

THE SUPREME COURT OF IOWA

NO. 20-0617
North Lee County No. FECR008289

STATE OF IOWA.

PLAINTIFF/APPELLEE,

VS.

KENNETH LEE LILLY,

DEFENDANT/APPELLANT.

APPEAL FROM THE DISTRICT COURT
OF NORTH LEE COUNTY

THE HONORABLE MARY ANN BROWN, JUDGE

BRIEF OF AMICUS CURIAE
NAACP

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City of Keokuk, Iowa, B05003B, Sex by Age by Nativity and Citizenship Status (Black/African American Alone) (2017):

<https://data.census.gov/cedsci/table?q=B05003B%20Keokuk,%20Iowa&tid=ACSDT5Y2017.B05003B&hidePreview=false>. 23, 32

City of Fort Madison, Iowa, B05003B, Sex by Age by Nativity and Citizenship Status (Black/African American Alone) (2017):

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City of Keokuk, Iowa, Table P10, Race for the Population 18 years and Over (2010):

<https://data.census.gov/cedsci/table?q=Table%20P10%20Keokuk,%20Iowa&tid=DECENNIALS12010.P10&hidePreview=false>. . . 23, 32

City of Fort Madison, Iowa, Table P10, Race for the Population 18 years and Over (2010):

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OTHER

About the American Community Survey, United States Census Bureau,

[https://www.census.gov/programs-surveys/acs/about.html#:~:text=The%20American%20Community%20Survey%20\(ACS,funds%20are%20distributed%20each%20year](https://www.census.gov/programs-surveys/acs/about.html#:~:text=The%20American%20Community%20Survey%20(ACS,funds%20are%20distributed%20each%20year) (last visited August 29, 2020). 23

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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About the American Community Survey, United States Census Bureau, [https://www.census.gov/programs-surveys/acs/about.html#:~:text=The%20American%20Community%20Survey%20\(ACS,funds%20are%20distributed%20each%20year](https://www.census.gov/programs-surveys/acs/about.html#:~:text=The%20American%20Community%20Survey%20(ACS,funds%20are%20distributed%20each%20year) (last visited August 29, 2020).

CPS Historical Geographic Mobility/Migration Graphs, United State Census Bureau, Figure A-1, <https://www.census.gov/library/visualizations/time-series/demo/historic.html> (last visited on August 16, 2020).

IV. UNDERREPRESENTATION WAS ATTRIBUTABLE TO THE COURT’S FAILURE TO SUPPLEMENT THE SOURCE LIST, ESTABLISHING SYSTEMATIC EXCLUSION, AND WITH NO REBUTTAL BY THE STATE, DEFENDANT IS ENTITLED TO A NEW TRIAL.

AUTHORITIES

Duren v. Missouri, 439 U.S. 357 (1979).

State v. Lilly I, 930 N.W.2d 293, 304 (Iowa 2019).

State v. Plain, 898 N.W.2d 801 (Iowa 2017).

Taylor v. Louisiana, 419 U.S. 522 (1975).


STATUTES & RULES

Iowa Code section 607A.22(2).

Iowa Code section 607A.22(3).

OTHER

Francis X Flanagan, *Race, Gender, and Juries: Evidence from North Carolina* 61 *Journal of Law and Economics* 193 (2018).



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 (2011).

Shamena Anwar, Patrick Bayer, & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q. J. of Econ. 1017 (2012).

INTEREST OF AMICUS STATEMENT

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 I*. This appeal in *Lilly 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.

SUMMARY OF THE ARGUMENT

In *Lilly I* and *Veal*, this Court issued landmark Iowa constitutional holdings on the determination of underrepresentation and systematic exclusion in fair cross-section claims under *Duren/Plain* prongs 2 and 3. *Lilly* instructed that persons (1) under 18 and (2) in prison should be excluded from the Census general population count so that the court system's jury pool and jury panel

counts are measured only against “jury-eligible” Census data. *Veal* recognized that it was right for the district court to include multi-racial Blacks in the court system’s jury pool count of “Blacks” in addition to “Blacks and African Americans Alone” and that, as a corollary, multi-racial Blacks must also be included “as an adjustment” in the Census count of jury-eligible Blacks.¹ *Lilly* also held that the most recent available jury pool/panel and Census data should be utilized for the Court’s underrepresentation calculations.

On the remand of *Lilly I*, the District Court excluded those under age 18 and prisoners from the Census count, but it overlooked the necessity of adding multi-racial Blacks to the Census count. The District Court’s failure to include multi-racial Blacks in its calculation of the Census jury-eligible Blacks count constitutes reversible error because, as a result of this omission, the District Court erroneously concluded Defendant Lilly had failed to establish underrepresentation under *Duren-Plain* prong 2. When multi-racial Blacks are included in the jury-eligible Census count of Blacks, creating a “combined Blacks”

¹ As we develop below, the District Court erred by not adding the multi-racial Blacks in the “Two or More Races” Census report (B05003G) to those U.S. Citizens 18 years of age and over in the “Black or African American Alone” Census report (B05003B).

count, Defendant Lilly clearly demonstrated underrepresentation statistically significant not only at the 1 standard deviation level required under the Iowa Constitution but also at the 2 standard deviation level required by the Sixth Amendment. Defendant's record evidence also demonstrated systematic exclusion of Blacks in Lee County by virtue of the court system's use of a source list which underrepresents Blacks and African Americans and failure to supplement the list, as the Iowa Code authorizes the Jury Manager to do, to mitigate the existing jury pool's racial disparities. The State put on no evidence to rebut Defendant's prima facie fair cross-section claim, and therefore this Court should reverse and order a new trial.

