No. 17-1566

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

BRIEF OF NATIONAL JURY PROJECT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

In *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 556 (1984), this Court held that a party is entitled to a new trial if (1) a juror "failed to answer honestly a material question on *voir dire*," and (2) "a correct response would have provided a valid basis for a challenge for cause." The questions presented are:

1. Whether "a valid basis for a challenge for cause" requires proof that the undisclosed information would have subjected the juror to mandatory disqualification, or whether the standard is satisfied where a reasonable judge, made aware of the withheld information, either would, or lawfully could, have excused the juror for cause.

2. Whether *McDonough* requires proof that the juror deliberately omitted or misstated information during voir dire, or whether the standard may be satisfied where the juror omitted or misstated material information inadvertently.

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INTEREST OF *AMICUS CURIAE*

The National Jury Project ("NJP") is a non-profit corporation established in 1975 to study the American jury system and work to maintain and strengthen that system.[1] The NJP provides consultative and educational

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to this brief's preparation or submission. Counsel of record for all parties received timely notice of *amicus*'s intent to file this brief and provided written consent to the filing of the brief.

services to attorneys in criminal and civil litigation in federal and state courts throughout the United States.

The NJP is a leading voice on jury research. The NJP has authored three texts: *Jurywork: Systematic Techniques* (2d ed. 2017-2018), *Women's Self-Defense Cases: Theory and Practice* (1981), and *The Jury System: New Methods for Reducing Prejudice* (1975). NJP members have written articles for both legal and social science journals and contributed to books related to the jury selection process. NJP members frequently speak at seminars for trial lawyers, including seminars conducted by the Federal Judicial Center, the Ninth Circuit Judicial Conference, the Northern District of California Judicial Conference, the National Association of Women Judges, the Florida Conference of County Judges, the NAACP Legal Defense Fund, the United States Department of Justice Civil Rights Division, the American Bar Association, the Practicing Law Institute, the American Trial Lawyers Association, and the National Criminal Defense College. NJP members have also testified before congressional and state legislative committees.

The NJP has conducted extensive research, including hundreds of public opinion surveys, on criminal justice issues. NJP members have submitted affidavits on issues such as bias, pre-trial publicity, jury composition, jury selection, and the use of peremptory challenges. They have also been qualified as expert witnesses and assisted in jury selection in thousands of trials in federal and state courts.

The questions presented in this case concern when a juror's failure to answer questions honestly during voir dire warrants a new trial. The NJP has a profound interest in that issue. Based on its extensive research and experience, the NJP has developed a broad understand-

ing of how psychological and emotional factors and the circumstances of jury selection shape jurors' answers during voir dire. This experience gives the NJP unique insights into the issues before the Court.

REASONS FOR GRANTING THE PETITION

The right to trial before an impartial jury is one of the most fundamental rights the Constitution guarantees. The right not only safeguards against "oppression by the Government"; it also affords defendants access to the "common-sense judgment" that results when ordinary citizens "participat[e] in the determination of guilt or innocence." *Duncan* v. *Louisiana*, 391 U.S. 145, 155-156 (1968). Nothing is so essential to the "integrity" of that right as the requirement that "verdict[s] 'must be based upon the evidence developed at the trial'" in light of "calm and informed judgment"—not pre-existing bias, prejudgment, or passion. *Turner* v. *Louisiana*, 379 U.S. 466, 472 (1965).

This case concerns a three-way circuit conflict regarding how courts must handle a significant threat to that constitutional guarantee: juror dishonesty during voir dire. The failure to disclose potential sources of partiality impugns the fairness and integrity of the trial process. It prevents trial judges from ferreting out potential bias. And it threatens public faith in the fundaments of our justice system.

