No. 20-5598

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

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

PHILIP J. WEISER
Attorney General

NATALIE HANLON LEH
Chief Deputy Attorney General

ERIC R. OLSON
Solicitor General

L. ANDREW COOPER
Deputy Attorney General
Counsel of Record

PAUL E. KOEHLER
First Assistant Attorney General

Colorado Department of Law
Ralph L. Carr Judicial Center
1300 Broadway, 10th Floor
Denver, CO 80203
Andrew.Cooper@coag.gov
(720) 508-6000

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QUESTION PRESENTED

In this Colorado criminal trial, the presiding judge's wife appeared for jury duty. Both parties knew she was Juror 25. Yet Petitioner did not seek to remove her with a for-cause challenge or a peremptory challenge, or otherwise raise any objection to her service on the jury. Nor did Petitioner seek to disqualify the judge. No statute or rule required the judge to act *sua sponte*. Because the parties did not object, the judge's wife served on the jury. The Colorado Supreme Court concluded that any objection had been waived.

The question presented is:

Whether the Constitution requires that trial judges automatically remove prospective jurors, or recuse themselves, when jurors have a familial or personal relationship with the judges and no party objects.

INTRODUCTION

The States have broad discretion in determining the qualifications of jurors and the rules for recusal of judges. *See Caperton v. A.T. Massey*, 556 U.S. 868, 887, 890 (2009) (the Constitution requires a judge's recusal only in "rare" circumstances for "extreme facts," where the judge is biased in favor of or against a party in a case); *Morgan v.*

Illinois, 504 U.S. 719, 727 (1992) (the Constitution requires only that jurors may not be actually biased against the defendant); *Taylor v. Louisiana*, 419 U.S. 522, 537-38 (1975) ("The States remain free to prescribe relevant qualifications for their jurors and to provide reasonable exemptions so long as it may be fairly said that the jury lists or panels are representative of the community.").

Colorado's Uniform Jury Selection and Service Act requires jurors to serve when selected, allows trial judges to excuse jurors from service only under its provisions, and requires judges to "strictly enforce [its] provisions." *See* Colo. Rev. Stat. § 13-71-104(1), (2), (4) (2020); Colo. Rev. Stat. § 13-71-119.5(1) (2020). It also provides that citizens who reside in a particular county more than 50 percent of the time "shall be qualified to serve as a trial or grand juror in such county." Colo. Rev. Stat. § 13-71-105(1) (2020). Prospective jurors "shall be disqualified" for various reasons, but no ground disqualifies a juror because he or she has any sort of familial or personal relationship with the trial judge. *See* Colo. Rev. Stat. § 13-71-105(2) & (3) (2020).

Through challenges for cause, Colorado allows parties to excuse jurors who are not qualified to serve, are biased against the defendant

or state, or fall within one of nine categories where bias is implied as a matter of law. Colo. Rev. Stat. § 16-10-103(1) (2020); *see also* Colo. R. Crim. P. 24(b)(1). None of the nine categories of implied bias concern familial or other personal relationships with the trial judge; instead, they concern various relationships between the juror and the parties or case, and the ability of the jurors to base their verdicts on the evidence and the trial court's instructions of law. *See* Colo. Rev. Stat. § 16-10-103(1)(a)-(k) (2020). Further, Colorado law only gives trial judges the authority to sustain or overrule challenges for cause made by the parties; it does not authorize trial judges to make and sustain their own challenges. *See* Colo. Rev. Stat. § 16-10-103(1).

Through peremptory challenges, Colorado law allows the parties—but not the trial judge—to excuse prospective jurors for any reason. Parties can use peremptory challenges to exclude jurors on grounds not covered by the juror-qualification and challenge-for-cause statutes. *See* Colo. Rev. Stat. § 16-10-104 (2020); Colo. R. Crim. P. 24(d). The only substantive limitation on the use of peremptory challenges is that they may not be used to violate equal protection. *See People v. Beauvais*, 393

P.3d 509, 516 (Colo. 2017) (discussing *Batson v. Kentucky*, 476 U.S. 79 (1986)).

And in Colorado, when a judge has been assigned to preside over a case, the judge has a "duty to sit" unless subject to recusal. *See Smith v. Dist. Ct.*, 629 P.2d 1055, 1056 (Colo. 1981). Colorado disqualifies judges to "hear or try" cases only if they are "related to the defendant or to any attorney of record or attorney otherwise engaged in the case," "[t]he offense charged is alleged to have been committed against the person or property of the judge or of some person related to him," the judge "has been of counsel in the case," or the judge "is in any way interested or prejudiced with respect to the case, the parties, or counsel." *See* Colo. Rev. Stat. § 16-6-201(1) (2020); Colo. R. Crim. P. 21(b)(1). But no Colorado statute or court rule authorizes recusal because the judge has any sort of familial or other personal relationship with a person called for jury duty.

