No. 00-1372

In the Supreme Court of the United States

JERMAINE BONEY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to a new trial because a felon who had concealed his conviction during voir dire served on petitioner's jury, where petitioner failed to show that the felon-juror was actually biased.

2. Whether the district court abused its discretion by refusing to require testimony from other jurors at the evidentiary hearing on whether the felon-juror was actually biased.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is unreported. The first opinion of the court of appeals (Pet. App. 31a-73a) is reported at 977 F.2d 624, and the second opinion of the court of appeals (Pet. App. 18a-30a) is reported at 68 F.3d 497. The opinion of the district court on remand after the second appeal (Pet. App. 3a-17a) is reported at 97 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 2000. The petition for a writ of certiorari was filed on March 2, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of distribution of cocaine base, in violation of 21 U.S.C. 841(a)(1), and possession of cocaine base with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner moved for a new trial on the ground that the jury foreman, during voir dire, had concealed the fact that he had a felony conviction. The district court denied the motion, and petitioner was sentenced to 78 months of imprisonment, to be followed by four years of supervised release. On appeal, the court of appeals remanded for an evidentiary hearing to determine whether the juror's failure to disclose his felon status resulted in actual bias against petitioner. Pet. App. 31a-73a. After the evidentiary hearing, the district court denied petitioner's motion for a new trial. The court of appeals remanded for a second evidentiary hearing into the juror's possible biases. *Id.* at 18a-30a. After that second evidentiary hearing, the district court again denied petitioner's motion for a new trial, *id.* at 3a-17a, and the court of appeals summarily affirmed, *id.* at 1a-2a.

1. On September 12, 1989, an undercover police officer approached petitioner's co-defendant, Jeffrey Marks, and asked to buy $20 worth of crack cocaine. Marks asked co-defendant Donald Holloman to serve the officer, but Holloman replied that he might not have enough. Marks then asked petitioner, who was standing nearby, to break "a piece off the rock." Petitioner retrieved a plastic bag containing a large off-white rock from behind the rear tire of a pickup truck and gave it to Holloman, who then sold .199 grams of crack cocaine to the officer for $20. Pet. App. 32a.

The officer returned to his car and radioed members of the arrest team. As the arrest team approached, one of the arresting officers saw petitioner throw a plastic bag under the pickup truck. Another officer recovered the bag, which contained 12.72 grams of crack cocaine. Petitioner, Holloman and Marks were arrested. Pet. App. 32a.

2. Before trial, jury questionnaires were sent to prospective jurors in the District of Columbia. One of the prospective jurors, "Mr. J," was a felon. In 1985, he had been convicted of grand theft and taking a vehicle without consent in California, and in 1984 he had been arrested for larceny in Arizona. On the jury questionnaire, Mr. J responded "No" to question 6, which asked, "Have you ever been convicted, either by your guilty or nolo contendere plea or by a court or jury trial, of a state or federal crime for which punishment could have been more than one year in prison?" Mr. J responded "Yes" to question 7, which asked whether his civil rights had been restored. Question 7 stated that the question should be answered "only if [your] answer to question #6 is 'Yes.'" Pet. App. 20a; Gov't C.A. Br. 3.

During voir dire, the district court asked the prospective jurors: "[H]ave you or any members of your immediate family or close friends ever been a victim of, a witness to, or charged with a crime?" The court repeated the question before taking answers at the bench. Mr. J did not respond to the voir dire question. Gov't C.A. Br. 4. Mr. J. was ultimately chosen to serve on petitioner's jury, and was later selected as foreman. After hearing the evidence, the jury found petitioner guilty on both counts, found co-defendant Holloman guilty on one count, and acquitted co-defendant Marks with respect to both counts. Pet. App. 33a.

3. Before petitioner and Holloman were sentenced, Holloman's counsel received a tip that the foreman of the jury was a convicted felon. An investigation by the government confirmed that Mr. J had been convicted of grand theft and taking a vehicle without consent in California, and that he had been arrested for larceny in Arizona. Petitioner and Holloman moved for a new trial on the ground that the presence of a felon on the jury had violated their Sixth Amendment right to an impartial jury. Pet. App. 33a.