The striking facts of this case illustrate how powerfully that threat can manifest itself. Petitioner stood accused of the highly-publicized murder of New Orleans police officer Jordan Williams and two restaurant workers (a brother and sister). Making the case even more emotionally charged—both for the public and the police department—petitioner's co-defendant was a New Orleans police officer who had been Officer Williams's pa-

trol partner. Reflecting the emotional impact on the community, one New Orleans paper exclaimed: "In an act of lawlessness horrifying even by New Orleans Police Department standards, an officer fired a bullet into the skull of her former patrol partner as she robbed a restaurant early Saturday, police sources said."[2]

Yet one of the jurors who sat in judgment of petitioner was not merely a 911 dispatcher with the New Orleans Police Department for nearly 20 years. Pet. App. 61a. She was on duty when the dispatch center received the 911 call reporting Officer Williams's murder—a fact she did not disclose in voir dire. *Id.* at 69a. Nor did she disclose that 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 shooter. *Ibid.* She did not disclose that she "felt like she knew" Officer Williams from their professional contact. *Id.* at 61a. She did not disclose that she had personally attended Officer Williams's funeral. *Ibid.* Nor did she disclose her strong emotional reaction to the murder. As she later explained: "We were all like family in the department." Writ App. 1409.[3] "After the murder happened it was very emotional for everyone in the department. * * * It was a tough time." *Ibid.*

If that were not enough, two additional jurors failed to disclose potential sources of bias—one with "a long history of employment in the field of law enforcement," Pet.

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[2] Michael Perlstein & Calvin Baker, *New Orleans Police Officer Charged with Killing Cop, 2 Others*, Times-Picayune, Mar. 5, 1995, http://www.nola.com/crime/index.ssf/1995/03/new_orleans_police_officer_cha.html.

[3] "Writ App." refers to the postconviction record lodged with the Louisiana Supreme Court.

App. 70a, and another whose two siblings had been brutally murdered, *id.* at 74a-75a. The potential bias based on those experiences—withheld from defense counsel and the court alike—is hard to overlook.

More than three decades ago, this Court established a framework for addressing the impact of such juror dishonesty. In *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 556 (1984), this Court held that a juror's "fail[ure] to answer honestly a material question on *voir dire*" entitles the defendant to a new trial if "a correct response would have provided a valid basis for a challenge for cause." But the courts of appeals and state courts are divided deeply on *McDonough* in two different respects.

First, as respondent has conceded, there is a three-way split over what constitutes a "valid basis for a challenge for cause." Two courts of appeals hold that the standard is satisfied if a reasonable judge, made aware of the undisclosed information, *would have* excused the juror for cause, even if disqualification was not mandatory. By contrast, other courts of appeals—like the Louisiana Supreme Court below—require proof that disqualification would have been mandatory. And yet other courts impose the additional requirement that the juror's motives for concealing information affected the trial's fairness. Second, there is a further division on whether the juror's concealment must have been deliberate to qualify as a "fail[ure] to answer honestly" during voir dire.

Those divisions of authority warrant this Court's review. The issues are important and recurring. And, as this case illustrates, their proper resolution has a profound impact on one of the most fundamental rights enjoyed by criminal defendants—the right to trial by an impartial jury.

I. THE CIRCUITS AND STATE COURTS ARE DEEPLY DIVIDED OVER THE PROPER INTERPRETATION OF *MCDONOUGH*

This Court's decision in *McDonough* establishes a facially clear standard. To obtain a new trial based on juror dishonesty, the defendant 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. The courts of appeals have deeply divided on what is necessary to establish the required "valid basis" for a for-cause "challenge." This Court's review is warranted.

A. Respondent Concedes the Three-Way Circuit Split Over the Meaning of "A Valid Basis for a Challenge for Cause"

The division in the circuits is undisputed and undisputable. When this case was previously before the Court, respondent conceded as much. Br. in Opp. at 25, *Lacaze* v. *Louisiana*, No. 16-1125 (May 24, 2017). "The circuit courts have formulated three separate tests," respondent agreed, "to determine whether a new trial is warranted under *McDonough*." *Ibid.* All courts of appeals agree that this Court's formulation—"a valid basis for a challenge for cause," *McDonough*, 464 U.S. at 556—controls. They disagree, however, on what that standard means.

