No.

IN THE
SUPREME COURT OF THE UNITED STATES

MALCOLM FRENCH,

PETITIONER

v.

UNITED STATES,

RESPONDENT

On Petition for a Writ of Certiorari to the
United States Court of Appeals,
First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The first time this case was before the First Circuit, it remanded for further proceedings on French's motion for a new trial made after information surfaced suggesting that a juror lied during the selection process. *United States v. French*, 904 F.3d 111, 113-14, 125 (1st Cir. 2018) ("*French I*").

The second time this case was before the First Circuit, the court affirmed the denial of a new trial, reasoning that the district court "did not abuse [its] discretion" because French failed to carry his burden of showing that the juror had a biased motive for lying. *United States v. French*, 977 F.3d 114, 125-27 (1st Cir. 2020) ("*French II*").

The questions presented are:

1. When a criminal defendant claims the structural error of deprivation of the right to trial by an impartial jury, is that claim appropriately reviewed on appeal using an abuse of discretion standard?

2. To win a new trial based on a claim of juror mendacity in the selection process, must a defendant prove that the juror possessed a biased motive?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Malcom French respectfully petitions for a writ of certiorari to review the Opinion and Judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the First Circuit under review was reported at 977 F.3d 114 and is attached at Appendix A. The First Circuit's Order denying rehearing en banc is attached at Appendix B. The district court's memorandum opinion is attached at Appendix C. The First Circuit's decision in *French I* is reported at 904 F.3d 111 and is attached at Appendix D.

STATEMENT OF JURISDICTION

The First Circuit issued its decision on October 7, 2020. The court denied rehearing en banc on November 20, 2020. The time within which to file a petition for writ of certiorari extends until April 19, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

I. Proceedings in the district court that gave rise to *French I*.

After his conviction on charges arising out of a large-scale marijuana-farming operation, French and co-defendant Rodney Russell sought a new trial based on claims that one juror lied in filling out the written questionnaire given to all prospective jurors prior to trial. *French I*, 904 F.3d at 113-14. Shortly after sentencing, defense counsel for French reported that they had just learned that a prisoner housed in the same jail as a co-defendant, who sat on the jury before which the case was tried, was the mother of a small-time marijuana trafficker. *Id.* at 114-15. Counsel for French investigated this report, and learned that Juror 86's son had indeed been convicted of marijuana and other drug-related offenses multiple times between 2002 and 2014 arising out of his use and sale of marijuana and cocaine. *Id.* at 115. At one point, Juror 86 visited her son in jail. *Id.* She also paid the legal fees arising out of his offenses on multiple occasions. *Id.*

The government did not challenge the accuracy of this information concerning Juror 86, none of which had been disclosed in response to questions asked of her during the jury selection process. *Id.* As part of that process, prospective jurors filled out a questionnaire, which included the following prompt:

> 3. a.) Please describe briefly any court matter in which you or a close family member were involved as a plaintiff, defendant, witness, complaining witness or a victim. [Prospective jurors were given a space to write an answer].

b.) Was the outcome satisfactory to you? [Prospective jurors were given "yes" and "no" check boxes here].

c.) If no, please explain. [Prospective jurors were given a space to write an answer].

Id. When jury selection began, the magistrate judge asked the following of the prospective jurors:

> Now, as you've heard for a couple hours now this morning, this is a case about marijuana, which is a controlled substance under federal law. Is there anyone on the jury panel who themselves personally or a close family member has had any experiences involving controlled substances, illegal drugs, specifically marijuana, that would affect your ability to be impartial?
>
> And by experiences, I'm talking about whether you or a close family member have been involved in that situation involving substance abuse or involving treatment that – maybe professionally treating the condition, or being the victim of a crime involving those substances, or being the perpetrator of a crime where someone alleged those substances were involved. Any…experiences regarding illegal drugs, and specifically marijuana, but any illegal drug, controlled substance under federal law, is there anyone who's had that sort of experience?

