No. 05-461

In the Supreme Court of the United States

WYATT HENDERSON, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the exemption of state and local law enforcement officers from jury service under the Jury Selection and Service Act of 1968, 28 U.S.C. 1863(b)(6), or the slightly broader exception adopted by the district court, which exempts federal and private law enforcement officers as well, violated petitioner's Sixth Amendment right to a jury drawn from a fair cross-section of the community, when the excluded group constitutes only 0.55% of the eligible juror pool.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 409 F.3d 1293. The opinion of the district court (Pet. App. 33a-45a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2005. A petition for rehearing was denied on July 15, 2005 (Pet. App. 46a-47a). The petition for a writ of certiorari was filed on October 6, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of deprivation of rights (use of excessive force) under color of law, in violation of 18 U.S.C. 242; obstruc-

tion of justice (submitting a misleading or incomplete police report), in violation of 18 U.S.C. 1512(b)(3) (2000 & Supp. II 2002); and making false statements to an agent of the Federal Bureau of Investigation, in violation of 18 U.S.C. 1001. He was sentenced to imprisonment for a term of 87 months. The court of appeals affirmed.

1. The Jury Selection and Service Act of 1968 (the Act), 28 U.S.C. 1861 *et seq.*, requires each United States district court to "devise and place into operation a written plan for random selection of grand and petit jurors that shall be designed to achieve the objectives of [the Act]." 28 U.S.C. 1863(a). The Act requires that each district court's plan shall bar from jury service three categories of individuals: members of the armed services in active service; "members of the fire or police departments of any State, the District of Columbia, any territory or possession of the United States, or any subdivision of a State, the District of Columbia, or such territory or possession"; and public officers. 28 U.S.C. 1863(b)(6). Pursuant to this statutory directive, the United States District Court for the Middle District of Florida provided in its Plan for the Qualification and Random Selection of Grand and Petit Jurors (Jury Plan) (Pet. App. 54a-73a) that each of the three groups identified in 28 U.S.C. 1863(b)(6) is exempt from jury service. Pet. App. 67a. The district court's Juror Qualification Questionnaire (*id.* at 74a-80a) includes questions designed to discover whether a prospective juror is exempt, including a question whether the individual is a "[m]ember of any governmental police or regular fire dep[artmen]t." *Id.* at 77a. Under the district court's practice, any individual who has arrest powers, including federal law enforcement officers and part-time and pri-

vate law enforcement officers, is considered to be covered by the exemption. *Id.* at 37a.

2. The criminal charges against petitioner arose from his apprehension and arrest of Christopher Grant while petitioner was a corporal with the Charlotte County, Florida, Sheriff's Department. Pet. App. 2a. Grant was targeted by the Department's Vice and Organized Crime Component (VOCC) for selling marijuana. *Ibid.* After Grant fled from VOCC officers attempting to arrest him as part of an undercover sting operation, petitioner pursued Grant's minivan and pulled it over to the side of the road. *Ibid.* Petitioner "pointed his service weapon at Grant and ordered him out of his car and onto his knees." *Ibid.* "Grant testified that he complied, exiting the car and kneeling on the ground with his hands on his head." *Ibid.*

Another officer who arrived at the scene, Detective Keith Bennett, testified that petitioner "approached Grant with his gun in his right hand, placed a knee on Grant's back and using his substantial weight advantage, 'rode him to the ground.'" Pet. App. 3a. Grant testified that subsequent to the takedown, petitioner struck him forcefully in the jaw with a "black object." *Id.* at 3a. Detective Bennett corroborated Grant's testimony, stating that "once Grant was prone and offering no resistance, he saw [petitioner's] gun arm move to strike Grant." *Ibid.*

After the incident, according to police witnesses, petitioner made incriminating statements indicating that he had struck Grant with his pistol. Pet. App. 3a. Detectives Bennett and Jack Collins further testified that petitioner instructed subordinate VOCC officers "not to include details of the arrest in their own police reports," and that petitioner told Bennett to deny that petitioner

had struck Grant. *Id.* at 3a-4a. Petitioner's own police report stated that "no force" had been used in the arrest and omitted any mention of striking Grant. *Id.* at 4a. "In a subsequent interview with an FBI agent investigating Grant's allegations of excessive force, [petitioner] represented that he had thrown his gun into his car before approaching Grant." *Ibid.*

3. Before trial, petitioner filed a motion to dismiss the indictment in which he challenged the jury selection process. Petitioner's motion argued, *inter alia*, that the Middle District of Florida's Jury Plan, and its practices, violated his Sixth Amendment right to a jury composed of a fair cross-section of the community by excluding law enforcement officers from the pool from which the jury would be chosen.

