No. 16-1125

**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

## REPLY BRIEF FOR PETITIONER

AMIR H. ALI
*Counsel of Record*
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
718 7th Street NW
Washington, DC 20001
(202) 869-3434
amir.ali@macarthurjustice.org

BLYTHE TAPLIN
CECELIA KAPPEL
THE CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 71103
*Attorneys for Petitioner*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

## REPLY BRIEF FOR PETITIONER

The brief in opposition confirms that this case satisfies all of this Court's criteria for certiorari. The State concedes that the circuits are entrenched in a deep split as to each prong of the test articulated in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). It does not (and could not) contest that the settled facts as to two of the jurors on Petitioner's jury squarely present the issues upon which the circuits are split. And, as described below, the arguments it makes with respect to the third juror directly beg those questions, too. Finally, the brief in opposition does not (and could not) contest that the acknowledged split over the *McDonough* test jeopardizes a basic constitutional right and recurs frequently because the test governs all civil and criminal trials.

The decision below exemplifies the substantial disparity and the immense stakes. Upon being implicated *by a law enforcement officer* in the murder *of a law enforcement officer and two siblings*, Petitioner was convicted and sentenced to death by two jurors who were asked about, but failed to disclose their *career-long employment in law enforcement*—as well as *experiences related to the particular murder and victim at issue*—and a third juror who was asked about and failed to disclose that *her own two siblings* had been murdered.

The Court should grant certiorari in this case.

## I. The Court Should Grant Certiorari To Resolve The Acknowledged And Deep Split Over *McDonough*.

### A. The Federal Circuits And State High Courts Apply Conflicting Interpretations Of The *McDonough* Test.

As the petition sets forth and the brief in opposition concedes, the federal circuits and state high courts are entrenched in a deep split regarding each prong of the *McDonough* test. *See* Pet. 20-26; BIO 25-27.

The brief in opposition agrees that the circuits have adopted three conflicting interpretations of what it means to show "a valid basis for a challenge for cause." *McDonough*, 464 U.S. at 556; BIO 25-27. It identifies the same divergent interpretations as Petitioner: (i) the First and Second Circuits 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 have granted a challenge for cause, BIO 25-26, Pet. 20-21; (ii) in contrast, the Third and Sixth Circuits ask only whether there is "actual or implied bias," BIO 26, Pet. 22; and (iii) the Fourth and Eighth Circuits require a "third prong" that "elevates the requisite standard" and requires a party to "establish that the juror's motives for concealing

information can truly be said to affect the fairness of the trial," BIO 26-27, Pet. 23-25.[1]

The State further acknowledges that in the decision below, the Louisiana Supreme Court adopted the second interpretation, requiring a showing that the information withheld at voir dire would have led to *per se* disqualification based on actual or implied bias (or some state rule otherwise rendering the juror incompetent). BIO 28. The State itself adopts that interpretation in defending the decision below. BIO 6-14, 28 (arguing that Petitioner has not shown that Juror Settle "qualified as an incompetent juror" through an "express admission of bias," a special relationship that gives rise to implied bias, or under Louisiana law).

In addition, as Petitioner set forth in his petition, the split above is compounded by a deep split among the federal circuits and several state high courts as to whether *McDonough* applies to cases of misleading omission or requires deliberate dishonesty. Pet. 25-26. As the brief in opposition acknowledges, *McDonough* "did not enunciate the degree of dishonesty or misrepresentation . . . that must be established before a new trial is warranted." BIO 25.

The divergent interpretations of *McDonough* that have been established over the past thirty-three years are acknowledged, Pet. 26-27, and have been

---

[1] As Petitioner explained, the Eleventh and D.C. Circuits have also adopted the second and third interpretations, respectively. Pet. 22-25.

fully aired out in reasoned decisions, Pet. 20-25. No credible argument has been or could be made that there is a need for further percolation. Only this Court can create uniformity.

### B. The Settled Facts Regarding Each Of The Three Jurors' Backgrounds And Failures To Disclose Presents The Perfect Opportunity To Resolve These Questions.

The facts found below, and not disputed by the brief in opposition, provide an ideal opportunity to resolve the splits above.

Based on the settled findings below, Juror Mushatt was a dispatcher for the NOPD for 20 years—the same police force that employed the victim police officer and accusing co-defendant in this case. Pet. 6-7. She never brought this to the court's attention after being called for individual questioning, despite being specifically instructed to do so. Pet. 8-9. She also never disclosed that she was present in the dispatch room for the 911 call pertaining to the murder at issue. *Id.* And she never disclosed that she attended the victim police officer's funeral. *Id.*; *see also* Amicus Br. of the National Jury Project at 4 (describing the funeral and the degree to which the law enforcement community rallied around the slain officer).

