NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2021

RODNEY RUSSELL

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

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

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Supreme Court Rule 39, the petitioner, Rodney Russell, moves to file the attached Petition For Writ of Certiorari to the United States Court of Appeals for the First Circuit without payment of costs and to proceed *in forma pauperis*, on the grounds that petitioner was represented in the United States Court of Appeals for the First Circuit by counsel appointed to the Criminal Justice Act, 18 U.S.C. § 3006a.

Respectfully Submitted,
RODNEY RUSSELL
Petitioner
By his attorney of record

_____

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DATE: April 2, 2021

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIRST CIRCUIT

WILLIAM S. MADDOX, Esquire
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P.O. Box 1202
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April 2, 2021

QUESTIONS PRESENTED

This case came before the First Circuit Court of Appeals on two occasions. In the first proceeding, the First Circuit remanded for further proceedings on defendants' motion for a new trial made after information became known that a juror had lied during the jury selection process. United States v. French, 904 F.3d 111, 113-114, 125 (1st Cir. 2018) ("*French* I ").

The second time this case came before the First Circuit Court of Appeals, the District Court affirmed the denial of a new trial, reasoning that the district court "did not abuse [its] discretion" because defendants Russell and French had failed to carry their burden of showing that the juror in question possessed a biased motive for lying. United States v. French, 977 F.3d 114, 125-127 (1st Cir. 2020) ("*French* II").

The questions presented are:

I. Whether it violated due process for the district court to appoint the Federal Defender not only to represent a juror for whom a legitimate claim of bias had been assessed, but also to inform that juror of the legitimacy of that claim of bias ex parte, as well as for the district court, pre-hearing, to abnegate responsibility to ask that same juror questions during an evidentiary hearing when the district court during

that hearing identified deficits in information from that juror.

II. Whether a claim of structural error of the deprivation of the right to trial by an impartial jury is appropriately reviewed on appeal using an "abuse of discretion" standard.

III. Whether a criminal defendant seeking to win a new trial must prove that a prospective juror possessed a biased motive on a claim of juror dishonesty in the jury selection process.

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PETITION FOR WRIT OF CERTIORARI
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RODNEY RUSSELL respectfully petitions this Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the First Circuit dated October 7, 2020, affirming denial of a motion for new trial, and the First Circuit of Appeals Order denying rehearing en banc dated November 20, 2020.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit in

United States v. Malcolm French, 977 F.3d 114 (1st Cir. Nov. 20, 2020) appears at Appendix A to this petition (hereinafter cited "A-1"). The First Circuit's Order denying rehearing en banc appears at Appendix B (hereinafter cited "A-9"). The United States District Court for the District of Maine memorandum opinion appears at Appendix C to this petition (hereinafter cited "A-11"). The opinion of the First Circuit Court of Appeals in *French* I, *United States v. Malcolm French*, 904 F.3d 111, appears at Appendix D (hereinafter cited "A-111").

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment of the Court of Appeals was entered on October 7, 2020. The petition for rehearing was denied on November 20, 2020. This Petition is filed within one hundred fifty (150) days after entry of judgment on the petition for rehearing en banc. *See* Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 18 U.S.C. § 3231 and the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law[.]

STATEMENT

1. Introduction

On November 20, 2020, the First Circuit denied a petition for rehearing with suggestion for rehearing en banc filed by Malcolm French and Rodney Russell. This petition asked the First Circuit to reconsider it's judgment and opinion affirming the district court's denial of French and Russell's motion for a new trial based on juror misconduct. United States v. French et al., 977 F.3d 114 (1st Cir. 2020) (hereinafter "*French II*"). At the nisi prius level "Malcolm French and Rodney Russell [unsuccessfully had] sought a new trial after a jury found them guilty of charges arising out of a large-scale marijuana-farming operation." Id. at 117 *referencing* United States v. French et al., 904 F3d 111 (1st Cir. 2018) (hereinafter "*French I*"). French and Russell had "argued that one juror had lied in filling out the written questionnaire given to prospective jurors prior to trial." *French II*, at 117. In *French I*, the First Circuit vacated the district court order and remanded the matter "for further proceedings to investigate the alleged juror misconduct." Id. The First Circuit stated "we agree that the district court's investigation concerning the answers given by one of the juror's was inadequate." *French I* at 114. Following an evidentiary hearing on remand, "the district court again denied the motion for new trial." *French II*, at 117. "French and Russell

filed a second appeal with the First Circuit "claiming that the district court improperly exercised its discretion in fashioning a procedure to investigate the defendant's claims and in concluding that a new trial was not warranted." Id. The First Circuit affirmed the district court's subsequent denial of the defendant's motion for a new trial and this petition for a writ of certiorari is filed questioning that affirmance. Id.

2. Proceedings in the district court that gave rise to *French* I

1) During jury selection process, prospective jurors filled out a questionnaire which included the following prompt:

> 3. a.) Please describe briefly any court matter in which you or a close family member were involved as a plaintiff, defendant, witness, complaining witness, or a victim. [Prospective jurors were give space to write]
> b.) Was the outcome satisfactory to you? [Prospective jurors were given "yes' and "no" check boxes here]
> c.) If no, please explain. [Prospective jurors were give space to write]

French I at 115. Juror 86 wrote "n/a" after part 3a, and left 3b and 3c blank. Id. "She also did not complete the second page of the questionnaire, which contained six additional prompts and a space to sign and declare under penalty of perjury that the prospective juror had answered all the questions truthfully and completely." Id.

2) At the beginning of jury selection, the magistrate judge had asked the venire:

> Now, as you've heard for a couple hours now this morning, this is a

> case about marijuana, which is a controlled substance under federal law. Is there anyone on the jury panel who themselves personally or a close family member has had any experiences involving controlled substances, illegal drugs, specifically marijuana, that would affect your ability to be impartial?

