IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	S.CT. NO. 17-1989
	)	
ANTOINE WILLIAMS,	)	
	)	
Defendant-Appellant.	)	

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

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 30th day of August, 2018, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Antoine Williams, No. 6620033, Anamosa State Penitentiary, 406 North High Street, Anamosa, IA 52205.

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Nick Johansen, Staley freed on Stand Your Ground ruling, Red Oak Express, February 13, 2018, found at https://www.redoakexpress.com/content/staley-freed-stand-your-ground-ruling

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ROUTING STATEMENT

Two issues raised in this case warrant retention by the Iowa Supreme Court. This case involves a shooting that occurred mere hours before amendments to Iowa Code chapter 704 (HF517 "Stand Your Ground") took effect, and Williams argues the provisions of this bill should apply in his case. A similar argument is raised in State v. Fordyce (17-1701), currently in the briefing stage of appeal.

This case also involves Williams' claim that his jury pool violated his right to a fair cross-section of his community under the Sixth Amendment and article I, section 10 of the Iowa Constitution. Two other cases currently pending on appeal also request the court clarify and expand on its decision in State v. Plain: State v. Veal (17-1453) has been retained by the Iowa Supreme Court and State v. Lilly (17-1901) is in the briefing stage.

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by the defendant-appellant, Antoine Williams, from his conviction,

judgment, and sentence for second degree murder following a jury trial in the Floyd County District Court.

Course of Proceedings: The State charged Antoine Williams with willful and premeditated first degree murder for shooting Nate Fleming. (Trial Information) (App. pp. 5-6). Williams filed a notice of intent to raise a self-defense/justification defense. (Notice of Defense) (App. p. 7). Before trial, the State filed a motion in limine seeking to exclude any evidence of the alleged victim's criminal history or prior bad acts. (Motion in Limine) (App. pp. 37-45). Williams filed a motion challenging the jury pool as a violation of Williams right to a fair cross section of the community under the Sixth and Fourteenth Amendments and Article 1, section 10 of the Iowa Constitution. (Motion Challenging Jury Pool) (App. pp. 16-18). The court overruled Williams' challenge to the jury pool, agreeing that the county had a history of underrepresentation of African-Americans in the jury pool, but concluding that the current jury pool did not suffer from that defect. (Order re: Jury Pool Challenge) (App. pp. 46-51).

During jury selection, Williams sought to question the jurors individually on race issues. The court denied the request because it would take too long. After discussing the issue with Williams on the record, Williams agreed he wanted his attorneys to bring up race, his attorneys questioned the jury panel as a whole about race. (Trial Tr. vol. I p. 206 L. 15 – p. 208 L. 4).

Williams also argued amendments to Chapter 704 passed during the 2017 legislative session affecting the justification defense in Iowa (House File 517, or commonly referred to as the Stand Your Ground law) should apply to his case. The court rejected his argument, concluding that because the relevant amendments became effective on July 1, 2017 and Williams was shot Fleming on June 30, 2017, the provisions did not apply. (Trial Tr. vol. IV, p. 116 L. 6 – p. 119 L. 23).

During his case in chief, Williams sought to have Fleming's criminal history entered into evidence but was denied. (Trial Tr. vol. VI, p. 125 L. 5 – p. 135 L. 20).

Williams requested the court instruct the jury with an ABA model instruction addressing implicit bias. The court rejected his request, noting no appellate court in this state had expressly approved of the instruction and concluding the issue as adequately addressed in another jury instruction. (Trial Tr. vol. VI, p. 138 L. 24 – p. 139 L. 11).

The jury acquitted Williams of first degree murder but found him guilty of second degree murder. (Forms of Verdict) (App. pp. 60-61). The court sentenced Williams to an indeterminate fifty year term of imprisonment subject to a seventy percent mandatory minimum. (Sentencing Order) (App. pp. 65-68). Williams filed a timely notice of appeal. (Notice of Appeal) (App. p. 69).

Facts: On June 30, 2017, Antoine Williams shot and killed Nathaniel Fleming. The question at trial was whether Williams shot in self-defense, in fear for his own safety and a belief that Fleming was reaching for a gun.

According to the trial testimony, Williams was born and raised in Greenville, Mississippi. As an adult, he had lived in

various cities, but ultimately moved to Iowa to get away from the "negativity" and violence that was a part of life in other places: Williams had been shot during a robbery and had been stabbed when he tried to break up a fight. (Trial Tr. vol. VI p. 3 L. 19 – p. 8 L. 19).

Nate Fleming was dating Williams' sister, Barb, and Williams first met him around Mother's Day 2017. Williams didn't have any issues with Fleming initially, although he'd been told that Barb and Fleming moved to Iowa from Kansas City, Missouri, because Fleming was "on the run from some things." (Trial Tr. vol. VI, p. 14 L. 9 – p. 16 L. 19). The couple initially lived with Williams' other sister but after a falling out with her, they came to live with Williams in his apartment. He gave them his bedroom, and they stayed with him for a couple months, moving out just a few days before the shooting. (Trial Tr. vol. VI p. 17 L. 15 – p. 19 L. 6).

Williams experience with Fleming was that he was aggressive and often threatened violence. He told Williams he was on the run and talked about carrying weapons. On the

first night they stayed in his apartment, Fleming showed Williams a gun he carried, a .40 caliber with an extended clip. He frequently made gang references. (Trial Tr. vol. VI, p. 20 L. 7 – p. 22 L. 9). Fleming told Williams how he used to rob people and commit break-ins. Fleming fought with Barb and had previously assaulted other girlfriends, as well. Williams described Fleming as "a real intimidating type of guy that carries weapons." "He would ugly [things] up for no reason." (Trial Tr. vol. VI p. 22 L. 23 – L. 26 L. 25). At first, Williams tried to stick up for him to other people, but eventually gave up trying because Fleming wouldn't stop "ticking people off." (Trial Tr. vol. VI p. 26 L. 3 – 25).

On June 30, Williams had a job interview in the morning and spent the afternoon with some friends. He got back to the Clarkview Apartment complex in Charles City late in the afternoon. (Trial Tr. vol. VI, p. 30 L. 1 – p. 32 L. 17). He saw his friends, Ed Brown and Josha Baker hanging around outside the apartment buildings and joined them. They drank from a bottle of liquor. (Trial Tr. vol. VI, p. 33 L. 4 p. 34 L. 13).

Fleming arrived, speeding through the parking lot in Barb's car, squealing his tires and driving recklessly. He was "acting crazy" and acting aggressively. He jumped of his car and called Josha's wife a bitch and taunting Josha for not doing anything to stop him. He tossed a bottle of vodka to Ed, telling him to hold it because he'd be back. He jumped back him in his car and drove away. When he returned, the three men talked to Fleming about his dangerous driving in the parking lot, concerned that someone could get hurt or call the cops. (Trial Tr. vol. VI, p. 35 L. 4 – p. 39 L. 9).

Williams' girlfriend, Ashley, arrived and asked Williams if he could babysit for her later. Fleming approached them, and Ashley told him to go away because "she couldn't take him today." Fleming cursed at her and reached inside her car and swiped at her face. Ashley left. (Trial Tr. vol. VI p. 39 L. 10 – p. 40 L. 7).

Fleming continued to act obnoxiously, taking drinks away from the other men and "wilding out"—driving his car recklessly in the parking lot. Ashley returned later and was talking

outside her apartment building with another friend. Fleming again approached her. She told Fleming again to stay away from her. Fleming then tried to shake hands wither Ashley's friend, who refused, saying he didn't deal with him. Fleming was upset, cursing at them. Then Fleming was upset with Williams: "So you must be with these motherfuckers?" Ashley told Fleming to get away from them. Fleming stared them down, then said "You motherfuckers better not be standing here when I get back or I'm going to spray this bitch up." Williams took this as a threat that he would shoot them. He was nervous and tried to calm Fleming down, but Fleming told Williams to "fuck that" and drove to another parking lot in the complex. (Trial Tr. vol. VI, p. 40 L. 15 – p. 44 L. 25). Williams was shaken up by Fleming's threat. He told his friend, Ed Brown, that Fleming was talking about killing him. (Trial Tr. vol. VI, p. 45 L. 1-12).

Soon after, Ashley and her friend tried to leave, but whenever Ashley would try to step off the curb to cross the parking lot, Fleming stepped on the gas and accelerated toward

her, slamming on the brakes just before he hit her. (Trial Tr. vol. VI, p. 45 L. 13 – p. 46 L. 8).

