

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

Appendix

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Appendix 1

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 19, 2024

Samuel A. Christensen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2022AP605-CR
STATE OF WISCONSIN**

Cir. Ct. No. 2020CF413

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DONALD LEE BILLINGS,

DEFENDANT-APPELLANT.

APPEAL from judgment and an order of the circuit court for Winnebago County: DANIEL J. BISSETT, Judge. *Affirmed.*

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Donald Lee Billings appeals a judgment convicting him of first-degree intentional homicide and unlawfully possessing a firearm as a previously convicted felon. He also appeals an order denying his motion for postconviction relief. He argues: (1) that he was denied the right to a trial by a fair and impartial jury; and (2) that there was insufficient evidence presented at trial to support his conviction for first-degree intentional homicide. We affirm.

¶2 Billings was charged with first-degree intentional homicide and unlawfully possessing a firearm as a felon in the death of Adam Baith. A jury convicted him of both counts. Billings moved for postconviction relief, arguing a violation of his constitutional right to a jury drawn from a fair cross section of the community. In lieu of an evidentiary hearing, the State and the defense stipulated to facts that served as the basis for the claim. The circuit court denied the motion. This appeal follows.

¶3 Billings first argues that his right to a jury drawn from a fair cross section of the community was violated because the jury venire significantly underrepresented Black Americans. According to the stipulated facts, jury venires in Winnebago County in 2021, as well as the jury panel called for this case, were drawn from a random list of people provided by the Department of Motor Vehicles (DMV). In addition, Black Americans constituted 2.5% of the population in Winnebago County per the United States Census Bureau, but Black Americans constituted only .81% of the jury venire panels in Winnebago County. Billings claims that this underrepresentation is due to systematic exclusion stemming from the jury selection process.

¶4 The Sixth Amendment and Fourteenth Amendment guarantee a defendant the right to a “jury selected from a fair cross section of the community.”

Duren v. Missouri, 439 U.S. 357, 358-59 (1979). To show a prima facie violation of the fair cross section requirement, a defendant must establish:

(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.

Id. at 364. Whether Billings has made a prima facie case under ***Duren*** is a question of law that we review independently. See ***State v. Arrington***, 2022 WI 53, ¶33, 402 Wis. 2d 675, 976 N.W.2d 453.

¶5 We focus on the third prong of the ***Duren*** test. Billings argues that the jury selection process in Winnebago County systematically underrepresents Black Americans because Winnebago County uses records from the Department of Motor Vehicles (DMV) to draw its jury pool, and those records disproportionately exclude minorities, who are less likely to have driver’s licenses. He also contends that Wisconsin statutes excluding felons from jury service disproportionately limit the number of Black Americans in the jury pool, citing statistical evidence on racial disparities in incarceration rates.

¶6 Even if we assume, for the sake of argument, that Billings has carried his burden of showing that Black Americans are underrepresented in the jury venires of Winnebago County, Billings has not carried his burden of showing that the underrepresentation is the result of systematic exclusion of Black Americans. Although Wisconsin courts have apparently not addressed when underrepresentation of a distinct group is systematic under ***Duren***, we believe the reasoning of the California Supreme Court is persuasive: “[a] defendant does not discharge the burden of demonstrating that the underrepresentation was due to

systematic exclusion merely by offering statistical evidence of a disparity. A defendant must show, in addition, that the disparity is the result of an improper feature of the jury selection process.” *People v. Henriquez*, 406 P.3d 748, 763 (Cal. 2017) (alteration in original; citation omitted). The *Henriquez* court further explained that “[w]here ... a county’s jury selection criteria are neutral with respect to the distinctive group, the defendant must identify some aspect of the manner in which those criteria are applied that is not only the probable cause of the disparity but also constitutionally impermissible.” *Id.*

¶7 Billings has not shown that the disparity here is the result of some constitutionally impermissible feature of Winnebago County’s jury selection process. Billings contends that randomly drawing potential jurors from DMV records disproportionately excludes minorities, but he has not shown that any other available governmental list or method of procuring potential jurors would have produced a jury venire that is more representative of the population. Without evidence showing that an alternative source of potential jurors would expand the diversity of the jury pool, and thus include more Black Americans, Billings’ argument lacks a proper evidentiary underpinning.

