No. 18-_____

In the
Supreme Court of the United States

Omar Christopher Miller,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth Amendment right to an impartial jury is violated when prospective jurors are allowed to conceal facts that indicate possible bias – including, as here, ties to law enforcement – if they "feel, personally," they can be fair.

The Second Circuit's answer to this question conflicts with those of the Fifth Circuit and D.C. Circuit.

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The opinion of the United States Court of Appeals for the Second Circuit can be found at 752 F. App'x 51 and Petitioner's Appendix ("Pet. App.") 1a-6a.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231 and entered judgment on July 10, 2017. The Second Circuit had jurisdiction under 18 U.S.C. § 3742 and 28 U.S.C. § 1291, and affirmed the district court's judgment on October 24, 2018. The circuit denied rehearing on January 11, 2019. Pet. App. 7a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury."

INTRODUCTION

This case concerns a right of criminal procedure as fundamental as it gets: the right to be tried "by an impartial jury." U.S. Const., amend. VI.

Petitioner Omar Miller, a Jamaican, was accused of lying to law enforcement to get a visa to enter the U.S. For all the record shows, however, his jury included a border agent, a cop, an employee of a prosecutor's office, a person with strong views on visa fraud, someone with particular notions about Jamaicans in the U.S., or all of the above. This is because, at *voir dire*, the judge asked people to reveal such facts only if "you feel, personally, that you could not be an impartial and fair juror."

"The defect in that question is obvious." *United States v. Littlejohn*, 489 F.3d 1335, 1344-45 (D.C. Cir. 2007). A juror's impartiality "'should not be adjudged on that juror's own assessment of self-righteousness.'" *Id.* at 1345 (citation omitted). Letting jurors conceal facts that suggest bias, as long as they feel they can be fair, "violate[s] [the] Sixth Amendment right to an impartial jury." *Id.* at 1344.

The Fifth Circuit agrees: "A juror may not conceal material facts disqualifying him simply because he *sincerely* believes that he can be fair." *United States v. Scott*, 854 F.2d 697, 699 (5th Cir. 1988) (emphasis in original).

The Second Circuit disagrees: jurors may conceal facts that objectively suggest bias if they subjectively feel they can be "fair and impartial." Pet. App. 4a. Miller's *voir dire* was adequate, the court said, because it was not "'brief,'" it did not "completely overlook[] 'a systematic or pervasive bias,'" and the record did not show "the 'jury misunderstood its duty to weigh certain evidence fairly.'" *Id.* (quoting *United States v. Lawes*, 292 F.3d 123, 129 (2d Cir. 2002)). In the Second Circuit, those "three limited circumstances" are the only ones "in which 'voir dire may be so insufficient as to call for a reversal.'" Pet App. 3a (quoting *Lawes*, 292 F.3d at 129).

That is too narrow a view. "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis v. United States*, 339 U.S. 162, 171-72 (1950). But bias cannot be proven (or even alleged) if jurors are licensed to conceal the very facts that suggest it.

Review is warranted to resolve the dispute over the important question here: May jurors conceal facts suggesting bias so long as they feel they can be fair?

STATEMENT OF THE CASE

1. "This case is about lies," the government told the jury at the start of Miller's trial. *See* 2d Cir. Docket No. 17-2140, Entry 58 at A. 21. "Miller, a Jamaican citizen, lied on a United States visa application. With those lies he got a U.S. visa, the travel document he needed to be able to enter the United States from Jamaica. . . . But after the defendant entered the country, his lies were eventually exposed. He was arrested and charged with visa fraud. That's why we're here." *Id*.

Given the charge of lying to the U.S. government, Miller asked the judge to ask the venire: "Who is your employer?," and "Do you or any member of your family have any relationship, or close friendship, with any federal law enforcement officers or federal agency employees?" E.D.N.Y. Docket No. 15-cr-580, Entry 43 at 3, 5. Miller also requested another basic question: whether anyone had worked for the "police or any district attorney's office." *Id*. at 3. Likewise: "Is there anyone here who has any preconceived opinion about someone from Jamaica applying for a business or tourist visitor visa?" *Id*. at 2. In a similar effort to identify potentially biased jurors, the government wanted to ask: "Do you have any significant connection to Jamaica?" *Id*., Docket Entry 44 at 2.