Id. Juror 86 did not respond to this question. *Id.* Later on in the process, the magistrate asked:

> Is there anyone here who knows of any other reason, some question I haven't asked or something that's been sitting there troubling you, why hasn't she asked me about this, those attorneys, those people

> should know about this fact and it might interfere with me being a fair and impartial juror or it might appear that it would interfere, is there any other fact that you feel would affect in any way your ability to be a fair and impartial juror?

Id. Again, Juror 86 was silent.

French filed a motion for new trial, and he argued that Juror 86's answers to the questionnaire and her lack of a response to oral voir dire questions amounted to dishonest answers to material questions, and that had the answers been honest, there would have been a valid basis for a challenge for cause. *Id.* at 116. French also asked for an evidentiary hearing to question Juror 86 about her answers. *Id.* at 116. The district court denied French's motion for a new trial, as well as his request for an evidentiary hearing. *Id.* at 116.

II. The First Circuit's decision in *French I*.

French appealed to the First Circuit. The court reasoned that French "came forward with factual information fairly establishing that Juror 86 likely gave an inaccurate answer to question 3 on the written questionnaire." *Id.* at 117. The court also noted that French "showed that the correct answer to question 3 may well have been quite relevant to assessing the juror's ability to fairly sit in judgment in this case." *Id.* Thus, "a court-supervised investigation aimed at confirming and then exploring further the apparent dishonesty was called for." *Id.*

The First Circuit then observed: "One major loose end remains." *Id.* at 119. The court was referring to the government's argument that "even if Juror 86 had committed misconduct, there was no prejudice to [French] because the government

had a strong case." *Id.* The court disagreed, concluding that: "The presence of a juror whose biases would require striking the juror for cause in a criminal case is structural error that, if preserved, requires a vacatur." *Id.* at 120.

Lastly, the court gave this instruction regarding the remand for an evidentiary hearing:

> [T]o the extent that memories have faded in the two years between [French's] filing of [his] motion for a new trial and this decision, we place the responsibility for that possible loss of evidence at the feet of the government, not the defendants. Defendants first became aware of the issue with Juror 86 in March 2016, and filed their motion approximately one month later, all the while in the midst of preparing for sentencing. That timeframe exhibits sufficient diligence on the part of defendants. The government then had the option of acquiescing to the defendants' request to bring Juror 86 in for an evidentiary hearing, but elected to oppose it, resulting in now over two more years of litigation on the issue. If the staleness of memories resulting from that additional two-year period becomes a problem that cannot be solved on remand, we think it only fair for that to cut against the government.

Id.

III. Proceedings in the district court on remand.

Following further proceedings on remand, including an evidentiary hearing involving testimony from Juror 86, the district court again denied French's motion for a new trial. During the evidentiary hearing, the parties stipulated to the relevant criminal record of Juror 86's older son, which included state-court convictions in three separate cases for unlawful furnishing or marijuana, possession of cocaine, and the

unlawful possession of marijuana. *French II*, 977 F.3d at 119. The district court also received evidence that Juror 86 wrote three personal checks to a lawyer in relation to services provided to her older son, visited him in jail, and possibly attended a juvenile proceeding in which he was charged with theft and forgery. *Id.* at 119-120. The district court learned that Juror 86 possibly accompanied her younger son to court when he was there on charges for possession of a "small amount of pot." *Id.* at 120.

Juror 86 testified that she did not include any of this information about her family members' involvement with the legal system on the questionnaire because she "did not think it was relevant." *Id.* at 120. Despite visiting her older son in jail, and paying his legal bills, Juror 86 said that she did not specifically know why her older son had hired a lawyer or what he had been charged with. *Id.* at 119-20. When prompted about her presence at a juvenile proceeding, Juror 86 recalled that she reported one of her sons to the police after he forged one of her checks and stole from her, but that she did not recall what legal proceedings resulted. *Id.* at 120.