¶8 Moreover, Billings provides no legal authority to support his argument that Wisconsin’s felon exclusion law results in constitutionally impermissible jury pools. This is an argument that has been routinely rejected by courts. *See, e.g., United States v. Barry*, 71 F.3d 1269, 1273-74 (7th Cir. 1995); *United States v. Foxworth*, 599 F.2d 1, 4 (1st Cir. 1979). In sum, without evidence regarding the effect of using other sources to create jury venires or legal authority to support his felon exclusion law argument, Billings has not established that he meets the third prong of the *Duren* test—that the underrepresentation was due to systemic exclusion.

¶9 Billings next argues that his conviction was not supported by sufficient evidence. “[A]n appellate court may not reverse a conviction unless the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). The standard for reviewing a conviction based on circumstantial evidence is the same as the standard for reviewing a conviction based on direct evidence. *Id.* “[T]he trier of fact is the sole arbiter of the credibility of the witnesses and alone is charged with the duty of weighing the evidence.” *State v. Below*, 2011 WI App 64, ¶4, 333 Wis. 2d 690, 799 N.W.2d 95. “When more than one inference can reasonably be drawn from the evidence, the inference which supports the trier of fact’s verdict must be the one followed on review unless the evidence is incredible as a matter of law.” *Id.*

¶10 The jury viewed a surveillance video showing Billings and Baith talking at a bar and leaving together. Billings’ friend, Cristafer Berdell, testified that he was with Dominica Propst and Billings at the bar. When the bar closed, they left to follow Baith to his home with the intention of continuing to drink. Berdell further testified that upon arrival at Baith’s home, he and Propst stayed in the car talking and smoking while Billings and Baith went inside. Berdell heard gunshots seven or eight minutes later and called 911, fearing that Billings had been shot.

¶11 Propst testified that she left the bar with Berdell and Billings. She saw Billings and Baith enter Baith’s home and heard gunshots a while later.

¶12 One of the responding police officers testified that he saw a man leave through the back door of Baith’s house but lost sight of him. Upon entering the home, the police found Baith dead. Billings’ DNA and his palm prints were found

inside. The medical examiner testified that Baith died from multiple gunshot wounds, with evidence suggesting close-range firing. Baith's wallet and Billings' cell phone were found on nearby property, suggesting a possible attempt to dispose of evidence.

¶13 Shortly after Baith's murder, surveillance footage captured Billings arriving at his girlfriend's home nearby and then leaving shortly thereafter. Billings' girlfriend testified that Billings arrived at her house at around 4:30 a.m., was acting suspiciously and demanded that she immediately drive him to Milwaukee.

¶14 The evidence presented at trial, briefly summarized above, which included witness testimony, physical evidence, and forensic analysis provided a robust basis for the jury to conclude beyond a reasonable doubt that Billings was responsible for the death of Baith. We reject the argument that there was insufficient evidence for the jury to conclude that Billings was guilty beyond a reasonable doubt of first-degree intentional homicide.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (2021-22).

Appendix 2

¹
FILED
04-20-2022
Clerk of Circuit Court
Winnebago County, WI
2020CF000413

1 STATE OF WISCONSIN WINNEBAGO COUNTY)
2 CIRCUIT COURT BRANCH 6)
3 -----)

4 STATE OF WISCONSIN,

5 Plaintiff,

6 -vs-

Case No. 20 CF 413

7 DONALD LEE BILLINGS,

8 Defendant.

9 -----
10 POST-CONVICTION MOTION HEARING
11 -----

12 Before the HON. DANIEL J. BISSETT,
13 Circuit Court Judge presiding

14 Winnebago County Courthouse - Oshkosh, Wisconsin

15 April 8, 2022

16 APPEARANCES:

17 Mr. Eric Sparr, District Attorney, Winnebago County, Oshkosh,
18 Wisconsin, appearing on behalf of the State of Wisconsin.