1. The First and Second Circuits hold that the standard is satisfied so long as a reasonable judge, made aware of the withheld information, would have excused the juror for cause (even if disqualification was not mandatory). Those circuits thus ask "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 cir-

cumstances that the juror lacked the capacity and the will to decide the case based on the evidence." *Sampson* v. *United States*, 724 F.3d 150, 165-166 (1st Cir. 2013); see *United States* v. *Parse*, 789 F.3d 83, 100, 111 (2d Cir. 2015) (challenge for cause valid where juror inferably biased and disqualification not mandatory). As respondent previously urged, that standard "comes directly from the two-part test established by Justice Rehnquist's controlling opinion in *McDonough*." No. 16-1125, Br. in Opp. 26.

Of the three standards employed by the courts of appeals, that standard comes closest to *McDonough*. By its terms, however, *McDonough* requires proof that the withheld information would have provided "a *valid basis* for *a challenge* for cause." 464 U.S. at 556 (emphasis added). Thus, what matters is whether counsel would have a valid *basis* for *challenge*—not how the court would have resolved the challenge. If the Court had meant to require proof that the juror would have been *dismissed*, the opinion would read very differently, requiring proof that "a correct response would" have "resulted in a for-cause dismissal." The opinion's focus on the *basis* for *challenge* imposes a different inquiry. The challenge has a "valid basis" if it is one the district court could lawfully have thought sufficient. A "challenge" does not lack a "valid basis" simply because some courts might not have sustained it.

2. Nonetheless, the Third, Sixth, and Eleventh Circuits—and the Louisiana Supreme Court below—have imposed a far more exacting standard. In those courts, "a valid basis for a challenge for cause" exists only where disqualification would be mandatory, either because of actual or implied bias. See *United States* v. *Claxton*, 766 F.3d 280, 301 (3d Cir. 2014) (affirming denial of motion for new trial where neither actual nor implied bias estab-

lished); *Johnson* v. *Luoma*, 425 F.3d 318, 326 (6th Cir. 2005) ("a juror is subject to a valid challenge for cause based on actual bias and, in certain limited circumstances, implied bias"), cert. denied, 549 U.S. 832 (2006); *United States* v. *Carpa*, 271 F.3d 962, 967 (11th Cir. 2001) (per curiam) (*McDonough* requires "a showing of bias that would disqualify the juror," namely, an "express admission" of bias or circumstances under which "bias must be presumed"), cert. denied, 537 U.S. 889 (2002); Pet. App. 37a-40a. The D.C. Circuit appears to take that approach further, holding that only *actual* bias—and not implied bias—can constitute a "valid basis." See *United States* v. *North*, 910 F.2d 843, 904 (D.C. Cir. 1990) ("Under *McDonough*, * * * a 'valid basis for a challenge for cause' absent a showing of actual bias, is insufficient justification for a mistrial." (citation omitted)), modified on other grounds, 920 F.2d 940 (D.C. Cir. 1990), cert. denied, 500 U.S. 941 (1991); see also Pet. 31 (collecting state court cases applying same interpretation).

Those standards diverge substantially from the majority opinion in *McDonough*. The phrase a "valid *basis* for a *challenge* for cause" is not naturally understood to mean "a basis that would *require* dismissal for cause." Moreover, as explained in greater detail below, such a standard creates an unacceptable risk that defendants will be tried—and potentially sentenced to death—by biased jurors. It leaves convictions in place even where juror dishonesty has prevented trial courts from evaluating and acting against potential sources of bias.

3. Finally, the Fourth and Eighth Circuits apply a different and even more demanding test. Those circuits impose the additional requirement that the juror's motivation for concealing information affect the trial's fairness. The Fourth Circuit thus holds that, "[e]ven 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.'" See *Conaway* v. *Polk*, 453 F.3d 567, 588 (4th Cir. 2006) (alterations in original). The Eighth Circuit similarly holds that *McDonough* requires proof "that the juror was motivated by partiality." *United States* v. *Hawkins*, 796 F.3d 843, 863-864 (8th Cir. 2015), cert. denied, 136 S. Ct. 2030 (2016).

