No. 01-1060

In the Supreme Court of the United States

GEORGE MEREDITH BISHOP, III, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

EILEEN J. O'CONNOR
Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
GREGORY VICTOR DAVIS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner was entitled to a new trial where a juror was found after trial to have been statutorily disqualified from serving on the jury, but the district court found that the juror was not biased against petitioner.

2. Whether testimony offered by petitioner about a statement made by his former bookkeeper should have been admitted at trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 264 F.3d 535.[1]

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2001. A petition for rehearing was denied on October 15, 2001 (Pet. App. 53). The petition for a writ of certiorari was filed on January 14, 2002 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The cover of the petition incorrectly indicates that the court below was the United States Court of Appeals for the Eighth Circuit. In fact, the court below was the United States Court of Appeals for the Fifth Circuit. See Pet. App. 1.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on two counts of willfully attempting to evade federal income taxes, in violation of 26 U.S.C. 7201, and one count of willfully making a false federal income tax return signed under penalties of perjury, in violation of 26 U.S.C. 7206(1). Pet. App. 1-2. Petitioner was sentenced to 18 months' imprisonment, followed by a two-year term of supervised release. Gov't C.A. Br. 2-3. The court of appeals affirmed. Pet. App. 1-32.

1. Petitioner was the sole proprietor of an eponymous law firm in Houston, Texas. Pet. App. 2. He attempted to evade more than $340,000 in federal income tax liability for 1991 and 1994 by diverting business income to personal bank accounts, causing false entries to be made in his business books and records, and concealing information from his accountants and IRS auditors. Petitioner also willfully filed a 1991 individual income tax return (Form 1040) that under-reported his gross income by more than $500,000. Gov't C.A. Br. 3; see Pet. App. 2-5, 19-23. In March 1999, a grand jury returned a three-count indictment against petitioner. *Id.* at 5.

2. During his trial, petitioner sought to introduce testimony that, in October 1996, his then-bookkeeper (who died in 1998) had said that it was her fault that a $400,000 fee petitioner received in 1994 had not been reported to petitioner's tax-return preparer. The bookkeeper also allegedly said that she did not know why she failed to record the fee. Pet. App. 15. Petitioner argued that this testimony went to the bookkeeper's state of mind, intent, and knowledge when filing petitioner's tax return for 1994 and therefore was ad-

missible under Rule 803 of the Federal Rules of Evidence. The government objected that the testimony was inadmissible hearsay not covered by any exception to Rule 802 of the Federal Rules of Evidence, and the district court sustained the government's objection. Pet. App. 15.

3. The jury found petitioner guilty on all three counts of the indictment. Pet. App. 1. After his convictions, petitioner filed a motion for a new trial. Petitioner asserted as one ground for the motion that a juror in his case, Jodi Tharp, was statutorily disqualified from jury service. *Id.* at 6, 33. In 1997, Tharp had pleaded guilty in Texas state court to a charge of third-degree felony embezzlement. The state court deferred an adjudication of guilt and placed Tharp on ten years' probation. *Id.* at 69. The deferred adjudication disqualified Tharp from serving on petitioner's jury. See 28 U.S.C. 1865(b)(5). Tharp, however, failed to disclose her criminal history on her juror questionnaire form and during *voir dire*, and she was seated on the jury. See Pet. App. 5-6.

In May 2000, the district court held a two-day evidentiary hearing on petitioner's motion for a new trial. Pet. App. 42. Tharp testified that she had been advised by her lawyer in 1997 that, because she received deferred adjudication, she did not have a conviction on her record and did not have to disclose a conviction for purposes such as employment applications. *Id.* at 45. Tharp said that, based on her lawyer's advice, she had believed that her responses to questions during petitioner's trial were correct. *Ibid.*

The district court found that Tharp's inaccurate responses were not motivated by any bias against defendant, Pet. App. 46-47, and that "[t]here [we]re no facts in this case even remotely approaching circum-

stances from which any bias on the part of Ms. Tharp could be presumed or implied, or that would permit a finding that Ms. Tharp, when seated as a juror, would feel compelled to return a verdict of 'guilty,'" *id.* at 48. The court further found that Tharp's criminal history was not injected into the jury's deliberations and that it was "highly improbable" that Tharp herself was "in any manner a leader or disproportionately influential in the deliberations" of the jury. *Id.* at 49. The district court accordingly denied petitioner's motion for a new trial. *Id.* at 51.