Id. Juror 86 did not respond to this question. Id.

3) Later in the voir dire, the magistrate judge asked the venire:

> Is there anyone here who knows of any other reason, some question I haven't asked or something that's been sitting there troubling you, why hasn't she asked me about this, those attorneys, those people should know about this fact and it might interfere with me being a fair and impartial juror or that it might appear that it would interfere, is there any other fact that you feel would affect your ability to be a fair and impartial juror?

Id. Again, Juror 86 remained silent. Id.

4) A week after sentencing, the defendants filed a motion for new trial, based on newly acquired information, claiming that Juror 86's answers "amounted to dishonest answers to material questions, and that had the answers been honest, there would have been a valid basis for a challenge for cause." Id. at 115-116. The defendants "also asked for an evidentiary hearing to question Juror 86 about her answers." Id. at 116. Over six months later, the district court denied the defendants motion. Id. The district court deemed the answer and non-answers as "mere mistake, and not dishonesty, [and that] a new trial was unwarranted absent a more flagrant showing of juror bias." Id. Furthermore, "the district court found that the passage of two years from the close of the trial cut[s] against any request for an

evidentiary hearing." Id.

3. The First Circuit's decision in *French* I

5) In *French I*, the First Circuit found that

> ...the defendants came forward with factual information fairly establishing that Juror 86 likely gave an inaccurate answer to question 3 on the written questionnaire. Further, the uncontested facts submitted by the defendants also made it quite likely – although not certain – that the juror's inaccuracy was knowing. Defendants also showed that the correct answer to question 3 may well have been quite relevant to assessing the juror's ability to fairly sit in judgment in this case. The mother of a drug user arrested for dealing to support his drug habit might have some strong thoughts about those who produce the drugs.

Id. at 117. The First Circuit disagreed with the district court's view blaming defense counsel for not asking "Juror 86 more questions at voir dire or [by not] bring[ing] to the court's attention the fact that the juror did not complete or sign the questionnaire." Id. at 117-118. The First Circuit also was not persuaded by the district court's supposition that the time delay between voir dire and the filing of defendant's motion might have caused the juror not to remember her thoughts. Id. at 118. This time delay was before the additional six months it took the district court to respond to defendants' motion. Id. at 116. An indication that time was important to their opinion was the First Circuit statement that "[t]he only way to tell if the passage of time would have erased Juror 86's memory of events would be

to ask her to recall these events, something the district court declined to do." Id.

6) Finally, the First Circuit in *French* I found "[t]hat the presence of a juror whose biases would require striking the juror for cause in a criminal case is structural error that, if preserved, requires vacatur." Id. at 120. The First Circuit was responding to the district court's conclusion that "even if Juror 86 had committed misconduct, there was no prejudice to defendants because the government had a strong case." Id. at 119. The government expanded the district court's "strong case" analysis, and claimed that any resultant error was harmless. Id. The First Circuit disagreed with this reasoning stating that "rejecting a claim as harmless presupposes the existence of the error in question," i.e. "that Juror 86 was, in fact, biased." Id. Significantly, the First Circuit drew a distinction between "the framework within which" a trial proceeds, and what might transpire during a trial or hearing. Id. *citing* Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed. 2d 302 (1991) .

7) On a final note, and drawing attention to the importance of time, the First Circuit stated that because the government had opposed the defendant's motion, a two year additional delay ensued between the filing of that motion and the First Circuit opinion. *French* I at 120. Given the government's opposition, the First Circuit stated that "to the extent that memories have faded....we think it only

fair for that to cut against the government." Id.

4. Proceedings in district court on remand.

8) "On remand, the district court held an evidentiary hearing to resolve the two questions on which the new-trial motion depends: '(1) Did Juror 86 fail to honestly answer a material question, and (2) would a correct response have provided a basis for a challenge for cause?'" *French* II, 977 F3d at 119.

9) Prior to the evidentiary hearing, over the objection of defense counsel, the district court appointed David Beneman, the Federal Defender for the District of Maine, to represent Juror 86. Id. Procedurally, the district court conducted the hearing by having Attorney Beneman conduct the direct examination of Juror 86, and by electing not to ask questions from the bench. Id. Pre-hearing, the parties stipulated that Juror 86's son had three drug-related state court convictions. Id. During the hearing, it was learned that Juror 86 wrote several checks hiring her older son's attorney; that she had visited her older son in jail; and that she had attended juvenile court when her younger son had been charged with theft and forgery. Id. at 119-120. Juror 86 also testified to having attended numerous other court hearings, including her younger son's possession of "a small amount of pot." Id. at 120.

10) On cross-examination, Juror 86 stated that she did not think her family's involvement with the legal system was relevant to her need to answer Question 3 on the questionnaire. Id. She said she only learned that her older son had been charged with marijuana charges from Attorney Beneman. Id. She testified that she felt the magistrate's questions "did not pertain to [her]" because she "stay[s] neutral' and do[esn't] form judgments prior to knowing the full story." Id. She testified that her sons' involvement with "marijuana would not have affected her ability to be impartial." Id. She also testified that she felt that she could be impartial, did not possess a desire to be on or off the jury, and felt no animosity toward people charged with marijuana offenses. Id. at 120-121.

