No. 16-1125

In The
Supreme Court of the United States

ROGERS LACAZE,

Petitioner,

versus

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 FOR REVIEW

1. Whether the seating of David Settle, whose employment history included past service as a police officer for railroad companies in states other than Louisiana and, at the time of defendant's trial, worked as a driver's license officer for the Louisiana Department of Motor Vehicles and whose primary job function was reinstating suspended driver's licenses, on the defendant's jury violated defendant's rights to a trial by an impartial jury and to due process guaranteed under the Sixth and Fourteenth Amendments to the United States Constitution.

2. Whether Lacaze was denied his right to a fair trial before an impartial tribunal when Judge Frank Marullo presided over his case.

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PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Jury trials for crimes, and procedural rights

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury[.]

U.S. Const. amend. VI.

Due Process

> No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

U.S. Const. amend. XIV.

Challenge for cause

The state or the defendant may challenge a juror for cause on the ground that:

> (1) The juror lacks a qualification required by law;
>
> (2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence;

(3) The relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict[.] . . .

La.C.Cr.P. art. 797.

Grounds for recusation of judge

A. In a criminal case a judge of any court, trial or appellate, shall be recused when he:

(1) Is biased, prejudiced, or personally interested in the cause to such an extent that he would be unable to conduct a fair and impartial trial;

(2) Is the spouse of the accused, of the party injured, of an attorney employed in the cause, or of the district attorney; or is related to the accused or the party injured, or to the spouse of the accused or party injured, within the fourth degree; or is related to an attorney employed in the cause or to the district attorney, or to the spouse of either, within the second degree;

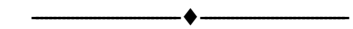
(3) Has been employed or consulted as an attorney in the cause, or has been associated with an attorney during the latter's employment in the cause;

(4) Is a witness in the cause;

(5) Has performed a judicial act in the case in another court; or

(6) Would be unable, for any other reason, to conduct a fair and impartial trial.

La.C.Cr.P. art. 671.



STATEMENT OF THE CASE

Lacaze, along with codefendant Antoinette Frank, was charged by bill of indictment, filed on April 28, 1995, by the Orleans Parish Grand Jury, with three counts of the first degree murders of Cuong Vu, Ha Vu, and Officer Ronald Williams of the New Orleans Police Department ("NOPD"), in violation of La.R.S. 14:30. Those murders ("the Kim Anh murders") took place on March 4, 1995, at the Kim Anh Restaurant in New Orleans East. Lacaze's trial commenced on July 17, 1995.

On July 17, 1995, voir dire was held. On July 20, 1995, the jury found Lacaze guilty as charged on each count. On July 21, 1995, the jury recommended that Lacaze be sentenced to death on each count. On January 25, 2002, on direct review, the Louisiana Supreme Court affirmed Lacaze's convictions and sentences. *State v. Lacaze*, 99-0584 (La. 1/25/2002), 824 So. 2d 1063. This Court denied Lacaze's petition for certiorari on October 7, 2002. *Lacaze v. Louisiana*, 537 U.S. 865, 123 S.Ct. 263 (2002).

Lacaze subsequently filed a *pro se* application for post-conviction relief. In connection therewith, the

Louisiana Supreme Court ultimately recused the district court judge, Honorable Frank Marullo, who had presided over Lacaze's trial and sentencing, from presiding over his post-conviction proceedings. *State v. Lacaze*, 10-2576 (La. 2011), 56 So. 3d 964. Following the subsequent self-recusals of the remaining district court judges, retired Judge Michael E. Kirby was appointed by the Louisiana Supreme Court to preside over Lacaze's post-conviction proceedings *ad hoc*.

Between June 17 and 26, 2013, the district court conducted an evidentiary hearing on Lacaze's post-conviction claims (which had been litigated in several filings by the State and Lacaze) during which more than twenty lay and expert witnesses testified for both Lacaze and the State. Of particular significance to the trial court's ultimate ruling was the testimony of former juror, David Settle. On June 27, 2013, the day after the conclusion of the hearing, the State was, for the first time, made aware of the existence of Kim Carter,[1] who had been close friends with Lacaze before and during the time of the Kim Anh murders and to whom he had given a detailed confession while awaiting trial in 1995. On November 22, 2013, the evidentiary hearing was re-opened in order to take testimony from Carter and inmate Darran Reppond, who had once been incarcerated with Antoinette Frank's brother, Adam Frank.

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[1] Carter contacted law enforcement in the town in which she lived after seeing an article about Lacaze on Nola.com on the last day of the hearing. Fearing Lacaze may be released, Carter asked local law enforcement to get in touch with New Orleans law enforcement in order to share what she knew.