Juror 86 also testified that she had no memory as to why she failed to respond to the magistrate's questions, but that she "stay[s] neutral" and "do[esn't] form judgments prior to knowing the full story." *Id.* at 120. Juror 86 added that her sons' involvement in marijuana-related matters would not have affected her ability to be impartial. *Id.* Juror 86 emphasized that, in hindsight, she must have felt that she could be fair and impartial, and that she still believed that to be the case. *Id.* Juror 86 said that she did not have a strong desire to be either on or off a jury or any bias

or animosity against people accused of drug crimes, including people accused of growing marijuana. *Id.* at 120-21.

French renewed his motion for new trial. *Id.* at 121. Despite finding that Juror 86 "failed to honestly answer a material question on voir dire" by not disclosing numerous court proceedings involving herself and her close family members, including several involving controlled substances, the district court concluded that Juror 86 would have been able to separate her emotions from her duties as a juror and that she would not have been stricken for cause by a reasonable judge had she honestly answered the questions posed. *Id.* at 121. In reaching that conclusion, the district court acknowledged, however, that it ultimately could not determine exactly why Juror 86 filled out her questionnaire inaccurately or failed to respond to the relevant questions posed during oral voir dire because she could not remember what she was thinking at the time. *French II*, 977 F.3d at 125; A: 102, 108-9.

IV. The First Circuit's decision in *French II*

The First Circuit began its analysis by reciting the two-factor test set forth in *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984). To obtain a new trial based on a juror's failure to respond accurately to questions asked of prospective jurors prior to their selection to sit as jurors: "a [defendant] must first demonstrate that a juror failed to answer honestly a material question on voir dire," and second, the defendant must "further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556.

The First Circuit reasoned that the district court's findings "left no likely explanation that would reveal any disqualifying bias toward either [French] or the government." *French II*, 977 F.3d at 125. Regarding Juror 86's motives, the court explained:

> Of course, the reason behind the juror's dishonesty is important when considering whether a reasonable judge would strike for cause. But not all motives are equally alarming. As the Supreme Court has explained, while "motives for concealing information may vary,…only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." Here, the testimony elicited at the evidentiary hearing and the district court's findings eliminated the motives that usually tend to show bias, and there is no suggestion in the record that Juror 86 had some other motive that would cast doubt on her impartiality.
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> [T]he district court was able to exclude the most obvious indicators of bias from the evidence that was in the record. And, with those most concerning motivations excluded, the defendants failed to posit any other concerning motive that might explain the juror's conduct but that the passage of time prevented from uncovering.

Id. at 126 (direct citation to *McDonough*, 464 U.S. at 556, and other internal citations omitted).

After announcing that it would review the district court's denial of a motion for new trial for abuse of discretion, *id.* at 121, the Court concluded that "the trial judge did not abuse his discretion" in concluding that the evidentiary hearing "did not yield any evidence that [Juror 86's] dishonesty was motivated by bias." *Id.* at 127.

REASONS FOR GRANTING THE WRIT

The First Circuit's decision in *French II* conflicts with two different strands of this Court's case-law, and as to the second, it contributes to the considerable confusion among the federal courts about the meaning and application of the *McDonough* test.

First, whether a criminal defendant is entitled to a new trial because of juror misconduct evincing bias presents an issue of constitutional importance – the right to trial by a neutral and impartial factfinder – so significant that, if a preserved error of that nature is found, vacatur is required. *French II*, however, applies an abuse-of-discretion standard of review, and holds that the district court did not abuse its discretion in concluding that French was tried by a neutral jury. This Court should grant review and announce that the abuse-of-discretion standard of appellate review is incongruous with constitutional errors, especially structural errors. No other error identified by this Court as structural is subject to the highly differential abuse-of-discretion standard of review. Nor should they be.

