

No. 24-

IN THE SUPREME COURT OF THE UNITED STATES

JOHNNY HO, Petitioner

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF
APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition involves questions of exceptional importance for jury selection in trials in all jurisdictions across our nation, involving the process for seating a jury to assure every defendant his or her Sixth Amendment right to a fair trial by a fair and impartial jury, as follows:

1. Is a defendant's right to a fair trial denied when every single juror seated on his jury is permitted to remain silent rather than answer important questions asked of them during jury selection?
2. Is a defendant in a criminal trial denied a fair and impartial jury when all of the jurors who were selected and seated on the jury had been asked several important questions calling for a "yes or no" answer and none of these jurors answered a single one of these important questions?
3. If every prosecutive juror within the jury venire is asked 32 questions and not a single prospective juror gives any verbal answer to any of these questions, including questions that call for a yes or no answer - even when the question includes phrases that call for a verbal answer such as, "Does everyone understand that principle?"; "Do you all understand that?"; "Do you think you could be fair and impartial?"; "Will all of you agree to apply the same standards for judging credibility. . . ?";

“Do you agree to abide by those instructions?”; and “If you were on trial, would you be willing to be tried by a jury with someone who has the same frame of mind as yours?”; (1) can it be said that defendant was able to effectively use his preemptory challenges?; and (2) can the defendant be assured that his guilt or innocence is being decided by a fair and impartial jury?

4. Did the judge deny the petitioner a fair trial when she improperly allowed all of the prospective jurors to choose not to answer questions that called for a specific answer, when she gave them the option to not answer any of the questions by deferring to the prospective jurors’ preferences when stating, “if you . . . **want to** respond to . . . any of these questions, I ask that you raise your hand”? (emphasis added) (R. 55, PageID 432).

PARTIES TO THE PROCEEDINGS

The petitioner is Johnny Ho, and the respondent is the United States of America.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Johnny Ho respectfully requests the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

DECISION BELOW

Ho was convicted by a jury in the United States District Court for the Eastern District of Michigan. He appealed his conviction to the Sixth Circuit.

The Sixth Circuit affirmed the District Court judgment in an opinion and order dated March 4, 2024. Ho's petition for rehearing en banc was denied on April 25, 2024.

STATEMENT OF JURISDICTION

This Court now has jurisdiction under 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Johnny Ho was charged in the district court for the Eastern District of Michigan and indicted with the crimes of conspiracy to commit wire fraud, 18 U.S.C. § 1349, wire fraud, 18 U.S.C. § 1343, and money laundering, 18 U.S.C. § 1957(a). Indictment, R. 1, Page ID # 1-15.

The government's theory

The government claimed that Johnny Ho and Antonio George conspired together to commit wire fraud and launder money by submitting false documents to lenders to obtain a PPP loan and an SBA loan. See the government's opening statement. R. 56, Page ID # 521.

The defense theory

The defense theory was that there is no dispute that the documents supporting the loan application were false, but that Antonio George, unbeknownst to Johnny, falsified the documents and submitted the falsified documents to the lenders while acting on Johnny's behalf. Thus, Johnny was not guilty of anything if he was not aware that the loan applications were fraudulent. See defense opening statement. R. 56, Page ID # 531.

During trial, the judge acknowledged the defense theory, "That's what his whole defense is based on, that Antonio George told him nothing, that he just did it on his own." R. 58, Page ID # 735.

The issue for the jury was whether or not Johnny knew that the documents submitted with the loan applications were false.

Jury Selection

At the pretrial conference, the judge announced that the magistrate judge would preside over jury selection and the judge would preside over trial. R. 62, Page ID # 1229-1230. When asked if the magistrate would be ordered to permit attorney voir dire, the trial court judge answered, "No". R. 62, Page ID # 1230.

During the jury selection the magistrate judge asked all of the questions of the jurors, and the attorneys were not permitted to ask the jurors any questions. R. 55, Page ID # 378-472.

At the beginning of the jury selection, Magistrate Judge Altman described the voir dire process for the prospective jurors, "Okay. Here's how we're going to pick the jury. First, we're going to put 30 of you in this box. I know it's not -- it looks a little tight, but we're going to get you all in there, and then we're going to examine you. Now there's a purple sheet of paper on each chair, and I want you to pick that up. And it has some basic information about yourself, so once we've got all 30 seated, we'll start with seat No. 1 and you will stand up and you will provide that information that's listed on the sheet. Once we have all 30 people who pass for cause, we will excuse 16 of you, which if you do the math, if you can do that quickly, that leaves 14 of you, and the 14 will be the jury.

And at the end of this case, two of you -- two of the 14 will be randomly excused as alternates." R. 55, Page ID # 383-384.

The voir dire began and continued as the first 30 prospective jurors were seated and asked a series of general questions about their backgrounds and demographics, and about their work and vacation schedules and their availability. These questions were as follows: (1) what is your name?; (2) what city do you live in?; (3) where do you work and what is your position there?; (4) what is your marital status?; (5) do you have children and how old are they/what do they do for work?; (6) what does your spouse or significant other do for work?; (7) what is your highest level of education received?; (8) what clubs or organizations do you belong to?; (9) what do you like watch on TV, listen to the radio, or websites you frequent?; and (10) what stickers do you have on your car? R. 55, Page ID # 386-435.