ARGUMENT

I. THE EVIDENTIARY TEACHINGS OF *STATE V. VEAL*.

In *Veal*, in making its jury pool count, the District Court took affirmative steps to expand the jury pool and not only included persons who self-identified as "African American" or "Black" on their juror questionnaires, but also multi-racial persons who it observed were of African American or Black lineage. 930 N.W.2d 319. The NAACP Amicus Brief in *Veal* indicated that including multi-racial Blacks in the

jury pool count of “Blacks” is appropriate if multi-racial Blacks included in the Census’s “Two or More Races” report [hereinafter “Multi-race Report”]² are also added to the Census’s “Blacks or African American Alone” report [hereinafter “Blacks Alone Report”] to determine the Census-derived count of jury-eligible “Blacks.” NAACP Amicus Brief, pp. 16-19. In other words, if the Court’s jury pool count is based on a “combined Blacks” count of “Blacks alone” and multi-racial Blacks, then its determination of the jury-eligible Blacks Census count and percentage must also be based on a “combined Blacks” count. The State and the Supreme Court agreed.

The Census’s American Community Survey [hereinafter “ACS”] reports provide the most accurate current population counts, including breakdowns by race and ethnicity, during the ten years between Decennial Censuses, so the parties in *Veal* relied upon the 2016 ACS report, the most recent Census report available on July 10, 2017—the date of *Veal*’s trial. The ACS “Multi-Race” report counts all mixed-race persons but does not provide a detailed breakdown of the various multi-racial populations, and as a result, those persons who are Multi-Racial Blacks are included in the 2016 ACS “Multi-Race” report for

² ACS B05003G.

Webster County but they are not disaggregated in the report's data as a "multi-racial Blacks" grouping.

Recognizing the necessity of including multi-racial Blacks in the Webster County Census jury-eligible Blacks count, the State in *Veal* proposed a pro-rata formula to estimate the multi-racial Blacks portion of the Webster County "Multi-Races" Census category: "Approximately 70% of all non-white, single-race respondents were African-American; [thus,] an additional 1.3% of the [1.9%] 'Two or More Races' population would be multiracial people who also belong to Veal's distinctive group." Appellee's Brief p. 31, *State v. Veal, supra*. The NAACP Amicus Brief agreed that the State's pro-rata formula was a reasonable approach to determining the number of multi-racial Blacks that should be included in the combined Blacks Census count. NAACP Amicus Brief p. 17-18, *State v. Veal, supra*.

On the *Veal* appeal, this Court based its underrepresentation calculations on the jury pool count that included multi-racial Blacks, but indicated these were only preliminary and remanded for fine-tuning of data, including two adjustments of the Census count of Blacks: "*Other adjustments, such as for the Fort Dodge prison population or for individuals of mixed race, likely would not alter the*

bottom line revealed by the aggregate data.” *Veal*, 930 N.W.2d at 329 (emphasis added). Because of the racial disparities in the Iowa criminal justice system, subtracting all prisoners would have an adverse impact on the Black Census count, reducing the jury-eligible Black percentage, while adding individuals of mixed race to jury pools and panels would increase the Black count and percentage.

II. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BY FAILING TO INCLUDE MULTI-RACIAL BLACKS IN ITS JURY-ELIGIBLE BLACKS CENSUS COUNT AS REQUIRED BY *VEAL*.

A. The District Court’s Calculation of a North Lee Division Jury-Eligible Population was Incomplete.

After submitting pre-trial calculations to determine the percentage of jury-eligible Blacks based on Lee County Census data, the State switched its strategy at the hearing and sought to “refine” that data to conform to the North Lee Division. While the State’s thesis was not unsound in concept, its implementation was flawed because its approach started and ended with its exclusion of Keokuk and ignored the rest of South Lee. Nevertheless, the District Court embraced the State’s approach.

There are two typographical errors in the District Court’s Ruling that make for confusion in its explanation, so we will set forth our understanding of the Court’s calculations:

Adult Census Population: N. Lee County Division: Table 1

Lee County Adult	27,241
MINUS Keokuk Adult	- <u>7,806</u>
N. Lee County Adult	19,435
MINUS All Prisoners	- <u>700</u>
N. Lee Jury-Eligible Population	18,735

Blacks Alone Census Population: N. Lee County Division: Table 2

Lee County Adult Blacks	706
MINUS Keokuk Adult Blacks	- <u>343</u> ³
N. Lee County Adult Blacks	363
MINUS Black Prisoners	- <u>285</u> ⁴
“Blacks Alone” in N. Lee	78
“Blacks Alone” %	0.00416 (78/18,735)

The State acknowledged that the divisor in this equation, 18,735, included persons who did not reside in the North Lee County district—roughly 5,500 persons by NAACP estimates⁵—very few of whom, it can be shown, were Black. As a result the quotient (0.00416) significantly *understated* the Black jury-eligible population count and percentage. The District Court recognized this very significant “imprecision” and

³ On page 5 the District Court mistakenly states the Keokuk adult Blacks numbered 313. 4/7/2020 Order p. 5.

⁴ On page 5 the District Court stated the number of Black prisoners was 283 in the second paragraph, and 285 in the third paragraph. *Id.*

⁵ See *infra* Sec. III.C, Table and accompanying text.

also a more minor “imprecision” in that “any African Americans that might live in South Lee County but not in the city of Keokuk are still included in the North Lee County population numbers.” 4/7/2020 Order p. 6. The District Court should not have included the “rural” population of South Lee in North Lee’s jury eligible population.

The District Court’s approach created a misleadingly low jury-eligible Black population count and baseline percentage, as the two “imprecisions” were clearly not offsetting. To compensate, the State proposed a compensatory adjustment that doubled the Black jury-eligible Census percentage. With some reservation the Court embraced the State’s proposal.

“Blacks Alone” Adult % N. Lee County Adult Census Population: Table 3

$78/18,735 = 0.00416 = .416\%$.

The Doubling Compensatory Adjustment: $0.00416 \times 2 = 0.00832 = .832\%$.

The NAACP submits that the “doubling” compensatory adjustment constitutes the law of the case and is binding, even though the “combined Blacks” percentage that correctly includes multi-racial Blacks is higher than what the State contemplated when it made its proposal.

