RACE & JURY TRIALS

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Jury Duty, Serve
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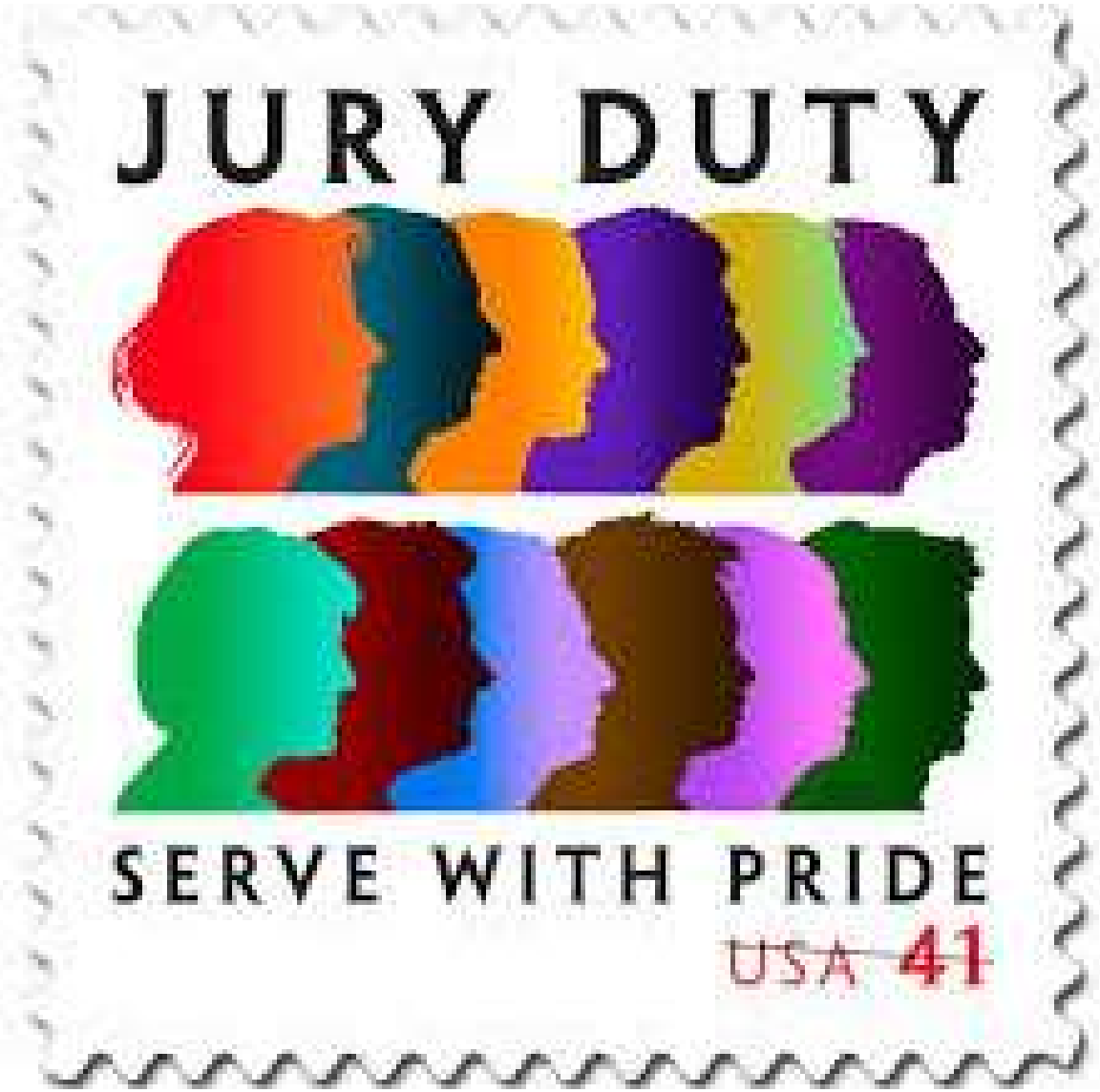

THE CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY: PART I

- The Sixth Amendment guarantees an accused "in all criminal prosecutions" the right to "an impartial jury of the State and district wherein the crime shall have been committed."
- Article I, Section 10 of the Iowa Constitution guarantees a criminally accused the same right.
- *Taylor v. Louisiana* and *Duren v. Missouri*: The Impartial Jury requirement demands that a jury be drawn from jury pools *and* jury panels that reflect a "fair cross-section" of the community served by the trial court.
- A major focus of the NAACP has been the issue of whether the jury panel in criminal cases involving an African American defendant fairly represents—does not *underrepresent*—African Americans and Blacks.
- *State v. Jones* (Iowa 1992): Badly flawed fair cross-section ruling created a 25-year desert.
- Catalyst: NAACP, 2015 Summit on Justice & Disparities, 2015 Branstad Committee Report.
- *State v. Plain* (Iowa 2017): Unanimous decision revitalized fair cross-section right in Iowa.

IMPORTANCE OF AN "IMPARTIAL JURY" & "FAIR CROSS SECTION"

- An "impartial jury" means that an accused is entitled to a jury free of bias and it also (1) provides protection against "the apprehended existence of prejudice" and (2) promotes public confidence in the administration of justice.
- An "impartial jury" drawn from a "fair cross-section" of the community reinforces the appearance of fairness and the independence of the judiciary in a democratic society—contrary to trials before judges beholden to the Crown.
- Studies and experience have demonstrated that the presence of African American jurors can shift the attitudes of white jurors, lead to the exchange of more information, greater likelihood and willingness to discuss racism, and improve deliberation by members of the jury.
- Whereas a jury drawn from a jury panel with one or more black jurors would convict a white and a black defendant at about the same percentage rate, a jury drawn from an all-white panel convicted black defendants 81 percent of the time while a jury drawn from a racially mixed panel did so only 66 percent of the time. Shamena Anwar, Patrick Bauer, and Randi Hialmarsson Q.J. Econ. (2012), cited by the Iowa Supreme Court in the *Plain* opinion (jury panels of about 30).
- Given the racial disparities in the criminal justice system—for example, with barely 4% of Iowa's population, African Americans represent 25% of those incarcerated in Iowa's correctional system—it is incumbent upon us to ensure an accused's right to an "impartial jury" drawn from a "fair cross-section" of the community is secured.