The district court denied the motion. *United States* v. *Holloman*, Cr. No. 89-381-SSH, 1990 WL 678953 (D.D.C. Nov. 5, 1990). Relying on *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1984), the district court concluded that the jury foreman's "failure to disclose his prior conviction and arrest [was] not evidence of bias per se." *Holloman*, 1990 WL 678953, at *2. The court also found "no evidence that [the foreman] harbored any actual bias against the defendants." *Ibid.* The court explained:

> In fact, the jury's verdicts suggest that it viewed the government's evidence critically and that it considered the defendants' case fairly. The jury rejected a reasonable inference based on the government's evidence that the three defendants acted together. The jury therefore found Marks not guilty on both counts and found defendant Holloman guilty on only one count. To reach a finding of actual bias, the Court would have to conclude that [the foreman's] prior conviction and arrest somehow biased him against defendants Holloman and Boney but not against defendant Marks. Moreover, the Court would have to find that the bias led the jury to convict defendant Holloman on only one count but [petitioner] on both

> counts. Common sense clearly belies such conclusions.

Ibid. The court accordingly found "no evidence of actual bias warranting either a hearing on the issue or a new trial." *Ibid.*

4. On appeal, the court of appeals affirmed in part and remanded in part for an evidentiary hearing. Pet. App. 31a-73a. The court held that "the Sixth Amendment guarantee of an impartial trial does not mandate a *per se* invalidation of every conviction reached by a jury that included a felon." *Id.* at 45a. The court explained that "the touchstone of the guarantee of an impartial jury is a protection against juror bias," but "felon status, alone, does not necessarily imply bias." *Ibid.* The court decided that the appropriate remedy was to hold an evidentiary hearing to determine whether the juror's failure to disclose his felon status resulted in actual bias to the petitioner. *Id.* at 46a-47a. The court explained that "[l]ying about a factor as important (and as easy to verify through public records) as felon status raises at least the inference that the juror had an undue desire to participate in a specific case, perhaps because of partiality." *Id.* at 47a. The court remanded "for the district court to hold an evidentiary hearing to determine whether the juror's failure to disclose his felon status resulted in actual bias to the [petitioner and Holloman]." *Ibid.*

Judge Randolph dissented in part. Pet. App. 52a-73a. He "reject[ed] the defendants' argument that the Sixth Amendment itself bars felons from serving on juries and requires reversal *per se* where one slips through." *Id.* at 56a. In his view, though, a felon's concealment of his status during voir dire was different than a juror's concealment of actual bias because felons are statutorily disqualified from serving on juries. *Id.* at 52a-55a. Judge

Randolph believed that a felon who deceived the court and counsel about his status "simply cannot be trusted to perform faithfully the solemn duty of sitting in judgment of others." *Id.* at 63a. He concluded that a felon's concealment of his status requires a new trial unless the felon's civil rights have been restored. *Id.* at 52a, 65a.

5. On remand, the district court located Mr. J, appointed counsel for him, and (on the government's motion) granted him statutory immunity. The court decided not to permit counsel to question the witnesses, but invited the parties to submit proposed questions. Pet. App. 20a; Gov't C.A. Br. 6-7. At the hearing, the jury administrator testified that a jury office employee had telephoned Mr. J before the trial because of the inconsistency in his answers to questions 6 and 7 on the jury questionnaire. Mr. J told the employee that he had made a mistake in answering question 7. Pet. App. 20a; Gov't C.A. Br. 7.

Mr. J also testified at the hearing. He confirmed that he had pleaded nolo contendere in 1985 to a charge of grand larceny in San Francisco, California; stated that he had served nine months of a one-year sentence, followed by what he recalled as a five-year probation term; and admitted that his civil rights had not been restored. Mr. J also testified that his answer to question 6 on the jury questionnaire, which inquired about prior felony convictions, was incorrect, but he explained that he "was thinking only as a juror in the District of Columbia and not in terms of San Francisco." He stated that he answered question 7 regarding the restoration of his civil rights because he believed that "whatever civil rights needed to be restored may have been restored" when his probation ended. Mr. J did not recall a telephone conversation with the jury office about his responses to the questionnaire. With respect to his failure to respond to

the district court's question during voir dire, Mr. J stated that he was "not quite sure of what was going through my head," but that "one of the things you condition yourself to do in order to gain employment or get back into mainstream society is deny that you ever served time or lie about it or to ignore the question." Pet. App. 20a-21a; Gov't C.A. Br. 7-9.

