The Supreme Court of Wisconsin

22-AP-605-CR

State of Wisconsin,
Plaintiff-Respondent

v.

Donald Lee Billings
Defendant-Appellant-Petitioner

Appeal from The Circuit Court of Winnebago County
The Honorable Daniel J. Bissett, presiding

Petition for Review

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Statement of the Issues

Black citizens represent 2.5% of Winnebago County residents, but only 0.81% of the 2021 jury array.[1] The right to a fair and impartial jury requires the jury to be compromised of a fair cross-section of the community. Did this discrepancy violate Mr. Billings's right to a fair and impartial jury?

> The circuit court concluded there was not an inadequate representation.
> The Court of Appeals concluded systemic exclusion requires an improper jury selection feature, and held Mr. Billings's rights were not violated.

Appellate courts are to reverse a conviction when the evidence, viewed in the light most favorable to the conviction, is so insufficient no reasonable juror could have found guilt beyond a reasonable doubt. Juries are permitted to make inferences from the evidence, but they must be reasonable. When the State's evidence can only show the defendant was present at the crime scene, is it reasonable to infer the defendant committed first degree intentional homicide?

> The Court of Appeals concluded presence at the scene was robust evidence to for a jury to conclude Mr. Billings's was responsible for Mr. Billings death.

[1] Wis. Stat. 756.01 defines the various groupings of jurors. The terminology is incorporated within, unless within a direct quote from another court.

Table of Contents

Reasons to Accept Review

The right to a trial by jury is one of, if not the defining characteristics of the American legal system. It places the responsibility of deciding whether a law has been broken with the people. The people are given the opportunity to examine the laws their legislators have enacted, review evidence collected by law enforcement, and determine whether their elected officials have met their high burden of proof. The venerable Lord Blackstone described the jury trial as the bulwark against tyrannical governments.

This bulwark 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.

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 50 years on this critical question. During that time period, there has been significant developments in this area of constitutional law, and analytical methods which are readily available to evaluate these claims.

In 1975, the Supreme Court of the United States issued a three part test to evaluate claims juries are not a fair representation of the community in *Taylor v. Louisiana*. The test was reiterated in *Duren v. Mississippi* in 1979. Since then, the Court has largely left the development of this question to the lower courts. 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.

The Wisconsin Court of Appeals has largely ignored this issue. While the issue has been raised, it has seldomly been raised well. Here, both the State and Mr. Billings requested publication so circuit courts would have an analytical framework to use when addressing *Duren* claims. The parties thoughtfully and diligently raised legal arguments for the court to consider.

The court of appeals decided to take a different route. The three judge panel created their own rationale for determining Mr. Billings was not entitled to relief: they believe a defendant must show there is an improper feature of the jury selection process. The Court decided this in a per curiam order.
The decision conflicts with the Supreme Court's fair cross section decisions as well as this Court's fair-cross section law.

Procedurally, the decision defies a bedrock legal principle often cited to by the court of appeals, this Court, and the Supreme Court of the United States. Courts cannot serve as advocates and do not develop issues for parties. To paraphrase Chief Justice Roberts, it is a court's job to call balls and strikes; it is not a court's job to determine which pitches to throw.

Mr. Billings raised a second question on appeal; was there sufficient evidence to uphold his conviction? Early decisions from this Court held the State must do more than establish presence at a crime scene to uphold a conviction. The court of appeals ignored those cases, and with a wave of their hand, concluded there was enough evidence to convict Mr. Billings, despite the State's evidence doing nothing more than demonstrating he was at the scene.

This Court should grant review to develop a critical body of law and harmonize Mr. Billings case with prior precedent.

Statement of Facts and the Case

This case begins on Fathers Day of 2020. (R.224:110). Donald Billings came to Neenah to spend time with his daughter and her mother. (R.224:110). Late that night, Mr. Billings and two companions, Mr. Berdell and Ms. Propst, went to a local bar. (R.224:111). 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. (R.224:113-115).