AN EFFECTIVE IMPLICIT BIAS INSTRUCTION, GIVEN AT THE OUTSET OF TRIAL AND AGAIN AT THE END, IS ESSENTIAL

- An "impartial jury" is necessarily one free of explicit bias but also *implicit bias*.
- Our focus this morning is on securing jury panels that represent a fair cross-section of the community served by the trial court, but that effort will go for naught unless the court and counsel address the reality of implicit bias in, well, nearly everyone in one way or another, certainly with respect to race and ethnicity in today's world.
- In *State v. Plain* (Iowa 2017), the Iowa Supreme Court recognized the reality of implicit bias and directed trial judges to be "proactive" in addressing it;
- But in *State v. Veal* (Iowa 2019), a majority of the Court approved as an acceptable implicit bias instruction one that we, and Justices Appel and Wiggins, concluded was off-point and hardly calculated to address the problem.
- In our writing and speaking we have criticized that aspect of the *Veal I* opinion, and we believe the Judicial Branch and the Bar should develop a much, much more explicit and effective implicit bias instruction; and we have cited as an effective example the instruction Federal Judge Mark Bennett developed, gave, and has written about.
- But that is not our topic for this morning.

THE DUREN PRIMA FACIE FAIR CROSS-SECTION CLAIM.

- *Taylor v. Louisiana* (U.S. 1975) held that "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."
- *Duren v. Missouri* (1977) articulated a three-prong, prima facie test requiring proof that (1) "the group alleged to be excluded [from the jury system] is a 'distinctive' group in the community," (2) "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) "this underrepresentation is due to systematic exclusion of the group in the jury-selection process."
- If the defendant establishes these three prongs, he or she has established a prima facie violation of the fair cross-section right, and the burden shifts to the government to show "attainment of a fair cross section to be incompatible with a significant state interest"—which requires more than mere rational interest.
- *Duren v. Missouri* held that a fair cross-section violation can occur at the jury panel stage, even though there was no underrepresentation at the pool stage.

THE DEFENDANT DOES NOT NEED TO BE A MEMBER OF THE UNDERREPRESENTED GROUP

- While most FCS challenges will be raised by defendants who are members of a racial minority group, the SCOTUS case law allows *any* defendant to raise a FCS claim.
- In *Duren v. Missouri* the SCOTUS upheld the FCS challenge by a male defendant to Missouri laws that had resulted in significant underrepresentation of women on his jury panel.
- Unfortunately, there is language in *State v. Plain I* that mistakenly suggests that "a defendant must establish membership in a distinctive group under community standards. * * * [A] defendant must show she has 'characteristics that are relevant to constituting a jury venire that is representative of the community.'"
- Jury pool: the members of the community selected for jury duty and summoned and reporting to the courthouse.
- Jury panel: the members of the pool directed to a particular courtroom to served as possible jurors for a specific trial.

STATE V. PLAIN (IOWA 2017): 6TH AMENDMENT FAIR CROSS-SECTION CLAIM DOES NOT REQUIRE PROOF OF DISCRIMINATORY INTENT

- Recognized the 6th & 14th Amendments "both protect the impartiality of a jury" but made an important distinction.
- 14th Amendment's Equal Protection Clause bars the *intentional* exclusion of or purposeful discrimination against protected minority groups.
- 6th Amendment guarantees minority groups will not be systematically excluded, even if there is no evidence of intentional exclusion or purposeful discrimination.
- Plain: "To establish systematic exclusion, a D must establish the exclusion is 'inherent in the particular jury-selection process utilized' but need not show discriminatory intent." That language is drawn from two United States Supreme Court landmark decisions, *Duren v. Missouri* (U.S. 1979) and *Taylor v. Louisiana* (U.S. 1975).
- Iowa Supreme Court unanimously OR'd the 10% Absolute Disparity test of *State v Jones* (Iowa 1992), which required the percentage of the distinctive group in the population served to be 10% or more greater than the percentage in the panel.
- The Supreme Court recognized that there wasn't a single county in Iowa in which African Americans constituted 10% of the jury-eligible population, and therefore could never demonstrate a 10% Absolute Disparity even if every African American had been excluded from jury service forever. Jones created a desert whose vestiges continue today.

PLAIN: CONSTITUTIONAL RIGHT TO ACCESS TO JURY RECORDS. THERE IS NO THRESHOLD SHOWING REQUIREMENT.

- Although there was no Iowa statute authorizing access to jury records by defense counsel, *Plain held that* a defendant has a constitutional right "to access the information needed to enforce their constitutional right to a jury trial by a representative cross-section of the community." 898 N.W.2d at 828.
- The trial judge may not require a showing of probable success on the merits as a condition of inspection of the jury records.
- The *Plain* Court relied upon the Missouri Supreme Court's holding that the "[fair] cross-section requirement would be without meaning if a defendant were denied all means of discovery in an effort to assert that right."
- "Because our statutes do not specify a procedure for accessing the information, [defendant Plain] took what we view to be a reasonable approach—he asked the jury manager to provide it." 898 N.W.2d at 828.
- NAACP has advocated that OSCA should make county jury data publicly accessible and available ONLINE.

LITIGATION POINTER: DEFENDANT MUST OBTAIN HISTORICAL JURY DATA EARLY TO ESTABLISH PRONG 2 UNDERREPRESENTATION AND TO SECURE EXPERT WITNESS ON SYSTEMATIC EXCLUSION PRONG 3

- PRE-TRIAL LITIGATION REALITY: Defense counsel must ANTICIPATE Fair Cross-Section CLAIM: Jury data must be obtained EARLY PRE-TRIAL. If it shows statistically significant underrepresentation, D must obtain Court approval for expert witness to research and testify re systematic exclusion based on jury management practice. .
- NAACP: We repeat: Court System Jury Data should be publicly accessible ONLINE.
- *State v. Plain* also recognized that implicit bias exists and is real, and the Supreme Court encouraged District Court Judges to be pro-active in addressing it. Trial Judge have discretion to give an Implicit Bias Jury Instruction but district courts are NOT required to do so.
- Implicit bias in peremptory challenges has not been found to violate Batson v Kentucky and Holland v. Illinois (USSC) held that 6th Amendment FCS principles do not apply to the 12-person jury itself.
- Therefore, alleged discriminatory peremptory challenges must be brought under the 14th Amendment Equal Protection Clause and require proof of intentional discrimination.
- Washington, California, and Arizona have enacted major reforms in recent years. Washington and California prohibit peremptory strikes that reflect implicit bias. Arizona has abolished peremptory challenges entirely.