The district court denied petitioner's motion. Pet. App. 33a-45a. The court first found that, even assuming that petitioner had established a *prima facie* case that the jury selection process did not produce a fair cross-section of the community because the court systematically excluded a distinctive group composed of law enforcement officers, the government had sufficiently rebutted petitioner's case by demonstrating the "significant state interest" of "keeping state and federal law enforcement officers on the street." *Id.* at 40a-41a. On this particular point, the district court found "instructive" prior circuit precedent holding that exempting police officers "from jury service because it is good for the community that they not be interrupted in their work does not violate the United States Constitution." *Ibid.* (quoting *United States* v. *Terry*, 60 F.3d 1541, 1544 (11th Cir. 1995), cert. denied, 516 U.S. 1060 (1996) (internal citations omitted)). Following this precedent, the district court concluded that "allowing state and federal

law enforcement officers and/or safety personnel, whether full or part-time, to perform their duties without interruption of jury services benefits the community" and presents "no violation of [petitioner's] Sixth Amendment rights." *Ibid.*

4. The court of appeals affirmed the district court's denial of petitioner's Sixth Amendment claim. Pet. App. 19a-22a.[1] The court recited the three-step analysis of *Duren* v. *Missouri*, 439 U.S. 357 (1979), and applied the *Duren* test for rebutting a *prima facie* case. The court agreed with the district court that the exemption at issue in this case passed constitutional muster under the circuit's earlier decision in *Terry*, even assuming that petitioner could show a *prima facie* Sixth Amendment violation, as it "does not reach much further than the exemption in *Terry*." Pet. App. 21a. In relevant part, the court of appeals observed that "federal, part-time, and private law enforcement officers"—the officers not covered by the exemption set forth in 28 U.S.C. 1863(b)(6) that the *Terry* court upheld—"would only compose a fraction" of the total number of law enforcement officers. Pet. App. 21a. Because law enforcement officers constitute only 0.55% of the eligible juror pool in the relevant area by petitioner's estimate, the court of appeals reasoned that "[i]t thus 'may be fairly said that the jury lists or panels are representative of the community.'" *Ibid.* (quoting *Duren*, 439 U.S. at 367 (internal citation omitted)). Moreover, even the slightly broader exemption for federal, part-time, and private law enforcement officers "manifestly and primarily" advances the significant interest of "allowing police officers to

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[1] The court of appeals vacated petitioner's sentence because of an error that is not relevant to this petition. See Pet. App. 24a-26a.

perform their duties without the interruption of jury service." *Ibid.*

Finally, the court of appeals rejected petitioner's argument that the district court's plan violated the Jury Selection and Service Act. Noting that a mere "technical violation" of the Act does not warrant relief, Pet. App. 21a, the court concluded that "[s]ince [petitioner's] figures state that law enforcement officers as a whole compose only 0.55% of the population in the division, the additional sweep of the Jury Plan in this case excludes, on average, less than one juror per 23-person [grand jury] panel," which is not "a significant enough impact * * * to violate the Act." *Id.* at 22a.

ARGUMENT

Petitioner contends (Pet. 7-9) that the court of appeals' decision upholding the constitutionality of the Jury Selection and Service Act as applied by the Middle District of Florida "directly contravene[s]" this Court's precedents on the fair-cross-section requirement of the Sixth Amendment. He also asserts (Pet. 10-13) that the policy of excluding police officers from juries is not justified in today's society. The court of appeals' decision conforms to this Court's precedents and does not conflict with a decision of any other circuit. Indeed, no other court of appeals has addressed the issue presented. This case does not present a legal issue warranting review by this Court.

1. The Sixth Amendment to the United States Constitution provides that "[i]n 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." U.S. Const. Amend. VI. The Court has interpreted this pro-

vision to require that jury venires be composed of a fair cross-section of the community. See *Holland* v. *Illinois*, 493 U.S. 474, 480 (1990); *Duren* v. *Missouri*, 439 U.S. 357, 363-364 (1979); *Taylor* v. *Louisiana*, 419 U.S. 522, 526-531 (1975).

In *Duren*, this Court held that "[i]n order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." 439 U.S. at 364. Even if a defendant establishes a *prima facie* case, the government may rebut that *prima facie* case by showing that the challenged exclusion serves "a significant [government] interest [that is] manifestly and primarily advanced by those aspects of the jury-selection process, such as exemption criteria, that result in the disproportionate exclusion of a distinctive group." *Id*. at 367-368.

Petitioner asserts (Pet. 8) that the Jury Selection and Service Act's exclusion of law enforcement officers from jury service, "as implemented and expanded upon" by the Middle District of Florida, is "expressly" prohibited by this Court's decisions in *Duren* and *Taylor*. In fact, far from expressly prohibiting the exemption at issue in this case, those cases recognize the constitutionality of reasonable exemptions of occupational groups —like the one at issue in this case—that meet community needs. *Taylor* stated that "[t]he States are free to grant exemptions from jury service to * * * those engaged in particular occupations the uninterrupted per-

formance of which is critical to the community's welfare. It would not appear that such [an] exemption[] would pose [a] substantial threat[] that the remaining pool of jurors would not be representative of the community." 419 U.S. at 534 (citing *Rawlins* v. *Georgia*, 201 U.S. 638 (1906)). In *Duren*, this Court reiterated that "it is unlikely that reasonable exemptions, such as those based on * * * community needs, 'would pose substantial threats that the remaining pool of jurors would not be representative of the community.'" 439 U.S. at 370 (quoting *Taylor*, 419 U.S. at 534).[2]