After this, Williams and the other men went to Ed Brown's girlfriend's house, continuing to drink. The more Williams thought about all that Fleming had done and said, the more worried he became that Fleming would really try to shoot him or Ashley. He asked his friend Ed Brown if he could borrow his gun for protection. He got the gun and put it in his pocket. (Trial Tr. vol. VI p. 47 L. 2 – p. 51 L. 22).

He eventually returned to the apartment complex and went to Ashley's apartment to babysit as he'd promised earlier. She didn't answer the door, so he walked around waiting for her. He was still worried about Fleming's threats, so he called him to try to work things out. Fleming answered the phone, but didn't talk to Williams. Instead, Williams could hear him talking to a third person about Williams: "This motherfucker must be with them, so I got something for his ass." Williams took that as a threat that Fleming intended to shoot him. He got flustered and hung up without saying anything. Williams

wandered around the outside of the apartment building, still waiting for Ashley. (Trial Tr. vol. VI, p. 51 L. 23 – p. 55 L. 15). He heard and saw some other people in the vicinity but didn't talk to anyone. (Trial Tr. vol. VI, p. 55 L. 15 – p. 56 L. 15).

Fleming pulled up and parked near the dumpster in the parking lot. Fleming was still driving crazy and backed in with his music blaring. Williams, feeling uncomfortable, asked Fleming why he was "pulling up on me like that?" Fleming turned down the music and Williams slowly approached him, asking him if he was okay and trying to sort out whether he was still mad. Fleming didn't want to listen to him and accused Williams of being "with" some men who had beat Fleming up on an earlier occasion. Williams denied it, and Fleming said, "You know, fuck that," and reached down with his right hand. Williams panicked, pulled the gun from his pocket, cocked it, and started firing. He didn't know how many shots he fired. (Trial Tr. vol. VI, p. 56 L. 16 – p. 67 L. 14).

When he was done, he was in shock and his first thought was just that he needed to get out of there. He pulled Fleming

out of the car. Fleming was still alive, and Williams didn't realize he was mortally wounded because he only saw a little blood on his shoulder. He left Fleming on the ground, got in the car, and drove away. He eventually abandoned the car in Waterloo and asked friends for a ride to Chicago, making up a story about going to see his mother. He didn't hear that Fleming had died until several days later when he found out police were looking for him, and he turned himself in. (Trial Tr. vol. VI, p. 64 L. 16 – p. 73 L. 25).

When he initially spoke to an investigator, he lied about his involvement. Later in the interview, he admitted shooting Fleming. (Trial tr. vol VI, p. 74 L. 7 – p. 77 L. 19). He did not specifically say he shot Fleming in self-defense but said that Fleming "said something that triggered" him. (Trial Tr. vol. IV, p. 101 L. 6-25).

Chris Vierkant was the closest witness to the shooting. He was walking through the parking lot and saw a car pull in and park. He didn't see the car drive fast or squeal its tires. He also saw Williams standing between a dumpster and a tree,

walking slowly toward the parked car. Vierkant said hello, but Williams didn't respond. Vierkant continued walking and didn't hear arguing or yelling. Then he heard bangs and saw flashes of light from behind him. He assumed it was fireworks and didn't turn around. Later he learned there was a shooting. (Trial Tr. vol. III, p. 244 L. 5 – p. 1 – p. p. 254 L. 22). Williams recalled seeing Vierkant at about the same time he saw Fleming pull into the parking lot. He thought he responded to Vierkant. (Trial Tr. vol. VI, p. 57 L. 2-10).

Jocelyn Simmons lived in the complex and knew Fleming because "he was trying to date" her. Her children's father was helping her with the kids on the evening of June 30. Fleming stopped by her apartment a couple times, and neither Jocelyn nor Shaun thought he seemed angry or upset. As they watched TV, they heard gunshots. Shaun was the first to the window, and he saw Williams standing outside the car with his arm extended. Shaun heard a couple more shots and saw the muzzle flash. He estimated Williams was about a foot from the vehicle. He then saw Williams pull Fleming from the vehicle.

When Jocelyn got to the window, she saw Williams standing over Nate's body as it lay on the ground. (Trial Tr. vol. III p 6 L. 16 – p. 25 L. 10; p. 49 L. 11 – p. 59 L. 13).

Tracy Hagen and her family had returned from a fishing trip late on the evening of June 30. They had parked near the dumpster, in the parking space next to Fleming. While her family unloaded their car, they didn't notice anything out of the ordinary or hear any fighting or arguing. They chatted for a moment with someone who asked about the fish they caught; as they got inside the apartment building she and her husband heard several popping sounds they took to be fireworks. When Tracy returned to her car a little later to retrieve her purse, she saw a man lying on the ground near the dumpster. She also saw Shaun Biehl nearby on the phone with police. (Trial Tr. vol. III, p. 90 L. 14 – p. 107 L. 10).

Ed Brown testified that he was at the apartment complex on June 30 and that Fleming was acting crazy, always moving around, driving recklessly and acting tough. He recalled Williams telling him that Fleming was talking about killing him.

Brown decided to leave because the whole situation was making him nervous. He denied giving Williams a gun, but acknowledged that he is not legally allowed to possess a gun. He had heard Fleming talk about having guns in the past and he saw Williams with a gun at one point in the past. Williams was not mad that night, and, in fact, he didn't remember having ever seen Williams mad in the five years he'd known him. He testified it was out of character for Williams to shoot Fleming. (Trial Tr. vol. IV, p. 144 L. 2 – p. 163 L. 23).

Josha Baker testified that he as at the apartments on June 30 and saw Fleming driving recklessly in the parking lot as well as being disagreeable and angry and threatening others. He heard Fleming threaten to get a gun and "come back at us." Baker was uncomfortable enough that he decided to leave. (Trial Tr. vol. V p. 12 L. 5 – p. 14 L. 18).

Corey Webb testified that he knew both Fleming and Williams. He testified that Fleming was cocky, boastful, arrogant, and acted like a badass. He had gotten into a physical fight in the weeks before the shooting and left Fleming

with two black eyes. Fleming had bragged about getting a gun on that occasion. (Trial Tr. vol. V, p. 41 L. 9 – p. 50 L. 20).

Additional facts will be discussed as necessary.

ARGUMENT

I. WILLIAMS' JURY POOL WAS NOT A FAIR CROSS-SECTION OF THE COMMUNITY, AND THEREFORE, A DENIAL OF HIS RIGHT TO AN UNBIASED JURY UNDER THE FEDERAL AND STATE CONSTITUTIONS.

A. Preservation of Error: Error was preserved by Williams' motion challenging the jury pool as a violation of his right to a fair cross section of the community under the Sixth Amendment. (Motion Challenging Jury Pool) (App. pp. 16-18). The court overruled Williams' challenge to the jury pool, agreeing the county had a history of underrepresentation of African-Americans in jury pools but concluding the jury pool in Williams' case did not underrepresent African-Americans. (Order 10/6/17) (App. pp. 46-51). Williams did not separately argue a violation of his rights under article I, section 10 of the Iowa Constitution until his motion for new trial. (Sent. Tr. p. 2 L. 23 – p. 3 L. 4). Accordingly, if the court concludes this was

insufficient to preserve error under the Iowa Constitution, Williams asserts his trial counsel was ineffective. State v. Tobin, 333 N.W.2d 842, 844 (Iowa 1983).

B. Scope of Review: Constitutional issues are reviewed de novo. State v. Plain, 898 N.W.2d 801, 810 (Iowa 2017). On a claim of ineffective assistance of counsel, the appellate court will make an independent evaluation of the totality of the circumstances, which is the equivalent of a de novo review. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984).

C. Discussion: In the present case, the court called two pools of jurors in an attempt to ensure sufficient representation of African-Americans in the pool. African-Americans were underrepresented in the jury pool, and Williams objected to the pool and suggested the court call an additional panel to see if the problem could be alleviated. (Motion Tr. p. 7 L. 12 – p. 9 L. 12). The district court expressed concerns that if Williams' argument was correct, and the underrepresentation of African-Americans was, in fact, a systematic exclusion, then calling additional panels under the same methods would not

solve the problem. Ultimately, the court would bump into Williams' speedy trial deadlines and be forced to dismiss the case. (Motions Tr. p. 9 L. 13-25; Order at fn. 1) (App. p.50). While the court acknowledged a historical underrepresentation of minorities on jury panels in the county, the court ultimately concluded the representation of African-Americans in this jury pool contained a proportionate number of African-Americans. (Order 10/6/17) (App. pp. 46-51).

