No. 17-1566

In the Supreme Court of the United States

ROGERS LACAZE,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Louisiana

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did Judge Marullo's failure to recuse, or even disclose, violate Petitioner's rights under the Due Process Clause?

2. Does demonstrating "a valid basis for a challenge for cause" under *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984) require a showing that the juror would have been subject to mandatory disqualification, or that a reasonable judge would have granted a challenge for cause?

3. Does the *McDonough* test apply only to a juror's deliberate concealment or does it also apply to misleading omissions?

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STATEMENT OF THE CASE

I. Background

1. Cuong Vu, Ha Vu, and Officer Ronnie Williams of the New Orleans Police Department ("NOPD") were murdered on March 4, 1995, at the Kim Anh Vietnamese restaurant in New Orleans. Pet. App. 30a. Surviving witnesses identified Petitioner Rogers Lacaze and Antoinette Frank—herself an NOPD officer—as the perpetrators. *Id.* at 30a-31a. Frank and Lacaze had met in November 1994 and were often seen together. *Id.* at 31a.[1] Lacaze made inculpatory statements after being taken into custody, and a grand jury returned an indictment charging him with three counts of first-degree murder. *Id.* at 2a, 31a. Lacaze was found guilty as charged and received capital sentences in accordance with the unanimous recommendation of the jury after a five-day trial. The Louisiana Supreme Court affirmed the convictions and sentences on appeal, and this Court denied certiorari. *Id.* at 3a, 57a.

Lacaze filed a shell application for post-conviction relief in 2002 or 2003, followed in 2010 by a 178-page supplement. *Id.* at 6a, 32a; Writ App. 335-522. Among his arguments were claims that jurors David Settle, Victoria Mushatt, and Lillian Garrett had failed to disclose information during voir dire that would have revealed bias. Lacaze also alleged bias on the part of the presiding judge, Frank Marullo, in connection with

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[1] At trial Lacaze personally confirmed that he met Frank when she came to show him a photo lineup the day after he was wounded in a shooting. R.7:560. That shooting occurred November 25, 1994. *See, e.g.,* R.5:96-97 (quoting testimony of Sergeant Geraldine Prudehome); R.7:485 (quoting testimony of Alice Chaney, Lacaze's mother).

an investigation into the release from the NOPD's Central Evidence and Property Room (the "Property Room") of two firearms, one of which (a 9mm pistol) was of the same caliber as ballistics evidence recovered from the crime scene and victim autopsies.[2]

2. Following Frank's arrest, police discovered that she had previously obtained two weapons from the Property Room: a revolver released on an unknown date and a 9mm Beretta pistol released on August 30, 1994.[3] This prompted the NOPD's Public Integrity Division to undertake an investigation (the "PID investigation") into whether Officer David Talley, the Property Room's gun vault officer, had violated departmental rules and regulations by releasing the weapons. Pet. App. 210a-212a.[4]

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[2] While bullets and casings submitted for analysis were all tied to one gun, police also recovered several fragments (including one from an autopsy) that were not suitable for comparison. *State v. LaCaze*, 824 So.2d 1063, 1069 n. 6 (La. 2002); R.5:184-85. The murder weapon or weapons have never been conclusively identified. *LaCaze*, 824 So.2d at 1069; Pet. App. 20a. One victim, Officer Williams, had a 9mm pistol that was missing from the crime scene and resurfaced only two years later in another investigation. Pet. App. 86a n. 8.

[3] The date and time of release for the 9mm gun were recorded on a chain-of-custody card. Pet. App. 212a. No such documentation was found for the revolver. *Id*. Officer David Talley averred that the revolver was the first gun he released to Frank. *Id.* at 87a.

[4] This internal investigation of Talley should not be confused with the criminal investigation of the homicides. *Cf.* Former State and Federal Trial Court Judges Amicus Brief 16 ("the judge had been embroiled in the NOPD's investigation of the very crime for which Mr. Lacaze stood trial.").

Investigators found what appeared to be two court orders authorizing the release of the firearms. *Id.* at 211a. One order, concerning the release of the revolver, bore the purported signature of Judge Morris Reed. *Id.* at 212a-213a. However, when Sergeant Robert Harrison showed this order to Judge Reed on March 27, 1995, the judge said the signature was not his, pointing out that his name was misspelled (as "Reid"). *Id.* The following day Sergeant Harrison showed Judge Marullo a copy of the release order for the 9mm pistol, which bore Judge Marullo's purported signature. *Id.* at 213a. Judge Marullo said that he did not believe the signature was his, adding that he would not have signed the order because it did not include a description of the weapon to be released. *Id.* at 214a. Talley claimed he had personally observed Judge Reed sign one order and that he had taken the other to Judge Marullo's chambers and handed it to a clerk, who went into chambers and returned with the order signed. *Id.* at 215a.[5]

On May 16, 1995, Sergeant Harrison left messages for Judges Reed and Marullo asking if they would provide taped statements. When Judge Marullo spoke to Sergeant Harrison two days later, he informed the sergeant that the prosecution of Frank and Lacaze had been allotted to his courtroom and advised that he would not give a statement until their cases reached a final disposition. *Id.* The record does not reflect that Judge Marullo spoke of the PID investigation before or during Lacaze's trial. He did speak of it during the subsequent trial of Frank, where the prosecution called

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[5] Talley later identified this clerk as Phillip Genovese, who was since deceased. *Id.* at 87a.