The North Lee Division's aggregate jury pool count of "Black" jurors for the five years preceding trial was 14 Blacks out of 1,939, or less than 1% (0.7%), based on those who answered the juror questionnaire; its aggregate jury panel count was 10 Blacks out of 1,573, also less than 1% (0.64%), based on those who appeared at the court house for service. The District Court concluded that the underrepresentation of Blacks did not exceed 1 standard deviation and that Defendant Lilly therefore failed to satisfy prong 2 of the *Duren/Plain* prima facie case.

Appellant's Brief demonstrates the ease with which the jury-eligible Blacks Census population count and percentage calculations can be made when based on Lee County data. The 1.6% "Blacks alone" jury-eligible population Appellant calculated, Appellant. Br. p. 15, is confirmed by the State's Pre-trial Brief calculation, pp. 6-7. The different framework the District Court chose and its approach led to demonstrable, reversible errors.

In showing those errors, the NAACP will draw upon the State Data Center's web page that summarizes the relevant and latest available American Community Survey Census data from the B05003 series for persons 18 and over [hereinafter "Adults"] and citizens,

complete with a drop down menu that enables one to access this information for each of Iowa’s 99 counties. The easily accessible web page created by the State Data Center provides a ready data base that is precisely the jury-eligible population *Lilly I* prescribed; and with a click on Lee County in the “Geography” drop down menu and on the ACS 2013-2017⁶ “Year” option, the Lee County jury-eligible “Blacks alone” and “Two or more races” population counts and percentages are readily calculated—in far fewer steps than the District Court embarked upon but left incomplete [hereinafter “SDC Lee County”]: <https://www.iowadatacenter.org/data/acs/social/citizenship/18over-nativity>.

The District Court’s effort to calculate a North Lee Division jury-eligible population was flawed in part because of the additional complexity, but mostly because its effort was incomplete. It failed to ascertain and add Blacks in the “Two or More Races” category to the number of “Blacks Alone,” and it should not have included the “rural” population of South Lee in North Lee’s jury eligible population. Nonetheless, the bulk of the NAACP’s analysis will work within the framework the District Court created.

⁶ ACS 2017 data (based on 5-year, 2013-2017 ACS average).

B. Although Multi-racial Blacks Were Counted by the State in Its Jury Pool Count and by the DOC in Its Prisoner Report to Obtain Their Counts of “Blacks,” the District Court Overlooked the Necessity of Including Multi-racial Blacks in Its “Blacks” Census Population Count.

The State in its Pre-Trial Brief p. 8 notes that one of the prospective jurors in the Lilly jury pools indicated he or she was “white/black.” The State counted this juror as “Black” and based its calculations on one Black among 76 jurors in the Lilly jury pool.⁷ *Id.* at p. 10. That juror was excused and the Lilly jury panel of 50 jurors included no Blacks. The State’s inclusion of the biracial Black juror in its “Blacks” count was consistent with the State’s and District Court’s approach in *Veal*.

The Department of Corrections [hereinafter “DOC”] report of the “Blacks” who were inmates at the Iowa State Prison also was a “combined Blacks” count, including multi-racial Blacks and those who are “Blacks alone.” See email from Sarah Fineran, DOC Research

⁷ Jury Manager Willson, when asked how the “white/black” person would be reflected in the Race Report, replied “I guess, there would be multiple possibilities – probably ‘Other’ or ‘Black’ – ‘African American.’” *Veal*, Tr. II p. 39, ll. 8 – 11. The jury manager’s response, when combined with the approach the State consistently has taken and the national practice, confirms that the 5-year jury pool count included multi-racial Blacks.

Director. (Ex. A). The District Court’s inclusion of multi-racial Blacks in these two counts—the jury pool count and the DOC prisoner count—had the following effects: (1) increasing the number of “Blacks” in the North Lee County division aggregate jury pools (by including multi-racial Blacks) helps the court system show a greater, more representative “combined Blacks” jury pool; and (2) subtracting all Black prisoners (including multi-racial Blacks) from the number of jury-eligible Blacks in the North Lee County Census will lower the percentage of Blacks in the jury-eligible population, against which the court system’s jury pool will be compared. These two steps, both of which were advantageous to the State, were appropriate only if the District Court accorded the same treatment to multi-racial Blacks in its Census count of Blacks in the jury-eligible population in North Lee County. However, the District Court failed to take this latter step.

Our point is simple: it is entirely appropriate for the District Court to include multi-racial Blacks in the court system’s combined Blacks jury pool and jury panel counts and to rely upon the DOC’s prisoner count that includes multi-racial Blacks in its count of “Blacks” *as long as* multi-racial Blacks from the “Two or More Races” Census

report are also included in the combined Blacks Census jury-eligible population count.

III. ADDING MULTI-RACIAL BLACKS TO THE CENSUS “BLACKS ALONE” COUNT AND PERCENTAGE IS ESSENTIAL.

The District Court erred because it did *not* include multi-racial Blacks from the ACS⁸ “Two or More Races” category (B05003G) when it counted jury-eligible Blacks in North Lee County. When multi-racial Blacks are included, Defendant Lilly has established underrepresentation at both the 1 and 2 standard deviation levels of significance. This is true using the District Court’s framework of analysis, our refinement of that approach, and the Lee County approach advocated by the Appellant.

A. The Pro-rata Multi-racial Blacks Calculation.

There is no disagreement with the District Court’s conclusion “[t]here are 706 adult African-Americans in all of Lee County.”

⁸ During the nine years in between Decennial Censuses, the Census conducts the annual American Community Survey (ACS). The ACS “continues all year, every year,” and randomly samples 3.5 million persons in every state, the District of Columbia, and Puerto Rico. *About the American Community Survey*, United States Census Bureau, [https://www.census.gov/programs-surveys/acs/about.html#:~:text=The%20American%20Community%20Survey%20\(ACS,funds%20are%20distributed%20each%20year](https://www.census.gov/programs-surveys/acs/about.html#:~:text=The%20American%20Community%20Survey%20(ACS,funds%20are%20distributed%20each%20year) (last visited August 29, 2020).