12 PERSON JURY

Constitution Goal:

Juries that represent a fair cross section of community.

THE CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY: PART II

- **It Takes a Village**: Branstad Committee Recommendations; Amendment of Iowa Code 607A; Supreme Court Jury Selection Advisory Committee Report (March 2018); Todd Nuccio, State Court Administrator; OSCA Jury Management Policy; Training of Jury Managers; State Data Center jury-eligible Census population web page
- *Lilly-Veal-Williams* Trilogy (Iowa 2019)
- Lilly is LANDMARK DECISION, invoking Court's independent authority to construe Iowa Constitution more generously than SCOTUS has construed Federal Constitution on both Prong 2 and Prong 3. NAACP Amicus.
- Proposed Amendments of Iowa Rules of Criminal Procedure (Pending 2022)
- Lovell & Walker, *Achieving Fair Cross-Sections on Iowa Juries in the Post-Plain World: The Lilly-Veal-Williams Trilogy*, 69 Drake L. Rev. 499 (2020). https://lawreviewdrake.files.wordpress.com/2021/01/lovell-walker-final.pdf.

BEWARE: THE "STANDING" COMPONENT OF LILLY'S 2-PRONG UNDERREPRESENTATION TEST IS THE SECOND STEP, NOT THE FIRST

- BEWARE: In proving *Duren* prong 2 Underrepresentation, *Veal II (2022)* states that Defendant must "first establish" constitutional injury or standing. From a litigation standpoint, this creates a trap for the unwary because the racial composition of Defendant's own jury panel cannot be determined until the day of trial. Defense counsel must begin her FCS research and discovery months before the day of trial, or it is TOO LATE!
- From a litigation standpoint, the first step is gathering the historical data and establishing the Court system's 6-month aggregate data shows underrepresentation at the 1 standard deviation level for the Iowa Constitution. Defense counsel's second step should be to request approval for funding from the Indigent Defense Fund for an expert on jury management practices. Lilly II made clear defendant cannot prove systematic exclusion without such expert testimony.
- Defendant must gather the evidence relevant to proving systematic exclusion exists, take depositions and other research, BEFORE defendant knows the racial composition of her jury pool and jury panel.
- Defendant should alert the trial court when underrepresentation in the historical aggregate panel data is evident through a Pre-trial Notice of Anticipated Fair Cross-Section Challenge and request for appointment of an expert.
- Lovell & Walker, Achieving Fair Cross-Sections on Iowa's Juries, 68 Drake Law Review, pages 532-543.

STATE V. LILLY:
PROVING DUREN PRONG 2 UNDERREPRESENTATION

- *State v. Lilly* (Iowa 2019) (4-3) interpreted the "impartial jury" guarantee of Article I Section 10 in the Iowa Constitution independently of the U. S. Supreme Court's interpretation of the 6th Amendment on prong 2 Underrepresentation AND Prong 3 Systematic Exclusion.
- Prong 2 has 2 components: (1) Underrepresentation on historical jury panel data for the preceding 6-12 months [determined pre-trial]; (2) Underrepresentation on Defendant's own jury panel [determined on day of trial when jurors assigned to courtroom];
- Historical Aggregated Data. Typically, 6 months data from multiple jury pools will be used to show the underrepresentation is systemic, so long as the data were not selective. Defendant must show that the representation of a distinctive group in the aggregated jury pool data falls below its representation in the jury-eligible Census population by one standard deviation or more. It provides confirmation that underrepresentation on D's own jury panel is not aberrational. Under the 6th Amendment, two standard deviations are required.
- Standing/Individual Injury. *Lilly I* held that a defendant whose jury panel contains at least as high a percentage of the distinctive group as the jury-eligible population has not been aggrieved under the *Duren/Plain* framework. *Veal II* (2022) confirms the Lilly I Standing requirement: if % of African Americans in Defendant's jury panel is less than the % of African Americans in the County's jury-eligible Census population, Defendant has standing. IMPORTANT NOTE: standard deviation test does NOT apply to standing.
- The most current Jury-Eligible Census Data must be used as the basis for comparison, adjusted for any reliable data that might affect eligibility, *e.g.*, persons under 18 years of age, persons in prison, multi-racial persons.

STATE V. LILLY:
PROVING DUREN PRONG 3 SYSTEMATIC EXCLUSION

- "[W]e do hold today that jury management practices can amount to systematic exclusion for purposes of article I, section 10." Justice Mansfield relied on Hannaford-Agor Drake Law Review article.
- "If a practice that leads to systematic underrepresentation of a distinctive group in jury pools can be identified and corrected, there is no reason to shield that practice from scrutiny just because it is relatively commonplace. At the same time, the defendant must prove that the practice has caused systematic underrepresentation.
- "Run-of-the-mill jury management practices such as the updating of address lists, the granting of excuses, and the enforcement of jury summonses can support a systematic exclusion claim where the evidence shows one or more of those practices have produced underrepresentation of a minority group.
- "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."
- The Court confirmed in Lilly II that defendant must prove "causation," that is, that the underrepresentation actually resulted from a particular feature or features of the jury selection system, with expert testimony.

"RIGHT TO A FAIR AND IMPARTIAL JURY IS CRITICAL TO CRIMINAL JUSTICE SYSTEM" AND REQUIRES COMPREHENSIVE APPROACH

- Justice Appel' Special Concurrence, joined by Justice Wiggins, described the comprehensive approach required:
- (1) we must reinforce the progress made in these cases by developing a proper approach to step three [the systematic exclusion prong] of *Duren* and *Plain*, (2) reconsidering our approach to *Batson* [protection against discriminatory peremptory challenges], (3) ensuring a robust opportunity to voir dire potential jurors on potential bias, and (4) providing the jury, at the commencement of trial and after the close of evidence, with an appropriate instruction on implied bias if requested by the defendant. If we were to address the serious issue of ensuring a fair cross section in the jury pool, but not the other important aspects of a jury trial, the progress made today may be illusory." Id. at 33-34.
- Lovell & Walker, A FAIR AND IMPARTIAL TRIAL FREE FROM RACIAL DISCRIMINATION WILL REQUIRE AN ACROSS-THE-BOARD APPROACH": SYSTEMIC REFORMS STILL NEEDED IN LIGHT OF THE "OTHER" RACIAL JUSTICE JURY TRIAL RULINGS IN STATE V. VEAL & STATE V. WILLIAMS, Drake Discourse (ONLINE Law Review
- https://lawreviewdrake.files.wordpress.com/2021/06/a-fair-and-impartial-trial-free-from-racial-discrimination-will-require-an-across-the-board-approach22-systemic-reforms-still-needed-in-light-of-the-22other22-racial-justice-jury-trial-r.pdf.

