No.

IN THE

Supreme Court of the United States

ROGERS LACAZE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The undisputed facts show that Orleans Parish District Court Judge Frank Marullo was a witness in the police investigation relating to the likely murder weapon in this case. Judge Marullo was alleged to have signed the order that released a 9mm gun from police evidence to Petitioner's codefendant—a gun that was likely then used to murder a police officer and two civilians. During the investigation, Judge Marullo denied signing the order and maintained that his signature had been forged. Judge Marullo subsequently presided over Petitioner's trial and chose not to disclose the investigation, his involvement in it, or his alleged association with the weapon. He continued his nondisclosure even though the release of the weapon was relevant to Petitioner's defense.

Following this Court's GVR in light of *Rippo v. Baker*, 137 S. Ct. 905, 907 (2017) (summarily reversing denial of judicial recusal claim), the Louisiana Supreme Court acknowledged that Judge Marullo had an objectively ascertainable self-interest in avoiding disclosure of his alleged connection to the likely murder weapon: "Realistically, the average judge would be vigilant to avoid being unjustly associated with any wrongdoing surrounding the release of the possible murder weapon" and "harbor[] some sensitivity about" that association. But the court concluded a judge may constitutionally preside despite such self-interest in the case before him—without even disclosing it—and limited this Court's recusal standard to cases involving bias specifically "for or against" a party.

The first question presented is whether Judge Marullo's failure to recuse, or even disclose, violated Petitioner's rights under the Due Process Clause.

In *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), this Court announced a test for obtaining a new trial where it is learned that a juror failed to disclose a material fact at voir dire: "[A] party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556. In this case concerning the murder of a police officer and two civilian siblings, two empaneled jurors—each asked multiple times about any connections to law enforcement—withheld that they were, in fact, career-long law enforcement employees. One was *present in the 911 dispatch room at the time of the call for this particular murder* and *personally attended the victim officer's funeral*. A third juror, asked multiple times if she had relatives who were victims of violent crime, did not disclose that her own two siblings had been murdered.

As Respondent previously conceded before this Court, lower courts are entrenched in a deep split on the second and third questions raised by this case:

2. Under *McDonough*, does demonstrating "a valid basis for a challenge for cause" require a showing that the juror would have been subject to mandatory disqualification or that a reasonable judge would have granted a challenge for cause?

3. Does the *McDonough* test apply only to a juror's deliberate concealment or does it also apply to misleading omissions?

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PETITION FOR WRIT OF CERTIORARI

Rogers Lacaze respectfully petitions for a writ of certiorari to review the judgment of the Louisiana Supreme Court.

OPINION AND ORDER BELOW

The Louisiana Supreme Court's opinion following remand from this Court (Pet.App. 1a–25a) is not yet reported, but is available at 2018 WL 1281112. This Court's GVR (Pet.App. 26a) is published at 138 S. Ct. 60. The Louisiana Supreme Court's prior opinion (Pet.App. 27a–50a) is reported at 208 So. 3d 856. The opinions of the Court of Appeal for the Fourth Circuit (Pet.App. 51a–52a) and Criminal District Court for Orleans Parish (Pet.App. 53a–209a) are unpublished.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on March 13, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent constitutional provisions are reprinted at Pet.App. 232a.

STATEMENT

I. Background.

On March 4, 1995, New Orleans Police Department ("NOPD") officer Ronald Williams and two siblings, Ha and Cuong Vu, were shot and killed at a restaurant in New Orleans. All three were killed with a 9mm gun that was not recovered at the time of the offense. Shortly thereafter, another NOPD officer, Antoinette Frank, was identified as one of the shooters. Following her arrest, Officer Frank claimed Petitioner, who was eighteen years old, was her accomplice.

The State indicted Officer Frank and Petitioner for first-degree murder. Both matters were assigned to Orleans Parish Judge Frank Marullo. Judge Marullo scheduled Petitioner's capital trial to begin less than three months later, a pace unheard of for a capital trial. He made clear that he would allow no continuances. Writ.App. 1161.[1]

Petitioner's defense was that he did not participate in the homicide, but believed that Officer Frank planned and committed the murder with her brother, Adam Frank, after obtaining a 9mm gun from the police property room to use in the crime. Pet.App. 19a. To support this defense, Petitioner took the stand to testify that Officer Frank had told him she would be getting a gun: "I got a friend of mine down in the Property Room, and I should be getting a nine millimeter soon." R.7:565. Petitioner was unable to

[1] "Writ.App." refers to the postconviction record lodged with the Louisiana Supreme Court. "R.X:Y" refers to volume X, page Y of Petitioner's trial record.

identify and present any other evidence corroborating this defense, however.

The jury convicted Petitioner of first-degree murder and, the next day, sentenced him to death.

II. Postconviction Discovery That Judge Marullo Was A Witness In The Investigation Into The Potential Murder Weapon.

On postconviction, Petitioner discovered that his own trial judge, Judge Marullo, had been a witness in an NOPD investigation into the release of a 9mm gun to his codefendant, Officer Frank.[2]

In the course of investigating the murders, NOPD learned that Officer Frank obtained two weapons from its evidence room. Sergeant Robert Harrison, assigned to investigate the release of the weapons, learned that Officer Frank obtained the 9mm gun with the help of David Talley, the officer in charge of the evidence room's gun vault. Pet.App. 3a, 210a–11a.[3]

According to Sergeant Harrison's contemporaneous report, Officer Talley obtained the 9mm gun for Officer Frank using a court order bearing Judge Marullo's signature. Pet.App. 3a. After obtaining the 9mm gun, Officer Frank reported it stolen ten days before the murders. *Id*. That report has since been proven false, as the gun was found three years later

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[2] The facts recited herein are as found by the courts below or undisputed.

[3] The NOPD investigation report is included at Pet.App. 210a–31a.

in the possession of her brother, Adam Frank. Pet.App. 3a–4a.

Officer Talley and Judge Marullo were both questioned during the NOPD investigation. Officer Talley admitted he helped Officer Frank obtain the 9mm gun from the evidence room. Pet.App. 213a–16a, 218a–23a. He stated that he brought the court order to Judge Marullo's chambers for his signature. Pet.App. 216a.[4]

Before Petitioner's case was assigned to Judge Marullo, Sergeant Harrison met with Judge Marullo and presented him with the order bearing his signature. Pet.App. 4a. Judge Marullo denied the signature was his, insisting "he would not have signed the order" because it "did not have a description of the weapon to be released." Pet.App. 214a.