This Court's reasoning in *Taylor* and *Duren* makes clear that neither the Jury Selection and Service Act's exclusion of state and local law enforcement officers nor the Middle District of Florida's slightly broader exemption for federal and private law enforcement officers poses a "substantial threat" to the representativeness of juries. Petitioner's attempt to liken the exemption for law enforcement officers to the States' discriminatory exemption of women, at issue in *Taylor* and *Duren*, is unavailing. In *Duren*, this Court observed that the "percentage of the community made up of the group alleged to be underrepresented" is "the conceptual benchmark for the Sixth Amendment fair-cross-section requirement" and disagreed with the lower court that jury venires containing approximately 15% women are

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[2] Petitioner criticizes the Eleventh Circuit for having relied, in its opinion in *United States* v. *Terry*, 60 F.3d 1541 (1995), cert. denied, 516 U.S. 1060 (1996), on this Court's decision in *Rawlins*, which petitioner dismisses as a "century-old case" that involved a due process, rather than a Sixth Amendment, claim. See Pet. 11-12. This Court's own reliance on *Rawlins* in *Taylor* and reiteration of that reasoning in *Duren* refutes petitioner's attempt to diminish the relevance of *Rawlins* to the court of appeals' analysis.

"reasonably representative" of a community in which women constitute 54% of the population. 439 U.S. at 364-366; see *Taylor*, 419 U.S. at 534. Although the Court has "never announced mathematical standards for the demonstration of 'systemic' exclusion" of a group, *Alexander* v. *Louisiana*, 405 U.S. 625, 630 (1972), the courts of appeals have been consistent in finding no Sixth Amendment violation in cases where the absolute disparity between a group's representation within the jury-eligible community and in the jury venire was far greater than existed here, see, *e.g.*, *United States* v. *Gault*, 141 F.3d 1399, 1402-1403 (10th Cir.) (7% absolute disparity), cert. denied, 525 U.S. 910 (1998); *United States* v. *Suttiswad*, 696 F.2d 645, 649 (9th Cir. 1982) (7.7%); *United States* v. *Tuttle*, 729 F.2d 1325, 1327 (11th Cir. 1984) (9.1%), cert. denied, 469 U.S. 1192 (1985).

The exclusion of law enforcement officers—a group that by petitioner's own estimate constitutes a mere 0.55% of the eligible jury pool—does not render a jury significantly unrepresentative of the community, and the exclusion of the smaller subset of federal and private law enforcement officers, who are exempted under the Middle District of Florida's plan but not by the Act, is even less significant. See Pet. App. 21a (concluding that even without law enforcement officers included, "the jury lists or panels are representative of the community"). As the court of appeals noted, a disparity of 0.55% "excludes, on average, less than one juror per 23-person [grand jury] panel." *Id.* at 22a. Indeed, even if there were no exception whatsoever for law enforcement officers, there would be, on average, only one law enforcement officer among every eight 23-person grand

juries, and one officer among every sixteen 12-person petit juries.

The court of appeals' decision upholding the Jury Selection and Service Act's exclusion of law enforcement officers, as applied by the Middle District of Florida, is fully consistent with *Taylor* and *Duren*.[3]

2. Petitioner's challenge to the court of appeals' determination that "a significant [government] interest is manifestly and primarily advanced," *Duren*, 439 U.S. at 367, by the law enforcement exemption— *i.e.*, "allowing police officers to perform their duties without the interruption of jury service," Pet. App. 21a, does not warrant review by this Court. Contrary to petitioner's claim (Pet. 12) that excluding police officers from jury service "is not justified in today's society," the courts below correctly held that there is a vital societal interest in having law enforcement officers on the streets, performing their role of protecting the public. Petitioner's criticism of a presumption he characterizes as one that society can "never spare a law enforcement officer for jury duty" overlooks the cumulative impact on scarce law enforcement resources that would result from those offi-

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[3] Although the court of appeals did not reach this issue, the court of appeals' result was also correct for the additional reason that petitioner failed to establish a *prima facie* case. In *Duren*, this Court held that "any [exemption] category expressly limited to a group in the community of sufficient magnitude and distinctiveness so as to be within the fair-cross-section requirement—such as women—runs the danger of resulting in underrepresentation sufficient to constitute a prima facie violation of that constitutional requirement." 439 U.S. at 370. As noted above, petitioner's own estimate puts law enforcement officers at 0.55% of the pertinent jury pool, which is not a community of "sufficient magnitude" to raise an issue of underrepresentation.

cials having to report for jury duty and await the jury selection process to run its course. In view of the compelling social interest in having law enforcement officials perform their jobs, there can be no genuine question that the exclusion of this occupational group is constitutionally permissible.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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