Mr. J testified that he had never seen petitioner or any of the defendants in this case before his jury service and that there was nothing about any of the defendants that caused him to want to serve or not serve as a juror. He further testified that "[t]here was nothing specific about the case in and of itself" that caused him to want to serve on the jury, but that "there was probably a desire in terms of my upbringing of being able to serve as a juror as all Americans would like to be able to vote or serve on a jury." Mr. J denied that he approached his participation as a juror with any sort of bias against the defendants. Pet. App. 22a; Gov't C.A. Br. 9. The district court refused to ask a series of questions proposed by petitioner's counsel concerning whether Mr. J had disclosed to other jurors his experience as a convicted felon and whether his vote to convict petitioner had been affected by his experience as a convicted felon. The court also refused to question other members of the jury. The court concluded that such questions were barred by Federal Rule of Evidence 606(b). Pet. App. 22a-24a.

The district court then denied petitioner's motion for a new trial. *United States* v. *Boney*, Cr. No. 89-381-SSH, 1994 WL 907463 (D.D.C. Aug. 18, 1994). The court concluded that Mr. J's failure to "disclose his felon status did not result in actual bias to the defendants." *Id.* at *1. The court found Mr. J "to be a very credible witness. Nothing in the record even hints that [Mr. J's] motivation for not disclosing his felony status was related to actual

bias towards the defendants. Nor was it related to any other aspect of the case." *Ibid.* The court also denied petitioner's motion for reconsideration of its decision not to ask several of petitioner's proposed questions. *Id.* at *2. The court determined that, although Federal Rule of Evidence 606(b) "permits inquiry into whether extraneous prejudicial information was improperly brought to the jury's attention," extraneous prejudicial information "does not include information about a juror's subjective beliefs or status as a felon." 1994 WL 907463, at *2.

6. The court of appeals remanded for a second evidentiary hearing. Pet. App. 18a-30a. The court concluded that the district court's inquiry was "insufficient and an abuse of discretion," *id.* at 26a, because the district court "asked Mr. J only two questions relating to bias," *ibid.*, and "took an overly narrow view of the kinds of bias to be examined at the hearing," *id.* at 27a. The court explained that "[t]he questions focused only on possible prejudice against the defendants specifically, and the [district] court refused to probe whether Mr. J might have been motivated by a more general desire to help the government, or whether either his efforts to conceal his felon status or his experiences as a criminal defendant might have influenced him." *Ibid.* "While the most important flaw in the evidentiary hearing was the failure to ask more probing questions," the court also believed that the district court "erred in not permitting [petitioner's] counsel to cross-examine the juror." *Id.* at 28a.

The court of appeals also ruled that Federal Rule of Evidence 606(b) did not preclude asking Mr. J whether he disclosed his felon status to his fellow jurors, but the court did not reach whether the district court should have questioned the other jurors on the panel regarding their contact with Mr. J. Pet. App. 28a-29a. Instead, the

court held that, "[b]ased on information that might be elicited from a more thorough inquiry of Mr. J, the [district court] will be better able to assess the value of questioning the other jurors and to determine whether such questions would fall within the 'extraneous prejudicial information' exception to Rule 606(b)." *Id.* at 29a. The court remanded the case "with instructions to conduct a second evidentiary hearing into Mr. J's possible biases." *Ibid.*

7. On remand, a second evidentiary hearing was held before a different district court judge.[1] On direct examination by the government, Mr. J testified that he did not disclose his felony conviction to any of his fellow jurors. He also testified that he did not disclose any attitudes about drug defendants and drug distribution or any information he acquired as a result of his prosecution and conviction. He further testified that he had no particular desire to help the government. Mr. J stated that his experience as a felon did not affect his vote, that he did not vote to convict petitioner so that people would not suspect he was a felon, and that there "was no other reason," besides the evidence and the testimony, that he voted to convict petitioner. Gov't C.A. Br. 14-15.

Before the hearing, petitioner's counsel submitted 65 proposed questions, with multiple subparts, inquiring into Mr. J's possible biases, his communications with other jurors, and his general credibility. The district court ruled at the hearing that petitioner's counsel could ask the proposed questions on cross-examination, except

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[1] The district court judge who had presided over the trial and first evidentiary hearing sua sponte recused himself following the second remand. *United States* v. *Boney*, 942 F. Supp. 47, 48 (D.D.C. 1996). The case was randomly reassigned to a different judge. Pet. App. 3a.