Given Judge Marullo's denial and the implication that Officer Talley forged the signature, Sergeant Harrison determined it was necessary to obtain a taped statement from Judge Marullo. Pet.App. 4a, 215a. When Sergeant Harrison approached Judge Marullo this second time, Judge Marullo stated he had been assigned Petitioner's case and would not provide a taped statement until the trial ended. Pet.App. 215a, 217a. The investigation "remained open through the duration of Defendant's trial and Frank's trial for the purpose of obtaining a statement from Judge Marullo." Pet.App. 4a.

During Petitioner's trial, Judge Marullo never disclosed he had participated in the police investigation

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[4] At the time, NOPD policy allowed weapons in the evidence room to be transferred to officers upon *ex parte* court order.

into the 9mm gun, or that the investigation even existed. *Id.* On the first day of trial, Petitioner's counsel moved to recuse Judge Marullo on other grounds.[5] Despite the resulting inquiry into Judge Marullo's neutrality, Judge Marullo made no mention of his involvement in the investigation or his alleged connection to the 9mm gun. *Id.* Judge Marullo also made no disclosure upon learning the defense's theory that Officer Frank had committed the murders with her brother after obtaining a 9mm gun from the police property room or hearing Petitioner's testimony to that effect. Judge Marullo thus left Petitioner without knowledge of evidence that would have corroborated his defense—that there had been an investigation confirming Officer Frank, in fact, obtained a 9mm gun from police evidence before the murder.

During his investigation, Sergeant Harrison learned that Judge Marullo's alleged association to the release of the 9mm gun had come up in a closed-chamber conference during Officer Frank's trial (approximately two months after Petitioner's conviction). Pet.App. 218a–19a. During Officer Frank's trial, the State sought to prove she obtained the 9mm gun from police evidence to commit the murder. Writ.App. 1491. When the State attempted to call Officer Talley as a witness, Judge Marullo conducted an off-record, *ex parte* conference with the prosecution. Writ.App. 1489.

Judge Marullo then convened a closed-chambers meeting on the record, wherein he confirmed his

[5] Counsel's motion alleged Judge Marullo had "screamed" at him so harshly to make him feel "inadequate and incompetent" to represent Petitioner. R.3:527.

recollection of the investigation into the release of the 9mm gun and his alleged association with it. Judge Marullo characterized Officer Talley's receipt of the gun as "a crime" and "a scam." Writ.App. 1491–92, 1495. He stated that he did not recall signing the order and (contrary to Sergeant Harrison's contemporaneous report) said he told Sergeant Harrison "it would be perfectly logical and correct that I would do something like that." Writ.App. 1490. Judge Marullo insisted three times that he had produced handwriting exemplars "to be analyzed by an expert" during the investigation and "they came back and told me it wasn't my signature." Writ.App. 1490–91, 1494–95. This also conflicted with Sergeant Harrison's report, which noted that other witnesses, but not Judge Marullo, had provided handwriting exemplars, and that even those exemplars came back inconclusive. Pet.App. 5a n.5, 223a.

Judge Marullo made clear in the closed-chambers conference that he would allow no testimony related to his involvement in the release of the 9mm weapons: "You are going to dig up something and it is going to come out about this investigation about the guns coming out of that room." Writ.App. 1493. "I'm not going to get involved in all of that—about the guns." Writ.App. 1492. Judge Marullo allowed the State to present evidence that Officer Frank obtained a 9mm gun from Officer Talley before the murder, but precluded any inquiry related to the investigation or his connection to the release of the weapon.

Sergeant Harrison approached Judge Marullo a third time after the completion of Petitioner's and Officer Frank's trials. Sergeant Harrison asked Judge Marullo if he remembered their prior conversation, in

which Judge Marullo indicated he would provide a taped statement at the end of trial. Pet.App. 217a–18a. Judge Marullo said yes, but that he would not provide a taped statement due to appeals, which would last "for a long time." *Id.*

The following year, Judge Marullo ran for reelection in a hotly-contested campaign, prevailing 51% to 49% over his opponent. Judge Marullo's campaign materials promoted that he was "tough on crime" and had sentenced "Lacaze to die by lethal injection."

At Petitioner's postconviction hearing, Judge Marullo recalled being approached in the "criminal investigation" and insisted he "never ordered the gun to be given to Antoinette Frank." Writ.App. 654. This time, Judge Marullo's explanation was that he would "never, ever" have released a gun indirectly "to one officer to give to another." Writ.App. 653.

III. Postconviction Discovery Of Jurors' Withholding Of Information At Voir Dire.

On postconviction, Petitioner also discovered that, in a case concerning the murder of a police officer and two siblings, he was convicted by two jurors who withheld their career-long employment by law enforcement and another juror who did not disclose that her own two siblings had been murdered.

David Settle. Juror Settle "had a long history of employment in the field of law enforcement." Pet.App. 70a. He spent five years in the Southern Railway Police Department as a special agent with the power to arrest, at which point he became a Sergeant of Police. *Id*. He worked in that capacity for an additional 11 years, until being discharged for misappropriating property. *Id.* At the time of Petitioner's trial,

Juror Settle was employed by the Louisiana State Police, New Orleans division, as a public safety officer. Pet.App. 71a.

At voir dire, Juror Settle was assigned to the second panel of jurors and was seated in the audience during questioning of the first panel. When questioning the first panel of jurors, defense counsel asked if anyone had relations to law enforcement. Pet.App. 70a. One potential juror disclosed her nephew was a police officer; another disclosed his brother-in-law was a customs officer. When Juror Settle's panel was called, "[t]he very first thing that happened" was a "question from the court as to whether anyone had something to volunteer based upon what they had heard with the first panel." *Id*. Juror Settle "did not respond, although he should have heard defense counsel's question." *Id.*

The court then asked the first row of the second panel—where Juror Settle sat—"if anyone was related to anybody in law enforcement." *Id*. Another prospective juror (seated next to Juror Settle) disclosed that his wife was a forensic pathologist. *Id*. Again, Juror Settle said nothing about his present and career-long employment in law enforcement. *Id.* at 71a.

The court then asked the second row of Mr. Settle's panel if anyone was "*involved* or know anybody in law enforcement? – any close personal friends or anything like that?" Pet.App. 38a. A prospective juror asked if the court was referring specifically to New Orleans. The judge responded, "*No, paint it with a wide brush. Anywhere in the world?*" The juror disclosed that her son was on the Atlanta police force. Juror Settle sat silently. Writ.App. 229.

