No._____

In the
Supreme Court of the United States

Donald Lee Billings,
Petitioner

v.

State of Wisconsin
Respondent

On Petition for Writ of Certiorari to the Wisconsin Court of Appeals

Petition for Writ of Certiorari

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Question Presented

In 1879 this Court stated the obvious: racial prejudice sways juries; preventing Black citizens from serving on jury panels is a clear denial of the equal protection guarantees of the Fourteenth Amendment. *Strauder v. W. Va.*, 100 U.S. 303, 25 L. Ed. 664 (1879). A hundred years later, this court distilled its fair-cross section and equal protection jurisprudence into a multi-factor test. A prima facia violation of the fair cross section requirement is shown by demonstrating:

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 persons in the community;
3. This underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664 (1979).

For the last half century, the lower courts have struggled to interpret and apply the second and third requirements. This Court has yet to provide clarity for the lower courts–it has accepted only one fair-cross section case, which ultimately left the underlying question unanswered.

This case presents this Court with the opportunity to clarify two pressing questions:

1. How should courts assess whether the representation of a group is fair and reasonable?
2. What is necessary to show an underrepresentation is "systematic"?

Parties to the Proceeding

The petitioner is Donald Lee Billings who was the defendant in the circuit court, defendant-appellant in the Wisconsin Court of Appeals, and the defendant-appellant-petitioner in the Supreme Court of Wisconsin.

The respondent is the State of Wisconsin, who was the the plaintiff in the circuit court, and the plaintiff-respondent in subsequent appellate proceedings.

Statement of Related Proceedings

This case arises from the following proceedings:

- *State of Wisconsin v. Donald Lee Billings* 22-AP-605-CR
- *State of Wisconsin v. Donald Lee Billings* Winnebago County 20-CF-413

There are no other proceedings in state or federal trial or appellate courts, or in this Court directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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The right to a trial by jury is one of, if not the defining characteristic of the American legal system. It places the responsibility of deciding whether a law has been violated with the people. The people are given the opportunity to examine the laws their legislators have enacted, review evidence collected by the executive branch, and determine whether their elected officials have met their high burden of proof. Lord Blackstone saw the jury trial as the bulwark against tyrannical governments. Thomas Jefferson explained the jury trial is the only way government can be held to the principles of its constitution. Letter from Thomas Jefferson to Thomas Paine (July 11, 1789), in 15 The Papers of Thomas Jefferson 269 (Julian P. Boyd ed., 1958). And John Adams considered the jury trial to be the "heart and lungs" of liberty. See Letter from John Adams to William Pym (Jan. 27, 1766), in 1 Papers of John Adams 169 (Robert J. Taylor et al. eds., 1977).

This fundamental protection relies on community participation. When distinct parts of the community are excluded from participating in jury service, it calls into question

not just the result of a single trial, but the validity of the entire system. Conversely, public engagement with the work of the courts results in a better-informed polity and a more robust democracy." J. Roberts, 2024 Year end Report on the federal judiciary.

This case presents an opportunity for this court to answer an important question. How are courts supposed to evaluate whether distinct groups of the community have been excluded from jury service? This Court has remained silent for nearly 50 years on this critical question. While lower courts have generally agreed in determining which groups qualify as distinct, and how to make that determination, *Duren*'s second and third prongs have led to analytical chaos. This Court should grant review to develop a critical body of law.

Opinions Below

The Wisconsin Supreme Court's decision denying the petition for review is not reported, but has been reproduced at App. 30. The court of appeals opinion affirming the decision of the circuit court is unpublished, but can be found at 2024 Wisc. App. Lexis 509 and 2024 WL 3051414 and is reproduced at App. 2-9 The circuit court's oral decision is reproduced at App. 10-29.