WAIVER REQUIREMENT STRICTLY CONSTRUED RE IOWA CONSTITUTIONAL FAIR CROSS-SECTION CLAIM

- *Plain II*, *Veal* II, and *Williams II* applied strict waiver standards regarding raising Iowa constitutional claims. In *Veal*, although defendant had raised an Article I, §10 state constitutional claim when making a *Batson* challenge, the Court held this was insufficient to assert such an Iowa constitutional claim as to his *FCS* challenge.
- Litigation Pointer: Defense Counsel must be very specific in asserting State Constitutional claims—both as to the judicial or other policy that is being challenged AND as to the specific Iowa Constitutional provision upon which the defendant is relying.

VEAL II: UNDERREPRESENTATION BASED ON HISTORICAL AGGREGATED JURY DATA FROM "MULTIPLE JURY POOLS" PRECEDING TRIAL (6 MONTHS DATA IS TYPICAL)

- In each of its Briefs in *Lilly II*, *Veal II*, and *Williams II*, the State persisted with its effort to severely restrict aggregation to the fewest number of jurors that could be the basis for a 1 or 2 standard deviation result.
- *Veal II (2022)* unanimously rejected the State's position. It explained the defendant must "prove underrepresentation in the defendant's own jury pool by a straight-forward comparison of the actual percentage of the distinctive group in the jury pool against the group's percentage in the jury-eligible population." In addition, the defendant must "show that the percentage of the distinctive group in the defendant's own pool or in jury pools over a recent representative period is less than the expected percentage by at least—under the Sixth Amendment—two standard deviations. * * * Historical data from multiple jury pools may be aggregated for this analysis. * * * In *Duren v. Missouri*, for instance, the defendant's trial began in March 1976, and the analysis focused on the county's historical jury pool data from June-October 1975 and January-March 1976."
- "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 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." ¶28, Expert Report, Professor Amy Vaughan, Drake University, State v. Plain, Oct. 31, 2019


800th ANNIVERSARY
1215 MAGNA CARTA 2015

PROVING PRONG 2 UNDERREPRESENTATION: (1) COURT SYSTEM JURY DATA; (2) CENSUS DATA; (3) STANDARD DEVIATION ANALYSIS

PRE-PANDEMIC COURT SYSTEM DATA SUGGESTS JURY PANEL DATA WILL BE FOCUS OF FUTURE FAIR CROSS-SECTION CLAIMS

- Preliminary OSCA jury pool data for the first January-June 2019 suggested that Iowa's more urban counties had cumulative jury data in which African Americans were NOT underrepresented at the jury pool stage.
- However, the OSCA data also indicated the percentage of African Americans declined as the selection process proceeded, and statistically significant underrepresentation existed in several urban counties at the jury panel stage.
- Under *Taylor* and *Duren*, defendants can bring a meritorious FCS challenge to their jury panel even though the jury pool was not unrepresentative.
- The recent OSCA juror data provided included Juror Empanelment information, which is new. At the NAACP's urging, the OSCA is beginning to collect data at the challenge for cause and peremptory challenge stages of the jury selection process.
- Plain held that defendants are entitled to access the court system's jury data. The NAACP advocates that jury data be publicly accessible ONLINE.

PRONG 2: JURY-ELIGIBLE CENSUS DATA

- *Lilly* held that trial courts should base FCS comparisons of the Court System's jury data to the community's jury-eligible population data, NOT the general population. *Lilly* specifically discussed the need to exclude those individuals who were 17 and under and those who were in state prisons from the Census data population count.
- The Census Bureau's American Community Survey (ACS) has annual reports from which each County's population of U.S. Citizen's 18 years of age and older can be calculated, and it breaks down the data by race and ethnicity. ACS Tables B05003, B05003B, etc. Sex by Age by Nativity and Citizenship Status (best to use 5-Year Estimates). State Data Center bases is its calculation on ACS data because it is updated annually.
- 2020 Decennial Census Table P10 will provide for each County the population that is 18 years of age and older. It will break down the data by race and ethnicity, but NOT by U.S. citizenship; there are also concerns about the undercount of African Americans and Latinos. The Decennial Census data becomes dated as the years go by.

STATE DATA CENTER WEB PAGE: JURY-ELIGIBLE CENSUS POPULATION, BROKEN DOWN BY RACE, FOR ALL 99 IOWA COUNTIES

- At the request of the NAACP, State Census Coordinator Gary Krob prepared user-friendly Jury-eligible population calculations based on the most recent American Community Surveys (for calendar years 2017 - 2020) for all 99 Counties in Iowa, broken down by race and ethnicity, non-whites, gender, AND U.S. Citizenship.
- Table 1 summarizes the actual data from Tables B05003 (A-I) for persons 18 years and over, broken down by Race-ethnicity and Sex for: White alone; Black/African American alone; American Indian and Alaska Native alone; Asian alone; Native Hawaiian and Other Pacific Islander alone; Some other race alone; Two or more races; Hispanic or Latino; White alone not Hispanic or Latino.
- Table 2 reflects the 18 and over U.S. citizen population for each county, broken down by the race and ethnic categories in Table 1, with each group's percent of the total county citizen population 18 years and over. Jury-eligible population!
- Krob will update the Jury-eligible calculations annually, once the ACS report is made public, typically in December, allowing for the update calculations to be posted by March.
- The State Census Data Center's web page: https://www.iowadatacenter.org/data/acs/social/citizenship/18over-nativity.

HOW TO ACCESS THE CENSUS DATA DIRECTLY

- Census.gov + Explore Data + Explore Data Main + "B05003, Polk County, Iowa"
- https://data.census.gov/cedsci/all?q=B05003%20Pok%20County,%20Iowa.
- Click on "Sex by Age by Nativity and Citizenship Status." Under "Product" click on the dropdown menu and click on the relevant year, the most recent is 2018, and on the ACS 5-Year Estimates Detailed Tables. This table for Polk County will enable you to readily determine the number of persons overall who are 18 years and over AND U.S. citizens by making simple arithmetic calculations.
- You then do the same search for the distinctive racial group in question. For "African Americans/Blacks alone," click on "B05003B, Polk County, Iowa." You then calculate the number of African Americans who are 18 years and over AND U.S. citizens. Dividing the number of African Americans U.S. citizens 18 and over by the overall number of Polk County U.S. citizens 18 and over will give the jury-eligible "African-American/Blacks alone" population.

