. (11/1/19 Hr'g Tr. at 34, 43-45). As a result, roughly half of persons who "failed to respond" never got the summons in the first place; if this group were more accurately

counted as "undeliverables," it would increase the number of "undeliverables" reported in Table 3 by fifty percent. This underscores that the futility and failure of efforts to obtain accurate addresses played a major role in causing the underrepresentation generally, which was magnified in ZTCA 50703.

Had OSCA or the Black Hawk County jury manager been monitoring the Black Hawk County jury selection data in 2015, they would have realized African Americans were significantly underrepresented. The 2015 6-month aggregated data showed African Americans comprised only 4.9% at the jury panel stage (83 of the 1,696 who identified their race), see Parsa Expert Report, ¶6, ¶20. But Black Hawk County was not monitoring its jury selection process, and given *State v. Jones'* absolute disparity bar, correcting for underrepresentation was never considered.

In *State v. Veal*, 930 N.W.2d 319, the trial court summoned an extra jury panel (which appeared to include more minority representation) and "reached out to jurors who had responded to surveys but had not appeared (because one was African American)," Trial Transcript, Vol. 1, p. 39, ln. 13-p. 44, ln. 6; Trial Transcript Vol.1, p.48, ln. 9-p.50, ln. 14. Stratified geographic sampling is a race-neutral approach that could have been effectively utilized. When a racial group is distributed unevenly among zip codes in the county, as were African Americans in Black Hawk County, ensuring residential proportionality at each step in the

selection process "can help ensure racial or ethnic proportionality as well." Nancy King and Thomas Munsterman, *Stratified juror selection: cross-section by design*, 79 Judicature 273, 274 (1996). Stratified geographic sampling allows additional names to be randomly drawn from zip codes within the county which have historic low response rates and significant numbers of residents who are people of color. While commonly done at the summoning stage, stratified sampling also can "seek proportional representation by geography at later stages of the jury selection process, not just on original source lists or master wheels." Id. at 275. In sum, there were sound, principled corrective steps the court or jury manager could have taken in Kelvin Plain's case. The Court took none.

In contrast to 2015, the practice under the Jury Management Policy that became effective in January 2019 now provides for use of the NCOA annually and whenever a pool is created, for issuance of a second summons upon a failure to respond, and scheduling of contempt hearing after a second failure to appear. More than 100 hearings were held in the first ten month of 2019. The results have been significant: a need to summon 15% fewer jurors, with increased percentage of responses to the jury questionnaire, including the now mandatory question about race and ethnicity, an increased percentage showing up for jury service, and almost certainly improved representation of African Americans in the jury pools and jury panels. (11/1/19 Hr'g Tr. at p. 25, ln. 19 through p. 27, ln. 7).

In this appeal the Court has the opportunity to announce once again a proactive role for Iowa courts in securing civil and constitutional rights, to reject the hypothesis that assumed socioeconomic factors cause underrepresentation, and to reaffirm the principle announced in *State v. Lilly* that sound and competent jury management practices matter. It is clear from the content of OSCA Jury Management Policy and the dramatic change in results to which Jury Manager Billie Treloar testified that jury management practices can have and have had a decided positive effect on jury pools and jury panels statewide—improving efficiency, and thereby reducing the amount the Judicial Branch spends annually on juror compensation, AND improving the representativeness of jury pools and panels as required by the Impartial Jury Guarantee.

III. THE JUDICIAL BRANCH CAN AND SHOULD TAKE AFFIRMATIVE STEPS SO THAT FAIR CROSS-SECTION PRINCIPLES ARE FULLY IMPLEMENTED.

Defendant Plain's counsel shares with the Court his view that "Standard Deviation Should Not be the sine qua non" of Fair Cross-Section Claims. In support of his argument he points out that the court system's juror data is not readily available in advance of trial, that lawyers and judges often make "a mess out of statistics," and that defense lawyers' experience severe overload trying to litigate fair cross-section claims on the first day of trial due to the many other issues for the day scheduled for trial. As a result, with the exception of the most

serious felony offenses, defense counsel make only superficial fair cross-section challenges or none at all.

