THE NUTS & BOLTS OF A FAIR CROSS-SECTION CHALLENGE

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OVERVIEW: MELDING POST-PLAIN LAW & FAIR CROSS-SECTION LITIGATION STRATEGY

- Lovell & Walker, Achieving Fair Cross-Sections on Iowa's Juries in the Post-*Plain* World: The *Lilly-Veal-Williams* Trilogy, 68 Drake Law Review 499 (2020 forthcoming)
- Presentation will follow the framework of the excellent Nina Chernoff & Joseph Kadane (C/K) article, *The 16 Things Every Defense Attorney Should Know About Fair Cross-Section Challenges*, in The Champion 14 (December 2013). The C/K article principally discusses Federal law per the 6th Amendment's "impartial jury" requirement and also the Federal Jury Selection and Service Act of 1968 (JSSA).
- The Chernoff/Kadane (C/K) article preceded the Plain-Lilly-Veal-Williams cases so our Presentation will build upon C/K's work and will emphasize the "post-Plain World" changes that reflect current Iowa law, principally the "impartial jury" requirement of Article I, §10 of the Iowa Constitution but also Iowa Code §607A.
- Our final 2 Slides will also incorporate an excellent Paula Hannaford Agor (PHA) hand-out, *10 Things You Should Always Be Able to Answer About Your Jury System,* which was distributed to Jury Managers and other attendees at the Spring 2019 Iowa jury managers training session. Hannaford Agor is the long-time Director of the Center for Jury Studies of the National Center for State Courts.

THE CONSTITUTIONAL RIGHT TO AN IMPARTIAL JURY: A FEW POINTS TO NOTE AT THE OUTSET

- 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."
- It is one of a cadre of fundamental rights guaranteed a defendant, including "the right to a speedy and public trial," the right "to be informed of the nature and cause of the accusation," the right to confront witnesses against him," and the right "to have the Assistance of Counsel for his defense," and is on a par in importance with each.
- Its roots or rationale antedate but are expressed in the Declaration of Independence as well as the Constitution.
- In words widely used by courts, by Congress, and by our General Assembly, it demands that a jury be drawn from pools that reflect a "fair cross-section" of the community served by the trial court.
- Our focus, and that of the NAACP, has been the issue of whether the jury pool in criminal cases involving an African American defendant fairly represents—does not *underrepresent*—African Americans and Blacks. Why?

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

- An "impartial jury" means that an accused is entitled to jury free of bias but also provides protection against "the apprehended existence of prejudice" and 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 member of the jury.
- Studies show that a jury drawn from a jury pool or panel that is all-white convicts an African American defendant at a significantly higher rate—81% compared to 66%--than one that is racially mixed, whereas the evidence also shows that all-white and racially mixed jurors tend to convict white defendants at about the same percentage.
- 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.

STATE V. PLAIN (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 important distinction!
- Landmark: While the 14th Amendment's Equal Protection Clause bars the intentional exclusion of protected minority groups, the 6th Amendment guarantees minority groups will not be systematically excluded, even if there is no evidence of intentional discrimination." fn. 9. Proof of discriminatory intent is NOT required.
- "To establish systematic exclusion, a D must establish the exclusion is 'inherent in the particular jury-selection process utilized' but need not show intent."
- Whereas a jury with one or more black jurors would convict a white and a black 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. Citing Shamena Anwar, Patrick Bauer, and Randi Hialmarsson Q.J. Econ. (2012)

STATE V. PLAIN: PROVING UNDERREPRESENTATION

- Iowa Supreme Court unanimously O/R State v Jones (1992) exclusive reliance on Absolute Disparity test.
- Implicitly O/R 10% threshold if Absolute Disparity test is one of models used.
- It recognized there is not a single county in Iowa in which African Americans constitute 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.
- Plain held district courts may use all 3 analytical models of analysis to measure representativeness of jury pool: Absolute Disparity, Comparative Disparity, and Standard Deviation
- State v. Lilly (2019) has superseded this latter holding, and now requires defendants to prove underrepresentation that is statistically significant using the Standard Deviation test, commonly referred to as the Binomial Distribution test.

PLAIN: D'S RIGHT TO JURY DATA IS CRITICAL TO PROVING SYSTEMATIC EXCLUSION & TRANSPARENCY

- *Plain* holds D has Constitutional right to information on racial composition of the jury pools and panel—without prior showing of underrepresentation or adverse impact--recognizing the fair cross section requirement is w/o meaning if D were denied this data.
- To be effective, D needs to request records pre-trial in anticipation of FCS challenge. State v. Stevenson (Linn County).
- Implicit bias exists and is real. District Court Judges are encouraged to be pro-active in addressing it.
- Trial Judge has discretion to give Implicit Bias Jury Instruction, but is NOT required to do so. .

12 PERSON JURY

Constitution Goal:

Juries that represent a fair cross section of community.

STATE V. LILLY: GUIDANCE ON PROVING UNDERREPRESENTATION

- Standard deviation or binomial distribution test would be exclusive measure of underrepresentation.
- Aggregated data on multiple jury pools will be used to show the underrepresentation is systemic, so long as the data were not selective.
- Under article I, section 10, a defendant establishes the underrepresentation prong of the Duren/Plain framework by showing that the representation of a distinctive group in the aggregated jury pool falls below the representation in the eligible juror population by one standard deviation or more.
- The representation of the group in the eligible juror population should be assessed using the most current census data, adjusted for any reliable data that might affect eligibility, such as the numbers of persons under the age of eighteen and persons in prison.
- Standing/Individual Injury. Lilly held that a defendant whose jury pool contains at least as high a percentage of the distinctive group as the eligible population has not been aggrieved under the Duren/Plain framework. Veal: if % of African Americans in Defendant's jury pool is less than the % of African Americans in the County's jury-eligible Census population, Defendant has standing. Standard deviation test does NOT apply to standing. Veal confirms this is bright-line, simple to administer, comparison: 3.27% Blacks in jury pool < 3.9% jury-eligible Blacks Census Webster County.