Juror Settle was seated as a juror and voted to convict Petitioner of murdering a fellow law enforcement officer.

Victoria Mushatt. At the time of trial, Juror Mushatt had been employed by NOPD as a police dispatcher for nearly twenty years. Pet.App. 61a. She was present in the dispatch room during the 911 call for the murder in this case. *Id*. She "may have overheard radio transmissions between various officers and the dispatchers handling the case" and "may even have helped other dispatchers search records to identify" the shooting NOPD officer. Pet.App. 69a. Juror Mushatt also "testified that she may have had some professional contact with [the victim NOPD officer] prior to the night of his murder, as a result of which she felt like she knew him." Pet.App. 61a.

Juror Mushatt also attended the victim officer's funeral, which was "understandably a very emotional event." *Id.* Her attendance reflected the bond of the law enforcement community, and the "common practice for police department employees to attend the funeral of a fallen officer." *Id.*

Juror Mushatt was also married to an NOPD officer. *Id*. Her husband had worked details, as the victim officer was doing at the time he was murdered. *Id*. Juror Mushatt was familiar with several of the State's witnesses by name, one of whom was a dispatcher like herself. Pet.App. 62a.

At the beginning of voir dire, when the prosecutor was addressing the whole venire, Juror Mushatt disclosed from the audience that she was a 911 dispatcher. Pet.App. 64a. The court instructed her to

raise this again if she was called for individual questioning on a panel. *Id*. When Juror Mushatt was called for individual questioning, she never raised her employment as an NOPD dispatcher. *Id*. Juror Mushatt also never raised that she was present in the dispatch room at the time of (and may have assisted in certain ways with) the 911 call for the murder at issue, or that she attended the victim's funeral.

Juror Mushatt was seated as a juror and voted to convict Petitioner of murdering her NOPD coworker.

Lillian Garrett. Both of Juror Garrett's brothers, like the Vu siblings, had been victims of tragic murders. One of her brothers was beaten to death and the other, like the victims in this case, died by gunshot to the head. Pet.App. 75a.

Juror Garrett's panel was asked on three occasions whether anyone had someone close who had been the victim of violent crime. Pet.App. 74a–75a. When the court asked the first time, other prospective jurors spoke up. Pet.App. 75a. Juror Garrett said nothing. *Id*. The court again asked if anyone else "had been the victim of a violent crime or a relative who has been the victim of a crime?" and defense counsel then asked for the same information. *Id*. Other jurors disclosed and, each time, Juror Garrett said nothing. *Id*. Defense counsel asked a third time, and Juror Garrett again said nothing. *Id*.

Juror Garrett was seated as a juror and voted to convict Petitioner for murdering the Vu siblings.

IV. Decisions Below.

A. Criminal District Court For Orleans Parish.

On July 23, 2015, the Criminal District Court for Orleans Parish issued a 128-page opinion granting Petitioner relief from his conviction and death sentence. The court held that Petitioner had been denied his right to an impartial jury under *McDonough*, 464 U.S. 548, and was thus entitled to a new trial. The court observed that to obtain a new trial under *McDonough*, Petitioner "must show a juror failed to answer honestly a voir dire question and show that a correct response would have provided a valid basis for a challenge for cause." Pet.App. 63a. The court concluded that Juror Settle's dishonesty satisfied both prongs. It found there was "simply no excuse" that Juror Settle "did not honestly answer" questions at voir dire. Pet.App. 71a, 74a. It further found that honest answers would have "provided a valid basis for a challenge for cause" because, at the time of Petitioner's trial, Louisiana had a *per se* rule that "law enforcement officers were not competent jurors." Pet.App. 71a.

The court concluded Juror Mushatt's circumstances did not satisfy *McDonough* because it could not conclude she had "a nefarious purpose or intent" or "'lied'" by making "a false statement made with a deliberate intent to deceive." Pet.App. 67a & n.7. Moreover, it concluded the information Juror Mushatt withheld would not have caused her to be *per se* ineligible for the jury under state rules. Pet.App. 63a, 66a.

The court also concluded Juror Garrett's circumstances did not satisfy *McDonough*. It found she had failed to disclose that her two brothers were murdered despite being asked twice, but reasoned that Petitioner could not show "a valid basis for a challenge for cause" under *McDonough* because "crime victims are not *ipso facto* subject to challenges for cause." Pet.App. 75a–76a. Moreover, the court could not determine that Juror Garrett "lied" or "consciously withheld the information." Pet.App. 76a.

The court denied Petitioner's claim that Judge Marullo's failure to recuse or disclose violated the Due Process Clause, reasoning that although Judge Marullo participated in the investigation, he was not "suspected of wrongdoing" and, although he failed to disclose his participation, he could not have been "aware . . . what the prosecution or defense strategies would be." Pet.App. 87a, 90a.

Finally, the court held that Petitioner's trial counsel rendered ineffective assistance at the penalty phase, warranting reversal of his death sentence. Pet.App. 186a–89a.

B. Fourth Circuit Court Of Appeal.

On appeal, the State argued the district court erred in concluding that Louisiana law provided a "per se" bar on Juror Settle's placement on the jury. The State did not appeal the district court's reversal of Petitioner's penalty phase, although it continues to house Petitioner on death row.

In a one-paragraph decision, the Fourth Circuit reversed the district court's finding that Petitioner had been denied his right to an impartial jury. Its explanation, in its entirety, was: "we find that the trial

court erred in finding that the seating of Mr. Settle on the defendant's jury was a structural error entitling him to a new trial." Pet.App. 52a.

C. Louisiana Supreme Court's First Opinion.

The Supreme Court of Louisiana affirmed. In its initial opinion, the court stated it was reinstating Petitioner's death sentence. It included a separate concurrence, which criticized Petitioner for "attempt-[ing] to re-litigate the penalty phase" and expressed satisfaction that "[i]t is time for justice to be served." Upon Petitioner's explanation that the State had never appealed the district court's penalty phase ruling, the court issued a corrected opinion, removing all references to reinstating Petitioner's death sentence and deleting the separate concurrence.[6]

The court concluded that Petitioner had not satisfied *McDonough* as to the three jurors. With respect to Juror Settle, the court commented that "it is not clear that his lack of candor can be characterized as outright dishonesty," but found that "because several questions were aimed at whether panelists had any connections with law enforcement, the inquiries were sufficient to have prompted a reasonable person in Mr. Settle's position to disclose his employment experience." Pet.App. 38a.