Jurisdiction

The Supreme Court of Wisconsin issued its opinion on A copy of this decision is reproduced at Appendix 30. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

Constitutional, Statutory, and Regulatory Provisions Involved

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the 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 Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Statement of the Case

This case begins on Fathers Day of 2020. Donald Billings came to Neenah to spend time with his daughter and her mother. Late that night, Mr. Billings and two companions, Mr. Berdell and Ms. Propst, went to a local bar. After fifteen to twenty minutes, AB entered the bar. Even though he and Mr. Billings did not know each other, they greeted each other warmly, played pool, and drank together for several hours.

Mr. Billings was ready to leave around the time the bar closed. Mr. Berdell and Ms. Propst were arguing; when Mr. Billings attempted to mediate the situation, Mr. Berdell began to argue with Mr. Billings. Rather than continue in this heated situation, Mr. Billings began to walk back to his daughter's home. Mr. Billings's journey took roughly two hours due to the heavy rain and his bad leg. Once Mr. Billings returned, a mild argument ensued regarding the amount of time he had spent out, rather than with his daughter. His daughter's mother agreed to drive Mr. Billings back home to Milwaukee.

Mr. Berdell told a different story. Mr. Berdell testified that he and Ms. Probst had been drinking quite a bit, and she was

"pretty drunk". Mr. Billings then invited them to an "after-bar" at AB.'s house.[1] When they got to AB's house, Mr. Billings went into the house, while he and Ms. Probst continued to argue in the car. They heard gun shots and called the police. Mr. Berdell believed Mr. Billings had been shot. Mr. Berdell called 911.

Police responded to AB's home. In the pitch black, they saw the silhouette of an individual in the backyard, and when officers began to issue commands, the individual ran off; Mr. Billings is incapable of running due to his prior leg injuries. Officer Reimer admitted it was pitch black out, they lost track of the individual, and the individual "could have gone south, he could have gone west or…east…he could have gone right back into the residence".

When Officer Reimer entered AB's home, he saw what he believed to be blood on a halfway wall, and then found AB lying on the bedroom floor, blood on his face, and his chest was so covered in blood, Officer Reimer could not lift his shirt.

When police questioned Mr. Berdell, he told the Mr. Billings name was "Mike" and they had just recently met. This

[1] An after-bar is a party to continue drinking and socializing.

was a lie. When Mr. Berdell was questioned later, he stuck to his fictitious story about "Mike". Mr. Berdell and Donald Billings had known each other for several years. Mr. Berdell tried to dispose of his personal cell phone during a break in police questioning.

Curiously, another individual from the bar also identified the image taken from the bar's surveillance system as "Mike", and thought she knew someone in jail who might know Mike. . This person in jail also identified the image as "Mike" who lives in Oshkosh. Donald Billings lived in Milwaukee.

AB owned a Glock 9mm. The shell casings found on the scene are consistent with this firearm.[2] When officers searched AB's home, the Glock 9mm was missing. Months later, while Mr. Billings was in custody, the gun was recovered in Dane County, roughly a hundred miles away. Officers had been involved in a high speed chase; the suspect exited his vehicle, then reentered, accessed the gun and shot himself. Investigators have been unable connect the suspect to Mr. Billings or the Neenah area.

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[2] Ballistics testing was not performed in this case.

How AB's gun managed to travel from Neenah to Dane County remains an unsolved mystery.

The State attempted to use forensic evidence to place Donald Billings in AB's house. A latent print examiner testified she concluded two palm prints found in AB's home matched Mr. Billings. Only, when she was cross-examined was it revealed these were partial palm prints. When asked by the court to estimate the size of the portion of the wall, the analyst was unable to give an answer. The court concluded the area was about twelve inches.