Talley as a witness. In response to defense objections raised during the State's examination of Talley, the judge convened two recorded, in-chambers conferences where he discussed the PID investigation, allowed defense counsel to question Talley about the release orders, and proposed to have the order for the 9mm pistol introduced for record purposes. Writ App. 1483-1522.[6]

On October 4, 1995, following the convictions of Frank and Lacaze, Sergeant Harrison placed another call to Judge Marullo. Pet. App. 217a-218a. The judge "related he did remember telling Sgt. Harrison he would give a statement after the case was completed," but explained that because of appeals it would still be a long time until that happened. *Id.* at 218a. The PID investigation concluded in August 1996, when Sergeant Harrison submitted a final report. *Id.* at 210a *et seq.* A decision by the NOPD to terminate Talley was later reversed by New Orleans Civil Service Commission. *Id.*

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[6] Lacaze writes that Judge Marullo convened an in-chambers conference "[w]hen the State attempted to call Officer Talley[.]" Pet. 5. In fact, the prosecutor called and began to examine Talley without incident. Writ App. 1483. Only after Frank's attorneys began raising objections was the examination interrupted by two bench conferences. *Id.* at 1486-88. The second concluded with Judge Marullo asking the prosecutor something off the record and then convening an in-chambers conference. *Id.* at 1489. The issues addressed were whether the purportedly fraudulent release orders were evidence of prior crimes or bad acts, whether they were admissible as such with respect to either Frank or Talley, and whether Talley might be asked to incriminate himself. *Id.* at 1489-1510, 1516-22.

at 87a n. 9.[7] Both Talley and Judge Marullo testified at an evidentiary hearing held in 2013 on Lacaze's post-conviction claims.[8]

3. Prior to serving as a juror at Lacaze's trial, David Settle had worked in other states as a police officer for railroad companies. Pet. App. 33a. He testified in 2013 that at the time of trial he worked without arrest powers at the Bureau of Motor Vehicles in New Orleans, "'clear[ing] up driver's license[s] for people under suspension.'" *Id.* at 35a. This information was not disclosed during voir dire, where Settle was not questioned about his past or present employment. The court did ask a group of prospective jurors that included Settle if they had relatives in law enforcement, and asked another group of prospective jurors if they were "'involved or know anybody in law enforcement[.]'" *Id.* at 33a, 38a (emphasis omitted).

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[7] During the hearing that resulted in Talley's termination, "Harrison stated that neither of the weapons released to Frank was involved in the murders for which she was convicted." Writ App. 1472 (*David Talley v. Dept. of Police*, 98-CA-2284, p. 6 (La. Ct. App. Apr. 14, 1999) (unpub.)).

[8] Judge Marullo affirmed that he would not have "give[n] [a gun] to one police officer to give to another," but acknowledged that if Frank had approached him directly, "it wouldn't be unusual that if she was a police officer that I would have given her the gun." Writ App. 653, 655. *Cf. id.* at 661 (quoting Judge Marullo affirming that judges releasing weapons to police officers was a "common occurrence" and "still happens today"); LA. REV. STAT. § 15:41(B)(2)(b) (providing for the disposition of unclaimed non-contraband property not needed as evidence by court order).

Before one panel of prospective jurors was dismissed, the prosecutor listed the names of witnesses he planned to call and asked if anyone knew them. Writ App. 193-215. Victoria Mushatt answered from the audience that she knew or might know four of the witnesses because she was an NOPD dispatcher,[9] and Judge Marullo instructed her to mention this again "when you reach the chairs up here." *Id.* at 195-96; Pet. App. 63a-64a. When the judge asked the next panel of prospective jurors, which included Mushatt, if any were related to someone in law enforcement, she stated that she was married to a police officer and knew other officers. The judge asked, "And, you know some of the people that we mentioned before?" She answered, "I know some of them just by associating with names I have come across, but I don't really know any of them, but my husband might [*sic*]." Writ App. 233; Pet. App. 64a-65a. The prosecutor later asked her if she was married to Raymond Mushatt, to which she responded "'Ah, Ah[,]' apparently signifying an affirmative response." Pet. App. 67a-68a. Mushatt was not questioned further about her personal or professional ties to police. At the evidentiary hearing in 2013, she testified that she had been in the dispatch room when the murders at the Kim Anh restaurant were called in, attended the funeral of Officer Williams, and "'felt like [she] knew'" Officer Williams as a result of repeatedly

[9] While the transcript merely attributes this and the next set of statements to "a juror," it is not disputed that this juror is Mushatt.

hearing his name over the dispatch. Writ App. 39a n. 2.[10]

Lillian Garrett did not respond when a panel of prospective jurors that included her was asked if any had close relatives who had been the victim of a crime. *Id.* at 39a n. 2. Lacaze has shown that Garrett had two brothers who were killed in the early 1980s. She did not testify at the post-conviction evidentiary hearing, apparently due to ill health. *Id.* at 74a.