4. The court of appeals affirmed. Pet. App. 1-32. Among his many claims on appeal, petitioner asserted that the district court violated Rule 803(3) of the Federal Rules of Evidence when it excluded petitioner's proffered testimony about statements purportedly made by the deceased bookkeeper. The court of appeals concluded (Pet. App. 14-15) that petitioner offered the testimony to prove the truth of its contents (*i.e.*, that omission of the $400,000 fee from petitioner's books was not petitioner's fault), not to show the bookkeeper's state of mind, and that the testimony therefore was inadmissible hearsay.

The court of appeals also rejected (Pet. App. 26-32) petitioner's claim that the district court erred in denying his motion for a new trial. The court of appeals held that, in order to obtain a new trial on the ground that Tharp improperly served as a juror, petitioner had to demonstrate that Tharp was either biased or fundamentally incompetent to serve. *Id.* at 26. The court of appeals further held (*id.* at 30-32) that there was no direct evidence that Tharp was biased in petitioner's case, and that this case does not present any "extreme circumstances" (*id.* at 27)—such as a special desire to serve on the jury or a relationship with a participant in

the trial—that would warrant an inference or presumption of bias. The court of appeals also noted that (as the district court had found) Tharp did not reveal her criminal history to the other jurors and "she probably was not particularly influential in deliberations." *Id.* at 31. The court of appeals therefore held that the district court did not abuse its discretion by denying petitioner's motion for a new trial. *Id.* at 32.

ARGUMENT

1. Petitioner principally contends (Pet. 5) that, under this Court's decision in *McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548 (1984), he was entitled to a new trial because juror Tharp failed to answer a material *voir dire* question honestly, and a correct response to the question would have been a valid basis for a challenge for cause. Petitioner suggests (Pet. 5-6) that the court of appeals erred by requiring petitioner to provide evidence of bias or of circumstances warranting an inference of bias.

In *McDonough*, a products-liability case, a prospective juror failed during *voir dire* questioning to identify himself as having suffered, or as having an immediate family member who had suffered, injuries that resulted in disability or prolonged pain and suffering. 464 U.S. at 549-550. The juror's son had in fact broken his leg when a tire exploded, but the juror explained after the trial that he did not consider his son's injury to be disabling or to have caused prolonged pain and suffering. *Id.* at 552 n.3. The court of appeals ordered a new trial, reasoning that the juror's failure to respond during *voir dire* concealed evidence of probable bias. *Id.* at 552.

This Court reversed and remanded, holding that the plaintiffs "[we]re not entitled to a new trial unless the

juror's failure to disclose denied [the plaintiffs] their right to an impartial jury." 464 U.S. at 549. The Court noted that "[t]he harmless-error rules adopted by this Court and Congress embody the principle that courts should * * * ignore errors that do not affect the essential fairness of the trial." *Id.* at 553. With that principle as "background," *id.* at 554, the Court held that, in order to obtain a new trial under the circumstances presented, "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," *id.* at 556. The Court noted that potential jurors' motives for concealing information during *voir dire* may vary, but it concluded that "only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *Ibid.*; see *ibid.* (Blackmun, J., concurring) (agreeing with majority "that the proper inquiry in this case is whether the plaintiffs had the benefit of an impartial trier of fact"); *id.* at 557-558 (Brennan, J., concurring in the judgment) ("[T]o be awarded a new trial, a litigant should be required to demonstrate that the juror incorrectly responded to a material question on *voir dire*, and that * * * the juror was biased against the moving litigant.").

McDonough does not support petitioner's claim of error in this case. Even assuming that Tharp did not answer *voir dire* questions "honestly" within the meaning of that case, and even accepting that 28 U.S.C. 1865(b)(5) provided a statutory basis for excluding Tharp from the jury, petitioner is unable to show that Tharp's answers denied him an impartial jury. As the court of appeals noted (Pet. App. 31), the record does not suggest that Tharp in fact harbored any bias, and it

indicates no circumstances that might support an inference or presumption of bias.[2]

Petitioner's claim of a circuit split between the Fifth Circuit and the Ninth Circuit on this issue (Pet. 6) is unfounded. In *Dyer* v. *Calderon*, 151 F.3d 970 (9th Cir.) (en banc), cert. denied, 525 U.S. 1033 (1998), the juror "lied repeatedly" about her brother's death, which occurred under circumstances similar to those in the case she heard as a juror; about her own history as a crime victim; and about the arrest records of her family members. 151 F.3d at 981. The Ninth Circuit found it appropriate under the circumstances to infer that the juror lied in order to be seated on the jury, and that the "extraordinary" circumstances warranted a presumption of bias. *Id.* at 981, 982, 984.