19 Mr. Steven Roy, Attorney at Law, Sun Prairie, Wisconsin,
20 appearing on behalf of the Defendant.

21 Defendant present in person and in custody.
22
23
24
25

1 **THE CLERK:** State of Wisconsin vs. Donald
2 Billings, 20 CF 413.

3 **THE COURT:** You, sir, are Donald Billings?

4 **THE DEFENDANT:** Yes, sir.

5 **THE COURT:** You're appearing today with
6 Attorney Roy, and Mr. Sparr on behalf of the State.
7 Mr. Sparr, the State is in victim rights compliance?

8 **MR. SPARR:** Yes, Your Honor.

9 **THE COURT:** Okay. We do have this set as
10 a decision hearing in regards to the motion for
11 reconsideration that was filed by the defense. The
12 parties had filed their briefs in this case, the
13 Court's had an opportunity to review those briefs. The
14 parties had also previously filed a stipulation and I
15 did have an opportunity to review that also. And I
16 guess at this point, Mr. Roy, anything further that you
17 wish to add?

18 **MR. ROY:** No, Your Honor.

19 **THE COURT:** And Mr. Sparr, anything
20 further the State wishes to add?

21 **MR. SPARR:** Just a few things to go into
22 and highlight, and perhaps Mr. Roy will wish to respond
23 to that. But I guess this is a situation, Your Honor,
24 where the numbers to a great degree just are what they
25 are and we've put them out there for the Court to make

1 a decision about. A few things that I want to
2 highlight or point out that really didn't get brought
3 out so much. We're talking about for 2021 the list of
4 potential jurors being just over 7,000 people. That's
5 not necessarily a direct representation of the
6 breakdown of the overall DMV list that they were
7 drawing from. So essentially the DMV has asked for a
8 particular number of individuals, they provide that
9 list, and what we have from that list of 7,000 is .81
10 percent. And one thing that we didn't really talk
11 about before is that number could vary a little bit
12 from year to year, although that probably doesn't
13 change significantly but it could be a little bit
14 different from one year to the next.

15 And the question ultimately is: Do we
16 need to request a list from wherever this is being
17 drawn from -- whether it's DOT or elsewhere -- do we
18 need to get a list of potential jurors that is X
19 percent female and a certain percentage of individuals
20 who are Hispanic and how precise does it need to be.
21 And I think, as noted, the case law is helpful with the
22 general rule but not too helpful with how the Court
23 needs to evaluate this or exactly what method needs to
24 be applied for a numerical comparison.

25 One thing about the facts from the

1 original defense brief, I guess it went into a few
2 facts from the trial and I think it's easy for either
3 side probably to pick the facts that are most positive
4 to them, and obviously the people that were present for
5 the entire trial probably came away with some
6 impressions about the strength of the case as they
7 would with any case and whether the jury composition
8 likely would have changed the outcome, but that's not
9 the issue with this case. This issue is about the
10 numbers and the composition of the overall panel, the
11 7,000 that the jury in Mr. Billings' case was drawn
12 from and some of these things are a little bit tricky
13 to compare with quite as much precision as we want.

14 I understand that the population for
15 Winnebago County shows to be 2.5 percent Black, that is
16 without regards to age which is I think it's kind of a
17 bit less precise when we're talking about eligible
18 jurors although, again, probably the difference isn't
19 that significant when we're talking about people who
20 would be age-appropriate to be jurors, what is the
21 percentage of them. We don't know precisely but it's
22 also not too different. There is the discussion
23 already with regards to in-custody status and I won't
24 go back through that, same with felony status.

25 The DOT list with the .81 percent also --

1 that was .81 percent of the individuals from that list
2 were Black. It also listed 5.37 percent other. And
3 again, it's one of those things where I'm not quite
4 sure how that plays into it, other than it introduces
5 some uncertainty here that -- how does that impact the
6 Court's decision making I'm not quite sure -- but it's
7 at least notable that that is there.

