No. 13-517

In the Supreme Court of the United States

GREGORY P. WARGER, PETITIONER

v.

RANDY D. SHAUERS

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

REPLY BRIEF FOR THE PETITIONER

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In his brief in opposition, respondent does not dispute, and indeed concedes, that there is a circuit conflict on the question presented: namely, whether, under Federal Rule of Evidence 606(b), a party moving for a new trial based on juror dishonesty during voir dire may introduce juror testimony about statements made during deliberations that tend to show the alleged dishonesty. See Br. in Opp. 4-5. Respondent also does not dispute, and indeed concedes, that the question presented is of substantial importance and thus may warrant the Court's review in an appropriate case. See *id.* at 16.

Respondent instead offers a smattering of reasons why the Court should not grant review on that question here. But none of those reasons is even colorable. Indeed, respondent made many of the same arguments be-

fore the lower courts—and those courts evidently, and correctly, rejected them in proceeding to consider and answer the question presented. Particularly in the wake of the lower courts' decisions, there is no valid impediment to the Court's doing the same, and thereby resolving a mature and widely recognized circuit conflict on an important question of interpretation involving a federal rule. Because this case readily satisfies the criteria for further review, the petition for certiorari should be granted.

1. Respondent concedes that "there is a recognized split among the circuits * * * on the admissibility of juror testimony about statements made during deliberations that tend to show juror dishonesty during voir dire." Br. in Opp. 4-5. Respondent nevertheless contends that this case does not implicate the circuit conflict because the asserted juror dishonesty at issue here occurred in response to "general, nonspecific questions" at voir dire, rather than "specific, material questions." *Id.* at 5; see *id.* at 4-12. That contention is completely unfounded; there is no support for respondent's superficial and illogical distinction.

a. As an initial matter, none of the cases that give rise to the circuit conflict supports respondent's proffered distinction. Instead, those cases uniformly address the broader question whether "[s]tatements which tend to show deceit during voir dire are * * * barred by [Rule 606(b)]"—without regard to whether the "deceit" at issue occurred in response to general or specific questions. *Hard* v. *Burlington Northern R.R.*, 812 F.2d 482, 485 (9th Cir. 1987). The Ninth and District of Columbia Circuits have held that such statements are not excluded under Rule 606(b), and the Fifth Circuit has indicated in dicta that it would follow the same rule. See *ibid.*; *United States* v. *Henley*, 238 F.3d 1111, 1121 (9th Cir. 2001);

United States v. *Boney*, 68 F.3d 497, 503 (D.C. Cir. 1995); *Maldonado* v. *Missouri Pacific Railway Co.*, 798 F.2d 764, 770 (5th Cir. 1986), cert. denied, 480 U.S. 932 (1987). By contrast, the Tenth Circuit, now joined by the Eighth Circuit in the decision below, has held that such statements are inadmissible under Rule 606(b), and the Third Circuit has suggested in dicta it would reach the same result. See *United States* v. *Benally*, 546 F.3d 1230, 1236-1238 (10th Cir. 2008), cert. denied, 558 U.S. 1051 (2009), and 132 S. Ct. 401 (2011); Pet. App. 6a-10a; *Williams* v. *Price*, 343 F.3d 223, 235 n.5 (3d Cir. 2003) (Alito, then-J.).

To be sure, some of those cases involved answers to more "specific" questions, and others answers to more "general" ones. See Br. in Opp. 11 (conceding that *Maldonado*, "the case that the Ninth Circuit relied on in *Hard* and *Henley*," involved a "nonspecific question"). But it could just as easily be said that some of those cases were decided on Mondays and others on Fridays. Nothing in any of those cases could even arguably be read to support the distinction that respondent seeks to draw between "general" and "specific" questions at voir dire.

Notably, in the decisions below, neither the court of appeals nor the district court gave any credence to respondent's proffered distinction. To the contrary, while ultimately ruling in respondent's favor, both courts expressly recognized the existence of a circuit conflict on the admissibility of juror testimony about statements made during deliberations that tend to show juror dishonesty during voir dire—with the clear implication that petitioner would have prevailed under the conflicting view. See Pet. App. 8a, 37a-38a. The courts below simply disagreed with the legal conclusions of the conflicting decisions, siding with the Tenth Circuit (and dicta from

the Third Circuit) in holding that Rule 606(b) does not permit a party moving for a new trial to introduce such juror testimony. See *ibid.* This case therefore involves precisely the sort of conflict that warrants the Court's review. See Stephen M. Shapiro et al., *Supreme Court Practice* § 6.31(a), at 479-480 (10th ed. 2013) (explaining that "[c]ases are properly regarded as conflicting if it can be said with confidence that another circuit would decide the case differently" if presented with the same facts, and noting that "the best 'evidence' of a genuine conflict" is when "the lower courts have expressly acknowledged the conflict").

