No. 21-

IN THE

Supreme Court of the United States

EARL MCCOY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in analyzing the Petitioner's Sixth Amendment right to trial by a fair and impartial jury by only applying the *McDonough* two prong standard.

2. Whether a new trial is warranted pursuant to this Court's decision in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), only upon circumstances evidencing intentional juror dishonesty for the purpose of securing a seat on the jury, or, alternatively, whether a new trial is warranted even upon a showing of intentional dishonesty for an alternative purpose or inadvertent juror dishonesty.

3. Whether *McDonough* requires a showing of actual juror bias before a new trial may be granted, or alternatively, whether a showing of implied or inferred juror bias is sufficient to demonstrate a valid basis for a challenge for cause to warrant a new trial.

4. Whether attempted robbery under the Hobbs Act, 18 U.S.C. § 1951, qualifies as a "crime of violence," meaning that it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another" when analyzed under the "categorical" or "elements" analytic.

Parties and Related Cases

The parties are Earl McCoy, Matthew Nix and the United States of America.

*_USA v. McCoy_ No. 6:14-cr-6181-1, District Court for the Western District of New York. Judgment entered October 24, 2007

*_USA v. McCoy_ No. 17-3515 and 18-619, US Court of Appeals for the Second Circuit. Judgment entered April 22, 2021

*_USA v. Matthew Nix_ No. 6:14cr 6181-4, US District Court for the Western district of New York. Judgment entered October 24, 2017

*_USA v. Matthew Nix_ No. 17-3516 and 18-625, U.S. Court of Appeals for the Second Circuit. Judgment entered April 22, 2021

*_Matthew Nix v. United States_, Petition for Writ of Certiorari No. 21-447 filed on September 15, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Earl McCoy respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion (*United States v. McCoy*, No. 17-3515 (2nd Cir. 2021) (Docket Nos 17-3515L, 17-3516, 18-619, 18-625) is published at 995 F. 3d 32 and reproduced in the appendix to the Petition for Certiorari filed by Matthew Nix at Docket No. 21-447. (Hereafter "APP") (App. 78a-149a) The district court's judgment is published at *United States v. Nix*, 275 F. Supp. 3d 420, (W.D.N.Y. 2017) and is reproduced in the appendix to the Certiorari Petition filed in the Nix Petition. (APP 1a–77a).

JURISDICTION

The Second Circuit entered its decision on April 22, 2021. Petitioner filed a motion for rehearing, or in the alternative for en banc review. The Court of Appeals denied said motion on June 28, 2021. The time to file the Writ of Certiorari was extended by this Court by Order dated July 19, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of 18 U.S.C. §§ 924 (c) and 1951 are reproduced in the Nix appendix (App. 152a-170a).

STATEMENT OF THE CASE

Earl McCoy and his co-defendant, Matthew Nix, were convicted on all eleven (11) counts of third Superceding Indictment No. 14-6181 after a jury trial held in the Western District of New York on March 17, 2017. The counts of conviction consisted of one count of Conspiracy to Commit a Hobbs Act Robbery, five (5) counts of Brandishing a Firearm in relation to a Crime of Violence, two (2) counts of Attempted Hobbs Act robbery, one count of Hobbs Act Robbery, one count of Conspiracy with Intent to Possess and Distribute Marijuana and Heroin, and one count of being a Felon in Possession of a Weapon. (See Court of Appeals Special Appendix, hereafter "SPA"). (SPA-11).

Upon his conviction, he was ultimately sentenced to an aggregate term of 1,620 Months, or 135 years' incarceration. (SPA 9-10). At the trial in this matter prospective juror number 6, (hereafter "J.B."), filled out his juror questionnaire and falsely stated that he had never been convicted of a felony. As the record would later show, he had been convicted of two (2)

felonies. During the day long *voir dire* which ended at approximately 7:00 p.m., J.B. continued to give false answers on multiple matters, stating that he had never been to a prison or jail, had never been involved in a court proceeding, had never sat on a jury, had never committed a burglary, had never been the victim of a burglary, and that there was nothing about his background which in all fairness the parties should know about before deciding whether to select him as a juror in this case. Although it cannot be said for certain that the foregoing falsehoods were uttered for the purpose of securing a seat on the jury, it is indisputable that honest answers to these questions would have lessened his chances of being selected.

Since the jurors had been told that Defendants were charged in several counts with committing burglaries and home invasions which were for the purpose of obtaining drugs, guns, cash and jewelry, J.B.'s nondisclosure was especially notable when it was discovered after the trial that J.B. had been arrested for a Burglary 2nd Degree charge in Rochester, New York wherein it was alleged that he and others had shot out the back window of an apartment. After going inside, he allegedly stole two (2) handguns and some gold according to his co-defendant. J.B. admitted to police that they stole a pouch containing heroin.

