IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

NO. _____

ELI ERICKSON,

PETITIONER,

-vs.-

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Was Defendant/Appellant Eli Erickson denied his right to a fair trial of jurors drawn from a fair cross-section of the community under the District of South Dakota's jury selection plan which sources jurors solely from the registered voter pool that excludes Native Americans who only have tribal identification cards or do not have a house number?

LIST OF PARTIES

The only parties to the proceeding are those appearing in the caption to this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Eli Erickson respectfully petitions for a writ of certiorari to review the judgment of the 8th Circuit Court of Appeals.

OPINIONS BELOW

On June 2, 2021, the Eighth Circuit Court of Appeals denied Erickson's appeal of challenging the racial cross section of his jury under the District of South Dakota's Plan for Selection of Grand and Petit Jurors, and his claims that the selection process is flawed in Central South Dakota, as the Native Americans who are selected are customarily stricken for cause due to the personal knowledge of the witnesses and parties appearing at trial. (Appendix D). The Eighth Circuit held that under the second prong of the test set forth in *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L.Ed.2d 579 (1979), "Erickson had not provided any explanation for how the Central Division of South Dakota's reliance on voter registration rolls otherwise operates to systematically exclude Native Americans from criminal jury pools and as a result, he was missing a required element of his prima facie case." (Appendix D). The Eighth Circuit held that, "Because Erickson has not presented evidence about the number of Native Americans in the Central Division's jury pool, he necessarily has failed to show that their representation in that pool was 'not fair and reasonable in relation to the number of [Native Americans] in the community.'" (Appendix D). However, South Dakota does not maintain records about the number of Native Americans in each district, but only as to the entire state as a whole. (Appendix C). Thus, Erickson's appeal was denied based upon his failure to provide

information which does not exist, making it a legal impossibility for him to be successful on appeal. Erickson filed a Motion for Rehearing En Banc on June 14, 2021, which was denied. (Appendix F).

JURISDICTION

On November 14, 2018, Erickson was charged with seven counts of offenses involving the violation of the laws of the United States of America under 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A); 18 U.S.C. §§ 924(c)(1)(A), 924(c)(l)(B)(i), 921(a)(6), 922(g)(3), 922(d) and 924(d); 26 U.S.C. §§ 5861(d), 5861(h), 5845(a)(2) and 5871; 21 U.S.C. § 853; and 28 U.S.C. § 2461(c), all of which occurred in South Dakota. On November 7, 2019, Erickson was found guilty of Conspiracy to Distribute a 500 grams of Methamphetamine, Possession of a Firearm in Furtherance of a Drug Trafficking Crime and three counts of Possession of a Firearm as a Drug Addict/User. On April 20, 2020, Mr. Erickson, was sentenced to a total of 188 months in federal prison, followed by 5 years of supervised release, a $1,000 fine, and a $500 special assessment to the Federal Crime Victims Fund. On April 24, 2020, Erickson timely filed his Notice of Appeal challenging his conviction and sentence on four separate grounds. On June 2, 2021, the Eighth Circuit entered a decision denying Erickson's appeal on all grounds. On June 14, 2021, Erickson filed a Motion for Rehearing En Banc, which was denied on July 13, 2021, affirming his conviction and denying his request for a new trial.

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in relevant part: "[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury." The U.S. Constitution guarantees all criminal defendants "the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." The right to a jury chosen from a "fair cross-section of the community" is a fundamental element of this guarantee. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced the requirement has solid foundation."); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) ("Trial by jury presupposes a jury drawn from a pool broadly representative of the community....").

STATEMENT OF THE CASE

This case presents the important question of whether the District of South Dakota's 2018 Plan for the Random Selection of Grand and Petit Jurors, which solely uses the South Dakota voter registration database, denied Erickson his right to a jury of his peers, because the South Dakota Voters Registration Action excludes person who do not have a State of South Dakota identification card, or a house number which simply aren't available to many Native Americans living on South Dakota's reservations. Under the Plan, "[A]ll jurors [are] selected at random from the list of registered voters provided by the office of the South Dakota

Secretary of State." See U.S. DIST. CRT. FOR DIST. SD, § 5A (Oct. 2018), Plan for the Random Selection of Grand and Petit Jurors.