On July 23, 2015, the trial court issued a written ruling denying all but two of Lacaze's claims for post-conviction relief. The trial court vacated Lacaze's convictions, finding that Lacaze had been denied a fair and impartial jury, and vacated Lacaze's death sentences, finding that Lacaze had been denied effective assistance of counsel in the sentencing phase.

The State filed an application for supervisory writ with the Louisiana Fourth Circuit Court of Appeal seeking review of the trial court's ruling. By Judgment issued on January 6, 2016, the Louisiana Fourth Circuit Court of Appeal granted the writ application in part, reversing the grant of a new trial on the juror basis, noting that "the trial court erred in finding that the seating of Mr. Settle on the defendant's jury was a structural error entitling him to a new trial," denied the writ as to the denial of the remaining claims, and remanded the matter to the trial court for consideration of defendant's remaining post-conviction claims. *See* Fourth Cir. No. 2015-K-0891 (unpub'd). Lacaze filed an application for supervisory writ with the Louisiana Supreme Court seeking review of the appellate court's ruling. By Judgment issued on December 16, 2016, the Louisiana Supreme Court denied the writ application, finding that the Fourth Circuit correctly reversed the order for a new trial, assigning written reasons. *State v. Lacaze*, 2016-KP-0234 (La. 01/09/15), reported at 208 So. 3d 856. The Louisiana Supreme Court issued a corrected action and per curiam

order on January 20, 2017.[2] Lacaze filed his Petition for Writ of Certiorari in the instant proceedings on March 16, 2017.

STATEMENT OF THE FACTS

The facts adduced at trial of the case are set forth in the Louisiana Supreme Court's decision in *State v. Lacaze*, 824 So. 2d 1063, 1066-72 (La. 2002). Respondent adopts the statement of facts from said opinion as if copied herein *in extenso*.

LAW AND ARGUMENT

I. The trial court committed manifest error in making the factual finding that juror David Settle was a "badge wearing law enforcement officer" at the time of trial for the purposes of *State v. Simmons*, because the defendant did not carry his evidentiary burden in order to support such a finding.

In *State v. Simmons*, 390 So. 2d 1317, 1318 (La. 1980), the Louisiana Supreme Court held that:

[2] The purpose of the corrected writ action was to remove all references to reinstating defendant's death sentence and deleting the concurring opinion, which had criticized defendant for attempting to relegate the penalty phase of the trial, since the sentence imposed was not an issue before the Court.

> The guarantee of an impartial trial in Article 1, Section 16, of the Louisiana Constitution of 1974 is offended by the presence on a jury of **a badge-wearing law enforcement officer**. See *Gaff v. State*, 155 Ind. 277, 58 N.E. 74 (1900); *Robinson v. Territory of Oklahoma*, 148 F. 830 (U.S. 8 Cir. 1906); *Tate v. People*, 125 Colo. 527, 247 P.2d 665 (1952); *State v. West*, 157 W.Va. 209, 200 S.E.2d 859 (1973). Deputy sheriffs have served on Louisiana juries. *State v. Reese*, 250 La. 151, 194 So.2d 729 (1967); *State v. Foster*, 150 La. 971, 91 So. 411 (1922); and *State v. Forbes*, 111 La. 473, 35 So. 710 (1903). However **an actively employed criminal deputy sheriff is not a competent criminal juror**. Any jurisprudence to the contrary is expressly overruled. Compare *State v. Bailey*, 261 La. 831, 261 So.2d 583 (1972) and *State v. Hunt*, 310 So.2d 563 (La., 1975).

(Emphasis added).

Following this decision, however, Louisiana courts of appeal interpreted *Simmons* as not constituting a wholesale exclusion to anyone *associated* with law enforcement and "carved out exceptions for law enforcement personnel **not actively engaged in the field in making arrests and enforcing the law**." *State v. Manning*, 2003-1982, pp. 32-33 (La. 10/19/04), 885 So. 2d 1044, 1079 (emphasis added) (*citing*, *e.g.*, *State v. Valentine*, 464 So. 2d 1091, 1095 (La.App. 1 Cir. 2/28/85), *writ denied*, 468 So. 2d 572 (La. 1985) (correctional officer for DOC in St. Gabriel Prison for Women was competent to serve although she also had four first