STATE V. LILLY: TRANSFORMATIVE HOLDING ON 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 defendant must prove "causation," that is, that the underrepresentation actually resulted from a particular feature or features of the jury selection system.

"RIGHT TO A FAIR AND IMPARTIAL JURY IS CRITICAL TO OUR CRIMINAL JUSTICE SYSTEM": THESE FCS RULINGS ARE FIRST STEP

- Justice Appel wrote a Special Concurrence, in which Justice Wiggins joined, and set forth their view that "the right to a fair and impartial jury is critical to our criminal justice system" and that the fair cross-section principle involved in this case "can only be understood in the larger context." Justice Appel outlined the comprehensive approach needed to ensure that Iowa's trial juries reflect their communities:
- [Today's fair cross-section rulings are] only a first step. In my view, (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.
- Reforms of Rule 2.18(5)(a) on challenges for cause are also needed (1) to enable those ex-offenders who have served their time to be considered for jury duty as any other citizen and (2) to disqualify for cause prospective jurors with racial biases (and discourage judges from "easy rehabilitation" of such jurors). Proposed amendments are presently under consideration by the Supreme Court.

BEWARE: DUREN 3-PRONG TEST IS ANALYTICAL, BUT NOT THE WAY TO ORGANIZE YOUR DISCOVERY PLAN AND TIME TABLE

- Beware: The Duren/Plain 3-prong test establishes the legal framework with which to analyze FCS challenges. However, the 1-2-3 sequencing of the defendant's prima facie is NOT the way a defendant must organize her litigation strategy for a FCS challenge.
- Defendant must begin to gather the Court system's aggregate data showing underrepresentation exists and has persisted over the past 6 months BEFORE defendant knows the racial composition of her jury pool/jury panel.
- Defendant must gather the evidence relevant to proving systematic exclusion exists, taking depositions and other research, BEFORE defendant knows the racial composition of her jury pool and jury panel.
- Defendant should alert the trial court to the underrepresentation in the aggregate pool and panel data in advance of the trial date through a Notice of Anticipated Fair Cross-Section Challenge. SPD attorneys Peter Persaud and Julia Zalensky have effectively used this technique.
- If defense counsel does not begin her FCS research and discovery until the day of voir dire, it is TOO LATE!

1. A DEFENSE ATTORNEY DOES NOT NEED TO SEE THE JURY BEFORE RAISING A FAIR CROSS-SECTION (FCS) CHALLENGE

- Best practice requires that defense counsel begin her discovery and research well in advance of jury selection.
- C/K state "a client's jury is irrelevant to a cross-section challenge." That is NOT true in Iowa.
- Lilly holds that a defendant must show that there is underrepresentation on her jury pool or jury panel in order to have experienced constitutional injury—i.e., Standing to raise a FCS challenge.
- On Veal Remand the State contends that Defendant must show underrepresentation at 2 Standard Deviation level to establish Standing.
- This is contrary to Supreme Court holding in Lilly and contrary to application of that holding in Veal, where it was sufficient that the percent of Blacks in the Veal jury pool (3.27%) was less than the percent of Blacks in the jury-eligible Census population of Webster County. If the 2 St. Dev. Threshold applied, no remand in Veal as only -.41 St. Dev. on Veal's own jury pool.
- "But there can be – a pattern of underrepresentation that exists and is significant and cannot be demonstrated just with one z-score and one p value. * * * In particular, in the situations that we have here and the situation that we typically have in Iowa, where we have a small population fraction, that makes it much, much harder to see how strong -- or it makes it much, much harder to detect underrepresentation just from one example." Grace Zalenksi, State v. Veal Remand.
- But counsel can't wait until she sees defendant's jury pool/panel to decide to pursue a FCS challenge, as an FCS challenge requires extensive pre-trial evidentiary work.

2. 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 of a male defendant who challenged the Missouri laws that had resulted in significant underrepresentation of women on his jury panel.
- Unfortunately, there is language in State v. Plain 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.'"
- For example, there are likely white defendants who would prefer to be tried by a jury that is representative of the community and they can make a FCS challenge asserting there were too few African Americans of Latinx in their jury pools.

3. THE CLIENT CAN MAKE A FCS CHALLENGE TO THE SYSTEM THAT SELECTED THE PETIT JURY AND TO THE GRAND JURY.

- Duren also made clear the constitutional FCS requirements apply not only to the jury pool, but also to the jury panel from which defendant's petit (trial) jury is drawn.
- In re Grand Jury of Dallas County (2020) held Plain's FCS principles apply to the composition of a grand jury. However, it was permissible for the grand jury to be sworn and to proceed while the district court had under consideration a Plain challenge—at least where the witnesses had already reported to the court house to testify.
- The FCS principles do NOT apply to the final 12-member trial jury itself. Holland v. Illinois held that 6th Amendment FCS principles would not apply the alleged discriminatory peremptory challenges; such claims must be brought under the 14th Amendment Equal Protection Clause and require proof of intentional discrimination.
- Lockhart v. McCree held that FCS principles didn't apply to challenges for cause which were based on individualized determinations as to each person and when those who were struck could still serve in other criminal cases.
- The NAACP contends Lockhart does NOT foreclose a FCS claim against Rule 2.18(5)(a) which has been construed to automatically disqualify any persons with a felony conviction for life.