The court found *McDonough*'s second prong dispositive, concluding that Juror Settle's nondisclosure did not give rise to "a valid basis for a challenge for cause" under *McDonough* because Petitioner did not show actual bias or a specific category for which bias

[6] All citations herein are to the court's corrected opinion.

"must be presumed." Pet.App. 37a. The court reasoned that Juror Settle was not covered by Louisiana's "per se bar to law enforcement personnel serving as jurors." Pet.App. 34a–35a.

The court addressed Jurors Mushatt and Garrett in a footnote, finding it again dispositive that Petitioner had failed to show actual bias or a situation in which "bias must be presumed" as to either juror. Pet.App. 39a–40a n.2. For Juror Garrett, the court also questioned whether Petitioner had demonstrated the requisite dishonesty under *McDonough*, reasoning that there was "no evidence [she] consciously withheld the information" about her brothers being murdered, even if she failed to disclose it upon being asked. *Id.*

The court also rejected Petitioner's claim that Judge Marullo's failure to recuse or disclose violated the Due Process Clause. The court reasoned that, "[a]s a post-conviction witness, Judge Marullo emphatically denied any bias on his part." Pet.App. 42a. Moreover, adopting the district court's analysis, the court reasoned that evidence from the investigation was "immaterial" because "none of the issues in dispute at trial pertained to the means by which the murder weapon was procured." *Id.*

D. This Court's GVR.

Petitioner filed a certiorari petition arguing that the Louisiana Supreme Court's interpretation of *McDonough* conflicted with the majority and controlling-plurality opinions in that case and deepened a substantial conflict of authority. Prior Pet. at 19–26. Respondent agreed that the lower courts are in conflict, conceded that the conflict was squarely presented as to two of the three jurors, and echoed the

Louisiana Supreme Court's reasoning as to the third. Prior Reply at 6–7.

Petitioner also argued that Judge Marullo's failure to disclose his involvement in the police investigation and to recuse himself warranted this Court's review and summary reversal. Prior Pet. at 32–39.

This Court requested the record and GVR'd in light of *Rippo v. Baker*, 137 S. Ct. 905 (2017). Pet.App. 26a.

E. Opinion On Remand.

The Louisiana Supreme Court held that *Rippo* did not alter its earlier conclusion that Judge Marullo could constitutionally preside over Petitioner's murder trial despite participating in and failing to disclose the police investigation in which he was alleged to have released the weapon likely used in the triple homicide.

The court began by rejecting the proposition that "an appearance of bias" could be sufficient to violate the Due Process Clause. Pet.App. 15a–16a & nn.12–13. It interpreted this Court's recusal standard to require a two-part test: To "first require[] that an objective 'probability of actual bias' be established"; and second require the defendant to "prove that the probability of actual bias rises to a level that 'is too high to be constitutionally tolerable' under the circumstances." Pet.App. 15a–16a.

Analyzing its first step, the court articulated a list of nine circumstances in which "an unconstitutional probability of bias exists." Pet.App. 17–18a. Because Judge Marullo had no "pecuniary interest"; "prosecutorial involvement"; "unacceptable relationship with the Defendant or prosecutors"; or "reason to fear

criminal prosecution," the court concluded that none of the listed circumstances was "present in the instant case." *Id.*

Echoing the court's prior opinion, it then focused at length on whether Judge Marullo engaged in any wrongdoing if he signed the order: "Judge Marullo did nothing wrong; he was merely performing a ministerial act that he was fully authorized to perform." Pet.App. 19a. It found it "significant[]" and "most important[]" that Judge Marullo was not "the subject of the Bureau's investigation." *Id.*

The court also repeated its materiality analysis of whether Judge Marullo's knowledge would have affected the outcome of Petitioner's case. *See* Pet.App. 20a. The court concluded that "[t]he fact that Frank got a 9 mm gun from the property room does not exculpate Defendant, especially in light of the abundant evidence of his guilt." *Id.*

The court found that, in light of the circumstances, Judge Marullo did have an objective self-interest in avoiding disclosure of his alleged association with the release of a weapon that was later used to murder a police officer and two civilians: "Realistically, the average judge would be vigilant to avoid being unjustly associated with any wrongdoing surrounding the release of the possible murder weapon to Frank" and "would have harbored some sensitivity about whether his signature was forged." Pet.App. 24a. The court reasoned that this objective self-interest did not violate the Due Process Clause, however, because "[a]lthough the average judge in this position may harbor these sensitivities, it does not follow that the average judge would reasonably harbor any bias for or against Defendant because of these sensitivities." *Id.*;

Pet.App. 22a ("[N]othing in the record shows that these unusual circumstances caused Judge Marullo to favor one party.").

The court further concluded that, even if there was a "probability of bias," it was not "too high to be constitutionally tolerable." Pet.App. 24a. It reasoned, again, that although the facts known by Judge Marullo were "related to [Petitioner's] case" and "may, therefore, have prompted an average judge to disclose this information," his objective self-interest did not violate the Due Process Clause because it did not "cause bias for or against either party in this case." Pet.App. 24a–25a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant Certiorari To Review Judge Marullo's Failure To Disclose Or Recuse.

A. The Conclusion That A Judge Need Not Recuse Despite An Objectively Ascertainable Self-Interest Conflicts With This Court's Due Process Precedent.

"The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *see also Ward v. Vill. of Monroeville*, 409 U.S. 57, 62 (1972) (a "neutral and detached judge" is an essential component of this due process requirement). This "requirement of neutrality" as to bias and interest is central to the "guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law." *Marshall*, 446 U.S. at 242. It also "preserves

both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.'" *Id.* (citation omitted).

This Court has implemented those guarantees through the adoption of "objective standards." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 878–79 (2009). The Court asks "whether, as an objective matter, 'the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias.'" *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (quoting *Caperton*, 556 U.S. at 881) (quotation marks omitted); *see also Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) (recusal required where the circumstances "would offer a possible temptation to the average . . . judge to . . . lead him to not to hold the balance nice, clear and true" (ellipses in original) (quoting *Ward*, 409 U.S. at 60)). "The Court [has] underscored that 'what degree or kind of interest is sufficient to disqualify a judge from sitting cannot be defined with precision.'" *Caperton*, 556 U.S. at 879 (quoting *Lavoie*, 475 U.S. at 822) (quotation marks omitted). It has also made clear that this "stringent rule" may require recusal even of "judges who would do their very best to weigh the scales of justice equally between contending parties." *Marshall*, 446 U.S. at 243 (quotation marks and citation omitted).