8 And I do agree, though, that the
9 observations from trial that were raised by Mr.
10 Billings' trial counsel that there did not seem to be
11 any individuals that were called for this jury in
12 particular that were Black. I agree with that. I
13 think that appears to be correct. And I'm not sure
14 that's consistent with the .81 percent number but even
15 with a higher number if a percentage of individuals in
16 the 7,000 was actually higher than the .81 percent
17 because some of the people listed as other may have
18 been Black. I don't know.

19 But I think the other thing that comes
20 down to is even if we're using a random sampling from a
21 particular pool such as the DOT list, and even if the
22 process is ideal, the breakdown of people who are given
23 to the Clerk of Courts by DOT is not always going to
24 perfectly match the population. Doesn't have to
25 perfectly match, it has to be an adequate

1 representation, and that's the question here.

2 And going beyond that, even if we have a
3 group of approximately 7,000 that adequately matches
4 the population, that doesn't mean that the group of 60
5 or so that's called for a particular trial is going to
6 match that precisely, so we're never going to have
7 that. And when we're talking about a random selection,
8 we're just not going to.

9 Again, the case law is kind of general.
10 It doesn't give us -- It gives some ideas from other
11 jurisdictions about which formulas might be used for an
12 appropriate comparison, but we don't have something
13 that's binding on this Court that indicates the Court
14 has to take a particular approach, so it leaves this
15 Court with ultimately probably a fair amount of
16 discretion about how to evaluate this.

17 Ultimately, it's the Court's decision
18 about whether the group of Black individuals is
19 underrepresented in the pool of 7,000 and I think I've
20 said enough about that part. If the Court concludes
21 that it does underrepresent the actual population, then
22 we get to that subsequent question of essentially is
23 there a compelling reason why that should be justified
24 and allowed. And the parties have addressed that a
25 little bit. But that's -- to me that's even a touchier

1 situation and one where I'm not sure what to say there
2 because my personal feelings on it might be different
3 than someone else's and it might be -- even if there is
4 a justifiable interest in that, there could be
5 arguments there and I touched on that briefly. But I
6 understand the defense's argument there, and, frankly,
7 if I were making the rules, they might be different.
8 But I'm not. And ultimately it's the Court's call on
9 whether -- if we get to that part of the inquiry --
10 whether there is a sufficient interest to justify the
11 underrepresentation.

12 But I guess I just want to point out that
13 it is the two-part process; first, is there
14 underrepresentation and, second, if there is, is it
15 something that's justifiable in some way. I guess,
16 with that, I'll get out of the way.

17 **THE COURT:** Mr. Roy, anything you wish to
18 add?

19 **MR. ROY:** Just briefly, Your Honor. I
20 would agree with Attorney Sparr that there's likely
21 going to be some sort of general variation whenever you
22 look at the large level population statistic. I think
23 that's why our proposed standard deviation test is so
24 important because that helps capture whether or not
25 that variation is meaningful. So I think I believe

1 it's 6.6 standard deviation is incredibly
2 significant -- excuse me -- incredibly statistically
3 significant; whereas, if it were much lower, say, one
4 less than one, there would be a lot less of an
5 argument. But the fact that it's so high quashes the
6 concerns about the general population statistics for
7 me.

8 I thought that it's a really good question
9 that Attorney Sparr has posed. What happens when the
10 7,000-person list is appropriate and then you draw a
11 60-person panel randomly that does not include the
12 protected groups. I think that's a really interesting
13 legal question but it's a question for another day. I
14 don't think it's properly before this Court. And while
15 I look forward to that question being answered in the
16 future, I think future is the appropriate time for
17 that.

18 And as to the second portion of the
19 Duren/Taylor test, I just don't think that the State
20 has made a compelling argument that its interest is
21 narrowly-tailored, which is fatal in both intermediate
22 and strict scrutiny. We concede that the probity of
23 the jury is a significant interest but the law must
24 still be narrowly-tailored to advance that interest.

25 **THE COURT:** Anything else?

1 **MR. ROY:** No, Your Honor. Thank you.