4. IOWA SUPREME COURT CAN PROVIDE GREATER PROTECTION UNDER IOWA CONSTITUTION AND DID SO IN LILLY

- SCOTUS caselaw on 6th Amendment FCS claims is binding on the Iowa Supreme Court.
- However, in Lilly-Veal-Williams the Iowa Supreme Court construed Article I, §10, of the Iowa Constitution to have a more lenient threshold of proof regarding (1) underrepresentation and (2) systematic exclusion than required when the FCS challenge is based solely on the 6th Amendment.
- The 1868 precedent of Clark v. Board of School Directors (of Muscatine) recognized that the Iowa Constitution can be construed to provide greater protection to Iowans than comparable individual rights provisions of the Federal Constitution afford Americans generally. The Clark precedent was relied upon in Varnum v. Brien and a host of criminal procedure cases beginning with State v Cline in 2000.
- Because no defense counsel has suggested a different analytical framework for Article I, §10 claims, the Lilly Court held it would follow the SCOTUS "framework" of Duren v. Missouri, but would apply a different standard.

5. A STATUTORY VIOLATION OF IOWA CODE §607A MAY EXIST EVEN WHERE THERE IS NO CONSTITUTIONAL VIOLATION.

- In Tyrone Washington v. State of Iowa, (Webster County 2015), SPD Chuck Kenville raised a FCS challenge. District Judge Coleen Weiland held that the jury selection process violated Iowa Code 607A and she struck the panel and started over.
- Judge Weiland recognized that, due to the 10% Absolute Disparity requirement of State v. Jones, it was impossible for a FCS challenge on behalf of African Americans to be successful in Iowa.
- State v. Jones was overruled 2 years later, in State v. Plain, and the Iowa Courts entered the post-Plain World.
- Defense counsel should raise their FCS challenges under the 6th Amendment, Article I, §10, and Iowa Code 607A.


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6. STRICT WAIVER REQUIREMENTS RE ASSERTING IOWA CONSTITUTIONAL FCS CLAIM; UNCERTAINTY RE TIMING REQUIREMENTS

- C/K do not cite any Iowa statute or rule of procedure setting a timeliness requirement for FCS challenges.
- C/K state that courts have held that constitutional claims are not required to meet time limitations.
- However, as will become evident when we consider the proof required under Parts 2 and 3 of the Duren test, it is very unlikely defense counsel will succeed in making out a prima facie FCS challenge if she has not engaged in extensive discovery, including statistical analysis and in depth examination of the court's jury selection process, well in advance of jury selection.
- Veal and Williams applied STRICF WAIVER standard 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 an Article I, §10 Iowa constitutional claim as to his FCS challenge.

7. DEFENDANT NEED NOT ALLEGE OR PROVE DISCRIMINATION

- The most important holding of the Iowa Supreme Court in its unanimous State v. Plain decision in 2017 is that the FCS requirement is rooted in the 6th Amendment, and NOT the 14th Amendment's Equal Protection Clause; as a result, a FCS challenge need not prove intentional, purposeful racial discrimination.
- Justice Hecht's unanimous ruling in Plain was reaffirmed by the Court in Justice Mansfield's Opinion for the Court in its 2019 decisions in Lilly-Veal-Williams. These were 4-3 decisions.
- The Lilly dissent, written by Justice McDonald, citing a solitary dissent by then-Justice Rehnquist and a solitary concurrence by Justice Thomas, strenuously argued that Duren v. Missouri was wrongly decided in 1977. The Dissent would appear to limit the scope of the FCS right to "widespread and state-sponsored or state-approved sexism and racism. . . . [where] the systematic exclusion of large percentages of the population for civic life was stark, palpable, and easily observed." Id. at 36.

8. IN GENERAL, A SUBSTANTIVE FCS CLAIM MUST START WITH A REQUEST FOR DISCOVERY.

- "Because the defense cannot tell by looking at a jury whether the cross-section right is being violated, it is almost always necessary to request discovery about the jury selection system. The question in a cross-section claim is whether steps in the jury selection process that precede the selection of petit jurors fail to include representative numbers of groups in the community. Typically only the court and jury selection system have access to information about those preliminary stages of the selection process. Therefore, a defendant cannot substantiate a cross-section claim without data supplied through discovery." C/K at 16.
- "It may also be important for a defense attorney to obtain or request funding for an expert. In some cases, an expert in statistics, computer programming, or jury system operation will be necessary to analyze the jurisdiction's jury data." Id.
- Justice Mansfield quoted Hannaford Agor regarding proof of systematic exclusion and the need for expert testimony to identify the cause(s) of the underrepresentation.

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

- The second most important holding in State v. Plain was that even though there was no Iowa statute authorizing access to jury records by defense counsel, 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. It is clear that 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. The jury manager did not produce the information, citing a lack of access to the information the state is constitutionally required to maintain. To the extent Plain did not meet his prima facie case with respect to the third prong of the test, we conclude he lacked the opportunity to do so because he was not provided access to the records to which he was entitled." 898 N.W.2d at 828.
- NAACP has obtained such jury records from the OSCA following the Plain decision.

10. THE DUREN/PLAIN PRIMA FACIE FAIR CROSS-SECTION CLAIM.

- In Duren v. Missouri (1977), SCOTUS held that a criminal defendant alleging a cross-section violation must satisfy a three-prong prima facie test by showing 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."
- The Iowa Supreme Court has embraced the Duren test not only for 6th Amendment claims, but also for state constitutional claims under Article I, §10. Lilly. However, the Lilly Court pointed out that defendant had not suggested a different analytical approach for his state constitutional claims.
- Invoking its independent authority under the Iowa Constitution, the Lilly Court applied Prongs 2 and 3 of the Duren test in ways that strengthened the FCS requirement in Iowa and, in doing so, provide greater protection to defendants.

