No.

In The
Supreme Court of the United States

RICKEY LEON SCOTT

Petitioner,

v.

ERIC ARNOLD, WARDEN OF CALIFORNIA STATE PRISON, SOLANO

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1 When a Justice contributes the necessary fifth vote to a majority opinion but also writes a concurrence interpreting that opinion, should lower courts disregard the concurrence and rely exclusively on the majority opinion to discern the holding in the case (as the Seventh Circuit and sometimes the Fourth Circuit have held); or should they grant the concurrence precedential weight (as the Third and Fifth Circuits, and sometimes the Ninth Circuit, have held)? And should the concurrence be granted precedential weight only if it is "narrower" than the majority opinion, per the rule in *Marks v. United States*, 430 U.S. 188, 193 (1977)?

2. For purposes of applying the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1), did this Court's decision in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984)—when read in light of the concurrence by Justice Blackmun, who also provided the fifth vote for the majority opinion—"clearly establish" that a defendant must be granted a new trial when a juror's dishonest *voir dire* responses concealed information that would have given the defendant a valid basis to challenge that juror for implied bias?

RELATED PROCEEDINGS

- *People v. Scott*, MCN: 12003786, SCN: 219205. Superior Court of California, County of California. Judgment entered Sept. 24, 2013.
- *People v. Scott*, No. A139921, Court of Appeal of the State of California, First Appellate District, Division Five. Judgment entered July 24, 2015.
- *People v. Scott*, No. S229031, Supreme Court of California. Review denied, Nov. 10, 2015.
- *Scott v. Arnold*, No. 16-cv-06584-JST, U.S. District Court for the Northern District of California. Judgment entered Aug. 24, 2018.
- *Scott v. Arnold*, No. 18-16761, U.S. Court of Appeals for the Ninth Circuit. Judgment entered June 22, 2020, rehearing denied, Aug. 14, 2020

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PETITION FOR WRIT OF CERTIORARI

Rickey Leon Scott petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The decision of the Ninth Circuit (App. A) is reported at 962 F.3d 1128. The decision of the District Court (App. B) is reported at 322 F.Supp.3d 978. The decision of the California Court of Appeal (App. C) is unreported but available at 2015 WL 4505784. The decision of the California Superior Court (App. D) is unreported.

JURISDICTION

The Ninth Circuit entered judgment on June 22, 2020 and denied Mr. Scott's petition for rehearing en banc on August 14, 2020. App. A at 1; App. E. This Court's March 19, 2020 Order extended the time to file this petition to January 11, 2021.[1] This Court has jurisdiction under 28 U.S.C. § 1254(1). The district court had jurisdiction under 28 U.S.C. § 2254(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The full, verbatim texts of the following provisions are set forth in Appendix F: **(1)** United States Constitution, Sixth Amendment; **(2)** 28 U.S.C. § 2254; **(3)** California Code of Civil Procedure § 225; and **(4)** California Code of Civil Procedure § 229.

[1] *See* https://www.supremecourt.gov/orders/courtorders/031920zr_d1o3.pdf.

INTRODUCTION[2]

This case presents the Court with an opportunity to resolve an explicit circuit split, recognized in published decisions by the circuits themselves,[3] on a fundamental interpretive issue that can be easily resolved by adopting a common-sense rule.

The question prompting the circuit split is: What legal rule does a Supreme Court decision establish when a Justice contributes the necessary fifth vote to a majority opinion but also writes separately to express his or her interpretation of that opinion? More specifically: Should lower courts disregard the concurring Justice's "gloss" on the majority opinion (as the Seventh Circuit and sometimes the Fourth Circuit have held), or should they treat the concurrence as affecting the holding and therefore having precedential weight (as the Third and Fifth Circuits and sometimes the Ninth Circuit have held)? And does the concurrence's precedential significance turn on whether the fifth Justice's interpretation is a "narrowing" one? These issues were raised by two Justices in *McKoy v. North Carolina*, 494 U.S. 433 (1990), but were never resolved. *See* Part I, *infra*.

Due to a lack of guidance on the *McKoy* question, lower courts have no rule by which to determine whether this Court's decision in *McDonough Power*

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[2] Throughout this brief, unless otherwise indicated, **(1)** emphases were added to, and internal punctuation, citations, and footnotes were omitted from, quotations; **(2)** page numbers within citations to the Appendix ("App. at __") refer to the original pagination of the document in question and not to any "ER" numbers or other forms of pagination appearing therein; **(3)** "Part __" refers to a Part within the "Reasons for Granting the Writ" section and "Statement, Part __" refers to a Part within the "Statement of the Case" section.

[3] *See* pp. 19–20, *infra*.

Equipment, Inc. v. Greenwood, 464 U.S. 548 (1984), "clearly established" for AEDPA purposes[4] that a defendant should be granted a new trial when a juror's dishonest *voir dire* responses concealed information that would have given the defendant a valid basis to challenge that juror for implied bias.[5] Although a concurrence by Justice Blackmun (who also provided the fifth vote for the majority opinion) leaves no doubt that the answer is "yes," some courts, including the Ninth Circuit in this case, have analyzed *McDonough* without taking any account of the Blackmun concurrence—because no interpretive rule tells them that they must. The fault lies not in *McDonough* itself, whose holding is perfectly clear if one gives the Blackmun concurrence its due, but in the lack of any authoritative rule for discerning the holding in *all* cases where a majority opinion is accompanied by an explanatory concurrence authored by the "linchpin" fifth Justice. *McDonough*'s holding certainly is no less clear than that of other cases meeting this description.

These questions merit the Court's attention for two reasons.

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[4] The Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1) ("AEDPA"), provides that a federal court may not grant a state prisoner habeas relief unless the state court's adjudication of the prisoner's claim of error "was contrary to, or involved an unreasonable application of, *clearly established* Federal law, as determined by the Supreme Court of the United States." *See* Statement, Part A.2., *infra*.

[5] As explained in the Statement, Part A.1., *infra*, an implied-bias challenge requires proof of objective circumstances that could prevent a typical juror from deciding impartially. Once those objective circumstances have been proved, the court must presume conclusively that the juror is biased. "Actual" bias, by contrast, requires proof that the juror was subjectively disposed to cast a vote against the defendant. *See generally Dyer v. Calderon,* 151 F.3d 970, 981–82 (9th Cir. 1998) (en banc).

First, the Court has acknowledged that the existing framework for discerning the holdings of fragmented decisions—the so-called *Marks* rule—is a bad fit for many cases; and it has never decided whether *Marks*, which was designed to deal with situations involving plurality opinions, extends to cases where a majority opinion exists but is interpreted by the separate opinion of the Justice who provided the necessary fifth vote for the majority opinion. *See* Part I, *infra*.

Marks held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977). But *Marks* is a particularly bad fit as applied to *McDonough*, where the "linchpin Justice" (joined by two others) wrote separately to give the majority opinion a particular interpretation, and the majority did not dispute that interpretation. Indeed, in *McDonough*, a second concurrence reinforced the interpretation proffered by the first. Under those circumstances, it makes little sense to apply *Marks* by attempting to determine which of the three opinions is "narrowest."

Petitioner does not call for the wholesale abandonment of the *Marks* standard and its replacement with some all-encompassing meta-rule, but rather for the type of "clarification and . . . refinement" that Justice Alito recognized as potentially

beneficial at the 2018 argument in *Hughes v. United States*.[6] As Justice Breyer noted at that argument, "law is part art and part science" and there are "no absolute rules" for "how to read an opinion."[7] This is an area where it seems advisable to make cautious and incremental moves that neither undermine nor alter vast bodies of existing precedent.

That said, 230 years is long enough to wait for a definitive rule on how to read concurrences that interpret majority opinions. Petitioner therefore proposes the following, common-sense rule: Lower courts should regard the concurrence by the "linchpin" fifth Justice to be an accurate and thus controlling interpretation of the majority opinion's holding, unless the majority opinion objects to it. Here, the majority raised no such objection, and therefore, Justice Blackmun's view that *McDonough* claims extend to the deprivation of all for-cause challenges, including those founded on implied bias, represents the clear and easily discerned holding of the case. As demonstrated *infra* at Part I, that is literally what a majority of the *McDonough* Justices believed and expressed.

Second, *McDonough* is an important and often-cited decision that plays an important role in guaranteeing the right to an impartial jury. Yet the failure to take account of concurrences authored by a majority of the Court has led some courts,

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[6] Transcript of Oral Argument at 13, Hughes v. United States, 138 S.Ct. 1765 (2018) (No. 17-155) [hereinafter *Hughes* Argument].

[7] *Hughes* Argument at 32.

including the Ninth Circuit in this case, to give *McDonough* an excessively narrow reading that arbitrarily denies litigants a remedy in a significant category of cases where the right to an impartial jury has been seriously compromised—that is, cases in which a juror's dishonest *voir dire* responses deprived the defendant of a valid challenge for implied bias. *See* Part II, *infra*.

This case is an excellent vehicle for deciding the questions presented. *See* Part III, *infra*. Those questions must be reached and cannot be avoided, as there is no way to decide Scott's claim without evaluating the scope of *McDonough*'s holding, and there is no way to do that without considering the content and precedential effect of the concurring opinions authored by a majority of the Court. Moreover, the result reached by the state court was not authorized by any adequate and independent state-law ground. And the questions presented here are not clouded by any extraneous debates as to whether the implied-bias doctrine itself is clearly established in federal law, because it is undisputed that Scott's implied-bias challenge would have been founded upon California's implied-bias statute. In short, the questions could not be more cleanly presented.

Finally, the Ninth Circuit's decision was erroneous. *See* Part IV, *infra*. Reading *McDonough* in light of the Blackmun concurrence, there is nothing uncertain about its holding, which clearly establishes Scott's right to a new trial on the facts of this case. And the Ninth Circuit never came to grips with the absurdity of its

proposed alternative reading of *McDonough*, which would require that a litigant *prove* actual bias in order to trigger a *presumption* of actual bias.

For all these reasons and others set forth more fully below, the Court should grant the petition.

STATEMENT OF THE CASE

A. Legal background

1. Actual versus implied juror bias

Two major categories of juror-bias challenge exist: "for cause" and "peremptory." For-cause challenges have to be explained, while peremptory challenges (subject to constitutional limitations[8]) do not. *Batson v. Kentucky*, 476 U.S. 79, 127 (1986) (Burger, C.J., dissenting).

A further distinction exists within the category of "for cause" challenges. "Traditionally, courts have distinguished between two types of challenges for cause: those based on actual bias, and those based on implied bias." *United States v. Mitchell*, 690 F.3d 137, 142 (3d Cir. 2012).[9] An actual-bias challenge requires proof that the juror was subjectively "disposed to cast a vote against" the defendant; whereas an implied-bias challenge requires proof of objective circumstances that could prevent a typical juror from deciding impartially. *Dyer v. Calderon,* 151 F.3d 970, 981 (9th Cir. 1998) (en banc). Once those "objective circumstances" have been proved,

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[8] *See, e.g., Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016).

[9] *See also* CAL. CODE CIV. PROC. § 225(b)(1)(B) (categorizing implied-bias challenge as "for cause"); *id*., § 229 (implied-bias challenge "may be taken for one or more of the following *causes*").

the court must "presume *conclusively*" that the juror is biased. *Id.* at 982; *see also United States v. Wood*, 299 U.S. 123, 133 (1936). Thus, there is no such thing as "rebuttable" implied bias. *See* Parts III & IV, *infra*.

2. AEDPA and the *McDonough* rule

AEDPA provides that a federal court may not grant a state prisoner habeas relief unless the state court's adjudication of the prisoner's claim of error "was contrary to, or involved an unreasonable application of, *clearly established Federal law, as determined by the Supreme Court of the United States*." 28 U.S.C. § 2254(d)(1). The italicized phrase refers to "the holdings, as opposed to the dicta, of [Supreme Court] decisions as of the time of the relevant state-court decision." *Williams v. Taylor,* 529 U.S. 362, 412 (2000). Circuit precedent, state-court decisions, treatises, and law-review articles do not constitute "clearly established Federal law, as determined by the Supreme Court." *Kernan v. Cuero*, 138 S. Ct. 4, 9 (2017). And Circuit precedent cannot be deployed to "refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that [that] Court has not announced." *Lopez v. Smith*, 574 U.S. 1, 74 (2014).

In this case, the district court held that, for purposes of applying AEDPA, this Court's decision in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), "clearly established" that a new trial is required where juror dishonesty in *voir dire* concealed information that would have provided a valid basis for any type of challenge "for cause"—including an implied-bias challenge.

But the Ninth Circuit reversed, finding *McDonough*'s majority opinion ambiguous on this point. *See* Statement, Part B., *infra*. In reaching that conclusion, however, the Ninth Circuit ignored two concurrences, authored by five justices, which eliminated that ambiguity.

In *McDonough*, plaintiff Billy Greenwood and his parents sued McDonough, a lawn-mower manufacturer, for injuries caused by one of its mowers. 464 U.S. at 549. During *voir dire*, potential jurors were asked whether they or any of their immediate family members had sustained any injuries that resulted in any disability or prolonged pain or suffering. *Id*. at 550. One juror did not respond to the question even though his son had sustained a broken leg due to an exploding tire. *Id*. at 550–51. After a three-week trial, the jury returned a no-liability verdict in McDonough's favor. The Greenwoods moved for a new trial based in part on the juror's failure to respond in *voir dire*; but the court denied the motion. *Id*. at 551.

On appeal, the Tenth Circuit reversed, holding that a new trial is required whenever a juror's failure to disclose important information in response to a *voir dire* question prejudices a party's right to exercise *peremptory* challenges. *Id.* at 549.

This Court reversed. Writing for the majority, then-Justice Rehnquist observed that "[a] trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process" because a juror provided a "mistaken, though honest" answer in *voir dire*. *Id*. at 554–56.

Justice Rehnquist then announced that a new trial is required if a party can "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 majority opinion listed no third prong to this test—no requirement that the defendant prove "actual" bias in all cases or in any case, and no exception to the new-trial rule where the lost for-cause challenge is for *implied* bias.