He also withheld that he had been the victim of a burglary years later when his home was entered and several items, including jewelry, checks and thousands of dollars in merchandise was stolen. One of the items stolen was a personal ring with his initials on it. (See Court of Appeals Appendix, hereafter "CA"). (CA-3499-3500). In the trial, one of the victims, Marc Agostinelli, also had a personal ring stolen from his home at 44 Polo Place. A detailed account of the *voir dire* is related in the Appellant's main brief. (Pgs. 6-18).

After the verdict, counsel for Mr. McCoy and Mr. Nix made motions for a new trial when it was discovered that J.B. had a felony conviction and further details concerning his additional false statements followed. The Court ordered a hearing at which J.B. testified with a promise of immunity from the Government for his truthful testimony.

Despite this, J.B. continued to lie at the hearing. In describing his first conviction for burglary, in which he acted as a get-away driver, Mr. Bradford claimed that he was not aware that his co-defendants were committing a burglary and he was "railroaded" into taking a plea. After being confronted with a signed confession and police reports indicating property from the burglary was found at his home, J.B. admitted that he was

lying. He went on throughout the hearing to give, at times false, and at other times incoherent, contradictory, and confusing responses. A more complete description of the hearing is set forth in Appellant's brief. (Pgs. 18-33).

After sentencing, and during the pendency of the Appeal, records concerning the Burglary, 2nd Degree charge committed by J.B. were delivered to counsel for Mr. Nix on November 24, 2017. These records had been a subject of a subpoena and Freedom of Information request prior to the juror hearing which had been held the previous June.

Despite efforts made to obtain these police reports prior to the hearing, none of them were produced until after the Appellants were sentenced and efforts to obtain them continued. The court's denial of the Rule 33 motion was the subject of a second appeal (Docket No. 619) which was consolidated with the first appeal.

REASONS FOR GRANTING THE PETITION

A. The Court defined Petitioner's Sixth Amendment rights by only employing the *McDonough* two prong standard.

The Court of Appeals evaluated Petitioner's Sixth Amendment right to trial by a fair and impartial jury by employing the two prong test set forth in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). Because of the similarity of J. B.'s life experiences

with subject matter of the trial, there should have been a presumption of bias which other circuits have used in evaluating the right to a fair and impartial jury. Employing that presumption, Petitioner would have been entitled to a new trial.

In *McDonough*, this Court espoused a two part test to determine whether a juror's false statements implicate his/her impartiality and necessitates a new trial. The Court held that "to obtain a new trial . . . a party must first demonstrate that a juror failed to honestly answer 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.

McDonough's two prong test promulgated for a civil case went on to be employed in criminal cases but was never intended by this court to be used in defining a of a defendant's Sixth Amendment rights. In his concurring opinion, Justice Blackmun noted "the Court's holding (did) not . . . foreclose the normal avenue of relief available to a party who is asserting that he did not have the benefit of an impartial jury". *Id* at 556.

It has been widely recognized that while *McDonough* can be applied to criminal cases, it is not the exclusive test for determining whether a new

trial is warranted. A showing that a juror was biased either consciously or by inference or implication by his background and prior life experiences can also be the basis for granting a defendant a new trial because his right to a fair and impartial jury has been violated under the Sixth Amendment. Such was held by the First and Fourth Circuits in *Fitzgerald v. Greene*, 150 F. 3d 357, 362-363 (4th Cir. 1998); *Jones v. Cooper*, 311 F. 3d 306 (4th Cir. 2002); and *United States v. Sampson,* 820 F. Supp. 151, 171 (D.C. Ma. 2011), aff'd *Sampson v. United States*, 744 F. 3d 150 (1st Cir. 2013).

The District Court opinion conflated the *McDonough* and Sixth Amendment standards concluding that neither prong of the *McDonough* test had been met because although it was undisputed that J.B. had been deliberately deceitful, he was not motivated by a desire to secure a seat on the jury.

Although *McDonough* is a civil case and obviously does not mention the Sixth Amendment, the District Court opinion and Court of Appeals applied *McDonough* as if it defined the Defendant's/Appellant's Sixth Amendment rights. This is best exemplified in the following passage from the opinion below in which the Court of Appeals approved the district Court's decision claiming that "the Court correctly laid out the relevant

Sixth Amendment principles, describing standards indicated by the Supreme Court in *McDonough* and applied in past cases in this Court . . . "(APP. 114a). The Court of Appeals apparent belief that *McDonough*, a civil case, lays out Sixth Amendment principles is obviously incorrect and ignores the entire body of case law which has found juror bias where information is withheld and bias is presumed because of the life experiences of the juror which can result in actual, inferred or implied bias.

