No. ____

In the Supreme Court of the United States

PAMELA LYNN BRAVEBULL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Evidence upon which the jury may rely in convicting a defendant must come through qualified sworn witnesses, not through a colloquy with a venireperson. The prosecutor in this case elicited evidence that a shod foot is a dangerous weapon through such a colloquy, and referred to this colloquy in his opening statement and closing argument. Did this violate the petitioner-defendant's Sixth Amendment right to cross-examination and a fair trial, her Fifth Amendment due process right, and multiple Federal Rules of Evidence?

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PETITION FOR WRIT OF CERTIORARI

In 2016, the petitioner, Pamela Lynn Bravebull, was indicted on three counts, the first two of which are relevant for this petition. Count 1 charged Bravebull with aiding and abetting the assault of a victim, Theresa See Walker, with a dangerous weapon — shod feet — in violation of 18 U.S.C. §§ 2, 113(a)(3), and 1153. Count 2 charged the petitioner with aiding and abetting the assault of See Walker, which resulted in serious bodily injury, in violation of 18 U.S.C. §§ 2, 113(a)(6), and 1153.

During voir dire, the prosecutor specifically questioned a venireperson who had extensive martial arts training. The prosecutor essentially qualified this venireperson as an expert, elicited the venireperson's opinion that a foot could be a dangerous weapon, used that opinion to ensure that the rest of the venire could determine that a foot is a dangerous weapon, and then used the venireperson's opinion in his opening statement and closing argument.

This case is one of first impression. It does not, therefore, present a circuit split. It does, however, present an important question of federal law that has not been settled by this Court, but should be because of its potential important, wide-ranging, and troubling ramifications.

OPINION BELOW

The Eighth Circuit issued its opinion on July 24, 2018. It rejected all of the petitioner's arguments and affirmed her conviction. The District Court issued its judgment on May 1, 2017.

JURISDICTION

The Eighth Circuit rendered its decision on July 24, 2018. This Court has jurisdiction based on 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The following relevant Constitutional provisions and Rules are located in the Appendix: Fifth Amendment to the United States Constitution; Sixth Amendment to the United States Constitution; Fed. R. Evid. 103; Fed. R. Evid. 104; Fed. R. Evid. 603; Fed. R. Evid. 606; and Fed. R. Evid. 702.

STATEMENT OF THE CASE

This case involves troubling prosecutorial conduct that may become a model for both criminal and civil litigators, both plaintiffs and defendants. This would not be a welcome model, however, as it would undermine provisions of the United States Constitution and multiple Federal Rules of Evidence, which in the aggregate would undermine the basic norms and structure of the American trial. This Court should act now to prevent this case from metastasizing.

During voir dire before the petitioner's criminal trial, the prosecutor informed the venirepersons that "[o]ne of the facts you guys will have to decide in this case . . . is whether or not a dangerous weapon was used . . . The dangerous weapon, as the facts will be presented to you, will be presented as shod feet . . . Does anybody here have any kind of question or concern with potentially a foot being a dangerous weapon?". There was no audible response that any venireperson had such a concern.

The prosecutor, nevertheless, proceeded to question one particular venireperson.

The entire one-on-one colloquy bears transcription:

> PROSECUTOR: Let's pick on our martial arts instructor, Mr. Merck, since you are probably the closest to having a dangerous weapon inside your shoe. How long have you been doing martial arts?
>
> MR. MERCK: Since 1985.
>
> PROSECUTOR: Okay. So what — what level of black belt are you?
>
> MR. MERCK: I have a fifth degree black belt.
>
> PROSECUTOR: So sometimes then you go to a lot of the national, international types of events?
>
> MR. MERCK: Yes.
>
> PROSECUTOR: And you spar a lot?
>
> MR. MERCK: Yes. I used to.
>
> PROSECUTOR: Okay. That's all done with bare hands and bare feet, correct?
>
> MR. MERCK: Yes.
>
> PROSECUTOR: In fact, you guys use some additional equipment in your instruction, in training with students to lessen any harm that could be caused with blows, correct?
>
> MR. MERCK: Everyone is required to wear safety — safety pads, to helmets, chest guards, face guards, mouth guards, groin cups, yeah.
>
> PROSECUTOR: So like pads on the feet, pads on the hands?
>
> MR. MERCK: Yes. The bottom of the feet are not padded.
>
> PROSECUTOR: But the tops are?
>
> MR. MERCK: Yes.
>
> PROSECUTOR: Because that's where you guys generally strike from, correct?

