No. 10-594

In the Supreme Court of the United States

WILLIAM ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
JOSEPH F. PALMER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion in refusing to strike a juror for cause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 605 F.3d 461.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2010. Pet. App. 1. A petition for rehearing was denied on August 4, 2010 (Pet App. 28). The petition for a writ of certiorari was filed on November 2, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of offering to receive or exchange child pornography, in violation of 18 U.S.C. 2251(d)(1)(A);

transporting or shipping child pornography, in violation of 18 U.S.C. 2252A(a)(1); and possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B). Pet. App. 1, 14-15. He was sentenced to 360 months of imprisonment, to be followed by a lifetime of supervised release. *Id.* at 4, 16-17. The court of appeals affirmed. *Id.* at 1-13.

1. On April 12, 2006, a Federal Bureau of Investigation (FBI) agent investigating child exploitation logged into a chat room and saw advertisements posted by petitioner offering to exchange child pornography. Pet. App. 2; Gov't C.A. Br. 2. Petitioner, using the handle "kidbot," offered access to a file server containing "New Pics/Vids Mostly Girls Few Boys 10-15," and "New Vids Girls only 10-15 NO NON-NUDE." *Id.* at 2-3. Petitioner's advertisements ran more than 300 times during the agent's April 12, 2006 session, and other users connected or attempted to connect to the file server nearly 200 times that day. *Id.* at 3. The agent, following the instructions in petitioner's advertisement, connected to the server, uploaded a file containing a corrupted image to obtain credit to download, and downloaded images showing pre-pubescent girls engaging in sexual activity with adult males. Pet. App. 2; Gov't C.A. Br. 3.

The FBI determined that "kidbot" was using an Internet Protocol address registered to petitioner's mother. Pet. App. 2. The FBI obtained and executed a warrant to search her house. *Ibid.* The agents found petitioner, who was 21 years old and living at his mother's house, in his bedroom with a desktop computer and other storage devices containing more than a thousand images of child pornography. *Ibid.* Petitioner's computer also contained a log file identifying it as the file server from which the agent had downloaded child por-

nography. *Ibid.* The agents found chat logs on petitioner's computer, in which petitioner identified himself as "William" and as a "21-year old male from Illinois." *Ibid.* In the chats, petitioner described how he used chat rooms to obtain and trade child pornography, and he also stated that he had molested children. *Id.* at 2-3; Gov't C.A. Br. 6.

2. A grand jury in the Northern District of Illinois returned an indictment charging petitioner with one count of offering to receive or exchange child pornography, in violation of 18 U.S.C. 2251(d)(1)(A); one count of transporting or shipping child pornography, in violation of 18 U.S.C. 2252A(a)(1); and one count of possessing of child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B).

During jury selection, Juror 31, in response to an item on the questionnaire asking whether anything would make it difficult for her to serve as a fair juror, disclosed that her then six-year-old daughter, who was now grown, had been a victim of an attempted kidnapping. Pet. App. 3, 40. The judge asked the juror whether that experience would somehow prejudice her against the defendant. *Id.* at 3, 32. She initially responded "Yes," but then stated "I can't be positive one way or the other. I don't know how I would react to it, being a touchy situation to begin with." *Id.* at 32.

The judge explained that "both sides are entitled to fairness and, actually, a clean slate in your mind, so that whatever exists in your past does not carry over and influence the decision in this case." Pet. App. 3, 32. The judge asked Juror 31 whether she could be open-minded, and she said that she could. *Id.* at 3, 32-33. The judge then asked whether she could perhaps set her experience aside, and the juror said, "Yes." *Id.* at 3, 33.