cousins who worked for the sheriff in East Baton Rouge Parish); *State v. Henderson*, 566 So. 2d 1098, 1103-04 (La.App. 2 Cir. 1990) (field sergeant at Wade Correctional Institute was competent to serve); *see also State v. Capps*, 461 So. 2d 562, 565 (La.App. 3 Cir. 1984) (juror employed as a police dispatcher was competent juror because she was "not in the same category as a criminal deputy sheriff" when determining qualification to serve); *State v. White*, 535 So. 2d 929 (La.App. 2 Cir. 1988), *writ denied*, 537 So. 2d 1161 (La. 1989) (former auxiliary police officer retired for five years was competent juror); *State v. Chapman*, 410 So. 2d 689 (La. 1981) (former warden of parish prison retired for four years was competent juror); *State v. Smith*, 466 So. 2d 1343 (La.App. 3 Cir. 1985) (prison security guard was competent juror). Accordingly, while *Simmons* was still deemed to be good law, "**appellate courts [ ] generally upheld the denial of a challenge for cause** where the potential juror's association with law enforcement ended or the juror [was] associated with a **branch of law enforcement not involved in investigating crimes, or apprehending or prosecuting suspected criminals**." *State v. Rhodes*, 97-1993 (La.App. 4 Cir. 11/18/98), 722 So. 2d 1078, 1079-80 (emphasis added) ("university security guard who retired from the New Orleans Police Department sixteen years prior to this trial" was competent juror). Ultimately though, the bright line rule of the *Simmons* decision was unanimously overruled by *State v. Ballard*, 98-2198 (La. 10/19/99), 747 So. 2d 1077.

In the case at bar, the trial court granted the defendant a new trial based upon its factual finding that juror David Settle met the definition of a "badge wearing law enforcement officer" as for the purposes of *Simmons*. A trial court's finding of fact may not be set aside in the absence of "manifest error" or unless it is "clearly wrong." *Theriot v. Lasseigne*, 93-2661 (La. 7/5/94), 640 So. 2d 1305, 1310 (*citing Sistler v. Liberty Mutual Ins. Co.*, 558 So. 2d 1106 (La. 1990)). The trial court in this case committed manifest error because the evidence and testimony presented by Lacaze in this case did not carry his burden of proving that David Settle was a "badge wearing law enforcement officer."

Settle was called to testify on the first day of the evidentiary hearing on Lacaze's application for post-conviction relief. This testimony was the sole basis upon which the trial court concluded that he was a "badge wearing law enforcement officer" at the time of Lacaze's trial. Settle's testimony on direct examination was as follows:

Q. Mr. Settle, are you familiar, um – let me ask you this. Were you ever a motor vehicle field officer for the state police?

A. **No, not a field officer**. I worked in the DMV at the motor vehicle office –

Q. Okay.

A. – after reinstatement.

Q. So when it[3] says, "motor vehicle officer field," what does that mean?

A. I have no idea.

* * *

Q. It's your testimony that you were a motor vehicle officer then, Mr. Settle?

A. I worked in the Reinstatement Department in the Reinstatement Office. **I don't know what do you mean what you mean by motor vehicle officer. I didn't have arrest powers**.

* * *

THE COURT:

In the summer of 1995, what did you do for a living?

THE WITNESS:

I worked at the Motor Vehicle Reinstatement Office in New Orleans.

THE COURT:

And what does – what does the Motor Vehicle Reinstatement Office do?

THE WITNESS:

Ah, clear up driver's license for people under suspension.

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[3] The "it" to which counsel referred was never identified. *See infra*.

THE COURT:

So you were a driver's license officer?

THE WITNESS:

Yes.[4]

The document shown to Settle by Lacaze's counsel was never authenticated or introduced (though a copy was provided to the State, which contained over 200 unnumbered pages) and no witness who would have even been legally competent to authenticate the documents was ever called. *See* La.C.E. art. 901, *et seq*. Further, counsel never identified for the court which page of this voluminous unauthenticated and unintroduced document with which it unsuccessfully attempted to impeach Settle. And yet, this is the only evidence that Lacaze put forward that Settle was a "badge wearing law enforcement officer" – a claim that Settle effectively denied. Accordingly, Lacaze clearly did not carry his burden under La.C.Cr.P. art. 903.2.

Despite this unequivocal testimony, the trial court's ruling stated that "[t]he parties . . . do not dispute [that Settle] was a commissioned law enforcement officer."[5] Based upon the above, however, it is clear that this is not so. In its post-hearing memorandum, the State referred to Settle as an employee of "the Department of Public Safety" and that this testimony

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[4] Transcript of Evidentiary Hearing held on June 17, 2013 at 33-35 (emphasis added).

[5] Trial Court's Written Ruling at 17.

was "not perjurious."[6] These arguments clearly dispute the factual claims made by Lacaze and do not, in any way, function as stipulations or admissions of Lacaze's claims regarding Settle's employment status in 1995. At any rate, even if it was reasonable to conclude that the State did not dispute Lacaze's claim, this would still not be relevant to the ultimate factual issue of Settle's employment status, given his burden under La.C.Cr.P. art. 903.2.