During the voir dire held in Erickson's jury trial on November 5, 2019, fifty-one qualified jurors reported for service. Appendix Affidavit of Matt Thelen, Clerk of Court, Docket 124. Of those 9 people, or 17.6%, identified their race as American Indian or Alaska Native. As of 2015, South Dakota's Central Division had a population which was 25% Native American. Affidavit of Matt Thelen, Clerk of Court. Docket 124. The district court excused six of these potential jurors for cause because they either knew Erickson, or knew the witnesses, or knew the facts of the case given the fact that it occurred on the Pine Ridge Indian Reservation which is a small, rural and cohesive community in which most people know of each other. The government exercised peremptory challenges to remove two other Native Americans for legitimate reasons not subject to a challenge under *Baton v. Kentucky*, 476 U.S. 79 (1986).

On November 7, 2019, following impaneling a jury which included no Native Americans, Erickson was found guilty of Counts 1, 2, 5, 6, and 7 of the Superseding Indictment. On April 20, 2020, Mr. Erickson was sentenced to a total of 188 months in federal prison, followed by 5 years of supervised release, a $1,000 fine, and a $500 special assessment to the Federal Crime Victims Fund. On April 24, 2020, Erickson timely filed his Notice of Appeal challenging his conviction and sentence on four separate grounds.

Two of Erickson's grounds on appeal were related to the inability to obtain Native American jurors on cases in Central South Dakota. In additional to contesting the problems of South Dakota Plan for Selection of Grand and Petit Jurors related to voter registration, Erickson also argued that the nature of the reservation system in South Dakota was such that many of the Native American's who were selected were being excluded as they were related or know the witnesses in the trials. On June 2, 2021, the Eighth Circuit entered a decision denying Erickson's appeal, holding that he had failed to provide information regarding the Native American percentages of the Central Division's Master Wheel as compared to the general population, and thus had failed to meet the requirements of *Duren* test. This ruling centered a legal impossibility for Erickson, however, in that South Dakota keeps only one Master Wheel for which statistics are available. See Appendix C - Affidavit of Matthew Thelen, Clerk of Court, Docket 124.

In South Dakota, when a jury is selected, a computer takes this registered voter pool and assigns potential jurors for a trial to a jury pool. There are no statistics kept of what the race percentages are in the Central Division. There simply is not a separate Master Wheel for the Central Division. See Appendix C. Thus, what the Appeals Court based their decision on was information they alleged Erickson failed to provide, but yet was not available.

On June 14, 2021, Erickson filed a Motion for Rehearing En Banc arguing that the appeal decision provided Erickson with a legal impossibility under the *Duren* test. This request was denied on July 13, 2021.

This petition follows.

REASONS FOR GRANTING THE PETITION

1. The issues of racial bias in the selection of juries is a perennial issue in that a comprehensive test has not been established for both federal and state courts. See Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785 (2020). The United States has had a long history of excluding minorities from jury sourcing, resulting in serious collateral consequences to the credibility, reliability, and integrity of the criminal justice system. See *Strauder v. West Virginia*, 100 U.S. 303 (1880) (African Americans); *Taylor v. Louisiana*, 419 U.S. 522 (1975)(women); *Hernandez v. Texas*, 347 U.S. 475, 479-80 (1954) (Mexican Americans); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 222 (1946) (daily wage earners). The problem emanates from a lack of a single test or clear numeric standard by which to measure underrepresentation or discrimination in the sourcing of jury lists among the federal district courts. Certiorari has been denied in most challenges regarding the composition of juries. See Mary R. Rose et al., *Jury Pool Underrepresentation in the Modern Era: Evidence from Federal Courts*, 15 J. EMP. L. STUD. 1, 13 (2018). Consequently, no uniform standard has emerged from case law, making it difficult to determine when supplementation of jury lists beyond the registered voter lists is required. *Id.* For instance, within the Eighth Circuit Court of Appeals seven of the ten districts supplement their registered voter pool with other sources of prospective juror

without any real reason, test or standard to determine when supplementation is required.