Williams, an African-American man, was denied his right to an impartial jury of his peers under both the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 10 of the Iowa Constitution because of the systematic exclusion of African-Americans from the jury pool in Floyd County. The current system of obtaining jury lists fails to pull sufficient numbers of minorities. Accordingly, the district court should have used its authority to remedy the problem in some fashion, such as by continuing to pull jury pools until one demonstrating a fair cross-section was achieved; pulling from other current, more comprehensive lists of

residents within the county to create a list more reflective of a fair cross-section of the community; changing venue if a fair cross-section could not be obtained; or ultimately, dismissing the trial information against Williams for a failure to be able to try him from a constitutional jury pool. Therefore, Williams' conviction for second degree murder must be reversed and the matter remanded for a new trial.

Floyd County draws its jurors from lists of current motor vehicle operators and voter registrations. (Order, p. 1) (App. p. 46). The Iowa Code provides for additional sources but does not require them. "A jury manager may 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." Iowa Code § 607A.22(2) (2017).

Williams obtained information for the jury pools from January 2013 through December 2017. The numbers provided by the clerk are not entirely self-explanatory, but the court interpreted the report as demonstrating that 206

summons letters were sent to potential jurors for the term in which Williams' trial was to take place. Seventeen letters were either undeliverable or the addressees did not respond. A total of 189 jurors responded. They were given an option to identify their race when they returned the form, and many chose not to answer that question. In total, 138 jurors responded and identified their race. Two identified as African-American: one was excused and one was in the pool. Thus the court considered the percentage of African-Americans in the jury pool to be 1.4%. The most recent census figures indicated the African-American population of Floyd County was 2.3%. (Order) (App. pp. 46-51).

Williams interpreted the numbers differently, contending it was only appropriate to count the one self-identified African-American who made into the pool. (Motion) (App. pp. 16-18). The district court disagreed because there had been no showing that African-American jurors were excused at a rate higher than other racial groups. Applying the three-pronged analysis of Duren v. Missouri, 439 U.S. 357, 364 (1979) and

State v. Plain, 898 N.W.2d 801 (Iowa 2016), the court concluded the first prong had been met, but that Williams failed to establish the second two prongs. Specifically, the district court concluded that representation of African-Americans on the jury panels in Floyd County had been underrepresented, but that the jury panel for Williams' trial did not suffer from such a defect. The court also concluded Williams had not established that any underrepresentation was systematic. (Order, p. 4-5) (App. pp. 49-50). See Duren v. Missouri, 439 U.S. 357, 364, 367-68 (1979).

Both the United States and the Iowa Constitution guarantee a criminal defendant the right to a trial "by an impartial jury." U.S. Const. amend VI; Iowa Const. art I, § 10. While these provisions use identical language, the Iowa Supreme Court jealously protects its authority to follow an independent approach under our state constitution. State v. Ochoa, 792 N.W.2d 260, 267 (Iowa 2010). The court's approach to independently construing provisions of the Iowa Constitution that are nearly identical to the federal counterpart

is supported by Iowa's case law. See e.g., Ochoa, 792 N.W.2d at 267; State v. Cline, 617 N.W.2d 277, 285 (Iowa 2000), overruled on other grounds by State v. Turner, 630 N.W.2d 601, 606 (Iowa 2001). Even where a party has not advanced a different standard for interpreting a state constitutional provision, the court may apply the standard more stringently than federal case law. State v. Bruegger, 773 N.W.2d 862, 883 (Iowa 2009).

"The right to an impartial jury entitles the criminally accused to a jury drawn from a fair cross-section of the community." Plain, 898 N.W.2d at 821. The United States Supreme Court believed that a jury representing a cross-section of the community enables "the commonsense judgment of the community [to serve] as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge." Id. (quoting Taylor, 419 U.S. at 530). Such juries are "critical to public confidence in the fairness of the criminal judicial system." Id. (quoting Taylor, 419 U.S. at 530).

In Plain this court applied the Duren three-part test for determining whether there was a violation of the Sixth Amendment fair cross-section requirement. Id. at 821-29.

> Under this three-part test, a defendant can establish a prima facie violation of the fair cross-section requirement by showing:
>
> > (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.
>
> If the defendant establishes a prima facie case, the burden shifts to the state to justify the disproportionate representation by proving "a significant state interest" is "manifestly and primarily advanced" by the causes of the disproportionate exclusion.

Id. at 821-822 (quoting Duren, 439 U.S. at 364, 367-68 (1979).

1. Distinctive group: To qualify as someone from a distinctive group, the accused must show membership in "a community group with 'a definite, objectively ascertainable membership' that 'constitutes a substantial segment of the

population' and has 'common and unique opinions, attitudes, and experiences' that cannot be adequately represented by members of the general population." Id. at 822 (quoting Thomas M. Fleming, Age Group Underrepresentation in Grand Jury or Petit Jury Venire, 62 A.L.R. 4th 859, 967 (1988)). Race is one such community group. Id.; see Iowa Code § 607A.2 (prohibiting exclusion from jury based on race, creed, color, sex, national origin, religion, economic status, physical disability, or occupation). The issue of whether Williams, an African-American, was from a distinctive group was not in question.

2. The representation of the group is not fair and reasonable in relation to the number of such persons in the community: In order to establish the second prong the accused must show that "the proportion of group members in the jury pool is under-representative of the proportion of group members in the community." Id. Three statistical tests have been used by the Supreme Court to measure representation and help determine what levels of underrepresentation are

permissible: (a) absolute disparity, (b) comparative disparity, and/or (c) standard deviation. Id. (citing United States v. Hernandez-Estrada, 749 F.3d 1154, 1160 (9th Cir. 2014)). Each test has its own advantages and short comings. Id. at 822-23.

The absolute disparity is measured by "taking the percentage of the distinct group in the population and subtracting from it the percentage of that group represented in the jury panel." Id. at 822 (quoting State v. Jones, 490 N.W.2d 787, 793 (Iowa 1992)). "The lower the resulting percentage, the more representative the jury pool." Id. The problem with the absolute disparity test, however, is that it "does not account for the relative size of the minority group in the general population." Id. at 823. When there is distinctive group population lower than the allowed absolute disparity, then the distinctive group will be excluded. Id. In 2016 African-Americans made up 2.3% percent of Floyd County and the jury pool consisted of a single African-American, or .7%.

Thus, the absolute disparity was 1.6 percent.[1] (Ex. D (jury reports, Sept-Dec 2017); Ex. E (Iowa Black Population Percentage, 2016 by County)) (Ex. App. pp. 29-31, 32-34). Such a low percentage would be unlikely to be sufficient to establish a prima facie case of a violation of the fair cross-section requirement.[2] See State v. Jones, 490 N.W.2d at

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[1] Williams and the district court disagreed about whether jurors who were excused before ever appearing in the courthouse should be counted as part of the pool. Williams asserts that only the members of the jury pool that actually appear and are available for service on the jury panel are appropriately counted. To reach the calculation in the brief, Williams interprets the data supplied by the jury manager as follows: Two pools of potential jurors were called during the term in which Williams' trial occurred. Summons letters were sent to 103 people for each pool. In Pool 1, twelve summons were undeliverable, nine jurors were excused, ten were disqualified, and one was deferred, leaving 71 potential jurors. In Pool 2, five were undeliverable, 25 were excused, six were disqualified, and thirteen were deferred, leaving 59 potential jurors. Thus the total jury pool consisted of 130 members, only 1 of which identified as African-American.

[2] The Jones court noted cases with absolute disparities as high as 10% and were not found to establish a prima facie case of under representation. See Swain v. Alabama, 380 U.S. 202, 208–09, 85 S.Ct. 824, 829, 13 L.Ed.2d 759, 766 (1965) (underrepresentation of as much as 10% as calculated by the absolute disparity concept, was insufficient to establish a prima facie case); United States v. Clifford, 640 F.2d 150, 155 (8th Cir.1981) (Eighth Circuit held that an absolute disparity of 7.2% did not represent a substantial underrepresentation of

793.