Given counsel's stature within the defense bar, the NAACP will not dispute his assessment that implementation of the Court's fair cross-section jurisprudence presents challenges to counsel on both sides and to the trial court. The NAACP believes that what is at stake in this case—as well as the present appeal in *State v. Lilly*—is the constitutional right of defendants, including especially defendants of color like Kelvin Plain, an African American, to an "impartial jury." With lineage to the Magna Carta, the right to a fair and impartial jury has for centuries been recognized to be the very heart of our system of criminal justice. *Taylor v. Louisiana*, 419 U.S. 522 (1975), recognized that that when people of color are underrepresented on juries, it is not just the rights of defendants that are compromised for the centrality of the jury to our system of justice realizes important societal interests are at stake, too: "Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." 419 U.S. at 530.

The NAACP understands defense counsel's concerns and believes it is urgent that this Court take affirmative steps to address them, both through appellate adjudication in cases such as the instant case, and also through the Court's

supervisory and rule-making authority. We disagree with defense counsel's concern about the inability of counsel to develop the requisite skill to effectively understand standard deviation analysis. With proper technical support from the Judicial Branch, we continue to believe that standard deviation analysis using "[t]he Binomial Distribution calculation is the most definitive statistically scientific measurement to determine whether" underrepresentation in jury pools/panels over time "could have happened by random chance . . . ." NAACP Amicus Brief, *State v. Veal*, at 18-19. The State agrees. State Appellee's Brief, *State v. Lilly* at 51 (No. 20-0617 2020).

A. Fair Cross-Section Law Did Not Merely Stagnate During the *Jones* Era, But Retrogressed, Necessitating a Pro-Active Response by the Judicial Branch in Order to Achieve Full Implementation

The NAACP submits that the Judicial Branch should be more pro-active in facilitating implementation of its fair cross-section decisions. The Court must recognize the reality that, as a result of *State v. Jones*, 490 N.W.2d 787 (Iowa 1992), a generation of judges and lawyers have litigated criminal cases largely oblivious to fair cross-section principles as applied to individual cases. Trilogy, at 511-13. Bringing those principles alive after 25 years requires that this Court take the lead through judicial administration and rule-making so that the fair cross-section principle has been restored not only as "law on the books" but fully

implanted as “law in action.” That *Plain*’s promise of restoring it to a central role in criminal cases, especially involving defendants of color, has been fulfilled.

Insofar as prong 3 is concerned, claims of systematic exclusion most frequently raised have been based on inadequate source lists for jury pools and/or jury management practices that are unreasonable, even negligent in light of practices widely known, recommended, and in use, and readily available technology. In response the Judicial Branch has been pro-active. Legislation that has been and will be introduced, and has no apparent opposition, will enable OSCA to access Department of Revenue records for taxpayers’ names and addresses, thus expanding the master source list and also providing far more current information than DOT and voter registration records, and so reducing the number of “undeliverable” summons. Moreover, OSCA adopted effective January 2019 a Jury Management Policy that addresses the failures that the record in this case demonstrates occurred in 2015, and the record also attests that statewide training on that Policy has occurred and will continue. These improvements in jury management should not only make the jury selection process more efficient but also more representative, and that is the NAACP’s shared goal with the Judicial Branch.

B. Facilitating Determination of Underrepresentation and Implementing Judicial Monitoring to Detect and Correct Problems in Advance Is Critical.

In contrast, progress on prong 2 requires the further attention of the Court and OSCA. Let us explain more fully the affirmative steps the Court and OSCA can and should take:

(1) This Court can and should make the court system's comprehensive juror data publicly available online quarterly. Since early 2018 the NAACP has formally recommended that the Judicial Branch post its juror data online for each of the 99 counties, broken down by race and gender, at each stage of the jury selection process, and do so quarterly,[6] and, this Court's Advisory Committee on Jury Selection embraced this approach in its Recommendation XI: https://www.iowacourts.gov/collections/41/files/499/embedDocument/. Posting each judicial district's jury data online, quarterly, will enable lawyers, judges, jury managers, and the public to determine whether a county's selection process is meeting fair cross-section standards, and, if it is falling short, to take corrective steps as to jury pools and/or panels in advance of trial dates. Id.; see also Trilogy at 594.