2. This confusion and lack of an established test makes it possible for courts to hide behind a presumption that voter registration lists are a constitutionally valid source of potential jurors despite the fact that in practice there is an obvious lack of minority jurors ending up in courts in the jury selection process. *Id.* at 364; *Casteneda v. Partida*, 430 U.S. 482, 494 (1977). The lack of a uniform standard allows courts to permit seemingly unreasonable underrepresentations to persist, and effectively denies minority defendants their Sixth Amendment right to a jury of their peers. See, e.g., *Swain v. Alabama*, 380 U.S. 202, 208-09 (1965); *Floyd v. Garrison*, 996 F.2d 947, 950 (8th Cir. 1993); *United States v. Grisham*, 63 F.3d 1074, 1078-79 (11th Cir. 1995). Added to this problem is the constant changes to the individual state's voter registration laws which recently have been expanded to disenfranchising minority voters. According to the Brennan Center for Justice, as of July 14, 2021, lawmakers had introduced more than 400 bills in 49 states to restrict the vote—at least four times the number of restrictive bills introduced just two years prior. To date, at least 18 states have enacted new laws containing provisions that restrict access to voting. See Waldman, Michael, *Voting in America: A National Perspective on the Right to Vote, Methods of Election*, Jurisdictional Boundaries, and Redistricting: Hearing Before the Subcomm. on Elections, 117th Cong. (2021); see also *Debunking the Voter Fraud Myth*, Brennan Center for Justice (Jan. 31, 2017).

3. Erickson argues that the *Duren* test is an outdated and ineffective way to evaluate whether a particular group is underrepresented in the jury pool because the test fails to take into account the size of the excluded group, and permits almost complete exclusion of small groups, while invalidating moderate underrepresentation of large groups. For instance, this means it is impossible for African-Americans to challenge underrepresentation in 75% of counties in the United States. See Brief for Social Scientists, Statisticians, and Law Professors, Jeffrey Fagan, et al., as Amici Curiae Supporting Respondent, at 22, *Berghuis v. Smith*, 559 U.S. 314, 130 S. Ct. 1382, 176 L. Ed. 2d 249, 2010 U.S. LEXIS 2925 (2010). For Latinos and Asian-Americans, such challenges are impossible in more than 90% of counties, and for other people of color this constitutional protection is practically non-existent. *Id.* see also Finkelstein, Michael O., *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1996).

I. The Constitution requires a jury chosen from a fair cross-section of the community, but the test established by *Duren v. Missouri* does not guarantee racial equality in jury selection.

4. The Sixth Amendment to the United States Constitution provides in relevant part: "[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." The right to a jury chosen from a "fair cross-section of the community" is a fundamental element of this guarantee. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) ("We accept the fair-cross-section requirement as fundamental to the

jury trial guaranteed by the Sixth Amendment and are convinced the requirement has solid foundation."); *Thiel v. Southern Pac. Co.*, 328 U.S. 217, 227 (1946) ("Trial by jury presupposes a jury drawn from a pool broadly representative of the community....").

5. In *Duren*, this Court established a three-part test to be used to determine if a defendant was denied a right to a fair trial based upon a lack of proportionate representation. 439 U.S. 357, 99 S. Ct. 664, 58 L.Ed.2d 579 (1979). To prevail on a claim of racial exclusion in jury selection, the *Duren* test requires a defendant to prove that: (1) the group alleged to be excluded 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. *Id.* at 364.

6. In Erickson's challenges to his jury composition, the district court and the Eighth Circuit both agreed that he had met the first element, which is that Native Americans are a "distinctive" group in the community under the first element of the *Duren* test. See also *United States v. Yazzie*, 660 F.2d 422, 426 (10th Cir. 1981).

7. However, both the district court and the Eighth Circuit found that Erickson had not proved the second element of the *Duren* test, because he had not proved that the Native American representation of his jury panel was not fair and reasonable in relation to the number of such persons in the community." See *Duren*, 439 U.S. at 364. The Appeals Court based this upon their finding that

Erickson did not provide information regarding the Native American percentages of the Central Division's Master Wheel as compared to the general population in the Central Division of South Dakota. (Appendix D). This ruling provided a legal impossibility for Erickson, however, in that South Dakota keeps only one Master Wheel for which statistics are available. (Appendix C). When a jury is selected, a computer takes this registered voter pool and assigns potential jurors for a trial to a jury pool. (Appendix C). There are no statistics kept of what the race percentages are in the Central Division, and there isn't a separate Master Wheel for the Central Division. (Appendix C). Thus, what the Appeals Court based their decision on was an allegation that Erickson failed to provide but yet was not available to him.