11) Following the evidentiary hearing, the defendants renewed their motions for a new trial. Id. at 121. In denying their motions, the district court stated that Juror 86's answers "would not have provided a valid basis for a challenge for cause." Id. The district court felt that despite finding that Juror 86 failed to honestly answer material questions on voir dire, she "would have been able to separate her emotions from her duties as a juror." Id. The district court stated that "no answer had been found as to 'why Juror 86 failed to accurately and honestly answer Question 3 in October 2013, why she did not reveal this information during voir dire in January 2019, [or] why she testified in such a

contradictory and confusing manner in January 2019.'" Id. The case had been remanded to the district court precisely for the district court to determine why Juror 86 failed to answer these questions, or, as the First Circuit stated: "[o]n remand, the district court held an evidentiary hearing to resolve the two questions on which the new-trial motion depends: '(1) Did Juror 86 fail to honestly answer a material question, and (2) would a correct response have provided a basis for a challenge for cause?" *French* II, 977 F3d. at 119.

5. The First Circuit's decision in *French* II

12) In *French* II, the First Circuit addressed the defendant's renewed claim "that the district court improperly exercised its discretion in fashioning a procedure to investigate defendants' claims and in concluding that a new trial was not warranted." United States v. French, 977 F.3d 114, 117 (1st Cir. 2020) ("*French* II"). Judge Kayatta stated that remand had been necessitated "because the record as it then stood did not indicate why Juror 86 answered as she did, [and, consequently] we could not definitively determine whether she was unduly biased." Id. at 119 (emphasis added).

13) In *French* II, the First Circuit reviewed the procedures employed by the district court. Id. at 119. In particular, *French* II reviewed the district court's

decision to appoint Attorney David Beneman, to represent Juror 86 at the evidentiary hearing, and the district court decision that it would not ask Juror 86 questions from the bench given the district court ruling that Attorney Beneman would ask Juror 86 questions on direct examination. Id. Judge Kayatta wrote that the appointment of the Federal Defender was made "[o]ver the defendants' objections." Id.

14) The First Circuit noted that the district court found "that Juror 86 'failed to honestly answer a material question on voir dire,'' and that "no answer had been found as to 'why Juror 86 failed to accurately and honestly answer Question 3 in October 2013, why she did reveal this information during voir dire in January 2014, [or] why she testified in such a contradictory and confusing manner in February 2019.'" Id. at 121. The First Circuit stated that "[t]he fact that juror bias constitutes a structural defect 'not susceptible to harmlessness analysis,'...along with the difficulties inherent in questioning a juror several years after the end of trial, further rendered the district court's response [to hold an evidentiary hearing] appropriate." Id. at 122. The First Circuit, however, stated that unlike United States v. Rhodes, the "procedures that the district court adopted and implemented for the evidentiary hearing" did not amount to a procedure "where the court simply let the juror decide for herself whether she was biased

without investigating further." Id. *referencing* United States v. Rhodes, 556 F.2d 599, 601 (1st Cir. 1977). Specifically, the First Circuit stated that Juror 86 testified, that all parties were present during her testimony, and counsel for all parties were afforded "wide latitude" to question Juror 86. *French* II at 122.

15) In assessing procedural adequacy, *French* II noted that no case was brought to their attention holding that the district court could not appoint counsel for the errant juror. Id. at 123. Judge Kayatte wrote:

> Russell challenges the court's decision to appoint counsel for Juror 86, and both defendants object to the court's decision not to question Juror 86 from the bench....The defendants point to no case holding that a court investigating juror bias or misconduct may not appoint counsel for the juror.

Id. at 122-123. The First Circuit noting that the appointment of counsel refreshed Juror 86's "memory before showing up at the courthouse," and other possible considerations "call[s] for judgment and discretion, not a rule of law." Id. With respect to the absence of questions from the bench, the First Circuit stated that the type of procedure chosen by the district court "varies depending on the circumstances" of the case. Id. In this case, because "protracted and far-ranging inquiry" was required, it was "less practical for the judge to direct the questioning." Id.

The First Circuit found Dyer v. Calderon unavailing, where the Circuit court "admonished the trial court of its 'independent responsibility to satisfy [itself] that

[an] allegation of bias is unfounded,'" because in that case the trial was still underway. Id. at 124 *citing* Dyer v. Calderon, 151 F.3d 970, 978 (9th Cir. 1998). "In sum." wrote Judge Kayatta in the present case, "the questioning undertaken by counsel was sufficient to address the defendant's concern's of Juror 86's bias." Id.

16) The First Circuit in *French* II then turned toward the substantive law where the relevant inquiry is as follows:

> "To obtain a new trial based on a juror's failure to respond accurately to questions asked of prospective jurors prior to their selection to sit as jurors, 'a [defendant] must first demonstrate that a juror failed to answer honestly a material question on voir dire," French, 904 F.3d at 116 (emphasis omitted) (quoting McDonough power Equip., Inc. v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984)). Second, the defendant must "further show that a correct response would have provided a valid basis for a challenge for cause." Id. (quoting McDonough, 464 U.S. at 556, 104 S.Ct. 845). The party seeking to overturn the jury's verdict bears the "burden of showing the requisite level of bias by a preponderance of the evidence." [United States v.] Sampson, 724 F.3d at 166.

Id. at 124. Resolution of the second element, the element under review here, depends on 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...that the juror lacked the capacity and the will to decide the case based on the evidence." Id. *citing* Sampson at 165-166. This inquiry, in turn, must be based on the "totality of the circumstances," including "the juror's interpersonal relationships; the juror's ability to separate her emotions from her duties; the

similarity between the juror's experiences and important facts presented at trial; the scope and severity of the juror's dishonesty; and the juror's motive for lying." *French* II at 124-125 *citing* Sampson at 165-166.