Here, Petitioner did not seek to remove the judge's wife from the jury and did not seek to disqualify the judge. The Colorado Supreme Court held that any objection had been waived. Pet. App. A, ¶ 20.

STATEMENT OF THE CASE

1. The overall course of Petitioner's case. When law enforcement officers tried arresting Petitioner on a failure-to-appear warrant, he fired a pistol at them twice. Petitioner possessed methamphetamine at the time.

The prosecution charged him with:

- ten counts of attempted first-degree extreme indifference murder (one per officer in Petitioner's line of fire);
- ten counts of attempted second-degree assault (one per each of those officers);
- possession of a weapon by a previous offender;
- possession of a controlled substance;
- violation of bail bond conditions;
- having committed a crime of violence; and
- five habitual criminal counts.

CF, pp 47-48, 82-87, 99-107.

On the attempted first-degree murder counts alone, Petitioner faced some 160 to 240 years in prison. *See* Colo. Rev. Stat. § 18-3-102(1)(d), (3) (2020); Colo. Rev. Stat. § 18-2-101(4) (2020); Colo. Rev.

Stat. § 18-1.3-401(1)(a)(I) (2020); Colo. Rev. Stat. § 18-1.3-406(1)(a), (2)(a)(I)(B) (2020).

But at the preliminary hearing, the trial judge dismissed two of the attempted second-degree assault counts and encouraged the prosecution to seek dismissal of all ten attempted first-degree murder counts, which the prosecution did. R. Tr. 6/20/14, pp 78-81; CF p 139.

Midtrial, the trial judge granted Petitioner's motion for judgment of acquittal as to three more counts of attempted second-degree assault. R. Tr. 1/22/15, pp 191-93.

The jury convicted Petitioner of:

- two counts of attempted second-degree assault,
- three counts of attempted third-degree assault (as lesser-included offenses),
- one count of violation of bail bond conditions, and
- one count of possession of a controlled substance.

CF, pp 165-76. The jury acquitted Petitioner of the weapons possession count. CF, p 177.

At sentencing, the trial judge found that Petitioner had five prior felony convictions. R. Tr. 2/20/15, p 28. The trial judge then expressed compassion for Petitioner's methamphetamine addiction and exercised

his sentencing discretion so that Petitioner's sentences would run concurrently instead of consecutively, for a total of 16 years in prison. R. Tr. 2/20/15, pp 34-38.

2. The trial judge's wife served on the jury, with no objection by either party. During the jury selection process, the parties and the trial judge learned the trial judge's wife was a member of the venire. Before the venire entering the courtroom, the trial judge made a minor joke about that fact: "Be nice to Juror 25. My dinner is on the line." R. Tr. 1/20/15, p 6. Neither party objected or expressed any concern.

During the jury selection process, the prosecution questioned the judge's wife on whether her relationship to the trial judge would affect her service as a juror:

> PROSECUTION: Sometimes the judges will ask the group if anybody knows each other within the group. I guess I would ask that question. Do any of you know each other? I kind of bring that up—if you did, it's fine. We might talk about it a little bit. You can sit on a jury with someone you know.
>
> One time I asked that question and some guy said that's my wife. There was a husband and a wife on a jury. I kind of bring that up because [Juror 25], [the trial judge] is your husband?
>
> JUROR: Yes.

THE COURT: Lucky you.

PROSECUTION: I never had that one before. I had my boss's wife on a jury once for a little bit. [Juror 25], good morning. Is there any reason that you don't think you could be fair if you ended up on this jury?

JUROR: No.

PROSECUTION: Have you ever been on a jury before?

JUROR: Yes, I have.

PROSECUTION: In [this] County?

JUROR: No. It was in [a different one].

PROSECUTION: I know you mentioned on your questionnaire—it says [the trial judge] on the top. You'd be worried about a possible distraction. Just like anyone, the main purpose is to be able to pay attention to the evidence and to make your decision based on that without any distractions.

If you are selected to be on this jury, are you worried you'd be distracted or would you be able to give your full attention to the case?

JUROR: I would give my full attention to the case.

PROSECUTION: Okay. Thank you.

R. Tr. 1/20/15, pp 46-47. Defense counsel chose not to question the trial judge's wife at all.

Both parties made challenges for cause to various jurors, some the trial judge granted and some he denied. Neither party challenged the trial judge's wife on any ground. *See id*. at 10-11, 76-79, 84-87.

During the parties' exercise of their peremptory challenges, the trial judge specifically asked defense counsel (whose turn it was to exercise a challenge on the venire):

> THE COURT: [Concerning Juror 25]? We have the defendant's fifth peremptory challenge to the panel. I need you to make a call.
>
> DEFENSE COUNSEL: All right. The defense would thank and excuse [another juror].

See id. at 86:18-22. The prosecution chose not to exercise a peremptory challenge against her either.

After the jury was sworn and had retired, *see id*. at 88, the trial judge told counsel that he had not mentioned the case to his wife:

> 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.

Id. at 91. Neither party objected or expressed any concern.