In its ruling, the trial court stated, "At the time of trial[,] [Settle] was actually employed by the Louisiana State Police as a public safety officer."[7] Not only is the question of Settle's employment with the Louisiana State Police open to interpretation,[8] he would nonetheless not be the equivalent of a "badge wearing law enforcement officer" for the purposes of disqualifying him from jury service under *Simmons*. At no time did Settle testify that he was a Louisiana State Police "Trooper" – which is the term of art for Louisiana State Police field officers. On the contrary, as an employee at the Office of Motor Vehicles, who did not have any kind of arrest powers, it was clear that Settle was not actively in the field investigating crimes or making arrests and, thus, was more akin to a civilian employee, rather than a commissioned officer. In the light most favorable to Lacaze, Settle's testimony established – *at best* – that

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[6] State's Post-Hearing Memorandum at 14-15.

[7] Trial Court's Written Ruling at 17.

[8] The compound nature of the question put to Settle renders his response of "No, not a field officer. I worked in the DMV at the motor vehicle office [ ] after reinstatement."

he was only an "officer" in the same sense that student loan officers or CEOs or CFOs are "officers," or in the same sense that an attorney is an "officer of the court." Based upon his testimony, it is clear that Lacaze did not establish that Settle qualified as an incompetent juror under *Simmons*.

In his post-hearing memorandum, Lacaze conceded the inadequacy of Settle's testimony to carry his burden at the evidentiary hearing when he argued that Settle had concealed a vast history of employment by various law enforcement agencies at the initial voir dire and that he "continued his pattern of deception" at the post-conviction evidentiary hearing.[9] By the phrase "continued his pattern of deception," of course, Lacaze could only mean that Settle's answers to his counsel's questions at the evidentiary hearing did not adhere to Lacaze's theory of the case, which would require Settle to be classified as a "badge wearing law enforcement officer." This conclusion is manifest, given that the testimony cited *supra* was the only evidence that Lacaze could marshal in order to support his conclusion that Settle was, in fact, a "badge wearing law enforcement officer" at the time of trial. Unfortunately, for Lacaze, he cannot carry his burden of proving that Settle was an incompetent juror by simply calling him a liar without any evidence to corroborate that claim.

Accordingly, the trial court was manifestly erroneous when it found that Settle fit the definition of a

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[9] Defendant's Post-Hearing Memorandum at 17.

"badge wearing law enforcement officer" for the purposes of *Simmons*, because Lacaze did not carry his burden of proving that claim at the evidentiary hearing.

II. The trial court committed manifest error in making the factual finding that juror David Settle lied about his alleged status as a "law enforcement officer" during voir dire, because no evidence was presented to support such a finding.

In its ruling, the trial court stated that the trial record established that David Settle did not honestly answer the questions posed to him at the 1995 voir dire.[10] This alleged deception, the trial court concluded, directly resulted in Settle being permitted to sit on the jury because "if he had honestly answered [these questions] he would have been found to have been a legally incompetent juror under *State v. Simmons*, *supra*." In support of its conclusion that Settle had lied, the trial court stated the following:

> When he was questioning the first panel, defense counsel asked if **anyone was *related* to someone in law enforcement**. However, Mr. Settle was not in that group. As with Ms. Mushatt, he was not called for individual voir dire until the second panel.
>
> The very first thing that happened with the second panel was the question from the

[10] Trial Court's Written Ruling at 19-20.

> court as to whether anyone had something to volunteer based upon what they had heard with the first panel. Mr. Settle did not respond, although **he should have heard defense counsel's question *concerning* law enforcement** employment since he had answered the rollcall at the beginning of jury selection.[11]

With regard to the ruling's summation of the original trial court's questions during voir dire, the actual questions to which Lacaze claimed that Settle provided dishonest answers are as follows:

> Ladies and gentlemen, you have heard the questions that have been previously asked the jurors that were sitting in this position before you, and I have asked you if you have anything to volunteer to go ahead and volunteer it, you know, but I think like I said that I will let them go ahead and question you because of the possible penalties in this case so I will leave it a little bit wider open than I usually do normally.
>
> But, let me ask you some essential questions, and maybe we can quicken the process.
>
> Did anybody in the first row serve on a jury before?
>
> What type of jury did you serve on, sir?[12]

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[11] *Id.* at 16 (emphasis added).

[12] Transcript of Voir Dire on July 17, 1995 at 173(8).