The analyst testified there is no particularly quality or quantity of information required to call a particular print an identification. There is no "point standard" for concluding there is a match, and identifications are based on each analyst's opinions and level of comfort. In layman's terms, the analyst "eyeballed" the identification, even though she was unable to estimate a simple measurement of one foot. The "science" of latent fingerprint analysis has been subject to significant

criticism over the last fifteen years. It is questionable whether it is even sufficiently reliable to be admitted as expert testimony.[3]

In addition to the latent prints, the State offered DNA evidence which concluded there was a mixture from Mr. Billings and AB on several items. This included the exterior and interior of a pair of socks, a plastic baggie, a beer bottle, and inexplicably the washing of fingernail or toenail fragments found in a sock. STR analysis can provide likelihood ratios, but cannot definitively say any given individual is part of the sample. The likelihood ratios are informed by the population statistics selected by the analysis company, and are often impacted by racially non-diverse samples. The mixture could be from AB, Mr. Billings, or anyone else. Much of this evidence could be explained by secondary transfer from the the contact the two men had while playing pool and drinking. .

Donald Billings was tried for first degree intentional homicide and possession of a firearm by a convicted felon. While selecting the jury, trial counsel for Mr. Billings objected to the jury panel, as it did not include any African-Americans. The

[3] President's Council of Advisors on Sci. & Tech., Exec. Office of the President, Forensic Sci. In Crim. Courts: Ensuring Sci. Validity of Feature Comparison Methods (2016) at 87-103

court denied counsel's objection noting the low percentage of African-Americans in Winnebago County, the Court's experience with "a majority of the panels" not having any Black Americans, and the use of a computer system to select a sampling of county. Sixty jurors were summoned, fifty-six actually appeared. Mr. Billings was convicted of both counts by an all white jury. He was sentenced to life in prison. If Mr. Billings survives the Wisconsin prison system until he is 85, he will have the possibility of extended supervision.

Mr. Billings filed a timely notice of intent to pursue post-conviction relief. He then filed a motion requesting the circuit court reconsider its decision to proceed to trial with a jury panel which lacked a single Black person. Mr. Billings and the State reached a stipulation as to the population statistics for Winnebago County, demographics for the 2021 jury array, as well as the jury panel and actual jury for Mr. Billings's case. Black residents were 2.5% of Winnebago County's population, but only 0.81% of the annual array. The absolute disparity is 1.69%.[4] The

[4] Absolute disparity is calculated by subtracting the percentage of the minority group in the jury array from the percentage of the minority group in the general population. Here: $2.5 - 0.81 = 1.69$

comparative disparity is 67.6%.[5] The difference in the expected proportion of African American jurors is 9.1 standard deviations.[6] At just 2 standard deviations, there is a 5% probability the discrepancy is due to chance. The odds of this discrepancy being observed due to random chance are less than one in one quintillion.[7]

After briefing, the circuit court denied Mr. Billings's motion for reconsideration. Mr. Billings appealed. A joint request for publication was made. On Juneteenth, the court of appeals issued a six page, unpublished summary disposition order denying relief. The order advanced a legal theory neither party briefed, and held a defendant must show the disparity is a result of an improper feature in the jury selection process. (App. at 6)

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[5] Comparative disparity is measured by dividing the absolute disparity by the percentage of the minority group the general population.

Here: $1.69/2.5 = 0.676$

[6] Standard deviation measures the predicted fluctuations from the expected value. It is calculated by taking the square root of the sample size multiplied by the probability of selecting the minority group multiplied by the probability of selecting the non-minority group.

Here: $\sqrt{((7055)(.025)(1-.025))} = 13.11$

The value of the standard deviation is 13.11. The expected number of Black citizens in Winnebago County's jury array based on the total population is 176.37. The difference from the actual to expected is 119. The difference is equal to 9.1 standard deviations:

$(176.37 - 57)/13.11 = 9.1$

[7] The odds of winning the Powerball lottery are one in 292.2 million.

Mr. Billings petitioned the Wisconsin Supreme Court for review, which was denied on November 12, 2024. Mr. Billings now requests this Court grant certiorari.