THE ONE STANDARD DEVIATION THRESHOLD: 16% CHANCE THAT UNDERREPRESENTATION WAS RANDOM EVENT

- When a **State** FCS Constitutional Challenge is made, *State v. Lilly* held: "[W]e conclude the threshold should be one standard deviation—in other words, the percentage of the group in the jury pool must be one standard deviation or more below its percentage in the overall population of eligible jurors. As we understand it, when the variance is one standard deviation, . . . the probability would be 16% that the departure is a random event and 84% that it is not."
- When a Federal Constitutional 6th Amendment FCS Challenge is claimed, a two standard deviations threshold must be met. Then, there would remain a 2.5% probability that this result occurred randomly and 97.5% that it is not.

PROVING DUREN PRONG 3: SYSTEMATIC EXCLUSION

- In *Duren v. Missouri* the U.S. Supreme Court explained "systematic exclusion" is something "inherent in the particular jury-selection process utilized."
- A state law that legally excluded Blacks from serving on juries (*Strauder v. West Virginia*) or state laws that automatically exempted women unless they affirmatively volunteered (*Taylor v. Louisiana*) or made women eligible for jury service but then presumptively exempted them (*Duren v. Missouri*), leading to underrepresentation, are examples of "systematic exclusion;"
- But so are instances where there is a pattern and practice—where jury commissioners routinely excluded and made no effort to include African Americans on grand juries the commissioners called to serve. (*Smith v. Texas*)
- These are pattern and practice instances where the State has actively prevented or excluded a distinctive group from being summoned for the jury pool or panel from which the trial jury will be drawn.

PRONG 3: MUST THE STATE BE PROACTIVE IN SECURING A "FAIR CROSS-SECTION" OF THE COMMUNITY IN JURY PANELS?

- The systematic exclusion in *Strauder, Taylor, Duren* or *Smith* was the result of affirmative governmental action.
- Factors significantly contributing to underrepresentation of distinctive groups such as African Americans in jury pools and panels are often perceived to be as a result of private choices:
  - People don't register to vote or obtain a driver's license and so are not on the lists from which the Source List is compiled;
  - Summons are issued but are undeliverable because of bad addresses—people have moved (12% annually), especially people with lower incomes;
  - People who are summoned fail to respond, or the person receiving it isn't the person summoned, and it's discarded;
  - People complete and submit the jury questionnaire, but they fail to appear—they don't want to serve—and there's no or only rare enforcement of the summons and order—no consequences.
- Are these "private choices" *not attributable to the system*? If underrepresentation can be attributed to factors like these, does the State have any obligation be proactive and to counteract these factors?

PRONG 3: JURY MANAGEMENT PRACTICES ARE WITHIN THE COURT SYSTEM'S CONTROL AND CAN HELP SECURE A FAIR CROSS SECTION

- Many courts have held that reasons such as these for underrepresentation reflect "private choices" and that the State has no obligation to counteract or compensate for their effect, even if they can be demonstrated to have contributed to underrepresentation of a distinctive group in the jury pool.
- One reason for that view that is apparent in cases is that courts continue to be influenced by 14th Amendment Equal Protection analysis, requiring intentional acts and "substantial underrepresentation," and they fail to identify the 6th Amendment—or Article I, Section 10 of the Iowa Constitution—as the source of an accused's right.
- Jury management practices *can* improve and help secure a fair cross-section of the community in jury panels—supplementing and improving the Source List, updating addresses, issuing a second summons and following up on failures to respond, enforcing *the court order to appear for jury service*—and these *are* within the State's control.
- In *State v. Lilly* the Court stated that *Berghuis v. Smith* (U.S. 2012) "appears to reject this proposition [that jury management practices can amount to systematic exclusion] under the Sixth Amendment." These were called "run-of-the-mill" jury management practices, and unfortunately that pejorative label has stuck.
- *Williams II (2022), decided solely on the Sixth Amendment,* rejected Defendant's and Amicus NAACP's arguments to the contrary.

LILLY I: RUN-OF-THE-MILL JURY MANAGEMENT PRACTICES CAN BE BASIS FOR FINDING OF SYSTEMATIC EXCLUSION WHEN SUCH PRACTICES HAVE PRODUCED UNDERREPRESENTATION.

- The *Lilly I* Court embraced NAACP argument that the path-breaking 2011 Drake Law Review article by Paula Hannaford-Agor, based on her experience as Director of Jury Studies for the National Center on State Courts, should guide the trial judge's determination of systematic exclusion under the Iowa Constitution's impartial jury clause:
- "[W]e do hold today that jury management practices can amount to systematic exclusion for purposes of Article I, §10. 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.
- " * * * If a practice that leads to systematic underrepresentation of a distinctive group in jury pools can be identified and corrected, there is no reason to shield that practice from scrutiny just because it is relatively commonplace.
- "At the same time, the defendant must prove that the practice has caused systematic underrepresentation. In sum, we hold today that run-of-the-mill jury management practices such as the updating of address lists, the granting of excuses, and the enforcement of jury summonses can support a systematic exclusion claim where the evidence shows one or more of those practices have produced underrepresentation of a minority group."
- This holding will allow admission of evidence that the Court system and its jury managers failed to implement good jury management practices, the cumulative effect of which caused the underrepresentation of African Americans in the jury pools.

HANNAFORD AGOR'S DRAKE LAW REVIEW ARTICLE,

- Justice Mansfield quoted extensively from Hannaford-Agor's Drake Law Review article:
- "Litigants alleging a violation of the fair cross section requirement would still have to demonstrate that the underrepresentation was the result of the court's failure to practice effective jury system management. This would almost always require expert testimony concerning the precise point of the juror summoning and qualification process in which members of distinctive groups were excluded from the jury pool and a plausible explanation of how the operation of the jury system resulted in their exclusion. Mere speculation about the possible causes of underrepresentation will not substitute for a credible showing of evidence supporting those allegations."