II. PRONG 1 OF DUREN TEST: IDENTIFYING A DISTINCTIVE GROUP

- The group that a defendant claims is not fairly represented in the jury pool must be a "distinctive" group in the community. Courts routinely recognize that African-Americans, women, and Latinos are distinctive groups. Native Americans, Asians, and Jews have also been recognized as distinctive groups.
- In State v. Jones, the Iowa Supreme Court held that "non-whites" was not a recognizable group under existing precedent. State v. Jones was of course overruled in State v. Plain.
- Given the demographics of Iowa, with its various racial minority groups constituting very small percentages in almost every County, the authors submit defendants may want to consider aggregating the various minority groups into a "non-white" or "persons of color" group as an alternative or fall-back group if underrepresentation cannot be established for defendant's own minority group. Even if this claim were foreclosed by 6th Amendment case law, it may be viable as an Article I, §10 claim.
- We have no doubt that African Americans defendants would prefer that their jury panel be diversified with an African American juror(s). However, if the underrepresentation of African Americans was not sufficient in and of itself to meet the FCS threshold but underrepresentation of non-whites would meet the threshold, we believe many/most African Americans would prefer a jury panel that included non-white representation over an all-white jury panel.

12. PRONG 2: DISPARITY BETWEEN THE PERCENTAGE OF DISTINCTIVE GROUP ON AGGREGATE JURY POOL AND THEIR PERCENTAGE IN THE JURY-ELIGIBLE CENSUS POPULATION

- A. Identifying the Number of Distinctive Group Members in the Community
- SCOTUS, and considerable case law, has permitted defendants to make out a prima facie FCS challenge based on U.S. Census general population data, even though such data is over-inclusive.
- State v. Lilly held that trial courts should apply FCS principles to jury-eligible population data. 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.
- Good News! 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 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). See NAACP Request to Take Judicial Notice, State v. Veal, Addendum A.
- 2010 Decennial Census Table P10 provides for each County the population that is 18 years of age and older, and breaks down the data by race and ethnicity. But not by U.S. citizenship.
- 2020 Decennial Census will be a factor until its data becomes dated, and then ACS data will be preferred.

HOW TO ACCESS THE CENSUS DATA.

- 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.
- This figure does NOT include multi-racial African Americans, who are among those included in B05003G, "Two or more races" table. This often will require a further adjustment as the NAACP believes it is common for judges and the court system to include multi-racial Blacks in their jury pool counts, e.g. State v. Veal.

B. IDENTIFYING THE NUMBER OF DISTINCTIVE GROUP MEMBERS IN NOT ONLY THE JURY POOL BUT THE JURY PANEL MAY BE DECISIVE

- In Taylor v. Louisiana, 419 U.S. 522 (1975), the initial FCS case under the 6th Amendment, SCOTUS 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." 419 U.S. at 538.
- Duren v. Missouri made clear that impermissible disparities can occur not only at the pool stage but throughout the process, including the jury panel stage.
- Jury Pool. Preliminary Jury Pool data for the first 6 months of 2019 (January – June) suggest that a several of the larger urban districts have been able to create jury pools that would appear to meet the FCS requirement for African Americans. This data must be examined further and inquiry made—but it appears to be Good News!
- Jury Panel. However, that is not the end of the story. Unfortunately, the SCAO data indicated the percentage of African Americans declined as the selection process proceeded, and, at the Jury Panel stage, several jurisdictions no longer met FCS requirements. Under Taylor and Duren, defendants still can bring a meritorious FCS challenge to their jury panels.
- Empanelment. The recent juror data provided by the OSCA also included a Juror Empanelment information, which is new. Although it appears rudimentary, the OSCA is beginning to collect data at each stage of the jury selection process.

STATE V. LILLY: 2 STEPS TO DUREN/PLAIN PRONG 2: DEFENDANT MUST DEMONSTRATE CONSTITUTIONAL INJURY IN STEP ONE

- C/K state "the limiting principle" is that Duren's 2d prong cannot be established by demonstrating the disparity between the percentage of African Americans in the community and the percentage on a single jury panel. This is true.
- However, the Iowa Supreme Court in Lilly created a 2-step test for Duren/Plain Prong 2 that does scrutinize the defendant's own jury pool and jury panel.
- The first "conceptual" step of Prong 2 requires that defendant prove he/she has suffered constitutional injury. Lilly holds this requires comparison of the percentage of African Americans in defendant's own jury pool/jury panel with the percentage of African Americans in the jury-eligible population of the County. "[A] defendant whose jury pool contains at least as high a percentage of the distinctive group as the eligible population has not been aggrieved under the Duren/Plain framework."
- The State contends in State v. Veal Remand that the 2 Standard Deviation threshold applies not only to the Step 2 aggregate data measurement, but also to the Step 1 individual injury/standing measure. The NAACP contends this is contrary to the holding of Lilly and its application in Veal—revisionism!

ONE OR TWO STANDARD DEVIATION UNDERREPRESENTATION BASED ON AGGREGATED JURY POOL/PANEL DATA IS STEP TWO

- The second "conceptual" step of Duren/Plain Part 2 requires that defendant prove the underrepresentation in his/her own jury pool/panel is not an aberration. This requires aggregation of jury pool and jury panel data, typically over the most recent 6-months preceding trial.
- Defendant must demonstrate "that the representation of a distinctive group in the jury pool falls below the representation in the eligible juror population by more than one standard deviation" under an Article I, §10 claim, and by more than two standard deviations if the FCS challenge is based on the 6th Amendment alone.
- Because Defendant will not know the racial composition of his own Jury Panel until the morning of the first day of trial, defense counsel must address Step 2 in the pre-trial proceedings. Best practices suggest, defense counsel should file well in advance of the trial date a Motion or Notice in Anticipation of Fair Cross-Section Challenge setting forth the data and the statistical evidence of underrepresentation for the preceding 6 months.
- Defense counsel should also engage in the critical pre-trial discovery as to juror data and the racial impact of jury selection practices that will be required to show causation on the systematic exclusion 3d prong of the Duren/Plain test.