Mr. Billings was ready to leave around the time the bar closed. (R.224:115-116). Mr. Berdell and Ms. Propst were arguing–when Mr. Billings attempted to mediate the situation, Mr. Berdell began to argue with Mr. Billings. (R.224:116-117). Rather than continue in this heated situation, Mr. Billings began to walk back to his daughter's home. (R.224:117-118). Mr. Billings's journey took roughly two hours due to the heavy rain and his bad leg. (R.224:118-119). Once Mr. Billings returned, a mild argument ensued regarding the amount of time he had spent out, rather than with his daughter. (R.224:121-122). His daughter's mother agreed to drive Mr. Billings back home to Milwaukee. (R.224:122).

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". (R.230:24-25). Mr. Billings then invited them to an "after-bar" at AB.'s house.[2] (R.230:26). When they got to AB's house, Mr. Billings went into the house, while he and Ms. Probst continued to argue in the car. (R.230:29). They heard gun shots and called the police. (R.230:29). Mr. Berdell believed Mr. Billings had been shot. (R.230:30). Mr. Berdell called 911.

[2] An after-bar is a party to continue drinking and socializing. (R.230:27)

Police responded to AB's home. (R.222:102). 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. (R.222:104-105). 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". (R.222:105).

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. (R.222:106:107).

When police questioned Mr. Berdell, he told the Mr. Billings name was "Mike" and they had just recently met. (R.230:16-17). This was a lie. When Mr. Berdell was questioned later, he stuck to his fictitious story about "Mike". (R.2:3-4). Mr. Berdell and Donald Billings had known each other for several years. (R.230:17). Mr. Berdell tried to dispose of his personal cell phone during a break in police questioning. (R.230:38).

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. (R.2-3). This person in jail also identified the image as "Mike" who lives in Oshkosh. (R.2-3). Donald Billings lived in Milwaukee.

AB owned a Glock 9mm. (R.230:104). The shell casings found on the scene are consistent with this firearm.[3] (R.230:108). When officers searched AB's home, the Glock 9mm was missing.

[3] Ballistics testing was not performed in this case. (R.230:109-110).

(R.230:104). Months later, after Mr. Billings was in custody, the gun was recovered in Dane County. (R.230:105). Officers had been involved in a high speed chase; the suspect exited his vehicle, then reentered, accessed the gun and shot himself. (R.230:105-108). Investigators have been unable connect the suspect to Mr. Billings or the Neenah area. (R. 230:108). 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. (R.230:199). Only, when she was cross-examined was it revealed these were partial palm prints. (R.230:205). 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. (R.230:205).

The analyst testified there is no particularly quality or quantity of information required to call a particular print an identification. (R.230:192). There is no "point standard" for concluding there is a match, and identifications are based on each analysts opinions and level of comfort. (R.230:205-208). 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.[4]

[4] 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

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. (R.177). 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. (R.223:44). 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. (R.223:68-69).

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. (R.222:74-75). This 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. (R.237:2; 224:248). He was sentenced to life in prison. (R.225:38). 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. (R.211). 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. (R.231). 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. (R.237). Black residents were 2.5% of Winnebago County's population, but only 0.81% of the annual array. The absolute disparity is 1.69%.[5] The comparative disparity is 67.6%.[6] The difference in the expected proportion of African American jurors is 9.1 standard deviations.[7]

After briefing, the circuit court denied Mr. Billings's motion for reconsideration. (R.268:17; 249). 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. (Appendix 3) Mr. Billings now petitions for review.

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[5] 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: $2.5 - 0.81 = 1.69$

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

Here: $1.69/2.5 = 0.676$

[7] 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:

$(176.37 - 57)/13.11 = 9.1$

Argument

I. As the law developing court of the State, this case presents the opportunity to develop a significant constitutional questions which have been dormant for fifty years

The last time this court addressed the fair cross section requirement was 1973. Since then, Justice Abrahmson became the first woman to serve in Wisconsin's judiciary. The Voyager probes were launched, and reached interstellar space. The personal computer and the internet have become ubiquitous. Entire legal doctrines have come and gone. *See Chevron, U.S.A., Inc. v. NRDC, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984) *overturned by, Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244 (2024); , *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed. 2d 597 (1980) *overturned by*, *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed. 2d 177 (2004).