B. Courts Are Divided Over Whether *McDonough* Requires Deliberate Concealment

Even apart from the divergent interpretations of the phrase "valid basis for a challenge for cause," federal and state courts are divided on whether the *McDonough* test requires *deliberate* concealment.

Some circuits hold that a new trial may be ordered under *McDonough* whether or not the juror's omission was deliberate. See *Jones* v. *Cooper*, 311 F.3d 306, 310 (4th Cir. 2002) (the *McDonough* "test applies equally to deliberate concealment and to innocent non-disclosure"), cert. denied, 539 U.S. 980 (2003); *United States* v. *Solorio*, 337 F.3d 580, 596 n.12 (6th Cir. 2003) ("*McDonough* does not entirely foreclose a party from seeking a new trial on the basis of a prospective juror's honest, though mistaken response."), cert. denied, 540 U.S. 1063 (2003); see also *Amirault* v. *Fair*, 968 F.2d 1404, 1405-1406 (1st Cir. 1992) (per curiam) (*McDonough* "require[s] a further determination on the question of juror bias even where a juror is found to have been honest"), cert. denied, 506 U.S. 1000 (1992); see also Pet. 33 (collecting state court cases).

Other circuits hold—like the court below—that a new trial may be ordered only when the juror's omission was

deliberate. See *Hawkins*, 796 F.3d at 863-864 (*McDonough* requires "that the juror answered dishonestly, not just inaccurately"); *Carpa*, 271 F.3d at 967 (similar); *United States* v. *White*, 116 F.3d 903, 930 (D.C. Cir. 1997) (per curiam) (similar), cert. denied, 522 U.S. 960 (1997); Pet. App. 39a n.2; see also Pet. 34 (collecting state court cases).

C. This Case Illustrates the Importance of Resolving the Circuit Split

This case illustrates the issues' importance. The different approaches do not merely implicate one of our most fundamental constitutional protections. They lead to diametrically opposed outcomes. Here, the Louisiana Supreme Court denied petitioner a new trial, declaring that he had not established actual or implied bias (for all three jurors) or deliberate dishonesty (for one juror). Pet. App. 37a-40a; see also Pet. 13-14. The court could not possibly have reached that result under the approach of the First and Second Circuits. The extreme facts of this case make that especially clear.

As noted above, the trial in this case was as emotionally charged as one could imagine. Petitioner and a New Orleans police officer stood accused of brutally murdering another New Orleans police officer and two restaurant workers (siblings). Pet. App. 2a. The murders had a devastating effect on the community and the police, as the contemporaneous press coverage showed. See p. 4, *supra*; see also Rick Bragg, *Killings That Broke the Spirit of a Murder-Besieged City*, N.Y. Times, May 13, 1995, https://www.nytimes.com/1995/05/13/us/killings-that-broke-the-spirit-of-a-murder-besieged-city.html. "The killing of Officer Williams, the first case in which one New Orleans police officer has been charged in the murder of another, leaves the department in alien territory.

* * * 'His funeral procession just went on and on, forever and ever,' Lieut. Sam Fradella said of the service for Officer Williams." *Ibid.*

Yet, during voir dire, three different jurors failed to disclose critical evidence of bias. One juror (Mushatt) had been working as a 911 dispatcher with the New Orleans Police Department for nearly 20 years. Pet. App. 61a. Although she disclosed her employment at the outset of voir dire, from the audience, the court instructed her to raise the issue again if she was questioned individually. But Mushatt failed to do so. *Id.* at 64a.

Worse, she withheld her deeply personal connections to the case and the victim. She failed to disclose that she was working in the dispatch center when it received the 911 call reporting that Officer Williams had been shot and killed. Pet. App. 61a. She never disclosed that 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 shooter. *Id.* at 69a. She failed to disclose that she "felt like she knew" Officer Williams from their professional contact. *Id.* at 61a. And she failed to disclose that she had attended Officer Williams's funeral. *Ibid.*

It is hard to imagine Mushatt—having been in the dispatch center that responded to the shooting, having potentially participated in the response, and having attended Officer Williams's funeral—could be free from bias. "We were all like family in the department," she observed. Writ App. 1409. "After the murder happened it was very emotional for everyone in the department. * * * It was a tough time." *Ibid.* Despite having been touched so personally by the murder for which petitioner stood accused, Mushatt said nothing—and then became one of

the jurors who voted to convict and sentence him to death.