b. Nor can respondent point to anything in the text of Rule 606(b)—or in any other authority, for that matter—to support his proffered distinction. By its terms, Rule 606(b)(1) precludes the use of juror testimony "[d]uring an inquiry into the validity of a verdict." The question that has divided the courts of appeals is whether, in the context of a motion for new trial, statements that tend to show juror dishonesty during voir dire are statements made "[d]uring an inquiry into the validity of a verdict" (and, if so, whether they may nevertheless be admitted under the exception in Rule 606(b)(2) for evidence that "extraneous prejudicial information was improperly brought to the jury's attention"). That inquiry has nothing to do with the form that the questioning at voir dire took. And there is nothing in the text of Rule 606(b) to support the bizarre view that statements that tend to show juror dishonesty during voir dire are admissible to support a motion for new trial when the dishonesty involves responses to specific questions, but not when it involves responses to general ones.

2. Respondent contends, in passing, that the question presented is not properly before the Court in this case because petitioner "has never alleged until now that

Juror Whipple was dishonest" during voir dire. Br. in Opp. 10; see *id.* at 3 n.2, 14. To begin with, respondent entirely ignores the familiar rule that this Court will consider an issue as long as it has been *either* pressed *or* passed upon below. See, *e.g.*, *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). Respondent does not dispute that both the court of appeals and the district court squarely addressed the question presented. See Pet. App. 6a-10a, 31a-38a.

For purposes of this Court's decision whether to grant review, that should be the end of the matter. But notably, both lower courts specifically acknowledged that they were addressing the question presented in response to petitioner's argument that he was entitled to a new trial because Ms. Whipple had been dishonest during voir dire. See, *e.g.*, Pet. App. 8a (statement by the court of appeals that "[petitioner] argues Rule 606(b) should not exclude the affidavit because it is * * * being used * * * to show a juror was dishonest during voir dire"); *id.* at 35a (statement by the district court that "[petitioner] also seeks to use the affidavit of Mr. Titus to demonstrate the foreperson lied during voir dire"). Those courts were correct—and respondent is incorrect—in their characterization of the argument that petitioner was advancing; in his briefs below, petitioner highlighted in detail Ms. Whipple's deceitful responses to questions at voir dire. See Pet. C.A. Br. 32; Br. in Opp. App. 14.

While respondent contends before this Court that petitioner "has never alleged until now that Juror Whipple was dishonest" during voir dire, respondent clearly felt otherwise before the lower courts, because he expressly responded to that argument in his briefs below. Specifically, respondent argued in both courts, as he does here, that "[petitioner's] claim that Ms. Whipple failed to disclose the experience that she had with her daughter dur-

ing *voir dire*" should fail because "[t]here is no evidence that any juror deliberately concealed information or purposely gave incorrect responses" and "[n]one of the questions asked during *voir dire* put the juror on notice that a particular answer was required." Resp. C.A. Br. 26-27; Mem. in Opp. to Mot. for New Trial 10, D. Ct. Dkt. 180 (Nov. 12, 2010). Respondent also argued that, "[r]egardless of how [petitioner] hopes to use the juror statements at issue, Rule 606(b) bars their admission unless the statements fall within one of the enumerated exceptions to Rule 606(b), which they do not." Resp. C.A. Br. 27; see Mem. in Opp. to Mot. for New Trial 8-9. Of course, that is precisely the legal question that the lower courts squarely addressed—and on which petitioner is seeking this Court's review.

3. Respondent next contends that this Court should deny review because petitioner has "waived his right to an evidentiary hearing." Br. in Opp. 14; *id.* at 14-16. That is an odd contention. Petitioner moved for a new trial based on Mr. Titus's affidavit detailing Ms. Whipple's dishonesty during voir dire. See Pet. App. 40a-41a. The district court denied petitioner's motion because it held that Rule 606(b) "bars [the] admission" of Mr. Titus's affidavit. *Id.* at 38a. The district court correctly explained that, under *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1984), a party is entitled to a new trial based on juror dishonesty during voir dire only if "[the] party presents *admissible* evidence of juror bias." Pet. App. 29a. Because its holding that Mr. Titus's affidavit was inadmissible under Rule 606(b) indisputably left petitioner with no admissible evidence of Ms. Whipple's dishonesty during voir dire, the district court denied petitioner's motion for a new trial. *Id.* at 38a.

Petitioner's position is that Mr. Titus's affidavit, standing alone, is sufficient to entitle him to a new trial:

namely, because it demonstrates that "a juror failed to answer honestly a material question on *voir dire*" and that "a correct response would have provided a valid basis for a challenge for cause," as *McDonough* requires. See 464 U.S. at 556. As respondent concedes, see Br. in Opp. 16, a district court need not hold an evidentiary hearing in order to determine whether the *McDonough* standard has been satisfied.