One thing which has not changed is the importance of diversity in the jury system. From Blackstone to Thomas the benefits of a diverse jury have remained unquestioned. *See* 3 William Blackstone, *Commentaries on the Laws of England* 355-361(Univ. of Chi. Press 1979) (1769), *Flowers v. Mississippi*, 588 U.S. 284, 356, 139 S.Ct. 228, 204 L.Ed. 2d 638 (2019) (Thomas, J., dissenting); see also *State v. Spencer* 2022 WI 56 ¶87 (Dallet, J., dissenting)) With advances in computing power, social scientists have routinely confirmed this constitutional analysis. Samuel R.Sommers, *On racial diversity and group decision making: Identifying multiple effects of racial composition on jury deliberations*., 90 Journal of Personality and Social Psychology 597–612 (2006); S. Anwar, P. Bayer & R.Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 The Quarterly Journal of Economics 1017–1055 (2012); F.

Flanagan, *Race, Gender, and Juries: Evidence from North Carolina*, Journal of Law and Economics, University of Chicago Press 61, No. 2 (May 2018).

The test to determine whether the fair cross-section requirement has been violated was crystalized in *Taylor* and *Duren*. A defendant must show:

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.

Once a prima facia case has been demonstrated, the State may defend its jury selection system

Duren v. Missouri, 439 U.S. 357, 364, 99 S. Ct. 664 (1979). Many State courts and Federal Circuits have attempted to grapple with the questions underlying the *Duren* framework. While a consensus has emerged to determine whether a group is distinct, courts have fractured while grappling with the second and third prong. *See United States v. Hernandez-Estrada*, 749 F.3d 1154 (9th Circuit. 2014)(Collecting cases).

There is no definitive method courts use to determine whether a group's representation is fair and reasonable. Some courts use the simple measure of absolute disparity. But even those courts are divided on how much absolute disparity must be shown. *See*, United *States v. Rodriguez-Lara*, 421 F.3d 932, 943-44 (9th Cir. 2005)(Requiring 7.7%); *United States v. McAnderson*, 914 F.2d 934, 941 (7th Cir. 1990)(Requiring 10%). A second group of courts use comparative disparity, again, they

struggle to find when the disparity becomes too great. *United States v. Weaver*, 267 F.3d 231 (3rd Cir. 2001)(comparative disparities of 40.01% and 72.98% are insufficient); *United States v. Chanthadara*, 230 F.3d 1237 (10th Cir. 2000)(68.22% is sufficient). Both of these methodologies have been subjected to significant criticism. Some, like the Ninth Circuit, have declined to select statistical methodologies. *Hernandez-Estrada*, at 1164-1165 (overturning *Rodriguez-Lara*).

One court has chosen to use an actual statistical method, standard deviation. *State v. Lilly*, 930N.W.2d 293 (Iowa 2019). This method does not suffer distortion due to population size, and does not impose artificial barriers to constitutional rights. Rather, this method measures how far away the expected values are from the actual values, and can determine the probability the difference is simply due to chance. The arithmetic is slightly more complex, but requires no more than basic working knowledge of a calculator.

Courts have also split as to what constitutes systematic exclusion. California requires an improper feature of the jury selection system. *People v. Henriquez*, 406 P.3d 748, 763 (Cal. 2017). This is a minority view. Other courts have remained faithful to the plain language of *Duren*, a demonstration of underrepresentation over time demonstrates systematic exclusion. *Weaver* at 244. But other courts require a defendant to show there is a feature within the selection system which leads to the under representation. *United States v. Sanchez*, 156 F.3d 875, 879 (8th Cir. 1998).

This Court cannot bring all other jurisdictions into harmony. But this Court can and should settle these difficult questions for Wisconsin rather than leaving the lower courts to sort through doctrinal chaos all by themselves.

II. Lower Courts are repeatedly encountering the question of whether the fair cross section requirement has been violated; a decision from this court will provide them with the analytical methods needed to make reasoned decisions

Fair cross-section claims have made routine appearances in the court of appeals. With a single exception, these cases have been resolved without publication. In the 19 decided cases, many suffer from a poorly compiled record. There is at least one other case currently before the court of appeals asking the court to evaluate a fair cross section requirement. *State v. Amani Swanel Tobias Smith*, 23-AP-1518-CR (District II).