With regard to the assertion in the trial court's ruling that, in order not to have responded to this, Settle must have a "plausible explanation for silence," it is worthy of note that this first "question" is not a question at all; it is the judge vocalizing a train of thought about the previous panel that ultimately ends in the trial court asking a question directed towards an individual about his prior jury service. By way of comparison, the transcript is replete with instances in which the lawyers or the trial court actually did address the panel and asked them questions as a whole with the intent of obtaining an answer. In each one of those instances, the court reporter notes, "THERE ARE NO RESPONSES FROM ANY OF THE JURY PANEL MEMBERS" and the lawyers typically remark that they will accept that jurors' silence as negative responses.[13] Here, there is no such note from the court reporter and no remark from counsel or the trial court. Indeed, even potential juror Massart – who readily answered another question about "relation" to people in law enforcement – was silent and did not volunteer any information.

Further, there was no factual support for the contention that Settle "should have heard defense counsel's question concerning law enforcement"[14] – in fact, the use of the phrase "should have" acknowledges that there was no proof presented that Settle did hear counsel's question during the first panel. The transcript

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[13] Transcript of Voir Dire on July 17, 1995, *passim*.

[14] Trial Court's Written Ruling at 16.

itself contains no admonition by the trial court for the room as a whole to listen to the entire voir dire for the first panel. Moreover, there is no confirmation by the trial court that second panel did, in fact, listen during the first panel, or if they had any questions. Settle could have just as easily left the courtroom to use the restroom, been reading a book, been sleeping, or simply not been paying attention. *See United States v. Casamayor*, 837 F.2d 1509, 1515 (11th Cir. 1988) (no new trial required when juror failed to disclose that, twenty-three years before trial, he had been a police trainee because nondisclosure was attributable to "inattentiveness"). This is all mere conjecture, however, because Lacaze's counsel never asked Settle whether or not he was *actually* paying attention during the first panel. That said, the matter before the trial court was a twenty-year-old murder case and Lacaze should not have been permitted to rely upon assumptions in carrying his burden.

The trial court's ruling states that it "cannot fathom a legitimate reason for [Settle] not speaking up when the trial court directly asked the first row of his panel **if anyone was *related* to anybody in law enforcement**."[15] The answer to this question, however, lies in the language of both the trial court's ruling and the 1995 voir dire. Even assuming that Settle did believe himself to be a law enforcement officer (despite his testimony to the contrary) this was not the question posed to him. The question presented to the row in

[15] *Id.* at 16 (emphasis added).

which Settle was seated (as well as during the first panel) was, "Is anyone in the first row ***related*** **to anyone in law enforcement**."[16] The question posed to Settle did not ask if he was currently in law enforcement or if he had been in the past. Based upon the record, the obvious explanation for why Settle did not respond in the affirmative to this question was because the honest answer was "No." Because (1) Settle has not been shown to have been a law enforcement officer; and (2) the record does not reflect that he was *related* to anyone in law enforcement, he cannot be deemed to have been dishonest. Accordingly, the trial court's statement that "[t]he record before this court abundantly establishes that, for whatever reason, Mr. Settle did not honestly answer the question"[17] is simply incorrect.

Further, contrary to the trial court's ruling, this is not a case like *United States v. Scott*, 854 F.2d 697 (5th Cir. 1988).[18] In *Scott*, the jurors were asked during voir dire, "Are any of you now serving as law enforcement officials, **or are any close relatives**? By that I mean, spouse, child, somebody dependent upon you, a close relative." *Id.* at 698 (emphasis added). In response to this question, one juror, David Buras, remained silent, despite the fact that his brother was not merely a deputy sheriff, but a deputy sheriff in the agency that investigated the defendant's case. Such is not the fact of

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[16] Transcript of Voir Dire on July 17, 1995 at 181-82.

[17] Trial Court's Written Ruling at 19-20.

[18] *Id.* at 19.

the matter in the case at bar. On the other hand, Lacaze's case is nearly identical to the decision by the Eastern District of Louisiana in *Riggins v. Butler*, 705 F. Supp. 1205, 1209-11 (E.D. La. 2/9/89), *aff'd*, 884 F.2d 576 (5th Cir. 1989).

The defendant in *Riggins* had been convicted in state court of first degree murder and, before deliberations during the sentencing phase had been completed, it came to light that one of the jurors had once been employed as a police officer. *Id.* The defense moved for a mistrial based upon the notion that the juror, a Mr. Danos, had been less than honest during voir dire. *Id.* The trial court denied the motion based upon the notion that former employment as a police officer did not constitute a valid challenge for cause. *Id.* The ruling on the motion for mistrial was subsequently affirmed by the Louisiana Supreme Court in *State v. Riggins*, 388 So. 2d 1164 (La. 1980).