Reasons for Granting the Petition

I. This Court should grant the petition to clarify constitutional questions which have flummoxed the lower courts for half a century

A. This Court should determine a methodology for determining whether the representation of distinctive groups is fair and reasonable

In the early 20th century, this Court repeatedly and emphatically rejected convictions where distinct groups had been excluded from the defendant's grand or petit juries. Often times, the discrimination was easily identifiable: no minority had served on a jury in thirty years, *Patton v. Mississippi*, 332 U.S. 463, 68 S.Ct. 184, 92 L.ed. 76 (1947); prospective jurors information was written on color coded cards, *Whitus v. Georgia*, 385 U.S. 545, 87 S.Ct. 643, 17 L.Ed.2d 599 (1967); or the percentage of potential minority jurors was progressively decimated through the selection process. *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed 536 (1971). This Court rejected jury systems which discriminated against not just Black Americans, but Mexican Americans and women. *Hernandez v. Texas*, 347 U.S.

475, 74 S.Ct. 667, 98 L.Ed. 886 (1954); *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed. 2d 690 (1975).

The reasoning behind these decisions is simple. "The racial composition of a jury matters because racial biases, sympathies, and prejudices still exist". *Flowers v. Mississippi*, 588 U.S. 284, 356, 139 S.Ct. 228, 204 L.Ed. 2d 638, (2019)(Thomas, J., dissenting). The existence of racial prejudices is not news. This Court admitted they existed 140 years before Justice Thomas's dissent in *Strauder v. West Virginia*, 100 U.S. 303, 308,25 L.Ed. 664 (1880). The existence of prejudice in juries is not a uniquely American problem. In 1768, William Blackstone noted the ancient English practice of summoning a jury which included both Englishmen and foreigners when one party was a foreigner to ensure an impartial jury. 3 Blackstone 360.

As is often the case, a test developed from the early fair cross-section jurisprudence. A prima facia violation is shown when a distinctive group's representation in jury wheels, pools, panels or venires, is unfair and unreasonable in relation the the size of the group in the community, and the underrepresentation is due to a systematic exclusion. *Duren* 439 U.S. at 363-64. Once

this showing is made, the government may demonstrate there is a significant interest which is advanced by the jury selection process which results in a disproportionate exclusion of the group. *Id.* at 367-68.

This test is easily applied to the early fair cross-section cases. The cases displayed egregious disparities, and often had blatantly discriminatory systems for jury selection. But as the lower courts have been presented with more nuanced situation, (then) Justice Rehnquist's concern of courts "simply playing a constitutional numbers game" has come to fruition. *Duren* at 375 (Rehnquist, J., dissenting).

The most popular version of the constitutional numbers game is known as absolute disparity and requires a defendant to show there is more than a 10% difference in the distinctive groups representation in the jury pool and the general population.[8] But Texas thinks the line should be set at 12% difference. *Pondexter v. State*, 942 S.W.2d 577 (Tex. Crim. App.

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[8] See *United States v.Ashley*, 54 F.3d 311 (7th Cir. 1995); *United States v.Clifford*, 640 F.2d 150 (8th Cir. 1981); *United States v.Grisham*, 63 F.3d 1074 (11th Cir. 1995); *People v. Omar*, 281 Ill. App. 3d 407, 666 N.E..2d 383 (Ill. App. Ct. 1996); *State v. Haskins*, 188 Conn. 432, 450 A.2d 828 (Conn. 1982); *Commonwealth v. Arrriaga*, 438 Mass. 556, 781 N.W. 2d 1253 (Mass. 2003); *State v. Davis*, 646 S.W.2d 871 (Mo. 1982).

1996). Arizona splits the difference at 11%. *State v. Sanderson*, 182 Ariz. 534, 898 P.2d 483 (Ariz. 1995). A 13.5% difference did not raise concerns in Maryland, and North Carolina had no issue with a 16.17% discrepancy. *Lovell v. State*, 347 Md. 623, 702 A.2d 261 (Md. 1997); *State v. Blakeney*, 352 N.C. 287, 531 S.E.2d 799 (N.C. 2000). Somewhat shockingly, New Hampshire found a disparity of 27% to be unproblematic. *State v. Elbert*, 121 N.H. 43, 424 A.2d 1147 (N.H. 1981).