II. Rulings Below

In 2015 the state trial court issued a 128-page judgment with reasons that denied most of Lacaze's claims. The court deemed it "improbable that Judge Marullo would have associated Mr. Lacaze with the release of the Beretta" and found "no evidence" that the judge "had done something wrong that he needed to cover up[.]" Pet. App. 89a. Allegations of bias on the part of Mushatt and Garrett were also rejected. However, the court vacated Lacaze's convictions and sentences based upon the seating of David Settle, finding that there was "simply no excuse for him not mentioning his employment status," and that this would have subjected him to a valid challenge for cause based upon state precedent that prohibited badge-wearing law enforcement officers from serving as

[10] Both Mushatt and Settle also testified in 2013 that they did not believe their backgrounds had affected their verdicts in Lacaze's case. R.4:619; R.4:630-31.

jurors.[11] *Id.* at 71a (citing *State v. Simmons*, 390 So.2d 1317 (La. 1980)).

Upon application of the State, the Louisiana Fourth Circuit Court of Appeal reinstated Lacaze's convictions, concluding that the trial court had erred in finding Settle's presence on the jury to be a structural error but had not erred in finding other claims meritless. *Id.* at 51a-52a. Lacaze applied to the Louisiana Supreme Court, which denied relief on December 16, 2016. In addition to confirming that the trial court's reliance on its *Simmons* decision was erroneous, the court found that it was not clear that Settle had been dishonest; and that, even assuming he had been, "Lacaze has not shown that [Settle] would have been subject to a meritorious challenge for cause." *Id.* at 38a. The court likewise determined that Lacaze "fail[ed] to make the required showings as to the seating of jurors Victoria Mushatt and Lillian Garrett." *Id.* at 39a n. 2.[12] Regarding the claim of judicial bias, the court noted that Judge Marullo had "emphatically denied any bias

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[11] The trial court also concluded that, although the issue was rendered moot by its finding of juror bias, Lacaze's counsel had rendered ineffective assistance at sentencing. Pet. App. 186a-189a. As Lacaze notes, the State did not seek reinstatement of his capital sentences. Pet. 12.

[12] Lacaze writes that the state supreme court's "sole basis for rejecting [his] claim as to Jurors Settle and Mushatt was that he had not shown a basis for mandatory disqualification[.]" Pet. 29. Lacaze is mistaken. The court described the relevant standard as having two prongs and expressly applied both to Settle. Pet. App. 36a-39a. It then wrote that Lacaze had "also" failed to make "the required showings," plural, as to the seating of Mushatt and Garrett. *Id.* at 39a n. 2.

on his part" and found no evidence that he had in fact "harbored any bias, prejudice, or personal interest in the case[.]" *Id.* at 42a.

Lacaze petitioned this Court for a writ of certiorari on March 16, 2017, raising the issues of juror bias and judicial recusal. Prior Pet. i-ii.[13] On October 2, 2017, the Court issued an order that granted certiorari, vacated the judgment below, and "remanded . . . for further consideration in light of *Rippo v. Baker*, 580 U.S. ___ (2017)." Pet. App. 26a. In *Rippo* the Court reversed another decision that denied a recusal claim for failure to show actual bias because this was "the wrong legal standard[.]" 137 S. Ct. 905, 907 (2017). Noting that "the Due Process Clause may sometimes demand recusal even when a judge 'ha[s] no actual bias,'" the Court directed attention to the correct standard, which requires an objective inquiry into whether circumstances present an undue risk of bias. *Id.* (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986)).

Following additional briefing and oral argument, the Louisiana Supreme Court issued a new decision on March 13, 2018. The court recognized that it had been "instructed to consider whether the trial judge's recusal should have been required because objectively speaking, the probability of actual bias on the part of

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[13] This petition presented two questions regarding juror bias that are almost identical to those here. The final question presented was somewhat different: whether "a trial judge's involvement as a witness in a police investigation . . . create[s] 'an unconstitutional potential for bias[.]'" Prior Pet. ii (citation omitted); *cf.* Pet. i (asking whether Judge Marullo violated Petitioner's rights).

the judge . . . [was] too high to be constitutionally tolerable under the circumstances." Pet. App. 1a (internal quotation marks omitted; quoting *Rippo*, 137 S. Ct. at 907). Following a review of pertinent facts and jurisprudence, the court answered this question in the negative. Among other things, the court noted that it has not been proven that the 9mm gun released by Talley was used in the murders at the Kim Anh restaurant; that Judge Marullo was not alleged to have had any direct contact with Talley or Frank, or to have had any personal knowledge of their actions; and, that the PID investigation had targeted Talley, not Judge Marullo. *Id.* at 19a-20a. "Contrary to any prior representations to the courts, there is absolutely no evidence in the record that Judge Marullo was under investigation himself"; the court added that even if Judge Marullo had signed the disputed release order, "he was merely performing a ministerial act that he was fully authorized to perform." *Id*. at 19a.

The Louisiana Supreme Court acknowledged that an average judge might have "harbored some sensitivity about whether his signature was forged," and about "being unjustly associated with any wrongdoing surrounding the release of the possible murder weapon to Frank." *Id.* at 24a. But it was "unclear," the court found, how this would distort the judge's perspective or otherwise bias him with respect to Lacaze's case. *Id.* at 25a. The court concluded that "[t]he association between the potential source of bias in this case and what might reasonably be expected to be a judge's anticipated psychological reaction" was "too remote and attenuated to show a 'probability of actual bias . . . too high to be constitutionally tolerable.'" *Id.* at 24a.