13. BINOMIAL DISTRIBUTION-STANDARD DEVIATION METHOD EXCLUSIVE MEASURE OF DISPARITY; GUIDANCE RE AGGREGATION OF DATA

- Justice Mansfield and the Lilly Court Majority determined the Binomial Distribution test, also known as Standard Deviation Analysis, would be the singular method of measuring disparity, rejecting any role for the Absolute and Comparative Disparity tests. The binomial distribution test was selected because it was recognized within the academic discipline of statistics.
- The Court rejected the State's argument that the courts should limit their review "to the pool from which the trial jurors were drawn, without considering other, earlier pools." The Court agreed with the NAACP on the importance of aggregate statistical data, observing: "It is unfair to restrict the defendant to the current jury pool that may have as few as seventy-five persons, and then at the same time require the defendant to furnish results that have a certain degree of statistical significance." Id. at 17-18.
- "Another question is whether there should be outer limits on aggregation, for example, whether aggregation should stop once it covers some period of time or some total numbers of potential jurors. This issue was not raised in the initial briefing in this case or at oral argument, and therefore we do not address it here." Lilly, n. 7.

STATE: JURY POOL AGGREGATION SHOULD BE LIMITED TO SMALLEST NUMBER THAT COULD GIVE 1 OR 2 STANDARD DEVIATION RESULT

- In each of its Petitions for Rehearing (Lilly, Veal, and Williams), 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, and continues to make this argument on the remand of the cases.
- Defense counsel must resist this strategy. Such a small sample size will make it more difficult to find statistical significance, and to convince judges they should be confident of the result. The jury data in Berghuis used the most recent 6 months, and in Duren the jury data was from the most recent 10 months.
- Six months has been typical, and, given that the size of the jury pools in Iowa are not large, the State's argument that statistical significance will always be found when huge jury pools are aggregated has no application to the facts in Iowa.
- "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

14. ONE STANDARD DEVIATION DISPARITY ESTABLISHED UNDERREPRESENTATION PER DUREN/PLAIN 2D PRONG

- When a FCS Constitutional Challenge is made under the Iowa Constitution, 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, there remains a 32% probability that we are seeing a random event. But if we are looking in only one direction, as we are in these cases, the probability would be 16% that the departure is a random event and 84% that it is not." Id. at 16.
- When a Federal Constitutional FCS Challenge alone 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.

SIMPLIFY: CHART SHOWING BLACK JURY POOL COUNT & % VS. BLACK JUROR-ELIGIBLE CENSUS COUNT & %

- The left side of the Chart presents the Court System's jury pool and/or jury panel juror data, broken down by race.
- The right side presents the jury-eligible population of the distinctive group based on Census data.
- Left Side. In Veal the trial court included multi-racial African Americans in its count of African American jurors who were in Defendant's Webster County jury pool—on the left side of the equation.
- Right Side. On the right side of the equation, the court only included the Census group "Blacks Alone," but did NOT include the multi-racial African Americans from the "Two or More Races" Census category for Webster County.
- Left Side. The trial court included 3 jurors (2 of the 3 were African Americans) who had felony convictions in its jury pool count--on the left side of the equation—even though each of the persons with felony convictions was struck for cause. The Attorney General takes the position such exclusion is required by Rule 2.18(5)(a).
- Right side. The Lilly Court instructed that prisoners (felons) at the correctional facility in Ft. Dodge should be excluded from the Census data in determining the percentage that African Americans comprise of the jury-eligible population (as prisoners are ineligible for jury service).

LEFT SIDE: ONLY JURORS WHO ANSWERED "RACE OR ETHNICITY" QUESTION ON QUESTIONNAIRE ARE COUNTED

- United States v. Hernandez-Estrada, 749 F.3d 1154, 1161 (9th Cir. 2014) (en banc) holds: "In determining the percentage of a distinctive group in the qualified jury wheel, the absolute disparity analysis excludes those jurors who did not identify their race or ethnicity on their jury questionnaire."
- It would distort the numbers if it were assumed that none of the jurors not reporting their ethnicity were Hispanic. Thus, 9th Circuit concludes FCS calcs are to be based only on those individuals who responded to the race question on questionnaire, and non-respondents are not included in the FCS calculation..
- In Veal, Justice Mansfield based his calculations on those jurors who responded to the race question.
- 90% Response Rate in 2019. Iowa Supreme Court Administration Office jury pool data for January – June 2019 shows major improvement in prospective jurors response to the "race and ethnicity" question on the juror questionnaire. The 7 largest Counties had a response rate better than 90%.
- Geocoding. Hannaford Agor, court expert, geocoding study on State v. Plain remand because of nonresponse rate greater than 40% in 2015. Jury experts Rose and Abramson contend geocoding involves numerous and complex calculations that increase the chance of error.

RIGHT SIDE: JURY-ELIGIBLE CENSUS DATA NOW REQUIRED

- General population Census data historically used, but no longer: "Representation of the group in the eligible population should be assessed using the most current census data, adjusted for any reliable data that might affect eligibility, such as the numbers of persons under the age of eighteen." Veal at 11.
- Jury-Eligible population Census data now required by Lilly. Paula Hannaford Agor: 2 principal U.S. Census sources: (1) American Community Survey (5-year estimates), Table B05003, B05003B, etc. provides data on residents for all 99 Iowa Counties who are 18 and older and U.S. Citizens, broken down by race and ethnicity. E.g., "Blacks and African Americans Alone," "Two or More Races," etc. (2) 2010 Decennial Census Table P10 provides data on residents for each of Iowa's 99 Counties for residents who are 18 and older, broken down by race. Once 2020 Census data is available, counsel will want to prepare calculations based on both of these Census reports.
- Now that Iowa Courts will base FCS calcs on much more precise jury-eligible Census data, fashioning a more lenient one standard deviation threshold struck a fair and appropriate balance.
- Adding multi-racial African Americans among B05003G "Two or more races" to B05003B "African Americans/Blacks Alone" is necessary if multi-racial African Americans were in jury pool count on the left side of the equation.