For many years, the 9th Circuit drew the line at 7.7% absolute disparity. *United States v. Artero*, 121 F.3d 311 (9th Cir. 1997). But panels frequently criticized this line drawn in the sand, and eventually the en banc court decided this number game could not stand and wiped the slate clean. *United States v. Hernandez-Estrada*, 749 F.3d 1154 (9th Cir. 2014). The court recognized the absolute disparity test is used because it is easy; it has no foundation or basis in statistics. Further it suffers from distortion based on populations size, and worse, it allows for the complete exclusion of distinct groups if the groups total population falls below the randomly assigned threshold. *Hernandez-Estrada* at 1161-62.

To shore up absolute disparity's weaknesses, some courts also use comparative disparity. The results of this number game are as scattered as those for absolute disparity. In Louisiana, a 6% absolute disparity with a 33% comparative disparity is constitutionally permissible. *State v. Holliday*, 340 So. 3d 645 (La. 2020) The Sixth Circuit, an absolute disparity of 1.28% and a comparative disparity of 34% is constitutionally unfair and impermissible. *Garcia-Dorantes v. Warren*, 801 F.3d 584 (6th Cir. 2015). The Third Circuit faced similar statistics, 1.23% absolute and 40.01% comparative disparity, but held it was insufficient to support a claim of under representation. *United States v.Weaver*, 267 F.3d 231 (3rd Cir. 2001). In Indiana, the standards for what is fair and reasonable depends on what type of case is before the court. An absolute disparity of 4.1% coupled with a comparative disparity of 48.2% is satisfactory in non-death penalty cases, but constitutionally suspect when death is on the line. *Azania v. State*, 778 N.E.2d 1253 (Ind. 2002).

Like absolute disparity, comparative disparity has no sound statistical basis. Comparative disparity tends to overstate the underrepresentation of small groups, and understate the

underrepresentation of large groups. *Hernandez-Estrada* 749 F.3d at 1163. Like absolute disparity, comparative disparity is easy to calculate, requiring only elementary arithmetic.

Perhaps a statistical measurement should use a statistical tool. See *Castaneda v. Partida*, 4030U.S. 482, 496 n.17, 97 S.Ct. 1272, 51 L.Ed. 2d 498 (1977); *Whitus v. Georgia*, 385 U.S. at 552 n.2. Standard deviation analysis is a statistical tool which measures the probability the disparity observed is attributable to random chance. *Berghuis v. Smith*, 559 U.S. 314, 324 n.1, 130 S.Ct. 1382, 176 L.Ed. 249 (2010). Standard deviation analysis does not overstate a disparity like comparative disparity, nor does is eliminate a constitutional guarantee for small populations like absolute disparity.

Several jurisdictions include standard deviation analysis in their analysis. *State v. Dixon*, 125 N.J.223, 593 A.2d 266 (N.J. 1991), *State v. Williams* 525 N.W.2d 5380 (Minn. 1994); *Hernandez-Estrada*, 749 F.3d. 1154. The State of Iowa, which consistently sees small minority populations, exclusively uses standard deviation. *State v. Lilly* 930 N.W.2d 293 (Iowa 2019); *State v. Veal*, 930 N.W.2d 319 (Iowa 2019). *Duren*'s second factor,

whether the representation is fair and reasonable, effectively asks whether the observed representation is one that is likely to be observed. In adopting standard deviation, the Supreme Court of Iowa highlighted standard deviations analysis's ability to determine the probability the observed variance is a random event. *Lilly* 930 N.W.2d at 304.

The calculations necessary for standard deviation analysis are more complex than the basic arithmetic needed for absolute and comparative disparity. It requires taking the square root of the product of three numbers. Prior to the introduction of modern calculators in the 1970s, such calculations were cumbersome, time consuming, and subject to vast quantities of human error. It is understandable why courts would be reluctant to impose this analytic method on a profession not known for its mathematical prowess. But in the modern age, calculating a square root can be reliably accomplished on basic scientific calculator, cell phone application, or entering the words and numbers into a search bar.