2 **THE COURT:** Thank you. I did have an
3 opportunity to review the briefs. As I indicated, I
4 did have an opportunity to review the stipulation that
5 the parties had agreed upon that was filed back on
6 January 20th of 2022. I'd like to thank counsel for
7 their briefs and their ability to put out to the Court
8 the applicable appellate history for these types of
9 matters as well as lay out the numbers really by way of
10 the stipulation. I think that did make this matter
11 more clear in some respects and did allow for analysis
12 in this case.

13 And in looking at the law in this case, I
14 think the attorneys agree as to what the standard is
15 for courts to evaluate these issues whether the group
16 alleged to be excluded is a distinctive group in the
17 community, two, the representations of this group and
18 the panel from which jurors are selected is not fair
19 and reasonable in relationship to the number of such
20 persons in the community, and whether the
21 underrepresentation is due to systematic exclusion of
22 the group in the jury selection process.

23 In this case, the stipulation provides
24 that for the calendar year 2021 -- which was the year
25 in which this particular trial was also conducted and

1 the jury selected from -- there were 7,055 jurors who
2 were included in the jury pool for Winnebago County.
3 The breakdown of those include 57 African-Americans or
4 .81 percent; 19 American Indian and Alaskan native, .27
5 percent; Asian or Pacific Islander, 122 or 1.73
6 percent; Caucasian, 6,364 or 90.21; Hispanic, 103 or
7 1.46 percent; category as other, 379 or 5.37 percent;
8 and a category entitled unknown, 11 or .16; for the
9 total of 7,055.

10 The parties in their stipulation agree
11 that the Census Bureau breakdown for Winnebago County
12 for 2021 for the racial breakdown is as follows: Black
13 or African-American, 2.5 percent; American Indian or
14 Alaskan native, .8 percent; Asian alone, 3.1 percent;
15 White alone, 91.8 percent; Hispanic or Latino, 4.4
16 percent; Native Hawaiian and other Pacific Islander .1
17 percent; two or more races category, 1.8 percent.

18 The parties did discuss the impact of the
19 incarcerated population of Winnebago County and how
20 that is represented in the census. And I don't think
21 there is a clear determination that all of those who
22 are incarcerated in facilities in Winnebago County --
23 which we do have a number of state prisons in our
24 county that do have a fairly significant population in
25 total but also of African-American or Black inmates --

1 how that affects those larger numbers on the Census
2 Bureau's breakdown.

3 I think there's also been some discussion
4 by the parties as to the convicted felon status of
5 individuals and their inability to serve on juries.
6 They are not able to serve until their civil liberties
7 have been restored. Certainly those that are serving a
8 sentence in the prison system aren't eligible for
9 service on a jury and I frankly think that I can't
10 imagine how logistically we could have somebody serve
11 on a jury who's incarcerated from a security standpoint
12 and a safety standpoint how that could be done. But
13 there are other individuals who are in the community
14 who are serving a prison -- a probation sentence or an
15 extended supervision sentence who would not be eligible
16 for service because of that felony status but who
17 otherwise physically logistically would be a potential
18 juror. So I think those numbers do have the potential
19 to affect the analysis in this case to some degree. I
20 don't know that they affect the analysis to a
21 substantial degree but they do I think as the parties
22 have pointed out that the actual number may be
23 somewhere between 1.86 percent and the 2.5 percent, so
24 it would most likely be somewhere less than the 2.5
25 percent and potentially reduced down to the 1.86

1 percent, but I don't believe it would be all the way
2 down to that based on how the census does count
3 incarcerated individuals so I do think that plays a
4 small factor here.

5 I agree with counsel that it's possibly
6 the appropriate time for the legislature to look at the
7 felons and the ability to serve on juries and whether
8 all felons should be excluded or whether there should
9 be some modification based on class or type of
10 conviction but that really is for the legislature and
11 potentially, I guess, appellate courts to determine
12 whether or not that should be changed or modified to
13 try to get a more representative sample for juries in a
14 particular jurisdiction.

