No._____

In The

SUPREME COURT OF THE UNITED STATES

GARY RICHARDSON, *Petitioner*

v.

STATE OF COLORADO, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Attorney for Petitioner:

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QUESTION PRESENTED

Whether a trial judge commits structural error violating a defendant's Sixth Amendment and due process rights to an impartial and independent jury by permitting an immediate family member, particularly a spouse, to serve on a jury for a criminal trial over which the judge presides?

PARTIES TO THE PROCEEDING

Petitioner Gary Richardson was the defendant in the district court proceedings, appellant in the court of appeals proceedings, and petitioner in the supreme court proceedings. Respondent State of Colorado was the plaintiff in the district court proceedings, appellee in the court of appeals proceedings, and respondent in the supreme court proceedings.

RELATED CASES

People v. Richardson, No. 15CA0526, Adams County District Court. Judgement of conviction entered November 27, 2018, *nunc pro tunc* February 20, 2015.

People v. Richardson, No. 15CA526, 2018COA120, ___ P.3d ___, Colorado Court of Appeals. Judgement affirmed August 23, 2018.

Richardson v. People, No. 18SC686, 2020 CO 46, ___ P.3d ___, Supreme Court of the State of Colorado. Judgement affirmed *en banc*, June 1, 2020.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gary Richardson respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of Colorado.[1]

OPINIONS BELOW

The opinion of the Colorado Supreme Court (App. A) is published at 2020 CO 46. The opinion of the Colorado Court of Appeals (App. B) is published at 2018 COA 120. The relevant proceedings and judgment of conviction of the trial court are unpublished.

JURISDICTION

The judgment of the Supreme Court of the State of Colorado was entered on June 1, 2020. App. A. This Court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury."

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[1] Colorado Office of Alternate Defense Counsel Intern Nicole King, who is a third year law student at the University of Denver, Sturm College of Law, assisted Counsel in the preparation of this Petition.

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

"Be nice to Juror 25," cautioned the trial judge during voir dire in Gary Richardson's criminal trial, "My dinner is on the line." Juror 25 was the trial judge's wife. More was on the line, however, than the judge's next meal. Mr. Richardson faced serious felony counts and years and years in prison.

In this case, the prosecution alleged that Mr. Richardson fired one or two shots at law enforcement officials while hiding in a crawl space. The case proceeded to trial on eight counts of attempted second degree assault, along with the possession of a controlled substance, violation of bail conditions, weapon, and habitual criminal charges.

During the jury selection process, prospective juror L.E., also known as Juror 25, disclosed on her juror questionnaire that her husband was the trial judge: "[The] Judge . . . is my husband – I might be distracted." Following the judge's admonishment to "be nice" to his wife during voir dire, the prosecution questioned Juror 25. Defense counsel did not. Neither the prosecution nor the defense

challenged Juror 25 for cause or used a peremptory strike to remove her. The trial proceeded with Juror 25 on the jury.

After the jury was empaneled, the judge and counsel had the following exchange outside the presence of the jury:

> THE COURT: Quite frankly, I don't know that I've ever heard of a sitting judge having a spouse or family member on the jury. There's nothing wrong with it. I think she'll be a fine juror. I have not spoken to her about this case.
> DEFENSE COUNSEL: I think we're both afraid to challenge her.
> THE COURT: That wasn't a stupid idea. Thank you. I appreciate it. .[2]

Throughout the proceedings over the next four days, the judge consistently called attention to his relationship with Juror 25. For example, during presentation of evidence the following exchange occurred:

> JUROR: I have a question
> THE COURT: After both sides have had the opportunity to ask all questions, then you can ask that.
> JUROR: Okay.
> THE COURT: I said no to my wife.

Later, the judge inquired of his wife in front of the other jurors, the defendant, and everyone else in the courtroom:

> THE COURT: What are we having for dinner?
> JUROR: Chicken from last night.

[2] These discussions are all recounted in App. A and App. B.

At the beginning of defense counsel's closing arguments, the jury, the defendant, and everyone else in the courtroom were again reminded of the relationship between the judge and Juror 25.

> DEFENSE COUNSEL: It's taken you away
> from your spouses. Not everyone has been taken away.
> JUROR: I've spent more time with him this
> week than usual.
> THE COURT: You forced her to spend more time
> with me which is worse.