The majority opinion's two-part test diverged from the Tenth Circuit's approach in two key respects: a new trial would be required only if the juror was *dishonest*, and only if the lost challenge was *for cause*, not merely peremptory. These additions were deemed necessary because "[t]he motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *Id.* In other words, while the reasons for raising a *peremptory* challenge may have nothing to do with "[a] juror's impartiality" and thus may lack any bearing on the "fairness of a trial," a challenge *for cause* usually *does* implicate the juror's impartiality and therefore *does* bear on the trial's fairness—especially if the juror answered dishonestly. *Id.*

As discussed *infra* at Statement, Part B, it was this one sentence in the majority opinion *("[t]he motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial*") that the Ninth Circuit in this case identified as preventing *McDonough* from

"clearly establish[ing]" a rule of law that could form the basis for a valid habeas claim under AEDPA. The Ninth Circuit deemed that sentence ambiguous and as therefore permitting lower courts reasonably to infer that a *McDonough* claim always requires a showing of actual bias (which the Court inaccurately referred to as "accommodating a prejudice analysis").[10]

But the Ninth Circuit ignored two concurring opinions signed by a total of five Justices, which eliminated that uncertainty and made it clear that *McDonough*'s holding encompasses cases involving both actual and implied bias, and that the two doctrines entail entirely different and separate inquiries.

The Blackmun concurrence. Justice Blackmun, joined by Justices Stevens and O'Connor, wrote separately to state that he "underst[ood] the [majority opinion's] holding not to foreclose the normal avenue of . . . order[ing] 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*." *Id*. at 556–57. As lower courts have recognized, the Blackmun concurrence furnished the "fifth, sixth, and seventh votes of [the *McDonough*] majority." *Dyer*, 151 F.3d at 985.

The Brennan concurrence. Justice Brennan, joined by Justice Marshall, concurred only in the judgment while observing that "the bias of a prospective juror may be actual or implied; that is, it may be bias in fact ***or*** bias conclusively

[10] *See* App. A at 8 (referring to "*McDonough*'s contested passage regarding dishonesty"); *id* at 6–7 (collecting cases that refer to that passage).

presumed as a matter of law." *McDonough*, 464 U.S. at 558. "Therefore, for a court to determine properly whether bias exists, it must consider at least two questions: are there are any facts in the case suggesting that bias should be conclusively presumed; ***and, if not***, is it more probable than not that the juror was actually biased against the litigant." *Id.*

The majority opinion took no issue with any of these statements.

The opinions of the five concurring Justices reveal that none of them would have contributed the necessary fifth vote to the judgment—that is, each would have become instead a *dissenter*—had they read the majority opinion as taking the radical step of arbitrarily eliminating a party's ability to obtain a new trial where a juror's dishonest *voir dire* responses concealed information that would have given the defendant a valid basis to challenge the juror for implied bias. Justice Blackmun's concurrence expressly articulated his understanding that the majority opinion had ***not*** taken that radical and arbitrary step. Both concurrences drew a firm line between actual and implied bias, emphasizing that they are analytically distinct inquiries. And the majority opinion objected to none of this.

Read in light of the concurrences, *McDonough* clearly established that a new trial is required whenever juror dishonesty in *voir dire* conceals information that would have provided a valid basis for any type of challenge "for cause"—including an implied-bias challenge in which proof of specified objective circumstances results in a conclusive presumption of bias, without regard to actual bias.

This Court confirmed this reading of *McDonough* in *Warger v. Shauers*, 574 U.S. 40 (2014), where the Court again articulated the *McDonough* two-part test without mentioning any additional actual-bias requirement. *See id.* at 43–44.[11]

B. Factual background

After a California jury returned a verdict of first-degree murder against petitioner Rickey Scott, his counsel learned that the jury foreperson had lied on the *voir dire* questionnaire, concealing information that would have allowed Scott to show that the juror must be disqualified for "implied bias" under California law. App. C at 7–8, 10 (ER023–024, ER026).

Scott accordingly filed a new-trial motion invoking the rule in *McDonough*.[12] Following a post-trial hearing, the superior court concluded that although the foreperson had failed to honestly answer a material question on *voir dire*, Scott was not entitled to a new trial, as he had failed to prove that the foreperson harbored actual, subjective bias against him. App. D at 26 (SER0230). The court denied Scott's new-trial motion, entered judgment, and sentenced Scott to 86 years to life. App. C at 7 (SER023).

Scott appealed, but the California Court of Appeal affirmed. In a decision that made no mention of either concurrence, the state court reasoned that

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[11] The Ninth Circuit mischaracterized *Warger*'s reaffirmation of the two-part test as dicta. Scott addressed this issue at some length below. *See* Appellee Rickey Leon Scott's Answering Brief, Scott v. Arnold, 962 F.3d 1128 (9th Cir. 2020) (No. 18-16761) (Dkt.14) at pp. 55–58 [hereinafter Scott Answer Br.].

[12] *See* App. C at 1, 7–8 (ER017, ER023–024).

McDonough does not compel a new trial when, under state law, a showing of *implied* bias can be, and is, "rebutted" by a showing that the juror lacked *actual* bias. App. C at 17, 20 (ER033, ER036). Before the state court's unpublished, noncitable decision in this case, no American court, to petitioner's knowledge, ever had held that a finding of *implied* bias, once made, is "rebuttable" by a showing of lack of *actual* bias; indeed, California law treats actual and implied bias as entirely separate inquiries.[13] The California Supreme Court denied review. App. B at 1.

Scott next filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. App. B at 1. Relying in part on the Blackmun concurrence,[14] the district court granted Scott's petition. *Id*. The court rejected the State's contention that *McDonough* requires a showing of actual bias, noting that "none of the cases relied on by [the State] supports the proposition that actual bias is required to warrant a new trial under *McDonough*" and that "[t]he Ninth Circuit does not endorse that view, nor do [other out-of-circuit cases cited by the State] create a circuit split." App. B at 10–11.

In reaching that conclusion, the district court noted that Ninth Circuit precedent had "cited Justice Blackmun's concurrence in *McDonough* for the proposition

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[13] *See, e.g., People v. Ledesma*, 39 Cal. 4th 641, 670 (2006). Scott argued to the Ninth Circuit that the state court's new "rebuttable implied bias" concept could not serve as an adequate and independent state ground for upholding Scott's conviction. *See* Scott Answer Br. at pp. 62–66 & Part III, *infra*. The Ninth Circuit apparently agreed—yet mischaracterized California's implied-bias statute (CAL. CIV. PROC. CODE § 229, reproduced in App. F) as enacting a "rebuttable presumption." App. A at 4.

[14] *See* App. B at 9.

that a movant may 'demonstrate actual bias, *or, in exceptional circumstances, that the facts are such that bias is to be inferred*.'" App. B at p. 9 (quoting *Pope v. Man-Data, Inc.*, 209 F.3d 1161, 1163 (9th Cir. 2000)) (emphasis added by district court).

The State appealed. In a decision that made no mention of either concurrence, the Ninth Circuit reversed the district court's grant of habeas relief on the ground that, for purposes of applying AEDPA, *McDonough* had not "clearly established" the new-trial rule that Scott invoked. App. A at 5–10. To the contrary, the Ninth Circuit found, "*McDonough* leaves several outstanding questions unanswered, and the current case falls into an area where clarity is lacking." *Id.* at 5. The Ninth Circuit opined that it remained "unclear whether and to what extent the United States Supreme Court recognizes distinctions between actual prejudice, implied prejudice, and '*McDonough* prejudice,' and what showings for relief are required in each scenario." *Id.* "Importantly," wrote the Ninth Circuit, "our court and other circuits have highlighted this remaining uncertainty and described *McDonough* as accommodating a prejudice analysis" (by which the court apparently meant "as requiring an actual-bias analysis"). *Id.* at 6; *see* Part IV, *infra*.

Scott filed a petition for rehearing en banc. His petition explained that importing an actual-bias requirement into an implied-bias inquiry would absurdly "require that the defendant, in effect, *prove* prejudice in order to receive *a presumption*

of prejudice."[15] Thus, it was patently unreasonable to read *McDonough* as countenancing a chimeric mashup of the two inquiries.

The petition further pointed out that the panel opinion not only read a nonexistent third (actual-bias) requirement into the majority opinion's two-part test but also "fail[ed] even to mention, let alone to carefully consider, the *McDonough* concurrences[.]"[16] The petition observed that, "[a]s the *McDonough* concurrences recognized, there is no such thing as an implied-bias challenge that 'accommodates a prejudice analysis.'"[17]

The Ninth Circuit denied the rehearing petition without opinion. App. E.

REASONS FOR GRANTING THE WRIT

I. The Circuits are divided on how to treat a concurrence by a Justice who contributed the necessary fifth vote to a majority opinion—a question bearing directly on the interpretation of the *McDonough* rule.

It's astonishing, but true: After more than two centuries, the federal courts still have not settled on a rule for exactly how to treat a concurrence by a Justice who contributed the necessary fifth vote to a majority opinion[18]—a question bearing

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[15] Petition for Rehearing En Banc, Scott v. Arnold, 962 F.3d 1128 (9th Cir. 2020) (No. 18–16761) (Dkt. 38), at 18–19 [hereinafter Reh'g Pet.] (quoting *Burdine v. Johnson*, 262 F.3d 336, 348 (5th Cir. 2001) (en banc)).

[16] Reh'g Pet. at 19.

[17] *Id*. at 18.

[18] Numerous cases have alluded to then-Justice Rehnquist's *McDonough* opinion as a "plurality" opinion. *See, e.g., Fields v. Brown*, 503 F.3d 755, 766 n.5 (9th Cir. 2007) (en banc); *Dyer v. Calderon*, 151 F.3d 970, 991 (9th Cir. 1998) (en banc); *Fitzgerald v. Greene*, 150 F.3d 357, 364 n.3 (4th Cir. 1998); *United States v. Doke*, 171 F.3d 240, 246 (5th Cir. 1999); *United States v. Tucker*, 243 F.3d 499, 508 (8th Cir. 2001); *United States v. Tucker*, 137 F.3d 1016, 1026 (8th Cir. 1998); *see also id.* at

directly on the proper interpretation of the *McDonough* rule. As a result, this case presents a circuit split on a fundamental interpretive issue—a split that the circuit courts themselves have referred to in published opinions.

The starting point for any discussion of this problem is *Marks v. United States*, 430 U.S. 188 (1977). *Marks* considered the problem of plurality opinions, holding that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Id.* at 193. More recently, the Court extended *Marks* to the AEDPA context, writing that, "[w]hen there is no majority opinion," a concurrence that offers "a more limited holding . . . constitutes 'clearly established' law for purposes of" AEDPA. *Panetti v. Quarterman*, 551 U.S. 930, 949 (2007) (citing *Marks*, 430 U.S. at 193).

But *Marks*'s "narrowest opinion" rule was designed for fragmented decisions in which no opinion attracts more than a plurality of the Justices. What about a decision where one opinion does obtain a majority but is accompanied by a concurrence authored by the "linchpin" fifth justice, purporting to interpret the majority opinion?

1026 n.7. But it was in fact a majority opinion, because the three signatories to the Blackmun concurrence joined the majority opinion, not merely the judgment.

This issue was broached—but not answered—30 years ago in a "battle of the footnotes" between Justice Blackmun's concurrence and Justice Scalia's dissent in *McKoy v. North Carolina*, 494 U.S. 433 (1990). In *McKoy*, the majority opinion held that a North Carolina rule, which barred capital juries from considering mitigating circumstances that they hadn't found unanimously, violated the rule laid down two years earlier in *Mills v. Maryland*, 486 U.S. 367 (1988). Justice Blackmun joined the majority but wrote separately to "underscore his conviction" that *Mills* controlled and was correctly decided. *Id.* at 445 (Blackmun, J., concurring). In footnote 3 of his concurrence, he dealt briefly with Justice White's *Mills* concurrence, on which the dissent had placed reliance. Justice Blackmun dismissed the importance of that concurrence on the ground that "the meaning of a majority opinion is to be found within the opinion itself; the gloss that an individual Justice chooses to place upon it is not authoritative." *Id.* at 448 n.3 (Blackmun, J., concurring).

Justice Scalia pushed back in footnote 3 of his dissent, arguing that a Justice who gives the majority opinion its fifth vote *can* write a concurrence that "narrow[s] what the majority holds"—because "the [majority] opinion is *not* a majority opinion except to the extent that it accords with his views." *McKoy*, 494 U.S. 462 n.3 (Scalia J., dissenting) (emphasis in original). Justice Scalia's full argument went as follows:

> [Justice Blackmun's statement] is certainly true where the individual Justice is not needed for the majority. But where he is, it begs the question: the opinion is *not* a majority opinion except to the extent that it accords with his views. What he writes is not a "gloss," but the least common denominator. To be sure, the separate writing cannot

> add to what the majority opinion holds, binding the other four Justices to what they have not said; but it can assuredly narrow what the majority opinion holds, by explaining the more limited interpretation adopted by a necessary member of that majority. If the author of the opinion finds what the "glossator" says inconsistent with his own understanding of the opinion, he may certainly decline, at the outset of the opinion, to show that Justice as joining; and if the "glossator" nonetheless insists upon purporting to join, I suppose the author can explicitly disclaim his company. But I have never heard it asserted that four Justices of the Court have the power to fabricate a majority by binding a fifth to their interpretation of what they say, even though he writes separately to explain his own more narrow understanding.

Id. (Scalia J., dissenting) (emphasis in original).

The footnote debate between Justices Blackmun and Scalia has framed subsequent circuit conflicts over this question. Quoting Justice Scalia's *McKoy* footnote, the Third Circuit opined that "[a] justice's separate opinion 'can assuredly narrow what the majority opinion holds, by explaining the more limited interpretation adopted by that necessary member of the majority.' In that case, the linchpin justice's views are 'the least common de-nominator' necessary to maintain a majority opinion." *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 310–11 (3d Cir. 2013). The Fifth Circuit has adopted the same approach. *See Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007) (reading majority opinion together with concurrence that "provid[ed] specificity to the rule announced by the majority"); *Martin v. Medtronic, Inc.*, 254 F.3d 573, 583 (5th Cir. 2001) (reading majority opinion "through the lens of [a] concurrence").