Paula Hannaford-Agor (PHA), Systematic Negligence in Jury Operations: Why the Definition of Systematic Exclusion in Fair Cross Section Claims Must Be Expanded, 59 Drake L. Rev. 761, 790-91 (2011).

- National Center for State Courts (Center for Jury Studies) web site http://www.ncsc-jurystudies.org/. Here's Fair Cross-Section link: http://www.ncsc-jurystudies.org/What-We-Do/Fair-Cross-Section.aspx.

Notably, Office of State Court Administration developed and issued a Jury Management Policy requiring recommended practices: e.g., annual updating of jury pools and use of NCOA system for each summoned jury; better enforcement of summons when there's a failure to appear through show cause proceedings and communication of consequences of failure by the summoned juror. These steps reduced in the number of jurors summoned by 15% in Black Hawk County, resulting in cost savings and easing the burden on jurors.

THE CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY: PART III

- Governor Reynolds's Executive Order No. 7 (August 5, 2020)
- Iowa Supreme Court's Supervisory Order (February 19, 2021)
- OSCA Preliminary Jury Monitoring Plan (April 5, 2021)
- Iowa Supreme Court's 3d Generation 2022 Fair Cross-Section Decisions: Lilly II, Plain II, Veal II, and Williams II
- Proposed Guidance re Clarification of Litigation Framework for Fair Cross-Section Cases
- Proposed Guidance re Implementation of Supervisory Order

MAJOR DEVELOPMENTS THAT POTENTIALLY ADD 165,000 NEW CITIZENS TO IOWA'S JURY POOLS

- Governor Reynolds's Executive Order No. 7 (August 5, 2020) restored voting rights of most persons with a felony conviction who have discharged their sentences. Persons convicted of homicides and sexual offenses were carved out and required to apply individually for restoration of rights.
- The Iowa Supreme Court's February 2021 Supervisory Order, amending Iowa Rule of Criminal Procedure 2.18(5)(a), made persons previously convicted of a felony whose citizenship rights had been restored eligible for jury service. No longer could such persons be automatically excluded upon motion to dismiss for cause; they of course are otherwise subject to challenge for cause and peremptory challenge as any other juror.

STATE V. PLAIN II (JANUARY 21, 2022)

- In the hearing on remand, *which was only under the 6th Amendment*, Plain focused on the third prong of *Duren/Plain*, systematic exclusion as causing the underrepresentation. Nationally recognized jury management expert Paula Hannaford-Agor was retained as a court-appointed expert. The evidence relied upon was:
  - The failure of State Court Administration, the District Court, and the Jury Manager to update the jury source list by using the USPS National Change of Address System (NCOA) (in use for decades and urged by the National Center for State Courts for going on two decades) and instead relying on dated DOT information (renewed every 6-8 years), Iowa Courts Online, and the occasional yellow sticky notes USPS would attach to undeliverable summons;
  - The failure effectively to follow-up on failures to respond, except with a standard form, weakly stated reminder;
  - The failure to hold enforcement hearings for those who failed to appear—perhaps 10-20 a year after three such failures, or four since if a case pled out and no jury was impaneled, failure to appear wasn't counted. PHA testified, "The single biggest predictor of whether a person failed to respond or failed to appear for jury service was their expectation about what would happen if they didn't. People who believe that something bad will happen . . . are significantly more likely to appear and to respond than people who believe that nothing will happen if they don't appear or they don't respond."
- The District Court ruled against Plain on remand, and the Iowa Supreme Court affirmed Plain's conviction on appeal. The Court did NOT consider PHA's testimony as it rejected defendant's arguments as relying only on "run-of-the-mill" jury management practices, which cannot qualify as a basis for systematic exclusion under the 6th Amendment. There was no occasion to reconsider, as Justice McDonald had urged in *Lilly II*, *Lilly* I's holding that jury management and selection practices may be shown to have caused underrepresentation under the Iowa Constitution.

STATE V. VEAL II (2022) DIDN'T REACH PRONG 3 AS IT FOUND DEFENDANT HADN'T DEMONSTRATED UNDERREPRESENTATION

- The NAACP contended (1) that there was statistically significant underrepresentation in the Webster County jury pools and panels, and on Veal's own jury pool and panel, and (2) that felon exclusion per Rule 2.18.5(a), a principal cause of the underrepresentation, constituted systematic exclusion.
- The NAACP pointed to criminal justice system data in Iowa that reveals dramatic disproportionate representation of African Americans. Over 115,0000 persons previously convicted of a felony had had their citizenship rights restored, including according to NAACP calculations between 7-8% of the African American jury-eligible population, but—in contrast to Federal law—they were automatically excluded per 2.18(5)(a).
- The State conceded that under Rule 2.18(5)(a) that exclusion was automatic upon motion. There was no inquiry into how long ago a conviction had occurred, evidence of rehabilitation and reintegration into the community, acceptance of responsibility for wrong done, and commitment to decide the case impartially upon the basis of the evidence adduced at trial. Even those whose citizenship rights had been restored by the Governor were excluded from jury service.
- The NAACP also contended that the fact that the trial court makes no individualized inquiry as to bias before excluding jurors previously convicted of a felony distinguished the case from *Lockhart v. McCree*, which held that FCS principles don't apply to challenges for cause *which were based on individualized determinations as to each person when those who were struck could still serve in other criminal cases.*

STATE V. VEAL II:
NO UNDERREPRESENTATION UNDER PRONG 2 (3.23% > 3.02%)

- The Iowa Supreme Court affirmed the District Court's rejection of Veal's 6th Amendment fair cross-section claim, concluding that Defendant has failed to prove underrepresentation on his own jury panel. The Court summarized the evidence:
- "African Americans comprised 3.27% (5 of 153) of Veal's own pool and 8.82% (3 of 34) of Veal's own panel."
- "Veal's expert calculated the county's percentage of jury-eligible African-American population at 3.02%."
- NAACP: Since Defendant challenged the felon exclusion rule, 2.18(5)(a), the felons in the jury panel (2 African American and 1 white) should be excluded, per *Williams I*, from the underrepresentation calculation—reducing the African American percentage to 2% of his jury pool (3 of 150) and 3.23% of his panel (1 of 31).
- Stupendous Legal Fiction. The Court declined to exclude the felons from the count, reasoning that, while the court must exclude a felon from jury service if a party makes a challenge for cause, "[n]othing requires a party to make such a challenge." Bottom line, the Court found the 3.23% African American representation on Veal's jury panel exceeded the 3.02% African American population.
- The Court also held that *Holland v. Illinois* and *Lockhart v. McCree* precluded a 6th Amendment fair cross-section challenge to a state's challenge for cause procedures and its peremptory challenges.