No other Court of Appeals requires that bias has to be proved to such an extent that it requires a defendant to show that a juror lied for the specific purpose of obtaining a seat on the jury. Simply showing that the bias violates the defendant's right to a fair and impartial jury is the standard.

In *United States v. Eubanks*, 591 F. 2d 513 (9th Cir.) the defendants were convicted of conspiracy to distribute cocaine. After the trial, Defendants learned that one of the jurors had two (2) sons who were serving long prison terms for murder and robbery. Both of the juror's sons were heroin users and their crimes had been committed in an effort to acquire additional heroin. The juror had stated on his juror questionnaire that he was married with no children. During *voir dire*, the juror did not respond when asked if any family member had been involved in the "defense of a criminal

case".

After discovery of the facts about the juror and his sons' experiences, defense counsel moved for a new trial, which was denied without a hearing. The Appellate Court reversed and remanded for a new trial. In so doing, the Court noted that had the trial judge known about the juror's sons experience with heroin, he would have excused the juror for cause. The "sons" tragic involvement with heroin bars the inference that (the juror) served as an impartial juror", *Id* at 517. The Ninth circuit did not imply motive to the juror's false statement or even suggest the statement was a lie, much less that it was motivated by a desire to be seated on the jury.

As the Eighth Circuit has held, bias is implied where the relationship between the juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial . . .". *Sanders v. Norris*, 529 F. 3d 787, 792 (8th Cir. 2008). The Seventh Circuit has held that in some circumstances, bias is also implied "when there are similarities, between the personal experiences of the juror and the issues being litigated, the bias is implied"; *Hunley v. Godinez*, 975 F. 2d 316 (7th Cir. 1992). The Tenth Circuit provides another example of implied or presumed bias occurring in *Burton v. Johnson*, 948 F. 2d 1150, 1157 (10th

Cir. 1981), where the prospective juror had been the victim of a crime or had experienced a situation similar to the one issue at a trial. There, the juror had been a domestic abuse victim in a murder trial where the defense was battered wife syndrome, such was also the case in the D.C. Circuit, *Jackson v. United States*, 395 F. 2d 615, 617-618 (D.C. Cir. 1968). (Court considered juror presumptively biased because he had been a participant in a "love triangle" analogous to the one at issue in trial). This also occurred in the Third Circuit, *United States ex rel. DeVita v. McCorkie*, 248 F. 2d 1, 8 (3rd Cir. 1957) (en banc). Court imputed bias to juror in a robbery case because juror had been a robbery victim prior to trial.

Here, the Court of Appeals did not even follow its own precedent in *United States v. Parse*, 789 F. 3d 83 (2nd Cir. 2015), where the Court stated "where the juror deliberately concealed information, 'bias' is to be presumed" *Id* at 111. That holding has now been modified to read that bias is only presumed when a juror "lies for the purpose of securing a seat on the jury". This caveat differs from the Sixth Circuit which has held that such presumption of bias applies, regardless of motive. *McCoy v. Goldstone*, 652 F. 2d 654, 659 (6th Cir 1981).

There were multiple instances of similar behavior engaged in by J.B.

which were similar to the charges for which Petitioner was being tried. Petitioner was accused of breaking into homes to steal money, jewelry and drugs. J.B. had been arrested for doing the exact same thing. More recently, J.B. had been the victim of a burglary where thousands of dollars were stolen along with jewelry and a ring. Like J.B., Marc Agostenilli, had a personal ring stolen. Nowhere does the district court or Court of Appeals even discuss these facts in the context of Petitioner's Sixth Amendment right to a fair and impartial jury. Instead, the Court simply defines the Sixth Amendment rights of Petitioner as being defined by the civil case of *McDonough*.

This Court has held in *Irvin v. Doud*, 266 U.S. 717, 722 (1961) and *Turner v. Louisiana*, 379 U.S. 466 (1965) that the Sixth Amendment guarantees the criminally accused a fair trial. Virtually every circuit dealing with the issue has not imposed a burden upon a Petitioner that he look into the mind of the juror and prove a specific intent on the part of the juror, who tells multiple lies that his intent was to secure a seat on the jury. Honest answers to the questions would have revealed bias so great that bias would have been imputed to the juror.

B. The Courts of Appeals are divided in their interpretation of *McDonough*

The first prong of *McDonough* asks whether the juror failed to "honestly" answer a question on *voir dire*. The First, Fourth and Sixth circuits have held that a new trial may be granted even where the juror's false statement was inadvertent. (See *United States v. Solorio*, 337 F. 3d 580, 596 Cn. 12 (6th Cir. 2003), cert. den., 540 U.S. 1063 (2003); *Jones v. Cooper*, 311 F. 3d 306, 310 (4th Cir. 2002) cert den. 539 U.S. 980 (2003); *Amirault v. Fair*, 9689 F. 2d 1404, 1405-1406 (1st Cir. 1992) (cert den., 506 U.S. 1000 (1992).