REASONS FOR DENYING THE PETITION

This case was remanded for further consideration in light of *Rippo v. Baker*, where a court applied "the wrong legal standard" in addressing another recusal claim under the Due Process Clause. 137 S. Ct. 905, 907 (2017). The Louisiana Supreme Court has complied with this mandate, having "ask[ed] the question [this Court's] precedents require: whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable." *Id*. Claims that the court misapplied this standard are unfounded. It is Petitioner who misconstrues the due process standard by viewing it as a farrago encompassing dicta, statutes, and proverb. His reading of the opinion below is overdrawn in certain respects and myopic in others, ignoring the full scope of the court's inquiry. The Louisiana Supreme Court recognized the variety of ways in which bias can arise and considered how the circumstances here could affect an average judge. Because this reflects a faithful application of the Court's precedents, Petitioner's first question does not warrant review.

The Court has previously declined to address the second and third questions and should do so again. The third question was never presented to courts below, and review of the second question alone would not affect the outcome of this case. Petitioner also fails to show that the Louisiana Supreme Court's adjudication of his claims of juror bias relied on an interpretation of constitutional law that is subject to meaningful dispute. Finally, because he is unable to allege that either Settle or Mushatt did not correctly respond to a material question, Petitioner's claims of bias on their

part are facially deficient. Review is unwarranted for all these reasons.

I. Certiorari Should be Denied on the First Question Presented.

A. The Louisiana Supreme Court correctly identified and applied the due process standard for recusal.

1. Judicial disqualification was exceptional in the Colonies and the early Republic. "The common law of disqualification . . . was clear and simple: a judge was disqualified for direct pecuniary interest and for nothing else." John P. Frank, *Disqualification of Judges*, 56 YALE L. J. 605, 609 (1947); *see also* WILLIAM BLACKSTONE, 3 COMMENTARIES 361 ("[T]he law will not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea."). Considerable change has since occurred at the level of statutes and judicial canons. *See, e.g.,* LA. CODE CRIM. PROC. art. 671(A) (listing various grounds for recusal, including inability, "for any [ ] reason, to conduct a fair and impartial trial."); LA. CODE OF JUDICIAL CONDUCT CANONS 2 & 3(A)(4) (judges are to avoid even the appearance of bias or impropriety). However, this Court has consistently maintained that "due process 'demarks only the outer boundaries of judicial disqualifications.'" *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1908 (2016) (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986)). Until 2009 the Court recognized only "two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of a case, and when

the judge is trying a defendant for certain criminal contempts." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 890 (2009) (Roberts, C.J., dissenting).

Caperton established a new standard: recusal is now constitutionally mandated under any circumstances "'in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Id.* at 877 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). This standard is applied through an "objective inquiry" into relevant circumstances, and may "require recusal whether or not actual bias exists or can be proved." *Id.* at 885-86. The ultimate question is "whether the average judge in [a particular] position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Id.* at 881; *cf. Rippo*, 137 S. Ct. at 907 (identifying "the question our precedents require" as "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable."). In reviewing Petitioner's recusal claim on remand, the Louisiana Supreme Court identified and applied the *Caperton* standard.

2. Petitioner continues to assert, as he did below, that a mere appearance of bias can violate the Due Process Clause. Pet. 22.[14] The Louisiana Supreme Court was right to reject this claim. While the Due Process Clause "'demarks only the outer boundaries of

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[14] Of note, several of the cases that Petitioner and his *amici* cite regarding the appearance of bias concern statutory law. *E.g., Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988) (applying 28 U.S.C. § 455(a)).

judicial disqualifications,'" *Caperton*, 556 U.S. at 889 (citation omitted), "'[a]ppearance' problems lurk everywhere, for they are in the eye of the beholder." *Del Vecchio v. Ill. Dep't of Corrs.*, 31 F.3d 1368, 1389 (7th Cir. 1994) (*en banc*) (Easterbrook, J., concurring). An appearance of bias can certainly reflect an actual risk thereof. But it is the risk of bias, not its appearance, which this Court has identified as dispositive under the Due Process Clause. *See, e.g.,* Jed Handelsman Shugerman, *In Defense of Appearances: What* Caperton v. Massey *Should Have Said*, 59 DEPAUL L. REV. 529, 540 (2010) (observing of *Caperton* that "Not once was 'appearance' used as part of the Supreme Court's due process analysis, nor was it ever cited as part of Supreme Court precedent.") (footnote omitted). *Cf. Williams*, 136 S. Ct. at 1908-09 (finding judge's "significant, personal involvement in a critical decision in Williams's case gave rise to an *unacceptable risk* of actual bias. *This risk* so endangered the appearance of neutrality that his participation in the case 'must be forbidden if the guarantee of due process is to be adequately implemented.'") (emphasis added; citation omitted).

In rejecting Petitioner's "appearance" argument, the Louisiana Supreme Court wrote that "an appearance of bias *alone* is insufficient to show a violation of federal due process." Pet. App. 15a (emphasis added; footnote omitted). This is an accurate statement of the law, and one echoed in the decisions of numerous circuit courts. *E.g., United States v. Rodriguez*, 627 F.3d 1372, 1381 (11th Cir. 2010) ("Rodriguez has identified no decision, nor have we found one, where this Court or the Supreme Court has held that the appearance of bias is enough by itself to be a constitutional violation."); *Suh*

v. Pierce, 630 F.3d 685, 691-92 (7th Cir. 2011) (finding that this Court "has never held, or even intimated," that the Due Process Clause may require recusal "based *solely* on how the situation might have 'appeared' to an outside observer") (emphasis in original); *Jones v. Phelps*, 599 F. App'x 433, 436 (3d Cir. 2015) ("The Due Process Clause only requires recusal when actual bias or 'a serious risk of actual bias' exists."). The Louisiana Supreme Court did not err in recognizing that this Court "has never rested the vaunted principle of due process on something as subjective and transitory as appearance." *Del Vecchio*, 31 F.3d at 1371-72.