4/7/2020 Order p. 5. 2017 ACS B05003B is the Census table source. See SDC Lee County, Table 2 at <https://www.iowadatacenter.org/data/acs/social/citizenship/18over-nativity>. But that number does not include Blacks in the “Two of More Races” category. How could the Court have determined these “multi-racial Blacks” who were adult citizens? The first step in the pro-rata calculation is to look to 2017 B05003G, which reports 481 adult citizens for Lee County, and 136 for Keokuk, and subtract the 136 such Keokuk residents from the 481 Lee County residents, resulting in a total of 345 “Two or More Races” persons in the North Lee County division. U.S. Census: Keokuk, Iowa 2017 B05003G, <https://data.census.gov/cedsci/table?q=Keokuk,%20Iowa%202017%20B05003G&tid=ACSDT5Y2017.B05003G&hidePreview=false>. How many of the 345 in this multi-racial group were multi-racial Blacks?

B05003G provides a combined total for all persons of mixed race but does not break down the “Two or More Races” totals by race. However, B05003G provides current data upon which an approximation can be made of the portion of the “Two or More Races” category that multi-racial Blacks comprise by using the pro-rata formula suggested by the State in *Veal*. The 2010 Decennial Census

Table P10 does break down the number of persons in various multi-racial groupings, such as multi-racial Blacks, but it is issued only once every ten years, and at the time of Lilly’s trial was far out-of-date. One area of agreement among the parties, the NAACP, and this Court, has been the requirement that calculations be based on current data. *See Lilly I*, 930 N.W.2d at 304.⁹ Since the Lilly trial was in September 2017, the 2010 Census data was nearly eight years old at the time of trial, and was not a viable option.¹⁰

Using the 2017 ACS Census data for Lee County,¹¹ the second step of the pro-rata calculation is to add each of the adult racial minorities

⁹ Americans are mobile, more than 12% of the U.S. population moved in each year from 2010 through 2017. *CPS Historical Geographic Mobility/Migration Graphs*, United State Census Bureau, Figure A-1, <https://www.census.gov/library/visualizations/time-series/demo/historic.html> (last visited on August 16, 2020). The 2017 Census data confirms that this demographic trend held true with regard to the multi-racial population in Lee County, which experienced a 65% increase in the number of multi-racial persons 18 years of age and older in Lee County since 2010, from 290 to 481.

¹⁰ For jury trials in 2021 and 2022, perhaps even in 2023, it would be appropriate for the District Courts to use the 2020 Decennial Census Table P10 to calculate the multi-racial Blacks citizen 18 and over population.

¹¹ The handiest source of the most current Census data is Iowa State Data Center, “Nativity and Citizenship Status by Race and Ethnicity,” Lee County, for the U.S. Citizen population 18 years and over in Lee County, 2013-2017 America Survey 5-year period estimates.

“alone” (each mono-racial group) totals to calculate a combined “Total All Races Alone” of 1,004. Note that the Census considers Hispanics as an ethnicity, and not a race, and therefore Hispanics are not included in this calculation. Table 5 shows the third step: calculating the Black multi-racial pro-rata percentage by dividing 706, the number of Lee County adults who are “Blacks alone,” by the sum of the Lee County “All Races Alone,” 1,004, for a pro-rata percentage of 70.3% ($706/1,004 = .703$).¹²

<https://www.iowadatatcenter.org/data/acs/social/citizenship/18over-nativity> (last visited September 9, 2020).

¹² Basing the pro-rata calculation on 2010 Table P10 would produce a 38% multi-racial Black percentage. The 40 multi-racial Blacks living in Keokuk would be subtracted from the 105 multi-racial Blacks living in Lee County overall in 2010, concluding there were 65 multi-racial Blacks living in North Lee County. Table P10 reports there were 290 “Two or More Races” persons living in Lee County in 2010. Excluding the 120 “Two or More Races” persons who lived in Keokuk yields 170 living in North Lee County. Again a pro-rata calculation is necessary: the 65 multi-racial adult Blacks are divided by the total 170 multi-racial persons in the “Two or More Races” group living in the North Lee County division in 2010, deriving a multi-racial Black pro-rata 38.2% ($65/170 = .382$). Assuming this same pro-rata percentage for multi-racial adult Blacks still held true seven years later, in 2017, it would project the number of multi-racial Blacks residents in North Lee County division at 132 ($345 \times .382 = 131.79$).

Total All Races Alone, Table 4	
Blacks Alone	706
American Indian Alone	71
Asian Alone	96
Hawaiian Alone	0
Some Other Alone	<u>131</u>
Total All Races Alone	1,004

Table 5: Adult Multi-Racial Black Pro-Rata %:
(“Blacks Alone/ Total All Races Alone): 706/1,004 = .703

Table 6 summarizes the entire calculation, including the fourth step, which is to calculate the pro-rata adjustment by multiplying .703 times the 345 adult multi-racial citizens in North Lee County Division,

Census Jury-Eligible “Combined Blacks” (Blacks Alone + Multi-Racial Blacks) BEFORE Compensatory “Doubling” Adjustment: North Lee County Census, Based on 2010 Census Data	
Blacks Alone, N. Lee County (Table 2)	363
Multi-racial Blacks, N. Lee County	<u>+ 132</u>
Combined Adult Blacks, N. Lee	495
Prisoners (Combined Blacks)	<u>-285</u>
Jury-Eligible Combined Blacks, N. Lee County	210

Prior to making the compensatory double, the “Combined Black” percentage would be 0.011 (210/18,735 = .011). There is a 6.18% probability of this result in a random selection process, a showing statistically significant at the 1 standard deviation threshold set by *Lilly I*: -1.60 standard deviations (.062 < .16). When the compensatory doubling is done, the “Combined Black” jury-eligible percentage is .022, or 2.2%. When doubled, the probability is 2.66E-07, with a standard deviation of -4.44.

resulting in an estimated multi-racial jury-eligible “Black” population of 243 ($345 \times .703 = 242.5$) people. See Table 6.