Second, this Court has instructed that when confronted with a plausible claim of juror bias, a new trial is warranted if the defendant can prove two things: (1) that the juror failed to honestly answer a material voir dire question; and (2) that a correct answer would have resulted in the juror's removal for cause. *McDonough*, 464 U.S. at 556; *see also Warger v. Shauers*, 574 U.S. 40, 44 (2014) (stating without qualification that "[i]f a juror was dishonest during *voir dire* and an honest response

would have provided a valid basis to challenge that juror for cause, the verdict must be invalidated.").

In *French II*, however, the court held that a defendant must prove something else in addition to these two factors: (3) that the juror possessed a biased motive. This added factor was detrimental to French because Juror 86's memory loss made it impossible to determine her motive for dishonesty; she simply had no recollection why she answered (or failed to answer) in the manner that she did. And yet, there is no doubt that, had the information revealed at the evidentiary hearing come to light during voir dire, Juror 86 would have been removed for cause. French can prevail under *McDonough's* binary test. He cannot under a variation of the test employed by some federal courts to the severe disadvantage of the movant for a new trial.

This added "biased motive" factor is discordant with this Court's case law. It incorporates a prejudice analysis into the *McDonough* framework and it is at odds with this Court's declaration that the presence of a biased juror qualifies as structural error.

As the Ninth Circuit recently recognized, there is a growing division among federal courts over whether the two-part *McDonough* test has a third component requiring a prejudice analysis. *Scott v. Arnold*, 962 F.3d 1128, 1132-33 (9th Cir. 2020). This Court should grant review to clarify that the *McDonough* test is a two-part test, not a three-part test.

Here, the district court confessed that it could not discern Juror 86's motive. It did not know "why Juror 86 failed to accurately and honestly answer Question 3...,

and why she did not reveal this information during voir dire…, and why she testified in such a contradictory and confusing manner [at the evidentiary hearing]." *French II*, 977 F.3d at 121. From this ambiguity springs the heartland of this case.

Suppose a district court judge learns during jury selection that a juror has given a false answer to a material voir dire question. Suppose the judge asks the juror to explain her answer, and the juror gives an unlikely, confusing, difficult-to-reconcile, contradictory response.[1] Suppose the judge then asks the juror what she was thinking when she gave the false answer, and the juror replies that she has no memory whatsoever of her thought process. Suppose that juror's false answer concerns her sons' criminal history of possessing and dealing marijuana, and the trial on which she may serve concerns marijuana manufacturing. This is a juror who would be removed for cuase by any reasonable judge. A juror who knowingly provides a false answer to a material voir dire question and has no explanation for doing so would never survive a challenge for cause. These are the facts of our case, and under the two-part *McDonough* test, French wins. The First Circuit added an additional criteria – whether the prospective juror had a biased motive for her material falsehood – and, concluding that French failed to establish one, it affirmed his conviction.

I. Application of an abuse-of-discretion standard of appellate review is incongruous with structural error.

In *French I*, the court announced: "the presence of a juror whose revealed biases would require striking the juror for cause in a criminal case is structural error

[1] This was the district court's characterization of Juror 86's testimony. (A: 53, 62).

that, if preserved, requires vacatur." *French I*, 904 F.3d at 120. This has ample support. A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," and it characterizes errors that "deprive defendants of 'basic protections' without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilty or innocence." *Arizone v. Fulminante*, 499 U.S. 279, 310 (1991); *Neder v. United States*, 527 U.S. 1, 8-9 (1999). Trial before a biased judge is a structural error. *Tumey v. Ohio*, 237 U.S. 510, 522-24 (1927). Trial before a jury whose impartiality has been fatally compromised is also a structural error. *Turner v. Louisiana*, 379 U.S. 466, 471-74 (1965). The First Circuit has previously, and correctly observed, that the right to an impartial jury is "constitutional bedrock." *Sampson v. United States*, 724 F.3d 150, 163 (1st Cir. 2013).