15 What I think, though, is more unanswered
16 in this case is the other and unknown categories that
17 are listed. As I indicated, in the 2021 jury pool of
18 7,055 jurors for Winnebago County, the other category
19 was 379 which represents 5.37, so in excess of 5
20 percent of the total jury pool is listed as other. A
21 smaller amount, 11, or .16 percent were listed as
22 unknown.

23 And as I looked at the numbers in
24 comparison -- percentage numbers as they compare to the
25 entire population based on the Census Bureau numbers

1 that the parties stipulated to, for instance, the
2 percentage of Caucasian or White only is 91.8 percent
3 based on the census numbers and is 90.21 percent based
4 on the category listed as Caucasian under the jury pool
5 numbers for 2021. The percentage for African-Americans
6 was 2.5 for the census and .81 for the jury panel. But
7 likewise for American Indian or Alaskan Native .27 for
8 the jury panel and American Indian or Alaskan Native .8
9 for the census. For the Asian or Pacific Islander,
10 which are listed together in the information that the
11 parties stipulated to, was 1.73 and as to the Census
12 Bureau 3.1 for Asian alone, Pacific Islander was
13 included with native Hawaiian for .1, and for Hispanic
14 the jury pool was listed at .46 and the Census Bureau
15 lists it as 4.4 percent.

16 So it appears that the category -- that
17 all categories are somewhat reduced because of the
18 other and unknown which added together would be
19 approximately 5.5 percent. And under the Census
20 Bureau, at least from what was stipulated to by the
21 parties, there isn't an other or unknown category;
22 there's only a two or more races category, which is
23 1.8, and we don't know what the breakdown of those or
24 at least the stipulation doesn't provide what the
25 breakdown of those two or more races would be in the

1 population under the census for Winnebago County.

2 But it appears that all categories are
3 somewhat affected when it comes to the percentage
4 totals for the jury panel because of that approximate
5 5.5 percent that are other or unknown. And it appears
6 that those for White alone or Caucasian is fairly
7 minimal from 91.8 percent to 91.21 percent but for
8 other races is more significant; for instance, for
9 Hispanic, it's listed at .146 percent as opposed to 4.4
10 percent. So I think it is a situation that affects all
11 races and it appears to affect some of the categories
12 more so than others; for instance, when it comes to
13 Asian, it is 1.73 percent for the jury panel and 3.1
14 for the census. So it may be somewhat less for some of
15 the groups as opposed to others.

16 But the issue that I think is most
17 prevalent to the Court here or of concern to the Court
18 is that there is approximately 5.5 percent of the jury
19 panel for 2021 that were represented as other or
20 unknown, and certainly I don't know what other
21 qualifies as, if that includes other unknown or if that
22 includes two or more races, and we don't know what
23 those two or more races may have been or may be. And I
24 would also note that the percentages for the 60
25 prospective jurors for Mr. Billings' particular case

1 does reflect 3 percent other and 1.6 percent unknown,
2 so there is a relatively close percentage -- the total
3 of that being 4.6 percent -- so something a little less
4 than the total pool but still a fairly significant
5 percentage that we don't know or were unknown.

6 And I guess to include, on the record, I
7 would note that the jury selection in this particular
8 case was done at the time of COVID restrictions. We
9 did choose the jury at the exposition center at our
10 fairgrounds simply because it was really the only place
11 that we knew of in the county that was open enough and
12 large enough to appropriately socially distance that
13 group of people, so it was significantly more spread
14 out than would have been in a normal courtroom setting.
15 And I can't say and I wouldn't be able to say what
16 there might have been for the other and unknown people
17 in that particular jury panel. And obviously there was
18 no inquiry as to racial breakdown of other individuals,
19 but there were none who represented as African-American
20 or, for that matter, American Indian or Alaskan native
21 on that particular panel.