17) In reviewing the "totality of the circumstances," the First Circuit found that "[n]o connection between Juror 86's sons and the defendants was shown....[and] the district court ultimately could not determine exactly why Juror 86 filled out her questionnaire inaccurately or failed to respond to the relevant questions posed during voir dire." *French* II at 125. Although "not all motives are equally alarming....[h]ere, the testimony elicited at the evidentiary hearing and the district court's findings eliminated the motives that usually tend to show bias." Id. at 126. The First Circuit stated that "[a]lthough the reasons why" Juror 86 felt as she did, "the lack of clarity, by itself, does not dictate a finding of disqualifying bias." Id. The Circuit Court held that any lapses in memory attributable to the government overlooks the general rule as to the defendants' burden. Id. The First Circuit then stated "[A]lthough our decision in *French I* noted that an exception to the general rule might apply If Juror 86's memory loss became "a problem that [could not] be solved on remand," 904 F.3d at 120, that possibility did not come to pass "because the district court [had] eliminated the most concerning possible motivations and the defendants failed to posit any other concerning motive that

might explain the juror's conduct." Id.

18) In conclusion, *French* II stated that

> Although the inquiry did not illuminate the exact reason for Juror 86's dishonest conduct, it also did not yield any evidence that her dishonesty was motivated by bias or that the facts she had concealed would have otherwise affected her ability or desire to be impartial. Based on this information,...[the district court] found that she lacked the type of bias that would disqualify her for cause.

Id. at 127.

19) Defendant Russell's argument that the district court had improperly elevated "motive" to the status as being a sine qua non of a review of the decision-making concerning the "totality of the circumstances" as outlined in the First Circuit opinion of *Sampson* factors, was lightly treated in two footnotes referring the reader to the rest of the opinion. Id. at 127 fn. 3 & 4 (fn. 4: "Russell's argument that the district court improperly elevated motive to be a 'sine qua non' of proving reversible bias....we are not persuaded that the evidence other than the evidence of motive tilted toward [juror] disqualification.").

In sum: The First Circuit in *French* I remanded the case to the district court in order to ascertain why Juror 86 failed to honestly answer material questions before and during voir dire. The district court decided to appoint Attorney Beneman to inform Juror 86 about the First Circuit's concerns and to then conduct

direct examination of Juror 86 at an evidentiary hearing to address those concerns. Additionally, before the hearing the district court had decided that it would not ask Juror 86 any questions from the bench. Because the evidentiary hearing did not produce reasons as to why Juror 86 failed to honestly answer material questions, the district court and the First Circuit in *French* II denied the defendant's motion for a new trial. Defendant Russell argues that the procedures employed by the district court permitted the errant juror to from decide for herself whether she was biased in such a manner that she would have been stricken for cause.

REASONS FOR GRANTING THE WRIT

The First Circuit in *French* II failed to adequately address defendant Russell's concern that the procedure fashioned by the district court to investigate the defendants' allegations of juror bias violated due process. Defendant Russell had argued that two separate procedures adopted by the district court allowed the errant juror to decide for herself whether she committed disqualifying bias. First, the district court appointed the Federal Defender to represent the errant juror and allowed him to inform her ex parte of the reasons why the defendants' claim of bias was legitimate. Second, the district court abnegated responsibility to ask questions of the errant juror, even though the district court felt that her answers created deficits, which deficits the district court then affirmatively utilized not to find disqualifying bias.

Beyond this, the First Circuit in *French* II has added to the confusion among the circuit courts surrounding the two-part test in McDonough, in two separate ways. First, the First Circuit in *French* II correctly identified juror bias as structural error, but used an abuse of discretion as the standard on review to analyze legitimate claims of juror bias. Second, the First Circuit elevated "motive" behind juror dishonesty to the status of overriding primacy in determining whether a dishonest juror should have been removed for cause.

A. The Court of Appeals erred in not finding a violation of due process where the district court chose a three-part process which shielded the juror from inquiry into her "motive" for her dishonesty, and by making "motive" the sole factor needed to establish reversible bias.

The district court employed three procedural mechanisms which shielded the juror from inquiry into her dishonest answers. The three suspect processes were: First, prior to the evidentiary hearing, and over objection of defense counsel, the district court appointed the Federal Defender to represent Juror 86. Pre-hearing, the Federal Defender reviewed the "pains and penalties of perjury" with Juror 86, ex parte, thereby alerting the juror to possible negative repercussions depending on how she would answer questions at the hearing. Second, in anticipation of hearing, the district court determined that only the attorneys would ask questions of Juror 86, thereby effectively curtailing any responsibility of the court to engage in meaningful fact-finding. Third, unknown to the lawyers, the district court had made the determination that the only factor needed to establish reversible juror bias or a valid basis for cause was the juror's motive. Instead, the lawyers' were operating under the premise that "motive" for dishonesty was only one of several factors used in the evaluation of reversible bias or establishing a valid basis for cause. See United States v. Sampson, 724 F.3d 150, 166 (1st Cir. 2013) (compendium of factors are to be considered including "motive"). Specifically

decrying utilization of only one of the listed factors, the Sampson court stated : "[a]lthough any one of these factors, taken in isolation, may be insufficient to ground a finding of a valid basis for a challenge for cause, their cumulative effect must nonetheless be considered." Id.

Thus, individually and cumulatively, these three expedients induced Juror 86, coached as she was on the pains and penalties of perjury, to "fail to remember" her motive for her dishonest answers. The net result was that the district court found Juror 86 to have been dishonest, but also found that the record did not establish, in the court's view, the presence of a biased motive for her dishonesty. Based on this result, the district court then made the finding that the absence of motive "cut against" the defendants who bore the burden of proof.