The trial judge then explained that he would make sure there were no improper communications about the case between his wife and their son:

> I will call my son who lives with us and I will tell him that. I will also tell him that he can't make any comments to his mother about being on this jury. I don't want them to have any discussion. Anything else?

Id. at 92. Neither party objected or expressed any concern.

In response, defense counsel joked with the trial judge about his wife being on the jury, "I think we're both afraid to challenge her." *Id*. at 92. The judge joked back, "That wasn't a stupid idea. Thank you. I appreciate it. Thank you." *Id*. at 92. Defense counsel responded, "Thank you." *Id*. at 92. Neither party objected or expressed any concern.

At the end of each day of trial, the trial court instructed the jury not to discuss the case with anyone. *See* R. Tr. 1/20/15, pp 250-51, 1/21/15, p 240; 1/22/15 pp 264-65. At the end of the first day of the four-day trial, during a witness' testimony, the trial judge's wife said she had a question for the witness, as Colorado law permits jurors to ask. *See* Colo. R. Crim. P. 24(g). The trial judge responded:

> 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. We are going to stop right now. The issue is when we come back tomorrow. I've got a docket tomorrow. I always have a docket.

R. Tr. 1/20/15, p 249. The trial judge then instructed the jury not to discuss the case with anyone, and he told it when to be in the jury assembly room the next day. *Id*. at 249-52. He concluded:

> THE COURT [to the jury]: Good day's work. Thank you. Drive carefully. What are we having for dinner?
>
> JUROR: Chicken from last night.
>
> THE COURT: Sounds good.

Id. at 252. Neither party objected or expressed any concern.

Two nights later, after reminding the jurors they had to wait until they began deliberating before arriving at any conclusions about the case, the trial court stated:

> THE COURT: You can't deliberate alone. The deliberation process is a 12 person thing. All I want you to do is go home and get this building out of your mind. Have a nice meal. What am I getting tonight? We'll get the teriyaki.
>
> JUROR: Chicken.

> THE COURT: I'm getting chicken again? Oh, God. Get back here at 8:30 and be ready to roll. I'm sorry to have kept you so late. Questions? Thank you. Drive carefully on the way home. Wear your seatbelts.

R. Tr. 1/22/15, pp 264-65. Neither party objected or expressed any concern.

During closing argument, defense counsel made a minor joke about the judge's wife serving on the jury:

> Ladies and gentlemen, on behalf of the defense and on behalf of [Petitioner], we'd like to thank you for your time here. We'd like to thank you for your attention. This has been a long three days. It's been a serious issue. There's been a lot of serious things.
>
> We didn't bring you here but this has taken you away from your work. It's taken you away from your families and your children. *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.
>
> DEFENSE COUNSEL: That is unique in jurisprudence in Colorado. We do appreciate your attention. These are serious issues. These are issues that matter. There's been a lot of difficult

> things that have been talked about in this room over the past three days.

R. Tr. 1/22/15, p 239 (emphasis added). Neither party objected or expressed any concern.

No other mention of the juror being the trial judge's wife occurred during the trial. She did not serve as the foreperson. *See* R. Tr. 1/23/15, p 6 ("THE COURT: Ms. [Another Juror], I think you're the foreperson").

3. Proceedings in the Colorado Court of Appeals. Petitioner complained on direct appeal that the trial judge committed structural error by not disqualifying his wife as a juror or recusing himself *sua sponte*. He also claimed that the comments the trial judge made about his wife's service intimidated his counsel in the conduct of the jury selection process. *See* Pet. App. B, ¶¶ 25-48.

Petitioner did not, though, use the processes Colorado law gave him to present evidence showing that his counsel had in fact been intimidated by the trial judge. *See* Colo. R. Crim. P. 33 (motions for new trial); Colo. R. Crim. P. 35(c) (motions for postconviction relief).

The majority held that "assuming error," it affirmed Petitioner's convictions "because [he] can show no prejudice resulting from this juror's presence." *See* Pet. App. B., ¶¶ 1, 25-47. In doing so, it noted:

- "Having a presiding judge's spouse on the jury does not in and of itself create partiality," *id.* ¶ 36;

- "[Petitioner] does not assert that the trial was conducted in a different manner than it otherwise would have been had the judge's spouse not been on the jury," *id.* ¶ 37;

- "[T]he trial was not colored by circumstances suggesting [that defense counsel] was unable to select the jury he wanted," *id.*; and

- "Defense counsel advocated zealously throughout trial on [Petitioner's] behalf, undermining any argument that counsel was afraid of the judge or uncomfortable conducting a trial in the presence of the judge's spouse," *id.*

The concurrence rejected Petitioner's claim that the record showed that his counsel had been "chilled" in his defense of Petitioner:

> "[F]rom the cold record, it is impossible to determine whether defense counsel was engaging in playful banter or wanted the court to know that he and the prosecutor were both too timid to exercise a peremptory challenge. As to the former, the judge's reply that it was not a stupid idea suggests playful banter. As to the latter, I cannot conclude that the defense counsel was forthrightly telling the judge that he and opposing counsel were afraid that the judge would not be fair to them if they challenged his wife."