Based on the settled findings below, Juror Settle "had a long history of employment in the field of law enforcement," including five years as a special agent with the Southern Railway Police Department, 11

years as a Sergeant of Police, and two years as an officer for the Louisiana State Police in charge of suspended licenses. Pet. App. 44a-45a.[2] The courts below further found that Settle was asked three times about any relations to law enforcement. Pet. 7-8. This included whether anyone on his panel was "involved or [knew] anybody in law enforcement" and a specific instruction to "paint it with a wide brush." *Id.* Yet Juror Settle sat silently as others around him disclosed their substantially more remote connections to law enforcement. *Id.*[3]

---

[2] The brief in opposition focuses on whether Juror Settle was a "badge wearing officer" or had arrest powers at the time of trial, such that he would have been subject to *per se* disqualification pursuant to then-governing Louisiana law. BIO 9-13. Petitioner does not contend that Juror Settle would have been subject to the state law rule rendering him incompetent as a juror and accepts the Louisiana Supreme Court's ruling to the contrary. Rather, Petitioner argues that the Louisiana Supreme Court's interpretation of *McDonough* to require *per se* disqualification in the first place—in the face of Juror Settle's failure to disclose his 20-year career in law enforcement—squarely presents what it means to show a "valid basis for a challenge for cause." Pet 28, 31-32; *infra* pp. 6-7.

[3] The State's fanciful suggestions that Juror Settle might have been "reading a book" or "sleeping" during voir dire, BIO 17, are inconsistent with the Louisiana Supreme Court's finding that "a reasonable person in Mr. Settle's position" would have disclosed his employment experience, Pet. App. 12a, as well as the district court's undisturbed finding that there is no "legitimate reason for [Juror Settle] not speaking up," Pet. App. 44a; *see also Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016) ("[I]n the absence of exceptional circumstances, we defer to state court factual findings[.]" (internal quotation marks omitted)).

And based on the settled findings below, Juror Garrett's two siblings were, like the Vu siblings in this case, victims of a New Orleans murder. Pet. 7. Despite being asked three times whether she had relatives who were the victim of violent crime and seeing prospective jurors around her disclose such details, she remained silent. Pet. 7, 9.

The State does not even attempt to dispute that a reasonable judge aware of the undisclosed experiences of Jurors Mushatt and Garrett would find a valid basis for a challenge for cause. Nor could it. *See* Pet. 31-32. The Louisiana Supreme Court's conclusion that neither juror satisfies *McDonough* based on the absence of actual or implied bias thus squarely presents the question upon which the circuits are divided: What it means to show "a valid basis for a challenge for cause." 464 U.S. at 556; Pet. 23, 28. Moreover, the State does not (and could not) dispute that the findings below that Jurors Mushatt and Garrett had not "lied," "consciously withheld the information," or acted with "deliberate intent to deceive" squarely present the question of whether the *McDonough* requires deliberate dishonesty in the first place. Pet. 28-29.

The State's sole argument in opposition to certiorari is that Juror Settle's failure to disclose his 20-year career in law enforcement does not implicate the divergent interpretations of *McDonough*'s prongs. BIO 28. But the State's own arguments demonstrate otherwise. First, the State contends that Petitioner "would not satisfy the first prong of *McDonough*" because the Louisiana Supreme Court

"expressly found" that the nondisclosure of his career in law enforcement "'cannot be fairly characterized as outright dishonesty.'" BIO 27 (quoting Pet. App. 12a). However, this argument directly begs the question of whether *McDonough*'s first prong requires "outright dishonesty" (as held by three circuits and several state high courts) or applies equally to misleading omissions (as held by five circuits and several other state high courts). Pet. 25-26.

Second, the State contends that Petitioner has not shown Juror Settle harbored actual or implied bias or "qualified as an incompetent juror" under Louisiana law. BIO 13, 28. This argument, again, begs the question that has divided the circuits—whether "a valid basis for a challenge for cause," *McDonough*, 464 U.S. at 556, requires a showing of *per se* disqualification or asks whether a reasonable judge would have found a valid basis for a cause challenge, *see* Pet. 31-32 (citing cases in which courts have found the reasonable judge standard, and even implied bias, to be satisfied in less egregious circumstances).

This case presents a unique opportunity to articulate the correct understanding of *McDonough* and provide concrete guidance by applying it to the settled facts of these jurors.