The judge asked none of those questions. He thus did not ask what the jurors did for a living or whether they worked in law enforcement. Rather, he asked if anyone had a "relationship with any federal, state, or local law enforcement officers . . . *that would prevent you from being fair*." 2d Cir. Docket No. 17-2140, Entry 57 at S.A. 22-23 (emphasis added). Likewise, he asked if anyone had a "relationship with

a prosecutorial office . . . that would prevent you from being fair."[1] *Id*. at S.A. 22.

Continuing the "being fair" questions, the judge said "this case is about visa fraud. Is there anything about the nature of that that would prevent you or might cause you to favor one side or the other in such a case?" *Id*. at S.A. 24. The judge concluded his requests for the jurors to self-diagnose their biases by asking them: "[I]s there anything else that I did not mention that makes you feel, personally, that you could not be an impartial and fair juror in this case?" *Id*. at S.A. 26.

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[1] Notably, the judge omitted the language as to "being fair" when he asked if anyone had a relationship with a defense lawyer. He asked, simply: "Have you or any family member or close friend ever worked for a criminal defense lawyer or a private investigator?" 2d Cir. Docket No. 17-2140, Entry 57 at S.A. 23. Miller's lawyer objected to this uneven questioning:

> MR. SUNDARAM: I noticed that with respect to the questions about whether any jurors – I don't know if this was intentional – had relationships with any prosecutorial offices or with any federal law enforcement, the Court asked a limited if – jurors who felt that that would prevent them from being fair or impartial.
>
> THE COURT: Right.
>
> MR. SUNDARAM: But when the Court asked if anybody worked for criminal defense or private investigator, they didn't qualify it as such. So, I think my concern is that I think that jurors who may have worked for prosecutor's offices or had relationships with prosecutorial offices or federal agencies, that we should be able to at least know—
>
> THE COURT: I have a different view of it, so your objection is overruled. I heard it. It's overruled. Anything else?
>
> MR. SUNDARAM: I think that's not fair to us.
>
> THE COURT: I heard you.

Id. at S.A. 30.

Defense counsel objected. He said these questions allowed jurors with jobs or relatives in law enforcement, or with particular views on visa fraud or Jamaicans, to conceal those facts if they decided for themselves that was "not something that would necessarily keep them from being fair." *Id.* at S.A. 52.

"Overruled," the judge said. "Exercise your peremptories." *Id.* at S.A. 53. Yet counsel had already pointed out: "I can't exercise peremptories if I don't know if people have relatives in law enforcement." *Id.* at S.A. 52.

Miller's *voir dire* continued. One prospective juror volunteered: "I voted for Donald Trump and I feel strongly on border patrol." *Id.* at S.A. 182. "Good for you," the judge replied, "Kellyanne Conway is a good friend of mine." *Id.* at S.A. 182-83. The judge refused defense counsel's request to ask this man if he "could be fair." *Id.* at S.A. 183. "Use your peremptory," the judge said. *Id.* Counsel did.

As Miller later noted on appeal, this exchange only "begs the question: were there others who were partial but didn't speak up? There's no way of knowing because the judge refused to probe bias in a way that didn't exempt those who deemed themselves incapable of exhibiting any." 2d Cir. Docket No. 17-2140, Entry 56 at 28. At *voir dire*, defense counsel reiterated: "[T]he Court did not ask any questions of the jurors about their background or anything that would – [] that is necessary to enable us to make not only challenges for cause, but to make an effective use of our peremptory challenges." *Id.*, Docket Entry 57 at S.A. 234.

A jury was empaneled. For all the record shows, it included border agents, police officers and people with strong views on Jamaicans and visa fraud who

concealed those facts because they did not "feel, personally, that [they] could not be an impartial and fair juror." *Id.* at S.A. 26.

2. Trial began. The government said Miller lied on his visa application by answering "no" to questions asking if he had ever been arrested or used another name: Miller had been arrested twice in Jamaica (neither arrest led to a conviction) and had used the name "Andy Fowl." *Id.*, Docket Entry 58 at A. 22. The government obtained an indictment alleging visa fraud in violation of 18 U.S.C. § 1546(a): entering the U.S. with a visa "knowing said document was procured by means of one or more false statements." *Id.* at A. 14.

Miller's defense was lack of such knowledge. This reflected the sizeable hole in the government's case: there was no evidence Miller filled out, read or submitted the visa application. On the contrary, the application indicated a commercial preparer named Ian Clarke completed and filed it online in Jamaica. *See id.* at A. 83-85. But the government did not call Clarke. And Miller did not testify. Thus, no one qualified to describe the application's preparation offered evidence.