By contrast, the Seventh and Fourth Circuits have adopted a "formalist approach," holding that the *Marks* rule "does not apply," and that concurrences accordingly lack precedential weight, "where there is a majority opinion." *B.H.*, 725 F.3d at 313 n.17 (criticizing approach that Seventh Circuit took in *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. # 204*, 523 F.3d 668, 673 (7th Cir. 2008) (criticizing in turn approach that Fifth Circuit took in *Ponce*, 508 F.3d at 768)); *United States v. Sterling*, 724 F.3d 482, 496 n.6 (4th Cir. 2013); *see also id.* at 523 (Traxler, C.J., concurring in part and dissenting in part); *but see Conaway v. Polk*, 453 F.3d 567, 587 (4th Cir. 2006) (relying on Blackmun and Brennan concurrences to conclude that "the doctrine of implied bias [is] yet available" in *McDonough* claims).[19]

And the Ninth Circuit, from which this case emanated, has waffled inconsistently between the two approaches when applying the *McDonough* rule, sometimes ignoring the Blackmun concurrence as it did here (*see* App. A) and sometimes relying on it. When it has taken account of the Blackmun concurrence, it has had no difficulty in concluding that the *McDonough* rule applies to cases in which juror dishonesty in *voir dire* deprives the defendant of a challenge for implied bias. *See, e.g.,*

[19] *See also United States v. Duvall*, 740 F.3d 604, 610 (D.C. Cir. 2013) (Rogers, J., concurring in denial of petition for rehearing en banc) ("Justices who join the majority may of course express additional thoughts in a concurrence, but concurrences do not bind lower courts in cases where there is a majority opinion."); *cf. Entergy Nuclear Fitzpatrick, LLC v. United States*, 93 Fed. Cl. 739, 745 (2010) ("The interpretation of the [Federal Circuit's] majority opinion presented by the concurrence is not binding on this court. . . . This court has chosen to follow analyses presented in concurring opinions of the Federal Circuit when the court finds that opinion persuasive."), *adhered to on denial of reconsideration*, 101 Fed. Cl. 464 (2011), *aff'd*, 711 F.3d 1382 (Fed. Cir. 2013).

Pope, 209 F.3d at 1163; *Dyer*, 151 F.3d at 985; *Coughlin v. Tailhook Ass'n*, 112 F.3d 1052, 1062 (9th Cir. 1997).

If review is granted here, Scott will urge the Court to adopt Justice Scalia's approach (and that of the Third and Fifth Circuits) to the limited extent that it would afford precedential weight to the concurrences of "linchpin justices" in general, and to Justice Blackmun's *McDonough* concurrence specifically. But that is only half the story, because there is the further question of whether, per *Marks* and the Scalia footnote, precedential weight should be afforded only to concurrences that are in some sense "narrower" than the other opinions in the case.

Good reasons exist to reject the narrowest-opinion rule in this specific context. To begin with, phrases like "the narrowest grounds" (*Marks*) and "a more limited holding" (*Panetti*) are somewhat Delphic and have in fact spawned several distinct variants of the *Marks* rule. *See generally* Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1942, 1976–93 (2019) (distinguishing among the "median opinion," "logical subset," "shared agreement," and "all opinions" versions of *Marks*). This Court has acknowledged that *Marks* is "more easily stated than applied" and that in some cases it is "not useful to pursue the *Marks* inquiry to the utmost logical possibility when it has so obviously baffled and divided the lower courts that have considered it." *Nichols v. United States*, 511 U.S. 738, 745–46 (1994); *see also*

Grutter v. Bollinger, 539 U.S. 306, 325 (2003).[20] Courts and commentators alike have concluded that *Marks* "is workable—one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions." *King v. Palmer*, 950 F.2d 771, 781–82 (D.C. Cir. 1991) (en banc); *see also United States v. Davis*, 825 F.3d 1014, 1020 (9th Cir. 2016) (en banc); Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under the Antiterrorism and Effective Death Penalty Act*, 54 CATH. U. L. REV. 747, 815 (2005) ("In some situations, . . . the [*Marks*] doctrine cannot be applied logically").

The fact that no federal case interpreting *McDonough* even mentions the narrowest-opinion rule sends a strong signal that courts have "found [that] framework inapplicable" to the configuration of opinions in *McDonough*[21]—again, with good reason, as it is a poor fit for the case. The Blackmun concurrence interpreted the majority opinion, clarifying that it extends to deprivations of either type of for-cause challenge—those based on actual bias and those based on implied bias. The majority opinion took no issue with that interpretation. To paraphrase Justice Scalia, if the author of the majority opinion had found what Justice Blackmun said to be "inconsistent with his own understanding of the opinion," he certainly could have

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[20] Recently, this Court was prepared to revisit *Marks* in *Hughes v. United States*, 138 S.Ct. 1765 (2018); but it never reached the issue because it resolved the underlying sentencing-law question instead. *See id.* at 1772.

[21] *United States v. Johnson*, 467 F.3d 56, 66 (1st Cir. 2006).

declined, at the outset of the opinion, to list that Justice as joining in that opinion; and if Justice Blackmun "nonetheless had insisted upon purporting to join," the author could have "explicitly disclaim[ed] his company." *McKoy*, 494 U.S. 462 n.3 (Scalia J., dissenting). But he didn't. And the Brennan concurrence likewise acknowledged the availability of implied-bias challenges, bringing to five the number of Justices who made that point explicitly in *McDonough*.

It appears, therefore, that the Justices *unanimously* viewed *McDonough*'s new-trial rule as applying to cases in which juror dishonesty in *voir dire* deprived the defendant of an implied-bias challenge. A legal rule doesn't get much more "clearly established" than that. Under these circumstances, no danger exists that Justice Blackmun's separate writing might "add to what the majority opinion holds, binding the other . . . Justices to what they have not said." *McKoy*, 494 U.S. 462 n.3 (Scalia J., dissenting). Rather, every other Justice either said what Justice Blackmun did on the "implied bias" issue expressly, or at least was content not to contradict him.

Under these circumstances, it makes no sense to mount a futile and unilluminating search for the "narrowest" or "most limited" opinion. The better approach is to regard the concurrence of the "linchpin" fifth Justice as an accurate and thus controlling interpretation of the majority opinion's holding, unless the majority opinion objects to it. Here, the majority raised no such objection, and Justice Blackmun's view that the *McDonough* remedy extends to the deprivation of all for-cause

challenges, including ones based on implied bias, represents the clear and easily discerned holding of the case.

Accordingly, this case presents the Court with an opportunity to resolve an explicit circuit split, recognized in decisions by the circuits themselves, on a fundamental interpretive issue that can be easily resolved by the adoption of a common-sense rule. The petition therefore should be granted.

II. Resolving the questions presented here will furnish lower courts with important guidance on how to discern holdings in a broad range of cases, both criminal and civil.

"The Constitution guarantees both criminal and civil litigants a right to an impartial jury. And [the Supreme Court] ha[s] made clear that *voir dire* can be an essential means of protecting this right." *Warger*, 574 U.S. at 50. But nothing is quite so corrosive of *voir dire* as juror dishonesty in answering a material question.

Implied-bias challenges, in particular, play a key role in maintaining the effectiveness of *voir dire*—arguably a far more important role than actual-bias challenges, given the intractable difficulties involved in proving actual, subjective bias. "Determining whether a juror is [actually] biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it." *Smith v. Phillips*, 455 U.S. 209, 221–22 (1982) (O'Connor, J., concurring). Under the implied-bias doctrine, therefore, bias is conclusively presumed when objective circumstances demand it, as when the juror is "an actual employee of the prosecuting agency," "a close relative of

one of the participants in the trial or the criminal transaction," or "a witness," *id.* at 222; or even where the juror's willingness to lie to get on the jury suggests an "excess of zeal" that could introduce an "unpredictable factor into the jury room." *Dyer*, 151 F.3d at 982. Under the California implied-bias statute involved in this case, the state legislature created an irrebuttable presumption that such unpredictable factors are introduced into the jury room whenever the juror "stood within one year previous to the filing of the complaint . . . in the relation of attorney and client . . . with the attorney for either party," Cal. Civ. Proc. Code § 229(b). That was undisputedly the situation here. *See* App. B at 5.

But the effect of the Ninth Circuit's published decision in this case is to deny defendants habeas relief when they may need it most—when juror dishonesty has deprived them of an implied-bias challenge, one of the most powerful tools for ensuring juror impartiality. And the Ninth Circuit's refusal even to consider the substance and precedential force of the *McDonough* concurrences increases the likelihood that other courts will commit the same error, in that circuit and beyond. Moreover, resolving the first question presented will provide the lower courts with guidance in every case, criminal or civil, that requires them to discern the holding of a precedent featuring both a majority opinion and a concurrence by the "linchpin" fifth Justice.

Accordingly, Scott's petition presents questions of importance not only to the fairness of criminal trials but also to the interpretation of decisions in every legal realm. The petition should be granted.

III. This case is an excellent vehicle for deciding the questions presented.

This case provides the Court with an excellent vehicle for deciding the questions presented. Those questions are squarely presented and cannot be avoided, as there is no way to decide Scott's claim without evaluating the scope of *McDonough*'s holding—i.e., whether that holding encompasses all cases involving the loss of a challenge for cause, or only those involving a for-cause challenge based on actual bias; and there is no way to perform that evaluation without considering the content and precedential force of the concurring opinions. *See* Part I, *infra*.

A further "good vehicle" factor is that the result reached by the state court and ultimately ratified by the Ninth Circuit cannot be justified on any adequate and independent state ground. *See generally Coleman v. Thompson*, 501 U.S. 722, 729 (1991); *James v. Kentucky*, 466 U.S. 341, 348–49 (2011). The only potential candidate for a state-law ground would be the state court's notion that, under California's implied-bias statute (Code of Civil Procedure § 229(b)), Scott's showing of implied bias could be, and was, rebutted by a showing of lack of actual bias. But "rebuttable implied bias" is, to put it colloquially, "not a thing"—which is probably why the state court, having engineered that concept for use in this case alone, declined to publish its decision, thereby rendering it incapable of being cited any California

court. *See* Cal. R. Ct. 8.1116(a); App. C at 1. Indeed, no citable California case ever has construed any clause of § 229(b) as providing that implied bias, once established, is rebuttable; nor has any federal court endorsed that notion. That ground is of decision is therefore not "adequate."[22]

And contrary to the Ninth Circuit's apparent assumption, the questions presented here are not clouded by any debate over whether the underlying implied-bias doctrine itself is clearly established in federal law.[23] That debate is irrelevant because here, Scott's implied-bias challenge would have been founded upon California's implied-bias statute, not on federal implied-bias doctrines. *See* CAL. CIV. PROC. CODE § 229(b); *People v. Ledesma*, 39 Cal. 4th 641, 670 (2006). In any event, Scott's claim is not an implied-bias claim—it is a *McDonough* claim premised on *the loss of* an implied-bias challenge, just as a legal-malpractice claim alleging that a negligent attorney caused the loss of a personal-injury claim is not, itself, a personal-injury claim.

This case is therefore an excellent vehicle for deciding the questions presented, and Scott's petition should be granted.

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[22] The adequacy requirement "applies [with equal force] whether the state law ground is substantive or procedural." *Coleman*, 501 U.S. at 729; *see also Walker v. Martin*, 562 U.S. 307, 315 (2011).

[23] *See* App. A at 6 (quoting *Hedlund v. Ryan*, 854 F.3d 557, 575 (9th Cir. 2017), for its statement that "[t]here is no clearly established federal law regarding the issue of implied bias.").

IV. Because it ignored the *McDonough* concurrences, the Ninth Circuit erroneously saw legal uncertainty where none exists.

The Ninth Circuit cited two main reasons for finding *McDonough* too ambiguous to "clearly establish," for AEDPA purposes, the new-trial right that Scott had invoked. Both reasons were erroneous and conflicted with *McDonough* and *Warger* (not to mention the Ninth Circuit's own en banc decision in *Dyer*).

1. The Ninth Circuit reversed the district court's habeas grant on the ground that it is unclear whether *McDonough* "accommodates a prejudice analysis" (meaning "requires an actual-bias analysis"). App. A at 4. But that holding provided the wrong answer to the wrong question. The question was never whether *McDonough* ever "*accommodates*" an actual-bias analysis. Of course it does—when the juror's dishonesty deprived the defense of a challenge for *actual* bias.

The real question is whether *McDonough*'s clear and explicit two-part test reasonably can be read to include an implicit third prong *requiring* an actual-bias analysis in *all* cases—even cases like this one, in which the juror's dishonesty deprived the defense of a challenge for *implied* bias.

That is what the State argued here; but that contention was founded upon an oxymoronic premise: As the *McDonough* concurrences recognized, there is *no such thing* as an implied-bias challenge that "accommodates" an actual-bias analysis. The two doctrines involve distinct inquiries that exclude each other *by definition.* Actual bias turns on evidence of the juror's subjective state of mind, while implied bias is a presumption arising conclusively from proof of objective circumstances

existing *outside* the juror's mind. Moreover, adding an actual-bias requirement to an implied-bias inquiry would absurdly "require that the defendant, in effect, *prove* prejudice in order to receive *a presumption of* prejudice." *Burdine v. Johnson*, 262 F.3d 336, 348 (5th Cir. 2001) (en banc). So it was patently unreasonable to read *McDonough* as countenancing a chimeric mashup of the two inquiries.

The Ninth Circuit not only read a nonexistent third requirement into the majority opinion's two-part test but also failed even to mention, let alone to carefully consider, the *McDonough* concurrences, which discussed actual and implied bias explicitly and drew clear distinctions between them. Indeed, the Ninth Circuit barely discussed the language of *any* of *McDonough*'s three opinions—a striking omission given the panel's core holding that *McDonough* is too ambiguous to clearly establish anything. The Ninth Circuit's own en banc decision in *Dyer*, by contrast, relied on the concurrences to discern *McDonough*'s true holding. *See Dyer*, 151 F.3d at 981–82, 985.

2. According to the Ninth Circuit, "*McDonough* itself rejected a challenge based on a lost opportunity to exercise a peremptory strike and announced a new test regarding for-cause challenges without applying that test. *McDonough*, therefore, did not explain if, or demonstrate through application whether, it was establishing a simple binary test or a test that accommodates a prejudice analysis." App. A at 6.

But it is simply wrong to assert that *McDonough* did not apply its own two-part test to the facts before it. Greenwood's juror-bias claim flunked the first prong of the *McDonough* test because the juror's misstatement was not dishonest, 464 U.S. at 554–55, and flunked the second prong because Greenwood claimed only the loss of a *peremptory* challenge—not the loss of a "*for cause*" challenge that implicated "a juror's impartiality" and whose loss therefore could "truly be said to affect the fairness of [the] trial." *Id*. at 555–56. Just because the facts of the case didn't *satisfy* the test's prongs doesn't mean that the test wasn't *applied*. Quite the opposite, in fact.

Thus, the Ninth Circuit's decision was erroneous and Scott's petition should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICKEY LEON SCOTT, *Petitioner-Appellee*, v. ERIC ARNOLD, Warden, of California State Prison, Solano, *Respondent-Appellant.*	No. 18-16761 D.C. No. 4:16-cv-06584-JST OPINION

Appeal from the United States District Court
for the Northern District of California
Jon S. Tigar, District Judge, Presiding

Argued and Submitted October 25, 2019
San Francisco, California

Filed June 22, 2020

Before: Michael J. Melloy,* Jay S. Bybee,
and N. Randy Smith, Circuit Judges.