Id. ¶ 79.

The dissent wrote that the judge's wife's service on the jury, coupled with "special treatment" she received and "trifling comments" caused by the trial judge's comments, caused structural error. *See id.* ¶¶ 83-124.

4. Proceedings in the Colorado Supreme Court. A six-justice majority of the Colorado Supreme Court affirmed, concluding that Petitioner waived any objection to trial the judge's wife's presence on the jury, and that the trial judge had no legal duty to excuse her or recuse himself. Pet. App. A, ¶ 20.

In particular, the court held that under well-established Colorado law, unless a party challenges a juror's service before the jury is sworn, any challenge to the juror's service is waived. Pet. App. A, ¶ 25. It noted that defense counsel knew the juror was the trial judge's wife, did not ask her any questions, did not challenge her for cause, or did not excuse her with a peremptory challenge even though the trial judge "seemed to invite defense counsel to exercise a peremptory challenge" against her. *Id.* ¶ 26.

It also noted that, given the jury's verdicts, "[d]efense counsel could have had sound strategic reasons for this decision." *Id.* ¶ 27, n.2;

see also id. ¶ 34 (noting that trial judge's pretrial trial rulings could suggest that defense counsel had made a strategic choice in not seeking to recuse him).

In response to Petitioner's claim that the trial judge's minor jokes were in fact threats that chilled his counsel's conduct during the jury selection process, the court noted that "friendly banter seemed to occur at other points during the trial," and that "defense counsel zealously advocated for [Petitioner] following jury selection, belying any suggestion that counsel was afraid to incur the judge's wrath." *Id*. at ¶ 27.

The court noted that "even fundamental rights can be waived, regardless of whether the deprivation thereof would otherwise constitute structural error." *Id*. ¶ 28. The court observed that the three out-of-state cases proffered by Petitioner all concerned cases in which the defendants made trial objections to the jurors' service. Pet. App. A, ¶ 30.

Finally, the court noted that no authority required the judge to recuse himself because of his relationship with his wife. *Id*. ¶¶ 33-40.

One justice dissented, reasoning that the trial judge's "be nice" and other comments about his wife gave her "special status" that "likely ensured that the other jurors (and the parties and counsel) would give deference to the judge's wife throughout the trial, thereby impairing the independence of the jury and creating an obvious appearance of impropriety [and] necessarily chilled the lawyers' advocacy." *Id*. at ¶ 63.

REASONS FOR DENYING THE PETITION

Petitioner overstates a jurisdictional split. Only one currently valid opinion of a state court of last resort, *Elmore v. State*, 144 S.W.3d 278 (Ark. 2004), supports Petitioner's substantive position and, there, the judge's wife became part of the jury after defense counsel had challenged her for cause and exhausted all of his peremptory challenges.

Five other state courts of last resort—including the Colorado Supreme Court's decision in this case—have rejected Petitioner's position on the friends or family members of trial judges. And no statutory law or court rule of any state, or the United States, disqualifies persons from serving as jurors, makes them challengeable

for cause, or justifies recusal, because they have a familial or other personal relationship with the trial judge.

As this Court has recognized, when a defense attorney makes a knowing waiver of a claim at trial, the claim is unavailable for appellate review. This case presents no reason to depart from that rule, especially since the facts here strongly suggest that defense counsel's decision not to challenge the trial judge or his wife's service were sound strategic decisions.

I. Petitioner overstates the split: only one state court of last resort prohibits a judge's family members from serving on a case over which the judge presides

Petitioner asserts that the Colorado Supreme Court's decision contravenes a consensus among the states that the Constitution requires that trial judges' spouses or other family members be automatically removed from jury panels.

In doing so, he identifies two decisions from state courts of last resort addressing similar situations, *State v. Tody*, 764 N.W.2d 737, 746

(Wis. 2009) (judge's mother) and *Elmore v. State*, 144 S.W.3d 278, 279-80 (Ark. 2004) (judge's wife).[1] *See* Sup. Ct. R. 10(b).

But after deciding *Tody*, the Wisconsin Supreme Court abrogated that decision in *State v. Sellhausen*, 809 N.W.2d 14, 19-24 (Wis. 2012), holding that a trial judge had no duty to excuse his daughter-in-law from a jury *sua sponte*, and that defense counsel's decision to exercise a peremptory challenge against her rendered any error harmless.

Like *Sellhausen* and the decision here, three other state courts of last resort have held that in cases about trial judge's relatives or personal friends, trial judges have no duty to excuse them *sua sponte*. *See State v. Timley*, 875 P.2d 242, 256-57 (Kan. 1994) (friend of judge's wife); *State v. Hendricks*, 555 P.2d 743, 746 (Mont. 1976) (judge's brother-in-law); *Porter v. State*, 160 So.2d 104, 109-10 (Fla. 1963) (judge's father).[2]

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[1] One lower court decision holds the same. *People v. Hartson*, 553 N.Y.S.2d 537, 538 (N.Y. App. Div. 1990) (judge's wife).

