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No.

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IN THE
SUPREME COURT OF THE UNITED STATES

MARK WHITWORTH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE EIGHTH CIRCUIT

_____

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QUESTION PRESENTED

Should a criminal defendant be required to prove prejudice when a federal district court erroneously strikes a potential juror for cause based on her familial association with a criminal defense attorney and her knowledge of a wrongful conviction, yet does not strike for cause venirepersons with familial associations with law enforcement officers?

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Petitioner, Mark Whitworth, respectfully asks this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit entered on July 11, 2024, affirming the district court's judgment.

OPINION BELOW

The opinion below is published at *United States v. Whitworth*, 107 F.4th 817 (8th Cir. 2024), and is attached as Appendix A. Mr. Whitworth did not file a petition for rehearing with the United States Court of Appeals for the Eighth Circuit.

JURISDICTION

Jurisdiction in the United States District Court for the Western District of Missouri was under 18 U.S.C. § 3231, because Mr. Whitworth was charged and convicted of offenses against the United States, i.e., conspiracy to distribute methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), and 846, and possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A).

Mr. Whitworth appealed from his conviction and sentence to the United States Court of Appeals for the Eighth Circuit. Jurisdiction in that court was established by 28 U.S.C. § 1291. The Eighth Circuit denied the appeal on July 11, 2024. Mr. Whitworth did not file a petition for rehearing.

Under Sup. Ct. R. 13.3 and 30, this petition is filed within ninety days of the date on which the Court of Appeals entered its judgment. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Sup. Ct. R. 13.3.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const., Amend. V.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to the Assistance of Counsel for his defence.

U.S. Const., Amend. VI.

STATEMENT OF THE CASE

A. Jury Selection

At the onset of jury selection, the district court had each prospective juror

briefly state their name, employment, marital status, and whether they had children (Tr. at 11).[1] Prospective juror #22, J.M., introduced herself and said she was a junior in college, worked as a waitress, and was single (Tr. at 18). The court added: "Counsel, Ms. M.'s father is B.M., and he's a plaintiff's lawyer here in town. Ms. M.'s mother is C.S., criminal defense lawyer here in town. Ms. M. and I have gone to church together for all of Ms. M.'s life. You may or may not have follow-up questions for Ms. M." (Tr. at 18).[2]

The prosecuting attorney asked the venire panel if they or a family member had been employed in a law office (Tr. at 71). J.M. stated her parents were both attorneys and that she worked for her mother during a summer vacation (Tr. at 74). When asked if her experience would affect her ability to be fair and impartial to both sides, she responded, "No" (Tr. at 74-75). J.M. also stated that her mother practiced in both state and federal court (Tr. 75). The court interjected, "Don't forget that wonderful tour I gave you of the UMKC Law School, Ms. M." (Tr. at 75). J.M. responded, "I won't" (Tr. at 75).

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[1] The record contains six transcripts: the pretrial conference transcript (referenced "PTC Tr."); voir dire (referenced "Tr."); trial transcript day one (referenced "Tr. I"); trial transcript day two (referenced "Tr. II"); trial transcript day three (referenced "Tr. III"); and the sentencing transcript (referenced "Sent. Tr.").

[2] Quotations have been modified to conceal the identities of the juror and her family.

The prosecuting attorney asked the panel whether any family member or close friend was arrested, charged, or convicted of a crime and followed up with questions of whether the person was treated fairly by police, prosecutors, and the court system (Tr. at 87, 89). J.M. said a family friend had a DUI and a close family friend spent 24 years in prison for a murder he did not commit (Tr. at 95). As for the family friend who was convicted of a DUI, J.M. did not believe she was wrongly prosecuted and believed she was treated fairly by police, prosecutors, and the court system (Tr. at 95). In her opinion, the wrongfully convicted family friend was not treated fairly (Tr. at 96). When asked if that experience would make her unable to be fair and impartial, she responded, "No" (Tr. at 96). The district court asked if she was referring to "Mr. Burton," and when J.M. affirmed she was, the court said, "Just so the record is clear, there's a Supreme Court case saying that he was actually innocent" (Tr. at 96).[3]

J.M. did not respond to any of defense counsel's questions (Tr. at 107-124). After the panel was excused for a recess, the court named the panel members it believed should be struck for cause (Tr. at 131-34). Among those named was J.M., about whom the court said:

[3] A recitation of the facts regarding Darryl Burton's wrongful conviction can be found in *Burton v. St. Louis Bd. of Police Com'rs*, 2012 WL 1933761 (E.D. Mo. 2012).

> Ms. M., No. 22, she and I have a lot of conversation. Her father is on my conflicts list, and from a – I feel like from a viewpoint of the justice system that that's too close and doesn't – I know I'm not one of the parties in this case. I just think it's too close looking. Not every kid gets a tour of the law school by a federal judge, and that just seems a little too close, though I give an outstanding tour if any of you are interested.