The guarantee of a "disinterested" and "detached" tribunal has always been a core feature of the Due Process Clause. In *Lavoie*, this Court held that it violated due process for a state supreme court justice to participate in the court's review of a verdict where the judge had a self-interest in the legal principles established by the state supreme court's decision. 475

U.S. at 825. The court rejected the defendant insurance company's arguments based upon hostility or prejudice particularly against insurance companies as defendants. *Id.* at 821. It instead held recusal was required because the judge had an "interest" or "direct stake" in the matter—in having the case unfold in a manner that "enhance[es] both the legal status and the settlement value of his own case." *Id.* at 821, 824.

Similarly, in *Ward*, this Court held it was inconsistent with due process for a village mayor to preside over a hearing for violation of a village ordinance. Although the mayor received no money himself, he carried an interest because he was responsible for the village's finances, which depended on fines levied in such proceedings. *Ward*, 409 U.S. at 60. The Court held this self-interest violated Petitioner's right to a "a neutral and detached judge." *Id.* at 62.

In *In re Murchison*, 349 U.S. 133, 136 (1955), a judge had convened a secret hearing in which a witness was questioned and the judge believed the witness to be lying. This Court held that, having been part of the secret accusatory process, the judge could not preside over the witness's contempt proceeding because it was improbable the judge could be "wholly disinterested." *Id.* at 137. The court explained that the judge's participation in the earlier, secret process made him "more familiar with the facts and circumstances" and deprived the defendant of the ability to call relevant witnesses, including the judge, who "might himself . . . be a very material witness." *Id.* at 138.

Here, having been a witness in a police investigation that led to his own association to the release of a 9mm gun to Petitioner's codefendant—a gun likely

used to murder a police officer and two civilians—Judge Marullo decided to preside over Petitioner's murder trial without disclosing any of it. He continued to preside—and not disclose—though the release of the weapon was "related to [Petitioner's] case" and the circumstances would "have prompted an average judge to disclose." Pet.App. 24a; *see also Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 866 (1988) (recognizing nondisclosure is a "fact[] that might reasonably cause an objective observer to question [a judge's] impartiality" and finding it "inexcusable" and "remarkable" not to provide "[a] full disclosure" to "completely remove[] any basis for questioning the judge's impartiality"); *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145, 149–50 (1968) (an adjudicator's nondisclosure of facts that "might create an impression of possible bias" gives rise to "evident partiality").[7]

Judge Marullo's contemporaneous statements demonstrate his clear discomfort with being linked to the release of the weapon. In closed-chambers at Officer Frank's trial, he characterized the release of weapons from the property room as "a crime" and "a scam" and expressed concern that someone would "dig up something" such that it would "come out about this investigation about the guns coming out of that room." Writ.App. 1491–93, 1495. Judge Marullo ultimately provided several different explanations, from knowing he did not sign the order because it "did not have a

[7] As noted, Judge Marullo also rushed Petitioner's capital case to trial in just three months. *Cf. Bracy v. Gramley*, 520 U.S. 899, 909 (1997) (that judge took "capital case to trial quickly" was specific, objective indicia of intent to "deflect any suspicion" of bias).

description of the weapon to be released," Pet.App. 214a, to incorrectly asserting a handwriting expert had cleared him, Writ.App. 1490–91, 1494–95, to stating it would be "perfectly logical and correct" to sign the order, Writ.App. 1490, to saying he would "never" have signed the order because it released a gun indirectly to another officer, Writ.App. 653.

As the court below acknowledged, these facts support an objectively ascertainable self-interest: "[T]he average judge" in Judge Marullo's circumstances would "be vigilant to avoid" disclosure of an association with the release of the weapon used in a triple homicide. Pet.App. 24a. Indeed, Judge Marullo was heading into a highly competitive election year. Judge Marullo was thus far from "wholly disinterested" or "detached" from the matter before him—he had a direct stake in disclosure of the police investigation that would have supported Petitioner's defense theory.

Judge Marullo's decision not to disclose the investigation also had the practical effect of depriving Petitioner of evidence that would have supported his theory that Officer Frank committed the crime with her brother, Adam Frank. For instance, during the undisclosed investigation, NOPD officers also questioned Officer Talley at length about Adam Frank, pressing Officer Talley on whether Officer Frank actually gave the gun "to her brother," consistent with Petitioner's defense. Writ.App. 1564–65, 1575. They also asked Officer Talley about a prior altercation between Adam Frank and the victim officer at the

very restaurant where the murders took place. Writ.App. 1574–75.[8]

To be sure, this Court has recognized that avoiding the "appearance of bias" against a party is "an essential means of ensuring the reality of a fair adjudication." *Williams*, 136 S. Ct. at 1909. But restricting the Due Process Clause to instances of bias specifically "for or against" a party turns this Court's due process jurisprudence on its head. Cases concerning concrete self-interest on the part of the judge, like *Lavoie*, *Ward*, and *Murchison* have always been at the historical core of due process. Certiorari is warranted to reconcile Judge Marullo's insistence on presiding over Petitioner's murder trial without disclosing information bearing on Petitioner's defense with the requirements established by this Court's due process jurisprudence.

B. The Louisiana Supreme Court's Unnecessary Holding That An Appearance Of Bias Cannot Violate Due Process Conflicts With This Court's And Other Courts' Jurisprudence.

In light of the objectively ascertainable self-interest on this record, there should have been no occasion for the Louisiana Supreme Court to issue its much broader ruling that "an appearance of bias" can never be sufficient to violate the Due Process Clause. Pet.App. 15a–16a & nn.11–13. That far-reaching conclusion further warrants certiorari because it conflicts

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[8] Three years after Petitioner's trial, Officer Frank's brother was arrested and had in his possession the 9mm gun taken from police evidence. Pet.App. 3a–4a.

with this Court's decisions and the decisions of several circuits and state high courts.