[2] Lower courts have arrived at the same conclusion. *See Rodgers v. Turner*, 178 F. Supp. 225, 228 (D. Utah 1959) (judge's friend); *State v. Morehead*, 239 So.3d 346, 343-46 (La. App. 2018) (judge's brother-in-law); *State v. Marr*, 499 S.W.3d 367, 377 (Mo. App. 2016) (judge's wife); *State v. Jones*, 303 P.3d 1084, 1095 (Wash. App. 2013), *aff'd in part and*

Addressing the issue of consensus as one of statutory law and court rules, the issue becomes even more lopsided. Judges, of course, have family members and friends, and legislators and rule-drafters would know that. Yet, neither Congress, the legislature of any State, nor any rule-making authority, sees the issue Petitioner presents as one of concern.

As in Colorado, no federal or state statute or court rule disqualifies prospective jurors from jury service because they have a familial or personal relationship with the trial judge.[3]

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rev'd in part on other grounds, 372 P.3d 755 (Wash. 2016) (wife of judge's friend); *People v. Bowens*, 943 N.E.2d 1249, 1258 (Ill. App. 2011) (judge's husband); *Gonzalez v. State*, 744 So.2d 1102, 1103 (Fla. App. 1999) (judge's friend).

[3] *See* 28 U.S.C. § 1865; Ala. Code § 12-16-60; Alaska Stat. § 09.20.010; Ariz. Rev. Stat. §§ 21-201, 21-202; Ark. Code Ann. § 16-31-101, 16-31-102; Cal. Civ. Proc. Code § 203; Conn. Gen. Stat. § 51-217; 10 Del. Code Ann. § 4509; Fla. Stat. §§ 40.01, 40.013, 913.12; Ga. Code Ann. § 15-12-135; Haw. Rev. Stat. § 612-4; Idaho Code § 19-2018; 705 Ill. Comp. Stat. § 305/2; Ind. Code § 33-28-5-18; Iowa Code § 607A.4; Kan. Stat. §§ 43-156, 43-158; Ky. Rev. Stat. Ann. § 29A.080; La. Code Crim. P. 401; 14 Me. Stat. § 1211; Md. Code Ann. § 8-103; Mass. Gen. Laws ch. 234A § 4; Mich. Comp. Laws § 600.1307a; Minn. Gen. R. Prac. R. 808; Miss. Code Ann. § 13-5-1; Mo. Rev. Stat. § 494.425; Mont. Code Ann. §§ 3-15-301, 3-15-303; Neb. Rev. Stat. § 25-1601(g); Nev. Rev. Stat. § 6.010; N.H. Rev. Stat. Ann. § 500-A:7-a; N.J. Stat. Ann. § 2B:20-1; N.M. Stat. Ann. §§ 38-5-1, 38-5-2; N.Y. Judiciary Law § 510; N.C. Gen. Stat. § 9-3; N.D. Cent. Code § 27-09.1-108; Ohio Rev. Code Ann. §

Also as in Colorado, no other federal or state statute or court rule makes a prospective juror challengeable for cause due to any sort of familial or personal relationship with the trial judge; all challengeable relationships concern prospective jurors and the case, parties, or counsel at issue.[4]

2313.17(A); 12 Okla. Stat. § 572; Or. Rev. Stat. § 10.030; 42 Pa. Cons. Stat. and Cons. Stat. §§ 4502, 4503; 9 R.I. Gen. Laws § 9-9-1.1; S.C. Code Ann. §§ 14-7-810, 14-7-820; S.D. Codified Laws § 16-13-10; Tenn. Code Ann. §§ 22-1-101, 22-1-102; Texas Gov't Code § 62.102; Utah Code Ann. § 78B-1-105; 4 Vt. Stat. Ann. § 962; Va. Code Ann. §§ 8.01-337, 8.01-338, 8.01-341; Wash. Rev. Code § 2.36.070; W.Va. Code § 52-1-8; Wis. Stat. § 756.02; Wyo. Stat. Ann. §§ 1-11-101, 1-11-102, 1-11-103.