The problems, however, were not limited to that one juror. Given the nature of the case—one police officer killing another—the trial court inquired whether jurors had any relationship to law enforcement. One juror (juror Settle) "had a long history of employment in the field of law enforcement." Pet. App. 70a. He had worked in law enforcement for virtually his entire adult life. *Ibid.* But he said nothing. He did not disclose his previous employment with the Southern Railway Police Department as a special agent; failed to disclose his later employment as a Sergeant of Police; and failed to disclose his then-current employment with the Louisiana State Police as a public safety officer. *Id.* at 70a-71a. Juror Settle withheld all that information, even though the court's "inquiries were sufficient to have prompted a reasonable person in Mr. Settle's position to disclose his employment experience." *Id.* at 38a.

A third juror likewise failed to disclose obvious sources of bias. Juror Garrett's panel was asked three times whether anyone had a relative who had been victimized by violent crime. Juror Garrett said nothing. But her two brothers had been murdered—one beaten to death, and the other shot in the head. Pet. App. 74a-75a. In a case involving the murder of siblings, and the shooting of a police officer in the head, the impact of juror Garrett's tragic experiences would be hard to shake.

There can be no doubt that such egregious non-disclosures more than satisfy the *McDonough* test applied in the First and Second Circuits. Just one of those non-disclosures likely would suffice in those circuits; the three together make the outcome inescapable. Courts in those circuits have granted new trials in far less extreme

cases. For example, in *Sampson*, 724 F.3d at 166-168, where the defendant was charged with carjacking, the court granted a new trial because one juror had failed to disclose a family history of domestic violence, larceny, and drug abuse. The decision in *Sampson* makes the raft of non-disclosures in this emotion-laden prosecution an *a fortiori* case. Petitioner "was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors." *Parker* v. *Gladden*, 385 U.S. 363, 366 (1966) (per curiam). If the Louisiana Supreme Court had applied the standard applied by at least two circuits, petitioner would have been entitled to a new trial. He should not be relegated to lesser justice because he was tried in a jurisdiction on the other side of a constitutional circuit split.

II. The Questions Presented Are Important And Recurring

These issues have critical and widespread implications for the fundamental right to a fair trial.

A. Juror Dishonesty Is a Serious Threat to Fair-Trial Rights

The right to trial by jury is "fundamental to the American scheme of justice." *Duncan*, 391 U.S. at 149. Nothing affects "the fairness of the trial—the very integrity of the fact-finding process"—so profoundly. *Brown* v. *Louisiana*, 447 U.S. 323, 334 (1980). But that right is meaningless without an *impartial* jury. "One touchstone of a fair trial is an impartial trier of fact—'a jury capable and willing to decide the case solely on the evidence before it.'" *McDonough*, 464 U.S. at 554. A voir dire process that effectively screens out bias and partiality is thus indispensable. "*Voir dire* examination serves to protect th[e] right [to an impartial jury] by exposing possible biases, both known and unknown, on the part of potential jurors." *Ibid.*

Juror dishonesty during voir dire, however, fatally impairs the process. When jurors fail to answer questions truthfully, judges cannot inquire further about potential sources of bias. They cannot fully evaluate juror demeanor, and responses, in light of a proper record. Denied proper information or flatly misled, courts cannot fulfill their critical mission of ensuring impartiality. As this Court observed in *McDonough*, "[t]he necessity of truthful answers by prospective jurors if th[e voir dire] process is to serve its purpose is obvious." 464 U.S. at 554.