MR. MERCK: Correct.

PROSECUTOR: Okay. Now, you didn't disagree with the fact that a foot could be a dangerous weapon, correct?

MR. MERCK: I did not disagree with that.

PROSECUTOR: Would a shoe on a foot make it even more so?

MR. MERCK: Most likely, yes, because it would add weight to the — to the striking surface.

PROESCUTOR: Would it also protect the foot for more force?

MR. MERCK: Repeated, yes. You would kick harder with a shoe on.

PROSECUTOR: So anybody here have any questions or concerns about potentially a foot being a dangerous weapon? (No audible response).

After voir dire had concluded, and during his opening statement, the prosecutor told the jury that

> the parties, we're saving you some time. *We've agreed via stipulation* that a couple things you will not have to find. One, you will not have to find that Theresa Seewalker . . . suffered serious bodily injury . . . *We've agreed* that fact exists . . . *We've also agreed* that Ms. Bravebull and/or [the alleged victims] are Indians . . . *We also agreed* that the assault would have taken place within Indian Country . . . Those are the things you're going to be able to check off on your list from the beginning . . . As we talked about in jury selection, a foot — *we agreed* that a foot could be a weapon based upon how it was used. A shod foot is what we're talking about here . . . Well, you kick somebody with a shod foot, you're able to have that additional weight. You're able to kick a lot harder.

(emphasis added).

During his closing argument, the prosecutor argued that "[t]he assault was committed with a dangerous weapon. We talked about that over and over *in jury*

selection. We talked about a foot. We talked about a shod foot. What does a shod foot do? It allows somebody like Pam to kick a lot harder." (emphasis added).

The petitioner was ultimately convicted, and she appealed to the Eighth Circuit.

On appeal to the Eighth Circuit, the petitioner argued that the prosecutor's questioning of the venireperson violated her Sixth and Fifth Amendment rights as well as multiple Federal Rules of Evidence.

During oral argument, the petitioner offered the following bright-line rule for questioning: "Where the jury's ability to decide a question it must decide has been determined in voir dire, you cannot go further."

This standard highlights the purpose of voir dire, which is to ensure that the jury that is ultimately selected is capable of evaluating the facts, understanding the law, and applying the law to the facts, whatever the outcome may be. Questioning that goes beyond this bright line threatens to undermine, not reinforce, the jury's task.

The Eighth Circuit rejected the petitioner's argument, but wrote that "the prosecutor may have strayed close to troublesome territory by discussing with the venireman his experience as a taekwondo instructor and his views on shoes as dangerous weapons, and then (maybe) referring to this discussion during his opening statement and closing argument."

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's holding opened the door to other litigants to engage in more "troublesome" voir dire. In her Blue Brief to the Eighth Circuit, the petitioner listed four hypothetical examples:

- In a medical malpractice case involving a death resulting from a doctor's off-label prescription of a drug, the defense attorney would be able to establish, through a venireperson who is a doctor, that off-label prescription of drugs is standard practice. The defense attorney could argue in his opening and closing statements that he and the jury "agreed" that such prescription is standard.
- In a negligent vehicular homicide case, in which the government claims a truck-driver defendant was negligent because he drove 15 hours straight and was therefore fatigued, the defense attorney could voir dire a truck-driver venireperson, who could establish that truck drivers regularly drive for 16 hours straight, usually without incident, and that that duration is standard in the industry. The defendant attorney could argue that he and the jury "agreed" to this fact.
- In a wrongful death lawsuit against a police officer who, in the line of duty, fatally shot someone at a distance of 15 feet, thinking the victim was holding a gun when in fact the victim was holding a cell phone, the plaintiff's attorney could establish, through a venireperson who was also an officer, that a trained officer can easily discern a gun from a cell phone at 15 feet.
- In a case in which a political protestor is charged with inciting a riot by yelling to her cohorts, who are standing athwart a line of officers, "Let's beat them down before they beat us down!", a constitutional law professor in the venire could establish that such vituperative speech is merely political rhetoric, is not intended to incite lawless action, and is therefore protected by the First Amendment. The defense attorney could then argue that he and the jury "agreed" that the protestor's speech was protected by the First Amendment.