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[6] NAACP Memorandum to Supreme Court Advisory Committee on Jury Selection, Jan. 23, 2018, at 25-26; Lovell-Doolin Memorandum to SCA Advisory Committee on Jury Selection, Feb. 15, 2018, at 10-11.

On line reporting of juror data would also reflect the letter and spirit of Resolution 1, "In Support of Racial Equality and Justice for All," ratified on July 31, 2020, by the Conference of Chief Justices and Conference of State Court Administrators. Among seven racial justice "initiated efforts" taken by "courts in many states" that were cited in Resolution 1 were efforts "to collect, maintain and report court data regarding race and ethnicity that enables courts to identify and remedy racial disparities." https://ccj.ncsc.org/__data/assets/pdf_file/0029/42869/07302020-Racial-Equality-and-Justice-for-All.pdf. The OSCA data collection has improved since the criticisms made by the Governor Branstad Criminal Justice Working Group Committee in November 2015, https://comment.iowa.gov/Notice/Details/JusticePolicyReform, but at this time the data is not publicly reported and available online.

2) The other key piece of factual information for the fair cross-section prong 2 underrepresentation calculation is the U.S. Census data necessary to determine the relevant jury-eligible population. The Census data is available without charge on the census.gov web page, but very few lawyers, judges, and jury managers are familiar with it. Particularly helpful is the Iowa State Data Center ("SDC") web page, https://www.iowadatacenter.org/data/acs/social/citizenship/18over-nativity. It

provides the most currently available voter and juror-eligible data for U.S. Citizens 18 years and over for each of Iowa's 99 counties, broken down by race and gender.

Gary Krob, Coordinator of the State Data Center, undertook and completed the proposed web page at the request of the NAACP in the late summer and fall of 2019. The NAACP has advised OSCA that the SDC web page was available and encouraged it to bring the SDC web page to the attention of judges, lawyers, and jury managers, Trilogy at 563-565, 567-568, and 575, but it is our impression that few are aware of it.

Krob has updated the web page twice, in December 2019 and January 2021, as more current American Community Survey data (5-year average) became available. Users can now access the most current available Census data (2019), as well as the 2017 and 2018 ACS data. Krob and the SDC have committed to updating the web page annually after the Census Bureau's December 10 annual release of the ACS data.[7] The SDC web page will provide courts and counsel with reliable, easily accessed information on the most currently available jury-eligible Census population percentages, as required by *Lilly*, and thus will allay a key concern of the Court's dissenting Justices in *Lilly*, *Veal*, and *State v. Williams*, 929 N.W.2d 319 (Iowa 2019). The NAACP urges this Court, through OSCA, to

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[7] Addendum C, Statement of Gary Krob, Coordinator, State Data Center of Iowa, June 28, 2019, ¶5-6, to Amicus Curiae NAACP Request to Take Judicial Notice, ¶10-12, State v. Veal (No. 17-1453 June 28, 2019).

endorse the State Data Center's web page as a presumptively reliable source of jury-eligible Census information.

(3) The Court should provide technical assistance through OSCA to lawyers, judges, and jury managers so that underrepresentation determinations can be made accurately, timely, and with confidence. The Court can and should clarify that defense counsel must research the prong 2 aggregated data and the prong 3 systematic exclusion components of the fair cross-section issue *well in advance of the day of trial*. Defense counsel must ascertain the jurisdiction's aggregated jury pool/panel data for the most recent 6-12 months for which data is available and the most currently available comparative Census data, and, if the aggregated data suggests statistically significant underrepresentation, to file a pre-trial Notice of Anticipated Fair Cross-Section Challenge, commence research as to the likely cause (which often will require expert assistance), and have the matter set for hearing. See Trilogy at 534-537, 540-41, and 594. To be sure, defense counsel *cannot* wait until the day of trial to address this critical issue.