This case presents an excellent opportunity for constitutional analysis. The relevant population statistics are

not contested. The percentage of the distinct group in the overall population is small, a scenario never addressed by this court. The differing methods of analysis have been briefed at each stage of the proceedings and there are no procedural complications which would prevent this Court from reaching a decision on the merits. This Court should grant certiorari to provide guidance to the fractured lower courts.

B. This Court should clarify what a defendant must show to constitute systematic exclusion

Resolving the confusion over *Duren*'s second factor is reason enough to grant certiorari. But it is not the only reason to review this case. The lower courts disagree as to what must be shown to demonstrate a systematic exclusion. Some courts agree with the plain language in *Duren* which allows a defendant to show systematic exclusion by demonstrating the exclusion consistently occurs over time.[9] Others allow a defendant to highlight an issue with the selection system.[10] But numerous courts require a defendant to show there is some impermissible feature or intentional discrimination.[11] Many jurisdictions have

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[9] See *United States v.Weaver*, 267 F.3d 231 (3rd Cir. 2001); *State v. Dixon*, 125 N.J.223, 593 A.2d 266 (N.J. 1991); *Mash v. Commonwealth*, 376 S.W.3d 548 (Ky. 2012).

[10] See *Garcia-Dorantes v. Warren*, 801 F.3d 584 (6th Cir. 2015); *Berryhill v. Zant*, 858 F.2d 663 (11th Cir. 1988); *Valentice v. State*, 135 Nev. 463, 454 P.3d 709 (Nev. 2019); *People v. Bryant*, 491 Mich. 575, 822 N.W.2d 124 (Mich. 2012).

[11] See *United States v. Artero*, 121 F.3d 1256 (9th Cir. 1997); *People v. Omar*, 281 Ill. App. 3d 407, 666 N.E.2d 383 (Ill. App. Ct. 1996); *State v. Sanderson*, 182 Ariz. 534, 898 P.2d 483 (Ariz. 1995); *People v. Bell*, 49 Cal. 3d 502, 778 P.2d 129 (Cal. 1989).

even held a random computer list cannot yield a systematic exclusion.[12]

This Court does not need to break new ground to resolve the dispute amongst the lower courts. Whether it is the conscious decision on the part of any person, results of a system can show discrimination. *Hernandez v. Texas*, 347 U.S. 475, 482, 74 S.Ct. 667, 98 L.Ed. 866 (1954). Evidence of specific discrimination is not necessary. *Alexander v. Louisiana*, 405 U.S. 625, 631, 92 S.Ct. 1221, 31 L.Ed. 536 (1972). Disproportionate representation which continues for a period of time creates a strong showing of systematic exclusion. *Patton v. Mississippi*, 332 U.S. 463, 466, 68 S.Ct. 184, 92 L.Ed. 76 (1947). Many defendants will never have a fair and impartial jury because the lower courts are ignoring binding precedent.

This case presents an excellent vehicle for constitutional analysis. Mr. Billings has statistically shown a significant disparity in his own panel, as well as the county's qualified jurors for an entire year. He has also posited the extreme racial

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[12] See *United States v.Ashley*, 54 F.3d 311 (7th Cir. 1995); *United States v.Sanchez*, 156 F.3d 875 (8th Cir. 1998); *State v. Jenne*, 156 Vt. 283, 591 A.2d 85 (Vt. 1991); *Gholston v. State*, 57 So. 3d 178 (Ala. 2010).

disparity of criminal justice outcomes in Wisconsin contributes to the disparity in qualified jurors. The State of Wisconsin has never argued this disparity does not systematically exclude Black Americans from its juries, merely that this is an allowable practice. This argument will allow this Court to correct the lower courts which have been conflating the requirements of demonstrating a prima facia case with whether there is a significant state interest which is primarily advanced by the aspects of the jury-selection process which result in a disproportionate exclusion. *Duren* at 367-68.

Conclusion

For the foregoing reasons, the Court should grant certiorari.

Dated: Monday, February 10, 2025
Respectfully submitted,

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