Adult Multi-racial Black Census Population: N. Lee County Division, Table 6	
Two or More Races, Lee County	481
Two or More Races, Keokuk	<u>-136</u>
Adult Multi-Racial Population N. Lee Co.	345
Multi-Racial Black %	<u>x .703</u>
Adult Multi-Racial Blacks N. Lee County	242.5

Returning to the calculation of the “combined Blacks” Census count, the 243 multi-racial Blacks (Table 6) should be added to the 363 North Lee County Black adults that the District Court based its Table 4 calculation (using only the Census “Blacks Alone” category, $706 - 343 = 363$).¹³ Then, and only then, would it be appropriate to subtract all 285 “Black” prisoners (which was a “combined Blacks” grouping) from this *combined* Blacks adult population to get the “final” “combined Blacks” Census jury-eligible population. See Table 7.

¹³ See *supra* Table 2 ($706 - 343 = 363$).

Census Jury-Eligible “Combined Blacks” (Blacks Alone + Multi-Racial Blacks) BEFORE Compensatory “Doubling” Adjustment: North Lee County Census, Table 7	
Blacks Alone, N. Lee County (Table 2)	363
Multi-racial Blacks, N. Lee County	+ 243
Combined Adult Blacks, N. Lee	606
Prisoners (Combined Blacks)	-285
Jury-Eligible Combined Blacks, N.Lee Co.	321 ¹⁴

**B. Calculating the “Combined Blacks” Jury-eligible
Census Percentage.**

Dividing the jury-eligible “combined Blacks” count in Table 7 by the overall jury-eligible North Lee County Census population calculated by the District Court of 18,735 in Table 1 will give the “Combined Blacks” jury-eligible population percentage for the North Lee County division, before the agreed compensatory adjustment. **This percentage, 0.017 (321/18,735), once it has been doubled, will serve as the p-factor in the binomial calculations.**

As discussed above, within the District Court’s approach the “doubling” compensatory adjustment constitutes the law of the case

¹⁴ If one adds the 243 Census multi-racial Blacks, N. Lee County to the District Court’s calculation of 78 “Blacks alone” Census N. Lee County, one gets the same result: $78 + 243 = 321$.

and is binding, even though the p-factor, as correctly calculated to include multi-racial Blacks, is higher than what the State contemplated when it made its proposal. **When doubled, the “combined Blacks” Census jury-eligible population percentage is: 2 x .017 = 0.034.** The NAACP will base its standard deviation calculations on both the .017 and .034 p-factors.

**Binomial Distribution/Standard Deviations Calculations:
Table A**

N. Lee County Jury Pool/Panel Data N. Lee Co. Combined Blacks
J-E Census Data

2013-2017	Blacks	Overall	P-Factor %		Binomial Probability	Standard Deviations
	14	1,939	W/o adjustment	.017	0.00015 <.025	-3.33
	14	1,939	100% adjustment	.034	4.85E-15 <.025	-6.51
	10	1,573	W/o adjustment	.017	0.00018 <.025	-3.26
	10	1,573	100% adjustment	.034	2.06E-13 <.025	-6.05

In sum, Defendant Lilly has not only satisfied the standard deviation threshold showing of underrepresentation required under Article I, section 10, but also the 2 standard deviation threshold required by the Sixth Amendment—and did so without the “doubling compensatory adjustment proposed by the State and adopted by the District Court.

C. A More Precise Calculation of the North Lee County Jury-eligible Population Was Possible and Would Discard the Compensatory “Doubling” Factor.

The State could have corrected for both of the “imprecisions” by further research in the same B05003 Census reports it used to determine the Lee County and Keokuk adult populations, then there would have been no need for the so-called “doubling” compensatory adjustment. The total Lee County adult citizen population in 2017 was 27,128, or 113 fewer persons than in the District Court’s calculation that included non-citizens. *SDC Lee, supra*. Importantly, the B05003 series provides this data for Keokuk and Ft. Madison, and that enables us to calculate the Lee County *rural* population by subtracting the population of these two cities. That is important because attribution of the entire rural population of Lee County just to North Lee resulted in erroneously lowering the combined Blacks’ jury-eligible population percentage in North Lee, as indicated earlier. The rural Lee County adult citizen population is 11,008, calculated by subtracting the adult citizen populations of Keokuk (7,695)¹⁵ and Ft. Madison (8,425) from the adult citizen population of Lee County (27,128).

¹⁵ The 7,806 used in the District Court’s calculations included 111 persons who were not U.S. citizens.

It would be reasonable to allocate the Lee County rural population equally between the two judicial divisions, allocating 5,504 persons to each. The next step is to subtract the adult citizen populations of *both* the Keokuk (7,695) *and* South Lee rural population (5,504) from the Lee County adult citizen population (27,128) for an overall North Lee County adult citizen population of 13,929. Subtraction of the 700 ISP prisoners would produce a jury-eligible North Lee population of 13,229.

**Adult Citizen Census Population: N. Lee County Division:
Table 8**

Lee County Adult Citizens		27,128
MINUS Keokuk Adult	- 7,695	
MINUS South Lee Rural Adult	<u>- 5,504</u>	<u>-13,199</u>
N. Lee County Adult		13,929
MINUS All Prisoners		- <u>700</u>
North Lee Jury-Eligible Population		13,229

By dividing the “Combined Blacks” jury-eligible population count for North Lee of 321 (Table 7) by 13,229 we can compute the “Combined Blacks” jury-eligible population percentage. Since the Table 8 calculation eliminated the South Lee rural residents from the overall North Lee Census jury-eligible population count, the need for the “doubling” compensatory adjustment could have been eliminated:

**North Lee Division “Combined Blacks” Adult Citizen
Percentage: Table 9**

$$321/13,229 = 0.0243 \text{ or } 2.43\%$$

However, fine-tuning is necessary in the form of two tweaks, addressing the District Court’s concern about the second “imprecision” in its calculation—the need to eliminate any Blacks living in rural South Lee from the North Lee “Combined Blacks” Census count. Examination of the Census data does reveal that a small number of “Blacks alone” and multi-racial Blacks were living in the South Lee rural area, and need to be excluded from the North Lee County “Combined Blacks” count.