Unfortunately, research shows that many jurors fail to provide honest and complete information during voir dire. Prospective jurors "are aware of being observed by an audience that includes their peers, attorneys, courtroom personnel, and sometimes, representatives of the media." 1 National Jury Project, *Jurywork: Systematic Techniques* §2:2 (2d ed. 2017-2018) (hereinafter *Jurywork*). The pressure of performing in front of that audience often causes jurors to withhold information or provide untruthful responses. For instance, "[w]hen voir dire is conducted in the presence of a large group of jurors, the tendency to avoid embarrassment by providing minimal responses is increased, as is the tendency to conform to responses given by others." *Id.* §2:3. Precedent is replete with examples of jurors failing to disclose sensitive or embarrassing, yet highly relevant, information.[4]

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[4] See, *e.g.*, *Dyer* v. *Calderon*, 151 F.3d 970, 972-984 (9th Cir. 1998) (en banc) (juror in murder case failed to disclose brother's murder), cert. denied, 525 U.S. 1033 (1998); *United States* v. *Eubanks*, 591 F.2d 513, 517 (9th Cir. 1979) (per curiam) (juror in heroin case failed to disclose sons' heroin abuse); *United States ex rel. De Vita* v. *McCorkle*, 248 F.2d 1, 8 (3d Cir. 1957) (en banc) (juror in robbery case failed to disclose he had been robbed), cert. denied, 355 U.S. 873

Prospective jurors, moreover, "understand that they will be included on or excluded from a jury based on their responses to questions." *Jurywork* §2:2. They "have an opportunity to observe and listen while other panelists are being questioned, and thus learn which responses lead to excuse for cause, peremptory challenge, or being seated on a jury." *Ibid.* To the extent prospective jurors seek to be either empaneled or excused, they may tailor responses to those ends. *Id.* §2:3.

Prospective jurors also are "aware of being evaluated by the judge and the attorneys." *Jurywork* §2:2. "When they are aware of being evaluated, most people become concerned with their performance." *Id.* §2:3. That may cause jurors to experience "evaluation apprehension": Their desire for a positive evaluation leads them to provide responses that, in their view, will produce that result. See Linda L. Marshall & Althea Smith, *The Effects of Demand Characteristics, Evaluation Anxiety, and Expectancy on Juror Honesty During Voir Dire*, 120 J. Psychol. 205, 208 (1986). For example, jurors are aware that "fairness" and "impartiality" are socially desirable characteristics, particularly in jury selection. As a result, prospective jurors may portray themselves as impartial and fair, even if they must provide dishonest answers to do so. *Id.* at 208-209; *Jurywork* §2:3 nn.3-8 (collecting research).

Exacerbating the problem is that many jurors may be unaware of their biases or mistakenly believe they are impartial nonetheless. See *Jurywork* §2:6. "Determining whether a juror is biased or has prejudged a case is

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(1957); *Banther* v. *State*, 823 A.2d 467, 481-484 (Del. 2003) (juror in murder case failed to disclose her molestation and rape); *State* v. *Briggs*, 776 P.2d 1347, 1349 (Wash. Ct. App. 1989) (juror failed to disclose speech impediment similar to defendant's).

difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it." *Smith* v. *Phillips*, 455 U.S. 209, 221-222 (1982) (O'Connor, J., concurring). This Court recognized the difficulty of discovering jurors' unknown biases over a century ago:

> Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one * * * who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence.

Crawford v. *United States*, 212 U.S. 183, 196 (1909).

Biases from particular sources—such as community membership or prior trauma—can be particularly difficult to identify and address.[5] Yet various pressures and influences can cause jurors to lie, omit information, or skew their answers about precisely those issues. For example, one study revealed that nearly 40% of jurors had failed to truthfully disclose during voir dire that they, or their close friends or family, either (a) had been victims

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[5] For example, researchers have observed that law enforcement officers often share a "cultural mandate" of "strong group loyalty" that may manifest itself in a "'we versus they' attitude toward citizenry." Eugene A. Paoline III, *Taking Stock: Toward a Richer Understanding of Police Culture*, 31 J. Crim. Just. 199, 203 (2003). It thus may be difficult or impossible for jurors with personal or familial law-enforcement connections to set aside a pro-law-enforcement bias. Similar issues arise with respect to crime victims and their close friends and family. Research has shown that jurors are significantly more likely to convict if they or someone they know has been the victim of a crime similar to the one at issue in the case. See Scott E. Culhane, *et al.*, *Crime Victims Serving as Jurors: Is There Bias Present?*, 28 L. & Hum. Behav. 649, 654-655 (2004).