3. Petitioner also alleges that the Louisiana Supreme Court misapplied the due process standard by inquiring whether the circumstances here were "objectively (and realistically) likely to cause bias for or against either party in this case." Pet. App. 24a-25a. He contends that "restricting the Due Process Clause to instances of bias specifically 'for or against' a party turns this Court's due process jurisprudence on its head." Pet. 22. Not at all. In the oft-quoted words of Chief Justice Taft, an impartial judge is one who "hold[s] the balance nice, clear, and true between the state and the accused" in a criminal case. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). Failure or inability to hold such a position of equipoise is precisely what the word "bias" denotes. *See* Black's Law Dictionary (10th ed. 2014) (defining bias as "A mental inclination or tendency; prejudice; predilection"); Oxford English Dictionary (2d ed. 1989) (identifying an original meaning of "Slanting, oblique. *bias line*: (in early geometry) a diagonal or hypotenuse"; subsequently, "An inclination, leaning, tendency, bent; a

preponderating disposition or propensity; predisposition *towards*; predilection, prejudice.") (italics in original).

Insofar as Petitioner is claiming the Louisiana Supreme Court understood bias solely in terms of *ad hominem* likes and dislikes, the decision below refutes this contention. The court reviewed the variety of ways in which bias can arise and made continual reference to *Rippo* in particular, where the trial judge was alleged to be motivated by pure self-interest. The court also viewed bias in terms of whether circumstances here would have "color[ed] Judge Marullo's perspective," Pet. App. 25a, and considered the "psychological tendencies of the average judge" in Judge Marullo's position (*e.g.*, "sensitivity about whether his signature was forged"). *Id.* at 24a. The Louisiana Supreme Court recognized possible forms and sources of bias in this case. It simply found that they did not present "such potential for bias as to require disqualification." *Ungar v. Sarafite*, 376 U.S. 575, 584 (1964).

4. Petitioner alleges several "patent errors" in his argument for summary reversal, but none reflects any defect in the analysis below. Pet. 26. First, the significance of the release order and of the PID investigation are germane to any "realistic appraisal of [the] psychological tendencies" of an average judge in Judge Marullo's position. *Caperton*, 556 U.S. at 883 (citation and internal quotation marks omitted). Second, there is no indication the state supreme court considered its list of circumstances in which unconstitutional bias has been found to be exhaustive rather than illustrative. Had the court taken the

former view, it presumably would have invoked this as cause for dismissing the distinctive circumstances in this case out of hand—which it did not. Finally, Petitioner contends that the Louisiana Supreme Court "required a showing of bias higher than this Court has ever contemplated." Pet. 27. In doing so he relies on *Tumey*, a decision that applied the traditional rule of disqualification for direct pecuniary interest, under which even "the slightest pecuniary interest" was disqualifying. 273 U.S. at 524.[15] This bears little resemblance to the question this Court's precedents now require: "whether, considering all the circumstances alleged, the risk of bias was too high to be constitutionally tolerable." *Rippo*, 137 S. Ct. at 907.[16]

B. The facts of this case did not require recusal.

1. This Court has always confined application of the due process standard for recusal to situations involving "extreme facts[.]" *Caperton*, 556 U.S. at 887. In *Caperton*, a CEO whose company had had a $50 million judgment entered against it proceeded to contribute some $3 million to replace a judge on the West Virginia Supreme Court of Appeals, the company's "next step once the state trial court dealt with post-trial motions." *Id.* at 886. *Williams* concerned a judge who, as a

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[15] *Tumey* suggested, but did not hold, that an exception to this rule might be made for *de minimis* sums. *Id*. at 531.

[16] *Bracy v. Gramley*, 520 U.S. 899 (1997), which Petitioner also invokes, likewise addressed a different standard: whether the petitioner's allegations sufficed to show "good cause" for discovery under Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts.

district attorney, had personally authorized his subordinates to seek the death sentence the petitioner was challenging. The argument in *Rippo* was that "a judge could not impartially adjudicate a case in which one of the parties was criminally investigating him." 137 S. Ct. at 906. In all these cases, the theory of bias is plain; they involve "extreme facts" in the sense that, with respect to the potential for bias, the facts essentially speak for themselves.

Here, the circumstances alleged to give rise to an objective risk of actual bias were as follows:

- On March 4, 1995, three people were shot to death with 9mm ammunition. Antoinette Frank (an NOPD officer) and Rogers Lacaze were identified as suspects and arrested shortly thereafter.
- Police discovered that Frank had obtained two weapons from David Talley in the department's Property Room, one of which was a 9mm handgun released to her on August 30, 1994.
- An internal investigation into whether Talley had violated departmental rules and regulations found a court order for the release of the 9mm gun purportedly signed by Judge Marullo.
- The officer investigating Talley showed this release order to Judge Marullo, who stated he did not believe the signature was authentic.