STATE V. WILLIAMS II (APRIL 1, 2022)

- Williams was convicted upon conditional affirmance and remanded to consider his Fair Cross-Section challenge to his trial jury under the Sixth Amendment. The Iowa Supreme Court affirmed the conviction, reiterating that "run-of-the-mill" jury management practices cannot serve as a basis for proving systematic exclusion under the 6th Amendment.
- *Waiver was crucial.* *Williams* and *Veal* are 6th Amendment cases, and together with *Plain II* they make clear that counsel for the defendant must early and clearly invoke Article I, Section 10 of the Iowa Constitution in order to attempt to prove a FCS case under the more lenient standards *Lilly I* held apply under the Iowa Constitution.
- Justice Appel specially concurred, noting that Williams did not present a state constitutional claim, but observing that federal law's exclusion of "run-of-the-mill" practices was "unpersuasive." He also indicated he was "not sure that requiring the defendant to carry the burden of proof, rather than the burden of production, on the third prong of Duren is the proper approach," and that "a lack of remedy drives a stake in the heart of a substantive legal right."

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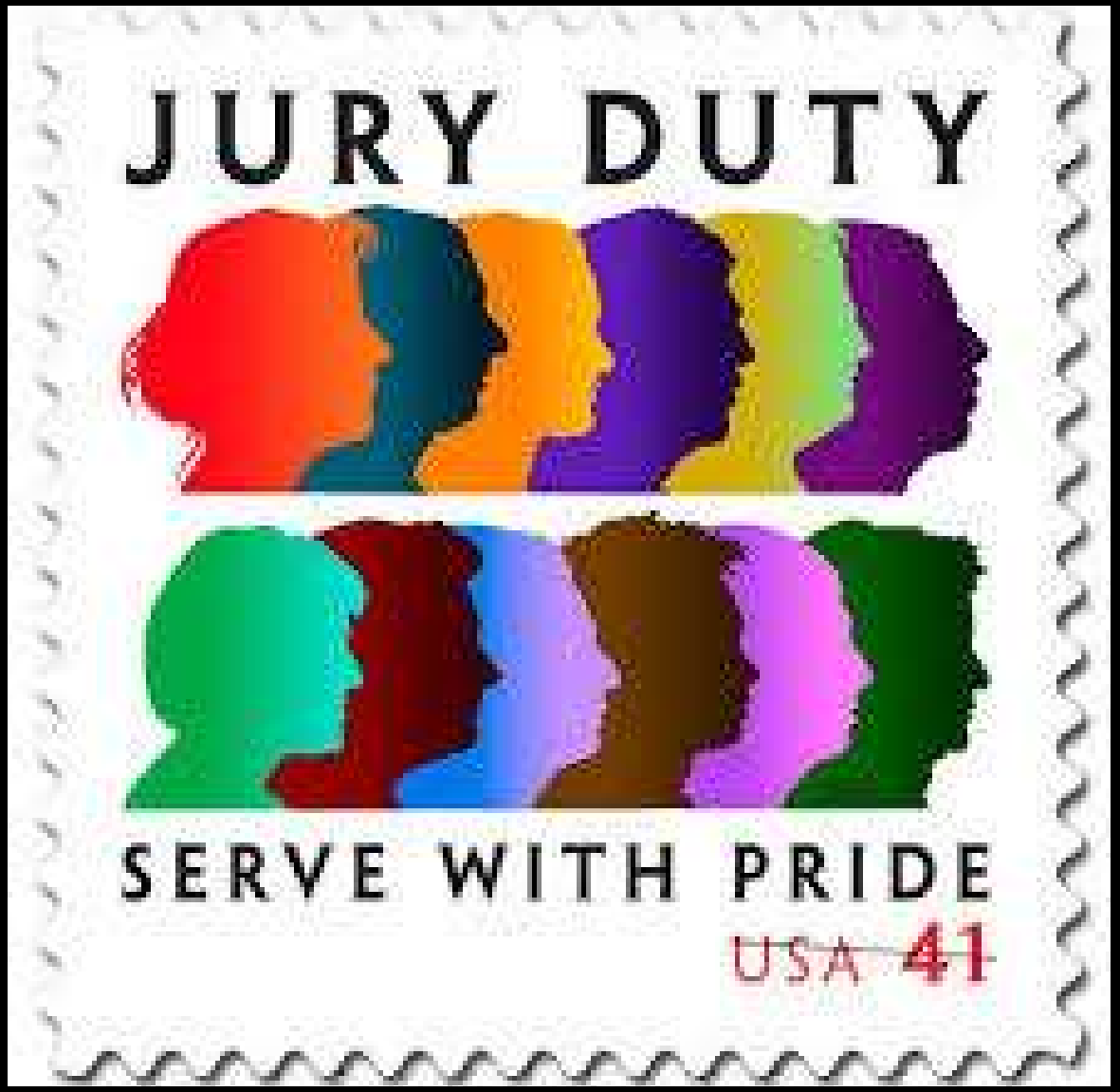

THE ROAD AHEAD: PERHAPS MORE RULE-MAKING AND GUIDANCE THAN CONSTITUTIONAL LITIGATION?

STATE V. LILLY II

- Following a hearing, the District Court on remand affirmed Lilly's conviction. This was the only case of the 4 FCS cases decided in 2022 that was decided under Article I, §10 of the Iowa Constitution. However, Lilly had not retained an expert on jury management and the systematic exclusion issue and had no chance. Lilly renewed an argument earlier rejected by the Iowa Supreme Court in the initial appeal about the inadequacy of the sources of the jury pool, namely, driver's license and non-operator ID's issued by the Department of Transportation and the voter registration lists, sources almost everywhere held adequate as a matter of constitutional law.
- Most troubling about the Court's opinion in Lilly II was the Concurring Opinion written by Justice McDonald, joined by Chief Justice Christensen and Justice Waterman, in which he wrote: "The Court's recent fair cross-section jurisprudence under the Iowa Constitution is undermining the administration of justice, rendering it incredibly difficult simply to have a jury trial without months of discovery, expensive motion practice, expensive expert witness testimony, and days of hearings. And to what end? None that have been evidenced to date."
- The NAACP strongly disagrees. Major improvements in jury management and selection practices have been made—OSCA's Jury Management Policy and on-going Jury Monitoring Plan—and the data-gathering and accessibility that are essential to the constitutional right of access to such information that *Plain I* articulated. The pre-pandemic 2019 OSCA 6-month jury data showed progress: jury pools appeared to be representative in urban counties, as were aggregate jury panel data in several counties.