of crime, or (b) worked in law enforcement. See Richard Seltzer, *et al.*, *Juror Honesty During the Voir Dire*, 19 J. Crim. Just. 451, 456 (1991).[6]

Those sources of bias—which are particularly intractable, p. 16 & n.5, *supra*—materialized here. Although the case concerned the killing of a New Orleans police officer, juror Mushatt did not disclose her professional relationship with the victim, her participation at the police dispatch center the night of his death, or her attendance at his funeral. Although the case involved the murder of siblings, juror Garrett failed to disclose that her brothers had been murdered—one shot in the head like Officer Williams. And while the case involved the killing of a law-enforcement officer by one of its own, juror Settle omitted his lifetime in the law-enforcement profession.

When jurors fail to answer questions honestly during voir dire, it "g[ives] the trial court no effective opportunity to assess the demeanor of each prospective juror in disclaiming bias" and deprives the court of the ability to "evaluate the credibility of the individuals seated on th[e] jury." *Mu'Min* v. *Virginia*, 500 U.S. 415, 452 (1991) (Kennedy, J., dissenting). Juror dishonesty defeats the role of counsel and the sound use of peremptory challenges. It impairs the effectiveness of voir dire, the trial court's role, and the fairness of the resulting trial. Where "jurors succeed in concealing bias or prejudice that would have led to disqualification, their presence on juries at

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[6] Case law corroborates such studies. See, *e.g.*, *Dunaway* v. *State*, 198 So. 3d 567, 581 (Ala. 2014) (juror failed to disclose cousin was victim of similar crime); *United States* v. *Scott*, 854 F.2d 697, 699-700 (5th Cir. 1988) (juror failed to disclose brother was sheriff in agency that investigated case); *State* v. *Akins*, 867 S.W.2d 350, 353 (Tenn. Crim. App. 1993) (juror in DUI case failed to disclose experience as DUI probation counselor).

the least potentially undermines the justice system's goal of trial by disinterested peers; at the worst, such jurors may vote based on their hidden predilections instead of the evidence, with injustice the result." Seltzer, *supra*, at 457.

Given the well-documented problem of juror dishonesty, and that such dishonesty may be discovered only post-conviction, post-conviction motions serve as an important safety valve. The test for granting a new trial is thus deeply important. It affects the right to a fair trial. And it affects the public's faith in the integrity of the system. In case after case—as here—it will determine whether the right to an impartial jury proves meaningful or illusory.

B. The Proper Interpretation of *McDonough* Is a Recurring Issue

The issue is important and recurring. Virtually every criminal trial implicates the right to an impartial jury. The issue arises with sufficient regularity, as the cases cited above (pp. 7-10, 14-15 n.4, 17 n.6, *supra*) attest. The issue of unintentional omissions—the focal point of the second circuit split on *McDonough*—is particularly likely to reoccur due to the pervasiveness of unknown, subconscious biases that can cause jurors to provide misleading or incomplete information inadvertently. See pp. 15-17, *supra*.

The current legal landscape is defined by significant inconsistency—instances of juror dishonesty that would give rise to a new trial in certain jurisdictions are insufficient in others. This case presents the Court with an opportunity to restore uniformity and clarity to governing law.

III. The Louisiana Supreme Court's Decision Is Incorrect

A. The Louisiana Supreme Court's Decision Is Inconsistent with *McDonough*

The Louisiana Supreme Court's interpretation of *McDonough* is erroneous. That court interpreted *McDonough* to require that petitioner establish actual or implied-in-law bias. Pet. App. 37a-40a. But the majority opinion in *McDonough*, by its terms, requires no such thing. As explained above (at 7), *McDonough* requires a "valid basis" for "challenge"—it does not require circumstances so grave that dismissal was mandatory.