WEBSTER COUNTY JURY POOL DATA

DUREN/PLAIN Step 1, Part 2	O	N	%
Blacks Alone + Biracial Blacks	5	153	3.27%
Blacks Alone (w/o Biracial)	3	153	1.96%
Blacks Alone + Biracial Blacks -Felons (2 Blacks, 1 White)	3	150	2.0%
Blacks Alone – Biracial Blacks -Felons	1	150	0.7%
DUREN/PLAIN Step 2, Part 2	Aggregated Webster County Jury Pool Data		
2016 Webster County Jury Pool	35	2,637	1.33%
Jan. – June 2017 Webster County Jury Pool Data	?	?	?

WEBSTER COUNTY CENSUS DATA

P	
Webster Co. Census/ ACS General Population "Blacks Alone"	4.6%
Webster Co. General Population Less (17 and under estimate) Veal Majority Calculation	3.9%
Webster Co. General Population "Two or more Races" Census/ACS	2.1%
Webster Co. "Two or more Races" Pro-rated: Biracial Blacks	1.3%
VEAL DISSENT = (1) Veal Maj.'s 3.9% (18 & older) less Prisoners (But No Adjustment Biracial)	2.6%
VEAL DISSENT + Pro-Rated "2 or More Races" = 2.6 + 1.3	3.9%
VEAL MAJORITY + PRO-RATED "2 OR More Races" less Prisoners 3.9 +1.3 = 5.2% - ??	5.2% Minus Prisoners?

EXCEL SOFTWARE SIMPLIFIES BINOMIAL CALCULATION LEFT-SIDE V. RIGHT-SIDE CHART PROVIDES THE KEY DATA

- Supreme Court Administration should develop the Excel Software binomial function expertise—we suspect it already has the expertise--to assist District Courts and Jury Managers across the state, as well as the parties, to ensure that accurate and efficient binomial distribution calculations are made using today's technology, the binomial distribution function available in the Excel Software. "J-E" = jury-eligible.
- The Microsoft Excel web site explains its binomial distribution function: The left hand-right hand equation chart contains the critical information to insert into the 3 BINOM.DIST function boxes:
- Number_s E.g., The number of J-E African Americans in the jury pool or panel ("O" on Chart).
- Trials E.g., The total of all J-E prospective jurors in the jury pool or panel ("N" on Chart).
- Probability_s The % that J-E African Americans comprise of the jury-eligible population ("P" on Chart).
- Cumulative Required. A logical value that determines the form of the function. If cumulative is TRUE, then BINOM.DIST returns the cumulative distribution function, which is the probability that there are at most number_s successes; if FALSE, it returns the probability mass function, which is the probability that there are number_s successes.

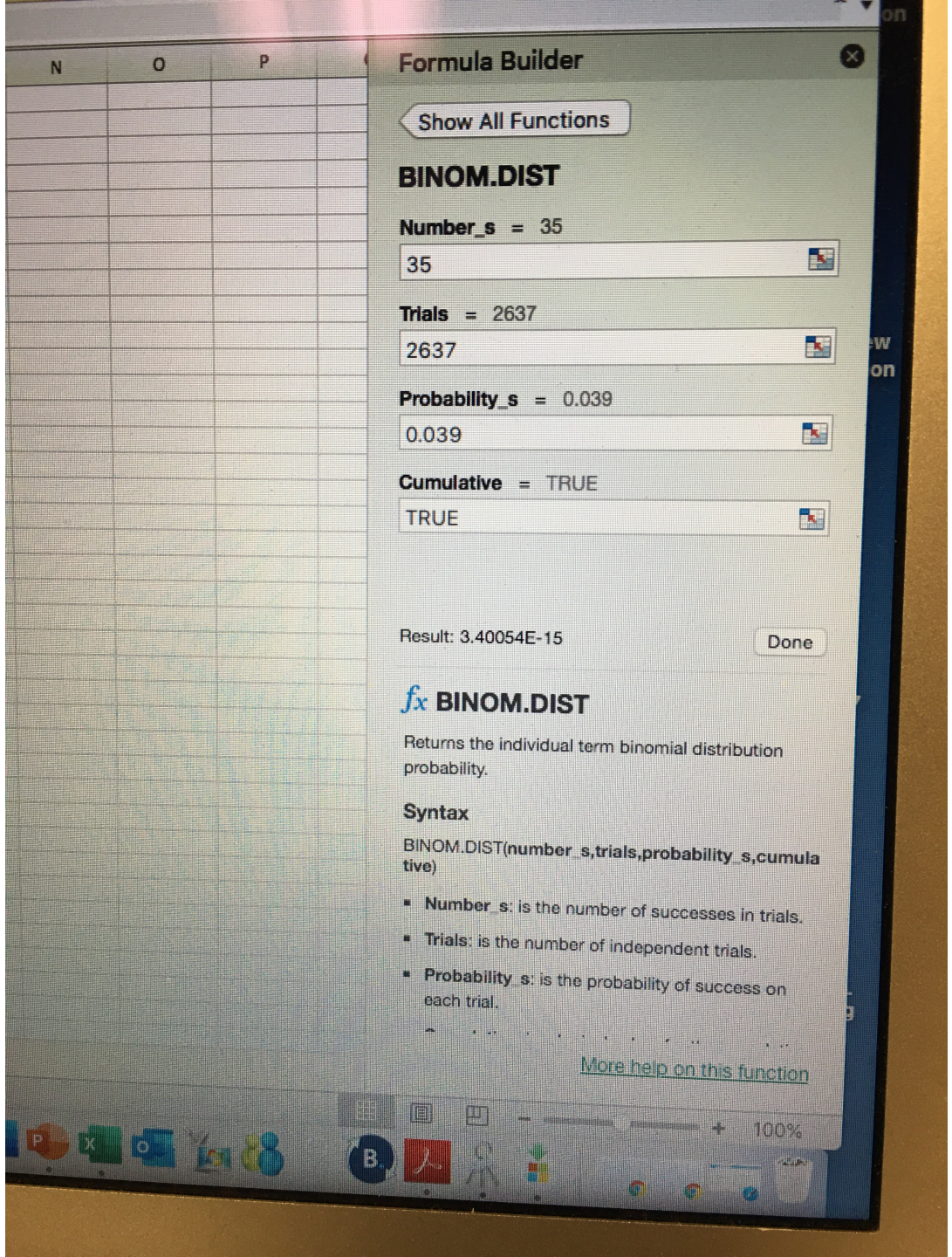
THE STATE V. VEAL BINOMIAL CALCULATIONS BASED ON 2016 AGGREGATED WEBSTER COUNTY JUROR DATA