The judge then shifted to questions constitutional rights and relevant issues pertaining to Johnny's trial. R. 55, Page ID # 384. None of these questions were asked directly to any individual jurors, but rather the questions were asked to the remaining group of 30 as a whole.

A question was asked if anybody had any prior knowledge of this case, and no juror answered that question. R. 55, Page ID # 435.

The group of prospective jurors were then asked if they had any prior knowledge of the PPP loan program, and two jurors answered yes, one was removed for cause. R. 55, Page ID # 435-437.

The group was then asked if they knew the defendant or any of the attorneys, or any of the named witnesses, and no juror answered this question. R. 55, Page ID # 440.

The group was then asked if they had any prior experience in court, such as a juror, plaintiff, defendant, or witness in a lawsuit, and five prospective jurors volunteered answers to this question. R. 55, Page ID # 440-443.

The group was then asked, "Do any of you have any close friends or relatives who have had any prior experience in court that I have just described as a Juror, plaintiff, defendant or a witness in a lawsuit?", and no juror gave an answer to this question. R. 55, Page ID # 443-444.

The group was then asked, if they or any family members had any prior connection or present connection with any government agency, law enforcement agency, or a prosecutor's office, and six jurors gave answers pertaining to this question. R. 55, Page ID # 444-447.

The group was then asked if they, a family member or a close friend was a victim of a crime or a witness in a criminal case, and only two jurors answered this question. R. 55, Page ID # 447-448, 449-450.

The group was then asked if they had any health problems which would cause them difficulty sitting as a juror, and three jurors answered this question. R. 55, Page ID # 448-450.

After the health questions were answered by the three jurors, the judge asked the group eight more questions, none of which were answered by any of the 30 prospective jurors, as follows:

“You can see that the defendant, Mr. Ho, in this case is a Vietnamese American citizen. Do any of you have any attitudes toward the Vietnamese or the Vietnam War that might prevent you from giving the defendant, Mr. Ho, who is an American of Vietnamese descent, a fair trial?

And have any of you had any experience with a member of any race, creed, color or national origin other than your own which resulted in any kind of confrontation?

Have any of you had any experience at your place of employment or school or at your residence which makes you feel as though you could not fairly judge a person of a

different race, creed or nationality or national origin of your own?

Do any of you feel that you have any prejudices or feelings against persons of another race, color, creed or national origin so that you could not fairly consider and decide the evidence -- this case on the evidence that is presented in this case?

Do any of you hold any opinions about courts or defense lawyers or prosecutors or law enforcement officers that would prevent you from fairly considering and deciding this case solely on the evidence?

Okay. Have any of you had any experiences in the past which causes you to doubt your ability to sit as a fair and impartial juror?

Okay? And if you were on trial, would you be willing to be tried by a jury with someone who has the same frame of mind as yours? **[calls for a yes or no answer – but no prospective juror was required to answer]**

Would any of you prefer not to serve as a juror in order to avoid having to make a decision about the innocence or guilt of a defendant?"

R. 55, Page ID # 450-451.

Defense objection to the jury selection process

After these eight questions were not answered, attorney Foster objected to the jury selection process, stating,

"It might take a little bit longer, but on some of these questions, especially the last two, I would ask that each juror say yes or no out loud, because a lot of people might just not say anything, but if they're actually asked the question, then I think we'd get a more accurate answer, and if they're just given the opportunity not to speak, I think they can avoid answering the question, so I'd object to the way, the format of how we're doing it." R. 55, Page ID # 451-452.

The government and the defense then had a colloquy with the judge as follows:

MR. SUTER: I don't believe that's necessary. We've seen from this jury individually that they've been -- not been hesitant at all to raise their hand when any issue has arisen.

MR. PARTICKA: And they've all taken a preliminary oath to answer all questions truthfully.

THE COURT: I agree.

MR. FOSTER: But they're not answering the question, so they're not having to live up to that oath.

THE COURT: I've seen all of them not hesitate to raise their hand to any question that I had posed, and it shows to me that they're carefully listening, and they did take the oath that they would answer any question truthfully, and I think, based on what I see, that this jury pool, it is not necessary to ask them individually. I think the collective process is fine, and that's what we're going to go forward with. Okay? But you have an objection.

MR. FOSTER: The objection is they're not answering the question; they remain silent. Thank you.

THE COURT: Well, that's because if they have had something they'd like to add to it, they would.

MR. FOSTER: But it's a yes-or-no question, but I understand your ruling.