This constitutional issue is occurring on a regular basis, and the lower courts have a single case, *State v. Pruitt*, which they can rely on for analytical guidance. But *Pruitt* is highly flawed. It contradicts *Taylor's* plain language, claiming the examination of a single array is insufficient to establish under representation. *State v. Pruitt*, 95 Wis.2d 69, 76, 289 N.W.2d 343 (Wis. Ct. App. 1980). But *Taylor* explicitly states petit juries must be drawn from a source fairly representative of the community. *Taylor* at 538. This includes jury wheels, pools, panels, and venires. *Id.*

Pruitt also abandon's the fair and reasonable requirement. It concluded "[t]he fair-cross-section requirement is met if substantial representation of a distinctive group exists." *Pruitt* at 78. The *Pruitt* Court also failed to answer the question which has generated significant circuit splits: how should courts determine whether a representation is fair or reasonable? *Pruitt* never explained how it determined the representation was fair and reasonable. And the elementary arithmetic it conducted is simply wrong. There were 53 prospective jurors out of 425 who

were under the age of 30. The *Pruitt* Court stated this was 12.7%; it is not. It is 12.47%.

This Court should grant review to answer the two questions which have divided courts across the country: how should a court determine if a representation is fair and reasonable, and what is necessary to demonstrate systematic exclusion.

III. This Court can implement new policies and adapt current policies to help ensure broad community participation in jury service.

In Blackstone's time, the sheriff's bore the responsibility for assembling jury panels. Fifty years ago, Wisconsin relied on jury commissioners to compile jury lists. Today, the director of state courts compiles the master list of prospective jurors. Wis. Stat §756.04(2)(a). The statute instructs the director to compile a list from the department of transportation. The director may use supplemental lists, but the clerk of courts indicated the director does not supplement the list.

The director of the state courts is hired by and serves at the pleasure of this court. SCR 70.01. This Court can and should instruct the director to investigate whether the use of additional sources would provide a prospective juror list which more accurately represents the diversity in Wisconsin's communities. This represents a common-sense approach for a first step to ensure Wisconsin's juries reflect the community as a whole.

IV. The court of appeals decision conflicts with binding precedent

A. Improper features are not required to demonstrate a systematic exclusion

> His undisputed demonstration that a large discrepancy occurred not just occasionally, but in every weekly venire for a period of nearly a year manifestly indicates that the cause of the underrepresentation was systematic.
>
> *Duren* at 366

Taylor and *Duren* were not the first instances where appellate courts were faced with challenges to the fair cross-section requirement. The clarity of each decision represents decades of litigation and opinions. In *Hernandez v. Texas*, the Court stated the *results* of the selection system "bespeaks discrimination, whether or not it was a conscious decision". 347 U.S. 475, 482, 74 S.Ct. 667, 98 L.Ed. 866 (1954)(emphasis added). A constitutionally valid jury system led to disproportionate *results* in Greene County Alabama. While the Court upheld the Alabama statute, it also upheld the district court's injunction ordering the jury commissioners to compile a jury list which did not produce disproportionate results. *Carter v. Jury Comm'n,* 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed. 2d 549 (1970).

This Court has also held results can be sufficient to show systematic exclusion:

> A systematic exclusion can be shown by the direct testimony of the jury commissioners or by *proving a disproportionate representation of a unit of citizens on the jury array over a period of time.*
>
> *State v. Holmstrom*, 43 Wis. 2d 465, 472, 168 N.W.2d 574 (Wis. 1969)(Emphasis added).

Holmstrom recognized what would later become the first and third prong of the *Duren* test. The second prong was effectively realized in *Wilson v. State*. There, the defendant attempted to show systematic underrepresentation of Blacks by sampling a small proportion of the jury lists from 1969 to 1971. He used a ten percent random sampling, and called those selected to ascertain their age and race. *Wilson v. State*, 59 Wis. 2d 269, 277, 208 N.W.2d 134 (Wis. 1973). The sampling revealed just a single Black juror in the 1971 panel, but one of the court commissioners testified he had submitted the names of eight Black residents for jury service that year. *Id.* at 277-279. The court held slight deviation from the expected value (1.64 Black residents) in the ten percent sampling (1) was insufficient to establish a prima facie case. *Id.* This Court's prior precedent is consistent with the rule announced in *Duren*, the Court of Appeals is not permitted to ignore it. *Cook v. Cook*, 208 Wis. 2d 166, 189-190, 560 N.W.2d 246 (1997).