This Court has recognized that under the Due Process Clause "[t]he inquiry must be . . . whether there was 'such a likelihood of bias *or an appearance of bias* that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.'" *Taylor v. Hayes*, 418 U.S. 488, 501 (1974) (emphasis added) (quoting *Ungar v. Sarafite*, 376 U.S. 575, 588 (1964)). Just a few terms ago the Court stressed that "insistence on the appearance of neutrality is . . . an essential means of ensuring the reality of a fair adjudication." *Williams*, 136 S. Ct. at 1909; *see also id.* ("Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself."). The Court has recognized the importance of the appearance of neutrality in numerous other decisions. *E.g.*, *Lavoie*, 475 U.S. at 825, 828 (explaining that "to perform its high function in the best way, 'justice must satisfy the appearance of justice'" and holding that "the 'appearance of justice' will best be served" by recusal); *Murchison*, 349 U.S. at 136; *Marshall*, 446 U.S. at 243; *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 618 (1993); *see also Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1666 (2015) ("As Justice Frankfurter once put it for the Court, 'justice must satisfy the appearance of justice.'" (citation omitted)).

The Louisiana Supreme Court reached the contrary conclusion, relying on Seventh Circuit cases holding that no due process violation lies where it is undisputed that "the judge was unaware of the

relationship" giving rise to the purported bias or self-interest. *Suh v. Pierce*, 630 F.3d 685, 692 (7th Cir. 2011) (discussing and quoting same observation in *Del Vecchio v. Ill. Dep't of Corr.*, 31 F.3d 1363, 1371 (7th Cir. 1994)); Pet.App. 15a–16a & nn.12–13. The Louisiana Supreme Court's broad inference from those cases conflicts with numerous other lower courts, which have recognized that the Due Process Clause protects against the appearance of bias. *E.g.*, *Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, 678 (4th Cir. 1989) ("The due process clause protects not only against express judicial improprieties but also against conduct that threatens the 'appearance of justice.'" (quoting *Lavoie*, 475 U.S. at 825)); *Archer v. State*, 859 A.2d 210, 227 (Md. 2004) ("Not only does a defendant have the right to a fair and disinterested judge but he is also entitled to a judge who has 'the appearance of being impartial and disinterested.'" (citation omitted)); *Allen v. Rutledge*, 139 S.W.3d 491, 498 (Ark. 2003) ("Due process requires not only that a judge be fair, but that he also appear to be fair."); *Commonwealth v. Brandenburg*, 114 S.W.3d 830, 834 (Ky. 2003) ("[T]here need not be an actual claim of bias or impropriety levied, but the mere appearance that such an impropriety might exist is enough to implicate due process concerns."); *Pierce v. Pierce*, 39 P.3d 791, 799 (Okla. 2001) ("[T]he reach of due process jurisprudence requires not only a fair tribunal, but also the *appearance* of a fair tribunal.").

The appearance of bias on this record is palpable. In addition to all the facts giving rise to the acknowledged objective self-interest, Petitioner's trial judge

participated in, and chose not to disclose, an investigation by the same police force that employed the victim officer, that interrogated and arrested Petitioner, and that had *over twenty* witnesses testify at trial.

The Louisiana Supreme Court's directive that judges may preside despite the appearance of bias cries out for this Court's review.

C. The Question Presented Is Exceptionally Important To The Preservation Of Public Confidence In The Justice System.

This case raises an issue of far-reaching national importance.

The decision below that Judge Marullo could constitutionally preside without even disclosing his involvement in the police investigation related to the case before him eviscerates this Court's objective standard. The principal justification for adopting an objective standard was appreciation of a judge's "difficulties of inquiring into actual bias" and the need for "adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case." *Caperton*, 556 U.S. at 883. In the vast majority of cases, only the judge him-or-herself will be aware of the facts that may give rise to self-interest or partiality incompatible with due process. In those instances, the Court's objective standard is entirely dependent on a broad understanding of a judge's disclosure obligations. *See Liljeberg*, 486 U.S. at 864, 868 (acknowledging the importance of "encourag[ing] a judge . . . to more carefully examine possible grounds for disqualification and to promptly

disclose them when discovered" to avoid "injustice in other cases, and the risk of undermining the public's confidence in the judicial process"); Model Code of Judicial Conduct Canon 2, r. 2.11 cmt. 5 (2011) ("A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.").

Moreover, this Court has recognized "the 'vital state interest' in safeguarding 'public confidence in the fairness and integrity of the nation's elected judges,'" *Williams-Yulee*, 135 S. Ct. at 1666 (citation omitted). A significant majority of states elect at least some of their judges. The legitimacy of those systems is called into question by instances like this, in which a judge facing an upcoming reelection chooses to preside over a case despite an objective self-interest that relegates neutrality and justice in pursuit of his own reelection. *See also N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 212 (2008) (Kennedy, J., concurring) ("The rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges.").

D. The Decision Below Alternatively Warrants Summary Reversal.

Even setting aside the problematic conclusion that objective self-interest and appearance of bias do not violate due process, the decision below contains several patent errors warranting summary reversal.

First, the court repeated its focus on (i) whether Judge Marullo, in fact, did something "wrong" if he

signed the order, Pet.App. 19a; and (ii) a *Brady*-like prejudice analysis of whether the evidence known but not disclosed by Judge Marullo would have been material at trial, such that it would have "exculpate[d]" Petitioner "in light of the abundant evidence of his guilt." Pet.App. 19a–21a; *see also* Prior Pet. at. 34–36 (discussing these errors in Louisiana Supreme Court's prior opinion).

Second, although "[t]he Court [has] underscored that 'what degree or kind of interest is sufficient to disqualify a judge from sitting cannot be defined with precision,'" *Caperton*, 556 U.S. at 879 (citation omitted), the court below did just the opposite: It began its analysis by itemizing what it viewed as the nine circumstances in which "an unconstitutional probability of bias exists," and then proceeded to rule each out. Pet.App. 16a–18a.

Third, by artificially dividing this Court's test into two steps—first showing a "probability of bias" and then additionally showing that the probability was "too high to be constitutionally tolerable"—the court required a showing of bias higher than this Court has ever contemplated. Since its earliest recusal cases, this Court has explained that even circumstances that "offer a *possible temptation* . . . not to hold the balance nice, clear and true" denies due process. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927) (emphasis added). The Court has recognized the potential for bias to be "too high to be constitutionally tolerable" in circumstances far more remote than this case. In *Tumey*, that potential arose from the adjudicator's potential pecuniary interest in $12. *Id.* The Court expressly acknowledged that "doubtless" adjudicators "would not allow such a consideration as $12 costs in each

case to affect their judgment," but nonetheless concluded that the risk was sufficient to violate due process. *Id.* In *Bracy*, the Court concluded that the petitioner's theory of "camouflaging bias" was "quite speculative," but nonetheless sufficiently concrete to give rise to a due process problem. 520 U.S. at 905.