R. 55, Page ID # 452-453

Once attorney Foster's objection was overruled by the magistrate judge, she continued asking the prospective jurors as a collective, the following 24 questions – none of which were answered – even with a simple yes or no - by a single one of the 30 prospective jurors:

1. Do any of you feel that because a defendant or an individual is charged with a crime, that she or he must have done something wrong simply because they're charged with a crime?
2. And this next question or comment builds on that, because, as I've mentioned, the law presumes that a person is innocent until proven guilty beyond a reasonable doubt, and that presumption stays with the defendant throughout the trial and goes with you all into the jury room when you begin your deliberations. And there is no obligation on the defendant to prove his innocence. The obligation is always on the Government to prove a defendant's guilt or innocence beyond a reasonable doubt, and that never shifts. Do any of you have any trouble with that principle of the presumption of innocence and the Government's burden of proof beyond a reasonable doubt?

[this was a long and rambling question about critical issues such as the presumption of innocence and

reasonable doubt that defendant Johnny Ho did not gain any insight from the jury because no juror gave a response to this compound question – the jurors were not even asked if they understood these important and complex legal principles]

3. As you may know, the law does not compel a defendant in a criminal case to take the witness stand and testify, and there's -- no presumption of guilt can be raised and there can be no inference of any kind that may be drawn from the fact that a defendant does not testify. Likewise, the law never imposes on a defendant in a criminal case the duty of calling any witnesses or producing any evidence. A defendant who wants to testify, however, is a competent witness and the defendant's testimony is to be judged in the same way as that of any other witness. And you will be instructed if the defendant -- regardless, if the defendant takes the stand or does not take the stand, you will receive further instructions from the judge on that. Are there any of you here that will have any difficulty in applying these principles?

4. And if the defendant does not testify, which is his right, will any of you hold it against him? **[calls for a yes or no answer - but no prospective juror was required to answer]**
5. And if the defendant does not testify, would it be something that any of you could not completely disregard knowing that the burden of proof rests with the Government at all times? **[calls for a yes or no answer - but no prospective juror was required to answer]**
6. And as I mentioned very early on in my history lesson to you, your function is to decide questions of fact. When it comes to the law, you are to take your instructions from the Court. The Judge will tell you what the law is and you are bound by those instructions. You cannot substitute your own notions for what you think the law is or should be, but you are to decide the facts based on the law that is presented to you. Does everyone understand that principle? **[calls for a yes or no answer - but no prospective juror was required to answer]**
7. Do any of you think you will have any trouble applying that principle? **[calls for a yes or no answer - but no prospective juror was required to answer]**

8. Do all of you understand that the issue of punishment is strictly to be decided by the Court and it should not be considered by you in any way at arriving at your verdict? Do you all understand that? **[calls for a yes or no answer – but no prospective juror was required to answer]**
9. Do any of you feel that you would be unable to remove the consideration of punishment from your deliberations, because the issue of punishment, as I said, is one for the Court, it's not for the jury?
10. Do each of you understand that if there is conflicting testimony during the trial about certain facts, that it is your task to try and resolve the conflict and decide which facts deserve to be believed or disbelieved? Does everybody understand that principle? **[calls for a yes or no answer – but no prospective juror was required to answer]**
11. Do any of you feel that it is improper for the prosecution to reduce or dismiss criminal charges against a witness involved in criminal activity in order to obtain his testimony against others involved in criminal activity? **[this is a critical question that should have been answered because the**

government's key witness was a cooperating co-defendant. The default or expected answer to this question is "no" but we do not know what any of the prospective jurors' answer to this question would have been because none of them were required to answer it]

12. As we noticed, this trial is scheduled to -- over the course of a few days. Do any of you feel that you could not avoid discussing this case with anyone during the course of the trial, because the Judge will tell you that you're not supposed to -- you're not allowed to discuss the case with anybody while the case is going on? Does anyone have a problem with that?

13. Do any of you feel that somehow you will have difficulty in not talking about the case when you go home that evening?

14. And has any past experience of any of you in any way caused a doubt of your ability to sit as an impartial juror? I think we've covered that over and over again, but we like to keep asking it just to make everybody clear and certain.

15. Is there any reason at all why you think you might in any way be unfair or partial to either the Government or the defendant in this case? **[calls for a yes or no answer – but if**

any of the prospective jurors did not want to volunteer anything about being even a little bit unfair or partial to defendant Johnny Ho, they kept their answers to themselves because they were not required to answer this question out loud and under oath]

16. And is there anything that you would like to tell me or the lawyers outside of the hearing of the other jurors about your service?