The defendant filed a *habeas corpus* petition in the Eastern District. In addressing Riggins' claims that Danos had been dishonest while being questioned on voir dire, the court stated the following:

> Under the *McDonough* test, the court's first consideration is whether the juror "failed to answer honestly a material question on *voir dire.*" [*McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556, 104 S.Ct. 845, 850, 78 L.Ed.2d 663 (1984)]. It cannot reasonably be argued that Danos answered incorrectly any question posed to him on *voir dire.* After he revealed that he was retired, Danos

was asked about his former occupation and responded that he worked for Avondale. This certainly cannot be interpreted as a dishonest answer. Petitioner does not dispute that Danos in fact retired from Avondale but maintains that he should have also disclosed his former employment as a police officer. However, no reasonable retiree would construe a question as to his former occupation to refer to every job he ever held. Hence, the answers given by Danos to the questions concerning prior employment cannot be considered dishonest.

Later during the *voir dire*, **Danos and other prospective jurors as a group were asked whether they had friends or relatives "who are members of the police department."** Petitioner views Danos's silence in response to this question as a dishonest concealment of his former employment as a law enforcement officer. **The question, however, elicits information, not about the jurors' former employment, but about their friends and relatives who were members of the police force at that time. Danos's failure to mention his past association with law enforcement cannot be considered a dishonest answer to that question**. As the Eleventh Circuit has found, "[t]here is no merit to the argument that the juror's prior employment by a law enforcement agency was raised implicitly by the question regarding friends in law enforcement." *United States v. Tutt*, 704 F.2d 1567,

> 1569 (11th Cir.1983), *cert. denied*, 464 U.S. 855, 104 S.Ct. 174, 78 L.Ed.2d 156 (1983).

(Emphasis added). Based upon *Riggins*, the statement in the trial court's ruling that "[t]here is simply no excuse for [Settle] not mentioning his employment status,"[19] when asked about whether he was *related* to anyone in law enforcement, appears to miss the mark. Settle was not required to volunteer answers to questions that he was not asked. As it was in *Riggins v. Butler*, so is it also in the instant case. The court in *Riggins* stated:

> Petitioner does not cite, nor have we found, a single case which supports the position that a juror's failure to volunteer information suffices to satisfy the first step in the *McDonough* analysis. On the contrary, a number of circuit court cases suggest that a juror's failure to volunteer information does not justify a presumption of juror bias.

Id. at 1211 (*citing Tutt*, *supra* ("There is no merit to the argument that the juror's prior employment by a law enforcement agency was raised implicitly by the question regarding friends in law enforcement."); *United States v. O'Neill*, 767 F.2d 780 (11th Cir. 1985) (no new trial required when juror failed to disclose that two close friends were narcotics agents because voir dire questions inquired only of relatives in law enforcement); *United States v. Rhodes*, 556 F.2d 599 (1st Cir. 1977) ("We readily hold that jurors, ignorant of voir

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[19] Trial Court's Written Ruling at 17.

dire procedure, are to be held to the question asked, and not to some other question that should have been asked")); *see also De la Rosa v. Texas*, 743 F.2d 299 (5th Cir. 1984), *cert. denied*, 470 U.S. 1065, 105 S.Ct. 1781, 84 L.Ed.2d 840 (1985) (no new trial required when juror failed to disclose that his stepfather was a repeat murderer because voir dire questions did not directly solicit the information).

Accordingly, because Settle was never asked about his background in law enforcement, there was no factual basis for the trial court to have concluded that he was dishonest during voir dire.

III. Lacaze was not denied his right to a fair trial before an impartial tribunal when Judge Frank Marullo presided over his case.

In addressing the merits of Lacaze's claim that the denial of his motion to recuse Judge Frank Marullo violated his right to a fair trial before an impartial tribunal, the Louisiana Supreme Court held as follows:

> LaCaze next asserts he is entitled to relief because Judge Marullo presided over trial despite an appearance of impropriety. LaCaze asserts recusal was necessary in light of information adduced at co-defendant Frank's subsequent trial; specifically, that months before the murders, Frank, then a New Orleans Police Officer, obtained – pursuant to a release purportedly signed by Judge Marullo – a 9 mm Beretta semi-automatic handgun from

the NOPD Evidence and Property Room. That weapon, which Frank reported stolen before the murders, was of the same caliber and perhaps the same gun used to kill the victims. As LaCaze sees it, Judge Marullo's failure to disclose that he was questioned in an internal police investigation as to how Frank obtained the weapon obstructed his ability to make an informed decision about moving for recusal.