Systematic exclusion certainly can be demonstrated by improper factors, and openly discriminatory intent. But those showings are not *required* to demonstrate systematic exclusion. Statistics over time can demonstrate systematic exclusion. The court of appeals was incorrect when it held otherwise.

B. Mere presence at a crime scene is insufficient to uphold a conviction for intentional acts

Mr. Billings also raised a challenge to the sufficiency of the evidence supporting his conviction. Once the court of appeals stated the high legal bar defendants face in this argument, it stopped citing to case law. It summarized the evidence which supported Mr. Billings was present at the crime scene, and concluded this was a "robust basis for the jury to conclude beyond

a reasonable doubt that Billings was responsible for the death of Baith."[8]

It is a mystery what happened in the house. The State had no witnesses who saw the shooting. It is unknown who may have been in the house prior to AB and Mr. Billing's arrival. The jury could infer AB's gun, recovered from an apparently unrelated suicide months later in a different part of the State, but no one could link that firearm to Mr. Billings.

Reasonable inferences must be built on a step by step basis. *State v. Coughlin*, 2022 WI 43 (Wis. 2022). The court of appeals makes a significant leap, jumping from presence at the crime scene to intending to, and causing the death of Baith. This logical leap not only violates the example of *Coughlin*, it flies in the face of this Court's holding in *Bruno v. State*, that presence at a crime scene is insufficient to convict a defendant.

In *Bruno v. State*, the Supreme Court of Wisconsin was faced with a case similarly lacking in probative evidence. *Bruno v. State*, 171 Wis. 490, 177 N.W. 610 (Wis. 1920). Similar to Mr. Billings's DNA and palm print, the State had identified the defendant's shoe print on the victim's premise. *Bruno,* 171 Wis. 494. The victim's granary had been set on fire, and multiple witnesses heard Bruno state he would burn them up or blow them up. *Id*. at 492-93. The Court concluded mere presence at the scene of the crime was insufficient to sustain a guilty verdict. *Id*. at 497. Even with the statements attesting to Bruno's motive,

[8] To convict Mr. Billings of First Degree Intentional Homicide, the State needed to demonstrate Mr. Billings *caused*, and *intended to cause* Baith's death. The Court of Appeals ignores the elements of the crime. They did not discuss intent at all, and their discussion of causation is simply to state Baith died from multiple gunshot wounds. There is no evidence in the record which connects Mr. Billings to a firearm.

the reasonable causal chain leading to the conclusion of arson was incomplete.

There is even less evidence against Mr. Billings then there was against Bruno. No motive was ever established for Baith's death. Mr. Billings and Baith had met earlier that evening while playing pool. Surveillance video shows two men getting along, there was not even the hint of a conflict.

The trial court summed it up best:

> What took place in that residence on the morning of June 22nd, 2020, is unknown. What was the motivation for the shooting is unknown. But the victim was shot and killed. The defendant's DNA and fingerprints were located at the scene.
>
> (R.225:33-34).

No one knows what happened that morning. The only conclusions which could be reasonably inferred from the evidence are that AB was fatally shot, and Mr. Billings was at the crime scene. As a matter of law, this is insufficient to sustain a guilty verdict. *Bruno* at 497. This court should grant review, and overturn the court of appeals decision which blatantly ignores this Court's precedent.

C. Party presentation is a bedrock principle of American Jurisprudence

Broadly speaking, there are two primary judicial systems in the world, the adversarial, and the inquisitorial. Like all human constructs, neither is infallible; they both have strengths and weaknesses. Having seen the ready abuses of inquisitorial courts, the founding generation enshrined the adversarial system into our Constitution. *See*, *Crawford v. Washington*, 541 U.S. 36, 43-50; The Declaration of Independence, 1776 para. 2 Cl 18; *In re*

S.M.H., 2019 WI 14 ¶20-21, 385 Wis. 2d 418, 922 N.W.2d 807, (Wis. 2019).