As defense counsel asked the jury, "What were the answers that Mr. Miller gave to Mr. Clarke? What were the questions Mr. Clarke asked Mr. Miller? Was there any discussion at all? You don't know any of these things. You don`t have any idea and yet, they're the most important questions in this case." *Id.*, Docket Entry 60-3 at A. 516. As far as the evidence showed, Clarke "completed the form" without asking Miller the other-name and arrest questions and "then got out of the way at his desk and his computer . . . and told Mr. Miller, okay, you've got to click

the form." *Id.*, Docket Entry 60-2 at A. 509. But "that wouldn't be enough on this record to make Mr. Miller guilty," *id.*, because it wouldn't prove he reviewed the application or knew of the two wrong answers.

Miller, defense counsel told the jury, "had the application prepared and submitted by a preparer . . . in good faith and with no idea that there was anything wrong with the application and with no belief that anything in the application was incorrect or false." *Id.*, Docket Entry 58 at A. 25.

In an effort to defeat this defense and prove Miller knew of the two wrong answers, the government called Andrew Daehne, a consular officer with the U.S. State Department. (The five other witnesses the government called at trial all worked in law enforcement too: a U.S. Customs and Border Protection officer, *see id.*, Docket Entry 59 at A. 246, a U.S. State Department Diplomatic Security Service agent, *see id.* at A. 274, and three members of the Jamaica Constabulary Force. *See id.*, Docket Entry 58 at A. 90, 103, 173.)

Officer Daehne had no idea what happened between Miller and Clarke. *See id.* at A. 85. But he read aloud language printed at the end of Miller's visa application stating submission "certifies that you have read and understood the questions in this application and that your answers are true." *Id.* at A. 47. And Officer Daehne said yes when asked if visa applicants are "required to sign and submit the application" and "certify to the truth of the statement[s] in their application . . . even if someone helps them prepare the form." *Id.* at A. 46. "So, they're still responsible for the statements in the form even if someone else helps

them prepare it?" "Absolutely," the officer said. *Id.*

The government hung its hat on this, arguing in closing that Miller "signed and submitted an online application for a nonimmigrant O-2 visa. When he did so, the defendant was warned that his electronic signature certifies that he had read and understood the questions in the application and that his answers were true and correct to the best of his knowledge and belief. Despite that warning, [his] visa application contained two false statements." *Id.*, Docket Entry 60-2 at A. 481.

In truth, there was no testimony Miller "signed and submitted" the visa application, or that he was "warned" about inaccuracies, or that he "certifie[d] that he had read and understood the questions . . . and that his answers were true." Nobody with any basis to make such claims testified. Still, the jury heard from Officer Daehne that applicants are supposed to "certify to the truth of the statement[s] in their application . . . even if someone helps them prepare the form," *Id.*, Docket Entry 58 at A. 46, and "absolutely" are "responsible for the statements." *Id.* The government used this testimony from a State Department officer to argue the jury should not credit Miller's defense. The jury agreed and found Miller guilty.

3. "Because 'the defense deserves a full and fair opportunity to expose bias or prejudice on the part of veniremen,'" Miller argued on appeal, "'there must be sufficient information elicited on *voir dire* to permit a defendant to intelligently exercise not only his challenges for cause, but also his peremptory challenges.'" *Id.*, Docket Entry 56 at 20 (citation omitted). No such intelligent exercise is possible if jurors are allowed to conceal facts that would support a for-cause challenge or

peremptory strike. And telling jurors they may reveal such facts if they "feel, personally, that [they] could not be an impartial and fair juror" is no fix. "Human nature being what it is, 'the bias of a juror will rarely be admitted by the juror himself, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it.'" *Id.* at 24 (citation omitted). "Hoping people will volunteer their biases is no way to empanel a jury." *Id.*

The Fifth Circuit has made this plain: "A juror may not conceal material facts disqualifying him simply because he *sincerely* believes that he can be fair." *Scott*, 854 F.2d at 699 (emphasis in original).