JURY MANAGEMENT TOOLS THAT, IF IMPROVED, WILL HELP ENSURE MORE REPRESENTATIVE JURY POOLS

- Increasing renewal frequency of Master Lists. Iowa 607A: update addresses at least every year. Use Postal Service NCOA for each summoned jury pool to update addresses and reduce impact of undeliverable summonses.
- OSCA is seeking current addresses from state income tax records. Legislation supported by the Judicial Branch, the OSCA, the State Attorney General's Office, and the NAACP was introduced but failed to advance (HF455).
- Improving jury summons response: Sending strongly worded 2nd summons to nonresponders and improving enforcement for Failure to Appear.
- OSCA's Jury Management Policy, adopted December 2018 and effective January 1, 2019, has made major improvements.
- Shortening length of service. Polk County: 1 week or 1 trial. Such steps reduce excusal rate for hardship, especially for financial reasons.
- Use of electronic juror questionnaire and requiring response re race and ethnicity are providing much, much better data.
- Jury Monitoring Plan, issued April 5, 2021, by State Court Administrator Todd Nuccio, which has been the subject of discussion between the NAACP and State Court Administrator Bob Gast and which is a work in progress.

A PLAN FOR LITIGATION OF FAIR CROSS-SECTION CLAIMS THAT WILL PROTECT THE CONSTITUTIONAL RIGHT & BE WORKABLE

- Proper disposition of fair cross-section claims requires that the defendant, prosecutor, and court have evaluated the aggregate 6-month Court System data well in advance of the trial date to determine whether there has been underrepresentation in the aggregated data at the 1 standard deviation level.
- If there is underrepresentation in the 6-month historical data, the District Court should approve a jury management expert to assess the cause of the underrepresentation and to determine whether better jury management practices would have minimized or eliminated the underrepresentation; and report on the steps that can be taken to provide reasonable assurance that D's jury panel will be representative.
- Due to the 25-Year-Long Fair Cross-Section Desert Created by *State v. Jones*, it is Incumbent upon the Judicial Branch to Take Pro-Active Steps to Ameliorate *Jones*'s Continuing, Longstanding Effects
- The Court Can Facilitate More Thorough Development of the Record in the Resolution of Fair Cross-Section Claims by (1) OSCA Making the Court's Jury Selection Data Publicly Accessible Online and by (2) OSCA Providing Instruction to All Participants on How to Use the State Data Center's Jury-Eligible Population web page.
- Technical Support by the Judicial Branch, including the Analytical Tool Currently Under Development by Iowa State University, Should Be Made Available to Jury Managers, District Judges, and Defense Counsel.
- NAACP and SPD plan to contact the Provosts of all of Iowa's college and universities in a public service effort to encourage professors and researchers to develop expertise in fair cross-section claims and jury management practices. We envision they could serve as consultants and expert witnesses.

IMPLEMENTATION OF SUPERVISORY ORDER MAKING PERSONS WHOSE CITIZENSHIP RIGHTS HAVE BEEN RESTORED JURY-ELIGIBLE

- The Judicial Branch Should Be Proactive and Both on the Questionnaire and in the FAQs Clearly Explain the New Right to Serve as a Juror and Its Importance to the Criminal Justice System and the Defendant.
- The Judicial Branch Should Amend the Juror Questionnaire and the Judicial Branch Web Page to Provide Notice, Welcome, and Encouragement to Those Whose Citizenship Rights Have Been Restored, and Clarify the Multi-Racial Question; Judicial Branch Podcast and Video; Post at County Courthouse
- There should be individualized voir dire of persons previously convicted of a felony, it should be conducted by the Judge, and the Judicial Branch web page should be revised accordingly, *e.g.*, the FAQs, So That a Prospective Juror Whose Citizenship Rights Have Been Restored Will Not Be Fearful of Embarrassment During Voir Dire by attorneys in open court.
- Maine's Judge-Centered Individualized Voir Dire of Those Whose Citizenship Rights Have Been Restored Strikes the Right Balance.
- Judicial and Attorney Implicit Bias Education and Dialogue/Study Committee about Challenges for Cause and Peremptory Challenges of Persons Previously Convicted of a Felony Eligible to Serve on Juries Because Their Citizenship Rights Have Been Restored
- Judicial Branch Should Require Comprehensive and Publicly Accessible Data Collection on Every Step of the Jury Selection Process, Including Challenges for Cause and Peremptory Strikes.
- Inclusion of "Convicted Felons" on Maine Juries "Foster[ed] Prosocial Change Among All Who Took Part.

SHIFTING BURDEN OF PROOF TO THE STATE ON PRONG 3 SHOULD GET CLOSER CONSIDERATION

- The NAACP has argued that because the State has much greater access to the jury data and to what was done in jury management and selection, the State should bear the burden of proof on the issue of systematic exclusion once underrepresentation both in the jury panel and in the aggregate data are shown. In our view, at least *the burden of producing the relevant evidence*—the burden of production, if not the risk of non-persuasion, should be on the State.
- Thus far, the Court has rejected the NAACP's argument. In *Lilly* Justice Mansfield stated, "[A]t this time we not prepared to embrace the NAACP's [broader] proposal 'that when the underrepresentation is severe enough, the court should relieve the defendant from proving the third *Duren/Plain* factor and instead shift the burden 'to the State to establish that its jury management practices have been reasonably calculated, in light of known best practices and available technology, to secure an impartial jury.'"
- However, Justice Mansfield added, "We may be willing to impose such an obligation in the future when we have more data about what those practices are and their effectiveness."—which he quoted in Lilly II. Slip Op. at 15. Remember, in order to make this argument you will need to have invoked Iowa's Constitution.
- The challenges of developing a workable pre-trial litigation process will require significant Judicial Branch involvement. Shifting the burden of proof on systematic exclusion would significantly ease the time pressures, and the costs, as OSCA can develop the experience and expertise to testify regarding jury management practices and systematic exclusion.