Finally, right before dismissing the jury for deliberations, the judge yet again referenced dinner plans:

> THE COURT: What am I getting tonight? We'll get the teriyaki.
> JUROR 25: Chicken.
> THE COURT: I'm getting chicken again? Oh God. Get back here at
> 8:30 and be ready to roll

The jury sentenced Mr. Richardson to sixteen years' imprisonment.

While at trial no objection or constitutional challenge was made to the judge's spouse sitting on the jury, Petitioner raised the constitutional question raised herein both the Colorado Court of Appeals and the Supreme Court of the State of Colorado.

A split panel of the Court of Appeals affirmed. The majority acknowledged that the trial judge's comments "affected the solemnity of the proceedings and were ill-advised," App. B, ¶ 45, but found that Mr. Richardson had at least forfeited his challenge to Juror 25. The majority reasoned that reversal was not

required under a plain error standard of review because Mr. Richardson did not present evidence of prejudice. The dissent, however, concluded that Juror 25's participation created an appearance of impropriety and affected the structure of the trial. Accordingly, the dissent would have reversed Mr. Richardson's conviction and remanded for a new trial. App. B.

A divided Colorado Supreme Court affirmed. Relying on the fact that Mr. Richardson did not challenge Juror 25 for cause or use a peremptory strike to remove her, the majority concluded that Mr. Richardson waived his challenge to Juror 25. The majority therefore declined to review Mr. Richardson's challenge, even for structural error. App. A., ¶28.

Justice Gabriel dissented. Justice Gabriel rejected the majority's view that the question was principally one of juror qualification. Rather, to Justice Gabriel, the question was whether the judge's conduct denied Mr. Richardson his right to a fair trial by undermining the independence of the jury and creating an appearance of impropriety. App. A., ¶42.

Justice Gabriel noted that when "[c]onfronting the same or similar issues, a number of courts have discerned error when a trial court has presided over a trial in which his or her spouse or a close relative sat as a juror." App. A., ¶64. the reasoning used by courts in New York, Wisconsin, and Arkansas, Justice Gabriel concluded that "the trial court erred in sitting on a case in which his wife served as

a juror and in which he told everyone in the courtroom to 'be nice' to his wife and then repeatedly reminded everyone in the room of their relationship." App. A, ¶68. Moreover, Justice Gabriel reasoned that because Mr. Richardson "could never show that the judge's conduct, in fact, caused the other jurors to defer to his wife," the facts defied any showing of prejudice. App. A, ¶72. Justice Gabriel, therefore, would have concluded that the judge's conduct constituted structural error and reversed Mr. Richardson's conviction. App. A. ¶76.

REASONS FOR GRANTING THE WRIT

This Court recognizes "[n]o right ranks higher than the right of the accused to a fair trial." *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984). The undisputed and paramount importance of this right dates back to the founding of our nation. Alexander Hamilton wrote in Federalist Paper 83:

> The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government.

Despite the unwavering recognition that the right to a fair trial constitutes a bedrock of our republic, today, state courts are intractably split over whether it violates the bedrock right to a fair trial with an independent and impartial jury

when a judge's immediate family member is on a jury and whether a judge has a duty to ensure the independence and impartiality of the jury under this circumstance.

Courts of last resort in Arkansas and Wisconsin, along with an intermediate appellate court in New York, have reversed petitioners' convictions in cases where immediate relatives of the trial judge served as jurors. These courts recognize a judge's duty to ensure the defendant the very right to a fair trial under this circumstance. In contrast, the Colorado Supreme Court, as well as intermediate appellate courts in Illinois and Texas, conclude that a judge has no duty to ensure a defendant's right to a fair trial and an impartial and independent jury under this circumstance and instead require a defendant take affirmative steps to have the judge's immediate family member removed from the jury. There is an intractable split among state courts regarding whether the protections of the Sixth Amendment apply.

Whether a defendant has a right to an impartial and independent jury should not depend on the state in which he or she is tried. What is more, the division among state courts not only infringes on the rights of the accused, it also upends the very "appearance of fairness" this Court has lauded as "essential to public confidence in the system." *Press-Enterprise Co.,* 464 U.S. at 508. Only this Court can resolve an issue of such fundamental importance to the rights of criminal

defendants and to the indispensable trust of our nation's citizens in the criminal justice system.