The D.C. Circuit has also made this plain. Miller cited that court's ruling in *Littlejohn*, where the trial judge told the prospective jurors to reveal ties to law enforcement only if "you believe that you, that you personally would be unable to be fair and impartial." 489 F.3d at 1341. "As Littlejohn points out, unless a prospective juror who worked in law enforcement believed that such employment would render impartial jury service impossible, neither he nor the court would have any way of knowing about this potential source of bias. This, he argues, violates his Sixth Amendment right to an impartial jury." *Id.* at 1342. The D.C. Circuit agreed: the "defect" in letting jurors conceal facts that suggest bias, provided they think they can be fair, is "obvious, as a simple hypothetical demonstrates." *Id.* at 1344-45. "Suppose one of the prospective jurors was a thirty-year veteran of the U.S. Park Police. Had the district court asked Littlejohn's proposed question [whether anyone worked in law enforcement], the juror would have had to answer in the affirmative,

giving Littlejohn and the court an opportunity to explore that potential source of bias." *Id.* at 1345. But given the judge's question, such employment would not be shared "unless the juror, in his or her own opinion, believed that working for the Park Police would make it impossible to serve impartially." *Id.* "'[W]hether a juror can render a verdict based solely on evidence adduced in the courtroom should not be adjudged on that juror's own assessment of self-righteousness.'" *Id.* (citation omitted). The judge's "questions violated Littlejohn's Sixth Amendment right to an impartial jury." *Id.* at 1344. "[W]e vacate the conviction." *Id.* at 1347.

The Second Circuit did otherwise. Citing its rule that there are only "three limited circumstances in which 'voir dire may be so insufficient as to call for a reversal,'" Pet. App. 3a (quoting *Lawes*, 292 F.3d at 129), it said none was present in Miller's case. "[W]e cannot say that *voir dire* in this case was 'so demonstrably brief and lacking in substance as to afford counsel too little information even to draw any conclusions' about the prospective jurors, or that the District Court completely overlooked 'a systematic or pervasive bias.' *Lawes*, 292 F.3d at 129. Nor has Miller pointed to any indication . . . the 'jury misunderstood its duty to weigh certain evidence fairly.' *Id.* Accordingly, we see no reversible error." Pet App. 4a.

As for the judge's letting jurors conceal a job, a relative or a particular view suggesting bias if they felt it would not "'prevent [them] from being fair and impartial,'" the court said "the record contains no suggestion that the inclusion of this qualifying language had any perceivable impact on Miller's trial." Pet. App. 4a (brackets in opinion; citation omitted).

As for *Littlejohn*, the Second Circuit claimed Miller's case was different: "In *Littlejohn*, the trial judge affirmatively told jurors not to bring to the court's attention any relations with law enforcement personnel unless the juror believed that he or she could not be fair and impartial." Pet App. 4a. "Moreover, unlike in *Littlejohn*, this was a case in which the evidence against Miller was strong and did not depend on an assessment of law enforcement witnesses' credibility." *Id.*

The Second Circuit denied rehearing. Pet. App. 7a.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are in Conflict Over Whether Jurors Who Feel They Can be Fair May Conceal Facts Objectively Indicating Possible Bias

The Second, Fifth and D.C. Circuits are "in conflict . . . on the same important matter," Sup. Ct. R. 10(a), namely whether prospective jurors may withhold facts objectively indicating possible bias so long as they subjectively feel they can be fair.

Of course, working in law enforcement does not mean a juror cannot be fair. But when "dealing with an employee of the government, the court would properly b[e] solicitous to discover whether in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him." *United States v. Wood*, 299 U.S. 123, 134 (1936). *See also Smith v. Phillips*, 455 U.S. 209, 216 (1982) (Though a "'holding of implied bias to disqualify jurors because of their relationship with the Government is no longer permissible . . . [p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.'") (quoting *Dennis*, 339 U.S. at 171-72).

No "actual bias" owing to "the nature or circumstances of [one's] employment" in law enforcement can be "discover[ed]" if jurors need not reveal that they work in law enforcement. And they were not required to do so here. The judge refused to ask Miller's proposed question: "Who is your employer?" E.D.N.Y. Docket No. 15-cr-580, Entry 43 at 5. Defense counsel thus objected: "We don't have anybody's employment information really." 2d Cir. Docket No. 17-2140, Entry 57 at S.A. 203. The judge responded: "You have as much as you're going to get. As much as lawyers who try cases in this court get." *Id*. Thus, jurors in law enforcement were not required to disclose their jobs unless, in a juror's personal assessment, the job "would prevent you from being fair" or "you feel, personally, that you could not be an impartial and fair juror." *Id*. at S.A. 23, 26.