The 2017 B05003B reports for “Blacks alone” showed 706 residents who are adult citizens in Lee County, 343 in Keokuk, and 331 in Fort Madison. Subtracting the “Blacks alone” city residents from the Lee County total indicates there were 32 “Blacks alone” living in the small towns and rural areas of Lee County. *See* Table 10. Splitting the 32 equally between the two districts results in a first “rural correction” that reduces the “combined Blacks” jury-eligible population of each division by 16 “Blacks alone.”

Table 10

“Blacks Alone” Adult Citizens

Lee County	706
Keokuk	(343)
Ft. Madison	(331)
Total Rural Districts	32 divided by 2 = 16 allocated to North & South

A second “rural correction” is appropriate regarding the multi-racial Blacks component of the “Two or More Races” category. The 2017 B05003G reports showed 481 residents in Lee County, 136 in Keokuk, and 262 in Fort Madison. Subtracting the city residents from the Lee County total indicates there were 83 “Two or More Races” persons living in the small towns and rural areas of Lee County; again, splitting the 83 equally between the two districts, results in allocation of 41.5 multi-racial persons to each district. *See infra* Table 11. Using the multi-racial Blacks pro-rata 70.3%, we estimate 29 of the 41.5 assigned to the North Lee Division were multi-racial Blacks: $(703 \times 41.5 = 29.2)$. *See infra* Table 12.

Table 11

“Two or More Races” Adults: Lee County Rural Multi-Racial Persons

Lee County	481
Keokuk	(136)
Ft. Madison	<u>(262)</u>
Total Rural	83 divided by 2 = 41.5 allocated to North & South Divisions

Table 12: Multi-Racial Blacks Among the N. Division Rural “Two or More Races” group: $41.5 \times .703 = 29.2$ Multi-Racial Rural Blacks

Thus, these two “rural corrections” address the “second imprecision” and reduce the “combined Blacks” jury-eligible population for North Lee County from 321 to 276.

Table 13

North Lee County Division “Combined Blacks” Count	
Combined Blacks (Table 7)	321
MINUS So. District Rural “Black alone”	(16)
MINUS So. District Rural pro-rata Multi-Racial Blacks	<u>(29)</u>
Combined Blacks Jury-Eligible Population	276

**Table 14: Combined Blacks Jury-Eligible Population %:
276/13,229 = 2.086 = 2.09%**

**Binomial Distribution/Standard Deviations Calculations:
Table B**

N. Lee County Jury Pool/Panel Data N. Lee Co. Combined J-E
Census

2012- 2017	Blacks	Overall	P-Factor %	Binomial Probability	Standard Deviations
SAME	14	1,939	.0209	1.15E-06	-4.23
SAME	10	1,573	.0209	2.55E-06	-4.05

With a p-factor of 2.09%, one would expect approximately 41 Blacks in the North Lee jury pools and 33 Blacks in the jury panels, over the 5-year period (1,939 x .0209 = 40.53; 1,573 x .0209 = 32.88)). Instead, there were only 14 and 10, respectively.

The District Court’s ruling on prong 2 is clearly erroneous and must be reversed. Each calculation unequivocally demonstrates that Defendant Lilly satisfied the required showing of underrepresentation under *Duren/Plain* prong 2 not only at the 1 standard deviation level sufficient under the Iowa Constitution, but also at the 2 standard deviation level required by the Sixth Amendment.

IV. UNDERREPRESENTATION WAS ATTRIBUTABLE TO THE COURT’S FAILURE TO SUPPLEMENT THE SOURCE LIST, ESTABLISHING SYSTEMATIC EXCLUSION, AND WITH NO REBUTTAL BY THE STATE, DEFENDANT IS ENTITLED TO A NEW TRIAL.

Jury pool and jury panel counts, Census data, and the various calculations incident to ascertaining the extent of claimed underrepresentation, if any, can seem tedious; but none should lose sight of the overarching importance of the Constitutional right to an “impartial jury” drawn from a fair cross section of the community that is fundamentally at stake.

In *State v. Plain*, 898 N.W.2d 801 (Iowa 2017), this Court emphasized not only how important the appearance of fairness is to the public’s confidence in the justice system, but also how the presence or absence of a racially mixed jury affects the outcome and no doubt the quality of jury deliberations and decision-making in actual cases involving a Black defendant like Lilly. In *Plain* this Court cited scholarly studies showing the impact of the absence of Blacks from jury pools and panels and, inevitably, from juries. *Id.* at 826. Whereas an all-white jury and a racially mixed jury convict a white defendant at about the same percentage rate, an all-white jury convicted Black defendants 81 percent of the time while a racially mixed jury did so

only 66 percent of the time. *Id.* at 825-26 (citing Shamena Anwar, Patrick Bayer, & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q. J. OF ECON. 1017–1055 (2012)); see also Francis X Flanagan, *Race, Gender, and Juries: Evidence from North Carolina* 61 *Journal of Law and Economics* 193 (2018).