Opinion by Judge Melloy

* The Honorable Michael J. Melloy, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

SUMMARY[**]

Habeas Corpus

The panel reversed the district court's judgment granting Rickey Leon Scott's habeas corpus petition in a case in which Scott, who was convicted of first-degree murder, moved for a new trial based on his discovery that a juror had made a false representation during *voir dire*.

The trial court denied the motion, and the California Court of Appeal affirmed, holding that *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), which permits a new trial where a juror's lies during *voir dire* hide a fact that would have permitted the juror to be stricken for cause, accommodates a prejudice analysis. The district court held that *McDonough* could not accommodate a prejudice analysis.

Applying AEDPA review, the panel held that it was not unreasonable for the state court to conclude that *McDonough* accommodates a prejudice analysis, as *McDonough* did not explain if, or demonstrate through application whether, it was establishing a simple binary test or a test that accommodates a prejudice analysis. The panel observed that fairminded disagreement exists as to the application of *McDonough*, and therefore concluded that the state court did not reach a decision contrary to clearly established Supreme Court precedent.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

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Steven A. Hirsch (argued), Steven P. Ragland, and Neha Mehta, Keker Van Nest & Peters LLP, San Francisco, California, for Petitioner-Appellee.

OPINION

MELLOY, Circuit Judge:

After Petitioner-Appellee Rickey Leon Scott was convicted of first-degree murder, he moved for a new trial based on his discovery that a juror had made a false representation during *voir dire*. The state trial court held an evidentiary hearing and denied his motion for a new trial, finding the juror had made a false representation but there had been no prejudice. The trial court also found the Supreme Court's opinion in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), did not require the trial court to grant Scott a new trial.

The California Court of Appeal affirmed. *People v. Scott*, No. A139921, 2015 WL 4505784 (Cal. Ct. App. July 24, 2015). The Court of Appeal noted that *McDonough* permits a new trial where a juror's lies during *voir dire* hide a fact that would have permitted the juror to be stricken for cause. *See id.* at *9. However, focusing on *McDonough*'s

rationale that "only those reasons that affect a juror's impartiality can truly be said to affect the fairness of the trial," *see* 464 U.S. at 556, the Court of Appeal interpreted *McDonough* as accommodating a prejudice analysis and as not mandating a new trial where the presumption of prejudice is rebutted.

In the present case, the juror's false representation hid the factual basis of a possible for-cause strike under a state statute that creates a rebuttable presumption of implied bias. *See* Cal. Civ. Proc. Code § 229(b) (rebuttable presumption arises if a prospective juror was represented by a party's attorney less than one year prior to the filing of the complaint in the case being tried). The prospective juror previously had been represented in a misdemeanor case by an attorney from the same public defender's office as Scott's attorney, giving rise to the statutory presumption of bias. The Court of Appeal found the presumption rebutted primarily because the prospective juror had not recognized an associational connection between his own attorney and Scott's public defender. *Scott*, 2015 WL 4505784, at *8. The Court of Appeal also emphasized that, even if the prospective juror had made a factual connection between the two attorneys, it was not clear how the fact of prior representation might have influenced the prospective juror's attitude towards Scott's case. *See id*; *see also id.* at *11 ("The bias that is implied statutorily under state law by virtue of a recent attorney-client relationship is not comparable to the extreme and extraordinary situations in which bias is presumed under federal law and may not be rebutted.").

The California Supreme Court denied further review, and Scott filed for federal habeas relief pursuant to 28 U.S.C. § 2254. The district court granted relief, holding the state court misapplied *McDonough*. The district court held that

McDonough could not accommodate a prejudice analysis and, instead, created a simple two-part test asking only if: (1) the prospective juror had lied; and (2) the lie concealed the basis of a for-cause challenge.

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), habeas relief is permitted only if the state court's ruling "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "This means that a state court's ruling must be 'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Shoop v. Hill*, 139 S. Ct. 504, 506 (2019) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). "[C]learly established Federal law, as determined by the Supreme Court of the United States" means "the holdings, as opposed to the dicta," of Supreme Court decisions "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000). Therefore, a "federal court may not overrule a state court for simply holding a view different from its own, when [Supreme Court] precedent . . . is, at best, ambiguous." *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003).

It was not unreasonable for the state court to conclude that *McDonough* accommodates a prejudice analysis. *McDonough* leaves several outstanding questions unanswered, and the current case falls into an area where clarity is lacking. It remains unclear whether and to what extent the United States Supreme Court recognizes distinctions between actual prejudice, implied prejudice, and "*McDonough* prejudice," and what showings for relief are required in each scenario. *Cf. Hedlund v. Ryan*, 854 F.3d

557, 575 (9th Cir. 2017) ("There is no clearly established federal law regarding the issue of implied bias."). *McDonough* itself rejected a challenge based on a lost opportunity to exercise a peremptory strike and announced a new test regarding for-cause challenges without applying that test. 464 U.S. at 555–56. *McDonough*, therefore, did not explain if, or demonstrate through application whether, it was establishing a simple binary test or a test that accommodates a prejudice analysis.

Importantly, since *McDonough*, our court and other circuits have highlighted this remaining uncertainty and described *McDonough* as accommodating a prejudice analysis. *See Faria v. Harleysville Worcester Ins. Co.*, 852 F.3d 87, 96 (1st Cir. 2017) ("The binary test set forth in *McDonough* is not a be-all-end-all test to be viewed without context. Rather, the fundamental purpose of the test is to answer the crucial, overarching trial inquiry: was the juror biased and, if so, did that bias affect the fairness of the trial?"); *Conaway v. Polk*, 453 F.3d 567, 582–89 (4th Cir. 2006) ("Even where, as here, the two parts of the *McDonough* test have been satisfied, a juror's bias is only established under *McDonough* if the juror's 'motives for concealing information' or the 'reasons that affect [the] juror's impartiality can truly be said to affect the fairness of [the] trial.'" (alterations in original) (quoting *McDonough*, 464 U.S. at 556)); *Pope v. Man-Data, Inc.*, 209 F.3d 1161, 1164 (9th Cir. 2000) ("Under *McDonough*, a new trial is warranted only if the district court finds that the juror's voir dire responses were dishonest, rather than merely mistaken, and that her reasons for making the dishonest response call her impartiality into question."); *Dyer v. Calderon*, 151 F.3d 970, 973 (9th Cir. 1998) (en banc) (describing *McDonough* as instructing courts to "determine whether . . . answers were dishonest and, if so, whether this undermined the

impartiality of [the] jury"). Simply put, "fairminded disagreement" currently exists as to the application of *McDonough*, and the state court did not reach a decision "contrary to" clearly established Supreme Court precedent. *Harrington*, 562 U.S. at 100, 103.

To the extent Scott argues dicta in a more recent Supreme Court case eliminates uncertainty surrounding *McDonough*, *see Warger v. Shauers*, 135 S. Ct. 521, 525 (2014) (holding that juror-deliberation evidence could not be used to attack a verdict but stating in dicta that, "[i]f a juror was dishonest during *voir dire* and an honest response would have provided a valid basis to challenge that juror for cause, the verdict must be invalidated"), we emphasize that clearly established Supreme Court precedent for purposes of 28 U.S.C. § 2254 cannot be found in dicta, *Carey v. Musladin*, 549 U.S. 70, 74 (2006) ("[C]learly established Federal law in § 2254(d)(1) refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." (citation omitted)).

Although we conclude Scott is not entitled to habeas relief under AEDPA's strict standards, we write further to emphasize two points. First, nothing in today's opinion should be construed as suggesting that we have found clarity in our circuit's treatment of *McDonough*. And second, even if such clarity existed at the circuit level, clearly established federal law for habeas purposes cannot be found in circuit courts' expansion or interpretation of Supreme Court precedent. *Lopez v. Smith*, 574 U.S. 1, 7 (2014) (per curiam). Rather, clarity must exist in the Supreme Court's own rulings. *See id.* ("[C]ircuit precedent cannot 'refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced.'" (quoting *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per

curiam))). As such, we may ask whether our own court has already determined that an issue was clearly established by the Supreme Court, but we "may not canvass circuit decisions to determine whether a particular rule of law is so widely accepted . . . that it would, if presented to [the] Court, be accepted as correct." *Marshall*, 569 U.S. at 64.

Looking at our own treatment of *McDonough*, we cite *Pope*, 209 F.3d at 1164, and *Dyer*, 151 F.3d at 973, above, for the emphasis they seemingly place on *McDonough*'s contested passage regarding dishonesty that demonstrates impartiality and the arguable need for a showing of prejudice. Earlier, in *Coughlin v. Tailhook Association*, we applied *McDonough* to determine whether a juror's dishonesty during *voir dire* required a new trial. 112 F.3d 1052, 1059–62 (9th Cir. 1997). Although we did not reference an impartiality or prejudice requirement under *McDonough*, we arguably applied a prejudice analysis in reaching our ultimate holding. *Id.* at 1062 ("Thus, the district judge did not clearly err when he concluded that [the juror] did not fail to answer honestly *material* questions on voir dire. We conclude that [the juror's] dishonesty, if any, was limited to collateral matters that had no impact on his ability to serve as a juror in this proceeding.").

More recently, in *Elmore v. Sinclair*, we initially described *McDonough* as requiring two showings: (1) "[the juror] failed to honestly answer a material question on voir dire" and (2) "a correct response would have provided a basis for a challenge for cause." 799 F.3d 1238, 1253 (9th Cir. 2015). Immediately after identifying these two showings, however, we described a prejudice analysis of sorts, indicating that the appropriate remedy following such a showing would be a hearing on juror bias. *Id.* ("If [the habeas petitioner] is able to show juror bias and lack of a fair

trial, then the appropriate remedy is a hearing on juror bias." (quoting *Smith v. Phillips*, 455 U.S. 209, 215 (1982))). In any event, we denied habeas relief on a *McDonough* claim in *Elmore* because we concluded a state supreme court had reasonably interpreted the juror's responses as not dishonest. *Id.* ("This suggests that he believed his responses on the questionnaire to be accurate. Accordingly, we conclude that the Washington Supreme Court was not unreasonable in dismissing [the habeas petitioner's] claims alleging juror bias.").

These cases appear to stand in contrast with our discussions in *Fields v. Brown*, 503 F.3d 755, 766–72 (9th Cir. 2007) (en banc) and *United States v. Olsen*, 704 F.3d 1172, 1189, 1195–96 (9th Cir. 2013), where we described actual bias, implied bias and *McDonough* bias as three separate concepts without describing a prejudice showing under *McDonough.* In *Fields*, we denied habeas relief under a pre-AEDPA analysis, and in *Olsen* we rejected arguments in a direct criminal appeal. In each case, our rejection of the *McDonough* claim turned on the absence of a showing of dishonesty on the part of a juror. *See Fields*, 503 F.3d at 767; *Olsen*, 704 F.3d at 1196. Because we found no dishonesty, neither case required us to make a determination as to whether *McDonough* accommodated (or required) a prejudice analysis.

Then, in *United States v. Brugnara*, we cited *Olsen*, and stated, "A defendant must make two showings to obtain a new trial based on *McDonough* bias: first, that the juror in question 'failed to answer honestly a material question on *voir dire*,' and second, 'that a correct response would have provided a valid basis for a challenge for cause.'" 856 F.3d 1198, 1211 (9th Cir. 2017) (quoting *McDonough*, 464 U.S. at 556). In *Brugnara*, however, we referenced

McDonough's contested passage, noting immediately after describing the two-part test that, "[o]nly concealment for 'reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.'" *Id.* at 1211–12 (quoting *McDonough*, 464 U.S. at 556). Ultimately, we denied relief in *Brugnara* because, although we assumed a juror had been dishonest, there had been no showing that the dishonesty concealed a valid for-cause challenge. *Id.* at 1212.

"Because the Supreme Court has not given explicit direction" as to whether *McDonough* requires a criminal defendant to show prejudice to obtain a new trial, "and because the state court's interpretation is consistent with many other courts' interpretations, we cannot hold that the state court's interpretation was contrary to, or involved an unreasonable application of, Supreme Court precedent." *Kessee v. Mendoza-Powers*, 574 F.3d 675, 679 (9th Cir. 2009). Petitioner is therefore not entitled to habeas relief.

We **REVERSE** the judgment of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

RICKEY LEON SCOTT,

Plaintiff,

v.

ERIC ARNOLD,

Defendant.

Case No. 16-cv-06584-JST

ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

Re: ECF No. 1

Before the Court is Petitioner Rickey Leon Scott's petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2554 to challenge the validity of his state criminal conviction. ECF No. 1. The Court will grant the petition.[1]

I. PROCEDURAL HISTORY

On April 12, 2013, a San Francisco jury convicted Scott of first-degree murder, finding that he had used a deadly weapon in the commission of the offense. ECF No. 36-2 at 132. On September 27, 2013, the trial court denied Scott's motion for a new trial and sentenced him to 86 years to life, with the possibility of parole, under California's Three Strikes law, Cal. Penal Code § 667(e)(2)(A). *Id.* at 579-81. On July 24, 2015, the California Court of Appeal affirmed Scott's conviction in an unpublished opinion. *People v. Scott*, No. A139921, 2015 WL 4505784 (Cal. Ct. App. July 24, 2015). The California Supreme Court denied review on November 10, 2015. ECF No. 36-10 at 535.

Scott's pro se habeas state habeas petition, filed during the pendency of his appeal, was summarily denied by the California Court of Appeal on October 16, 2014. *Id.* at 588. He filed

[1] Petitioner's request for oral argument, ECF No. 46, is denied as moot.

two pro se habeas petitions before the California Supreme Court. The first of these was withdrawn at Scott's request on January 27, 2015. *Id.* at 590. The second was stricken for lack of jurisdiction on December 3, 2015. *Id.* at 659.

On March 22, 2016, Scott filed a pro se habeas petition in this Court pursuant to 28 U.S.C. § 2254. *Scott v. Arnold*, 16-cv-01391-JST, ECF No. 1. On November 14, 2016, pro bono counsel filed a second federal habeas petition on Scott's behalf, without knowledge of the first. ECF No. 1; ECF No. 23 at 2. On October 2, 2017, this Court construed the second petition as a motion for leave to amend, granted leave to amend, and deemed the second petition as an amendment to the first. ECF No. 30. Scott contends that he is entitled to a new trial under *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), and because the jury foreperson was actually biased against him.