22 But I do think that the issue that really
23 is of concern here is the fact that there is a large
24 portion of our jury panel or jury pool -- again,
25 approximately 5.5 percent -- that we don't know the

1 racial breakdown based on I believe it's their
2 self-reported information that they provide, but we
3 don't know what their racial breakdown is. We do know
4 that it appears that all categories are somewhat
5 reduced in those that are disclosing what their race is
6 as opposed to what the census information is for each
7 particular race. We know that or it appears that there
8 are some that are more significant than others but we
9 don't -- we can't, for lack of a better term, do an
10 apples-to-apples analysis on those numbers because
11 there are different categories and different
12 reflections in those categories that make that type of
13 analysis. I think at least from the information we
14 have now it's impossible to do with any type of
15 precision. And I think depending on how those numbers
16 come out in these cases, it certainly is a significant
17 or substantial difference in how the distinctive groups
18 are represented in particular pools.

19 So the Court can find that the Black or
20 African-American group is a distinctive group alleged
21 to be excluded in our community, but based on the
22 information presented, I'm not able to determine that
23 the pool of jurors that are and have been selected and
24 chosen is not a fair and reasonable relationship to the
25 number of such people in the community because of the

1 other and unknown factors that are present. It is
2 beyond the ability of the Court to determine that those
3 groups are not a fair and reasonable relationship to
4 the percentages contained within the census data or
5 population in general in the community.

6 So I would deny the defendant's motion for
7 reconsideration based on the record provided today.
8 And, Mr. Roy, if you wish to prepare an order and
9 reference the transcript, I certainly will sign that.

10 **MR. ROY:** Certainly, Your Honor. Just to
11 make the record clear, I understand the concerns about
12 the other and unknown, and the Court's concerns; I just
13 am confused as to whether the factual basis for
14 concluding this other and unknown population includes
15 certain groups. I don't think that factual basis is
16 before this Court at this point.

17 **THE COURT:** And we don't know that.

18 **MR. ROY:** And I would note that because of
19 the way the state records their data pool information
20 it's -- this uncertainty would prevent a defendant from
21 ever raising a Duren/Taylor claim if we let this level
22 of uncertainty and self-identification, I mean, it's
23 basically saying let's toss Taylor and Duren out the
24 window until we change how we look at the reporting,
25 respectfully.

1 **THE COURT:** To a degree I think, yes, but
2 I think do agree, depending on the percentages and the
3 numbers that come in, it may not be.

4 In this particular case, based upon the
5 numbers presented, I don't think that I can say that
6 there has been an unfair or unreasonable selection here
7 because of those unknown numbers. But there may be
8 cases where there would be, depending on what the
9 census population is and what the jury is, that that
10 analysis could be made, but in the numbers provided to
11 this Court, I don't believe that I can make that
12 finding.

13 **MR. ROY:** Thank you for your thoughtful
14 decision, Your Honor, and I will prepare an order.

15 **THE COURT:** Thank you. Record's closed.
16 (Proceedings adjourned)

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1 STATE OF WISCONSIN)

2 COUNTY OF WINNEBAGO) SS:

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4
5 I, Lori L. Baldauf, Official Court
6 Reporter of Winnebago County Circuit Court Branch 6, do
7 hereby certify that the foregoing transcript, numbered
8 to and including 19 pages, constitutes a true and
9 accurate transcription to the best of my skill and
10 ability of said proceedings held on the 8th day of
11 April , 2022.

12
13 Dated this 21st day of April, 2022

14 Lori L. Baldauf

15 Lori L. Baldauf, RPR/RMR

16 Official Court Reporter, Branch 6

17 Winnebago County - Oshkosh, Wisconsin

18
19 The foregoing certification of this
20 transcript does not apply to any reproduction of the same by
21 any means unless under the direct control and/or direction of
22 the certifying reporter.
23
24
25

Appendix 3



OFFICE OF THE CLERK
Supreme Court of Wisconsin

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FILED

11-12-2024

CLERK OF WISCONSIN

SUPREME COURT

November 12, 2024

To:

Hon. Daniel J. Bissett
Circuit Court Judge
Electronic Notice

Sonya Bice
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Steven Roy
Electronic Notice

You are hereby notified that the Court has entered the following order:

No. 2022AP605-CR State v. Billings, L.C. #2020CF413

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of defendant-appellant-petitioner, Donald Lee Billings, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

Samuel A. Christensen
Clerk of Supreme Court