I. State courts are intractably divided over whether the Sixth Amendment precludes a judge's immediate family member from serving as a juror in a case over which the judge presides

In 1990, a New York appellate court considered a case where a trial judge's wife served as a juror in his courtroom. *People v. Hartson*, 160 A.D.2d 1046, 553 N.Y.S.2d 537 (1990). The court described this occurrence as "unusual." 160 A.D.2d at 1048. Despite this characterization, state court decisions over the last three decades indicate that this situation is becoming alarmingly routine. Appellate courts in six states have heard cases in which trial judges' husbands, wives, brothers, and mothers have served as jurors on cases over which their loved ones presided. With courts in three states reversing the defendants' convictions in these cases, and courts in three more upholding them, there is now an intractable divide among state courts regarding the question presented.

In *People v. Hartson*, 160 A.D.2d 1046, 553 N.Y.S.2d 537, a New York intermediate appellate court first considered the question presented here. In that case, the trial judge's wife was selected to serve on the jury. The defense did not move to strike the judge's wife for cause and did not use a peremptory strike to remove her. The New York Court of Appeals acknowledged that the defendant "did not preserve a question of law for…review by raising a timely challenge to

the seating of the Trial Judge's wife." *Id.* at 1047-1048. Nevertheless, the division concluded that "the importance of defendant's right to an impartial jury and the concomitant right of the public at large that the jury appear to be impartial" necessitated reversal of the conviction. *Id.* at 1048.

Later, in *Elmore v. State*, 355 Ark. 620, 144 S.W.3d 278 (2004), the Arkansas Supreme Court became the first court of last resort to address this issue. In that case, the defendant used all eight of his peremptory strikes before the judge's wife was called to replace one of the stricken jurors. The defendant moved to strike the judge's wife for cause, but the trial judge refused. Concluding that a trial court must use its discretion "both critically and carefully to avoid even the appearance of impropriety, bias, or prejudice" in accordance with a defendant's Sixth Amendment rights, the Arkansas Supreme Court reversed and remanded the case for a new trial. 144 S.W.2d at 280. According to the Court, "we hold that the trial court should have excused his wife for cause." *Id.*

Following the lead of New York and Arkansas, in *State v. Tody,* 316 Wis. 2d 689, 694, 764 N.W.2d 737 (2009), *abrogated by State v. Sellhausen,* 338 Wis.2d 286, 809 N.W.2d 14 (2012), the Wisconsin Supreme Court considered a case in which the trial judge's mother served as a juror. There, defense counsel moved to strike the judge's mother for cause, but the trial judge denied the motion. *Id.* 316 Wis. 2d at 698. The defense then declined to use its remaining peremptory strikes

to remove her from the jury. *Id.* at 699. The Wisconsin Supreme Court concluded that the defendant's failure to exercise a peremptory challenge did not constitute a waiver of his right to be tried by an impartial jury. *Id.* The court reasoned that although the trial judge's mother did not demonstrate any actual bias against the defendant, her relationship to the judge constituted objective bias. *Id.* at 711. Accordingly, the Wisconsin Supreme Court vacated the defendant's conviction and remanded his case for a new trial. *Id.*

Although the aforementioned cases each present a slightly distinct factual predicate, the central issue remains the same: Whether the Sixth Amendment right to an unbiased and independent jury permits a trial judge's immediate family member to serve as a juror in a criminal case. The three courts discussed above concluded that it does not.

In 2011, however, the Illinois Court of Appeals departed from this established consensus. In *People v. Bowens*, 407 Ill.App.3d 1094, 943 N.E.2d 1249 (2011), the court reviewed a case in which the trial judge's husband served on a jury in her courtroom. The defendant challenged the trial judge's spouse for cause, but like the defendants in *Hartson* and *Tody*, he did not use any of his remaining peremptory strikes to remove the judge's family member from the jury. Unlike the *Hartson* and *Tody* courts, however, the Illinois court concluded that the defendant waived his right to an impartial jury when he failed to use a peremptory strike to

remove the trial judge's husband. 943 N.E.2d at 1258. This decision marked the first time an appellate court explicitly required that the defendant take an affirmative step – in the form of a peremptory strike or a challenge for cause – to secure his Sixth Amendment right to an impartial and independent jury under these circumstances.

Seven years later, the Colorado Court of Appeals, in this case, cited *Bowens* in determining Petitioner forfeited his right to an impartial jury when he failed to challenge the trial judge's wife for cause or use a peremptory strike to remove her.