"questions on the reactions or comments of any other jurors during deliberations." Gov't C.A. Br. 14. The court later disallowed three other questions as irrelevant. *Id.* at 15 & n.10. Petitioner's counsel posed approximately 85 questions to Mr. J that covered his experiences facing criminal charges, being convicted, and serving time in jail; his opinions on drugs and drug dealers; his reasons for concealing his felony conviction on the jury questionnaire and during voir dire; his reasons for wanting to serve on a jury; and his conduct during deliberations. Pet. App. 9a; Gov't C.A. Br. 15-20, 26.

During cross-examination, Mr. J testified that he did not recall receiving a telephone call from the jury office about his answers on the jury questionnaire, but he recalled meeting with a clerk and discussing his answers when he arrived for jury duty. Gov't C.A. Br. 17-18. Mr. J later stated it was "fuzzy" to him whether the conversation with the clerk was by telephone or in person. *Id.* at 20.

The district court again denied petitioner's motion for a new trial. Pet. App. 3a-17a. The court concluded:

> Ultimately, the Court is persuaded that the Juror's testimony included no direct evidence of actual bias. Nor did the overall evidence regarding the Juror's prior criminal conviction, the Juror's failure to disclose this felony conviction to the trial court, and the Juror's history of concealing this conviction, constitute sufficient grounds for the court to *infer* the existence of actual bias and unfair prejudice in the jury deliberation process.

Id. at 13a. The court explained that petitioner's detailed cross-examination had "failed to demonstrate that any particular element of the Juror's criminal experience—arrest, trial, incarceration or probation—biased the Juror

against [petitioner]." *Ibid.* The court also noted that "[t]he only consistent motive offered by the Juror for not disqualifying himself as a potential juror was that he came of age during the Civil Rights movement and desired to exercise his right to serve on a jury." *Ibid.* Despite "minor inconsistencies" between the juror's testimony at the first hearing in 1994 and his testimony at the second hearing in 1997, the court found that "the Juror's efforts to cooperate in these proceedings and his claims of impartiality in regards to defendant's trial appear to be genuine." *Id.* at 14a. The court's concern about Mr. J's history of untruthfulness was "mitigated by the Court's observation of the witness and the Court's independent assessment of his demeanor and credibility at the second evidentiary hearing." *Ibid.*

In addition, the court "[did] not find that the circumstances surrounding this case [were] 'exceptional' enough to imply bias as a matter of law." Pet. App. 15a (quoting *McDonough*, 464 U.S. at 556 (Blackmun, J., with Stevens & O'Connor, JJ., concurring)). Finally, the court concluded that there was no need to poll the other members of the jury panel in light of its determinations "that the Juror's testimony during the remand hearing was credible and that the Juror had no bias, actual or otherwise, towards [petitioner]." *Id.* at 16a.

8. The court of appeals summarily affirmed in an unpublished judgment order. Pet. App. 1a-2a. The court "conclude[d], specifically, that on remand the district court scrupulously followed" the court's instructions in its prior decision. *Id.* at 1a. The court affirmed the judgment "substantially for the reasons stated in the district court's memorandum opinion." *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 9-23) that he is entitled to a new trial, or yet another evidentiary hearing, in view of the fact that Mr. J concealed his status as a felon and served on the jury that convicted him. The court of appeals correctly rejected that contention, and further review of that court's unpublished decision is not warranted.

1. As the court of appeals explained, "[t]he Sixth Amendment right to an impartial jury * * * does not require an *absolute bar* on felon-jurors." Pet. App. 45a. See also *Coughlin* v. *Tailhook Ass'n*, 112 F.3d 1052, 1058-1059 (9th Cir. 1997); *United States* v. *Humphreys*, 982 F.2d 254, 261 (8th Cir. 1992), cert. denied, 510 U.S. 814 (1993). Instead, felons are prohibited from serving as jurors in federal cases by an Act of Congress, not by a constitutional mandate.[2] As this Court has explained, the Sixth Amendment "right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961). The Sixth Amendment does not itself prohibit otherwise impartial, indifferent individuals from serving as jurors merely because they have a felony conviction.