8. A further disparity exists in the case in that the fact was that the charges were alleged to have occurred on the Pine Ridge Indian Reservation, which is populated essentially only by Native Americans, while the Central Division of South Dakota as a whole has a population which is only approximately 25% Native American. The Central division contains the Rosebud Indian Reservation, Crow Creek Indian Reservation, and Cheyenne River Indian Reservation, with outlying areas that are predominately Caucasian. See 2019 United States Census Bureau Population Table. Erickson's criminal act is alleged to have occurred in Antelope, South Dakota, an area 2.3 square miles in size according to the United States Census Bureau, and which has a population of 867 people, 225 households, and 177 families residing there, with 96.89% of the people being Native American. Antelope, South Dakota is located in Todd County, South Dakota, which has a

population of 10,177 people of which 86.8% are Native Americans. See 2019 United States Census Bureau Population Table. The number of register voters in Todd County was 4,623 out of 5,934 persons 18 years or older, meaning that 22% of the citizens of Todd County are not registered to vote. *Id.* The caseload of the Central Division primarily comprises crimes occurring in Indian County, yet the entire district as a whole is used for an analysis of what a jury of Erickson's peers would be. The result is that in trial after trial, Native Americans are being tried by nearly all Caucasian juries for crimes occurring in nearly all Native American reservations.

9. The Eighth Circuit Court of Appeals also found that Erickson failed to meet the third prong of the *Duren* test in that he failed to show that "this underrepresentation is due to systematic exclusion of the group in the jury selection process." *Duren*, at 364. The same problems plaguing South Dakota's voter registration were noted by Justice Ginsberg in her dissent in *Brakebill v. Jaeger,* 586 U.S. ____ (2020) that, "(1) 70,000 North Dakota residents—20% of the turnout in a regular quadrennial election—lack a qualifying ID; and (2) approximately 18,000 North Dakota residents also lack supplemental documentation sufficient to permit them to vote without a qualifying identification card." See also Stambaugh, Hannah, *America's Quiet Legacy of Native American Voter Disenfranchisement: Prospects for Change in North Dakota After Brakebill v. Jaeger*, AMER. UNIV. L. REV.: Vol. 69: Issue 1, Article 7 (2019). The Brennan Center for Justice has called the structural obstacles facing Native Americans voters "an often overlooked crisis

in our democracy." *See*, Brennan Center for Justice (2012), Voting Rights & Elections, New York: New York University School of Law. http://www.brennancenter.org/content/section/category/voting_rights.

10. In February of 2020, the American Bar Association's House of Delegates overwhelmingly passed a pair of resolutions that aim to increase voter participation and minimize voter suppression noting the crisis and disenfranchisement of Native Americans was a problem simply not being addressed. The resolution was co-sponsored by the Coalition on Racial and Ethnic Justice, Commission on Disability Rights, Commission on Hispanic Legal Rights and Responsibilities, Commission on Sexual Orientation and Gender Identity, National Conference of Specialized Court Judges, National Native American Bar Association, Section of State and Local Government Law and Standing Committee on Election Law. See, Amanda Robert, *Pass laws making it easier for Native Americans and those without addresses to vote*, American Bar Association Newsletter, February 17, 2020. There is no shortage of qualified sources identifying both the problem and the solution to this longstanding disenfranchisement issue which begs the question of why a solution has not been forthcoming.

II. The Question Presented Significantly Impacts The Administration of Criminal Justice.

11. The practice of using voter registration rolls solely to compile the Master Wheel in federal courts is expressly permitted under the Jury Selection and Service Act of 1968. See 28 U.S.C. § 1863(b)(2). The Eighth Circuit has held "that a jury

selection plan based on registered voter lists withstands constitutional scrutiny unless there is [otherwise] a showing of systematic exclusion of [the underrepresented group] in the jury selection process." *Smith v. Copeland*, 87 F.3d 265, 269 (8th Cir. 1996); *United States v. Warren*, 16 F.3d 247, 252 (8th Cir. 1994).