No Iowa counties have a greater than 10% African-American population. Therefore, using the absolute disparity test, it would be essentially impossible for any Iowa minority to establish a prima facie case of a violation of the fair cross-section requirement. Plain, 898 N.W.2d at 825. As this court noted "an African-American could not establish a racially unrepresentative jury using the absolute disparity model under the Sixth Amendment even if the exclusion of African-Americans was total and systematic." Id.

The comparative disparity tests looks at the relation of the percentage of the designated group in the jury pool and compares it to the percentage of the designated group in the

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native Americans on the jury panel.). "Other federal circuit cases arising in districts where the distinct group is a small percentage of the general population have reached a similar conclusion." Jones, 490 N.W.2d at 793 (citing United States v. Sanchez–Lopez, 879 F.2d 541, 547-49 (9th Cir.1989)(Hispanic 2.8% absolute disparity); United States v. Armstrong, 621 F.2d 951, 956 (9th Cir.1980) (African–American 2.8% absolute disparity); United States v. Kleifgen, 557 F.2d 1293, 1297 (9th Cir.1977) (African–American 1.9% absolute disparity); United States v. Whitley, 491 F.2d 1248, 1249 (8th Cir.1974) (African–American 2.05% absolute disparity)).

community. Plain, 898 N.W.2d at 823. "Comparative disparity is calculated by dividing the absolute disparity by the percentage of the population represented by the group in question." Id. (quoting United States v. Sanchez, 156 F.3d 875, 879 n.4 (8th Cir. 1998). The higher the comparative disparity percentage, the less representative the jury pool. Id. In the present case 1.6% by 2.3%, resulting in 70% underrepresentation.

The comparative disparity test has been criticized because it "can overstate underrepresentation for groups with a small population percentage." Id. To compound matters the comparative disparity tests with large group populations tends to validate deviations that are not produced by chance even though that can alter the representativeness of the average jury significantly. Id.

"Standard deviation is calculated by analyzing a sample taken from the voter wheel and analyzing it for randomness and fluctuations." Id. Specifically, it is "defined for the binomial distribution as the square root of the product of the total

number in the sample . . . times the probability of selecting a [member of the designated group] times the probability of selecting a [a member not belonging to the designated group]." Castaneda v. Partida, 430 U.S. 482, 496, 97 S. Ct. 1272, 1281, 51 L. Ed. 2d 498 (1977). In this case, assuming 2.3% African-American population in Floyd County and a jury pool of 130 members with only one African-American, the standard deviation is 1.71. However, relying on standard deviation also has problems. "Measures of standard deviation presume randomness; however, the chances of drawing a particular jury composition are not random, in part because 'the characteristics of the general population differ from pool of qualified jurors.'" Id.

Plain held "multiple analyses to be used that are appropriate to the circumstances of each case." Id. at 827. By allowing multiple analytic models courts can take into account the strengths and weaknesses of each test and apply them appropriately to the facts of the individual case. Id. The conclusion appears to be that using multiple tests will avoid the

pitfalls of a test understating or overstating a statistical disparity when working with low percentage numbers.

In a community with a 2.3% African-American population, only one African-American was selected for the jury pool of 130 people. According to the data provided by the jury manager, each jury pool back to January 2013 consisted of, at most, a single African-American. Many jury pools contained none. The district court acknowledged that "[h]istorically there appears to be underrepresentation of African-Americans on the juries in Floyd County." (Order, p. 3) (App. p. 48).

3. Systematic exclusion: The third Duren prong requires Williams to establish that the underrepresentation is a result of a systematic exclusion the distinctive group. Plain, 898 N.W.2d at 823-34. The defendant does not need to show *intentional* exclusion but must show that the exclusion is "inherent in the particular jury-selection process utilized." Plain, 898 N.W.2d at 824. "The third prong distinguishes between situations where a particular jury venire is non-representative and those situations where the jury venires

in a district are continuously non-representative of the community." Plain, 898 N.W.2d at 824. This can be shown with "evidence of a statistical disparity over time that is attributable to the system for compiling juries." Plain, 898 N.W.2d at 824.

In the present case, Williams has offered the necessary records to establish a systematic exclusion of African-Americans from the jury pool. The Floyd County jury manager created race reports from January 2013 through December 2017. (Ex. D) (Ex. App. pp. 7-31). The most recent census data indicated Floyd County had a 2.3% African-American population. (Ex. E) (Ex. App. pp. 32-34). The jury reports demonstrate that the jury pools have consistently, at most, a single African-American in the jury pool.

The jury manager creates the list of potential jurors from lists of current voter registrations and current motor vehicle operators. These lists exclude large segments of the population. (Ex. F; Ex. G) (Ex. App. pp. 35-39).

In the recommendations of the committee on jury selection, the committee made recommendations to enlarge the number of those who serve on the jury. In particular, the third recommendation was to use additional comprehensive source lists. Recommendations of the Committee on Jury Selection, p. 10 (March 2018). The committee recognized that Iowa Code section 607A.22 allows state court administrators and jury managers to receive lists from applicable lists from government officials, upon request, as no cost. Id. "The inclusiveness of the master list directly increases with the use of multiple source lists." Id. There are numerous other sources available that are not utilized, such as income tax filers and persons receiving unemployment compensation. Id. In addition, the committee suggested the Supreme Court administrator investigate the availability of lists from housing authorities and the Child Support Recovery Unit. Id. pp. 10-11.

"If certain groups continue to be underrepresented through the years, it stands to reason that some aspect of the jury-selection procedure is causing that underrepresentation."

Plain, 898 N.W.2d at 824 (quoting David M. Coriell, An (Un)fair Cross Section: How the Application of Duren Undermines the Jury, 100 Cornell L. Rev. 463, 481 (2015)).

D. Conclusion. The jury pool drawn for Williams' trial was not a fair cross-section of the community. Williams established the first three prongs of the Duren test. Because the district court erred in concluding Williams had not satisfied the Duren test, Williams' conviction should be reversed and the matter tried anew.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY REFUSING TO ALLOW WILLIAMS TO INDIVIDUALLY VOIR DIRE THE JURY POOL ABOUT RACE ISSUES.

A. Error Preservation. Error was preserved when Williams requested to individually voir dire potential jurors about race issues and the court denied his request. (Trial Tr. vol. I p. 206 L. 15 – p. 208 L. 4; Motion for Individualized Voir Dire) (App. pp. 52-53). See State v. Windsor, 316 N.W.2d 684, 687 (Iowa 1982).

B. Standard of Review. Appellate review of the manner and scope of jury voir dire is for an abuse of discretion. State v. Windsor, 316 N.W.2d 684, 686 (Iowa 1982).

C. Discussion. Race was a concern for Williams and his defense team before trial began. As discussed in section I above, Williams had unsuccessfully challenged the make-up of the jury panel because of a lack of diversity. During voir dire, Williams asked to be able to question the jurors individually about their attitudes about race. (Trial Tr. vol. I, p. 206 L. 15-20). The district court denied the request, concerned about the amount of time it would take and concluding the jurors were fair:

> All right. I'm going to overrule that motion. One, for the reasons stated by the State. I -- We've listened to this jury, and I think most of them have expressed an opinion that they can be fair and impartial and don't have any predisposition in -- in this matter. And just from that kind of general sampling, I don't think it's going to be necessary to have an individual examination.
>
> The second reason is just a matter of – of timing. Five minutes each -- and I think that's generous -- times 34 is 170 minutes, which is, you know, almost three hours. And if we take some breaks here and

there for the court reporter, you know, basically we'd be using a half a day for that.

We have a shot of getting the jury selected today. I don't know if that's going to happen or not. My experience is if I have 150 people having to come back overnight, we lose some of them, there might be exposure to things that we don't want to have them exposed to. It's a lot easier if I have 14 people that I have to take care of and -- and keep track of.

So I don't want to spend that time in order to -- to pick a jury, given all that; and also I -- I think it's somewhat unfair to -- to the jury members that we do that without, you know, more cause shown for doing that.

So saying that, that means Ms. O'Mara's – I think wants to inquire regarding their attitudes towards race. I think the concern is that that -- if you're going to raise that issue, the defendant should express his consent to going into that issue.

(Trial Tr. vol. I, p. 207 L. 5 – p. 208 L. 9). Instead, after a colloquy with Williams to ensure his consent, the court permitted Williams to question the jurors as a group about race issues. (Trial Tr. vol. I, p. 209 L. 5 – p. 213 L. 16).