Similarly, in *Green* v. *White*, 232 F.3d 671 (9th Cir. 2000), a juror failed to reveal his felony convictions, including an assault conviction for which he had served six months' imprisonment. *Id.* at 672-673. During the

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[2] The *McDonough* Court did not have before it a situation, such as the one presented here, where the juror's disputed answers during *voir dire* relate to a statutory ground for disqualification that is independent of actual bias. See 464 U.S. at 552 (quoting court of appeals' conclusion that juror's failure to answer question about severe injury "would have been significant and cogent evidence of the juror's probable bias"). Petitioner's argument (Pet. 7) that this case "fits squarely within the two-prong test set out by this Court in *McDonough*" accordingly is incorrect. Moreover, nothing in the legislative history of the Jury Selection and Service Act of 1968, Pub. L. No. 90-274, 82 Stat. 53—on which petitioner relies (Pet. 6)—addresses the circumstances under which a conviction should be overturned based on an allegation of misconduct during *voir dire*. The legislative history offered by petitioner nevertheless does state—consistent with *McDonough*, 464 U.S. at 555—that "perfection" is not required in juror-selection. Pet. App. 66.

trial, the same juror reportedly commented that he always knew the defendant was guilty and that he wanted to shoot the defendant. *Id.* at 673-674. Citing *Dyer*, the Ninth Circuit found that the juror lied to get on the jury, gave false answers to explain his initial lies, and engaged in behavior bringing his impartiality into serious question. *Id.* at 677-678. The Ninth Circuit concluded that those facts together required a presumption of prejudice and a new trial. *Id.* at 678.

Far from disagreeing with *Dyer* and *Green*, the Fifth Circuit in this case expressly relied on both cases as support for its conclusion that bias may be presumed from inaccurate *voir dire* responses "in extreme circumstances." Pet. App. 27; see *id.* at 27-28. But the court of appeals held (*id.* at 30-31) that, in this case, no extraordinary circumstances existed to justify a presumption of bias. That fact-bound conclusion does not warrant review by this Court.

2. Petitioner also challenges (Pet. 7-9) the district court's refusal—which the court of appeals affirmed, Pet. App. 14-15—to admit petitioner's proffered testimony about his deceased bookkeeper's claim of responsibility for omitting the $400,000 fee from petitioner's tax records. That also is a fact-bound challenge that does not warrant this Court's review.

Petitioner first argues (Pet. 7) that the disputed testimony was admissible under Rule 803(3) of the Federal Rules of Evidence, which provides an exception to the hearsay rule for "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed." Fed. R. Evid. 803(3). The court of appeals found that the district court

correctly applied Rule 803(3) because the bookkeeper's alleged statements were being offered "to prove the truth of their content, that is, to show it was not [petitioner's] fault that all or a portion of a $400,000 fee was not reported to the IRS." Pet. App. 15. That factual determination makes Rule 803(3) inapplicable by its terms to the testimony, because the bookkeeper's statements were "statement[s] of memory or belief to prove the fact remembered or believed." Fed. R. Evid. 803(3).

Petitioner's allegation of a circuit split on this point (Pet. 7-8) lacks merit. In *Phoenix Mutual Life Insurance Co.* v. *Adams*, 30 F.3d 554, 566 (4th Cir. 1994), and *United States* v. *Collins*, 78 F.3d 1021, 1036 (6th Cir.), cert. denied, 519 U.S. 872 (1996), out-of-court statements were offered to show the declarant's state of mind, not for the truth of the matter asserted. Rule 803(3) was not considered in *United States* v. *Baird*, 29 F.3d 647 (D.C. Cir. 1994).

Petitioner next asserts (Pet. 8-9) that the bookkeeper's alleged statement was admissible under Rule 703 as information upon which petitioner's tax attorney would have relied, and under Rule 804(b)(3) as a statement against the bookkeeper's interest. Petitioner failed to present those arguments to the court of appeals and the court of appeals did not consider them.[3] See Pet. App. 14-15. Petitioner's new evidentiary arguments, which are fact-bound in any event, therefore should not be considered by this Court. See *Glover* v. *United States*, 531 U.S. 198, 205 (2001).

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[3] Thus, there could not be any merit to petitioner's claim (Pet. 8-9) that the Fifth Circuit's decision in this case conflicts with the decisions of other courts of appeals on the application of Rule 804(3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

EILEEN J. O'CONNOR
Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
GREGORY VICTOR DAVIS
Attorneys

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