It is in this light that the application to this case of *Duren/Plain's* third prong must be examined. Was the substantial underrepresentation of Blacks and African Americans in Lilly's jury pool attributable to systematic exclusion by the State? Lilly has contended from the outset that the source list from which the jury pool was drawn in his case—the Voter Registration List and the lists of holders of a driver's license or non-operator ID cards issued and maintained by the DOT—disproportionately excluded lower income populations in general and, in Lee County, Blacks in particular. Like the state statutes functionally excluding women from jury pools in *Taylor v. Louisiana*, 419 U.S. 522 (1975), and *Duren v. Missouri*, 439 U.S. 357 (1979), Iowa's utilization only of Voter Registration and DOT lists results in underrepresentation of Blacks and African Americans from the Master Source List and thus from jury pools and panels. The reason for that is Blacks almost certainly are underrepresented on the

Voters' and DOT lists, especially where—as the record in the case at bar reveals—the percentage of Blacks living at poverty level or below, of low per capita income, and of low household income in Lee County, far exceeds that of any other racial group.

Definitive records establishing such underrepresentation seem not to exist. Former Iowa DOT Director, and before that, Director of the Motor Vehicle Division, Mark Lowe communicated, “I do not know that useful data on the extent to which Blacks and African Americans are underrepresented among Iowans with a driver’s license or with a non-operator’s ID exists, at least not directly in the DOT’s records. As you know, they do not collect race data as part of the customer record and there has never (to my knowledge) been any study of representation rates by race or socio-economic factors.” Email from Mark Lowe to David Walker, September 8, 2020, at 7:15 a.m. (Ex. B).

“At the same time,” Lowe continued, “I don’t think anyone associated with licensing would disagree with the concept that minorities are under-represented. Our collective experience is that low-income and poverty are barriers to licensing and identification, for reasons from inability to pay fees, fines and penalties to inability to obtain or access identification documents to inability to find

transportation to a service center. We watched people struggle with those things every day and it informed efforts to reduce financial obstacles to licensing and identification and increase outreach to low-income communities. I don't think it's a stretch to make the connection that if minorities are over-represented in low-income groups they are more likely to struggle with licensing and identification and to be underrepresented, but it's unfortunately more assumption than actual data. I suspect it would take some level of surveying to establish representation rates." *Id.*

Lilly challenged the representativeness and fairness of the source list from which his jury pool was selected and ultimately the jury that heard his case. This Court in *Lilly I* rightly rejected the notion that socioeconomic factors contributing to underrepresentation are shielded from judicial scrutiny if there were actions that the court system could have taken to ameliorate those factors. *Lilly I*, 930 N.W.2d at 307-308. *Lilly I*'s fundamental insight in that regard was based on Paula Hannaford-Agor's years of experience as Director of Jury Studies for the National Center on State Courts: "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.* (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”]). Defendant’s evidence is convincing, at least in Lee County with the deep poverty experienced by such a large portion of the Black population residing there, that the cause of Black underrepresentation in jury pools occurs at the very front end of the selection process—in the failure of the court system to go beyond the two principal source lists: DOT and voter registration lists. Hannaford Agor addressed this point succinctly: “The use of multiple source lists to improve the demographic representation of the master jury list is perhaps the most significant step courts have undertaken since they abandoned the key-man system in favor of random selection from broad based lists.” Hannaford-Agor, at 780 (footnote omitted). Indeed, Hannaford-Agor applied what we now know as the *Lilly* principles to the very facts of the instant case:

Courts have no control over whether an individual chooses to register to vote, but . . . courts do have control over which source lists to use in compiling the master jury list. Technology permitting courts to merge two or more source lists and identify

and remove duplicate records has existed for many years. This allows courts to create more inclusive and representative master jury lists than would be possible using any single list.

Id.

Lilly requested the District Court to expand the source list, suggesting use of utility customer or Food Stamp recipient lists in Lee County, in an effort to enhance representation of Blacks and African Americans in the selected jury pool. The District Court on remand acknowledged and appreciated that argument, noting in particular the jury manager's suggestion that it could access and use "the list of individuals who have received traffic tickets in the state of Iowa," who might be caught driving and ticketed for some violation whether or not they had a driver's license or their license had been suspended. There are courts that have held that the failure to make such efforts, however effective they might be in redressing a recognized problem, does not constitute "systematic exclusion" within the meaning of *Duren*. But this Court in *Lilly I* rejected that minimalist approach to jury management in cases being decided under the Iowa Constitution. The North Lee County's failure to add the above-mentioned source lists is precisely the kind of jury management practice that *Lilly* held could constitute systematic exclusion under *Duren/Plain* prong 3.

Actually, the District Court did not hold that Lilly had failed to establish systematic exclusion. This is evident from the following observations: “This court does not disagree with the idea that the currently used lists should be expanded to include broader groups of people,” and the court seemed to accept the jury manager’s “observation that there is one list that the Court does have control over that could actually broaden the demographics of people to be summonsed for jury duty.” 4/7/2020 Order p. 8. The Court went on to conclude: “Regardless of this [the Court’s having access to and control over a list that would broaden the demographics of the pool], in this particular case in this particular county, the master list used to create the jury pools has not created pools that underrepresented African Americans.” *Id.* at p. 9. Thus, the District Court did not decide whether its failure to draw on other sources and expand the source list from which the jury pool was drawn constituted systematic exclusion, but instead pegged its ruling on its conclusion there was no underrepresentation of Blacks.

The State did not rebut Defendant’s evidence, nor did the Court make findings rejecting Defendant’s evidentiary showing of systematic exclusion under *Duren/Plain* prong 3. The questions that were of

concern to the District Court, whether the District Court has the power to “correct” the master jury list assembled by the Office of State Court Administration by adding another source list, and, if it has such power, whether it is limited to a source list over which the court system has “control or discretion,” are not issues that arise under *Duren/Plain* prong 3. Those issues, the NAACP submits, are properly seen as part of the State’s rebuttal burden of proof to the Defendant’s prima facie case. Having proven underrepresentation and identified the jury management practice that is the principal cause of the underrepresentation, the NAACP submits Defendant proved a prima facie case of a fair cross-section violation, and the burden of proof shifted to the State to rebut the prima facie case in accord with *Duren/Plain*. We do not believe the Defendant has the burden of proof as to issues of judicial power and authority relating to ways to remedy the practice causing underrepresentation—rather it is the State’s burden to demonstrate a significant state interest that precludes it from making the necessary reforms.