While an average judge might have "harbored some sensitivity" about being associated in any way with a weapon that might, in theory, have been used in a notorious crime, the Louisiana Supreme Court was

correct to find this "too remote and attenuated" a source to create a probability of actual bias too high to be constitutionally tolerable. Pet. App. 24a. As the court observed, it is not even clear how these circumstances would affect an average judge's view of Petitioner's case. *Id*. Judge Marullo is not alleged to have been exposed to any information about the Kim Anh restaurant murders, and Petitioner is not alleged to have had any connection to Talley's release of a 9mm gun to Frank. That release occurred on August 30, 1994—almost three months before Frank even met Petitioner, and over six months before the murders.

In cases such as *Caperton*, *Williams*, and *Rippo*, the theory of bias was self-evident; the only difficulty lay in assessing its weight—*i.e.*, whether it demonstrated a probability of bias too high to be constitutionally tolerable. Here, there is no clear and coherent theory of bias in the first place. Petitioner is therefore incapable of showing a risk of bias so great as to be constitutionally intolerable.

2. Petitioner also argues that Judge Marullo could not be impartial because he was "heading into a highly competitive election year." Pet. 21. Such claims are not supported by anything in the record.[17] This in turn reflects the fact that Petitioner did not argue to the Louisiana Supreme Court, on either of his two

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[17] Judge Marullo was not questioned at the post-conviction hearing about political matters, and the only evidence introduced on the subject was a piece of campaign literature filed in the trial court but not submitted to courts of review. Writ App. 344 (identifying Exhibit 58 of the supplemental post-conviction application as "Judge Frank Marullo Campaign Literature").

occasions for doing so, that Judge Marullo was influenced by politics. He should therefore not be heard to do so now.

In any event, judges are presumed to be impartial, a presumption that "stems . . . from the more generally applicable presumption that judges know the law and apply it in making their decisions, and the even more generally applicable presumption of regularity." *Coley v. Bagley*, 706 F.3d 741, 751 (6th Cir. 2013) (citations omitted). Extreme cases are one thing; in *Bracey* and *Rippo*, the judges in question had committed crimes. But the presumption of an impartial judiciary is hollow indeed if one can assume the average judge is beholden to mere careerism.

3. Finally, Petitioner points to conduct on the part of Judge Marullo himself, apparently as proof that the judge was actually, subjectively biased. But the Louisiana Supreme Court already determined in 2016 that Petitioner had failed to show that Judge Marullo harbored any bias or prejudice. Pet. App. 42a. That finding was not called into question by this Court's GVR. To the contrary, the GVR directed the state court to reconsider Petitioner's claim in light of *Rippo*, which emphasized that "the Due Process Clause may sometimes demand recusal even when a judge ha[s] no actual bias." 137 S. Ct. at 907 (citation and internal quotation marks omitted; brackets in original).

Furthermore, the determination that Petitioner failed to show actual bias was correct. In asserting that Judge Marullo "rushed Petitioner's capital case to trial," Pet. 20 n. 7, Petitioner fails to note that on May 15, 1995, he adopted a motion for speedy trial filed by Frank. R.1:16. In hypothesizing that Judge Marullo

wanted to cover up the disputed release order, Petitioner overlooks the judge's willingness to discuss the order in two recorded conferences during Frank's trial, in which the judge also allowed defense counsel to question Talley about the order and offered to accept it into the record. Lastly, in alleging that Judge Marullo deprived him of evidence, Petitioner indulges in wishful thinking, for the judge had no evidence to give. Petitioner suggests the judge could have corroborated his testimony that Frank had told him, "'I got a friend of mine down in the Property Room, and I should be getting a nine millimeter soon.'" Pet. 2 (citation omitted). But Judge Marullo is not alleged to have been privy to conversations between Frank and Petitioner, or to have had personal knowledge of goings-on in the Property Room. Nor is the judge alleged to have had any knowledge, even second-hand, of Frank obtaining guns from the Property Room during or after the time Petitioner first met her in November 1994.

Petitioner has not shown that Judge Marullo was actually biased. Nor has he shown how or why an average judge in Judge Marullo's position would have been biased by viewing a document that was no more than tangentially related to Petitioner's case. His recusal claim was properly denied.

II. Certiorari Should be Denied on the Second and Third Questions Presented.

Petitioner's second and third questions concern claims of juror bias under *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). Courts typically apply *McDonough* using a two-prong test that requires a party to show that (1) a juror failed to answer a material question honestly, and (2) an

honest response would have provided a valid basis for a challenge for cause. *See, e.g.,* Pet. App. 36a. Petitioner's claims of a deep circuit split over *McDonough*'s application are exaggerated, as seen below,[18] and this Court has found it unnecessary to reexamine *McDonough* when previously asked to do so. *See McKinney v. Kelly*, 137 S. Ct. 1228 (2017); *Arreola v. Choudry*, 555 U.S. 1048 (2008); *Tucker v. United States*, 534 U.S. 816 (2001); *Skaggs v. Otis Elevator Co.*, 528 U.S. 811 (1999); *Greenwood v. United States*, 513 U.S. 929 (1994).