(4) The Judicial Branch, through OSCA, the district court, and the jury managers, should monitor on an ongoing basis the district's own data to see if there are any problems, that is, whether it indicates the county's jury pools and panels are not representative, so that the court system can make corrections if, and when, the data reveal problems. The 2015 Branstad Committee's Report

emphasized how critical this judicial monitoring function is to fulfillment of the fair cross-section right:

> Chapter 607A should be updated to allow for the use of current technology and to clarify the responsibilities of the State Judicial Branch and each Judicial District as to oversight and accountability for the jury selection process. The responsibility of each to take affirmative steps to ensure jury pools that truly reflect a fair cross section of the community will require ongoing monitoring and coordination at both the State and District Court levels.

Chapter 607A has been updated, but the recommendation on monitoring has not been implemented. Monitoring the data enables the Chief Judge and the court to take corrective steps when there is time to do so in a principled way. With the assistance of OSCA, each jurisdiction should report on its web page its own assessment of its compliance with the fair cross-section requirement at least quarterly.

(5) The Excel Binomial Distribution Software provides a straightforward way to make the Standard Deviation calculation required by *Lilly*. It requires instruction—something to which we are all accustomed—but it is eminently learnable and, once mastered, will enable lawyers, judges, and jury managers to make standard deviation calculations with accuracy and confidence. In the NAACP's view, ideally the Judicial Branch would dedicate one staff employee as a back-up resource who would assist judges, lawyers, and jury managers in the making of fair cross-section calculations using the Excel Binomial Distribution

software or a similar computer program and would assist each jurisdiction in monitoring compliance as outlined in (4) above. We are aware that the Judicial Branch has experienced funding cuts in recent years, but the NAACP believes providing this support and expertise would significantly improve the implementation of fair cross-section principles on the ground in districts across the State of Iowa, and would prove cost-effective. Once people have been trained and gain experience, the NAACP is confident the level of OSCA support required will diminish.

(6) On the day of trial, the jury manager should routinely provide the prosecutor and defense counsel with the necessary data regarding the jury pool and the jury panel for the defendant' trial.

Paula Hannaford-Agor reports that such pro-active steps reflect good jury management, and that a by-product of good jury management practice are juries that are representative of the community. She emphasized that such good jury management techniques are employed routinely "by the vast majority of courts." Hannaford-Agor at 764. The NAACP urges this Court to take the pro-active steps that will ensure the fair cross-section principle is readily workable. That will lead to jury pools and panels that truly reflect their communities and will ensure that fair cross-section principles are not merely "law on the books" but "law in action."

CONCLUSION

The Court should reverse the District Court and hold that Kelvin Plain is entitled to a new trial.

/s/ *Russell E. Lovell, II*

Russell E. Lovell, II
4055 42nd Street
Des Moines, IA 50310
Phone: (515) 271- 1806
Fax: (515) 271- 4100
AT0004851
Russell.lovell@drake.edu
COUNSEL FOR THE NAACP

/s/ *David S. Walker*

David S. Walker
1922 80th Street
Windsor Heights, IA 50324
Phone: (515) 556-7944
Fax: (515) 271-4100
AT0008229
David.walker@drake.edu
COUNSEL FOR THE NAACP

CERTIFICATE OF FILING AND CERTIFICATE OF SERVICE

The undersigned certifies that on Friday, January 15, 2021, he filed this Brief of *Amicus Curiae* NAACP with the Clerk of the Iowa Supreme Court and on all other parties by EDMS to their respective counsel and mailed a copy to Appellant's last known residential address.

Office of the Attorney General of Iowa
Louis Sloven, Assistant Attorney General
Criminal Appeals Division
Hoover Building
Des Moines, Iowa 50319

/s/ *Russell E. Lovell, II*

Russell E. Lovell, II
4055 42nd Street
Des Moines, Iowa 50310
Phone: (515) 271-1806
Fax: (515) 271-4100
AT0004851
Russell.lovell@drake.edu

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d), 6.903(1)(g)(1), and 6.906(4) because it has been prepared in a proportionately spaced typeface using Times New Roman in size 14 point and contains 6,994 words excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ *Russell E. Lovell, II*
Russell E. Lovell, II
4055 42nd Street
Des Moines, Iowa 50310
Phone: (515) 271-1806
Fax: (515) 271-4100
AT0004851
Russell.lovell@drake.edu