It is well-settled that a judge is presumed impartial. *State v. Edwards*, 420 So.2d 663, 673 (La. 1982). La.C.Cr.P. art. 671(A) lists the grounds for recusal in a criminal case, providing in part that a judge shall be recused if he is biased, prejudiced, or personally interested in the cause to such an extent that he would be unable to conduct a fair and impartial trial or "would be unable for any other reason, to conduct a fair and impartial trial." The latter catch-all includes circumstances which clearly indicate the judge cannot remain impartial, although no specified ground for recusal exists. La.C.Cr.P. art. 671, Cmt. The code article thus underscores a judge's duty to avoid even the appearance of impropriety. *See State v. LeBlanc*, 367 So.2d 335, 341 (La. 1979) ("[E]ven the appearance of impartiality, as well as impartiality itself, outweighs the inconvenience caused by recusal of the trial judge.") (citing *State v. Lemelle*, 353 So.2d 1312 (La. 1977)).

A review of the parties' competing views shows that even if Judge Marullo had disclosed his possible connection with the

weapon's release to Frank – and thereby led LaCaze to move for his recusal on that basis – LaCaze has pointed to no evidence that the judge harbored any bias, prejudice, or personal interest in the case, let alone to such an extent that it rendered him unable to conduct a fair trial. As a post-conviction witness, Judge Marullo emphatically denied any bias on his part. Further, LaCaze fails to show "any other reason" why Judge Marullo was unable to conduct a fair trial. La.C.Cr.P. art. 671(A)(6). The suggestion that he became entangled in the facts at issue, purely because he was possibly involved in an administrative release of a weapon that may have been later used to commit the crimes, is baseless and hardly sufficient to rebut the presumption of impartiality.

There has been considerable inquiry, to no avail, as to whether the signature is genuine. Even assuming it is, meaning Judge Marullo in fact authorized the weapon's release to Frank – a practice which for all that appears was routine, subject to established NOPD procedures – none of the issues in dispute at trial pertained to the means by which the murder weapon was procured. Whether months earlier Judge Marullo approved the release has no bearing on the evidence indicating LaCaze killed Ofc. Williams while Frank gathered the others in the kitchen and that both co-defendants were equally guilty under the law of principals. *LaCaze*, 99-0584, p. 10, 824 So.2d at 1071-72. As the district court put it, whether Frank obtained the murder weapon

> "pursuant to a bogus court order" is "immaterial and irrelevant since it did not address any issue that needed to be proved in the case nor did it have a tendency to make the existence of any fact of consequence [] more or less probable."

State v. Lacaze, 208 So. 3d 856, 863-64 (La. 2016) (internal footnotes removed). Respondent adopts the *ratio decidendi* of the Louisiana Supreme Court's opinion herein.

REASONS FOR DENYING THE PETITION

In *McDonough Power Equip., Inc. v. Greenwood*, 104 S.Ct. 845, 850 (1984), this Honorable Court held that, in order to merit a new trial based on a claim of undisclosed juror bias, "a party 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." However, the plurality opinion did not enunciate the degree of dishonesty or misrepresentation on the part of the juror or the nature of bias, that is, express or implied, that must be established before a new trial is warranted.

The circuit courts have formulated three separate tests to determine whether a new trial is warranted under *McDonough*. Under the test formulated by the First and Second Circuits, the relevant inquiry is 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 circumstances that the juror lacked the capacity and will to decide the case based on the evidence and that a valid basis for excusal for cause exists. *See*, *e.g.*, *Sampson v. U.S.*, 724 F.3d 150, 152 (1st Cir. 2013); *U.S. v. Parse*, 789 F.3d 83 (2d Cir. 2015). This interpretation comes directly from the two-part test established by Justice Rehnquist's controlling opinion in *McDonough*. *See McDonough*, 104 S.Ct. at 850.

In interpreting *McDonough*, the Third and Sixth Circuits have stressed the importance of actual or implied bias in order to find a juror excusable. This interpretation is generally derived from the concurring opinion by Justices Brennan and Marshall in *McDonough*. *See McDonough*, 104 S.Ct. at 851. Under this approach, implied bias may only be found under extreme and exceptional circumstances as to allow the conclusive presumption that the juror is biased, such as the examples offered by Justice O'Connor in *Smith v. Phillips*, 102 S.Ct. 940, 948-49 (1982), where the juror has a material work-related relationship with the prosecuting agency, is a close relative of a participant of the trial or criminal transaction, or was a witness or involved in the criminal transaction. *U.S. v. Flanders*, 635 Fed.Appx. 74 (3d Cir. 2015); *Johnson v. Luoma*, 425 F.3d 318, 326 (6th Cir. 2005).