A. Petitioner's third question was not presented to courts below and is not a subject of dispute.

1. Petitioner's third question asks whether *McDonough*'s first prong can be met by any misleading omissions, even those that are not deliberate. The Court should not consider this question because it was not pressed or passed upon below. *See Illinois v. Gates*, 462 U.S. 213, 218-222 (1983). Petitioner's argument to the Louisiana courts was that jurors had "'consciously censored information' in an attempt to gain a seat on the jury when [they] would otherwise have been struck." Writ App. 451 (Petitioner's supplemental post-conviction application) (citation omitted); *see also* Petitioner's Original Writ Application to the Louisiana

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[18] While Respondent did not previously dispute Petitioner's account of a split over *McDonough*'s first prong, it disagrees with Petitioner's characterization of this as an affirmative concession. Pet. 33. Even if Respondent had made such a concession, it would not choose to "be consciously wrong today because [it] was unconsciously wrong yesterday." *Comm. of Mass. v. United States*, 333 U.S. 611, 640 (1948) (Jackson, J., dissenting).

Supreme Court at 10, 2016-KP-0234 (La. Feb. 5, 2016) ("The *McDonough* test . . . embodies the long-standing principle that a juror who gives 'willfully evasive or knowingly untrue' answers during voir dire 'is a juror in name only.'") (quoting *Clark v. United States*, 289 U.S. 1, 11 (1933)). In light of this framing, and in accordance with pertinent case law, the Louisiana Supreme Court accepted without discussion that *McDonough* requires a showing of dishonesty. Pet. App. 36a. Only in his prior petition to this Court did Petitioner first question "the significance of dishonesty to *McDonough*[.]" Prior Pet. 28.[19]

If the Court were to grant certiorari on Petitioner's third question, that would make it the court of first instance on the subject. This strongly suggests that certiorari should be denied. *See Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court."); *Yee v. Escondido*, 503 U.S. 519, 533 (1992) ("In reviewing the judgments of state courts under the

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[19] According to one group of *amici*, the issue of juror bias was again "raised by Mr. Lacaze on remand." Louisiana Association of Criminal Defense Lawyers, National Association of Criminal Defense Lawyers, and 32 Other Associations of Criminal Defense Lawyers Amicus Brief (Defense Lawyers Amicus Brief) 3 n. 2. That is not the case. Applicant's Brief on Remand, 16-KP-0234, 2017 WL 8217159 (La. Nov. 27, 2017). Also, while the same *amici* state that some courts "have questioned whether *McDonough* applies at all in the criminal context," the only case cited for this proposition, *Frank v. Lizarraga*, 721 F. App'x 719 (9th Cir. 2018), does not support it. Defense Lawyers Amicus Brief 7. *Frank* simply rejected the unfounded claim that *McDonough* "establish[ed] that a trial court violates the Sixth Amendment by dismissing during deliberations a holdout juror[.]" 721 F. App'x at 719.

jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below.").

2. Certiorari is also unwarranted because there is no meaningful dispute as to the significance of dishonesty under *McDonough*. *McDonough* was a products liability case in which potential jurors were asked whether they had any immediate family members who had sustained a "severe injury" that resulted in disability or prolonged pain and suffering. 464 U.S. at 550. Although one venireman's son had sustained a broken leg as a result of an exploding tire, he failed to mention this at the time, later explaining that he did not consider the injury "severe." *Id.* at 551 n. 3. The Tenth Circuit found that the juror's failure to disclose warranted a new trial, a decision this Court reversed unanimously (although Justices Brennan and Marshall concurred only in the judgment). Writing for the Court, then-Justice Rehnquist stated that in order to obtain a new trial in such circumstances, a party must first show that he was denied information because a juror "failed to answer honestly a material question on *voir dire*[.]" *Id.* at 556. The party must "then further show that a correct response would have provided a valid basis for a challenge for cause. The 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.*

McDonough's application of this standard turned on the good faith of the non-disclosing juror. The Tenth Circuit had held that good faith "'is irrelevant to our inquiry. If an average prospective juror would have

disclosed the information, and that information would have been significant and cogent evidence of the juror's probable bias, a new trial is required . . . .'" *Id.* at 552 (quoting *Greenwood v. McDonough Power Equipment, Inc.*, 687 F.2d 338, 343 (10th Cir. 1982)). The Court rejected this approach, stating that "To invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give." *Id.* at 555.

Courts have accordingly recognized that *McDonough* is addressed to intentional concealment. *See* Pet. 33-34 (citing cases from the Eighth, Eleventh, and D.C. Circuits); *Skaggs v. Otis Elevator Co.*, 164 F.3d 511, 515 (10th Cir. 1998) ("The first prong of the *McDonough* test is satisfied if the movant can prove that the juror in question intentionally gave an incorrect answer."), *cert. denied*, 528 U.S. 811 (1999); *Fields v. Brown*, 503 F.3d 755, 772-73 (9th Cir. 2007) (*en banc*) ("Accordingly, when the issue of bias arises after trial . . . or, as here, on collateral review of a conviction in state court, dishonesty in voir dire is the critical factor."); *United States v. Benabe*, 654 F.3d 753, 781-82 (7th Cir. 2011) (finding no error in denial of motion for new trial where "[n]othing suggested . . . that Juror 79 intentionally withheld any information or failed to honestly answer"); *United States v. James*, 513 F. App'x 232, 234 (3d Cir. 2013) ("To satisfy the first prong of *McDonough*, a defendant must show that the juror's answer was dishonest, as opposed to merely 'mistaken, though honest'") (quoting 464 U.S. at 555).