II. The Court Should Resolve The Deep Split Over *McDonough*.

This Court long ago recognized that the right to an impartial jury guarantees a jury free of bias, and that "[t]he bias of a prospective juror may be actual or implied." *United States v. Wood*, 299 U.S. 123, 133 (1936). Indeed, that guarantee derives from Blackstone and Chief Justice Marshall's opinion in the trial of Aaron Burr. *United States v. Torres*, 128 F.3d 38, 46 (2d Cir. 1997) (Calabrese, J.). Actual bias is "bias in fact," while implied bias is bias "conclusively presumed as a matter of law." *Wood*, 299 U.S. at 133. The latter exists in "extreme situations," such as "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction," *Smith v. Phillips*, 455 U.S. 209, 222 (1982) (O'Connor, J., concurring). Where a juror is actually or impliedly biased, disqualification is mandatory. *Id.* at 223; *Torres*, 128 F.3d at 45.

In *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), Justice Rehnquist's majority opinion announced a test that applies in the particular instance of juror dishonesty at voir dire. There, the plaintiffs moved for a new trial after losing a civil suit involving a lawnmower accident, arguing that a

juror had failed to disclose that his son had been injured in an accident involving the explosion of a truck tire. *Id.* at 550–51. Writing for a seven-judge majority, Justice Rehnquist announced: "[T]o obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause." 464 U.S at 556. Three Justices whose votes were necessary to the majority joined a plurality opinion, adding that the Court's test for cases involving juror dishonesty does not "foreclose the normal avenue of relief" available in other instances of juror partiality—a party may still obtain a new trial by demonstrating "actual bias or, in exceptional circumstances, that the facts are such that bias is to be inferred." *Id.* at 556–57 (Blackmun, J., concurring).

As described above, the district court held that the extreme facts of juror dishonesty in this criminal case satisfied *McDonough*. The Louisiana Supreme Court disagreed. Its sole basis for rejecting Petitioner's claim as to Jurors Settle and Mushatt was that he had not shown a basis for mandatory dismissal, *i.e.* actual bias or a category of implied bias under federal or state law from which bias "must be presumed." Pet.App. 34a–35a, 37a, 39a & n2. It echoed that requirement as to Juror Garrett, and further limited *McDonough* to instances of "consciously withheld . . . information." Pet.App. 39a–40a n2. In his prior petition to this Court, Petitioner set forth the conflict among federal circuits and state high courts on these dispositive issues, Prior Pet. at 20–26, and Respondent conceded it, Prior BIO at 25. This conflict

concerns a fundamental trial right, and the position adopted by the court below renders Justice Rehnquist's majority opinion superfluous.

A. The Three-Way Split Over What It Means To Show "A Valid Basis For A Challenge For Cause."

Petitioner sets forth in brief the conflict of authority regarding what must be proven to demonstrate that a juror's honest answer would have provided "a valid basis for a challenge for cause," *McDonough*, 464 U.S. at 556, which was expressly agreed with by Respondent, Prior BIO at 25–27.

1. Hypothetical reasonable judge standard. In the First and Second Circuits, *McDonough* asks whether a hypothetical reasonable judge would have excused the juror for cause if the judge had been aware of the juror's nondisclosure. *Sampson v. United States*, 724 F.3d 150, 165–66 (1st Cir. 2013) (inquiry is "whether a reasonable judge, armed with the information that the dishonest juror failed to disclose and the reason behind the juror's dishonesty, would conclude under the totality of the circumstances" that "a valid basis for excusal for cause existed"); *United States v. Fell*, No. 2:01-CR-12, 2014 WL 3697810, at *15 (D. Vt. July 24, 2014) (In the Second Circuit, "the test is not whether the true facts would compel the Court to remove a juror for cause, but rather whether . . . '[the court] would have granted the hypothetical challenge.'" (quoting *United States v. Greer*, 285 F.3d 158, 171 (2d Cir. 2002))); *see also* Prior Pet. at 20–22 (collecting more cases); Prior BIO at 25–26.

2. Mandatory/*per se* disqualification. Like the court below, the Third, Sixth, and Eleventh Circuits

hold that "a valid basis for a challenge for cause," *McDonough*, 464 U.S. at 556, requires a showing that the juror would have been subject to mandatory dismissal, either because he was actually biased or within a category of implied bias. *See Johnson v. Luoma*, 425 F.3d 318, 326–27 (6th Cir. 2005) (acknowledging Second Circuit's third category of "inferred bias," but interpreting *McDonough* to require actual or implied bias); *United States v. Carpa*, 271 F.3d 962, 967 (11th Cir. 2001) (*McDonough* requires showing that would "disqualify the juror," which means either "express admission" of bias or circumstance from which "bias must be presumed"); *United States v. Flanders*, 635 F. App'x 74, 78 (3d Cir. 2015) (*McDonough* requires actual or implied bias, where latter "is a limited doctrine, one reserved for exceptional circumstances" and a "narrowly-drawn classes of jurors") (quoting *United States v. Mitchell*, 690 F.3d 137, 142–44 (3d Cir. 2012))); *see also* Prior Pet. at 22; Prior BIO at 26 (agreeing that Third and Sixth Circuits adopt this side of split).

The D.C. Circuit and a few state high courts have restricted *McDonough* even further by interpreting "a valid basis for a challenge for cause" to require a showing of actual bias. *United States v. North*, 910 F.2d 843, 904 (D.C. Cir.) ("Under *McDonough*, … a 'valid basis for a challenge for cause' absent a showing of actual bias, is insufficient."), *modified on other grounds*, 920 F.2d 940 (D.C. Cir. 1990); *State v. Myers*, 711 A.2d 704, 706 (Conn. 1998) (not even "bias that is implied" suffices); *Young v. United States*, 694 A.2d 891, 894–95 (D.C. 1997) (same); *State v. Pierce*, 788 P.2d 352, 356 (N.M. 1990) (same).

3. Additional prong of improper motive. Two circuits—the Fourth and Eighth—"have taken the *McDonough* opinion a step further, establishing a third prong necessary to satisfy excusal of a juror." Prior BIO at 26. "Under the third prong, the defendant must establish that the juror's motives for concealing information can truly be said to affect the fairness of the trial." *Id*.