The federal district courts for South Dakota do not supplement the registered voter list. However, within the Eighth Circuit, Minnesota, Nebraska, Iowa, Missouri and Western Arkansas, they include lists of names to supplement voter records. See Jury Selection Plan of the United States District Court for the District of Minnesota for the Random Selection of Grand and Petit Jurors, U.S. DIST. CRT. DIST. MINN. § 6 (Nov. 2019); Plan for Random Jury Selection, U.S. DIST. CRT. DIST. NEB., § 5 (Oct. 2019); Jury Selection Plan, U.S. DIST. CRT. NORTHERN DIST. IOWA, § 5(c) (Jan. 2017); Jury Selection Plan, U.S. DIST. CRT. SOUTHERN DIST. IOWA, § 5(c) (Feb. 2019); Jury Selection Plan, U.S. DIST. CRT. WESTERN DIST. MO., 2 (Apr. 2019) Plan for the United States District Court for the Eastern District of Missouri for the Random Selection of Grand and Petit Jurors, §§ 2, 4 (May 2016); Plan for the Random Selection of Jurors, U.S. DIST. CRT. WESTERN DIST. ARK., § 401 (Nov. 2015). Nearly all state courts use more than one source list for prospective juror names. See Ninth Circuit Jury Trial Improvement Committee, First Report on Goals and Recommendations, U.S. CTS. NINTH CIR. at 3 (May 2004).

12. The resulting disparity between state and federal courts in the same geographic area, and between deferent federal court districts within the same area,

has the effect of creating confusion and distrust among the public. See Srikrishnan, Maya, *Federal Court's Jury Selection Plan Under Fire,* Voice of San Diego, January 25, 2021. In practice, most criminal cases arising from within the reservations of South Dakota are tried to nearly all white juries, creating the appearance of impropriety among non-legal trained observers. As noted in *Taylor v. Louisiana,* "Community participation in the administration of the criminal law . . . is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system." Quite simply, single-source jury pools foster continued perceptions of racial segregation and racial inequity within the federal framework which simply cannot be explained by reference to the *Duren* test, which allows these inequities to continue.

13. These are not simply the observation of the undersigned. They are well-documented issues noted most recently by the American Bar Association. In an effort to address these issues, the American Bar Association has adopted Principle 10(A) which notes that supplemented jury pools are essential "to preserving the right to a fair and impartial jury." Judge William Caprathe, et al., *Assessing and Achieving Jury Pool Representativeness*, A.B.A. (May 1, 2016). The American Bar Association, through the adoption of Principle 10(A), directly addresses the remaining federal district courts that have failed to expand beyond voter registration pools in the sourcing of juror. These remaining federal district courts are directly targeted in the discussion as the last remaining bastions of jury

inequality that need to be addressed as most state courts have already adopted supplemental sourcing of their jury pools.

14. The Court's most recent decision in *Brnovich v. Democratic National Committee*, 594 U.S. ___ (2021), would support a finding that the South Dakota Voter Registration Act is unconstitutional, and by implication the sourcing of the South Dakota federal jury pool is as well. The holding of the majority in *Brnovich* made it clear that any legislation that does not "make voting equally open to all" and does not give everyone an equal opportunity to vote would be invalid. *Brnovich* 594 US at 21. (The interpretation set out above follows directly from what §2 commands: consideration of "the totality of circumstances" that have a bearing on whether a State makes voting "equally open" to all and gives everyone an equal "opportunity" to vote). The South Dakota voting registration process clearly does not give everyone an equal opportunity to vote and consequently deprived Erickson of a fair jury. Luckily, following the decision in *Brekbill v. Jaeger,* North Dakota legislature adopted changes to their voter registration law, which essentially leaves South Dakota as one of the last remaining states to continue Native American disenfranchisement. Ferguson-Bohnee, Patty, *How the Native American Vote Continues to be Suppressed*, American Bar Association, Human Rights Magazine, Volume 45, No. 1, Voting Rights (Feb. 9, 2020).

15. This Court is urged to consider granting this writ and set forth a federal jury sourcing test or standard which unifies all of the federal district courts and takes into account the large percentage of minorities who are excluded as a result of

single-source voter registration pool jury sourcing. Absent some judicial oversight or change to the *Duren* test, the public's deterioration of trust within our criminal justice system will continue to decline at a time when the public is demanding transparency, accountability and equality in government institutions.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Dated this 11 day of October, 2021

Respectfully submitted,
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