- First, explain the role of the binomial formula to the judge, again returning to the left hand v. right hand chart.
- Based on the .046 African American Alone general population percentage, one would expect random selection to result in approximately 121 African American jurors in the 2016 Webster County Jury Pool (2,637 x. .046 = 121). Instead, there were only 35 African American jurors. The Binomial Distribution function enables us to determine the probability that an underrepresentation of 86 jurors (121 – 35 = 86) could occur by random chance.
- Based on a .039 African American jury eligible population percentage, one would expect random selection to result in approximately 103 African American jurors in the aggregate pool (2,637x .039 = 103). There were only 35 African American jurors. The Binomial Distribution function enables us to determine the probability that an underrepresentation of 68 jurors (103 – 35 = 68) could occur by random chance.
- Now we are ready to do the Excel calculation. You will want to do several Binomial calculations for the District Court, using the Excel software. This allows you to show the Court the probability result depending on which set of statistical facts the Court chooses.

PUT THE NUMBERS INTO THE EXCEL BINOMIAL DISTRIBUTION SOFTWARE FUNCTION

- It seems likely courts will require these calculations be made by a statistical expert in the initial cases raising FCS challenges; However, with familiarity with the Excel software, courts and attorneys can make the preliminary calculations on their own. Let's examine Justice Mansfield's State v. Veal calculations, using P = .046 and P = .039.
- Click on "Insert Function" and Drop Down Menu appears. Scroll down to "Binom. Dist. Click on it and press the button "Insert Function." 4 boxes will appear.. Go to the left-hand v. right-hand chart for the numbers.
- Put the number of Webster County African American jurors (35) in 2016 in the first box (Number_s)
- Put the total number of Webster County jurors (2,167) in 2016 in the second box (Trials)
- Put the % that African Americans comprise of the Webster County jury-eligible population (.039) in the third box (Probability_s)
- Type in True in the fourth box (Cumulative)
- Press the button "DONE"
- The "Result" is reported.

Using p = .039, the Excel Spreadsheet calculates a binomial result of 3.4005E-15 or 0.00000000000000034005 <0.025, a showing of underrepresentation far beyond 2 standard deviations.


N
O
P
Formula Builder
Show All Functions
BINOM.DIST
Number_s = 35
35
Trials = 2637
2637
Probability_s = 0.039
0.039
Cumulative = TRUE
TRUE
Result: 3.40054E-15
Done
fx BINOM.DIST
Returns the individual term binomial distribution probability.
Syntax
BINOM.DIST(number_s,trials,probability_s,cumulative)
Number_s: is the number of successes in trials.
Trials: is the number of independent trials.
Probability_s: is the probability of success on each trial.
More help on this function
100%

STATE V. VEAL: JUSTICE MANSFIELD'S BINOMIAL CALCULATIONS

- The Excel Spreadsheet calculates a binomial result of (1) 5.594E-21 or 0.000000000000000000005594) when p = .046, and (2) 3.4005E-15 or 0.0000000000000034005 when p = .039.
- The Excel binomial calculations reach results identical to those calculated by Justice Mansfield if one puts "False" into the Cumulative box. If False is put in the Cumulative Function, the result is 4.0513E-21 (0.000000000000000000000405) when p = .046, and (2) 2.289E-15 or (0.0000000000000229) when p = .039.
- State v. Veal calculations. Justice Mansfield reported these results in Veal: "The odds of getting only thirty-five successes out of 2637 trials with p of .046 are 4.05 X 10-21. As the State concedes in its brief, 'The odds of that occurring randomly . . . are very low.' * * * The odds of getting only thirty-five successes out of 2637 trials with p of .039 in that case are 2.29 X 10-15." Veal, Slip Op. at 18.
- In the Veal case, and we suspect in most cases, the choice between "True" and "False" in the Cumulative box is negligible in terms of the result. Either calculation provide strong confirmation that the likelihood that the actual result, 35 African Americans in the 2016 Jury Pool or 2,637, occurred by random chance is infinitesimal, and far beyond the one standard deviation threshold (Article I, §10 claims) or the two standard deviation threshold (6th Amendment claims).

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 - 2018) 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. Within each racial and ethnic group, the data also enables calculation of those who are U.S. Citizens, which is a requirement for jury service in Iowa.
- 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.
- Krob will update the Jury-eligible calculations annually, once the ACS report is made public, typically in December. The 2019 ACS B05003 tables will be available on December 20, 2020.
- The State Census Data Center's web page: https://www.iowadatacenter.org/data/acs/social/citizenship/18over-nativity.

15. THIRD PRONG OF DUREN/PLAIN TEST REQUIRES DEFENDANT TO DEMONSTRATE DISPARITY IS DUE TO SYSTEMATIC EXCLUSION

- In *Duren v. Missouri* the U.S. Supreme Court explained "systematic exclusion" as 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 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 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.

MUST THE STATE BE PROACTIVE IN SECURING A "FAIR CROSS-SECTION" OF THE COMMUNITY IN JURY POOLS AND 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 quite prosaic or commonplace.
  - 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?