While the Petitioner's petition for certiorari was pending before the Colorado Supreme Court, a division of the Texas Court of Appeals heard a similar case. There, in *Hicks v. State* (01-18-00603-CR), ___S.W.3d ___. 2020WL1519968[3], the trial judge's brother and the prosecutor's brother-in-law served on the jury in the same criminal matter. The defense did not discover that the two jurors were related to the presiding trial judge and prosecutor until the prosecutor volunteered this information during an unrelated post-trial hearing. The Texas Court of Appeals concluded that because "there is no indication…that defense counsel sought to question the venire about their relationships—familial or

[3] Petition for discretionary review filed in Texas appellate system on May 1, 2020.

otherwise—with the prosecutors or the trial judge but was prevented from doing so," the defendant forfeited his right to challenge the jurors. *Hicks, supra*, *9.

Thereafter, in affirming the decision of the Colorado Court of Appeals in the instant case, the Colorado Supreme Court became the first court of last resort to uphold the conviction of a criminal defendant when a trial judge's immediate family member served on the jury. The majority declined to review the case for structural error, and to conclude the trial judge had a duty to protect a defendant's constitutional right to a fair trial with an independent and impartial jury under this circumstance. Instead, the Colorado Supreme Court concluded the Petitioner waived his Sixth Amendment right to an impartial and independent jury when he failed to object to the trial judge's wife on the jury. App. A, ¶28. Justice Richard Gabriel dissented, concluding that he found the reasoning used in the *Hartson, Elmore,* and *Tody* cases to be "persuasive" and that he would "adopt that reasoning here." App. A, ¶68.

Until now, this Court has not been presented with the full scope of the split over the question presented. When this Court denied the petition for certiorari in Bowens, the intermediate appellate court in Illinois had been the only court in conflict with the approach used by New York, Arkansas, and Wisconsin. Since then, however, the Colorado Supreme Court's decision has deepened that split.

Given Colorado's role in cementing – and even exacerbating – the split between courts, there is no hope of uniformity unless this Court intercedes.

This case is a particularly suitable vehicle for resolving the conflict among state courts. Petitioner properly presented his claim in the state appellate court system, and the majority and dissent in both Colorado's court of appeals and supreme court engaged in meaningful discussions on the merits of the case. Further, had Petitioner appealed his case in another jurisdiction – like New York – he would have been granted a new trial.

In light of the implications for individual defendants as well as the public's confidence in the criminal justice system, this split should not be permitted to percolate among other state courts.

II. The question presented is critically important to the administration of criminal justice

This question is of critical importance to the administration of criminal justice for two reasons: It deeply impacts the rights of criminal defendants and it has far-reaching ramifications regarding public confidence in our judicial system.

Nearly two hundred years ago, Chief Justice Marshall recognized that the "great value of the trial by jury certainly consists in its fairness and impartiality." Indeed, an impartial and independent jury services the basic requirement of due process, namely that litigants receive a "fair trial in a fair tribunal." *In re*

Murchison, 349 U.S. 133, 136 (1955); *Dennis v. United States*, 339 U.S. 163, 173 (1950) (Jackson, J., concurring) ("The right to fair trial is the right that stands guardian over all other rights."). The right to trial by an impartial jury is a cornerstone of our system of criminal justice, ensuring "tribunals in which every defendant stands equal before the law." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). This includes the fundamental constitutional right to a trial by a jury that is impartial and independent in fact and in appearance. *Reid v. Covert*, 354 U.S. 1, 9 (1957); *Duncan v. Louisiana*, 391 U.S. 145, 209 (1968). The jury's role is "a vital check against the wrongful exercise of power by the State." *Power v. Ohio*, 499 U.S. 411, 411 (1991). Accordingly, this Court has repeatedly granted certiorari to craft and clarify rules aimed at insulating the jury box from bias. The same imperative applies here.

Specifically, this Court has heard a long line of cases that address actual bias – such as racial bias – among jurors. See, e.g., *Pena-Rodriguez v. Colorado*, ___ U.S. ___, 137 S.Ct. 855 (2017). Further, this Court has considered ways to identify and dispatch with various forms of implied bias, including biases due to employment relationships, media influence, and participation in a defendant's previous trial. Implied bias due to family relationships is no less deserving of this Court's review. Indeed, Justice O'Conner stated that a situation in which a "juror is a close relative of one of the participants in the trial" might constitute an "extreme

situation[] that would justify a finding of implied bias" and that "the Sixth Amendment right to an impartial jury should not allow a verdict to stand under such circumstances." *Smith v. Phillips*, 455 U.S. 209, 222, 102 S. Ct. 940, 948–49, 71 L. Ed. 2d 78 (1982).