Petitioner Russell avers first, that the district court's three misguided processes created an impossible dilemma for defense counsel by instituting a procedure allegedly designed to ascertain a dishonest juror's "motive" for lying during voir dire, but which in fact inhibited ascertainment of her reason for dishonesty. Secondly, with particular respect to the third misguided process, the district court independently erred by finding that an absence of evidence as to her motive equated to an absence of the single-most essential criteria for finding reversible juror bias, when "motive" was one of only several factors to be

considered when evaluating a finding establishing a valid basis for cause. In other words, the district court independently erred by elevating "motive" to be the sole factor.

1. Appointment of Federal Defender

The process utilized by the district court impeded ascertainment of the nature of Juror 86's bias, instead of facilitating it, by letting the juror decide for herself if her behavior was prejudicial to a fair trial. By appointing counsel to represent Juror 86 pre-hearing, the district court created the opportunity for Juror 86 to explain her behavior in a manner protected by the attorney-client privilege. The result was that an insulating layer of process designed to protect the juror, in fact, inhibited ascertainment of her thinking by the court and by the individuals potentially prejudiced by her dishonesty. This insulation accomplished what the First Circuit found reversible in United States v. Rhodes, in that the chosen expedient "...let the juror's decide for themselves the ultimate question whether what they had learned had prejudiced them." United States v. Rhodes, 556 F.2d 599, 601 (1st Cir. 1977). In Rhodes, the jurors could decide for themselves if publicity had prejudiced their juror's oath. In the present matter, a court-appointed attorney, who, if he found anything prejudicial about the juror's behavior, was

obligated by the attorney-client privilege to not disclose that or any prejudicial motive, if the client directed him to not disclose. The First Circuit ordered a new trial in Rhodes, instead of an evidentiary hearing "partly because so much time has gone by since the discharge of the jury." Id. at 602. The amount of time was two years. Id.

There is a direct connection between the appointment of counsel to represent the errant juror, in this case, the Federal Defender, and the juror's subsequent failure to recall many facts, including her reasons for answering as she did.

The most troubling aspect of the appointment of the Federal Defender, however, is that the Federal Defender is an employee of the federal judiciary susceptible to ex parte communication with the federal court. On the "Defender Services" section of the uscourts webite, it is written:

> Federal public defender organizations are federal entities, and their staffs are federal employees. The chief federal public defender is appointed to a four-year term by the court of appeals of the circuit in which the organization is located. The Congress placed this appointment authority in the court of appeals rather than the district court in order to insulate, as best as possible, the federal public defender from the involvement of the court which the defender principally practices.

HTTPS://www.uscourts.gov/services-forms/defender-services.

When Judge Kayatta stated that "defendants point to no case holding that a

court investigating juror bias or misconduct may not appoint counsel for the juror," his statement failed to mention that in this case the appointed attorney was the Federal Defender. *French* II at 122-123. This distinction is significant. If the Congress placed "appointment authority in the court of appeals rather than the district court in order to insulate, as best as possible, the federal public defender from the involvement of the court which the defender principally practices," then the district court sub judice breached that insulation by appointing the Federal Defender. Petitioner Russell specifically objected to appointment of Federal Defender Beneman; Judge Kayatta specifically supported only the appointment of counsel in general. It is not hard to imagine that the Federal Defender in Maine routinely and repetitively has ex parte communications with the federal judiciary. In view of the language concerning "isolation" in the Defender Services section of the uscourts website, it would appear that Federal Defenders nationwide also have routine communication with their respective judiciaries. Otherwise, there would be no need to isolate or otherwise convey the need for impartiality.

Thus, the appointment of Federal Defender Beneman presents an independent and significant violation of the defendants' fourteenth (and fifth) amendment(s) right to a fair and impartial process.

2. Failure of District Court to Engage in Meaningful Fact-Finding

The second procedure adopted by the district court to investigate the defendants' allegation of juror bias which the defendants' took issue with was the district court's decision to abnegate it's responsibility to engage in fact-finding from the bench. Defendant Russell had presented approaches from three circuit courts which the First Circuit found lacking.

A. United States v. Resko, 3 F.3d 684 (3rd Cir. 1993) – Third Circuit

Juror 86's "forgetfulness" might have been ameliorated by a district court invested in the fact-finding process. The Third Circuit in United States v. Resko, stated that where "there is no way for us [the Circuit court] to determine whether the defendants were or were not prejudiced, we will vacate the convictions and remand for a new trial, even though the defendants have not established prejudice." United States v. Resko, 3 F.3d 684, 686 (3rd Cir. 1993). The Third Circuit stated that for whatever the reason, "...our own ability to review the district court's determination that there was no prejudice to the defendants is hampered by this absence of information in the record." Id. at 691. To this end, the Third Circuit stated that

> We conclude that the district court erred by declining to engage in further inquiry....By failing to do so, the district court allowed the jurors, in effect, to be the judge of whether or not they had been influenced by their

> premature discussions. In this way, the district court effectively ceded to the jury its responsibility for determining whether or not the defendants would be prejudiced by the juror's misconduct.

Id. The Third Circuit stated that by not engaging in further inquiry, "the district court ...effectively delegated to the jurors the duty of deciding their own impartiality." Id. at 692. The Third Circuit stated:

> A trial judge does not possess talismanic powers. In the absence of any effort to evaluate the impact the premature deliberations may have had on the jurors, the judge can only guess as to the existence or non-existence of prejudice....
>
> Although ordinarily a defendant must establish prejudice before a new trial will be ordered, in the circumstances here, in which there is unequivocal proof of jury misconduct discovered mid-trial coupled with a failure by the district court to evaluate the nature of the jury misconduct or the existence of prejudice, we conclude that a new trial is warranted. Given the importance of the Sixth Amendment rights at stake and the relevant ease with which the district court here could have properly assessed the impact of the jury misconduct, it would be unfair to penalize the defendants for the lack of evidence of prejudice. We are thus willing, in these limited circumstances, to carve out an exception to the rule that a defendant must demonstrate prejudice before a new trial is warranted.