II. FACTUAL BACKGROUND

The following summary describing the factual basis for Scott's claims is taken from the California Court of Appeal's opinion:[2]

> The factual basis for the juror misconduct claim was that Juror No. 8, the foreperson, failed to disclose during voir dire that he had suffered a misdemeanor conviction in 2009 and was unhappy with his representation by his deputy public defender, who worked for the same office as appellant's trial counsel. The declarations, testimony and exhibits presented in support and opposition of the motion for new trial on this ground established the following:
>
> Juror No. 8 was convicted on July 22, 2009 of a misdemeanor count of making a criminal threat under Penal Code section 422 following a jury trial at which he was represented by deputy public defender Emily Dahm of the public defender's office in San Francisco. The charges arose from an incident in which Juror No. 8 had threatened a parking control officer while she was issuing him a citation. At the sentencing hearing held on September 25, 2009, Juror No. 8 was placed on probation and ordered to serve five days in county jail. Dahm filed a notice of appeal on Juror No. 8's behalf, and private attorney Marsanne Weese was appointed to represent him in the appellate division of the superior court. Weese filed a brief stating she could find no arguable issues on appeal and asking the appellate

[2] The Court has independently reviewed the record as required by AEDPA. *Nasby v. Daniel*, 853 F.3d 1049, 1052-54 (9th Cir. 2017). Based on this review, the Court finds that the state court's summary of facts is supported by the record, unless otherwise indicated in this order. A full recitation of the facts underlying Scott's conviction can be found in the California Court of Appeal's opinion at *Scott*, 2015 WL 4505784, at *1-4.

division to independently review the record under *People v. Wende* (1979) 25 Cal.3d 436, and the appellate division affirmed the judgment in an opinion filed March 28, 2011.

On May 2, 2011, Dahm appeared on behalf of Juror No. 8 in superior court, at which time the remittitur was "spread upon the minutes," that is, read into the record. Juror No. 8 was not present for this proceeding. He had not communicated with Dahm since his sentencing hearing in 2009 and was unaware of his appeal, the identity of his appointed counsel on appeal, or of the hearing at which the remittitur was spread. Juror No. 8 believed he had been wrongfully convicted and was highly dissatisfied with the representation provided by Dahm.

Juror No. 8 was called for jury service and assigned to the panel in appellant's case. Appellant was represented at trial by Jeff Adachi, the elected Public Defender of the City and County of San Francisco. Before voir dire began on March 18, 2013, the jurors completed a written questionnaire. Question No. 24 asked, "Have you, a family member, or a close friend ever been investigated, arrested, charged with, or convicted of any crime?" Juror No. 8 responded no. Question No. 27 asked, "What are your opinions, if any, of prosecutors and/or criminal defense attorneys?" Juror No. 8 wrote, "NA." Question No. 38 asked, "The judge will instruct you as follows: Do not let bias, sympathy, prejudice or public opinion influence your decision. You must reach your verdict without any consideration of punishment. Is there any reason you would be unable to comply with this order?" Juror No. 8 answered no. Question No. 61 asked, "Is there any matter not covered in this questionnaire that you think the attorneys or court should know when considering you as a juror in this case?" and "Is there any other reason why you might not be able to be an impartial judge of the facts for both the prosecution and defense in this case?" Juror No. 8 responded no to both parts of the question. He also indicated he did not know the prosecutor or "[d]efense lawyer and Public Defender Jeff Adachi." During voir dire itself, Adachi asked the prospective jurors whether anyone had negative feelings about defense attorneys, and Juror No. 8 did not raise his hand or otherwise reply. On March 21, 2013, the jury and six alternate jurors were impaneled.

On April 12, 2013, the day of the verdict in appellant's case, Dahm was in the courthouse on another matter and ran into Juror No. 8 in the hallway. Although Juror No. 8 did not recognize her at first (she had been pregnant and had longer hair when she represented him in 2009), they had a brief and friendly conversation. Juror No. 8 told Dahm he was going to go do his civic duty, which led Dahm to believe he had been called for jury duty, but she saw him later in the day outside the courtroom where appellant's case was being tried and learned at that time he was on appellant's jury. Dahm knew Adachi was trying the case and told Juror No. 8 she could not talk to him and asked him to contact her when the case was over. She emailed Adachi to advise him that a former client was on his jury, and Adachi reviewed Juror No. 8's questionnaire during the following week, after the jury had returned its verdict. Had Adachi known of Juror No. 8's prior relationship with his office, he would

> have exercised a challenge and removed him from the jury panel.
>
> Juror No. 8 testified at the hearing on the motion for new trial under a grant of immunity and while represented by counsel. He explained that he had not disclosed his 2009 conviction on the jury questionnaire because over three years had passed and he was trying to forget about it. He felt he could be fair and impartial when he was selected to be a juror in appellant's case, though he fretted extensively over the possibility that an unconscious bias based on his experience with Dahm might have affected his jury service. He was not trying to cheat appellant out of a fair trial and he did not recall holding any of his negative feelings about Dahm against appellant. He did not have any negative feelings about appellant or Adachi, and he did not realize Adachi was from the same office as Dahm. He also did not realize that the prosecutor in appellant's trial was from the same office as the prosecutor in his misdemeanor case. Juror No. 8's daughter, who had witnessed her father's arrest in 2009, testified that he did not discuss the incident leading to his conviction very often because it was upsetting to his wife, but that he had alluded to it several times during 2012. Though her father sometimes told small lies and exaggerated things, she believed he was an honest person and would not vote to convict somebody else simply because he believed he himself had been wrongfully arrested and convicted.

Scott, 2015 WL 4505784, at *5-6.

At the July 16, 2013 hearing, Juror No. 8 testified that his feelings that he was wrongfully convicted and that he received inadequate representation from the public defender's office "were still there" when he filled out the written jury questionnaire. ECF No. 36-9 at 321-22. He acknowledged that he should have answered truthfully about his conviction. *Id.* at 321.

The California Court of Appeal accurately summarized the California statutes relevant to Scott's claim that Juror No. 8 should have been stricken for cause:

> Under California law, a juror may be challenged for cause for one of the following reasons: "(A) General disqualification—that the juror is disqualified from serving in the action on trial. [¶] (B) Implied bias—as, when the existence of the facts as ascertained, in judgment of law disqualifies the juror. [¶] (C) Actual bias—the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (Code Civ. Proc., § 225, subd. (b)(1)(A)-(C).) Code of Civil Procedure section 229 provides in relevant part: "A challenge for implied bias may be taken for one or more of the following causes, and for no other: [¶] . . . [¶] (b) . . . having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party."

Scott, 2015 WL 4505784, at *8 (alterations in original).

The trial court found that the "questions presented in the questionnaire were relevant and unambiguous," that Juror No. 8 "had sufficient knowledge of the information to respond," and that the juror's answer to Question No. 24 "was false." ECF No. 36-2 at 548. However, it found that Scott could not have challenged the juror for cause because California Code of Civil Procedure section 229(b) "[did] not apply to the relationship between Juror 8 and Scott's counsel." *Id.* at 555. The trial court further concluded that, even if section 229(b) did apply, *McDonough* would not require a new trial because the court did "not find any evidence that Juror 8 harbored bias or prejudice against Scott, his attorney or, for that matter, against the People or the Office of District Attorney, which prosecuted him in 2009." *Id.* at 559.

The California Court of Appeal noted the parties' agreement that "Juror No. 8 committed misconduct when he did not reveal his 2009 misdemeanor conviction on his questionnaire." *Scott*, 2015 WL 4505784, at *7. The appellate court disagreed with the trial court and found that Scott's counsel "had an attorney-client relationship with Juror No. 8 in the 2009 misdemeanor case," and the court "assume[d] that attorney-client relationship still existed 'within one year previous to the filing of the complaint' in [Scott's] case, as required for Code of Civil Procedure section 229 subdivision (b) to apply," based on Dahm's May 2, 2011 appearance on Juror No. 8's behalf. *Id.* at *9; *see also id.* at *9 n.6 (observing that the complaint against Scott was filed on February 9, 2012). Nonetheless, the court affirmed the trial court's denial of Scott's *McDonough* claim. It first observed that *McDonough* did "not directly apply to a California criminal trial because it involved an implementation of a rule of federal civil procedure, rather than an interpretation of the federal Constitution." *Id.* at *9. It then concluded that, even if *McDonough* did apply, "and that [Scott's] trial counsel would have been entitled to excuse Juror No. 8 for cause if the prior representation by the public defender had been disclosed during voir dire, it does not follow that a new trial should be granted when the presumption of prejudice can be rebutted." *Id.* Based on its review of the record, the court found that "[a]ny bias implied under Code of Civil Procedure section 229, subdivision (b) was rebutted" because "there is no substantial likelihood Juror No. 8 was actually biased." *Id.* at *8, *11.

III. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a district court may entertain a petition for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). The court may not grant a petition challenging a state conviction or sentence on the basis of a claim that was reviewed on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

A state court decision is "contrary to" clearly established Supreme Court precedent if it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). A decision involves an "unreasonable application" of law if it "identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 413. "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

Section 2254(d)(1) restricts the source of clearly established law to the Supreme Court's jurisprudence. "[C]learly established Federal law, as determined by the Supreme Court of the United States" refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412. "A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from [the Supreme] Court is, at best, ambiguous." *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003).

The district court reviews the "last reasoned decision" of the state court. *Ylst v.*

Nunnemaker, 501 U.S. 797, 803-04 (1991). Here, the California Supreme Court denied review. Thus, the last reasoned state-court decision is that of the California Court of Appeal.

IV. DISCUSSION

Scott argues that he is entitled to a new trial under *McDonough*, 464 U.S. 548, because (1) "the jury foreperson failed to answer honestly a material question on *voir dire*" and (2) "a truthful response would have provided Scott with a valid challenge for cause under California Code of Civil Procedure § 229(b) for implied bias." ECF No. 1 at 7. He therefore contends that "the Court of Appeal's decision denying Scott's motion represents an unreasonable application of clearly established federal law as articulated by the Supreme Court in *McDonough*."[3] *Id.* at 8.

Scott first argues that the California Court of Appeal's conclusion that *McDonough* does not apply to state-court criminal trials was erroneous. This Court agrees. The Ninth Circuit and other circuit courts have consistently applied *McDonough* on habeas review of state-court criminal proceedings, and the Court is aware of no case in which a court refused to apply *McDonough* to such proceedings.[4] *E.g.*, *Smith v. Swarthout*, 742 F.3d 885, 892-93 (9th Cir. 2014); *Fields v. Brown*, 503 F.3d 755, 766-68 (9th Cir. 2007); *Conaway v. Polk*, 453 F.3d 567, 582-89 (4th Cir. 2006); *Gonzales v. Thomas*, 99 F.3d 978, 984-85 (10th Cir. 1996). As the Third Circuit concluded: "Although *McDonough* was a federal civil case, a state court decision failing to apply this same rule in a criminal prosecution would represent an unreasonable application of clearly established federal law within the meaning of 28 U.S.C. § 2254(d)(1)." *Williams v. Price*, 343 F.3d 223, 229 (3d Cir. 2003) (Alito, J.), *abrogated on other grounds by Pena-Rodriguez v.*

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[3] Scott also argues that "the trial court's finding that the foreperson was not actually biased . . . was based on an unreasonable determination of the facts and was contrary to the foreperson's testimony expressing actual and explicit bias." ECF No. 1 at 8. The Court does not reach this argument because, as discussed below, it is persuaded by Scott's *McDonough* claim.

[4] The state court did not cite any such cases. Respondent cites *Montoya v. Scott*, 65 F.3d 405, 419 (5th Cir. 1995), and *Riggins v. Butler*, 705 F. Supp. 1205, 1210 (E.D. La. 1989), for the weaker proposition that "some courts have questioned whether *McDonough* applies on federal habeas review of a state criminal conviction." ECF No. 35-1 at 23 n.1. In *Montoya*, the Fifth Circuit applied *McDonough* after "assum[ing], arguendo, that a *McDonough* theory of juror bias would be sufficient to obtain federal habeas relief." 65 F.3d at 419. Similarly, in *Riggins*, the district court stated it was "not convinced that the *McDonough* standard is applicable in habeas cases," but it did not decide the question because it found that the petitioner could not meet that standard even if it did apply. 705 F. Supp. at 1210. Neither case held that *McDonough* did not apply.

Colorado, 137 S. Ct. 855 (2017). But in this case, the state court applied *McDonough* – albeit in dicta – and the Court therefore considers whether the state's application was unreasonable.

The Sixth Amendment "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *see* U.S. Const. amend. VI. Due process requires that the defendant be tried by "a jury capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). "The presence of even one biased juror affects that right. Juror bias comes in three forms: actual, implied, and *McDonough* bias."[5] *United States v. Brugnara*, 856 F.3d 1198, 1211 (9th Cir. 2017) (citation omitted), *cert. denied*, 138 S. Ct. 409 (2017).

To obtain a new trial under *McDonough*, "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." *McDonough*, 464 U.S. at 556. The parties do not dispute that these two prerequisites are clearly established Supreme Court law. Instead, their dispute centers on the import of the next sentence in the *McDonough* opinion: "The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *Id.* Respondent argues that this sentence added actual bias as third element to the *McDonough* analysis, and that the Ninth, First, and Fourth Circuits have agreed, thus rendering it impossible to conclude that Scott's view of *McDonough* was clearly established law. *See Clark v. Murphy*, 331 F.3d 1062, 1071 (9th Cir. 2003) ("The very fact that circuit courts have reached differing results on similar facts leads inevitably to the conclusion that the [state] court's rejection of [a habeas petitioner's] claim was not objectively unreasonable."), *overruled on other grounds by Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

However, none of the four cases on which Respondent relies held that a movant must show

[5] Scott argues *McDonough* bias in this case. Thus, the Ninth Circuit's holding that "[t]here is no clearly established federal law regarding the issue of implied bias" does not preclude habeas relief. *Hedlund v. Ryan*, 854 F.3d 557, 575 (9th Cir. 2017); *see Rodrigues v. Davis*, No. 16-17069, 2018 WL 2439536, at *2 (9th Cir. May 31, 2018) (concluding, following *Hedlund*, that a habeas petitioner "is limited to demonstrating actual bias or *McDonough* bias").

actual bias to prevail on a *McDonough* claim. First, in *Dyer v. Calderon*, the Ninth Circuit explained that, under *McDonough*, the court "must determine whether [a prospective juror's] answers were dishonest and, if so, whether this undermined the impartiality of Dyer's jury." 151 F.3d 970, 973 (9th Cir. 1998) (en banc). But the court did not limit the second inquiry to determining whether the prospective juror harbored actual bias. To the contrary, the court held that it "need not resolve the actual bias question . . . because the implied bias issue is dispositive here." *Id.* at 981. The court concluded that "jurists of reason would all agree" that some jurors, including those with blood or business relationships with the litigants or lawyers, "should have been struck without stopping to inquire into their subjective state of mind." *Id.* at 985. The court explained:

> Of course, a juror could be a witness or even a victim of the crime, perhaps a relative of one of the lawyers or the judge, and still be perfectly fair and objective. Yet we would be quite troubled if one of the jurors turned out to be the prosecutor's brother because it is highly unlikely that an individual will remain impartial and objective when a blood relative has a stake in the outcome. Even if the putative juror swears up and down that it will not affect his judgment, we presume conclusively that he will not leave his kinship at the jury room door.