(Tr. at 132).

Defense counsel objected, saying, "I understand the close relationship and her history with the legal system, but I do not believe that she voiced anything that would be a strike for cause" (Tr. at 133). The court responded, "I appreciate that. If I were you, I would want C.S.'s daughter on my jury as well. You feel free to tell her I said that" (Tr. at 133). Defense counsel inquired whether J.M. remained on the panel, and the court said, "No. She's gone" (Tr. at 135).

Venirepersons with familial relationships with law enforcement officers were not struck for cause. Venireperson #4's husband previously worked for the Missouri Department of Corrections and the Department of Probation and Parole (Tr. at 60, 108). Venireperson #7 had an aunt and uncle with whom he had a close relationship who were law enforcement officers in the Kansas City and Independence police departments, respectively (Tr. at 69-70, 109-10). Venireperson #13's father was a retired transportation officer for the Missouri State Highway Patrol Troop A, the

same troop as government witness Primm, and her uncle was a trooper as well (Tr. at 28-30, 61-62, 113). Venireperson #16's father was a police officer for the Kansas City Police Department for thirty years before retiring (Tr. at 62-63, 114). Venireperson #32's brother-in-law was a police officer (Tr. at 66). The court struck none of these jurors for cause even though their familial relationships might suggest a bias for the prosecution.[4] Each potential juror was peremptorily struck by the defense (Tr. at 136).

B. The Decision Below

On appeal Mr. Whitworth argued that the district court abused its discretion in striking J.M. for cause, even though she did not indicate she could not be fair and impartial, while leaving similarly situated venirepersons on the panel. *United States v. Whitworth*, 107 F.4th 817, 821 (8th Cir. 2024). The government argued "[t]here is 'no legally cognizable right to have any particular juror participate in a defendant's case.'" *Id*. at 821, n. 4. According to the government, an erroneous strike for cause is unreviewable. *Id*., *United States v. Cardena*, 842 F.3d 959, 973 (7th Cir. 2016). The Eighth Circuit disagreed and reviewed for an abuse of discretion. *Id*. Under

[4] The court struck venireperson #12 for cause because her husband was a law enforcement officer and "she didn't respond well with facial expressions to [defense counsel] (Tr. at 15, 111-12, 132). Neither the court nor the parties noted any body language of J.M.

Eighth Circuit law, a defendant must show the district court had no sound basis for its decision, and he suffered actual prejudice from the decision. *Id*. at 821.

The Eighth Circuit questioned "whether the district court's relationship with J.M. and her family necessitated striking J.M. from the venire," without resolving the issue. *Id*. The court denied relief because Mr. Whitworth did not show he was prejudiced by the ruling. *Id*. at 821-22. The court said, "[b]ased on the record before us, there is simply no way to know if and how J.M.'s presence on the jury would have impacted the proceedings." *Id*. at 822.

Mr. Whitworth did not seek rehearing by the Eighth Circuit. He now seeks review by this Court.

REASONS FOR GRANTING REVIEW

In this case and in others, qualified prospective jurors have been dismissed for a world view such as believing the justice system is unfair to African American males, for being affiliated with the National Rifle Association, and for favoring decriminalization of marijuana possession. *See e.g.*, *Mason v. United States*, 170 A.3d 182, 185 (D.C. 2017) (juror believed Black males, including her brother, are treated unfairly by the criminal justice system but stated her brother's experience would not affect her decision and she could be fair and impartial ; *Commonwealth v. Williams*, 481 Mass. 443, 445, 116 N.E.3d 609, 612 (2019) (prospective juror

who worked with low income youth, including teenagers convicted of drug crimes, in a school setting believed "the system is rigged against young African American males" but said she could be unbiased); *United States v. Salamone*, 800 F.2d 1216, 1218 (3d Cir. 1986) (court struck one potential juror and five potential alternates solely based on their affiliation with the National Rifle Association); *King v. State*, 287 Md. 530, 532, 414 A.2d 909, 910 (1980) (two potential jurors disagreed with criminalization of simple possession of marijuana and were struck for cause without being asked if their views would prejudice them against the state).

Some courts hold that there is no remedy when a court erroneously strikes for cause a qualified prospective juror who does not fall within a protected class, because the defendant cannot demonstrate prejudice because the potential juror's removal does not result in a biased juror sitting on the jury. *United States v. Cardena*, 842 F.3d 959, 973 (7th Cir. 2016). "There is 'no legally cognizable right to have any particular juror participate in a [a defendant's] case.'" *Id*., quoting *United States v. Polichemi*, 201 F.3d 858, 865 (7th Cir. 2000). These courts treat the claim as unreviewable.