> [T]rial courts in Iowa should make or permit counsel to make specific inquiry into racial prejudice upon proper request in similar circumstances and in any case in which a reasonable possibility exists that the verdict might be affected by racial prejudice. We also hold, however, that, absent special circumstances of the nature delineated in Ham, the inquiry may be limited to a question of the panel sufficient to call the jurors' attention to the subject

and require response from any juror harboring racial bias.

State v. Windsor, 316 N.W.2d 684, 687 (Iowa 1982).[3]

Although the district court did allow Williams to question the potential jurors about race in a group setting, the minimum required by Windsor, Williams submits that the circumstances of his case, given the scholarship that has developed in the thirty-six years since Windsor was decided about the role racial bias plays in jury verdicts, the district court abused its discretion in refusing to allow Williams to individually question the potential jurors. As an African-American in rural Iowa, facing an all-white jury in a trial for first degree murder, Williams' situation did implicate "special circumstances" warranting the individual questioning. But see State v. Oshinbanjo, 361 N.W.2d 318, 321 (Iowa Ct. App. 1984) (no abuse of discretion when court did not allow defendant to

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[3] Ham involved a civil rights worker who was a prominent civil rights worker who alleged local law enforcement framed him on a drug charge because of his civil rights work. Ham v. South Carolina, 409 U.S. 524, 93 S.Ct. 848, 35 L.Ed.2d 46 (1973).

question jurors individually about race and instead asked question about racial biases from the bench and defense counsel had a chance to question the group).

Although the court allowed Williams to voir dire the jury about race as a group, the court abused its discretion by refusing to allow Williams to question the jurors individually. The court's reasoning, that "most of [the jury panel] have expressed an opinion that they can be fair and impartial and don't have any predisposition in -- in this matter" was an abuse of discretion. An abuse of discretion is shown when the court exercises its discretion "grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Helmers, 753 N.W.2d 565, 567 (Iowa 2008).

The court's refusal to allow Williams to individually voir dire the members of the jury panel because they most of them expressed an ability to be fair and didn't think they had any predispositions was clearly untenable and unreasonable. Whether the jurors had expressed a belief that they could be fair and impartial does not alleviate concerns about the jurors'

ability to recognize and set aside any implicit bias they possess. Implicit bias by its nature is bias that is reflexive and instinctual, and it is found in people who are adamantly convinced they are not biased. Adam Hahn, Charles M. Judd, Holen K. Hirsh & Irene V. Blair, Awareness of Implicit Attitudes, 143 J. Experimental Psychol. 1369 (2014); Jerry Kang, Implicit Bias, A Primer, Nat'l Center for State Courts (Aug. 2009).

More importantly, a defendant would want to question jurors about racial issues and bias, explicit or implicit, *individually* to ensure the honesty and forthrightness of the individual juror who will likely be embarrassed to admit biases in front of a large group of people. Questioning with only the attorneys, judge, and defendant present is more likely to elicit sincere responses that can be explored effectively by defense counsel. Further, if a potential juror was inclined to express bias, particularly racial bias, that might be rooted in his or her previous experiences, questioning in a group runs the risk of exposing the rest of the jurors to inappropriate commentary and tainting other jury members.

The court also considered how long it would likely take to question the jurors individually, concluding it would add about three hours to the jury selection process. In prosecution against an African-American man for first degree murder, in a trial the parties already expect to last about a week, a concern about adding a few hours to ensure a critical issue like racial bias is addressed and rooted out, is unreasonable. Williams was African-American, as were most of the witnesses on his behalf. Ensuring the jury would treat Williams fairly and give fair consideration to his witnesses is worth a few hours in such a grave matter.

Williams was prejudiced by the district court's abuse of discretion. See State v. Elmore, 201 N.W.2d 443, 446 (Iowa 1972) (when method and manner of jury questioning is challenged, "we are not disposed to reverse unless it is apparent that such discretion has been abused and that prejudice has resulted"). Given the circumstances of his case, there is "a reasonable possibility that racial or ethnic prejudice might have

influenced the jury." Rosales-Lopez v. United States, 451 U.S. 182, 191, 101 S. Ct. 1629, 1636, 68 L. Ed. 2d 22 (1981).

Williams presented a credible claim of self-defense. Witnesses for both the State and the defense characterized Williams as "a very nice gentleman" and "a real good person" with a "soft voice" who was "cordial with everything." He was a "big, nice, gentle guy" who was "quiet" and "treated everyone kindly." Witnesses had "never seen him angry" or characterized him as slow to anger, often turning the other cheek when faced with conflict. He didn't like guns, and it was out of character for him to shoot Fleming. (Trial Tr. vol. III p. 92 L. 22 – p. 93 L. 16; p. 112 L. 3 – 14; p. 256 L. 10-16; p. 259 L. 17-24; vol. IV p. 153 L. 11-14; vol. V p. 5 L. 8 – p. 7 L. 18; p. 25 L. 1-25; p. 33 L. 3-17; p. 43 L. 2-7; p. 53 L. 1 – p. 54 L. 14). In contrast, witnesses testified that Fleming was "disagreeable," "aggressive," "acted tough for no reason," and "always had a problem with something." He threatened to shoot people, bragged about having guns, and was "boastful," "cocky" "arrogant" and "acted like a badass." (Trial Tr. vol. IV p. 153 L.

17 – p. 163 L. 23; vol. V p. 12 L. 24 – p. 16 L. 9; p. 44 L. 2 – p. 45 L. 16; p. 46 L. 15-17; p. 55 L. 5-22; p. 63 L. 10-19). On the day of the shooting, Fleming was brash and aggressive, threatening to shoot Williams' girlfriend and the men he was with. There was no indication Williams had a motive for shooting Fleming other than fear for his own safety. Tellingly, the jury found Williams guilty of second degree murder, rejecting a conclusion that Williams acted with the specific intent to kill and willfully and with premeditation. Accordingly, the record demonstrates a reasonable probability that racial bias played a role in his conviction.

D. Conclusion. Because the district court abused its discretion in refusing to allow Williams to voir dire the jury panel individually about race, Williams' conviction should be vacated and his case remanded for a new trial.

III. THE DISTRICT COURT ERRED IN EXCLUDING EVIDENCE OF FLEMING'S PRIOR CONVICTIONS FOR WEAPON-RELATED OR ASSAULTIVE CRIMES AND PRIOR ACTS OF VIOLENCE NOT NECESSARILY KNOWN BY WILLIAMS.

A. Preservation of Error: Error is preserved because

the district court considered and issued final rulings on the issue of the admissibility of proposed evidence of Fleming's prior acts of violence and criminal record. The issue of the admissibility of Fleming's prior acts of violence and criminal record was initially raised during discovery. (Motion to Produce 9/20/17; Resistance 10/2/17) (App. pp. 8-12). The State filed a motion in limine seeking to exclude any evidence of Fleming's past history of criminal arrests or convictions, any evidence of specific acts or incidents to show his violent or quarrelsome character, and any reputation or opinion evidence of Fleming's violent character until Williams introduced some evidence that he acted in self-defense. (Motion in Limine, p. 5-9) (App. pp. 41-45). The court agreed that only opinion evidence regarding Fleming's violent character was admissible, but acknowledged that there might be specific acts of violence that would be admissible because they were directly related to the shooting or were witnessed by Williams. The court therefore advised the State to object when the contested evidence was proffered. (Motion Tr. p. 33 L. 8 – p. 39 L. 19).

At the close of the State's case, the court again addressed the issue in more detail. The court concluded Williams could not introduce evidence of specific acts of violence by Fleming unless Williams "was there and observed that conduct. But if you – you can't tie it in Mr. – something Mr. Williams observed, then – then I think it's just reputation or trying to prove character by a specific incident of conduct, which is – would not be allowed." (Trial Tr. vol. IV, p. 137 L. 24 – p. 138 L. 9).

The court sustained objections from the State during the testimony of various defense witnesses, limiting the testimony to Fleming's behavior on the day of the shooting and precluding any evidence of reputation until the record included some evidence supporting a justification defense. (Trial Tr. vol. IV, p. 146 L. 9 – 20; p. 148 L. 15 – 20; p. 153 L. 17 – p. 154 L. 8) (Ed. Brown). Later the court allowed reputation/opinion evidence, but refused to allow testimony about specific acts of violence by Fleming. (Ashley Chapman) (Trial Tr. vol. V p. 19 – p. 56 L. 1; p. 56 L. 17 – p. 58 L. 3). During Williams' testimony, the State also secured a ruling that Williams could only testify about

what he knew about Fleming before June 30. (Trial Tr. vol. VI, p. 22 L. 4 – 21).