Id. at 982. Likewise, in *Pope v. Man-Data, Inc.*, the Ninth Circuit stated that, "[u]nder *McDonough*, a new trial is warranted only if the district court finds that the juror's voir dire responses were dishonest, rather than merely mistaken, and that her reasons for making the dishonest response call her impartiality into question." 209 F.3d 1161, 1164 (9th Cir. 2000). But, again, the court did not limit the impartiality inquiry to actual bias; it cited Justice Blackmun's concurrence in *McDonough* for the proposition that a movant may "demonstrate actual bias *or, in exceptional circumstances, that the facts are such that bias is to be inferred*." *Id.* at 1163 (emphasis added) (quoting *McDonough*, 464 U.S. at 556-57 (Blackmun, J., concurring)).

In *Conaway*, the Fourth Circuit considered allegations "that Juror Waddell failed to disclose that he was co-defendant Harrington's double first cousin, once removed." 453 F.3d at 585. The court held: "Even where, as here, the two parts of the *McDonough* test have been satisfied, a juror's bias is only established under *McDonough* if the juror's 'motives for concealing information' or the 'reasons that affect [the] juror's impartiality can truly be said to affect the

fairness of [the] trial.'" *Id.* at 588 (alterations in original) (quoting *McDonough*, 464 U.S. at 556). But although the court structured its analysis into three steps, it did not require any showing of actual bias as part of the third step. To the contrary, the court concluded – without any inquiry into whether Wardell was actually biased – that "Juror Waddell's relationship to co-defendant Harrington *necessarily* affected the fairness of Conaway's trial." *Id.*

Finally, in *Faria v. Harleysville Worcester Insurance Co.*, the First Circuit explained that "[t]he binary test set forth in *McDonough* is not a be-all-end-all test to be viewed without context. Rather, the fundamental purpose of the test is to answer the crucial, overarching trial inquiry: was the juror biased and, if so, did that bias affect the fairness of the trial?" 852 F.3d 87, 96 (1st Cir. 2017). In considering a juror, Mr. Rieger, who was allegedly dishonest about his status as a felon who was ineligible for jury service, the court concluded that the Farias "have not asserted what particular bias Mr. Rieger harbored or how that bias would have affected the fairness of the trial. Instead, they merely speculate as to the bias and prejudice that resulted" and "have failed to adequately explain how bias, if any, tainted their trial result." *Id.* at 89-90, 96-97. But the court also noted that "Mr. Rieger's felon status, alone, *does not necessarily imply bias*, and accordingly his mere presence on the Farias' jury does not, without more, demonstrate an unfair trial result." *Id.* at 96 (emphasis added). Thus, actual bias was relevant only because Mr. Rieger's status as a convicted felon did not establish implied bias; the court's ruling cannot be read as requiring actual bias in all cases. Moreover, the court's discussion of bias is dicta because the it concluded that the Farias "have not demonstrated that Mr. Rieger answered dishonestly," thus failing to satisfy *McDonough*'s first prong, and because the court merely "[a]ssum[ed] *McDonough* applies on all fours," apparently without actually deciding that it did so. *Id.* at 95-96.

In short, none of the cases relied on by Respondent supports the proposition that actual bias is required to warrant a new trial under *McDonough*.[6] The Ninth Circuit does not endorse

[6] In addition, the Ninth Circuit confirmed last year that only "two showings" are required "to obtain a new trial based on *McDonough* bias: first, that the juror in question 'failed to answer honestly a material question on *voir dire*,' and second, 'that a correct response would have provided a valid basis for a challenge for cause.'" *Brugnara*, 856 F.3d at 1211 (quoting *McDonough*, 464 U.S. at 556). Similarly, the Fourth Circuit recently explained that a *McDonough* claim is distinct from an actual bias claim. *Porter v. Zook*, No. 16-18, — F.3d —, 2018 WL

that view, nor do *Conaway* and *Faria* create a circuit split.

But even if the above cases could be read in the manner asserted by Respondent, the Supreme Court re-stated the requirements of *McDonough* in 2014 without including any reference to actual bias. In *Warger v. Shauers*, the Court explained that "[i]f a juror was dishonest during *voir dire* and an honest response would have provided a valid basis to challenge that juror for cause, the verdict *must* be invalidated."[7] 135 S. Ct. 521, 525 (2014) (emphasis added) (citing *McDonough*, 464 U.S. at 556). This recitation removed any doubt that, at least as of the time of the *Warger* decision – which occurred before the California Court of Appeal's decision in this case – *McDonough* requires only two elements, and no more. By requiring a showing of actual bias, the California Court of Appeal therefore failed to apply clearly established federal law.

The Court of Appeal found that the parties did not dispute that Juror No. 8 was dishonest "when he did not reveal his 2009 misdemeanor conviction on his questionnaire." *Scott*, 2015 WL 4505784, at *7. The court further found that Scott's trial attorney "had an attorney-client relationship with Juror No. 8" and, based on his counsel's appearance at a May 2, 2011 hearing on Juror No. 8's behalf, "assume[d] that attorney-client relationship still existed 'within one year previous to the filing of the complaint' in [Scott's] case, as required for Code of Civil Procedure section 229, subdivision (b) to apply." *Id.* at *9. The court recognized that the California Supreme Court "described implied bias under Code of Civil Procedure section 229 as 'a presumption of bias that could not be overcome by a finding that [the juror] could be fair and impartial.'" *Id.* at *10 (quoting *People v. Ledesma*, 39 Cal. 4th 641, 669-70 (2006) (alteration in *Scott*)); *see also People v. Wheeler*, 22 Cal. 3d 258, 274 (1978) ("Implied bias arises when the juror stands in one of several relationships to a party, such as consanguinity, trust, or employment, or has been involved in prior legal proceedings relating to the parties or the case; in such

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3679610, at *8 (4th Cir. Aug. 3, 2018); *see also id.* at *15 (not mentioning actual bias when explaining that "[t]o prove a juror bias claim under *McDonough*, the petitioner must show: (1) 'a juror failed to answer honestly a material question on *voir dire*,' and (2) 'a correct response would have provided a valid basis for a challenge for cause'" (quoting *McDonough*, 464 U.S. at 556)).

[7] Of the four circuit cases relied on by Respondent, only one – *Faria*, 852 F.3d 87 – post-dates *Warger*. The First Circuit made no mention of *Warger* in that case.

circumstances no proof of prejudice is required – it is inferred as a matter of law." (citation omitted)), *overruled on other grounds by Johnson v. California*, 545 U.S. 162 (2005). The court distinguished *Ledesma* only on grounds that "[t]he case says nothing about what should happen when a juror who should be subject to a challenge for cause based on one of the statutory grounds listed in Code of Civil Procedure section 229 actually sits on the jury and the issue is raised for the first time in a motion for new trial." *Scott*, 2015 WL 4505784, at *10. It did not hold that Juror No. 8 would not have been dismissed for cause if his relationship with the public defender's office had been raised during voir dire, and it apparently recognized that, had the truth of Juror No. 8's relationship with Scott's trial counsel come to light during voir dire – as it would have, but for Juror No. 8's dishonesty – Juror No. 8 would have been excused for cause. Under *McDonough*, this is where the state court's inquiry should have ended. The court determined that Juror No. 8 "failed to answer honestly a material question on *voir dire*" and that "a correct response would have provided a valid basis for a challenge for cause." *McDonough*, 464 U.S. at 556. Consequently, "the verdict must be invalidated." *Warger*, 135 S. Ct. at 525.

CONCLUSION

The California Court of Appeal's denial of relief under *McDonough* was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). Scott's petition for habeas relief is therefore granted, and his conviction is vacated. Respondent shall release Scott from custody unless proceedings to retry him are commenced within ninety days of the date of this order.

In addition to the usual service on counsel of record, the Clerk shall send an informational copy of this order to the San Francisco District Attorney.

The Clerk shall enter judgment and close the file.

IT IS SO ORDERED.

Dated: August 24, 2018

JON S. TIGAR
United States District Judge

APPENDIX C

Filed 7/24/15 P. v. Scott CA1/5

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RICKEY LEON SCOTT, Defendant and Appellant.	A139921 (San Francisco County Super. Ct. No. 219205)

While waiting for services in a homeless shelter, appellant Rickey Leon Scott stabbed Abdul Smith, another client in the shelter. He was convicted of first degree murder following a trial at which the jury was instructed on the lesser offenses of second degree murder and manslaughter, based on theories of accident, self-defense, imperfect self-defense and provocation. Appellant argues the judgment must be reversed because (1) the jury foreperson committed misconduct in failing to disclose his prior misdemeanor conviction for making criminal threats and his dissatisfaction with his representation in that case by the same public defender's office that represented appellant; (2) the evidence was insufficient to support a conviction of first degree murder because there was no substantial evidence of premeditation and deliberation or lying in wait; (3) the trial court abused its discretion in admitting evidence appellant owned a second knife that was not used in the commission of the crime; and (4) a newly discovered witness could present testimony corroborating appellant's version of events. We affirm.

I. FACTS AND PROCEDURAL HISTORY

The San Francisco District Attorney filed an information charging appellant with the murder of Smith and alleging he personally used a deadly weapon (a knife) in the commission of that offense. (Pen. Code, §§ 187, 12022, subd. (b).) The information also alleged appellant had suffered prior "strike" convictions and prior serious felony convictions. (Pen. Code, §§ 667, subd. (a), 1170.12.) The case proceeded to a jury trial, at which the following evidence was adduced.

A. *Prosecution Evidence*

The St. Vincent de Paul shelter on Fifth Street and Bryant Street in San Francisco, also known as MSC South, provides services for homeless individuals. Clients must pass through metal detectors and security wands at the entrances to the shelter, and they are expected to check their weapons with security and reclaim them when they leave. A violation of this no-weapons policy will result in an individual being excluded from the shelter and its services. Despite the policy and its enforcement, it is not uncommon for clients of the shelter to carry knives for protection.

Appellant, who was homeless, went to the drop-in side of the shelter at about 4:55 p.m. on February 6, 2012, to sign up for a bed for the night. He was carrying a black computer bag that contained some of his personal effects and belongings, including a brown-handled folding knife and a black-handled steak knife. Appellant was aware of the shelter's no-weapons policy, but he did not check his two knives with security and was able to take them inside. Once inside, appellant sat down to wait in the entertainment area, which had a television and vending machines as well as 35 folding chairs.

Smith entered the drop-in side of the shelter at about 6:48 p.m. and went through security, giving the guard a hug. Shelter worker Jaime Torres noticed that Smith had been drinking, but he was not hostile or belligerent and he had no problems with his coordination. James Joyner, a program aide at the shelter, believed Smith was

intoxicated, but Smith had a mellow personality and was not being aggressive. Smith frequently came to the shelter and was generally quiet.

After passing through security, Smith walked into the entertainment area, passing near the chair where appellant was seated. He walked out of the entertainment area, retrieved a newspaper, and returned to the entertainment area a few minutes later. Someone yelled out "Fight!" and Smith staggered out of the entertainment area, bleeding, having been stabbed with a knife. Appellant followed Smith, but Joyner intercepted appellant and pushed him (appellant) up against a wall. Joyner described appellant as having "rage" in his eyes, and he thought appellant was going to "finish [Smith] off."[1] Appellant told Joyner to "back up" and Joyner complied, noticing a knife in appellant's hand as he did so. Blood was dripping from the knife. Appellant took his bag and ran out of the shelter after placing the knife inside his bag.

A video surveillance camera inside the shelter captured appellant's and Smith's entry into the shelter and their movements outside the entertainment area where the stabbing occurred. The video does not clearly show what happened between them when Smith was stabbed because a pillar obscures the view, although some movement can be seen. None of the shelter staff members on duty that evening saw the stabbing.

Whitey Pavao, who was a frequent client of the drop-in shelter, had been sitting in the entertainment area when Smith arrived. He testified that he noticed Smith walk through the entertainment area once and did not see him cause anyone any problems. Smith returned a second time and appellant said something to him like "I told you to stay away from here" or "I told you to stay away from me." Smith fell near the vending machines, and Pavao saw appellant wrap a "boning knife" in a shirt as he left. Pavao did not see the actual stabbing, but he heard appellant say something "like he won't rip off

[1] In a statement to a defense investigator in September 2012, Joyner said he had seen fear on appellant's face, like he was having a flashback. He described appellant's eyes as "really bulgy, the way some people look when they're trying to defend themselves," and said "if you're trying to defend yourself, you're feeling rage and scared at the same time." Asked about this statement at trial, Joyner testified that he had not seen the altercation itself or anything to indicate appellant was defending himself.

anybody anymore." According to Pavao, appellant stood up from his chair and "[t]hey had words, and the knife came out. [Appellant] hit [Smith] with the knife, and then he sat back down on the chair, wrapped it up in a shirt, and took off." Pavao saw Smith "standing in a self-defense stance" or "a fighter's stance, you know, in a ready stance." He did not see Smith hit, punch or kick appellant, and did not hear appellant ask Smith if he was okay after the stabbing.

Pavao provided a short, handwritten statement and was interviewed by police officers on the night of the stabbing. In his handwritten statement, he wrote, "I also heard the man who did the stabbing what sounded like an altercation about having money stolen, and then he stabbed him, but it was marked for real." In the interview, Pavao told police officers that Smith had been walking around in the entertainment area and appellant "went and got out of the chair and stalking with that knife." Appellant "came off the chair and he—he literally, he literally attacked him." After Smith had been stabbed, Smith said, "I guess I'm gonna die," and appellant told Smith something to the effect of "I guess you're not gonna rip anybody off anymore." Pavao did not see Smith hit or kick appellant before the stabbing.[2]

After appellant left the shelter, he threw his folding knife up onto the roof of a building and headed to a homeless encampment under a freeway off-ramp less than a block away. At the encampment, appellant took off the hat he had been wearing inside the shelter and threw it on the ground along with his black bag.