17. Have you, a family member or a close friend ever applied for a Paycheck Protection loan or an Economic Injury Disaster Loan, to your knowledge? **[calls for a yes or no answer – but no prospective juror was required to answer this question]**

18. In this case, you may hear testimony from representatives of a bank, a lender, loan processor or other financial institutions such as -- as well as the Small Business Administration. Have you had any experiences with any bank, lender, loan processor or other financial institution that would make it difficult for you to evaluate that testimony fairly and impartially? **[calls for a**

yes or no answer – but no prospective juror was required to answer this question]

19. Have you had any experiences with the Small Business Administration that would make it difficult for you to evaluate that testimony fairly and impartially? **[calls for a yes or no answer – but no prospective juror was required to answer this question]**
20. Do you think you could be fair and impartial in weighing the evidence in a case in which the [alleged] victim is a bank or other financial institution? **[calls for a yes or no answer – but no prospective juror was required to answer]**
21. Will all of you agree to apply the same standards for judging credibility to an FBI or law enforcement agent as to any other witness? **[calls for a yes or no answer – but no prospective juror was required to answer – this was an important question because one of the government's key witnesses was an FBI agent who interviewed Johnny Ho, and the credibility of the FBI agent and the defendant was at issue because they gave conflicting testimony about]**

what Johnny Ho said to the FBI agent that was critical to the jury's determination of guilt or innocence]

22. And you will be instructed by the judge in this case as to how to evaluate witness testimony. Do you agree to abide by those

instructions? **[calls for a yes or no answer – but no prospective juror was required to answer]**

23. And here the Government is alleging, it hasn't been proven,

that Johnny Ho and others conspired to commit wire fraud, which is to defraud the Government out of money. Most people

would agree that it is wrong to defraud the Government, but do you have any strong feeling about people defrauding the

Government such that it would be hard for you to sit as a fair and impartial juror in this case, and even knowing that Mr. Ho

is presumed to be innocent, as we've talked about many times this morning? **[calls for a yes or no answer – but no prospective juror was required to answer]**; and

24. Have any of you heard any news reports about fraud

regarding PPP or Small Business Administration loans, and if you heard reports, would hearing those reports make it hard for

you to sit as a fair and impartial juror in this case even knowing that Mr. Ho is presumed to be innocent?

R. 55, Page ID # 453-464.

Defense use of peremptory challenges

Between the defense and the government, there were peremptory challenges made that were required to be used to get the jury down from 30 prospective jurors to 14 seated jurors (12 plus 2 alternates).

The defense utilized 8 peremptory challenges and the government utilized 7 peremptory challenges. R. 55, Page ID # 469-470.

The defense was required to use its 8 peremptory challenges without hearing any answers from the 30 prospective jurors to any of the above 32 questions – none of the previously listed 8 questions before the defense objection were answered by a single juror, and none of the above listed 24 questions after the defense objection were answered by a single juror. The defense was not permitted to ask any follow up questions to the prospective jurors.

The defense did not have the option of not using its peremptory challenges based upon the jury selection system used by the magistrate judge. Peremptory challenges were required by both sides for the court to get the trial jury down to 14 people.

The government's case

FBI agent Matthew Sluss was the first government witness and testified to the overall investigation. Sluss interviewed Ho at Ho's home. R. 56, Page ID # 535. Sluss claimed that Ho told him that he applied for the PPP loan for his company Diva Nails at Antonio George's house, using George's computer. R. 56, Page ID # Page ID # 536. Ho later testified in his own defense, testifying that George did the loan application and that he told George to "do it right". R. 60, Page ID # 1070-1073. Sluss conceded that the interview with Ho was not audio recorded nor video recorded, that Ho was not asked to provide a written statement or affidavit, and that Sluss's written report of this interview did not contain – a word for word description of Sluss's questions and Ho's answers. R. 57, Page ID # 655-656, 660.

Sluss testified that Ho knew that the Diva Nails PPP loan application was false, but Sluss conceded that Ho could have learned for the first time after Antonio George was arrested that the PPP loan application was false. R. 57, Page ID # 667. Further, Sluss testified that in his Grand Jury testimony, Sluss never told the Grand Jury when Ho knew that the PPP loan application was false. R. 57, Page ID # 666-667. Sluss conceded that from reviewing the seven pages of documents that

were the PPP loan application, that Mr. George or anyone else could have prepared and submitted this loan application. R. 57, Page ID # 671.

Mary Beth Cvengros, a senior litigation investigative attorney with the U.S. Small Business Administration testified as to the legal requirements and rules for applying for and receiving PPP and SBA loans, and the loan application process. R. 57, Page ID # 697-723.

Frank Maniaci, a senior vice president of Citizen's bank testified about the procedures and policies of Citizen's pertaining to the PPP loan application process. R. 59, Page ID # 913-933. Maniaci testified that there was no way to verify who the person was that filled out the initial PPP loan application through the portal, and that Maniaci could not verify that Johnny Ho prepared the application with Citizen's for the PPP loan. R. 59, Page ID # 932.

Lawrence Joseph, a vice president and business banking area manager of JP Morgan Chase, testified about his involvement in the receipt and processing of PPP loan applications on behalf of Chase Bank, and about Johnny Ho's two PPP applications that Chase Bank denied. R. 59, Page ID # 933-944. Joseph testified that there were no fraudulent forms or documents submitted by Johnny Ho with either of his PPP loan applications to Chase. R. 59, Page ID # 944.

Symon Pakula, a business consultant at Paychex, testified about the on-boarding of Johnny Ho and his company Diva Nails with Paychex to become a new Paychex client. R. 59, Page ID # 945-957.