This Court has recognized that the judge is a key participant in the trial who can affect its outcome. *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968) ("Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.") (emphasis added). Therefore, a judge's actions with regard to his or her relative's service on the jury invite this Court's review.

Similarly, this Court has stated that "due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences." *United States v. Olano*, 507 U.S. 725, 738 (1993) (Citations omitted). Whether a trial judge acts in this "ever watchful" manner when he permits his close relative to serve on a jury in his courtroom is a question that should be decided by this Court – not a hodgepodge of lower tribunals.

This issue is not only of critical importance to the accused, but to the legitimacy of our criminal justice system at large. The integrity of the judicial

system requires a jury independent from the judge who *is* part of the government. See *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring) ("Judges, it is sometimes necessary to remind ourselves, are part of the State."). This Court has acknowledged that "the Sixth Amendment…limits judicial power…to the extent that the claimed judicial power infringes on the province of the jury." *Blakely v. Washington*, 542 U.S. 296, 308 (2004).

When a judge's close relative serves on a jury, the roles of judge and juror may be improperly muddled. The juror may be privy to additional information about a case, or the parties in it, obtained through communications with the judge. Even if no pertinent information has been shared, however, the family member juror has a greater ability than other jurors to read a judge's mannerisms and the other jurors are likely to assign greater weight to the relative, simply by nature of the family member's close relationship to the judge. Byron C. Lichstein, *Beyond Caperton: "Public Confidence" in Courts and Close Relationships Between Judges and Jurors*, 61 Cath. U. L. Rev. 429, 448–49 (2012).

This Court has also acknowledged that when the accused faces a deprivation of her or his Sixth Amendment rights, "[t]he injury is not limited to the defendant -- there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." *Ballard*

v. United States, 329 U.S. 187, 195 (1946)[4] (Lower court decision reversed because women were intentionally and systematically excluded from federal jury). These risks inhere when a trial judge permits a close family member to serve as a juror in a case over which the judge presides. In this case, the trial judge's intimate relationship with a juror garnered significant media attention, whereas the underlying incident involving Petitioner did not. The *Ballard* case captured the attention of citizens precisely because it called into question the legitimacy of the trial. This Court has recognized that our criminal justice system "is dependent on the public's trust" and has exercised care to safeguard it. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 876. The significant principles of legitimacy raised by this case therefore counsel in favor of this Court's review.

III. The decision below is wrong

"The majority asks the wrong question and arrives at the wrong answer," stated Justice Richard Gabriel in his dissent. App. A, ¶42. In its opinion, the majority of the Colorado Supreme Court analyzed the issue primarily as one of waiver, declining to consider whether the court committed structural error, or whether a trial judge has an affirmative duty to act in this circumstance, and concluding,

[4] In the *Ballard* case, this Court "granted the petition for certiorari because of the serious questions regarding the administration of criminal justice which were raised." 329 U.S. at 189.

instead, the Petitioner waived his right to an impartial jury when he failed to challenge the trial judge's wife for cause or use a peremptorily. In Justice Gabriel's words, however:

> [T]he question is whether Richardson was denied a fair trial when the trial judge sat on a case in which his wife served as a juror and in which the judge told everyone in the courtroom to "be nice" to his wife and then repeatedly reminded everyone of his relationship with her.

App. A, ¶42. The egregiousness of a close family member being a juror is obvious in this case. It was evident to any and every person in the courtroom from voir dire (even in the wife's jury questionnaire) through closing statements.

The Petitioner acknowledges that a defendant ordinarily must raise a contemporaneous objection in order to preserve his ability to challenge the empanelment of a juror on appeal. The issue here, however, is not one of juror qualification, but of fundamental fairness. The contemporaneous objection requirement should not apply in this case for two reasons.

A. Requiring a contemporaneous objection serves no purpose in this scenario

The purpose of a contemporaneous objection is to give the court an opportunity to rule on an issue. *United States v. Price*, 458 F.3d 202, 206 (3rd Cir. 2006) (Purpose of requiring contemporaneous objection is to ensure trial court has

opportunity to consider and rule on disputed question); *Gomez v. Brown*, 655 F.Supp.2d 332, 356 (S.D.N.Y. 2009) (Providing court opportunity to remedy claimed error is precise government interest underlying objection rule). When a defendant suspects his Sixth Amendment rights will be compromised by a biased venire member who is unknown to the judge, counsel's contemporaneous objection advances this goal. It gives the judge, and both parties, an opportunity to explore any biases the juror may have. These suspected biases can be weighed and probed during the colloquy in that moment.