The Second Circuit found no Sixth Amendment violation in this practice. The Fifth and D.C. Circuits have found just the opposite.

The D.C. Circuit disapproved asking jurors to raise their hands if they or a relative was ever "employed by any law enforcement agency" and "[a]s a result . . . you believe that you, that you personally would be unable to be fair and impartial." *Littlejohn*, 489 F.3d at 1341. "The defect in that question is obvious," *id*. at 1344-45, as it allows jurors in law enforcement to conceal that fact unless they believe it is "impossible to serve impartially." *Id*. at 1345. Yet "'whether a juror can render a verdict based solely on evidence adduced in the courtroom should not be adjudged on that juror's own assessment of self-righteousness.'" *Id*. (citation omitted). Miller's judge asked that very question: Does a relationship with law enforcement

"prevent you from being fair and impartial" or make "you feel, personally, that you could not be an impartial and fair juror?" 2d Cir. Docket No. 17-2140, Entry 57 at S.A. 23, 26. The formulations above are all various ways of asking the same thing: Do you have ties to law enforcement that you feel prevent you from being fair?

The Second Circuit said the question in *Littlejohn* was different because the judge there "affirmatively told jurors not to bring to the court's attention any relations with law enforcement personnel unless the juror believed that he or she could not be fair and impartial." Pet App. 4a. But while that judge said "don't raise your hand right away" simply for having ties to law enforcement, he said "you must raise your hand" if, "as a result" of such ties, "you believe that you, that you personally would be unable to be fair and impartial." 489 F.3d at 1341. The judge thus let jurors assured of their own impartiality opt out of revealing their ties to law enforcement. Miller's judge did exactly the same: jurors with a "relationship with any federal, state, or local law enforcement officers" did not have to reveal that fact unless they decided "that would prevent [them] from being fair and impartial." 2d Cir. Docket No. 17-2140, Entry 57 at S.A. 22-23.

As the D.C. Circuit holds, whether to disclose facts indicating possible bias "'should not be adjudged on that juror's own assessment of self-righteousness.'" *Littlejohn*, 489 F.3d at 1345 (citation omitted). "[S]uch self-evaluation is particularly troublesome when jurors are asked about the potential bias caused by their employment history. Even the most scrupulous juror may not recognize that 'lingering loyalty [to a past employer], friendship of persons still employed there, or

knowledge of agency procedures' may color his or her judgment." *Id*. (brackets in *Littlejohn*; citation omitted). Thus, allowing jurors to conceal facts suggesting possible bias – like a job in law enforcement – because the jurors believe they can be fair "violate[s] [the] Sixth Amendment right to an impartial jury." *Id*. at 1344.

The Fifth Circuit agrees: "A juror may not conceal material facts disqualifying him simply because he *sincerely* believes that he can be fair." *Scott*, 854 F.2d at 699 (emphasis in original). The jurors in that case were asked if they had ties to law enforcement rather than, as here and in *Littlejohn*, told they could conceal them, but the controlling question in all three cases – whether to defer to jurors' self-assessments of impartiality – is the same. A juror in *Scott* who concealed his ties to law enforcement said "he had not furnished the information in answer to the trial judge's question because he did not think that it would affect his judgment in the case." *Id*. at 698. And the judge found the juror "'sincerely' believed that his brother's position [in law enforcement] would not affect his impartiality as a juror." *Id*. But the circuit found this immaterial: "That is an insufficient basis for the court to accept [] a juror. A finding of 'sincerity' is not the same as a finding that the juror was unbiased." *Id*. at 699. Thus, a "juror may not conceal material facts" just because he "believes that he can be fair." *Id*.

The Second Circuit takes the contrary view. "Miller contends that the District Court erred by requiring prospective jurors to respond to questions concerning their relationship with law enforcement authorities only if they felt that the relationship 'would prevent [them] from being fair and impartial in this

case.' . . . [W]e disagree." Pet. App. 3a-4a (brackets in opinion; citation omitted).

Only this Court can resolve this conflict: Is *voir dire* constitutionally adequate when jurors may conceal facts relevant to bias so long as they feel they can be fair? This question is important and recurring, and the Second Circuit got it wrong.