Like the second category above, the Fourth Circuit has expressly rejected that a petitioner need "establish only that the trial court had a valid reason to dismiss the dishonest juror, not that the trial court would have been required to dismiss the juror." *United States v. Blackwell*, 436 F. App'x 192, 196 (4th Cir. 2011). But it reads *McDonough* to require a "third prong": that "the juror's 'motives for concealing information' or the 'reasons that affect [the] juror's impartiality can truly be said to affect the fairness of [the] trial.'" *McNeill v. Polk*, 476 F.3d 206, 224 n.8 (4th Cir. 2007) (King, J., concurring in part and concurring in the judgment) (quoting *Conaway v. Polk*, 453 F.3d 567, 585 (4th Cir. 2006)). The Eighth Circuit agrees. *United States v. Hawkins*, 796 F.3d 843, 863–64 (8th Cir. 2015) (*McDonough* requires third prong "'that the juror was motivated by partiality'" (quoting *United States v. Ruiz*, 446 F.3d 762, 770 (8th Cir.2006))); *see also* Prior Pet. at 23–24; Prior BIO at 26–27.

B. Lower Courts Are Further Divided Over Whether The *McDonough* Test Can Be Satisfied By Misleading Nondisclosure Or Requires Deliberate Concealment.

The inquiry above was dispositive as to Jurors Settle and Mushatt. With respect to Juror Garrett, the

court further limited *McDonough* to "consciously withheld . . . information." Pet.App. 39a–40a n2. As Petitioner previously set forth, and Respondent again conceded, federal circuits and state high courts are also divided over what is required to show "that a juror failed to answer honestly" at voir dire. *McDonough*, 464 U.S. at 548; Prior BIO at 25.

Five circuits and several states hold that *McDonough* may require a new trial "regardless of whether [a juror's] failure to respond was intentional or unintentional." *Baker v. Craven*, 82 F. App'x 423, 429 (6th Cir. 2003); *Amirault v. Fair*, 968 F.2d 1404, 1405–06 (1st Cir. 1992) ("[W]e read [*McDonough*] to require a further determination on the question of juror bias even where a juror is found to have been honest."); *United States v. Greer*, 285 F.3d 158, 170 (2d Cir. 2002) (*McDonough* applies to "juror nondisclosure or misstatements"); *Jones v. Cooper*, 311 F.3d 306, 310 (4th Cir. 2002) ("[T]he test applies equally to deliberate concealment and to innocent non-disclosure."); *United States v. Scott*, 854 F.2d 697, 698–700 (5th Cir. 1988) (rejecting argument that *McDonough* turns on honesty); *see also, e.g., State v. Dye*, 784 N.E.2d 469, 473 (Ind. 2003) ("[T]he test applies equally to deliberate concealment and to innocent non-disclosure."); *Schwan v. State*, 65 A.3d 582, 591 (Del. 2013) (applies to "inadvertent nondisclosure"); *State v. Thomas*, 830 P.2d 243, 246 (Utah 1992) ("[I]ntent or lack of intent is irrelevant.").

Three circuits and a few other states agree with the court below that a new trial may be ordered only in the case of deliberate dishonesty. *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 955 F.2d 1467, 1473 (11th Cir. 1992) ("[T]he *McDonough* test

requires a determination of . . . whether [the juror] was aware of the fact that his answers were false." (quotation marks omitted)); *Hawkins*, 796 F.3d at 863–64; *United States v. White*, 116 F.3d 903, 930 (D.C. Cir. 1997); *Sanchez v. State*, 253 P.3d 136, 146 (Wyo. 2011) ("party must show that the juror intentionally gave an incorrect answer"); *Pineview Farms, Inc. v. A.O. Smith Harvestore, Inc.*, 765 S.W.2d 924, 930 (Ark. 1989) (must have "deliberately concealed").

C. The Interpretation Adopted Below Is Irreconcilable With *McDonough* Itself.

Interpreting *McDonough* to require that a dishonest juror would have been subject to mandatory dismissal, as the court below and several other courts have done, renders Justice Rehnquist's majority opinion superfluous and contravenes the controlling-plurality.

As set forth above, this Court recognized long before *McDonough* that the right to a new trial lies where a juror was actually biased or falls into one of the "extreme situations" in which bias must be presumed. *Smith*, 455 U.S. at 222–23 (O'Connor, J., concurring) (collecting cases); *Torres*, 128 F.3d at 45–46 (Calabrese, J.) (explaining "historical common law roots" of requiring new trials in cases for which disqualification would have been mandatory). To interpret "valid basis for a challenge for cause" to require a showing of actual or implied bias would thus render Justice Rehnquist's majority opinion in *McDonough* redundant of the already-existing, general standard for obtaining a new trial independent of any dishonesty at voir dire. Indeed, that interpretation untenably imposes *a greater burden* where a juror

has been dishonest, because a party would have to show actual or implied bias (which would alone suffice in all other circumstances), *and* "that a juror failed to answer honestly a material question." *McDonough*, 464 U.S. at 555. This interpretation also contravenes the controlling plurality opinion, whose principal purpose was to distinguish *McDonough*'s new test from the generally applicable test based upon actual or implied bias. *Id.* at 556–57 (Blackmun, J., concurring).

D. The Court Should Grant Certiorari In This Case To Resolve The Conflicting Interpretations Of *McDonough*.

This issue is of profound importance because the *McDonough* standard presently governs all civil and criminal cases. *See Sampson*, 724 F.3d at 159–160 (difficulty interpreting *McDonough* fits "snugly within the[] narrow confines" of mandamus jurisdiction because it has caused "an unsettled question of systemic significance," because "the right at stake . . . deserves great respect," and because "[t]he specter of juror dishonesty presents a recurring danger in all cases, civil and criminal, capital and non-capital"). The conflict has developed over the course of thirty-four years of attempting to interpret the majority test and plurality gloss, and there can be no benefit from further percolation.

This case provides an ideal record for resolving the conflict. Louisiana courts have made all of the predicate findings regarding (1) the backgrounds and information that each of the three jurors withheld at voir dire; and (2) the questions asked to each juror and each juror's respective failure to disclose the information. The decision below as to Jurors Settle and

Mushatt squarely presents the meaning of "valid basis for a challenge for cause," and its reasoning as to Juror Garrett additionally presents the significance of dishonesty. *See* Prior Reply at 6–7 (observing Respondent's concession that the facts of this case squarely present this issue).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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