In any event, the District Court made two notable errors of law in its discussion of the issues related to its power to fashion a remedy. First, it did “not believe it is within its power or authority to dictate

which lists are used to create jury pools.” That is wrong. Iowa Code section 607A.22(2) expressly authorizes the jury manager to “use any other comprehensive list of persons residing in the county which the state court administrator or the jury manager determines are useable for the purpose of a juror source list.” Second, with respect to lists that Lilly suggested be added into creating the pool, the District Court stated that those were “not ones that the Iowa court system has any control or discretion over.” That, too, is wrong. Iowa Code section 607A.22(3) explicitly states, “The applicable state and local government officials shall furnish, upon request, the state court administrator or the jury manager with copies of lists necessary for the formulation of source lists at no cost.” We do not know what the District Court would have done if the Judge had correctly recognized the authority and control the Legislature has given to the jury manager and the court in a case like Kenneth Lilly’s.

The NAACP submits that the State had the opportunity and the obligation to introduce evidence and prove that attainment of a fair cross section as Lilly had suggested was “incompatible with a significant state interest” that was “manifestly and primarily advanced” by its refusal to add additional sources, such as utility

customers and food stamp recipients, to the source list from which the jury pool would be drawn. The State introduced no such evidence, nor did it even raise the issue, and so has waived it.

CONCLUSION

The NAACP respectfully submits this Court should reverse the District Court and order a new trial.

NOTICE OF ORAL ARGUMENT

The NAACP requests opportunity to participate as Amicus in oral argument of this case.

Respectfully submitted,

/s/ Russell E. Lovell, II

Russell E. Lovell, II

/s/ David S. Walker

David S. Walker

ATTORNEYS FOR AMICUS NAACP

CERTIFICATE OF COMPLIANCE

This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 6,991 words, excluding the parts exempted by that rule.

This brief complies with the typeface requirements of Iowa R. App. P.6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using 14-point Georgia.

RULE 6.906(4)(d) CERTIFICATE OF COMPLIANCE

Pursuant to Iowa Rule of Appellate Procedure 6.906(4)(d), the undersigned Counsel for the NAACP state that they authored this brief in whole without contribution from any party or party's counsel. No funding was received by any person or organization, as the undersigned Counsel worked pro bono for the NAACP.

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EXHIBIT A

Fineran, Sarah <sarah.fineran@iowa.gov>

Thu 8/20/2020 10:05 AM

To: Russell Lovell

Cc: Sondra Holck <sondra.holck@iowa.gov>; Skinner, Beth <beth.skinner@iowa.gov>

*****This Email is from an EXTERNAL source. Ensure you trust this sender before clicking on any links or attachments.*****

Hi Russel - Thank you for your note. Below in red are responses to the questions you posed. Please let me know if you have any questions. Please feel free to share our responses with others on your team.

Best,
Sarah

Therefore, I have the following questions:

- (1) Is the DOC population count at its institutions based on the race/ethnicity reported by each prisoner? **Yes**
- (2) Does the DOC form on which a prisoner reports his/her race/ethnicity allow designation of “multi-racial” and/or “Two or More Races”? **No. This is not an option within our ICON data system, however, individuals can identify as one particular race (White, African American, Asian, Pacific Islander, Native American, etc....as well as whether they are Hispanic or Non-Hispanic). Individuals can select their race and, as well as whether they are Hispanic or non-Hispanic. An individual can only select one race and one ethnicity within our reporting requirements.**
- (3) Does the DOC base its population counts, including the race/ethnicity of prisoners, based upon the observation of DOC personnel? If so, please explain. **No. Race data is self-reported by incarcerated individuals or obtained through official documentation.**
- (4) How does the DOC report prisoners who are multi-racial? **See response for item #2**
- (5) In the September 2017 Report for the Iowa State Prison, how did the DOC report multi-race persons who had African American or Black as one of their races? **An individual would have been identified as multi-racial if they were African-American/Black, as well as Hispanic. Individuals who are African-American/Black and non-Hispanic would have been counted as one race.**
- (6) In the September 2017 Report for the Iowa State Prison, were multi-racial persons who had African American or Black as one of their races counted in the “Black-Non Hispanic” and “Black-Hispanic” categories? If not, in what category were such persons counted? **These individuals would have been counted either as Black Non-Hispanic or Black-Hispanic. An individual would not have been counted in more than one category.**

Sarah Fineran
Research Director
Iowa Department of Corrections
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EXHIBIT B

Mark Lowe <marklowe242@gmail.com>

Tue 9/8/2020 7:15 AM

To: David Walker

This Email is from an EXTERNAL source. Ensure you trust this sender before clicking on any links or attachments.

Dean Walker,

To my knowledge data on the extent to which Blacks and African-Americans are underrepresented among Iowans with drivers licenses and non-operator's identification cards (IDs) does not exist in the Iowa DOT's records. As you know the Iowa DOT does not collect race data as part of the customer record and there has never (to my knowledge) been any study of representation rates by race or socio-economic factors.

At the same time I don't think anyone associated with licensing would discount the proposition that minorities are under-represented. During my tenure as Director of the Iowa DOT's Motor Vehicle Division (April 2009 to November 2016) and as Director of the Iowa DOT (November 2016 to January 2020) our collective experience was that low income and poverty are barriers to licensing and identification, for reasons that range from inability to pay fees, fines and penalties to inability to obtain or access foundational identification documents like birth records and name change records to inability to find transportation to a service center. We watched people struggle with those things every day and it informed efforts to reduce financial obstacles to licensing and identification and increase outreach to low-income communities. I don't think it's a stretch to make the connection that if minorities are over-represented in low-income groups they are more likely to struggle with licensing and identification and to be underrepresented.

I hope this information is helpful to you. Please let me know if you have any questions.

Best regards,
Mark Lowe