Constitutional errors, especially structural errors, are entitled to plenary appellate review, rather than the highly differential abuse-of-discretion standard. *See e.g. Pierce v. Underwood*, 487 U.S. 552, 558 (1988). This, too, could be fairly characterized as a "bedrock" principle.

No other structural error, if preserved, is subject to an abuse-of-discretion standard of review, and the First Circuit's suggestion that the district court's ruling on French's motion, which directly implicated his constitutional right to trial by an impartial jury, would be viewed deferentially, is, respectfully, wrong. French respectfully requests that, on this basis, this Court grant review, vacate the decision

in *French II*, and remand for further consideration in light of this Court's unwavering instruction that constitutional errors are entitled to plenary consideration on appeal.

II. There is confusion among federal courts over whether *McDonough* is a two-part or a three-part test.

As the Ninth Circuit explained in *Scott*, 692 F.3d at 1131, "*McDonough* leaves several outstanding questions unanswered…. It remains unclear whether and to what extent the United States Supreme Court recognized distinctions between actual prejudice, implied prejudice, and '*McDonough* prejudice,' and what showings for relief are required in each scenario." The court continued: *McDonough* "did not explain if, or demonstrate through application whether, it was establishing a simple test or a test that accommodates a prejudice analysis." *Id.* And, "since *McDonough*, our court and other circuits have highlighted this remaining uncertainty and described *McDonough* as accommodating a prejudice analysis." *Id.* at 1131.

A. The First Circuit. In addition to *McDonough's* two part test, the First Circuit requires movants to establish a third factor – a biased motive – in order to win reversal. In *Sampson v. United States*, 724 F.3d at 166, the court observed that "the juror's motive for lying" must be considered. In *Faria v. Harleysville Worcester Ins. Co.,* 852 F.3d 87 (1st Cir. 2017), the court instructed that "[t]he binary test set forth in *McDonough* is not a be-all-end-all test to be viewed without context. ….[T]he animating principle of the *McDonough* test is this: '[t]he motives for concealing information may vary but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.'" *Id.* at 96 (quoting *McDonough*).

B. The Fourth Circuit. The Fourth Circuit likewise adds an additional "juror's motives" factor to *McDonough's* binary test. In *Conaway v. Polk*, 453 F.3d 567 (4th Cir. 2006), the Court recited *McDonough's* two-factor test and then wrote: "Additionally, a litigant must show that the fairness of the trial was affected either by the juror's 'motives for concealing the information' or the 'reasons that affect the juror's impartiality.'" *Id.* at 585 (quoting *McDonough*). Later in the decision, the Court reiterated: "Even where…the two parts of the *McDonough* test have been satisfied, a juror's bias is only established under *McDonough* if 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.'" *Id.* at 588.

C. The Ninth Circuit. The Ninth Circuit has acknowledged its own lack of "clarity in our circuit's treatment of *McDonough*." *Scott*, 962 F.3d at 1132. The court observed that in two cases, it "arguably applied a prejudice analysis" in reaching the ultimate holding. *See Scott*, 962 F.3d at 1132-33 (discussing *Coughlin v. Tailhood Association*, 112 F.3d 1052, 1059-62 (9th Cir. 1997), and *Elmore v. Sinclair*, 799 F.3d 1238, 1253 (9th Cir. 2015)). But, "these cases appear to stand in contrast," the Ninth Circuit explained, "with our discussions…where we described actual bias, implied bias and *McDonough* bias as three separate concepts without describing a prejudice showing under *McDonough*." *Scott*, 962 F.3d at 1133 (discussing *Fields v. Brown*, 503 F.3d 755, 766-72 (9th Cir. 2007) (en banc), and *United States v. Olsen*, 704 F.3d 1172, 1189 (9th Cir. 2013)). The Ninth Circuit's explanation for this apparent confusion is that "the Supreme Court has not given explicit direction as to whether

McDonough requires a criminal defendant to show prejudice to obtain a new trial[.]" *Id.* at 1133 (internal quotation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

March 5, 2021

Respectfully submitted

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