Williams ultimately sought to introduce Fleming's criminal history report, but the court sustained the State's objection. The court relied on several grounds for disallowing the evidence, including that Fleming's criminal history, which included several assaults and weapons offenses, was not relevant because the only relevant determination was what Williams knew at the time of the shooting. (Trial Tr. vol. VI, p. 125 L. 5 – p. 135 L. 20).

However, if error was not preserved for any reason, Williams contends his trial counsel was ineffective for failing to preserve error. State v. Lucas, 323 N.W.2d 228, 232 (Iowa 1982).

B. Standard of Review: Evidentiary rulings are reviewed for an abuse of discretion. State v. Nelson, 791 N.W.2d 414, 419 (Iowa 2010). An abuse of discretion occurs when the trial court exercises its discretion on grounds that are clearly untenable or clearly unreasonable. State v. Greene,

592 N.W.2d 24, 27 (Iowa 1999).

Ineffective assistance of counsel claims are reviewed de novo. Taylor v. State, 352 N.W.2d 683, 684 (Iowa 1984). A defendant claiming a violation of his constitutional right to the effective assistance of counsel must establish: (1) counsel's performance fell below an objective standard of reasonableness and (2) counsel's deficient performance prejudiced the defense. Id. at 685. Prejudice is established by showing "a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 669, 104 S.Ct. 2052, 2055, 80 L.Ed.2d 674 (1984). A reasonable probability is one sufficient to undermine confidence in the outcome. Gering v. State, 382 N.W.2d 151, 153-54 (Iowa 1986).

C. Discussion. The district court excluded testimony by Ed Brown and Ashley Chapman because it concluded evidence of specific acts of violence by the alleged victim were not admissible to support Williams' justification defense unless they were witnessed or known by Williams. The court

excluded Fleming's criminal history for several reasons, including insufficient notice by the defense, the report was not clear, the witness was not able to lay the proper foundation for the report, specific acts are not admissible to show propensity of the victim to act similarly on the occasion at issue, and the details of the underlying criminal acts are not known. These decisions of the district court were an abuse of its discretion.

1. ***Rule 5.405: Use of Specific Instances of Conduct to prove Character:*** Iowa Rule of Evidence 5.404 generally prohibits the use of character evidence to prove a person acted in accordance with such character on a particular occasion. Iowa R. Evid. 5.404(a) (2017). However, an exception to that general rule applies in criminal cases to permit the defendant to present "evidence of the victim's pertinent trait." Iowa R. Evid. 5.404(a)(2)(A)(ii) (2017).

> While ordinarily evidence of a victim's prior violent or turbulent character is immaterial and not admissible at trial, if the accused asserts he or she acted in self-defense, specific instances of the victim's conduct may be used to demonstrate his or her violent or turbulent character.

State v. Einfeldt, ___ N.W.2d ___, ___ (Iowa 2018). See also State v. Webster, 865 N.W.2d 223, 243 (Iowa 2015); State v. Jacoby, 260 N.W.2d 828, 837 (Iowa 1977).

When a defendant claims self-defense, the "violent, quarrelsome, dangerous or turbulent character of the [victim] may be shown" and is relevant for two purposes. First, if the character traits are known to the defendant, then they "show the state of mind of the defendant, the degree and nature of his or her apprehension of danger which might reasonably justify resort to more prompt and violent measures of self-preservation." Additionally, the victim's character is relevant "[a]s tending to prove who was the aggressor [in the encounter with the defendant]," "*even if these character traits were unknown to the accused.*" State v. Jacoby, 260 N.W.2d 828, 837 (Iowa 1977) (emphasis added). See also State v. Dunson, 433 N.W.2d 676, 680-681 (Iowa 1988); State v. Webster, 865 N.W.2d 223, 243 (Iowa 2015).

In this case, the district court erroneously believed that specific acts of conduct demonstrating a victim's character for

violence or aggressiveness was not admissible under Rule 5.404 on the question of who is the first aggressor in a self-defense case. (Trial Tr. vol. IV, p. 146 L. 9 – 20; p. 148 L. 15 – 20; p. 153 L. 17 – p. 154 L. 8; vol. V p. 19 – p. 56 L. 1; p. 56 L. 17 – p. 58 L. 3; vol. VI p. 135 L. 2-20).

The district court was incorrect. In State v. Dunson, the Iowa Supreme Court addressed as a question of first impression, "[w]hether evidence of a victim's subsequent acts is admissible in a criminal case to prove the victim's aggressive and violent character at the time of the earlier crime." Dunson, 433 N.W.2d at 680. The court there determined that both Rules 404 and 405 (now Rules 5.404 and 5.405) permit the admission of such evidence. First, the Court held that Rule 404 permits the admission of such evidence because the evidence is "offered by the defendant" and "relates to a character trait of the victim: her aggressiveness and propensity for violence." Id. The court determined such character can be shown by specific instances of conduct under then-Rule 405, which stated: "In cases in which character or a trait of

character of a person *is an essential element of a* charge, claim, or *defense*, proof may also be made of specific instances of his conduct." Id. (emphasis added). Noting that Rule 405(b) "does not limit admissibility to past instances of conduct" and allows admission of subsequent instances of conduct as well, the Court held that "evidence of a victim's subsequent acts is admissible in a criminal case to prove the victim's aggressive and violent character at the time of the earlier crime." Id. at 680-681.

More recently in State v. Webster, 865 N.W.2d 223, 243 (Iowa 2015), the Iowa Supreme Court decided, consistently with Dunson, that "the trial court correctly found [a victim's] act of striking his ex-wife was relevant to show [the victim's] violent/aggressive character" as "relevant to show [the victim] was the first aggressor" in the incident with defendant.

And most recently, the Iowa Supreme Court reaffirmed these holdings in State v. Einfeldt.

> Under Iowa Rule of Evidence 5.404(*a*)(1), "[e]vidence of a person's character or character trait is not admissible to prove that on a particular

> occasion the person acted in accordance with the character or trait." An exception to this rule is when a defendant seeks to offer "evidence of the victim's pertinent trait." While ordinarily evidence of a victim's prior violent or turbulent character is immaterial and not admissible at trial, if the accused asserts he or she acted in self-defense, specific instances of the victim's conduct may be used to demonstrate his or her violent or turbulent character.

State v. Einfeldt, ___ N.W.2d ___, ___ (Iowa 2018) (internal citations omitted).

The district court excluded the testimony of Ed Brown and Ashley Chapman and prohibited the introduction of Fleming's criminal history report based on an erroneous interpretation of the law. The court concluded specific acts of violence not known to or witnessed by Williams prior to the shooting were inadmissible. "A ruling is untenable when the court bases it on an erroneous application of law." State v. Smith, 753 N.W.2d 562, 564 (Iowa 2008). Accordingly, the district court abused its discretion in excluding the evidence.

2. *Rule 5.403: Probative Value vs. Prejudice:* The district court also concluded the evidence of Fleming's criminal history created "a 403 problem." (Trial. Tr. vol. VI, p. 135 L. 17-20).

Iowa Rule of Evidence 5.403 allows exclusion of otherwise relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." Iowa R. Evid. 5.403. "Probative value measures the strength and force of the evidence to make a consequential fact more or less probable." State v. Martin, 704 N.W.2d 665, 672 (Iowa 2005) (quotation marks and citation omitted). "Unfairly prejudicial evidence, on the other hand, appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action that may cause a jury to base its decision on something other than the established propositions in the case." Id. at 672-673 (quotation marks and citation omitted). Thus the question under Rule 5.403 is "whether the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." Id. (quoting State v. Wright, 203 N.W.2d

247, 251 (Iowa 1972)). Such a standard was not satisfied in this case to justify the exclusion of the evidence in this case.