Nonetheless, petitioner argues (Pet. 9-23) that he is entitled to a new trial because Mr. J deliberately concealed his felon status during voir dire. In *McDonough*

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[2] Under 28 U.S.C. 1865(b)(5), any person who "has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and [whose] civil rights have not been restored" is disqualified from serving on a jury. The statute, however, "does not implement a constitutional bar to jury service, but establishes a statutory impediment." *United States* v. *Uribe*, 890 F.2d 554, 561 (1st Cir. 1989).

Power Equipment, Inc. v. *Greenwood*, 464 U.S. 548, 556 (1984), this Court explained that to obtain a new trial in a civil case based on allegations of juror deception during voir dire, "a party must first demonstrate that a juror failed to answer honestly a material question * * * and then further show that a correct response would have provided a valid basis for a challenge for cause." The defendants, the Court also held, were "not entitled to a new trial unless the juror's failure to disclose denied [the defendants] their right to an impartial jury." *Id.* at 549.[3] See also *Swain* v. *Alabama*, 380 U.S. 202, 220 (1965) ("[C]hallenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality."). This Court "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Smith* v. *Phillips*, 455 U.S. 209, 215 (1982).

Petitioner does not challenge the finding that Mr. J was not actually biased. Instead, he argues that bias should be implied as a matter of law whenever a felon deliberately conceals his status during voir dire and then serves on a jury. As Members of this Court have observed, however, inferences of bias based on such concealment are generally permissive rather than mandatory, and are in any event reserved for "extreme" or "exceptional" cases. See *McDonough Power Equip., Inc.*, 464 U.S. at 556-557 (Blackmun, J., concurring) ("[I]t remains within a trial court's option, in determining

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[3] As petitioner notes (Pet. 16), a juror's status as a felon would provide a valid basis for a challenge for cause. Such a challenge, however, would be based on the juror's statutory disqualification under 28 U.S.C. 1865(b)(5) rather than his partiality. See *United States* v. *Tucker*, 137 F.3d 1016, 1028-1029 (1998), on appeal following remand, 243 F.3d 499 (8th Cir. 2001), petition for cert. pending, No. 00-1726.

whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias or, in exceptional circumstances, that the facts are such that bias is to be inferred."); *Smith* v. *Phillips*, 455 U.S. at 222 (O'Connor, J., concurring) ("While each case must turn on its own facts, there are some extreme situations that would justify a finding of implied bias.").[4] Petitioner concedes (Pet. 18-19) that felon status by itself does not automatically indicate a bias in favor of or against one side or the other in a criminal prosecution. See Pet. App. 45a ("A *per se* rule would be appropriate, therefore, only if one could reasonably conclude that felons are always biased against one party or another. But felon status, alone, does not necessarily imply bias."); *id.* at 63a (Randolph, J., dissenting in part). For that reason, the court of appeals correctly held that the appropriate remedy when a felon serves on a jury is not automatic reversal of the conviction, but rather an evidentiary hearing to determine whether the juror was actually biased. That holding is consistent with the decisions of the other courts of appeals that have considered the issue. See *Coughlin* v. *Tailhook Ass'n*, 112 F.3d at 1058-1059; *United States* v. *Humphreys*, 982 F.2d at 260-261; *United States* v. *Uribe*, 890 F.2d 554, 562 (1st Cir. 1989); *United States* v. *Currie*, 609 F.2d 1193, 1194 (6th Cir. 1979), cert. denied, 445 U.S. 928 (1980); *Ford* v. *United States*, 201 F.2d 300, 301 (5th Cir. 1953); cf. *Raub* v. *Carpenter*, 187 U.S. 159 (1902).

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[4] Justice O'Connor noted that examples of such extreme situations "might include a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction." 455 U.S. at 222.