Id. at 694. In addition, with respect to the juror's "forgetting" why they answered as they did, the Third Circuit concluded that "[g]iven the passage of time, [one year], a juror may no longer recall what his or her state of mind was before the conclusion of trial." Id. at 695. On this basis the Third Circuit vacated the defendants convictions and remanded the matter for a new trial. Id. at 696. The Third Circuit found that it was an abuse of discretion for the district court to not

conduct inquiry beyond a questionnaire in order to ascertain if premature jury deliberation on the seventh day of a nine day trial impermissibly resulted in conviction. Id. 685-688.

Likewise, petitioner Russell had asked argued before the First Circuit that it would not have been burdensome for the district court to have asked Juror 86 questions, especially when the district court felt there was something missing in her given answers and the First Circuit in *French* I had previously chided the district court for declining to ask Juror 86 questions.

B. Dyer v. Calderon,151 F.3d 970 (9th Cir. 1998) – Ninth Circuit.

Other circuits have also espoused the idea that the judge has an affirmative fact-finding responsibility, which any district court charged with investigating bias should not ignore. In Dyer v. Calderon, a juror lied during voir dire about her brother's having been murdered, in a murder case, stating that she thought her brother's death to be an accident. Dyer v. Calderon,151 F.3d 970, 972-973 (9th Cir. 1998). The Ninth Circuit stated that "[s]o long as the fact-finding process is objective and reasonably explores the issues presented...the trial judge's findings based on that investigation are entitled to a presumption of correctness." Id. at 975. Yet, because the trial judge did not "uncover" relevant and obtainable facts, the

Ninth Circuit stated that the judge left "the matter in doubt," and that "a judge investigating juror bias must find facts." Id. at 976. Citing and quoting First Circuit precedent, the Ninth Circuit stated

> "It was the [trial] court's obligation to develop the relevant facts on the record, not merely presume them." United States v. Gaston-Brito, 64 F.3d 11, 13 (1st Cir. 1995). The judge's lack of verve in pursuing the matter casts doubt on his findings.

Dyer, supra at 975 *citing* United States v. Gaston-Brito, 64 F.3d 11, 13 (1st Cir. 1995)(lack of sufficient inquiry by trial court violates due process). The Ninth Circuit stated that in order to overturn a conviction "the evidence not discovered [that an adequate hearing would have discovered] must be so significant that a reasonable fact-finder could have decided the bias question differently if armed with this knowledge." Dyer, at 976.

Beyond this failure to fulfill it's fact-finding function, the Ninth Circuit took issue with the conclusion of "[t]he California Supreme Court [which] laid the blame for the inadequate factual development at the bias hearing on the shoulders of defense counsel." Id. at 977. The Ninth Circuit concluded that "[g]iven the extremely delicate situation when a juror is suspected of prejudice or misconduct, the trial judge must assume the 'primary obligation – to fashion a responsible procedure for ascertaining whether misconduct actually occurred and if so, whether it was prejudicial." Id. For this reason, the Ninth Circuit stated, "[w]here juror

misconduct or bias is credibly alleged, the trial judge cannot wait for defense counsel to spoon feed him every bit of information which would make out a case of juror bias; rather, the judge has an independent responsibility to satisfy himself that the allegation of bias is unfounded." Id. at 975. With respect to the trial judge's lack of fact-finding, the Ninth Circuit stated "...we attribute the trial judge's complacency to an ostrich-like desire to avoid learning anything that would jeopardize the verdict."Id. at 979. The errant juror under review, "Freeland [, had] overlooked too many incidents for us to attribute her responses to forgetfulness." Id. at 980. "A juror, like Freeland, who lies materially and repeatedly in response to legitimate inquiries about her background introduces destructive uncertainties into the process....a perjured juror is unfit to serve." Id. at 983. So too, Juror 86.

C. Sampson v. United States, 724 F.3d 150 (1st Cir. 2013) – First Circuit

In contrast to Resko and Dyer, the hearing judge in United States v. Sampson, took an active part in asking questions at the evidentiary hearings held in that matter, the answers to which induced both the hearing court and the First Circuit Court of Appeals to grant a new trial, albeit on different grounds. Sampson v. United States, 724 F.3d 150, 156 (1st Cir. 2013).

> Thus, ...to obtain relief under McDonough, Sampson was required to prove by a preponderance of the evidence that: (1) C was asked a question during voir dire that should have elicited particular information; (2) the question

> was material; (3) C's response was dishonest, meaning deliberately false, rather than the result of a good faith misunderstanding or mistake; (4) her motive for answering dishonestly relates to her ability to decide the case solely on the evidence and, therefore, calls her impartiality into question; and (5) the concealed information, when considered along with the motive for concealment, the manner of it's discovery, and C's demeanor when required to discuss J and P, would have required or resulted in her excusal for cause for either actual bias, [or] implied bias.

Id. at 159.

The First Circuit entertained jurisdiction in Sampson in order to address the government's concerns as to the correct application of the test for juror disqualification articulated in McDonough Power Equip., v. Greenwood. Sampson v. United States, 724 F.3d 150, 156 (1st Cir. 2013) *referencing* McDonough Power Equip., v. Greenwood, 464 U.S. 548, 556, 104 S.Ct. 845, 78 L.Ed.2D 663 (1984). Stating that "the cases that populate this arcane corner of the law are muddled," the First Circuit felt it necessary to answer "important questions about when and under what circumstances the belated discovery of juror dishonesty during the voir dire process demands vacatur of the jury verdict." Sampson at 154. In Sampson the First Circuit reviewed the district court's findings of fact, then reviewed the appropriate legal framework, and then applied the findings to that framework. Id. at 161.