Brandi Witkowski, an FBI forensic accountant, testified about all of the details of the \$4,154,842 in loans applied for and the \$3,366,142 in disbursements of the loan proceeds of the 29 loans associated with Antonio George in the alleged conspiracy and presented these details in charts and visual displays. R. 59, Page ID # 966-989.

Witkowski identified that amount of the PPP loan proceeds from Citizen's Bank pertaining to Ho's business Diva Nails was \$193,700 (R. 59, Page ID # 974), and the EIDL loan proceeds from the SBA loan to SFX Transportation, Inc. involving Johnny Ho was \$149,900. R. 59, Page ID # 979. These were the only two loans relating to Johnny Ho.

Antonio George – the government's star witness

Antonio George, the leader of the wire fraud conspiracy, testified for the government as a cooperating witness against Johnny Ho. R. 58, Page ID # 744-869, R. 59, Page ID # 878-912.

George prepares people's taxes through his company, The Tax Wolf. R. 58, Page ID # 745. He admitted to assisting his tax clients in preparing false tax returns. R. 58, Page ID # 748. George never

admitted to doing these false tax returns without the knowledge of the taxpayers, he testified that the taxpayers were in on it with him when he testified, “What I did exactly was I helped some of my clients basically in advising them illegally to fraudulently reduce their taxable liabilities by inflating their business expenses” and “My tax clients -- basically, they wanted to evade paying taxes.” R. 58, Page ID # 749.

George fraudulently prepared 940 and 941 tax documents for Johnny’s company, Diva Nails, but testified repeatedly that Johnny was involved and aware of this fraud, (R. 58, Page ID # 767-768, 771, 774) just as he testified that his tax clients were aware of the fraud. George also testified that Johnny was involved with and aware of George’s fraud in applying for an EIDL loan for SFX Transportation. R 58, Page ID # 789-791.

George was asked about his former taxpayer clients, including Westley Grant, Ebony Moore, and Tamisha Milton. He claimed he did not remember much of the details pertaining to these clients, but testified, “I won’t say without her knowledge, I did -- I never did thing without a person’s consent.” R. 58, Page ID # 841-845. George explained, “I’m basically directed by my clients”. R. 58, Page ID # 837.

Westley Grant, Ebony Moore, and Tamisha Milton were all interviewed by defense private investigator Desiree Edwards. Grant told Edwards that George listed in his Schedule C that Grant and his wife owned a company that did not exist. Grant did not even know about this false company George listed on his return until the IRS agents informed him. Grant told Edwards that he “doesn’t understand why George would falsify his tax returns”. R. 31, Page ID # 159. These statements were taken from an offer of proof filed on June 7, 2022 during trial and taken from the Sunshine Investigations Report, dated June 6, 2022, page 2)¹

Moore told Edwards that “federal agents questioned her about the Schedule C forms during the Zoom interview. She said she does not know of the business George listed on the form. She said she wasn’t aware of the information on the form until the federal agents brought it to her attention during that interview. She said George never reviewed the document with her. She said if he had she would’ve told him the information was fraudulent and would have refused to sign the tax return.” R. 31, Page ID # 157. These statements were taken from an offer

¹ Westley Grant was called as a defense witness but did not testify at trial because he became unavailable after he asserted his Fifth Amendment privilege and Desiree Edwards was not permitted to testify as a defense witness about what Grant told her.

of proof filed on June 7, 2022 during trial and taken from the Sunshine Investigations Report, dated June 6, 2022, page 2)²

Desiree Edwards – defense private investigator

Desiree Edwards, the defense private investigator, testified as to her investigation of Antonio George and testified that there were two separate social security numbers associated with Antonio George and his 15 businesses. R. 60, Page ID # 1044-1050.

Johnny Ho's testimony

Johnny testified in his own defense. R. 60, Page ID # 1063-1100. In 2020 Johnny was running his business Diva Nails and Spa and became interested in obtaining a PPP loan, thinking he was eligible to qualify for a PPP loan even though he had 1099 workers, he still considered them his employees. R. 60, Page ID # 1066.

Johnny had only been inside Antonio George's home twice. The first time was for a barbecue on August 31, 2020, the night before George got arrested. R. 60, Page ID # 1068. The second time Johnny was inside George's home was the very next day, after George was released. George

² Ebony Moore was called as a defense witness but did not testify at trial because she became unavailable after she asserted her Fifth Amendment privilege and Desiree Edwards was not permitted to testify as a defense witness about what Moore told her.

showed Johnny documentation about why George was arrested. The documentation showed that they charged him with conspiracy, wire fraud, and listed the companies involved, including Johnny's company, Diva Nails & Spa. That was the first time Johnny knew that something was up with Diva Nails. R. 60, Page ID # 1069.

Early in 2020, Johnny applied for a PPP loan for Diva Nails on his own with Chase Bank and was declined. That is why he sought help from George to prepare a PPP loan application. R. 60, Page ID # 1070.

Johnny gave George his 2019 tax returns and the account number for his Citizen's Bank account so that George could apply for a PPP loan on Johnny's behalf. R. 60, Page ID # 1070-1071.