Fleming's criminal history had significant probative value in helping to establish that it was Fleming, not Williams, who acted as the first aggressor in this situation. Although there were witnesses to the Fleming's actions earlier in the day of the shooting and to Williams' actions after the shooting, no one actually witnessed the interaction between the two men immediately prior to the shooting. Williams alone was able to tell his side of the story, but given a defendant's interest in his own criminal trial for first degree murder, his testimony will certainly be treated with skepticism by a jury. See Jury Instruction No. 8 (advising jury to consider a witness's "interest in the trial" and "motive" when deciding what testimony to believe). Fleming's criminal history included at least five convictions for assault. (Trial Tr. vol. VI, p. 131 L. 14-20). Repeated convictions for assault demonstrate his violent nature and make it more likely that Fleming was the first aggressor in this circumstance. "[T]he real question is of relevancy of this

evidence to prove character, not of the character to prove the act." Dunson, 433 N.W.2d at 680. Multiple convictions for assault are highly relevant to prove an aggressive and violent character.

The probative value is clear and the risk of prejudice is limited by the factual nature of the report. A criminal history report is purely factual and contained no details of the assaults themselves that could inflame a jury's passions. Thus, because the probative value outweighed the risk of prejudice, the district court erred in excluding the evidence.

3. *Other reasons to exclude*. The court also concluded Williams had provided late notice of the witness who would lay the foundation for the report, the criminal history report did not reveal the underlying facts of the crimes themselves, and the report was confusing and difficult to interpret. These reasons do not justify the exclusion of the fact of the convictions. Williams proposed calling in the dispatch officer to lay the foundation. The witness was a dispatch officer who ran the criminal history report at the request of the

prosecution. (Trial Tr. vol. VI, p. 126 L. 20-25). As discussed above, the lack of unduly prejudicial details about the crimes weighs in favors of admission of the evidence, as discussed above. The lack of detail is something the jury could rightfully weigh as it assessed the evidence for the proper purpose. Any confusion about the criminal history report could be resolved through the testimony of the dispatch officer who ran and is trained to read such reports, and the report could have been redacted to exclude any listings that didn't result in convictions. Importantly, the court's consideration of these issues were colored by its erroneous legal conclusion that the evidence wasn't admissible under other rules of evidence.

4. *Prejudice.* Even if an abuse of discretion may have occurred, reversal is not required if the court's erroneous exclusion of evidence was harmless. State v. Sullivan, 679 N.W.2d 19, 29 (Iowa 2004); Iowa R. Evid. 5.103(a). Here, the court's abuse of discretion was not harmless. The evidence of specific acts of assault by Fleming were critical to establishing that he was the first aggressor in this scenario. While the

court let in other evidence relevant to Williams' state of mind, and opinion and reputation evidence about Fleming, such evidence does not resonate with or have the impact on a jury that concrete evidence of specific violent acts would have. Williams presented a credible claim of justification and the jury rejected the State's charge of first degree murder, convicting Williams of second degree murder instead. Under these circumstances, the court's error was not harmless.

D. Conclusion: Because the district court erred in excluding evidence of Fleming's prior assaultive conduct and convictions, Williams conviction should be vacated and his case remanded for a new trial.

IV. THE DISTRICT COURT ERRED IN REFUSING TO GIVE WILLIAMS' REQUESTED JURY INSTRUCTION ON IMPLICIT BIAS.

A. Error Preservation: Error was preserved when Williams requested the jury receive an instruction addressing implicit bias and race switching. The court denied his request. (Trial Tr. vol. VI p. 138 L. 11 – p. 139 L. 11). See State v. Fountain, 786 N.W.2d 260, 262 (Iowa 2010).

B. Standard of Review. The appellate court will review a district court's refusal to give a requested cautionary jury instruction for an abuse of discretion. State v. Plain, 898 N.W.2d 801, 816 (Iowa 2017). The denial of a cautionary instruction constitutes an abuse of discretion if the district court's decision rested on clearly untenable or unreasonable grounds, such as an erroneous application of law. Id. at 816-17.

C. Discussion. Williams requested the jury be given an instruction suggested by the American Bar Association:

> Our system of justice depends on judges like me and jurors like you being able and willing to make careful and fair decisions. Scientists studying the way our brains work have shown that, for all of us, our first responses are often like reflexes. Just like our knee reflexes, our mental responses are quick and automatic. Even though these quick responses may not be what we consciously think, they could influence how we judge people or even how we remember or evaluate the evidence.
>
> Scientists have taught us some ways to be more careful in our thinking that I ask you to use as you consider the evidence in this case:
>
> Take the time you need to test what might be reflexive unconscious responses and to reflect carefully and consciously about the evidence.

- Focus on individual facts, don't jump to conclusions that may have been influenced by unintended stereotypes or associations.
- Try taking another perspective. Ask yourself if your opinion of the parties or witnesses or of the case would be different if the people participating looked different or if they belonged to a different group?
- You must each reach your own conclusions about this case individually, but you should do so only after listening to and considering the opinions of the other jurors, who may have different backgrounds and perspectives from yours. Working together will help achieve a fair result.

American Bar Association, Achieving an Impartial Jury Toolbox, (found at https://www.americanbar.org/content/dam/aba/publications/criminaljustice/voirdire_toolchest.authcheckdam.pdf).[4]

The district court denied Williams' request to include the instruction:

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[4] "The American Bar Association Criminal the Achieving an Impartial Jury (AIJ) project focuses on implicit bias in the context of the jury system and offers tools to address its impact. Funded by an ABA Enterprise Grant, implementation of the AIJ Project was led by the Criminal Justice Section, the Section of Litigation, several ABA diversity entities, and a strong Advisory Group of leaders from the social sciences, the legal academy, the ABA, and the practicing bench and bar." American Bar Association, https://www.americanbar.org/groups/criminal_justice/voir_dire.html.

> I've also considered the defendant's proposed instruction regarding setting aside stereotypes. That's derived from the ABA model instruction. That's not been reviewed by the Iowa Jury Instruction Committee or by any of the Iowa courts to my knowledge. Instruction 5 does talk about setting aside stereotypes, biases, and prejudices. I think that addresses the issue. The law -- The jury's otherwise instructed to consider what they've heard in the courtroom; and -- and if they follow those instructions, then the race of the -- of the defendant or the -- or Mr. Fleming would not be pertinent. I'm aware of the concerns; but, as I said, I think Instruction 5 addresses that matter.

(Trial Tr. vol. VI, p. 138 L. 24 – p. 139 L. 11).

Instructions addressing and mitigating the danger of unfair prejudice are permitted in Iowa. It is within the trial court's discretion to decide whether to give the requested instruction. Plain, 898 N.W.2d at 816.

The court's reasoning for rejecting the instruction in this case was virtually identical to the reasoning of the district court in Plain. Just as in Plain, the requested instruction was a correct statement of the law and it was an abuse of discretion for the district court to refuse to give the instruction simply because it had not been approved by an appellate court in this

state. Plain, 898 N.W.2d at 816 ("The district court, however, refused to give the instruction because it erroneously believed it lacked authority from our court to give the instruction."). This reasoning constituted an abuse of discretion "[b]ecause the court's decision rested on an error of law." Plain, 898 N.W.2d at 816.

The district court in this case also reasoned that Jury Instruction number 5 sufficiently addressed the issue. Instruction 5 was identical to the Bar Association's model instruction No. 100.8.

> You must determine whether the defendant is guilty or not guilty from the evidence and the law in these instructions. My duty is to tell you what the law is. Your duty is to accept and apply this law and to decide all fact questions.
>
> You must consider of the instructions together. No one instruction includes all of the applicable law.
>
> As you consider the evidence, do not be influenced by any personal sympathy, bias, prejudices, or emotions. Because you are making very important decisions in this case, you are to evaluate the evidence carefully and avoid decisions based on generalizations, gut feelings, prejudices, sympathies, stereotypes, or biases. The law demands that you return a just verdict, based solely on the evidence, your reason and common sense, and

these instructions. As jurors, your sole duty is to find the truth and do justice.

Jury Instr. No. 5; Iowa State Bar Ass'n, Criminal Jury Instr. No. 100.8 (2017).

Although this instruction tells the jury not to base its decision on stereotypes or biases, it is entirely different than advising a jury to examine their implicit and latent biases. Implicit bias is by definition bias that is subconscious and unintentional. An instruction telling the jury not to base its decision on race is ineffective in addressing the type unconscious bias Williams' suggested instruction sought to root out and eliminate.

In 2016, the American Bar Association resolved that judges should give the instruction on implicit bias. See https://www.americanbar.org/content/dam/aba/administrative/american_jury/2016_juryprinciple_resolution.authcheckdam.pdf. The Iowa Supreme Court "strongly encourage[s] district courts to be proactive about addressing implicit bias." Plain, 898 N.W.2d at 817. Although specific means are not required,

the district court abused its discretion in failing to give the requested instruction.