With respect to findings, the Sampson court "found that Juror C gave false answers not only during voir dire but also during the post-trial hearing itself." Id. at

161. These lies centered on her ex-husband and her daughter "whose very existence she had failed to acknowledge either in her responses to the juror questionnaire or during the voir dire." Id. at 162. During the post-trial hearing, Juror C "continued her charade" and "she resisted that line of inquiry." Id. at 163. It was only during the second day of questioning that "Juror C admitted, for the first time, that she had a daughter who had been arrested." Id. The examining court determined "that she had withheld the information...when completing the questionnaire [because] she 'didn't think [her] personal life had anything to do with [] being a juror.'" Id.

In reviewing the legal framework, Sampson adopted a binary test for a party seeking a new trial based on subsequently discovered juror dishonesty. Id. at 164-165. First, the party must show "that the juror failed to answer honestly a material voir dire question," and second, the party must demonstrate "that a truthful response to the voir dire question 'would have provided a valid basis for a challenge for cause.'" Id. at 164-165 *citing* McDonough, supra 455 U.S. at 556. Sampson felt that"[w]hat constitutes a valid basis for excusal...is the question that lies at the heart of these appeals." Id. at 165. Only demonstrated "cognizable juror bias is a valid basis for excusal." Id. Because "[e]verything depends on the particular circumstances" of each case, "cognizable bias [cannot] be confined to

any particular sub-categories." Id. Evaluation "in determining whether a juror has both the capacity and the will to decide the case solely on the evidence" is made by applying a non-exclusive compendium of factors to the case. Id. at 166.

> This compendium may include (but is not limited to) the juror's interpersonal relationships...; the juror's ability to separate her emotions from her duties...; the similarity between the juror's experiences and important facts presented at trial...; and the juror's motive for lying. Although any one of these factors, taken in isolation, may be insufficient to ground a finding of a valid basis for a challenge for cause, their cumulative effect must nonetheless be considered.

Id.

With respect to the first part of the test, the First Circuit in Sampson noted that while the lower court had incorrectly viewed the facts adduced at hearing within a prism of three categories of bias, "the court of appeals had the authority, in lieu of remand, to array the [correctly adduced] findings against the correct legal standard" bereft of categories of bias. Id. To this end, the First Circuit found that "Juror C understood her duty to be truthful in answering the voir dire questionnaire, yet [found] her certification under the pains and penalties of perjury...knowingly false." Id.

With respect to the second part of the test, the First Circuit noted that while "juror dishonesty by itself is not sufficient to demonstrate bias, it can be a powerful indicator of bias." Id. at 167. Given Juror C's "parlous pattern of persistent

prevarication...[her] ability to perform her sworn duty as an impartial juror was compromised from the start." Id. Indeed, the First Circuit found "that she would rather lie to the court than discuss these painful life experiences." Id. Notably, the First Circuit stated that "[w]hen a juror has life experiences that correspond with evidence presented during the trial, that congruence raises obvious concerns about the juror's possible bias." Id. Based on several similarities between her life experiences and the issues brought forth in the penalty-phase trial, the First Circuit stated

> We conclude that if fully informed of Juror C's willingness to lie repeatedly, her fragile emotional state, her past experiences with P [her ex-husband] and J [her daughter], and the similarities between those experiences and the evidence to be presented during the penalty-phase hearing, any reasonable judge would have found that the cumulative effect of those factors demonstrated bias (and thus a valid basis for excusal for cause).

Id. at 168.

A juror must be willing and able to decide the case based solely on the evidence. Juror 86 was neither willing nor able to discuss her fallacious answers.

In another First Circuit case. United States v. Bristol-Martir, the First Circuit agreed with the defendant's claims that the district court improperly handled a juror misconduct issue, vacated the convictions and remanded the matter for a new trial. United States v. Bristol-Martir, 570 F.3d 29, 34 (1st Cir. 2009). During trial,

the district court questioned a juror who had searched the internet for definitions of legal terms. Id. at 37. After two conferences with counsel, the district court questioned the juror a second and third time. Id. The Court called in the jury foreperson and another juror twice each. Id. The district court replaced the errant juror, but denied defense motions for a new trial. Id. at 37-38. The district court, however, failed to question the other jury members regarding their ability to remain impartial, an expedient which the First Circuit deemed "would not have been burdensome because the district court was already interviewing each of the juror's individually." Id. at 43. Given this, the First Circuit noted that there remained "uncertainty surrounding the errant juror's presentation," leading the First Circuit to find "that the district court's handling of the errant juror's misconduct constituted an abuse of discretion because it compromised the defendant's right to have a trial by an unbiased jury. Id. at 43-44.

D. Differing approaches in circuit courts

Beyond meaningful fact-finding investigation by a district court charged with ascertaining bias, lies the very conundrum of the concept of bias itself. Because a prospective juror's bias may impair impartial decision-making as a consequence of similarities between the prospective juror's life and the issues at

trial, or merely because bias, as demonstrated by dishonesty during jury selection, a finding of bias becomes endemic to that juror's ability to follow court instructions. "In some circumstances, bias is also implied' when there are similarities between the personal experiences of the juror and the issues being litigated.'" See Skaggs v. Otis Elevator Co., 164 F.3d 511, 517 (10th Cir. 1998).

Petitioner Russell points to United States Supreme Court precedent as follows:

> Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore most wisely says that, with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.

Crawford v. United States, 212 U.S. 183, 196, 29 S.Ct. 260, 53 L.Ed.2d 465 (1909).