Moreover, long before *McDonough*, a new trial could be granted upon proof of actual or implied juror bias. See *United States* v. *Wood*, 299 U.S. 123, 133 (1936) ("The bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law."); *McDonough*, 464 U.S. at 556-557 (Blackmun, J., concurring) (the "normal avenue of relief" for claims of juror bias pre-*McDonough* was a hearing on actual or implied bias). If satisfying the *McDonough* test required proof of actual or implied bias, then *McDonough* decided nothing—and the two-part test it set forth can be entirely ignored.

The court below also erred in construing *McDonough* to require deliberate juror dishonesty. Pet. App. 39a n.2. Again, *McDonough* says no such thing. And the law before *McDonough* allowed for new trials where there was actual or implied juror bias even absent a juror's misstatement. *McDonough*, 464 U.S. at 556-557 (Blackmun, J., concurring); *Smith*, 455 U.S. at 221-224 (O'Connor, J., concurring). Courts that require information to have been withheld deliberately in effect impose a more oner-

ous test than that which applies when the juror has not withheld any information. That makes no sense.

There are good reasons why defendants should not be required to prove actual or implied bias under *McDonough*. *McDonough* applies only when the juror has failed to provide honest answers during voir dire. Such nondisclosure makes it appropriate to treat the dishonest juror with more skepticism than a juror who answered all questions truthfully. Moreover, a juror's failure to provide honest answers defeats the primary guardian of the fair-trial right—the fully-informed judge who can investigate and evaluate the juror's responses and demeanor. Trial judges who are given honest answers can make sound judgments regarding jurors' demeanor, responsiveness, and ability to evaluate the evidence fairly. Judges who have been deceived by jurors, or deprived of critical facts, cannot. When juror misconduct has disabled the principal tool for protecting the right to an impartial jury, a court should approach the assertion that the juror was impartial with greater reservation.

B. The Louisiana Supreme Court's Interpretation of *McDonough* Does Not Safeguard the Right to an Impartial Jury

The decision below also undermines the right to trial before an impartial jury. Interpreting *McDonough* to permit new trials only in instances of deliberate dishonesty, coupled with actual or implied bias, so narrows protections as to render them illusory. It risks leaving almost all threats to the right to an impartial jury wholly without remedy. The facts are rarely egregious enough to give rise to a mandatory presumption of bias. See *Smith*, 455 U.S. at 222 (O'Connor, J., concurring) (noting that only "extreme situations * * * would justify a finding of implied bias," such as where the juror "is an actual

employee of the prosecuting agency," "is a close relative of one of the participants in the trial or the criminal transaction," or "was a witness or somehow involved in the criminal transaction"). It is rarer still for a juror to openly admit to having been biased. See pp. 15-17, *supra*; see also *McDonough*, 464 U.S. at 558 (Brennan, J., concurring in the judgment) ("the bias of a juror will rarely be admitted by the juror himself"). Jurors are often particularly disinclined to admit to having been biased in the context of a post-conviction proceeding, potentially years after voting to convict. And jurors, of course, will be highly reluctant to admit having lied or misled intentionally. Limiting *McDonough* to cases of actual or implied bias thus would exclude myriad cases of genuine but concealed bias.

Petitioner's case shows precisely the problem with that approach. Jurors Mushatt, Settle, and Garrett's concealed experiences suggest a strong likelihood that each harbored undisclosed biases—collectively, the impact is inescapable. See pp. 14-17, *supra*. Those sources of bias were hardly abstract. Each had an extraordinarily close nexus to this case and its particular facts. See p. 17, *supra*. Yet, because none of those jurors explicitly admitted bias, and because the facts did not fit within any of the tightly circumscribed implied-bias categories, petitioner was refused a new trial. By imposing a cramped construction on *McDonough*, the court below failed to ask or to answer the question that really matters—whether concealed information shakes our confidence that the jurors were impartial. If the threat to the integrity of voir dire and the right to an impartial jury does not warrant a new trial here, it is hard to imagine where it would.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2018