One of the costs to this system is that learned judges serve as neutral arbiters. *Greenlaw v. United States*, 554 U.S. 237, 243-44. Our system presumes the parties know what is best for them, and the parties are responsible for advancing the facts and arguments entitling them to relief. *Castro v. United States*, 540 U.S. 375, 386, 124 S.Ct. 789, 157 L.Ed. 2d 778 (2003)(Scalia, J., concurring in part and concurring in judgment). Courts are largely passive instruments of government and they do not sally forth each day looking for wrongs to right. *United States v. Sineneng-Smith,* 590 U.S. 371, 376, 140 S.Ct. 1575, 206 L.Ed. 2d 866.

At times, members of this court have struggled with how strictly it should apply the principle of party presentation. *See*, Sanders v. State claims Bd., 2023 WI 60, ¶36-38 (Opinion of R.G. Bradley, J.,)(Collecting opinions). Nonetheless, this court does not depart from its neutral role to develop or construct arguments for parties.[9] *SEIU Local 1 v. Vos*, 2020 WI 67 ¶24, 393 Wis. 2d 38, 946 N.W.2d 35 (Wis. 2020) *quoting, State v. Pal,* 2017 WI 44 ¶26, 374 Wis. 2d 759, 893 N.W.2d 848.

While tension exists between party presentation and the development of the law, this tension is less significant in the court of appeals. Only a slight handful of their decisions become

[9] Discretionary courts have numerous tools at their disposal to ease the tension between party presentation and the duty to develop the law. For instance, a court may raise a specific question when granting a petition, and may request supplemental briefing if an issue become apparent after the initial grant. Courts can signal alternative legal theories using dicta, and concurring or dissenting opinions. Cases can be remanded for further consideration, or even dismissed as improvidently granted. All of these options allow courts to maintain their neutrality, while furthering the development of the law.

binding precedents. In *State v. Pettit*, one of the court of appeal's most cited opinions, the court explicitly stated it could not serve as advocate and judge. *State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Wis. Ct. App. 1992). This position later reiterated as "[W]e will not abandon our neutrality to develop arguments". *Indus. Risk Insurers v. Am. Eng'g Testing, Inc.*, 2009 WI App 62 ¶25, 318 Wis. 2d 148, 769 N.W.2d 82 (Wis. Ct. App. 2009).

In the decision below, the Court of Appeals abandoned its neutrality and developed an argument for the State in order to affirm Mr. Billings's conviction. Citing a California Supreme Court decision, the court of appeals told Mr. Billings, "we believe…[a] defendant must show…the disparity is the result of an improper feature of the jury selection process. (Appendix 6-7). Problematically, the State and Mr. Billings had never cited any California decisions, and no party had made the argument there must be an improper feature.

If the State had raised this argument, Mr. Billings's would have been able to refute this argument. The argument has found support in few jurisdictions, and for good reason. It is contradicted by the facts of *Duren*, and systematic exclusion prior to *Duren* never required an improper feature. *Supra* at 16-17. And just like the rejected methodology from *Swain*, it would require a "crippling burden of proof", effectively immunizing the jury selection process from constitutional scrutiny. *Batson v. Kentucky*, 476 U.S. 79, 92-93, 106 S.Ct. 1712, 90 L.Ed. 2d 69.

This is the benefit to our adversarial system. Humans, including judges cannot always be trusted to safeguard the rights of the people. *Crawford* at 68. Vigorous advocacy allows neutral arbiters to sift and winnow the arguments presented. It takes true judicial wisdom and humility to refrain from pitching and batting, and to simply call balls and strikes.

The Court of Appeals erred when it departed from these bedrock principles. This Court should grant review to correct the lower court's error and determine which of the parties arguments will carry the day.

Conclusion

For the above reasons, Mr. Billings respectfully requests this Court grant review in his case.

Dated: Monday, November 13, 2023
Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (8)
I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 5,454words.
Electronically Signed By: Steven Roy

CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (2)
I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.
I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.
I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.
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