The judge explained that petitioner was "entitled to the presumption of innocence" and asked the juror whether she could give petitioner that presumption. *Ibid.* She replied, "I think I could." *Ibid.*

The judge then allowed petitioner's counsel to ask additional questions. Pet. App. 3. Counsel referred to the juror's answer on the questionnaire and again asked her whether the "nature of the charges" and her "past experience" would make it difficult for her to be fair. *Id.* at 3, 33-34. Juror 31 responded that she didn't know, but that, in light of her past experience, the "circumstances" of the trial "bother[ed her] personally, with having children and a little girl." *Id.* at 34. Counsel again asked, "So the charges—the child pornography—just the nature of the charges alone would make it difficult for you to be fair to both parties?" *Ibid.* Juror 31 initially replied that it would, and then she indicated she was unsure. *Id.* at 3-4, 34-35. The judge then explained, "There is not anything wrong with having an impact, but it is whether, just the nature of the charges, you find so offensive that you will not give the guy the benefit of the doubt?" *Id.* at 4, 35. Juror 31 responded, "I would give him the benefit of the doubt until everything is presented, yes." *Ibid.* The judge said, "You strike me as a fair-minded person." *Id.* at 35.

Over petitioner's objection, the district court refused to strike Juror 31 for cause and allowed her to be seated as the twelfth juror. Pet. App. 4. The judge explained that although he initially thought that Juror 31 should be excused, the colloquy as a whole led him to conclude that she could be fair. *Id.* at 35-36. The court indicated that the juror's equivocal statements were caused by defense counsel "push[ing] her in another direction." *Id.* at 36. Petitioner's counsel renewed his objection the

following day, and the judge stated that, following the colloquy, he "became firmly convinced * * * that she could be a fair and impartial juror." Gov't C.A. Br. 11-12. The jury convicted petitioner on all counts. Pet. App. 4.

3. The court of appeals affirmed. Pet. App. 1-13. As relevant here, the court concluded that the district court did not abuse its discretion in refusing to strike Juror 31 for cause. The court noted that a prospective juror may be seated, despite a party's for-cause challenge, if the juror has given "final, unequivocal assurances" that, in deciding the case, the juror can "set aside any opinion [she] might hold." *Id.* at 6 (quoting *Patton* v. *Yount*, 467 U.S. 1025, 1036 (1984)). In considering that question, the court accorded "great deference to the judgment of the experienced trial judge" who had the "unique opportunity to assess the credibility of the jurors." *Id.* at 5 (quoting *United States* v. *Nururdin*, 8 F.3d 1187, 1190 (7th Cir. 1993)).

The court concluded that the district court was "within its discretion" to find that Juror 31 gave "final, unequivocal, and credible assurances that she could set aside any bias" arising from her daughter's attempted kidnapping. Pet. App. 6. The court reasoned that any relevant bias Juror 31 may have held was "relatively minimal," *id.* at 9, because the attempted kidnapping of the juror's daughter "related only tangentially" to petitioner's child pornography crimes and the specific issues in the case. *Id.* at 8. The court further stated that Juror 31 explicitly recognized as much when she agreed that "this crime has nothing to do with that crime." *Id.* at 7. The court also concluded that the juror's statement that she would give petitioner the benefit of the doubt was sufficiently final and unequivocal. *Id.* at 8. The court of

appeals credited the district court's conclusion that the juror's earlier, equivocal statements were caused by defense counsel's "pushing." *Ibid.* Finally, the court of appeals noted that Juror 31 demonstrated an ability to follow the court's instructions by twice stating, in response to the district court's instructions, that she would give petitioner the presumption of innocence. *Id.* at 9.

Judge Wood dissented. In her view, Juror 31's admission that "it would be difficult for her to be fair," combined with her failure to offer "an unequivocal assertion of impartiality," required the juror's dismissal. Pet. App. 12-13. Judge Wood noted that the juror's assurance that she would give petitioner the "benefit of the doubt" was insufficient because it suggested a more lenient standard than proof beyond a reasonable doubt, and because the statement was made in response to the district court's "misleading[]" statement that there was "not anything wrong" with the juror's prior experience "having an impact" on her perception of the case. *Id.* at 13.