Petitioner asserts that there is a split on this issue because the First, Second, Fourth, Fifth, and Sixth

Circuits hold that *McDonough* also applies to unintentional failures to disclose. Pet. 33.[20] In fact, the Second Circuit has expressly stated that this was never its position,[21] and insofar as it was ever espoused by other circuits, they have either retreated from or abandoned it. *See Dennis v. Mitchell*, 354 F.3d 511, 521 (6th Cir. 2003) (finding relief unwarranted because "as in *McDonough*, juror Harris's misunderstanding of a legal term d[id] not denote dishonesty."); *Billings v. Polk*, 441 F.3d 238, 245 (4th Cir. 2006) ("*McDonough* provides for relief only where a juror gives a dishonest response . . . not where a juror innocently fails to disclose"); *Sampson v. United States*, 724 F.3d 150, 164 n. 8 (1st Cir. 2013) ("[I]n the absence of dishonesty, post-trial relief, *if available at all*, will require a more flagrant showing of juror bias.") (emphasis added); *Austin v. Davis*, 876 F.3d 757, 793 (5th Cir. 2017) ("Austin has not met the first prong of *McDonough*, that Erwin was dishonest during *voir dire*.") The clear trend has been toward greater consensus that dishonesty is critical to *McDonough*.

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[20] Petitioner further asserts that "several states" have taken this position. *Id.* But only one of the state decisions he cites on this point, *State v. Thomas*, 830 P.2d 243 (Utah 1992), actually held that the defendant had established a *McDonough* claim based on inadvertent non-disclosure.

[21] *See United States v. Shaoul*, 41 F.3d 811, 815 (2d Cir. 1994) ("Such a contorted reading of *Langford* is incorrect, because it would eliminate the threshold requirement of the *McDonough* test: juror dishonesty."). In the Second Circuit decision Petitioner cites, the court declined to address whether *McDonough*'s first prong had been met because it sufficed to affirm that the second had not been. *United States v. Greer*, 285 F.3d 158, 170-71 (2d Cir. 2002).

3. It is also widely recognized that *McDonough*'s first prong is addressed to whether a juror answered questions honestly, not whether he failed to volunteer information. *See, e.g., United States v. O'Neill*, 767 F.2d 780, 785 (11th Cir. 1985) (finding delayed disclosure in a drug case of juror's friendship with two narcotics agents not dishonest where juror "was never specifically asked if he had friends in law enforcement."); *Billings*, 441 F.3d at 244 ("Coleman's failure to volunteer this information does not amount to a dishonest response to the questions posed.") (footnote omitted); *Fields*, 503 F.3d at 767 (finding no *McDonough* violation where juror "would have furnished [information], if asked. But he wasn't asked[.]"); *Benabe*, 654 F.3d at 781 ("Juror 79 answered correctly during voir dire that her son had been involved in a gang. She did not say that it was the Insane Deuces, but nobody asked her."); *cf. United States v. Rhodes*, 556 F.2d 599, 601 (1st Cir. 1977) ("We readily hold that jurors, ignorant of voir dire procedure, are to be held to the question asked, and not to some other question that should have been asked."). In this case, Petitioner has not pointed to any inaccurate response, or lack of response, to a question posed to Settle or Mushatt. He merely contends that they ought to have taken it upon themselves to volunteer information. This is not an adequate basis for a *McDonough* claim.

B. Petitioner's second question is not implicated here, and review of this question alone would not affect his case.

Petitioner's second question asks whether *McDonough*'s second prong requires a showing of grounds for mandatory disqualification of a juror. This question is not presented by the decision below. It is simply not the case that the Louisiana Supreme Court demanded "a showing that [a] juror would have been subject to mandatory dismissal," as Petitioner claims it did. Pet. 30-31. Rather, the court inquired whether Petitioner had shown grounds for "a meritorious challenge for cause." Pet. App. 38a. In doing so the court referred not only to the standards for establishing actual or implied bias, but also to inferences based upon intentional concealment and to proof of bias under state law. With regard to David Settle, moreover, it is clear that the state supreme court did not confine itself to asking whether his background *required* a presumption of bias. *Id.* at 38a-39a ("Lacaze neither alleges nor shows that Mr. Settle had any relationships or experience which affected *or* must be presumed to have affected his view of the evidence in this case.") (emphasis added). This inquiry did not turn on any of the points that Petitioner alleges to be in dispute: whether *McDonough*'s second prong recognizes only actual bias, or only actual and implied bias, or whether a showing of improper motive is required. Pet. 30-32. As such, it affords the Court no occasion to address such issues in a non-advisory capacity.

Certiorari is also unwarranted because review of Petitioner's second question, without more, would not affect the outcome of his case. The Louisiana Supreme

Court declined to find that Petitioner demonstrated dishonesty on the part of any juror, a determination he has not called into question. And while Petitioner argues that dishonesty is not dispositive under *McDonough*, that argument is not properly presented. *See supra* Part II.A. Thus, because Petitioner's claims would remain deficient under *McDonough*'s first prong regardless any reassessment of the second, he is without a "'personal stake in the outcome'" as to this question. *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). *Cf. North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (affirming that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.").

CONCLUSION

Respondent respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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