As appellant was leaving the homeless encampment, he was stopped by San Francisco Police Department Sergeant Joseph Allegro, who had received a dispatch about

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[2] In a statement given to a defense investigator on September 27, 2012, Pavao said he did not hear appellant say anything about getting "ripped off," but had heard other clients speculating about that possibility after the stabbing. Pavao explained the discrepancy at trial: "I couldn't have been sure that they were arguing about money at the time of the interview, but I can remember now that he talked about—talked about ripping off somebody and money before the altercation happened." Pavao also told the defense investigator that before he was stabbed, Smith assumed a "leaned back fighting stance with fists closed, both of them one foot forward and one foot back."

the stabbing. Allegro asked appellant what he was doing and appellant responded, "Taking a pis[s]." Officers detained appellant. At some point, Allegro asked appellant where he planned to sleep that night, and appellant responded, "County jail." Referring to the homeless encampment, Allegro asked, "Not back there?" and appellant said, "I don't live back there, that's somebody else's stuff." Appellant had a fresh cut on the inner palm side of his right index finger. According to Homicide Inspector John Evans of the San Francisco Police Department, it is common for stabbing suspects to have wounds from the knife wielded because a knife has a tendency to slip forward when it strikes something.

Police searched the homeless encampment and found appellant's hat and computer bag. The bag contained his steak knife wrapped in a cardboard sandwich bag box, buried underneath more plastic bags. Appellant's folding knife was recovered from the rooftop where appellant had thrown it. DNA samples were taken from each knife and it was determined that the folding knife carried Smith's DNA, but the steak knife carried only appellant's. The parties stipulated that the folding knife was the knife that caused Smith's wound, and that the steak knife was not used to harm Smith.

The autopsy on Smith's body revealed that he had died from a stab wound to the heart. He did not have any defensive wounds, which is consistent with a surprise attack.

B. *Defense Evidence*

Appellant testified about the circumstances surrounding the stabbing, which he described as an accident. He explained that although he knew of the shelter's no-weapons policy, shelters are dangerous places and he felt he needed a knife for protection. He used the folding knife for protection and the steak knife (which he had found that same day) to cut sandwiches. Appellant claimed the security guard at the shelter's entrance saw the knives when he searched appellant's computer bag, but let him go through without taking them away. Once inside and seated in the entertainment area, appellant put the folding knife into his jacket pocket for protection.

Appellant spoke to another shelter client called "Bubble" and dozed off in the chair. He was awakened when Smith fell into him and hit him in the face or shoulder. Appellant recognized Smith from an encounter in 2005 or 2006, when Smith had tried to kick appellant's legs out from under him due to a dispute over a trivia game. Appellant had not taken Smith's behavior seriously and would sometimes give him a dollar when he saw him on the street during the ensuing years.

Smith walked over to the vending machines and gave appellant a taunting look. He left the entertainment area, and appellant got up to smoke a cigarette outside. Appellant saw Smith walking back to the entertainment area holding a partially rolled-up newspaper. Appellant was uneasy because he knew people sometimes hid weapons inside newspapers, so as Smith approached, appellant took out his folding knife and told Smith to "back up." Smith came right at him and either walked or lunged into the knife. Appellant only intended to scare Smith, and did not strike at him or thrust the knife into his chest. He had not seen a weapon in Smith's hand.

When appellant felt the knife enter Smith's chest, he threw it on the floor.[3] He followed Smith asking him if he was all right, but Joyner pushed him (appellant) against the wall. Bubble kicked the knife toward appellant and told him to pick it up, and appellant took it and left the shelter in shock. Appellant knew the police would be coming but he wanted to go outside and get some air. He acknowledged throwing the folding knife onto the roof of a building.

Dr. Judy Melinek, the medical examiner who performed the autopsy on Smith's body, testified that the knife wound that killed Smith was horizontal and penetrated two to three inches into Smith's heart, less than the length of the folding knife's blade. A diagonal wound is more common in stabbing cases, and a horizontal wound is consistent with someone running into a knife, though the knife could also be thrust into someone's body at a horizontal angle. The horizontal nature of the wound does not necessarily mean

[3] Paul Endo, the defense expert in videography, testified about an enhanced version of the surveillance video he had prepared and identified a movement on the video as being consistent with a knife being thrown, and not with a striking motion.

the knife was parallel to the ground when it entered Smith's body, as Smith could have been bending over.

Smith's body had a 0.21 blood alcohol level at the time of the autopsy and a vitreous (eye fluid) alcohol level of 0.29 percent. In light of the intravenous fluids and blood transfusion given to Smith during lifesaving efforts, his blood alcohol level could have been as high as 0.29 percent, which would cause serious impairment. According to Dr. Alex Stalcup, the defense expert on alcohol intoxication, blood alcohol at that level could cause someone to become aggressive, or to fail to appreciate danger or feel threatened when they were not, even though regular users of alcohol can build up a tolerance. Shelter worker Jeynitha Richardson testified that Smith appeared to be "staggering drunk" when he arrived at the shelter on the night of the stabbing, but he was not angry or aggressive and could control his movements.

Dr. Margo Kushel, a defense expert on homelessness, testified that most of her homeless patients were afraid for their safety in homeless shelters, which were rough places. Homeless individuals could be hypervigilant and prone to reacting with slight provocation.

C. *Verdict and Posttrial Proceedings*

The jury returned a verdict convicting appellant of first degree murder and finding he had used a deadly weapon in the commission of the offense. (Pen. Code, §§ 187, 12022, subd. (b)(1).) Appellant filed a motion seeking a new trial based on juror misconduct and a separate motion seeking a new trial based on the return of a verdict contrary to the evidence, the admission of prejudicial evidence due to the court's error of law, and newly discovered evidence. (Pen. Code, § 1181, subds. 3, 5, 6 & 8.) The trial court denied the motions after holding an evidentiary hearing on the juror misconduct issue.

The court sentenced appellant to prison for "86 years to life" (actually, 75 years to life plus 11 years), having found appellant had been previously convicted of two prior felony convictions for purposes of the Three Strikes law and the serious felony

enhancement. (Pen. Code, §§ 667, subd. (a), 1170.12.)[4] The sentence consisted of a term of 25 years to life for the murder conviction, tripled under the Three Strikes law, plus two five-year terms for the serious felony enhancements and a one-year term for the weapon use allegation. (Pen. Code, §§ 190, subd. (a), 667, subd. (a), 1170.12, subd. (c)(2)(A)(i), 12022, subd. (b)(1).)

II. DISCUSSION

A. *Juror Misconduct*

1. Motion for New Trial and Relevant Proceedings

Appellant contends the trial court should have granted his motion for new trial based on juror misconduct under Penal Code section 1181, subdivision 3, which applies when "the jury has . . . been guilty of any misconduct by which a fair and due consideration of the case has been prevented." We disagree.

The factual basis for the juror misconduct claim was that Juror No. 8, the foreperson, failed to disclose during voir dire that he had suffered a misdemeanor conviction in 2009 and was unhappy with his representation by his deputy public defender, who worked for the same office as appellant's trial counsel. The declarations, testimony and exhibits presented in support and opposition of the motion for new trial on this ground established the following:

Juror No. 8 was convicted on July 22, 2009 of a misdemeanor count of making a criminal threat under Penal Code section 422 following a jury trial at which he was represented by deputy public defender Emily Dahm of the public defender's office in San Francisco. The charges arose from an incident in which Juror No. 8 had threatened a parking control officer while she was issuing him a citation. At the sentencing hearing

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[4] The trial court struck its true findings on allegations based on an additional prior conviction for aggravated assault under Penal Code section 245, subdivision (a)(1), because the record of that prior conviction showed the assault was committed with hands and fists, rather than a deadly weapon, meaning it did not qualify as a serious or violent felony. (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 262; *People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1034.)

held on September 25, 2009, Juror No. 8 was placed on probation and ordered to serve five days in county jail. Dahm filed a notice of appeal on Juror No. 8's behalf, and private attorney Marsanne Weese was appointed to represent him in the appellate division of the superior court. Weese filed a brief stating she could find no arguable issues on appeal and asking the appellate division to independently review the record under *People v. Wende* (1979) 25 Cal.3d 436, and the appellate division affirmed the judgment in an opinion filed March 28, 2011.

On May 2, 2011, Dahm appeared on behalf of Juror No. 8 in superior court, at which time the remittitur was "spread upon the minutes," that is, read into the record. Juror No. 8 was not present for this proceeding. He had not communicated with Dahm since his sentencing hearing in 2009 and was unaware of his appeal, the identity of his appointed counsel on appeal, or of the hearing at which the remittitur was spread. Juror No. 8 believed he had been wrongfully convicted and was highly dissatisfied with the representation provided by Dahm.

Juror No. 8 was called for jury service and assigned to the panel in appellant's case. Appellant was represented at trial by Jeff Adachi, the elected Public Defender of the City and County of San Francisco. Before voir dire began on March 18, 2013, the jurors completed a written questionnaire. Question No. 24 asked, "Have you, a family member, or a close friend ever been investigated, arrested, charged with, or convicted of any crime?" Juror No. 8 responded no. Question No. 27 asked, "What are your opinions, if any, of prosecutors and/or criminal defense attorneys?" Juror No. 8 wrote, "NA." Question No. 38 asked, "The judge will instruct you as follows: Do not let bias, sympathy, prejudice or public opinion influence your decision. You must reach your verdict without any consideration of punishment. Is there any reason you would be unable to comply with this order?" Juror No. 8 answered no. Question No. 61 asked, "Is there any matter not covered in this questionnaire that you think the attorneys or court should know when considering you as a juror in this case?" and "Is there any other reason why you might not be able to be an impartial judge of the facts for both the prosecution and defense in this case?" Juror No. 8 responded no to both parts of the question. He

also indicated he did not know the prosecutor or "[d]efense lawyer and Public Defender Jeff Adachi." During voir dire itself, Adachi asked the prospective jurors whether anyone had negative feelings about defense attorneys, and Juror No. 8 did not raise his hand or otherwise reply. On March 21, 2013, the jury and six alternate jurors were impaneled.

On April 12, 2013, the day of the verdict in appellant's case, Dahm was in the courthouse on another matter and ran into Juror No. 8 in the hallway. Although Juror No. 8 did not recognize her at first (she had been pregnant and had longer hair when she represented him in 2009), they had a brief and friendly conversation. Juror No. 8 told Dahm he was going to go do his civic duty, which led Dahm to believe he had been called for jury duty, but she saw him later in the day outside the courtroom where appellant's case was being tried and learned at that time he was on appellant's jury. Dahm knew Adachi was trying the case and told Juror No. 8 she could not talk to him and asked him to contact her when the case was over. She emailed Adachi to advise him that a former client was on his jury, and Adachi reviewed Juror No. 8's questionnaire during the following week, after the jury had returned its verdict. Had Adachi known of Juror No. 8's prior relationship with his office, he would have exercised a challenge and removed him from the jury panel.

Juror No. 8 testified at the hearing on the motion for new trial under a grant of immunity and while represented by counsel. He explained that he had not disclosed his 2009 conviction on the jury questionnaire because over three years had passed and he was trying to forget about it. He felt he could be fair and impartial when he was selected to be a juror in appellant's case, though he fretted extensively over the possibility that an unconscious bias based on his experience with Dahm might have affected his jury service. He was not trying to cheat appellant out of a fair trial and he did not recall holding any of his negative feelings about Dahm against appellant. He did not have any negative feelings about appellant or Adachi, and he did not realize Adachi was from the same office as Dahm. He also did not realize that the prosecutor in appellant's trial was from the same office as the prosecutor in his misdemeanor case. Juror No. 8's daughter,

who had witnessed her father's arrest in 2009, testified that he did not discuss the incident leading to his conviction very often because it was upsetting to his wife, but that he had alluded to it several times during 2012. Though her father sometimes told small lies and exaggerated things, she believed he was an honest person and would not vote to convict somebody else simply because he believed he himself had been wrongfully arrested and convicted.

The trial court issued a detailed written order denying the motion for new trial. Citing *People v. Blackwell* (1987) 191 Cal.App.3d 925, 929 (*Blackwell*), it concluded Juror No. 8 had committed misconduct by falsely indicating on the questionnaire that he had not been convicted of a crime, which gave rise to a presumption of prejudice. The trial court found this presumption had been rebutted, the evidence having shown no substantial likelihood Juror No. 8 harbored actual bias against appellant. The trial court rejected appellant's argument that bias should be implied under Code of Civil Procedure section 229, subdivision (b), which sets forth the grounds for a challenge for cause based on implied bias, or under case law recognizing that a juror's bias may be implied under exceptional circumstances. Finally, the court concluded a new trial was not required under *McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 555-556 (*McDonough*), which addresses the effect of a juror's untruthful response during voir dire where a truthful response would have provided a valid basis for a challenge for cause.

Appellant argues the trial court erred in denying his motion for new trial based on juror misconduct because (1) Juror No. 8's failure to disclose his 2009 misdemeanor conviction was misconduct giving rise to a presumption of prejudice that was not rebutted by the prosecution, and (2) the public defender's prior representation of Juror No. 8 established implied bias giving rise to a challenge for cause, which entitles appellant to a new trial under *McDonough*, *supra*, 464 U.S. 548.

2. Juror Misconduct; Actual Bias

" 'A juror who conceals relevant facts or gives false answers during the voir dire examination . . . undermines the jury selection process and commits misconduct.

[Citations].' " (*In re Boyette* (2013) 56 Cal.4th 866, 889 (*Boyette*), citing *In re Hitchings* (1993) 6 Cal.4th 97, 111.) Once misconduct is established, it raises a presumption of prejudice. (*People v. Nesler* (1997) 16 Cal.4th 561, 578 (*Nesler*); *People v. Stanley* (1995) 10 Cal.4th 764, 836.) This presumption "excuses the defendant from affirmatively proving prejudice when that cannot be done" and "prevails ' "unless the contrary appears." ' " (*In re Carpenter* (1995) 9 Cal.4th 634, 657.)

Notwithstanding the presumption of prejudice that arises from a juror's concealment of material information, "we determine whether an individual verdict must be reversed for jury misconduct by applying a substantial likelihood test. That is, the 'presumption of prejudice is rebutted, and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e., no *substantial likelihood* that one or more jurors were actually biased against the defendant.' " (*Boyette*, *supra*, 56 Cal.4th at pp. 889-890.) "[T]he test asks not whether the juror would have been stricken by one of the parties, but whether the juror's concealment (or nondisclosure) evidences bias." (*Id.* at p. 890.) Whether prejudice arose from juror misconduct is a mixed question of law and fact subject to an appellate court's independent review, accepting the trial court's credibility determinations and findings of historical fact when supported by substantial evidence. (*People v. Gamache* (2010) 48 Cal.4th 347, 396 (*Gamache*); *People v. Ault* (2004) 33 Cal.4th 1250, 1261-1263; *Nesler*, *supra*, 16 Cal.4th at p. 582.)