Contrary to petitioner's contention (Pet. 9, 11), the court of appeals' decision does not conflict with *Dyer* v. *Calderon*, 151 F.3d 970 (9th Cir.) (en banc), cert. denied, 525 U.S. 1033 (1998). That case did not involve a felon who concealed his convictions in order to serve on a jury. Rather, the juror in *Calderon*, which was a state capital prosecution for murder, "lie[d] materially and repeatedly in response to legitimate inquiries about her background," *id.* at 983, so as to conceal a personal history that would strongly suggest a pro-prosecution bias. The juror in *Calderon* concealed the fact that her brother had been a murder victim, and then lied about her knowledge of the circumstances of her brother's murder. *Id.* at 974, 979-980. She concealed the fact that she had been the victim of several crimes and the fact that several relatives, including her estranged husband, had been arrested for crimes. *Id.* at 980-981. Moreover, the juror's estranged husband had met the defendant in jail, and he told the defendant that the juror had expressed strong views about her brother's murder. *Id.* at 973-974, 976-977. On habeas review, the court of appeals found that "the magnitude of [the juror's] lies and her remarkable display of insouciance—her expressed feeling that only she would decide what matters—fatally undermine our confidence in her ability to fairly decide [the defendant's] fate." *Id.* at 984. "The facts here," the court concluded, "add up to that *rare case* where we must presume juror bias." *Ibid.* (emphasis added). Thus, far from establishing a broad holding that juror bias *must be* presumed from any and every juror lie at voir dire, *Dyer* stands only for the proposition that bias may be presumed in certain, "rare" cases where the facts—in *Dyer* itself, the repeated nature of the lies, their magnitude, and the fact that they concealed information that itself strongly suggested pro-prosecution bias—support that presump-

tion. The facts in this case, in contrast, do not support such a presumption, as the district court expressly found. Pet. App. 15a (refusing to "find that the circumstances surrounding this case are 'exceptional' enough to imply bias as a matter of law"). Indeed, after extensive evidentiary hearings, two different district court judges and the court of appeals all concluded that Mr. J was not, despite his concealment of his convictions, biased.[5]

Nor does the court of appeals' decision conflict with *United States* v. *Colombo*, 869 F.2d 149 (2d Cir. 1989). That case also did not involve a felon who concealed his conviction to serve on a jury. Rather, *Colombo* involved a juror who allegedly told another juror that, during voir dire, she failed to disclose that her brother was a government attorney in order to sit on the jury and that she lived near a restaurant where the defendants met and knew it was a hangout for gangsters. *Id.* at 150-151 & n.1. The Second Circuit concluded that the defendant would be entitled to a new trial if the allegations were true because they "reflected an impermissible partiality on the juror's part" and "a personal interest in this

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[5] As noted above, the Ninth Circuit in *Coughlin* v. *Tailhook Ass'n*, 112 F.3d at 1059, agreed with the court of appeals' decision in this case "that the participation of a felon-juror is not an automatic basis for a new trial" and "that the participation of a felon-juror can be the basis for a new trial if the juror's participation in the case results in 'actual bias' to one or more of the parties." Petitioner argues (Pet. 11 n.9) that it is unlikely that *Coughlin* survives the en banc decision in *Dyer*. See also *Green* v. *White*, 232 F.3d 671, 676-678 (9th Cir. 2000). But *Dyer* does not expressly overrule *Coughlin*, and the *Dyer* opinion itself recognizes that *Dyer* was one of those "rare" cases in which bias may be presumed in view of the seriousness, the subject matter, and the repetition of the lies. In any event, any tension between *Coughlin* and *Dyer* would be a matter for the Ninth Circuit, and not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

particular case that was so powerful as to cause the juror to commit a serious crime." *Id.* at 151. The Second Circuit remanded the case for an evidentiary hearing to determine whether the allegations were true. *Id.* at 152. In a later case, the Second Circuit clarified that *Colombo* did not establish a *per se* rule that a juror's intentionally false response on voir dire automatically requires a new trial. *United States* v. *Langford*, 990 F.2d 65, 69 (2d Cir. 1993) (*Colombo* "did not suggest a *per se* rule based simply on whether a prospective juror had lied, without respect to whether the dishonesty had a bearing on her impartiality."); see also *United States* v. *Torres*, 128 F.3d 38, 45-46 (2d Cir. 1997), cert. denied, 523 U.S. 1065 (1998).[6]

In any event, the question presented in this case is not of sufficient recurring importance to merit this Court's review. Only a handful of cases have considered whether