This rationale does not apply, however, when the judge obviously knows of his or her relationship with the juror and thus, already knows that a juror is impliedly biased. As discussed above, Justice O'Conner has stated that a "juror is a close relative of one of the participants in the trial" might "justify a finding of implied bias" *Smith v. Phillips*, 455 U.S. 209, 222. Within this definition, the only determination a judge need make is whether the prospective juror is a close family member. In the present case, the trial judge was well aware that his wife was on the venire. An objection made by the defendant would not afford a judge any benefit in ruling on the issue.

B. ***The trial judge impermissibly impaired the defendant's right to challenge his wife***

This Court has previously stated that the right to exercise peremptory challenges is "'one of the most important of the rights secured to the accused'" and that "impairment of the right is reversible error without a showing of prejudice." Specifically, this Court has clarified that this right "must be exercised with full freedom, or it fails of its full purpose" *Lewis v. United States*, 146 U.S. 370, 378 (1892). *See also, Swain v. Alabama*, 380 U.S. 202, 220 (1965), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79, 100 (1986)[5]. ("The essential nature of the peremptory challenge is that it is one exercised…without being subject to the court's control.").

In this case, the trial judge did not allow petitioner to exercise this right freely, but rather actively discouraged him from doing so. At the very beginning of voir dire, the judge stated, in open court, "Be nice to Juror 25. My dinner is on the line." After both parties finished exercising their peremptory challenges and the jury was impaneled, the following exchange occurred outside the jury' presence:

> THE COURT: Quite frankly, I don't know that I've ever heard of a sitting judge having a spouse or family member on the jury.

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[5] Footnote 25.

> There's nothing wrong with it. *I think she'll be a fine juror*. I have not spoken to her about this case.
> DEFENSE COUNSEL: I think we're both afraid to challenge her.
> THE COURT: *That wasn't a stupid idea*. Thank you. I appreciate it.

(Emphasis added.)

While the majority interpreted this exchange as taking place in jest, nothing in the record indicates that the judge was joking. Indeed, Justice Gabriel observed, "Although the People characterize these comments—and particularly defense counsel's statement that the lawyers were afraid to challenge the judge's wife—as minor jokes, it is not at all clear to me that they were." App. A, ¶53.

Here, the judge first stated his opinion that his wife would make a "fine juror." He then told petitioner's counsel that it "wasn't a stupid idea" to refrain from challenging her. And finally, he thanked counsel, presumably for the courtesy of refraining from an objection. Collectively, these remarks had a chilling effect on defense counsel's advocacy, leading to acquiesce to the trial judge's determination. The trial court's conduct therefore impaired Petitioner's right to challenge members of the venire. In light of these circumstances, Petitioner's failure to object, at a minimum, did not constitute the "intentional relinquishment or abandonment of a known right" necessary to find that he waived his rights. *United States v. Olano*, 507 U.S. 725, 733 (1993).

Had the majority found that Petitioner did not waive his right, the majority acknowledges that "the erroneous seating of an impliedly biased juror is . . . structural error." App. A, ¶28. As discussed above, the juror's intimate relationship to the trial judge created one such bias. What is more, "an error is also structural when "the effects of the error are simply too hard to measure." *Weaver v. Massachusetts*, ___ U.S. ___, 137 S.Ct. 1899, 1908 (2017). Due to the inexact and immeasurable influence of the trial judge's wife on other jurors, the public, and the proceedings as a whole, the error falls into this category. Accordingly, the Colorado Supreme Court erred in concluding that petitioner waived his rights and should have instead concluded that the trial court had a duty to act and committed structural error requiring a new trial. In Justice Gabriel's words:

> "The trial judge's conduct ensured special status for his wife as a juror, likely undermined the independence of the jury, chilled the lawyers' advocacy, created an obvious appearance of impropriety, and ultimately deprived Richardson of the fair trial that the United States and Colorado Constitutions guarantee him."

App. A, ¶75.

CONCLUSION

Given the severity of the impact on criminal defendants, the centrality of the issue to preserving public confidence in the criminal justice system, and the

division among state courts, Petitioner Gary Richardson requests this Court grant the petition for a writ of certiorari.

Respectfully submitted,

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