[4] *See* 28 U.S.C.A. § 1866(c)(2); Ala. Code § 12-16-150; Alaska R. Crim. P. 24(c); Ariz. R. Crim. P. 18.4(b); Ark. Code Ann. § 16-33-304(b)(2)(B)(i); Cal. Civ. Proc. Code §§ 192, 223, 225, 229; Conn. Gen. Stat. § 54-82f; Del. Super. Ct. R. Crim. P. 24; Fla. Stat. § 913.03(9); Ga. Code Ann. § 15-12-163; Haw. Rev. Stat. §§ 612-5, 612-7; Idaho Code §§ 19-2019, 19-2020; 705 Ill. Comp. Stat. § 305/14; Ind. Code § 35-37-1-5; Iowa R. Crim. P. 2.18(5); Kan. Stat. Ann. § 22-3410; Ky. R. Crim. P. 9.36; La. Code Crim. P. art. 797; 15 Me. Stat. § 1259; Md. Rule 4-312(e)(2); Mass. Gen. Laws ch. 234A § 67A; Mich. Comp. Laws § 768.10; Mich. Court R. 2.511(D); Minn. R. Crim. P. 26.02(5); Miss. R. Crim. P. 18.3(b); Mo. Rev. Stat. § 494.470; Mont. Code Ann. § 46-16-115; Neb. Rev. Stat. § 29-2006; Nev. Rev. Stat. § 175.036; N.H. Rev. Stat. Ann. § 500-A:12; N.J. Stat. Ann. § 2B:23-10; N.M. R. Crim. P. 5-606(c); N.Y. Consolidated Laws § 360.25; N.C. Gen. Stat. § 15A-1212; N.D. Cent. Code §§ 29-17-34, 29-17-35, 29-17-36; Ohio Rev. Code Ann. § 2945.25; 22 Okla. Stat. §§ 658, 659, 660; Or. Rev. Stat. § 136.220; Penn. R. Crim. P. 631(F)(2); R.I. Gen. Laws § 9-10-14; R.I. R. Crim. P. 24; S.C. Code Ann. § 14-7-1020; S.D. Codified Laws § 23A-20-13.1; Tenn. Code Ann. §§ 22-1-104, 22-1-105; Tex. Code Crim. Proc. art. 35.16; Utah R. Crim. P.

Also as in Colorado, no other federal or state statute or court rule disqualifies a trial judge from presiding over a case, or subjects the judge to recusal, because of any sort of familial or personal relationship with a prospective juror. All recusable relationships concern the judge and the case, parties, or counsel at issue.[5]

18(e); 12 Vt. Stat. Ann. § 61; Va. Sup. Ct. R. 3A:14; Va. Code Ann. § 19.2-262.01; Wash. Rev. Code § 4.44.150-190; W.Va. Code § 56-6-12; Wis. Stat. §§ 805.08, 972.01; Wyo. Stat. Ann. § 7-11-105.

[5] *See* 28 U.S.C. § 455; Ala. Code § 12-1-12; Alaska Stat. § 22.20.020; Ariz. Rev. Stat. § 12-409; Ark. Code Ann. § 16-13-214; Cal. Civ. Proc. Code § 170.1; Conn. Gen. Stat. § 51-39; Del. Code Jud. Cond. 2.11; Fla. Stat. § 38.10; Ga. Code Ann. § 15-1-8; Haw. Rev. Stat. § 601-7(a); Idaho Code Jud. Cond. 2.11; 725 Ill. Comp. Stat. § 5/114-5; Ill. Code Jud. Cond. 63.C; Ind. Code § 35-36-5-2; Iowa Code 51:2.11; Kan. Stat. Ann. § 20-311d; Ky. Rev. Stat. Ann. § 26A.015; La. Code Crim. P. art. 671; Me. Code Jud. Cond. 2.11; Md. Judges R. 18-102.11; Mass. Code Jud. Cond. 2.11; Mich. Ct. Rule 2.003(C); Minn. Code Jud. Cond. 2.11; Miss. Code Ann. § 9-1-11; Mo. Rev. Stat. § 545.660; Mont. Code Ann. § 3-1-803; Neb. Rev. Stat. § 24-739; Nev. Rev. Stat. § 1.230; N.H. Code Jud. Cond. 2.11; N.J. Stat. Ann. § 2A:15-49; N.M. Code Jud. Cond. 21-211; N.Y. Judiciary Law § 14; N.C. Gen. Stat. § 15A-1223; N.D. Code Jud. Cond. 2.11; Ohio Code Jud. Cond. 2.11; Ohio Rev. Code Ann. § 2701.03; 20 Okla. Stat. § 1401; Or. Rev. Stat. § 14.210; Penn. Code Jud. Cond. 2.11; R.I. Code Jud. Cond. 2.11; S.C. Code Ann. § 14-1-130; S.D. Code Jud. Cond. ch. 16-2 Canon 3(E); Tenn. Code Ann. § 17-2-101; Tex. Code Crim. P. art. 30.01; Utah Code Ann. § 78A-2-222; 12 Vt. Stat. Ann. § 61; Va. Code Ann. § 16.1-69.23; Wash. Code Jud. Cond. Canon 2 R. 2.11; W.V. Code Jud. Cond. 2.11; Wis. Stat. § 757.19; Wyo. R. Crim. P. 21.1.

Finally, all jurisdictions grant attorneys the power to use peremptory challenges to remove jurors for reasons not specified in the juror-qualification or challenge-for-cause statutes or court rules.[6] *See Skilling v. United States*, 561 U.S. 358, 388 n.21 (2010) ("Peremptory challenges . . . provide protection against prejudice.").