THE RELEVANCE OF JURY MANAGEMENT PRACTICES TO THE JURY SELECTION PROCESS AND THE RIGHT TO AN IMPARTIAL JURY

- 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 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 pools—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;
- But a widely held view has been that failure to observe sound jury management practices does not constitute systematic exclusion within the meaning of *Duren v. Missouri*.

THE CONTRIBUTION OF *STATE V. LILLY* TO THE UNDERSTANDING OF "SYSTEMATIC EXCLUSION" UNDER *DUREN* AND *PLAIN*

- Lilly Court embraced NAACP argument that 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. * * * 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.

READ PHA DRAKE LAW REVIEW ARTICLE AND CHECK OUT NATIONAL CENTER FOR STATE COURTS FCS WEB PAGE

- Justice Mansfield quoted extensively from Hannaford-Agor's Drake Law Review article:

"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.

- "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.

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 updates to reduce impact of undeliverable summonses.
- SCAO is seeking current addresses from state income tax records. Legislation was short-circuited due to pandemic last Session and will be pursued again in 2021.
- Improving jury summons response through effective enforcement. Sending 2d summons to nonresponders and FTAs (failure to appear)
- Executive Order No. 7 restored voting rights of most persons with a felony conviction who have served their time. Proposed amendment to Iowa Rule of Criminal Procedure 2.18(5)(a) would make such persons eligible to service, subject to challenge for cause and peremptory challenge as any other juror.
- Research Resources: Prof. Brian Kalt's American University Law Review article; Prof. James Binnall Maine L. Review
- Shortening length of service. Polk County: 1 week or 1 trial. Such steps reduce excusal rate for hardship, especially for financial reasons

PROVING SYSTEMATIC EXCLUSION UNDER THE 6TH AMENDMENT

- In State v. Lilly the Court stated that the Berghuis (SCOTUS) case "appears to reject this proposition [that jury management practices can amount to systematic exclusion] under the Sixth Amendment." Id. at 307.
- The NAACP views Berghuis, a case heavily laden with Federalism concerns. For those litigating the FCS challenge only under the 6th Amendment (as is true of the remands in Plain, Veal, and Williams), NAACP suggests that this Lilly-Veal holding should be read in the context of the Court's discussion of systematic exclusion in State v. Lilly, particularly its reliance on the California Supreme Court decision in People v. Henriquez, 406 P.3d 748 (Cal. 2017), which suggested an FCS claim could have been made out if proof that better jury management practices would have improved minority juror representation.
- For the future, defense counsel only need assert the Article I, §10, FCS claim, to avoid the narrower constraints of the Lilly-Veal construction of the 6th Amendment FCS claim.
- Justice Mansfield summarized the Henriquez holding as "declin[ing] to find systematic exclusion based on a county's decision not to adopt a list of practices alleged to improve minority jury representation, absent proof that they actually would improve minority juror representation." Lilly at 20.
- Rule 2.18(5)(a)'s felon exclusion rule would appear to clearly have a significant racial impact and be subject to challenge as systematic exclusion. But defendants must put on proof—a key part would be proof that such persons are deterred from even responding to jury summons because they know they will be automatically disqualified.

POSSIBILITY OF RECONSIDERING BURDEN OF PROOF WHEN COURT HAS MORE DATA ON JURY SELECTION PRACTICES

- "[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.'" Id. At 18-19.
- However: "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." Id. at 21.
- Defense counsel should make a record as to the inadequacy of the Court system's own jury selection process records, including as to racial impact, and the great difficulty the lack of such records causes in terms of proof.

16. DISCOVERY IN CROSS-SECTION CLAIMS INCLUDES ALL JURY SELECTION MATERIALS RELEVANT TO THE CLAIM

- The Chernoff/Kadone article has an excellent short discussion on discovery strategy in FCS challenges, and discusses the broad scope of jury records that are discoverable. In some instances it may be necessary for disclosure pursuant to a protective order to protect jurors' privacy.
- Hannaford Agor makes presentations to jury managers and judges all across the country, including presentations in Iowa this past Spring and next week, on compliance with FCS law and requirements.
- PHA's 1-page handout is a gem! 10 Things Every Jury Manager Needs to Know.
- This Nutshell provides an exceptional outline for defense counsel taking depositions of the jury manager and the SCAO and developing her discovery plan generally.

PHA, TEN THINGS YOU SHOULD ALWAYS BE ABLE TO ANSWER ABOUT YOUR JURY SYSTEM

- 1. Under what legal authority does your jury system operate? E.g., statute, court rules, administrative rules, locally adopted jury plan.
- 2. What source list(s) is used to compile your master jury list? What is the procedure for compiling the master jury list? How often is that procedure undertaken? When was it last done?
- 3. What process is used to select names to receive a qualification questionnaire or summons? How often is that process audited to ensure random selection? What were the results of the most recent audit?
- 4. What types of documentation are required or what procedures are followed to verify the status of prospective jurors seeking to be disqualified, exempted or excused from jury service? Who is authorized to disqualify, exempt, or excuse a prospective juror from service? What criteria are used for disqualification, exemption, or excusal?
- 5. What criteria are used to suppress names on the master source list from receiving a qualification questionnaire or summons? Under what legal authority are names suppressed?

PHA, POINTS 6 - 10

- 6. How often are these suppression files reviewed or updated? How many records are included in the suppression file? How many names from the master jury are actually suppressed?
- 7. What proportion of qualification questionnaires or summonses is returned undeliverable? What steps does your court undertake to ensure the accuracy of addresses on the master source list? How effective are those steps?
- 8. What proportion of prospective jurors fail to respond to the qualification questionnaire or fail to appear for jury service? What steps does your court to follow-up on non-responders or FTA jurors? How effective are those steps?
- 9. What jury system documents must you provide to defense counsel upon receipt of a valid subpoena? If requested to do so by defense counsel, are you required to document the gender, race, and ethnicity of jurors reporting for jury service?
- 10. If the jury system is challenged, who is your attorney? How familiar is your attorney with jury system operations?