Johnny told George, "I couldn't do it right. I don't know what forms I'm missing. So, if you're able to help me, can you do it right for me?" When Johnny said "do it right" he did not mean that George should submit fake and fraudulent documents. R. 60, Page ID # 1071.

The PPP loan application for Diva Nails included false 940 and 941 reports, but Johnny had never even seen a 940 or 941 until he was preparing for trial with his attorney and reviewed the false 940 and 941 documents – he had never seen these types of documents because he did not ever have employees at his business, only independent contractors.

Johnny did not assist George in fraudulently preparing or creating false 940 or 941's or false monthly payroll reports. R. 60, Page ID # 1071-1072.

At the time that George submitted the PPP loan application for Johnny, Johnny thought that George was "doing it right" because Johnny trusted George, because he considered George to be a successful person – from his appearance, his home, his vehicles, and all of the business that he has. R. 60, Page ID # 1072-1073.

George directed Johnny to open up an account at Paychex for the loan proceeds, because George wanted it that way. R. 60, Page ID # 1073.

Johnny admitted to signing by DocuSign, a 20 page certification and authorization from Citizen's bank (Exhibit 8A) – and that he signed this document while he was at work on May 15, 2020 – this was signed a few days after the initial application was submitted by George. There were no fraudulent documents attached to this 20 page certification and authorization signed by Johnny. R. 60, Page ID # 1074-1075.

When cross examined, Johnny testified that he did not know that the Citizen's Bank PPP loan application contained false information. R. 60, Page ID # 1080-1081. Johnny now knows that the Citizen's Bank PPP loan application was submitted with false information, but at the

time that it was submitted, Johnny believed that this loan application was perfectly legitimate. R. 60, Page ID # 1085, 1090-1091.

Johnny testified that he did not apply for the SFX Transportation EIDL loan, and that there was nothing wrong with receiving funding from this loan, and that he thought “the loan was just a loan that I have to pay back”. R. 60, Page ID # 1094-1095. Johnny did not feel it was wrong to write the four checks to Antonio George’s companies from the proceeds of this loan, just as George directed him to do. R. 60, Page ID # 1097

REASON FOR GRANTING THE WRIT

The jury voir dire was unfairly conducted, making the defendant’s peremptory challenges useless, which denied him a fair trial.

The judge conducted the voir dire, and most of her questions presented to the prospective jurors were not answered by any of those jurors. Further, the judge did not allow the attorneys to directly question those jurors or to ask any follow up questions.

The judge engaged in “collective questioning”, asking many excellent questions of the prospective jurors as a group of 30, but unfortunately did not require any of them to answer these questions. It was as if these excellent questions were never asked. The judge told the

jurors that they could answer her questions if they “*want to*”, giving them permission to remain silent and not to answer any of her questions.

This amounted to an unfair trial for Johnny because defense counsel was not able to effectively utilize his preemptory challenges without hearing answers to most of the specific questions asked of these prospective jurors by the judge.

The jury selection process was flawed at the outset, but the specific harm that prejudiced Johnny was the fact that critical questions involving important constitutional rights were never answered by any of the 30 prospective jurors. There was not even any indication that any of these prospective jurors understood the concepts of the “presumption of innocence” and the “beyond a reasonable doubt” standard. Also, not a single prospective juror was required to make any verbal statement in answer to important questions that were asked about assessing police (FBI agent) credibility as compared to a lay person (Johnny Ho, the defendant), where police credibility was one of the critically important issues in this trial. Lastly, not a single prospective juror was required to make any verbal statement in answer to the concept of a cooperating co-defendant getting favorable treatment in exchange for working with the

government to help prosecute and convict his co-defendant (Antonio George cooperating with the government to convict Johnny Ho).

I. Johnny Ho's Sixth Amendment right to a trial by an impartial jury was denied where the judge erroneously failed to insist that the prospective jurors answer her questions, and when they did not answer the questions presented to them, the defendant did not have sufficient information from which to make effective use of his peremptory challenges, rendering these peremptory challenges meaningless.

A. The magistrate judge gave the prospective jurors permission to not answer her questions.

All of the prospective jurors chose not to answer important voir dire questions pertaining to (1) racial bias; (2) ability to be fair and impartial; (3) presumption of innocence; (4) reasonable doubt; (5) burden of proof; (6) defendant not testifying; (7) defendant's right to testify; (8) following only the law given to them by the judge; (9) determining the facts; (10) not to consider possible punishment when reaching a verdict; (11) resolving conflicting testimony; (12) testimony of a cooperating witness; (13) not being allowed to discuss with others until they are discharged as jurors; (14) ability to be fair in a case with financial

institutions as victims; (15) credibility of FBI compared to the average person; and (16) evaluating witness testimony.