The Eighth and Fourth Circuits have taken the *McDonough* opinion a step further, establishing a third prong necessary to satisfy excusal of a juror. Under the third prong, the defendant must establish that the

juror's motives for concealing information can truly be said to affect the fairness of the trial. In other words, the movant must establish that the juror's prejudices or interests materially affected the attainment of a fair proceeding. The addition of the third prong elevates the requisite standard for a movant to attain in order to establish that the juror would have been subject to excusal based on cause. *See U.S. v. Hawkins*, 796 F.3d 843, 863-64 (8th Cir. 2015); *U.S. v. Blackwell*, 436 Fed.Appx. 192 (4th Cir. 2011).

In the present case, applicant avers that a writ for certiorari should be granted in order to adequately resolve the discrepancies between the circuits, as they pertain to the decision in *McDonough*. Three general interpretations have arisen since the Court first ruled on the matter.

In the present case, as the Louisiana Supreme Court expressly found, Mr. Settle's failure to disclose his prior employment as a railroad officer in states other than Louisiana and his then-current employment as a driver's license officer for the Louisiana Department of Motor Vehicles "can[not] be fairly characterized as outright dishonesty." *See State v. Lacaze*, 208 So. 3d 856, 862 (La. 2016). The simple fact of the matter is, Mr. Settle was never questioned about his *own* experience in law enforcement. Rather, he was only asked if he was "*related* to anyone in law enforcement." *See id.* Under these circumstances, the State submits that Mr. Settle's non-disclosure of his affiliation with law enforcement would not satisfy the first

prong of *McDonough* under *any* of the three tests set forth by the "split" federal circuit courts of appeals.

Even assuming for the purpose of argument that Mr. Settle "failed to honestly answer a material question on *voir dire*," thereby satisfying *McDonough*'s first prong, Lacaze has not shown that he would have been subject to a meritorious challenge for cause. "[D]espite having called Mr. Settle as a post-conviction witness, [LaCaze] has offered neither an express admission of bias from Mr. Settle nor pointed to any specific facts from which Mr. Settle's bias or partiality must be inferred. . . . 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." *State v. Lacaze*, 208 So. 3d at 862. Indeed, when cross-examined on post-conviction, Mr. Settle indicated that his decision to vote guilty was based solely upon the evidence and not upon his tenuous connection with law enforcement. *See* Transcript of Evidentiary Hearing held on June 17, 2013.

Article III, § 2, of the Constitution confines federal courts to the decision of "Cases" or "Controversies." *See Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1067 (1997). This case-or-controversy limitation serves "two complementary" purposes. *Flast v. Cohen*, 88 S.Ct. 1942, 1949 (1968). It limits the business of federal courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and it defines the "role assigned to the judiciary in a tripartite

allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government." *Ibid.*

Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. *Deakins v. Monaghan*, 108 S.Ct. 523, 528 (1988); *Preiser v. Newkirk*, 95 S.Ct. 2330, 2334 (1975). To invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision, *Allen v. Wright*, 104 S.Ct. 3315, 3324 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 102 S.Ct. 752, 757-59 (1982). Article III denies federal courts the power "to decide questions that cannot affect the rights of litigants in the case before them," *North Carolina v. Rice*, 92 S.Ct. 402, 404 (1971), and confines them to resolving "'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Ibid.* (*quoting Aetna Life Insurance Co. v. Haworth*, 57 S.Ct. 461, 464 (1937)). This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. "To sustain our jurisdiction in the present case, it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals." *Deakins*, 108 S.Ct., at 528; *Steffel v. Thompson*, 94 S.Ct. 1209, 1216,

n. 10 (1974). The parties must continue to have a "'personal stake in the outcome'" of the lawsuit, *Los Angeles v. Lyons*, 103 S.Ct. 1660, 1665 (1983) (*quoting Baker v. Carr*, 82 S.Ct. 691, 703 (1962)).

Applicant avers that a writ for certiorari should be granted in the present case in order to adequately resolve the discrepancies between the circuits as to the appropriate standard under *McDonough*. The facts in the present case fail to satisfy *any* of the three tests adopted by the courts of appeals. Accordingly, even if the instant writ were granted and this Court were to issue an opinion clarifying the standard under *McDonough*, the outcome would remain the same. Therefore, as things presently stand, any judgment or decree rendered by this Court in the present action will serve no useful purpose and give no practical relief or effect. For these reasons, the Petition for Writ of Certiorari fails to present a case or controversy necessary to support federal jurisdiction.

CONCLUSION

Based on the foregoing, Petitioner has failed to present compelling reasons why this Court should exercise its discretionary jurisdiction in the instant case. Accordingly, the State of Louisiana, respondent herein, respectfully submits that certiorari be denied.

Respectfully submitted,

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