Williams must also establish that he was prejudiced by the district court's error. Plain, 898 N.W.2d at 817. "When the error is not of constitutional magnitude, the test of prejudice is whether it sufficiently appears that the rights of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice." Plain, 898 N.W.2d at 817 (quoting State v. Marin, 788 N.W.2d 833, 836 (Iowa 2010)).

Unlike Plain, this case does not involve strong evidence of guilt. Instead, this case involves a credible claim of self-defense. Witnesses for both the State and the defense agreed that Williams was a peaceful, soft-spoken, generous man. (Trial Tr. vol. III p. 92 L. 22 – p. 93 L. 16; p. 112 L. 3 – 14; p. 256 L. 10-16; p. 259 L. 17-24; vol. IV p. 153 L. 11-14; vol. V p. 5 L. 8 – p. 7 L. 18; p. 25 L. 1-25; p. 33 L. 3-17; p. 43 L. 2-7; p. 53 L. 1 – p. 54 L. 14). Many also agreed that Fleming threatened violence and created drama and conflict with most everyone he

encountered. (Trial Tr. vol. IV p. 153 L. 17 – p. 163 L. 23; vol. V p. 12 L. 24 – p. 16 L. 9; p. 44 L. 2 – p. 45 L. 16; p. 46 L. 15-17; p. 55 L. 5-22; p. 63 L. 10-19). On the day of the shooting, Fleming was brash and aggressive, threatening to shoot Williams' girlfriend and the men he was with. There was no indication Williams had any other motive for shooting Fleming. Tellingly, the jury found Williams guilty of second degree murder, rejecting a conclusion that Williams acted with the specific intent to kill and willfully and with premeditation. That means the jury credited Williams' testimony to some extent, and if they had an instruction helping them face any latent bias it is likely they would have fully credited his justification defense or found him guilty of manslaughter. Accordingly, the record demonstrates Williams' rights have been injuriously affected and his conviction must be reversed and remanded for a new trial.

D. Conclusion. Because the district court abused its discretion in failing to give the requested jury instruction

addressing implicit bias, Williams' conviction must be vacated and his case remanded for a new trial.

V. BECAUSE THE RELEVANT PROVISIONS OF HOUSE FILE 517 (STAND YOUR GROUND) ARE AMELORIATIVE AND PROCEDURAL, THE DISTRICT COURT ERRED IN CONCLUDING THEY DID NOT APPLY TO WILLIAMS' CASE.

A. Error Preservation: Error was preserved when Williams argued the provisions of HF 517, the "Stand Your Ground" bill, should apply to Williams' case as the provisions were in effect at the time Williams was charged and therefore during the time of his trial and sentencing. The court concluded the provisions did not apply. (Trial Tr. vol. IV, p. 116 L. 6 – p. 119 L. 23). Williams renewed the issue in his motion for new trial, and it was again denied by the district court. (Motion for New Trial; Sent. Tr. p. 3 L. 18 – p. 6 L. 12) (App. pp. 62-64).

B. Standard of Review. The appellate court will review a district court's interpretation of statutes for correction of errors at law. State v. Childs, 898 N.W.2d 177, 181 (Iowa 2018).

C. Discussion. House File 517 was passed by the Iowa legislature during the 2017 legislative term and was signed by the governor on April 13, 2017. The bill provided that certain provisions, not relevant to this case, took effect upon enactment. The remaining provisions became effective on July 1, 2017. See Iowa Const. Art III, section 26. The district court concluded the provisions of HF 517 did not apply to Williams' criminal prosecution because the act for which he was on trial—shooting Fleming—occurred on June 30, 2017, just hours before the Stand Your Ground law went into effect.

"A statute is presumed to be prospective in it operation unless expressly made retroactive." Iowa Code § 4.5 (2017). However, "[i]f the penalty, forfeiture, or punishment for any offense is reduced by the reenactment, revision, or amendment of a statute, the penalty, forfeiture, or punishment, if not already imposed, shall be imposed according to the statute as amended." Iowa Code § 4.13(2) (2017). HF 517 amended section 704.1 and redefined "reasonable force" to clarify that "a person may be wrong in the estimation of the danger or the

force necessary to repel the danger as long as there is a reasonable basis for the belief." It also amended the provision addressing a person's duty to retreat, providing that a person has not duty to retreat as long as he is not engaged in illegal behavior, even if the person is in a public place. Before, a person was require to retreat if he was in public and could do so safely. Compare Iowa Code §§ 704.1 (2015) and 704.1 (2017). Although these amendments do not expressly reduce the punishment for the crime of murder, the reduction of punishment is effected indirectly.

"An ameliorative provision should be interpreted liberally so as to apply to every case in which it can properly apply." State v. Chrisman, 514 N.W.2d 57, 62 (Iowa 1994). Section 4.13 is intended to give an un-sentenced defendant the benefit of a reduced punishment enacted after the commission of the offense. Chrisman, 514 N.W.2d at 62. The Iowa Supreme Court expressly rejected the argument that section 4.13 only applies when the legislature directly changes the punishment for a crime. Id. "There are many ways to reduce the penalty

for a specific criminal act, only one of which is to directly change the punishment." Id. "Section 4.13 should apply whether the reduction in punishment is accomplished directly or indirectly". Id.

To decide if section 4.13 applies, the court will decide "whether the same prohibited conduct is punished less severely under the amended statute." Id. In this case, we don't know why the jury rejected Williams' justification defense because the verdict was general verdict. However, if the jury concluded Williams was wrong in his assessment of the danger or that he had an alternative course of action before he shot Fleming, then Williams' conduct was killing Fleming with malice aforethought, or second degree murder, punishable by fifty years in prison. Under the amendment, the same conduct—killing Fleming without malice aforethought while having a alternative course of conduct or while being wrong in his assessment of the danger force necessary to avoid the danger, Williams not be punished at all. Clearly, under the amended statute, the same conduct

is punished less severely and section 4.13 applies. See Chrisman, 514 N.W.2d 62.

HF 517 also added a new section 704.13 which provides that a person who is justified in using reasonable force "is immune from criminal or civil liability for all damages incurred by the aggressor pursuant to the application of reasonable force." Iowa Code section 704.13 (2017). No appellate court in this State has yet interpreted this section. Before this amendment, the law already provided that a defendant who was justified in his use of force would not be held criminally liable or punished for his conduct. However, some district courts in the state have interpreted this provision as implementing a procedure to establish the defendant's immunity separately from a criminal trial. See Stephen Gruber-Miller, Judge: 'Stand Your Ground' doesn't exempt ped mall shooter from trial, Des Moines Register, Nov. 3, 2017, found at https://www.desmoinesregister.com/story/news/crime-and-courts/2017/11/03/lamar-wilson-iowa-city-ped-mall-shooting-trial-stand-your-ground-ruling/829896001/ and Nick

Johansen, Staley freed on Stand Your Ground ruling, Red Oak Express, February 13, 2018, found at https://www.redoakexpress.com/content/staley-freed-stand-your-ground-ruling. Even if this provision establishes a new procedure to provide immunity to a person, the provision would apply to Williams' case. See City of Waterloo v. Bainbridge, 749 N.W.2d 245, 249 (Iowa 2008) ("[R]emedial or procedural statutes . . . may be applied retrospectively.").

> "[Retrospectivity] is relevant only to statutes that create or take away vested rights. . . . Thus, notwithstanding section 4.5, the court has applied remedial and procedural statutes to proceedings pending on the effective date of the enactment."

Schuler v. Rodberg, 516 N.W.2d 902, 904 (Iowa 1994) (quoting State ex rel. Buechler v. Vinsand, 318 N.W.2d 208, 210 (Iowa 1982)).

D. Conclusion. Because the relevant provisions of HF 517 are retrospective and should be applied to cases pending when they became effective, the district court erred in concluding they did not apply. Accordingly, Williams'

conviction should be vacated and his case remanded for a new trial in which the amended section 704.1 and new section 704.13 (2017) are applied in his case.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $6.63, and that amount has been paid in full by the Office of the Appellate Defender.

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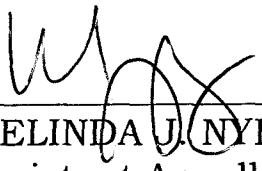

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