The question before this Court, however, is not whether Mr. Titus's affidavit is sufficient to meet the *McDonough* standard; it is the threshold legal question whether Rule 606(b) permits the introduction of juror testimony of the type at issue here. Should the Court agree with petitioner on that question, respondent would be free to argue on remand that Mr. Titus's affidavit is insufficient to meet the *McDonough* standard. And if the district court on remand were to conclude that Mr. Titus's affidavit were substantial evidence of juror misconduct, but insufficient standing alone to meet the *McDonough* standard, it would plainly have the discretion to order an evidentiary hearing. See *McDonough*, 464 U.S. at 556. In any event, those are issues for another day; they have no bearing on this Court's ability to consider and resolve the question presented here.

4. Finally, respondent contends that, "[w]hile the question presented is one that may warrant the Court's review at some point, this case is not an optimal vehicle for consideration and resolution of the question." Br. in Opp. 16; see *id.* at 16-20. As a preliminary matter, respondent does not dispute that this case presents a vastly superior vehicle to *Benally*, the only recent case in which the Court has had the opportunity to consider the question presented. See Pet. 17-19. To the extent that respondent suggests that this case suffers from vehicle problems of its own, that suggestion lacks merit.

a. As he did below, respondent contends that Ms. Whipple answered the "general" questions at voir dire truthfully—or, at a minimum, that there is no evidence that the answers were intentionally dishonest. See, *e.g.*, Br. in Opp. 18; see *id.* at 11, 14-15. Again, however, the decisions below provide a complete answer to that contention: both courts operated on the premise that Ms. Whipple's statements made during deliberations, as recorded in Mr. Titus's affidavit, tended to show dishonesty. See, *e.g.*, Pet. App. 8a, 35a. And as noted above, they did so in the face of respondent's assertions that "[t]here is no evidence that any juror deliberately concealed information or purposely gave incorrect responses" and "[n]one of the questions asked during *voir dire* put the juror on notice that a particular answer was required." See pp. 5-6, *supra*.

In any event, it verges on the frivolous to suggest that a juror who was plainly unwilling to award *any* damages to petitioner based on her daughter's own involvement in a fatal automobile accident, see Pet. App. 40a, answered truthfully when she was asked whether there was any reason why she could not remain fair and impartial—much less when she was specifically asked whether she could vote to award damages for future medical expenses or pain and suffering if the evidence supported such an award. See Tr. 52-61, 77, D. Ct. Dkt. 197 (Sept. 20, 2010). There is no conceivable "meaning Juror Whipple [could have] attributed to" those questions that would render her answers truthful. Br. in Opp. 18. And to the extent respondent maintains that Mr. Titus's affidavit is insufficient to demonstrate that "a juror failed to answer honestly a material question on *voir dire*," respondent would be free to renew that argument on remand, in the event this Court holds that

Rule 606(b) permits the introduction of juror testimony of the type at issue here. See p. 7, *supra*.

b. Respondent next contends that, "[i]f [p]etitioner was interested in" whether the jurors "or a close family member or friend had been involved in an accident," his counsel "had an obligation to ask more probing questions during voir dire to ferret out this type of sensitive and specific information." Br. in Opp. 18. Once again, however, the lower courts addressed the question presented without in any way suggesting that petitioner's counsel somehow had an obligation to ask Ms. Whipple more specific questions. See, *e.g.*, Pet. App. 8a, 35a. And in any event, respondent's contention lacks merit, because the questioning that took place here, however "general" or "specific," "should have elicited instances of bias, if any at all existed, on the part of the [potential jurors]." *United States* v. *Peterson*, 483 F.2d 1222, 1226 (D.C. Cir. 1973). Here, there can be no real dispute that the questioning should have exposed Ms. Whipple's bias based on her daughter's own involvement in a fatal automobile accident—if, that is, she had answered those questions truthfully.

c. Most curious of all, respondent contends that "the proper time to discover" juror dishonesty is "when the jury is selected and peremptory challenges are available to the attorney." Br. in Opp. 19 (citation omitted). But petitioner's counsel would have had no basis to challenge Ms. Whipple (whether peremptorily or for cause), precisely because her answers during voir dire were dishonest; that dishonesty became apparent only when Mr. Titus came forward after trial. The whole point of *McDonough* is that it provides a mechanism for a party to obtain a new trial when evidence of juror dishonesty comes to light only after the fact. The court of appeals erred when it affirmed the denial of a new trial on the

ground that the evidence of dishonesty at issue here is excluded by Rule 606(b). In light of the mature and widely recognized circuit conflict on that issue, the court of appeals' decision warrants this Court's review.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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