### C. This Is A Fundamental Question Worthy Of This Court's Review.

Although *McDonough* itself arose in the context of a personal injury suit, the divergent understandings

of its majority and plurality opinions have led to disparity in protecting the right to an impartial jury—one of the most basic constitutional rights guaranteed in civil and criminal cases alike. Pet. 27. Such disparity is especially intolerable in the criminal context, where liberty—or even life—is at stake. Indeed, the defender associations from over half the states in the nation, plus the District of Columbia, have urged the Court to grant certiorari in this case. *See* Amicus Br. of Defender Ass'ns of 27 States and D.C. at 15 ("The stakes in criminal cases are simply too high to permit these multi-faceted circuit splits and their attendant divergent outcomes to continue.").

Furthermore, as explained in the petition, this Court's review is warranted because the position adopted by the court below and multiple federal circuits renders Justice Rehnquist's majority opinion in *McDonough* a nullity. *See* Pet. 28-32.

The Court should grant certiorari.

## II. The Court Should Grant Certiorari To Address Whether A Judge's Participation As A Witness In An Investigation Before And During Trial—And His Failure To Disclose It—Gives Rise To An Objective Appearance Of Bias.

The brief in opposition does not even attempt to dispute the basic facts showing that Petitioner's trial judge was enmeshed in an investigation as to how Petitioner's codefendant obtained the murder weapon and failed to disclose the fact of the

investigation, as well as potentially exculpatory evidence. The parties are in agreement as to all of the facts relied upon by Petitioner. As taken directly from the brief in opposition:

(i) "[M]onths before the murders, [Petitioner's codefendant, Officer Frank] obtained—pursuant to a release purportedly signed by Judge Marullo—a 9 mm Beretta semi-automatic handgun from the NOPD Evidence and Property Room." BIO 22-23.

(ii) The weapon obtained "was of the same caliber and perhaps the same gun used to kill the victims." BIO 23.

(iii) Through the investigation and these proceedings there "has been considerable inquiry, to no avail, as to whether the signature is genuine." BIO 24.

(iv) Judge Marullo "fail[ed] to disclose that he was questioned in [the] internal police investigation as to how Frank obtained the weapon" at the start of trial, upon defense counsel's motion to recuse, or upon hearing the defense's theory that Officer Frank had planned to obtain a gun from evidence for her brother and committed the crime with him. BIO 23.[4]

*Compare* Pet. 34 (listing same facts).

---

[4] It is also undisputed that the 9mm weapon was recovered three years later, in the possession of Officer Frank's brother. Pet. 12 n.4.

The undisputed facts thus squarely present the question of whether Judge Marullo's involvement in the investigation and his failure to disclose the fact of it or the existence of a potential accomplice of Officer Frank (the person who first implicated Petitioner in this crime) raises an appearance of bias. *See* Amicus Br. of Yale Ethics Bureau at 12-23.

This issue presented concerns a fundamental corollary of this Court's prior judicial bias cases. It would be virtually meaningless to have "objective standards that do not require proof of actual bias" and instead ask "whether there is an unconstitutional 'potential bias,'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881, 883 (2009), unless a judge must disclose facts giving rise to an appearance of bias *even if he subjectively believes he can remain impartial*. Pet. 37-38. Although this Court's prior cases, like *Caperton* and *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016), involved objective bias that happened to be evident from public documents, this circumstance—in which the judge must have a framework for determining whether to disclose—is the more likely recurrence. Given the very nature of nondisclosure, there will almost never be a settled record like this to address the issue. Pet. 38-39. The Court should take this opportunity.

## III. In The Alternative, The Court Should Summarily Reverse.

The brief in opposition does not contest that the court below applied the wrong standard to evaluate Petitioner's judicial bias claim, by focusing on

whether Petitioner's trial judge believed himself to be biased (or committed "wrongdoing") and applying a *Brady*-like prejudice standard to determine whether the information withheld would have been "material" at trial. Pet. 34-36; *see also* Amicus Br. of Yale Ethics Bureau at 10-12 (further explaining how the court below "blatantly disregarded this Court's clear precedent"). In the event the Court does not grant plenary review of the questions presented, it should summarily reverse this egregious misapplication of its precedent.

## CONCLUSION

For the foregoing reasons and those stated in the petition, certiorari should be granted.

Respectfully submitted,

AMIR H. ALI
*Counsel of Record*
RODERICK & SOLANGE
MACARTHUR JUSTICE CENTER
718 7th Street NW
Washington, DC 20001
(202) 869-3434
amir.ali@macarthurjustice.org

BLYTHE TAPLIN
CECELIA KAPPEL
THE CAPITAL APPEALS PROJECT
636 Baronne Street
New Orleans, LA 71103

*Attorneys for Petitioner*