Others, like the Eighth Circuit here, treat the claim as reviewable under an abuse of discretion standard but require a demonstration of actual prejudice. *United States v. Whitworth*, 107 F.4th 817, 821-22 (8th Cir. 2024). While the Eighth

Circuit theoretically posits a remedy may be available if a court abuses its discretion, its actual prejudice requirement of demonstrating a potentially different outcome had the potential juror served on the jury in effect precludes relief in most cases just as surely as treating the claim as unreviewable.

Other courts seek a middle ground, granting relief if a court automatically excludes an entire class of otherwise qualified jurors, such as NRA members, employing a presumption that these individuals are biased without inquiring whether the affiliation prevents or substantially impairs a juror's impartiality. *Salamone*, 800 F.2d at 1226. Recognizing that the nature of such a practice renders proof of actual harm virtually impossible to adduce, these courts presume prejudice if the court's abuse of discretion results in wholesale exclusion of a group, rather than affecting a single excluded juror. *Id*. at 1227.

This Court should grant Mr. Whitworth's petition and determine whether a presumption of prejudice should be applied where one or more qualified potential jurors are wrongfully excluded for cause based on a life experience, social or political association, or world view that does not prevent them from serving as a fair and impartial juror.

ARGUMENT

Here, a federal district court struck for cause a qualified (capable of being fair

and impartial) venireperson because her mother was a criminal defense attorney, and she was familiar with a man who had been wrongfully convicted and released from prison. The court did not automatically strike for cause jurors with familial associations with law enforcement officers who assured the court they could be impartial. The Eighth Circuit affirmed because Mr. Whitworth could not demonstrate prejudice, saying there was no way to know if J.M.'s presence on the jury would have changed the outcome. *Whitworth*, 107 F.4th at 821-22. Although the Eighth Circuit disavowed the government's argument that the claim is unreviewable, the court's reasoning inevitably leads to the same result since proof of actual harm "is virtually impossible to adduce." *Salamone,* 800 F.2d at 1227.

Erroneously striking unbiased jurors for cause based on their world views, group affiliations, and life experiences strips juries of large parts of the community. Prospective jurors are not required to set aside their life experiences and beliefs to serve on a jury. *Beck v. Alabama*, 447 U.S. 625, 642 (1980). Courts should not impose this burden on prospective jurors by presuming their familial, political, or social affiliations make them automatically biased against the government or the defendant.

In *Lockhart v. McCree*, this Court said, "We have never invoked the fair-cross section principle to invalidate the use of either for-cause or peremptory challenges

to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large." 476 U.S. 162, 173 (1986). The Court reiterated something similar in *Taylor v. Louisiana*, 419 U.S. 522, 538 (1975), adding "[d]efendants are not entitled to a jury of any particular composition."

While the fair-cross section principle may not have been applicable in those cases, they should not be read to preclude relief in this case. Mr. Whitworth is not advocating for a rule entitling a defendant to a petit jury representative of the community at large, which "would cripple the device of peremptory challenge," which are intended to eliminate extremes of partiality on both sides and assure the selection of a qualified and unbiased jury. *Holland v. Illinois*, 493 U.S. 474, 484 (1990). Mr. Whitworth is asking for a rule prohibiting a court from erroneously excluding potential jurors for cause by putting a thumb on the scale for one side in a way that prevents the prosecution and the defense from competing on an equal basis. *Id.* at 481 ("The fair-cross section venire requirement assures, in other words, that in the process of selecting the petit jury the prosecution and defense will compete on an equal basis"). Here, the defense was at a disadvantage because the district court permitted prospective jurors with familial associations to law enforcement officers to serve but prohibited a prospective juror with familial

association to a criminal defense attorney from serving.

The fair-cross section requirement has several purposes. It guards "against the exercise of arbitrary power" and ensures that the "commonsense judgment of the community" will act as "a hedge against overzealous or mistaken prosecutor." *Lockhart*, 476 U.S. at 174. It preserves "public confidence in the fairness of the criminal justice system." *Id*. And it prevents distinctive groups from suffering a "substantial deprivation of their basic rights of citizenship." *Id*. at 176. These purposes cannot be fulfilled if courts exclude individuals presumably more defense oriented and permit individuals presumably more prosecution oriented the chance to serve.

Here, the court excluded, without a motion to strike for cause from the prosecutor, a potential juror with exposure to the criminal justice system through the eyes of a parent who is a criminal defense attorney but allowed potential jurors with exposure to the criminal justice system through the eyes of family members who were law enforcement officers a chance to serve. That Mr. Whitworth had enough peremptory challenges to strike these potential jurors does not solve the problem of courts making inconsistent presumptions about certain categories' ability to serve—those related to law enforcement officers are not influenced by the association while those related to criminal defense attorneys are influenced by the

association. That is an arbitrary rule.

The district court erred in this case, and the error should have a remedy that does not demand a showing of actual prejudice. This Court should presume prejudice and require the government to demonstrate harmless error beyond a reasonable doubt.

CONCLUSION

For these reasons, Petitioner respectfully requests that the Court grant this petition.

Respectfully submitted,

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