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[6] Contrary to petitioner's suggestion (Pet. 14), this Court's decision in *Williams* v. *Taylor*, 529 U.S. 420 (2000), provides no support for his claim. The Court concluded in *Williams* that the defendant, who had been convicted of two capital murders and other crimes, was entitled to an evidentiary hearing on a claim of juror bias in a habeas proceeding under 28 U.S.C. 2254. 529 U.S. at 440-444. In that case, it was discovered after trial that one of the jurors previously had been married to the prosecution's lead witness, a deputy sheriff, and that the juror had been represented by one of the prosecutors in her divorce proceedings from the witness. During voir dire, the juror had failed to respond to questions that asked whether any potential juror was related to any of the witnesses and whether any potential juror had been represented by any of the attorneys. *Id.* at 440-441. In remanding the case, the Court noted that its analysis "should suffice to establish cause for any procedural default," but that "[q]uestions regarding the standard for determining the prejudice that petitioner must establish to obtain relief * * * can be addressed by the Court of Appeals or the District Court in the course of further proceedings." *Id.* at 444.

a defendant is entitled to a new trial when a convicted felon served on the jury, and the courts in those cases have uniformly held that the defendant must show "actual bias" on the part of the felon in order to obtain a new trial. Indeed, petitioner does not cite a single decision of any court of appeals holding that bias must be implied as a matter of law whenever a felon deliberately conceals his status during voir dire and then serves on a jury. Further review is therefore unwarranted.

2. Petitioner also contends (Pet. 23-25) that the district court abused its discretion by refusing to require other jurors to testify at the evidentiary hearing. The district court, however, did not abuse its discretion in concluding that such a further intrusion into jury deliberations was unnecessary in light of its independent determination that "the Juror's testimony during the remand hearing was credible and that the Juror had no bias, actual or otherwise, towards [petitioner]." Pet. App. 16a. Petitioner made no proffer suggesting that testimony from other jurors would undermine that conclusion, which had been reached independently by two different district court judges.

Contrary to petitioner's claim (Pet. 25), the court of appeals' summary affirmance of the district court's decision is not at odds with the decisions of other courts of appeals. In *United States* v. *Tucker*, 137 F.3d 1016 (8th Cir. 1998), for example, the court remanded the case for an evidentiary hearing where it was alleged that one of the jurors had concealed her plan to marry a man who, as a state prisoner, had been denied clemency by the defendant when he was the governor of Arkansas. *Id.* at 1026-1029. The court also concluded that an evidentiary hearing was warranted with respect to allegations, contained in an affidavit signed by a state senator, that the same juror, after her mid-trial marriage to the man who

had been denied clemency, had engaged in improper discussions with him. The court concluded that "a defendant who makes an allegation of serious misconduct by a juror, supported by evidentiary materials with significant indicia of reliability, is entitled to a more thorough investigation of his complaint than merely asking the juror whether he committed the misconduct." *Id.* at 1032. Here, the trial court did more than ask the juror whether he committed the misconduct. It held extensive hearings on the juror's inaccurate responses at voir dire, his reasons for those responses, what he revealed to other jurors, and any potential bias he may have had. Such an inquiry is amply sufficient to satisfy the requirements of *Tucker*. See also *United States* v. *Tucker*, 243 F.3d 499 (8th Cir. 2001) (affirming district court's denial of new trial after remand), petition for cert. pending, No. 00-1726.

United States v. *Brantley*, 733 F.2d 1429 (11th Cir. 1984), cert. denied, 470 U.S. 1006 (1985), and *United States* v. *Forrest*, 620 F.2d 446 (5th Cir. 1980), are likewise distinguishable. In *Brantley*, the defense alleged that one juror told the others, during deliberations, that the defendant had been involved in drug smuggling before; the juror himself, however, denied having done so. The court of appeals concluded that the juror's denial was, by itself, "an insufficient basis upon which to reject a claim of misconduct." 733 F.2d at 1440. Jurors, the court explained, would have a "natural inclination * * * to deny making" such improper "remarks." *Ibid.* Similarly, in *Forrest*, the court of appeals concluded that a dismissed juror's testimony that she did not tell other jurors about her niece's attempt to influence her to acquit the defendants was an insufficient basis to conclude that the other jurors were unaware of the attempted jury tampering. 620 F.2d at 457. Unlike

those cases, this case does not involve specific allegations that one juror committed particular misconduct or introduced extraneous evidence during deliberations. Instead, the only claim is that Mr. J concealed his felony conviction during voir dire so he could serve on the jury. The several hearings held by the district court fully explored that deception, Mr. J's motive for it, and any possibility of bias on the part of Mr. J. Because those hearings fully aired the issues, no further proceedings were required, and no further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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