A venireperson could, of course, establish the contrary: that off-label drug prescriptions are inherently dangerous, that truck drivers should stop driving after 14 hours, that officers under the stress of a dynamic encounter can easily mistake a cell phone for a gun, and that the protestor's speech was not protected.

I. The venireperson was an unofficial, unsworn, unqualified expert witness

A "witness" has been defined as "a person who provides testimony," *United States v. Hubbell*, 530 U.S. 27, 49 (2000) (Thomas, J., concurring), "a person who gives or furnishes evidence," one who "furnishes evidence or proof," *id.* at 50, and one who "bear[s] testimony." *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

Fed. R. Evid. 702 defines an "expert witness" as one whose "knowledge, skill, experience, training, or education" gives the witness scientific, technical, or other specialized knowledge which will assist the trier of fact. Such an expert has also been defined as "a witness who has special scientific or professional training or experience in connection with the particular subject matter about which he is called to testify." *United States v. Allied Stevedoring Corp.*, 258 F.2d 104, 108 (2d Cir. 1958).

"Testimony", in turn, has been defined as "a solemn declaration [usually] made orally by a witness under oath in response to interrogation by a lawyer or authorized public official"; "[a] declaration by a witness under oath, as that given before a court or deliberative body"; and "[e]vidence that a competent witness under oath or affirmation gives at trial or in an affidavit or deposition." *Medina v. Gonzales*, 404 F.3d 628, 634-35 (2d Cir. 2005). But for the lack of oath, the venireperson in this case likely would have provided effective expert testimony.

II. The error was multipronged and structural

But the prosecutor didn't call the venireperson as an expert witness. Instead, he elicited unsworn, inadmissible testimony from that venireperson to bolster his case. The prosecutor, furthermore, suggested to the jury that the parties had stipulated that a shod foot was a dangerous weapon, when the parties had not.

The error in this move is not singular, but it is also not hard to discern. It violated Fed. R. Evid. 103(d), which requires the court to "conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means." It violated Fed. R. Evid. 104(a), which requires the court to "decide any preliminary question about whether a witness is qualified . . . or evidence is admissible." It violated Fed. R. Evid. 603, which requires that before testifying, a witness must give an oath or affirmation to testify truthfully. It violated Fed. R. Evid. 606(a), which provides that a juror may not testify as a witness before the other jurors at the trial. It violated Fed. R. Evid. 702, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999), which impose upon the court a gatekeeping obligation to ensure that expert witnesses meet the requirements of Rule 702. It violated the Sixth Amendment to the United States Constitution, which provides defendants with the right to cross- examine, under oath, witnesses against them. *Pointer v. Texas*, 380 U.S. 400, 406-07 (1965). It violated the Fifth Amendment to the United States Constitution, which protects defendants from being deprived of liberty without due process of law.

This complex of errors entails a structural problem, which requires no showing of, or inquiry into, actual prejudice and that entitles Bravebull to automatic reversal of her conviction. *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1905 (2017). In *Weaver*, this Court held that a structural error is one that undermines "certain basic, constitutional guarantees that should define the framework of any criminal trial." *Id.* at 1907. One of the basic, structural guarantees of any trial — civil or criminal — is that evidence can come in only through qualified witnesses.

The alternative has major and troubling implications, as the petitioner has noted above. These implications, furthermore, will not clearly benefit prosecutors or defense counsel, plaintiffs or defendants, or civil or criminal litigants. The ramification will run through all trials and undermine many of the constitutional and evidentiary rules upon which American justice is built.

CONCLUSION

The Court should grant the petition and hear this case in order to foreclose the important and troubling ramifications that may emerge from this case. It should do so by adopting the petitioner's bright-line rule which she offered to the Eighth Circuit, or by creating one of its own.

Respectfully submitted,

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