The sole decision of a state court of last resort supporting Petitioner's position is an extreme outlier.

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[6] *See* 28 U.S.C. § 1870; Ala. Code § 12-16-100(a); Alaska R. Crim. P. 24(d); Ariz. R. Crim. P. 18.5(g); Ark. Code Ann. §§ 16-33-303(a), 16-33-305; Cal. Civ. Proc. Code § 231; Conn. Gen. Stat. § 54-82g; Del. Super. Ct. Crim. R. 24(b); Fla. Stat. §13.08; Ga. Code Ann. § 15-12-165; Haw. Rev. Stat. § 635-29; Idaho Code § 19-2016; Ill. S.Ct. R. 434(d); Ind. Code § 35-37-1-3; Iowa R. Crim. P. 2.18(9); Kan. Stat. Ann. § 22-3412; Ky. R. Crim. P. 9.36, 9.40; La. Code Crim. P. art. 795, 799; 15 Me. Stat. § 1258; Md. Rules 4-313; Mass. R. Crim. P. 20(c); Mich. Comp. Laws § 768.12; Minn. R. Crim. P. 26.02; Miss. Code Ann. § 99-17-3; Mo. Rev. Stat. § 494.480; Mont. Code Ann. § 46-16-116; Neb. Rev. Stat. § 29-2005; Nev. Rev. Stat. § 175.051; N.H. Rev. Stat. Ann. § 606:3; N.J. Stat. Ann. § 2B:23-13; N.M. R. Crim. P. 5-606(d); N.Y. Laws § 360-30; N.C. Gen. Stat. § 15A-1217; N.D. Cent. Code §§ 29-17-30, 29-17-46; Ohio R. Crim. P. 24(d); 22 Okla. Stat. § 654, 655; Or. Rev. Stat. § 136.230; Pa. R. Crim. P. 634; R.I. R. Crim. P. 24(b); S.C. Code Ann. § 14-7-1110; S.D. Codified Laws § 23A-20-20; Tenn. Code Ann. § 40-18-118; Texas Code Crim. Proc. art. 35.15; Utah R. Crim. P. 18; 12 Vt. Stat. Ann. § 1941; Va. Code Ann. §§ 19.2-262; Wash. Code § 4.44.130; W.Va. Code § 62-3-3; Wis. Stat. § 972.03; Wyo. Stat. Ann. § 7-11-103.Rev.

II. This case is a poor vehicle: by not objecting, Petitioner waived his complaint, and Petitioner's claim that his trial counsel was intimidated lacks support in the record.

Even if there is a fundamental Constitutional right to have a trial judge excuse a juror with whom he has a familial or personal relationship, this Court has always considered that such rights are subject to waiver. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1911-12 (2017) (referencing structural error cases that "necessitated automatic reversal after they were preserved and then raised on direct appeal"); *Peretz v. United States*, 501 U.S. 923, 936 (1991) ("The most basic rights of criminal defendants are similarly subject to waiver.").

Here, both parties were fully aware of the trial judge's relationship with his wife, and neither party tried to have her excused from the jury or for the judge to recuse himself. During the parties' exercise of their peremptory challenges, neither party exercised one against her; indeed, defense counsel declined the trial judge's direct invitation to do so. *See United States v. Olano*, 507 U.S. 725, 733 (1993) (waiver is the "intentional relinquishment or abandonment of a known right"); *see also Ford v. Georgia*, 498 U.S. 411, 422-23 (1991) (*Batson* claim must be made before the jury makes its oath).

Waiver in this circumstance has a strong Sixth Amendment basis because of the great deference given to the strategic reasoning defense attorneys use in the jury selection process. *See Nguyen v. Reynolds*, 131 F.3d 1340, 1349 (10th Cir. 1997) ("An attorney's actions during voir dire . . . cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill chosen that it permeates the entire trial with obvious unfairness."); *Morales v. Thaler*, 714 F.3d 295, 305 (5th Cir. 2013) (counsel held not ineffective for choosing not to strike potential jurors who "admitted they were 'probably' biased against the defendant"); *State v. Litherland*, 12 P.3d 92, 99-100 (Utah 2000) ("An attorney's decisions regarding jury selection may even appear counterintuitive, particularly when viewed from the perspective of a bare transcript on appeal."); *see also Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("Even the best criminal defense attorneys would not defend a particular client in the same way.").

Decisions by counsel to seek a trial judge's recusal also have a strong strategic component. *See United States v. Bayless*, 201 F.3d 116, 128-30 (2d Cir. 2000) (recognizing that strategic choices—including a judge's rulings in the defendant's favor—affect counsel's decision

whether to move to recuse). Given the trial court's numerous defense-favorable rulings and the jury's defense-favorable verdicts, this case reflects highly successful strategic decision-making by defense counsel.