DISCUSSION

Petitioner contends (Pet. 9-15) that the district court abused its discretion in refusing to excuse Juror 31 for cause. The court of appeals correctly rejected that contention, and the court's fact-bound ruling does not conflict with any decision of this Court or of another court of appeals. Further review is unwarranted.

A district court must excuse for cause any prospective juror who would be unable to render an impartial verdict. See 28 U.S.C. 1866(c)(2). The court need not excuse a juror for cause, however, if the juror indicates an ability to lay aside his or her opinion and render a verdict based on the evidence. See *Patton* v. *Yount*, 467

U.S. 1025, 1037 n.12 (1984); *Irvin* v. *Dowd*, 366 U.S. 717, 722-723 (1961). Because the inquiry into a prospective juror's bias turns largely on assessments of "demeanor and credibility that are peculiarly within a trial judge's province," *Uttecht* v. *Brown*, 551 U.S. 1, 7 (2007), appellate review of those determinations is highly deferential. "Reviewing courts are properly resistant to second-guessing the trial judge's estimation of a juror's impartiality, for that judge's appraisal is ordinarily influenced by a host of factors impossible to capture fully in the record—among them, the prospective juror's inflection, sincerity, demeanor, candor, body language, and apprehension of duty." *Skilling* v. *United States*, 130 S. Ct. 2896, 2918 (2010); see *Wainwright* v. *Witt*, 469 U.S. 412, 428 (1985); *id.* at 429 (noting that the trial judge's "predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record"); *United States* v. *Jimenez*, 513 F.3d 62, 72 (3d Cir. 2008) (trial court's resolution of whether a prospective juror can render a fair verdict entitled to "special deference"); *United States* v. *Tipton*, 90 F.3d 861, 880 (4th Cir. 1996) (appellate review of district court rulings on for cause challenges "is appropriately most deferential"), cert. denied, 520 U.S. 1253 (1997). As the court observed in *United States* v. *Lowe*, 145 F.3d 45 (1st Cir. 1998), "[t]here are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empaneling of a jury." *Id.* at 49 (quoting *United States* v. *Gonzalez-Soberal*, 109 F.3d 64, 69 (1st Cir. 1997)).

The extraordinary deference accorded a district court's rulings on for-cause challenges also reflects a recognition that juror testimony on voir dire may be

"ambiguous and at times contradictory." *Patton*, 467 U.S. at 1039. As this Court noted in *Patton*, "the lay persons on the panel may never have been subjected to the type of leading questions and cross-examination tactics that frequently are employed," and thus they "cannot be expected invariably to express themselves carefully or even consistently." *Ibid.* For that reason, "it is [the trial] judge who is best situated to determine competency to serve impartially," and he "properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading." *Ibid.*; see *Skilling*, 130 S. Ct. at 2918 ("In contrast to the cold transcript received by the appellate court, the in-the-moment *voir dire* affords the trial court a more intimate and immediate basis for assessing a venire member's fitness for jury service."); *Reynolds* v. *United States*, 98 U.S. 145, 156-157 (1879) ("[T]he manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. * * * Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case."); *United States* v. *Moore*, 149 F.3d 773, 780 (8th Cir.) (concluding that district court's credibility determination concerning juror partiality "cannot be manifest error; indeed it is virtually unassailable on appeal"), cert. denied, 525 U.S. 1030 (1998). Thus, "in reviewing claims of this type, the deference due to district courts is at its pinnacle." *Skilling*, 130 S. Ct. at 2923.