B. The Court of Appeals Erred In Applying an abuse-of-discretion Standard of Appellate Review Concerning a Claim of Structural Error

The First Circuit in *French* I found "[t]hat the presence of a juror whose revealed biases would require striking the juror for cause in a criminal case is structural error that, if preserved, requires vacatur." *French* I at 120. The First Circuit appropriately drew a distinction between "the framework within which" a

trial proceeds, and what might transpire during a trial. Id. *citing* Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed. 2d 302 (1991). In *French* II the First Circuit did not follow its own precedent by 1) using an "abuse of discretion" standard to evaluate legitimate claims of juror bias; 2) adding a mental state to the evaluation of juror bias in this case; and 3) creating an in-trial error by appointing the Federal Defender for the District of Maine to the biased juror, before anyone had the opportunity to question her.

In *French* I, significantly, the First Circuit drew a distinction between "the framework within which" a trial proceeds, and what might transpire during a trial or hearing. Id. *citing* Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed. 2d 302 (1991). In Fulminante, Chief Justice Rehnquist delivered the opinion of the majority on this issue. He wrote that since Chapman v. California, the Supreme Court adopted the general rule that not all constitutional errors require reversal of a conviction, and that harmless error analysis could be applied to a wide range of errors. Fulminante at 306-307 *referencing* Chapman v. California, 386 U.S. 18 (1967). "The common thread connecting these cases [susceptible of harmless error analysis] is that each involved 'trial error' – error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to

determine whether its admission was harmless beyond a reasonable doubt." Fulminante at 307-308. Chief Justice Rehnquist arrayed such "trial error" cases against cases involving "constitutional errors," which undermine the "constitution of the trial mechanism,' or present a "structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." Id. at 309-310. Regarding the latter category, Chief Justice Rehnquist stated

> One of those cases, Gideon v. Wainwright, 372 U.S. 335 (1963), involved the total deprivation of the right to counsel at trial. The other, Tumey v. Ohio, 273 U.S. 510 (1927), involved a judge who was not impartial. These are structural defects in the constitution of the trial mechanism, which defy analysis by 'harmless error' standards. The entire conduct of the trial, from beginning to end, is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial.

Id. 309-310. Equally, as Judge Kayatta noted in *French* I, the entire conduct of the French trial, from beginning to end, was affected by the presence of a biased juror.

It is because the entire conduct of the French trial, from beginning to end, was affected by the presence of a biased juror, imposition of a standard of review requiring analysis of the type and nature of motive for that bias is contrary to the First Circuit's previously adopted position. For this reason, review in *French* II should have been de novo review and not abuse of discretion.

C. The Court Of Appeals Erred By Elevating "Motive" to Become a Third part of the Two-part McDnough Test to Assess Legitimate Claims of Juror Bias.

A Ninth Circuit case decided last summer highlights the difficulties courts across the country are having interpreting the test enunciated in McDonough, and whether the party claiming dishonesty must elucidate a motive for the juror's honesty. Scott v. Arnold, 962 F3d. 1128 (9th Cir. 2020). This difficulty is further illustrated by the First Circuit opinion in United States v. Tsarnaev, in which the court declined to definitively resolve appellants allegations that two jurors, the foreperson #286 and #138, were dishonest during voir dire. United States v. Tsarnaev, 968 F.3d 24 (1st Cir. 2020) (Tsarnaev lawyer admitted at oral argument that trial attorney admitted guilt thereby nullifying error regarding juror misconduct). "Jurors who do not take their oaths seriously threaten the very integrity of the judicial process." *French* I at 117 *quoting* Sampson, 724 F.3d at 169. See supra.

The Ninth Circuit in Scott stated that "nothing in today's opinion should be construed as suggesting that we have found clarity in our circuit's treatment of McDonough." Scott v. Arnold, 962 F3d. 1128, 1132 (9th Cir. 2020). The issue was that "[i]t remains unclear whether and to what extent the United States Supreme Court recognized distinctions between actual prejudice, implied prejudice, and

'McDoungh prejudice,' and what showings for relief are required in each scenario. Id. at 1131. The Ninth Circuit stated that confusion exists because "the Supreme Court has not given explicit direction as to whether McDonough requires a criminal defendant to show prejudice to obtain relief." Id. at 1133. See also Conaway v. Polk, 453 F.3d 567 (4th Cir. 2006) (defendant must show juror's motive or reason affecting impartiality);

D. Summation

The Sixth Amendment guarantees a criminal defendant a verdict by an impartial jury. Here, the district court and the First Circuit both found that Juror 86 was dishonest and that her dishonesty allowed her to be seated on the jury which convicted the defendants. Both the district court and the First Circuit determined, however, that the juror's motive for her dishonesty was not ascertainable and, therefore, could not be analyzed for a post facto review whether she would have been stricken for cause had her dishonesty materialized sooner. The procedure employed by the district court – to appoint a defense attorney to the juror, who interviewed her pre-evidentiary hearing – most likely prevented the court from deducing any possible motive. The missing motive was not pursued by the district

court fact-finder, who deliberately abnegated all responsibility for fact-finding by choosing pre-hearing not to ask the juror any question at all, let alone any question as to motive for dishonesty. As noted above, the First Circuit opinion for which certiorari is being sought, in essence, boils down to: no motive equals no basis for striking for cause, equals defendants' did not carry their burden. This is fundamentally unfair.

Juror 86 would have been stricken for cause because her forgetfulness on several issues involving her, her son's and her family's involvement with marijuana in a marijuana case revealed bias. The quantum of bias actually shown was in spite of the faulty procedures which inhibited production of a statement along the lines of "my views and experiences with marijuana preclude me from sitting on a case involving marijuana."

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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