Even analyzed under the plain error standard of review, Petitioner's claim would fail because, without any controlling authority from this Court or any Colorado statute or appellate court decision, the error would not have been obvious when made. *See Puckett v. United States*, 556 U.S. 129, 135 (2009); *Cardman v. People*, 445 P.3d 1071, 1082 (Colo. 2019).

Petitioner bases his claim here, as he did in the Colorado Supreme Court and Court of Appeals, on the assertion that the trial judge's comments about his wife intimidated his counsel. But Petitioner did not use the procedural mechanisms afforded by Colorado law to determine, during an evidentiary hearing, whether that assertion was factually true. *See* Colo. R. Crim. P. 33 and Colo. R. Crim. P. 35(c). Petitioner's intimidation claim thus is speculative. *See Jones v. United States*, 527 U.S. 373, 394-95 (1999) ("Where the effect of an alleged error is so uncertain, a defendant cannot meet his burden of showing that the error actually affected his substantial rights.").

III. There is no need to read the Constitution to prohibit family members or friends of judges from serving on juries in the judges' courtrooms.

Petitioner seeks a nationwide, one-size-fits-all rule prohibiting jurors who have any familial or personal relationship with trial judges from serving on juries in their courtrooms due to a general fear that such jurors would have a greater influence during deliberations. But there is no reason to assume that jurors would ignore their oaths and base their verdicts on something other than the evidence and trial court's instructions of law. *See Richardson v. Marsh*, 481 U.S. 200, 206 (1987) (referencing "the almost invariable assumption of the law that jurors follow their instructions").

Further, in our legal system, judges and juries act as the neutral arbiters of the legal and factual issues in a trial. Unlike affinities between *parties* and judges or jurors—all proper grounds for challenges for cause or judicial recusal—any affinity between judges and jurors should not affect the result of a case.

Petitioner posits that his counsel might not have challenged the trial judge's wife because he feared upsetting the judge. This Court recognizes, though, that even when the actions of counsel leave judicial

officers unhappy, judges nonetheless perform their duties properly. *See Liteky v. United States*, 510 U.S. 540, 555-56 (1994).

And trial judges rule on objections and jury selection challenges for cause all the time. The trial judge here had likely made many thousands of such rulings. *See* R. Tr. 1/20/15:18:10-12 (trial judge mentioning to the venire in his jury selection explanation that it had been "at least 20 years" since he had presided over a trial at which neither party exercised a peremptory challenge).

The trial judge also explained to the members of the jury they should not take personally any challenges for cause or peremptory challenges that counsel might make, something the judge knew himself.[7] *See id*. at 15-22, 83:14-19. And the trial judge's words to defense counsel during the parties' exercise of their peremptory challenges—"I need you to make a call"—is strong evidence he would have granted a challenge to his wife had either party made one. *See* R. Tr. 1/20/15, p 86:20.

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[7] The judge's wife's juror questionnaire suggests that she had been a court reporter, and thus familiar with the jury selection process.

Nor was there anything improper about the trial judge's minor jokes about the situation. He made seven of them over the course of this four-day trial. Two he made outside the jury's presence. All were wry and self-deprecating in nature. None denigrated Petitioner, counsel, or the important issues the jury had to determine.

The record also reflects that the judge made a few other minor jokes during trial. *See, e.g.*, R. Tr. 1/20/15, pp 85:13, 249-50; R. Tr. 1/22/15, p 92:7-9. As one commentator noted about proceedings before this Court, "[l]aughter enables justices and lawyers to negotiate the institutional, social and intellectual barriers that impede human communication[.]" Adam Liptak, *A Taxonomy of Supreme Court Humor*, New York Times, Jan. 24, 2011. Appropriate judicial good-naturedness, and some minor humor, might well alleviate a portion of the stress jurors face by being thrust into the unfamiliar circumstances of a criminal trial, thereby making it easier for them to perform their important work.

And, of course, if the trial judge had removed *sua sponte* his wife from the jury where she was not subject to removal under Colorado law, Petitioner might well have claimed that statutorily unauthorized act

violated his right to a fair trial by denying him a juror his counsel wanted to decide the case.

Finally, the appellate record shows that the trial judge presided over this case properly. And the trial judge's dismissal of multiple serious charges, the jury's verdicts, and the trial judge's exercise of his sentencing discretion, suggest that the decision not to object to either the judge or the juror was a sound trial strategy that likely inured to Petitioner's benefit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

L. Andrew Cooper

Digitally signed by L. Andrew Cooper
Date: 2021.01.04 17:09:03 -07'00'

L. ANDREW COOPER
Deputy Attorney General
Counsel of Record

PAUL E. KOEHLER
First Assistant Attorney General

Colorado Department of Law
Ralph L. Carr Judicial Center
1300 Broadway, 10th Floor
Denver, CO 80203
Andrew.Cooper@coag.gov
(720) 508-6000

PHILIP J. WEISER
Attorney General

NATALIE HANLON LEH
Chief Deputy Attorney General

ERIC R. OLSON
Solicitor General

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