The district court acted within its discretion in denying petitioner's for-cause challenge to Juror 31. It is true that Juror 31 initially stated that the incident involving her daughter would make it difficult for her to be fair, and that she was unsure whether that incident

would influence her ability to begin the case presuming the defendant's innocence. But she also stated that she would try to be open-minded and that she thought she would be able to do so. She affirmed her belief that she could set her experience aside, she recognized that her daughter's experience had nothing to do with petitioner's case, and she twice said she would give petitioner the presumption of innocence. That she gave an equivocal answer to defense counsel's inquiry whether her experience would make it difficult to be fair did not automatically disqualify her from service, especially considering her subsequent assurances to the judge. See *United States* v. *Johnson*, 495 F.3d 951, 964 (8th Cir. 2007) (upholding denial of a motion to strike a juror for cause, because "[a]lthough the juror gave some equivocal answers and acknowledged the possibility that his judgment could be affected by some aspects of the case, the district court concluded that juror 600 could be fair and impartial and that his statements reflected the reasonable self doubts of a conscientious and reflective person") (internal quotation marks omitted), cert. denied, 129 S. Ct. 32 (2008); *United States* v. *Alexander*, 48 F.3d 1477, 1484 (9th Cir.) (district court did not abuse its discretion in concluding that when juror said she "believed" she could act impartially, this was equivalent to saying she would do so), cert. denied, 516 U.S. 878 (1995); *United States* v. *Barraza*, 576 F.3d 798, 801-804 (8th Cir. 2009) (no abuse of discretion in refusing to strike for cause a juror who stated his strong feelings about a parent's responsibility could affect his ability to hear the case but stated he would try to be fair), cert. denied, 131 S. Ct. 67 (2010); *United States* v. *Grandison*, 780 F.2d 425, 432 (4th Cir. 1985) (no abuse of discretion in refusing to strike for cause a juror who expressed

doubts as to whether she could remain uninfluenced by the indictment but stated she would try to follow the court's instructions), vacated on other grounds, 479 U.S. 1076 (1987).

Petitioner contends (Pet. 9-13) that the decision below conflicts with this Court's statement in *Reynolds* that "a juror who has formed an opinion cannot be impartial." 98 U.S. at 155. But Juror 31 did not state that she had formed an opinion as to petitioner's guilt, but instead assured the court that she would presume his innocence until the evidence was presented. Nor is this case analogous to the situation in *Irvin* v. *Dowd*, in which the Court ruled that jurors' declarations of impartiality were insufficient where a "barrage" of publicity in a small rural community, including defendant's reported confession to a brutal murder and robbery spree, resulted in a jury composed two-thirds of people who thought petitioner was guilty before the trial began. 366 U.S. at 725-728.

Petitioner further contends (Pet. 13) that this Court should establish a "clear line" requiring dismissal of any juror who indicates a bias unless the juror makes "an unambiguous statement of impartiality." Such a "bright line rule" would be inconsistent with the special deference this Court has accorded to trial judges in this context, as well as with this Court's recognition that jurors "cannot be expected invariably to express themselves carefully or even consistently." *Patton*, 467 U.S. at 1039; see *United States* v. *Wood*, 299 U.S. 123, 145-146 (1936) ("Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.").

Finally, petitioner contends (Pet. 14-15) that the decision below conflicts with *In re Winship*, 397 U.S. 358 (1970), because Juror 31 said she would give petitioner "the benefit of the doubt," rather than explicitly reciting the constitutionally required standard of proof beyond a reasonable doubt. That contention ignores the context of the juror's statement. The juror was not discussing the standard of proof. She referred to giving petitioner the "benefit of the doubt until everything is presented" to assure the court that she would be impartial and would not come to the case with a previously formed opinion as to petitioner's guilt. Given that context, the court of appeals properly "rel[ied] on the trial court's discretion in determining which [of Juror 31's] responses best manifest[ed] the juror['s] true opinions." *Tipton*, 90 F.3d at 880 (quoting *Briley* v. *Bass*, 750 F.2d 1238, 1246 (4th Cir. 1984), cert. denied, 470 U.S. 1088 (1985)). The court of appeals' fact-bound conclusion that the district court acted within its discretion does not implicate any conflict of authority or merit this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ('We do not * * * grant certiorari to review evidence and discuss specific facts.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
LANNY A. BREUER
Assistant Attorney General
JOSEPH F. PALMER
Attorney

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