The prospective jurors remained silent in response to 32 questions asked of them. When trying to understand how this happened, it becomes clear that the prospective jurors were given a specific option to not answer any of these questions if they did not want to give an answer. The magistrate judge instructed them as follows:

“Okay. Now we have 30 of you in the box and there's a whole series of other questions that I'm going to ask to you collectively. *If you* have a comment or want to add something or *want to respond to* this -- *any of these questions*, I ask that you raise your hand, and we'll pass the microphone to you. Okay? And for those of you who are in the back, as I said in the beginning, I want you also to listen to these questions, because if you are called to fill one of these seats, I'll ask you *if you wanted to* add anything. Okay? All right. (emphasis added in bold italics) (R. 55, PageID 432).

The judge gave every single one of the 30 prospective jurors the option to not answer any of the questions by deferring to the prospective

jurors' preferences when stating, "if you . . . ***want to*** respond to ... any of these questions, I ask that you raise your hand"? (emphasis added with bold and italics) (R. 55, PageID 432).

When listening to the judge's instruction, a juror could decide to himself or herself, "I do not want to respond to any of these questions", or a juror could decide to himself or herself after each of the 32 unanswered questions were asked, "I do not want to respond to this question"; or "I know in my mind what my answer is to this question, but I do not need to answer it out loud, and should only answer by raising my hand if I think it is important to answer"; or "I will only speak if I am specifically called on and required to answer".

Once a few questions went by that were not answered by any of the 30 prospective jurors, the prospective jurors fell into a "herd mentality" – conforming to a pattern of passively listening to the judge's questions and not answering - as if they were in school listening to a classroom lecture. The jurors did not at all disregard the judge's instructions pertaining to the questions. Rather, they were choosing – as was an option they were given by the judge – to purposefully not answer dozens of the questions presented to them.

The judge's jury selection process was flawed because there were 32 unanswered questions that the prospective jurors were not required to answer. They did not answer because of the pattern they fell into and because the judge specifically told them that it was acceptable for them not to answer.

This process and the end result of this process left Johnny and his attorney with a lack of information as to which of the jurors may be fair and impartial and which jurors may not be fair and impartial. Johnny's ability to exercise his peremptory challenges was substantially impaired by this process.

The judge abused her discretion by conducting the voir dire in a manner that unduly impaired Johnny's ability to exercise his peremptory challenges or make his challenges for cause. *United States v. Johnson*, 584 F.2d 148, 155 (6th Cir.1978). Johnny could only use the bland demographic information that the jurors gave, such as if they had children, their employment, what they watch on TV, and the stickers on their cars. This information could only be used to make generalizations about the prospective jurors, but did not give Ho any insight as to how these prospective jurors thought about the important legal concepts involved in his case.

A judge cannot conduct voir dire in a process that unduly impairs the defendant's ability to exercise his peremptory challenges or make his challenges for cause. *United States v. Martinez*, 981 F.2d 867, 870 (6th Cir.1992).

Conducting a voir dire where the judge instructs the prospective jurors that answering her questions is optional, is an abuse of discretion because it unduly impaired Johnny's ability to exercise peremptory challenges and to make challenges for cause. Johnny' right to a fair trial by a fair and impartial jury was denied him by the judge because she unfairly conducted jury selection.

B. Discussion

The Sixth Amendment requires that "the accused shall enjoy the right to a . . . trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. Const. Amend. VI.

"Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored. Without adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled . . . Similarly, lack of adequate voir dire impairs the defendant's right to

exercise peremptory challenges where provided by statute or rule, as it is in the federal courts.” *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) (plurality opinion) (internal citation omitted).

Despite its “critical function,” voir dire in federal court is often restricted and conducted exclusively by the trial judge, or in Johnny’s case, by the magistrate judge. But, as the court in *United States v. Harris*, 542 F.2d 1283, 1295 (7th Cir. 1976), recognized: “[T]he defendants must be permitted sufficient inquiry into the backgrounds and attitudes of prospective jurors to enable them to exercise intelligently their peremptory challenges.” “[P]eremptory challenges are worthless if trial counsel is not afforded an opportunity to gain the necessary information upon which to base such strikes.” *United States v. Ledee*, 549 F.2d 990, 993 (5th Cir. 1977). Here, Johnny’s use of peremptory challenges was worthless because the 30 potential jurors in the venire did not answer any of the identified 32 questions asked by the judge, and the judge never insisted that a single one of these 30 potential jurors answer even one of these 32 questions.

Accordingly, in many cases “justice requires that each lawyer be given an opportunity to ferret out possible bias and prejudice.” *Id.* The goal of voir dire is to uncover jurors’ biases, opinions, and attitudes, as

well as their life experiences. The judge should allow the parties to obtain sufficient information about prospective jurors for an informed exercise of peremptory challenges or motions to strike for cause based upon a lack of impartiality. *United States v. Toomey*, 764 F.2d 678, 682 (9th Cir. 1985) (citing *United States v. Baldwin*, 607 F.2d 1295, 1297 (9th Cir. 1979)). Johnny's use exercise of his peremptory challenges was uninformed – he was unable to uncover jurors' biases, opinions, or attitudes, and how they felt about the 32 questions posed to them that were unanswered.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” U.S. Const. Amend. VI. The right to an impartial jury is applicable to the states via the Fourteenth Amendment. *See Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965); *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). *See also Morgan v. Illinois*, 504 U.S. 719, 726, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1992) (discussing *Irvin* and *Turner*). Furthermore, “due process alone has long demanded that, if a jury is to be provided the defendant, regardless of whether the Sixth Amendment requires it, the jury must stand impartial and indifferent to the extent commanded by