The Eight, Eleventh and D.C. Circuits only require a new trial where the juror's dishonestly was intentional, (See *United States v. Hawkins*, 796 F. 3d 843, 863-864 (8th Cir. 2015) cert. den. 136 S. Ct. 2030 (2016); *United States v. Carpa*, 271 F. 3d 962, 967 (11th Cir. 2001) cert. den. 537 U.S. 889, (2002); *United States v. White*, 116 F. 3d 903, 930 (D.C. Cir. 1997) cert. den. 522 U.S. 960 (1997).

Unlike any other Circuit, the Second Circuit requires that not only must the juror's dishonesty be intentional, but Petitioner must have proved that it was for the specific purpose of obtaining a seat on the jury.

The second prong of *McDonough* requires that the dishonest

statement of the juror must be of such magnitude that it would "create a valid bias for a challenge for cause". Each of the circuits has employed different criteria in employing this prong. For example, the Fourth and Eighth circuits hold that a valid basis for a challenge for cause exists where disqualification would be mandatory, *Hawkins*, 796 F. 3d at 863-864; *Conaway v. Polk*, 453 F. 3d 567, 588 (4th Cir. 2006). This is not required in the First and Second Circuits, *Parse*, 789 F. 3d at 111; *Sampson v. United States*, 724 F. 3d 150, 165-166 (1st Cir. 2013). The Third, Sixth and Eleventh Circuits hold that a valid basis for a challenge for cause exists where disqualification would have been mandatory because of actual or implied bias. See *United States v. Claxton*, 766 F. 3d 280, 301 (3rd Cir. 2014); *Johnson v. Luoma*, 425 F. 3d 318, 326 (6th Cir. 2005); *Carpa,* 271 F. 3d at 967. The absence of "a valid basis for challenge for cause" provides an unjustifiable risk of unequal sentences.

C. The Court misapplied *McDonough.*

The Second Circuit's interpretation of *McDonough* which prescribes that a juror must have a motive of obtaining a seat on the jury for providing a dishonest answer in the first prong of the analyses is not followed by any other court and was incorrectly applied in this case. In fact, if this Court in

McDonough had required that a juror's dishonest answer be accompanied with such a dishonest intent to sneak or smuggle one's way on to the jury, there would not be a need for a second prong.

Any lie told by the juror to obtain a seat on the jury would have to be of such materiality and of such magnitude that it would betray an intense bias. In the words of Justice Cardozo, such juror would "not be a juror at all" and "his presence on the jury would be a pretense and a sham", *Clark v. United States*, 289 U.S.1, 13 (1933).

D. Attempted Robbery under the Hobbs Act, 18 U.S.C, § 1951, does not qualify as a "crime of violence" under 18 U.S.C. § 924 (c) (3) (A).

The Second Circuit has concluded that Attempted Hobbs Act Robbery is a "crime of violence" as that term is use in 18 U.S.C. § 924 (c) (3) (A). There is a circuit split with the Fourth Circuit decision in *United States v. Taylor*, 979 F. 3d 203, 207 (4th Cir. 2021). The court below ruled that Hobbs Act Robbery categorically constitutes a crime of violence, it follows as a matter of logic that attempted Hobbs Act robbery also "categorically qualifies as a crime of violence". (APP 127-128).).

The Court suggested a legal imagination would be required to hypothesize a situation where one could commit an attempted robbery (APP

128). As a factual matter, no legal imagination, *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) is required to envision these cases because they already exist. See e.g., *United States v. Wrobel*, 841 F. 3d 450, 454-55 (7th Cir. 2016) (defendants made plans to travel to New York to commit a robbery via threats of force, with no intent to harm victim, but were arrested before they reached New York). And as a legal matter, the Court of Appeal's reliance on *Duenas-Alvarez* is unfounded where, as here, the statutory language literally and explicitly includes conduct (i.e. attempted threat of force) that is not a "crime of violence" under the elements clause. *Duenas-Alvarez's* inquiry into the probability that a defendant would be convicted of violating § 924 (c) based on an attempted threat thus has no place here because the statutory language clearly allows such a conviction. See e.g., *Hylton v. Sessions*, 897 F. 3d 57, 65 & n.4 (2nd Cir. 2018) (collecting cases and noting "nearly unanimous disagreement" with approach that would require *Duenas-Alvarez* analysis where the statute is clear).

CONCLUSION

For any and all of the foregoing reasons it is respectfully requested that the Court grant the Petition herein.

DATED: November 22, 2021
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