II. The Second Circuit Wrongly Answered the Important Question Here

"England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury." *Irvin v. Dowd*, 366 U.S. 717, 721 (1961). This "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Id.* at 722. And a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Parker v. Gladden*, 385 U.S. 363, 366 (1966).

"[P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). "'*Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. Without an adequate *voir dire* the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled.'" *Id.* at 729-30 (brackets in *Morgan*; citation omitted). *See also J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 143-44 (1994) ("*Voir dire* provides a means of discovering actual or implied bias and a firmer basis upon which the parties may exercise their peremptory challenges intelligently.").

Far from safeguarding the right to an impartial jury, the *voir dire* practice the Second Circuit endorsed makes realizing that right effectively impossible.

"All persons otherwise qualified for jury service are subject to examination as to actual bias." *Wood*, 299 U.S. at 133. But one cannot "discover . . . actual bias," *id.* at 134, if jurors are allowed to conceal the very facts that suggest it.

Miller was charged with lying to the U.S. government, and the prosecutor used a U.S. government witness to argue he must have lied and that his defense should not be believed. Thus, to ensure the jury was not unfairly stacked against him – a goal the judge and government ought to have shared – Miller had to decide whether to raise for-cause challenges, or exercise peremptory strikes, against jurors with ties to the U.S. government. He could not do so, however, because he did not know who had such ties unless a juror volunteered them. Likewise, as he did not know which jurors had strong views on Jamaicans or visa fraud, Miller could not strike or challenge them. *See, e.g., United States v. Segal*, 534 F.2d 578, 581 (3d Cir. 1976) ("[T]he parties have the right to some surface information about prospective jurors which might furnish the basis for an intelligent exercise of peremptory challenges or motions to strike for cause. . . . [T]he defendants [who were charged with bribing an IRS agent] would reasonably need to know whether any member of the panel or any person in his family had ever been employed by the Internal Revenue Service."); *United States v. Martin*, 507 F.2d 428, 432 (7th Cir. 1974) ("[T]he prospective jurors' relationship with and attitude toward the Government and government agent witnesses, should have been addressed on voir

dire. Of the four witnesses called by the United States, three were employees of government agencies. Thus, it was particularly important for the defendant to know of any prejudices the jurors may have had about the Government or about the credibility of government agents.") (footnote omitted); *United States v. Baldwin*, 607 F.2d 1295, 1298 (9th Cir. 1979) (Where "the trial judge so limits the scope of voir dire that the procedure used for testing does not create any reasonable assurances that prejudice would be discovered if present, he commits reversible error.").

The "opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury." *Dennis*, 339 U.S. at 171-72. By allowing the jurors to conceal the facts needed to root out bias, Miller's judge denied him that guarantee.

The Second Circuit excused this, saying some jurors "brought numerous relations with law enforcement personnel to the [District] Court's attention. The District Court struck many of these jurors for apparent cause." Pet. App. 4a. But that only begs the question: how many jurors with connections to law enforcement (or views on Jamaicans or visa fraud) did *not* speak up because they believed those things, which could prejudice others, would not "prevent [*them*] from being fair?"

It cannot reasonably be assumed the answer is zero: "[E]veryone likes to think they can be fair under any circumstances and are highly reluctant to admit that they cannot." *Sluss v. Commonwealth*, 450 S.W.3d 279, 285 (Ky. 2014). As one trial judge has observed, "I find it remarkable when a juror has the self-knowledge and courage to answer that he or she cannot be fair in a particular case." Hon. Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection:*

The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions, 4 Harv. L. & Pol'y Rev. 149, 160 (2010).

The "bias of a juror will rarely be admitted by the juror himself, 'partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it.'" *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 558 (1984) (Brennan, J., joined by Marshall, J., concurring) (quoting *Phillips*, 455 U.S. at 221-22 (O'Connor, J., concurring)). *See also United States v. Villar*, 586 F.3d 76, 87 n.5 (1st Cir. 2009) (same); *Conaway v. Polk*, 453 F.3d 567, 587 (4th Cir. 2006) (same); *United States v. Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001) (same); *United States v. Heller,* 785 F.2d 1524, 1527 n.1 (11th Cir. 1986) (same). Implicit biases, meaning "the fears, feelings, perceptions, and stereotypes that lie deep within our subconscious, without our conscious permission or acknowledgement," Bennett, *supra*, at 149, are especially pernicious. "[S]ocial scientists are convinced that we are, for the most part, unaware of them. As a result, we unconsciously act on such biases even though we may consciously abhor them." *Id*. *See also Woods v. City of Greensboro*, 855 F.3d 639, 641 (4th Cir. 2017) ("[M]any studies have shown that most people harbor implicit biases and even well-intentioned people unknowingly act on racist attitudes.").