the Sixth Amendment.” *Morgan*, 504 U.S. at 727, 112 S.Ct. 2222. The *voir dire* is designed “to protect [this right] by exposing possible biases, both known and unknown, on the part of potential jurors.” *McDonough*, 464 U.S. at 554, 104 S.Ct. 845. Therefore, “[t]he necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious.” *Id.* *Dennis v. Mitchell*, 354 F.3d 511, 520 (6th Cir. 2003).

Here, the 30 potential jurors as a whole were asked 32 questions by the judge about their fitness to serve as jurors and their opinions, beliefs, and attitudes, and none of the 30 jurors were required to answer these questions, and no juror answered a single one of these 32 questions.

In response to defense counsel’s objections to the *voir dire* process and that the jurors were not answering the questions the judge had been asking, the judge answered,

THE COURT: I've seen all of them not hesitate to raise their hand to any question that I had posed, and it shows to me that they're carefully listening, and they did take the oath that they would answer any question truthfully, and I think, based on what I see, that this jury pool, it is not necessary to ask them individually. I think the collective

process is fine, and that's what we're going to go forward with. Okay? But you have an objection.

Defense counsel pointed out one flaw in the judge's analysis – that the jurors as a collective were not answering any of the questions,

MR. FOSTER: The objection is they're not answering the question; they remain silent. Thank you.

The judge continued to justify her voir dire process by trying to look inside the minds of silent potential jurors as follows,

THE COURT: Well, that's because if they have had something they'd like to add to it, they would.

MR. FOSTER: But it's a yes-or-no question, but I understand your ruling.

R. 55, Page ID # 452-453

The judge merely stating that if the jurors had something to add they would have answered is pure speculation. There were some jurors who volunteered answers to some of the other specific questions, but many of the jurors did not answer a single one of the specific questions

asked by the judge after the first round of questioning was completed, where they were all required to answer.

Many people in groups have a fear of public speaking. Unless a person is asked a question individually and directly, often a person will avoid the spotlight and not say anything at all. Indeed, Justice Kennedy of this Court in a dissent once wrote, “I fail to see how the trial court could evaluate the credibility of the individuals seated on this jury. The questions were asked of groups, and individual jurors attested to their own impartiality by saying nothing. *Mu'Min v. Virginia*, 500 U.S. 415, 452, 111 S. Ct. 1899, 1919, 114 L. Ed. 2d 493 (1991). Justice Kennedy impliedly wrote here that when prospective jurors are asked questions in groups, there attestations of impartiality are suspect.

C. Conclusion

This Court has stated that the right to exercise peremptory challenges is “one of the most important of the rights secured to the accused,” *Swain v. Alabama*, 380 U.S. 202, 219 (1965), overruled in part by *Batson v. Kentucky*, 476 U.S. 79 (1986).

Voir dire examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising

peremptory challenges. *Mu'Min v. Virginia*, 500 U.S. 415, 431, 111 S. Ct. 1899, 1908, 114 L. Ed. 2d 493 (1991)

In Johnny's case, he and his counsel's use of the peremptory challenges was almost completely guess work, because none of the 30 prospective jurors gave even a single answer to 32 of the critical questions posed by the judge.

Many critical questions went unanswered, including: (1) Questions about "if the jurors understood important legal concepts" were not answered by a single prospective juror; (2) Questions about "whether jurors would want a person like themselves to be on the jury if they were a defendant" were not answered by a single prospective juror; (3) Questions asking "if the jurors could be fair" were not answered by a single prospective juror; (4) Questions about "reasonable doubt" and the "presumption of innocence" were not answered by a single prospective juror; (5) Questions about a "defendant's decision not to testify" were not answered by a single prospective juror; (6) Questions about "police officer (FBI agent) credibility" were not answered by a single prospective juror; and (7) Questions about "how jurors felt about the government's use of a cooperating co-defendant witness during trial against the defendant Johnny Ho" were not answered by a single prospective juror.

The judge's conduct of the voir dire was an abuse of discretion, because not requiring answers to questions is like not even asking the questions to begin with. The judge explicitly gave the jurors permission to not answer her questions.

Thus, Johnny was denied a fair trial because he was not able to gain enough information from the individual jurors to determine if they would be fair and unbiased, and was unable to make effective use of his peremptory challenges.

Decisions on the peremptory challenges that Johnny was required to use amounted to nothing more than a "coin flip" or a dart thrown at the names of the prospective jurors on a wall while blindfolded.

CONCLUSION

Mr. Johnny Ho respectfully requests that this Court issue a writ of certiorari.

Date: July 24, 2024

Respectfully submitted,


s/ **Mitchell T. Foster**

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