This Court has thus recognized that, when a prospective juror is asked outright whether he can be fair, "the juror's assurances that he is equal to th[e] task cannot be dispositive." *Murphy v. Florida*, 421 U.S. 794, 800 (1975). Indeed, "judges commonly ask questions such as, 'Can all of you be fair and impartial in this case?'

This question does not begin to address implicit bias, which by its nature is not consciously known to the prospective juror," and so it "would be delusional to assume that this question adequately solves implicit bias." Bennett, *supra*, at 160. *See also Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 869 (2017) ("Generic questions about juror impartiality may not expose specific attitudes or biases that can poison jury deliberations."). If a juror's explicit assurances of impartiality are not dispositive, then neither are his assurances to himself. Express claims of fairmindedness can at least be gauged by observing demeanor, tone and body language. A juror's feeling that he is fair cannot.

Voir dire is essential for "exposing possible biases, both known and unknown, on the part of potential jurors." *McDonough*, 464 U.S. at 558. "Demonstrated bias in the responses to questions on *voir dire* may result in a juror being excused for cause; hints of bias not sufficient to warrant challenge for cause may assist parties in exercising their peremptory challenges. The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious." *Id.*

Equally obvious is that none of this can happen – no questions or answers – if jurors are allowed to conceal the very facts needed to conduct a meaningful inquiry.

The Second Circuit is on the wrong side of the split here, and its additional reasons for ruling against Miller do not withstand scrutiny.

Besides the circuit's "three limited circumstances" standard for inadequate *voir dire* being too narrow, Pet. App. 3a, the court said "the record contains no suggestion" that the can-you-be-fair questions "had any perceivable impact on

Miller's trial." Pet. App. 4a. But how could it? Bias is not "perceivable" when jurors are licensed to conceal the facts needed to detect it. *See, e.g., Littlejohn*, 489 F.3d at 1347 ("I do not take [language in another case] to establish a requirement that in order to prove a violation of Sixth Amendment rights by an inadequate voir dire or other prejudicial error in jury selection, a defendant must identify an actually biased juror who sat on the case. Such a hurdle seems to me to be impractical and in most cases impossible. Absent some unlikely extra-judicial utterance by such a juror or some extrinsic evidence not extant in most cases, a defendant could not know, let alone establish the prejudice of a particular juror.") (Sentelle, J., concurring).

Finally, the circuit said "this was a case in which the evidence against Miller was strong and did not depend on an assessment of law enforcement witnesses' credibility." Pet App. 4a. As shown above, that is not so. Conviction hinged on the jury crediting Officer Daehne's testimony: as neither Miller nor Clarke testified, Officer Daehne was the only witness who spoke to the visa application process. According to him, an applicant must certify that the information in the application is correct even if a third party prepares the application. The government urged the jury to credit this testimony and thus reject Miller's defense that Clarke completed and filed the application without Miller knowing of the two wrong answers. The jury did just that. But the evidence of Miller knowing of the two wrong answers was not "strong." Only two people had personal knowledge of how the application was prepared and filed: Miller and Clarke. Neither man testified. Miller was thus

convicted based on an inference, stemming from Officer Daehne's testimony, that Miller must have known of the two wrong answers. That inference might be reasonable, but it is not inevitable: a commercial preparer could have filled in the "right" answers on the application without performing a step-by-step review with his client. In any event, the weight of the evidence is irrelevant: "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. . . . This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." *Irvin*, 366 U.S. at 722.

* * *

It would be "injurious to permit it to be thought that persons entertaining a disqualifying prejudice were allowed to serve as jurors and that inquiries designed to elicit the fact of disqualification were barred. No surer way could be devised to bring the processes of justice into disrepute." *Aldridge v. United States*, 283 U.S. 308, 315 (1931).

A judge conducting *voir dire* "has a serious duty to determine the question of actual bias." *Dennis*, 339 U.S. at 168. A judge shirks that duty by telling jurors that, as long as they feel they are fair, they may conceal facts suggesting otherwise.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 11, 2019