The parties agree Juror No. 8 committed misconduct when he did not reveal his 2009 misdemeanor conviction on his questionnaire. The issue is whether the presumption of prejudice that arises from this misconduct was rebutted—whether the record establishes there was no substantial likelihood Juror No. 8 was actually biased against appellant. We answer this question in the affirmative.

In assessing whether the presumption of prejudice arising from a juror's concealment of a material fact has been rebutted, "the court should . . . determine if prejudice to the defendant in selecting the jury reasonably could be inferred from the

juror's failure to respond." (*Blackwell, supra,* 191 Cal.App.3d at p. 930.) Although Juror No. 8 unquestionably should have disclosed his misdemeanor conviction for criminal threats, prejudice against appellant cannot reasonably be inferred from his false answer to the jury questionnaire. The circumstances leading to the misdemeanor conviction were completely different than the facts underlying appellant's murder charge, and no bias against appellant appears from the misdemeanor conviction itself.

The dissimilarity between the events leading to Juror No. 8's conviction and the homicide with which appellant was charged distinguishes the situation before us from the prejudicial juror misconduct in *Blackwell, supra,* 191 Cal.App.3d at pp. 929-931. The defendant in *Blackwell* was a woman convicted of murdering her husband, who presented a defense of " 'battered wife syndrome.' " (*Id.* at p. 927.) After the verdict was rendered, it was discovered that a female juror who had been the victim of domestic violence had failed to disclose as much during voir dire. (*Id.* at p. 928.) The court concluded that under the circumstances of the case, prejudice could not be rebutted: "[The defendant's] defense was that her husband's abusive conduct caused her to entertain an honest, even if unreasonable, belief in the necessity to defend herself against imminent bodily injury. [Citation.] Juror R.'s affidavit reveals her bias: when confronted with a situation similar to [the defendant's], she was able to escape an abusive husband without resort to physical violence or self-defense. She felt that if she could do so appellant should have governed herself accordingly. As a consequence, the presumption of prejudice is even stronger." (*Id.* at p. 931; see *People v. Diaz* (1984) 152 Cal.App.3d 926, 930-932 (*Diaz*) [in trial on assault with a deadly weapon charge, court should have discharged juror after learning on the last day of trial that she had been a victim of a knifepoint attack and had concealed that fact during voir dire]; compare *Boyette, supra,* 56 Cal.4th at pp. 889-890 [juror's concealment of criminal history and substance abuse issues of himself and his close family members was not prejudicial because concealment did not suggest actual bias].)

The actual bias that might logically flow from Juror No. 8's prior misdemeanor case was not his prosecution and conviction per se, but the fact he had been represented by the same public defender's office that was representing appellant, and was unhappy

with his attorney. But even if we accept that a juror who was disgruntled with his representation in a prior criminal case might be biased against a different lawyer from the same organization, and that this bias might affect his ability to be fair to the party represented by the lawyer, this could only occur where the juror had made the connection between the two lawyers. In this case, Juror No. 8 testified that he had not understood Adachi and Dahm worked in the same office. The trial court accepted this historical fact and found Juror No. 8 to be credible on this point, a factual determination by which we are bound. (*Gamache*, *supra*, 48 Cal.4th at p. 396.) In light of this, there is no substantial likelihood Juror No. 8 was biased against Adachi, much less against appellant, by virtue of his misdemeanor conviction or his representation by Dahm.[5]

Appellant notes that during his testimony at the hearing on the motion for new trial, Juror No. 8 expressed concern about the effect his misdemeanor conviction might have had on his deliberations. It is true Juror No. 8 made a number of statements speculating that his prior conviction might have affected his performance in appellant's case in some way: "You know, I was upset about that verdict from before, so it was in me, you know, but I didn't act like it didn't matter or it wasn't going to matter when I answered that [the questionnaire]. I would have liked to forget about it, but maybe I didn't. [¶] . . . [¶] [L]ike I say, I'm not a psychologist, but it's there, and I guess, yeah, I guess it could have affected it, you know, the decision that I made, so yes." But at no point could Juror No. 8 explain *how* that conviction might have affected his service in appellant's case, and he also indicated he wanted both sides to have a fair trial and would have informed the court if he had believed there was some reason he could not give both sides a fair trial.

The trial court concluded that Juror No. 8's speculation about his possible unconscious bias was the product of his anxiety during the new trial hearing, at which he

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[5] Although Dahm testified that she had met with Juror No. 8 at the public defender's office while she was representing him and was confident he knew at that time that she worked for the public defender, there is nothing inherently improbable about a layperson failing to connect her with Adachi after a gap of more than three years.

did not initially appear to appreciate he had been granted immunity from a prosecution for perjury. The court determined Juror No. 8 was truthful when he testified that when he filled out the questionnaire he believed he could give appellant a fair trial—a credibility determination to which we defer. (*Gamache*, *supra*, 48 Cal.4th at p. 396.)

Our independent review of the record satisfies us that there is no substantial likelihood Juror No. 8 was actually biased. The presumption of prejudice arising from his concealment of his misdemeanor conviction and prior representation was adequately rebutted.

3. *McDonough* and Code of Civil Procedure section 229, subdivision (b)

Under California law, a juror may be challenged for cause for one of the following reasons: "(A) General disqualification—that the juror is disqualified from serving in the action on trial. [¶] (B) Implied bias—as, when the existence of the facts as ascertained, in judgment of law disqualifies the juror. [¶] (C) Actual bias—the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party." (Code Civ. Proc., § 225, subd. (b)(1)(A)-(C).) Code of Civil Procedure section 229 provides in relevant part: "A challenge for implied bias may be taken for one or more of the following causes, and for no other: [¶] . . . [¶] (b) . . . having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party."

Appellant argues that Juror No. 8's prior representation by the public defender's office (which would have come to light if the 2009 misdemeanor had been revealed) subjected that juror to a challenge for cause based on implied bias under Code of Civil Procedure section 229, subdivision (b). He further argues that Juror No. 8's failure to disclose that information during voir dire entitles appellant to a new trial as a matter of federal law based on the decision in *McDonough*, *supra*, 464 U.S. 548, regardless of whether the record establishes a substantial likelihood of actual bias.

We agree with appellant that his trial attorney, Jeff Adachi, had an attorney-client relationship with Juror No. 8 in the 2009 misdemeanor case. (*People v. Sapp* (2003) 31 Cal.4th 240, 256 [" 'In cases handled by the public defender's office, it is the officeholder who is the attorney of record' "].) And, in light of Dahm's court appearance on behalf of Juror No. 8 on May 2, 2011, at the hearing to spread the remittitur, we assume that attorney-client relationship still existed "within one year previous to the filing of the complaint" in appellant's case, as required for Code of Civil Procedure section 229, subdivision (b) to apply.[6] That said, we are not persuaded *McDonough* requires a new trial.

The decision in *McDonough* arose from a civil suit filed in federal court under its diversity jurisdiction, in which a child and his parents sued an equipment manufacturer for injuries suffered by the child when riding on a lawnmower. (*McDonough*, *supra*, 464 U.S. at p. 549.) During voir dire, the jurors were asked whether they or any of their immediate family members had sustained any accidental injuries resulting in disability or prolonged pain and suffering. (*Id.* at p. 550.) After a verdict had been rendered in favor of the manufacturer, the plaintiffs brought a motion for new trial on the ground that one of the jurors had failed to disclose his son had been injured when a truck tire exploded. (*Id.* at pp. 550-551.) The district court denied the motion but the court of appeals reversed, accepting the plaintiffs' argument that the juror's concealment of information, even if made in good faith, had impaired the plaintiffs' right to exercise a peremptory challenge. (*Id.* at pp. 552-553.)

The United States Supreme Court reversed the decision of the court of appeals because a new trial was not appropriate absent a showing of prejudice under Rule 61 of the Federal Rules of Civil Procedure. (*McDonough*, *supra*, 464 U.S. at pp. 552-555.) It stated: "A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the

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[6] The charges against appellant were initiated by a criminal complaint filed February 9, 2012, about nine months after Dahm's appearance at the hearing.

peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on *voir dire* examination. . . . We hold that to obtain a new trial in such a situation, 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. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of the trial." (*Id.* at pp. 555-556.)

Appellant's argument presumes that the quoted language in *McDonough* establishes a two-pronged test that requires a new trial in state court criminal proceedings, regardless of actual bias or prejudice, whenever a juror has concealed a material fact during voir dire and a correct response would have provided grounds for a challenge for cause under state law. We do not agree. *McDonough* does not directly apply to a California criminal trial because it involved an implementation of a rule of federal civil procedure, rather than an interpretation of the federal Constitution. "Federal rules based on the supervisory power of the United States Supreme Court over the administration of justice in the federal courts . . . are not binding on the states." (*People v. Thayer* (1965) 63 Cal.2d 635, 639; see *People v. Guiton* (1993) 4 Cal.4th 1116, 1126 (*Guiton*).) And, even if we were to agree that the "two-prong test" of *McDonough* applied to this case, and that appellant's trial counsel would have been entitled to excuse Juror No. 8 for cause if the prior representation by the public defender had been disclosed during voir dire, it does not follow that a new trial should be granted when the presumption of prejudice can be rebutted.

Appellant observes that in *People v. Ledesma* (2006) 39 Cal.4th 641, 669-670 (*Ledesma*), our state Supreme Court described implied bias under Code of Civil Procedure section 229 as "a presumption of bias that could not be overcome by a finding that [the juror] could be fair and impartial." *Ledesma* does not assist appellant. The cited comment was part of a discussion in which the court rejected the defendant's claim that a juror who was employed as a corrections officer should have been excused for cause during voir dire based on implied bias. (*Ibid.*) The case says nothing about what should

happen when a juror who would be subject to a challenge for cause based on one of the statutory grounds listed in Code of Civil Procedure section 229 actually sits on the jury and the issue is raised for the first time in a motion for new trial. Penal Code section 1181, subdivision 3 provides for a new trial based on juror misconduct "by which a fair and due consideration of the case has been prevented." The high court in *McDonough* emphasized that in light of the resources invested in a trial, a judgment should only be set aside where a juror's concealment of information affects the fairness of the trial, in other words, when prejudice has been established. (*McDonough*, *supra*, 464 U.S. at pp. 553-556; see *Diaz*, *supra*, 152 Cal.App.3d at p. 938 [contrasting juror misconduct discovered during trial with juror misconduct issue raised in posttrial proceedings].)

In an analogous context, this court has addressed the analysis to be employed when a juror who is disqualified from jury service due to a felony conviction fails to disclose that ex-felon status during voir dire. (*People v. Green* (1995) 31 Cal.App.4th 1001, 1017-1020 (*Green I*); Code of Civ. Proc., § 203, subd. (a)(5).) In such a situation, the concealment of an ex-felon status is juror misconduct giving rise to a presumption of prejudice, but this presumption is subject to rebuttal. (*Green I*, at pp. 1017-1020.) We see no reason for establishing a more stringent standard for the concealment of a status that would allow a challenge for cause based on implied bias under Code of Civil Procedure section 229.[7]

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[7] The defendant in *Green I* subsequently filed a petition for writ of habeas corpus in federal district court under the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254. Although the district court denied the petition, the defendant prevailed in an appeal to the Ninth Circuit Court of Appeals, which ruled that this court's decision affirming the judgment in *Green I* was "based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." (*Green v. White* (9th Cir. 2000) 232 F.3d 671, 672, 675-676 (*Green II*).) The Ninth Circuit concluded the prosecution had not rebutted the presumption of prejudice arising from the juror misconduct, which went far beyond the concealment of ex-felon status and included statements by the juror during deliberations that he knew the defendant was guilty the moment he saw him and that he wanted to kill the defendant himself. (*Green II*, at pp. 673, 676.) Though the Ninth Circuit disagreed with the conclusion in *Green I* that prejudice had been rebutted, nothing in *Green II* suggests a juror's concealment of

We acknowledge federal cases recognizing that even in the absence of actual bias, "in rare instances a court will find implied bias, which is 'bias conclusively presumed as a matter of law.' " (*United States v. Olsen* (9th Cir. 2013) 704 F.3d 1172, 1191 [juror's conversations with friend about the case when it was reported in the news a year before the trial did not support finding of implied bias].) Such bias should be presumed only in " 'extreme' " or " 'extraordinary' " cases, and has been recognized only in two contexts: "first, 'in those extreme situations "where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances," ' [citation] and second, 'where repeated lies in voir dire imply that the juror concealed material facts in order to secure a spot on the particular jury.' " (*Id.* at pp. 1191-1192.)

The bias that is implied statutorily under state law by virtue of a recent attorney-client relationship is not comparable to the extreme and extraordinary situations in which bias is presumed under federal law and may not be rebutted. Code of Civil Procedure section 229, subdivision (b) applies only to relationships existing within one year of the filing of the complaint in the case being tried; if the Legislature had believed a previous attorney-client relationship was so inherently prejudicial that bias could not be rebutted in the context of a posttrial juror misconduct claim, we think it unlikely the provision would have extended only to those relationships falling within a one-year time frame. (Compare *United States v. Gonzalez* (9th Cir. 2000) 214 F.3d 1109, 1111-1114 [implied bias found where ex-husband of juror in cocaine distribution case had used and dealt cocaine, contributing to the breakup of the family]; *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 972-974, 979-985 [bias implied where juror in murder case denied during voir dire that she or any family member had been a victim of a crime or accused of a crime; among other things, her brother was victim of a homicide and was killed in a manner similar to the victims in the case on which she sat and her husband had been arrested for rape];

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ex-felon status during voir dire requires reversal in the absence of actual bias or prejudice when the issue is raised in a posttrial proceeding.

Tinsley v. Borg (9th Cir. 1990) 895 F.2d 520, 526-529 [no implied bias on part of juror in rape case who had counseled rape victims as part of her job as social worker when neither she nor a close friend or family member had been a victim of rape]; *United States v. Eubanks* (9th Cir. 1979) 591 F.2d 513, 517 [implied bias where sons of juror in a heroin distribution case were themselves heroin users who were serving prison sentences]; *United States v. Allsup* (9th Cir. 1977) 566 F.2d 68, 71-72 [court should have granted challenge for cause to two prospective jurors who worked for different branches of the bank the defendant was accused of robbing].)

Any bias implied under Code of Civil Procedure section 229, subdivision (b) was rebutted for reasons already discussed. The trial court did not err in denying the motion for new trial based on juror misconduct.

B. *Evidence of First Degree Murder*

The jury was instructed on two theories of first degree murder: (1) willful, deliberate and premeditated murder; and (2) murder by lying in wait. (Pen. Code, § 189.) In his motion for new trial, appellant argued the verdict for first degree murder under either of these theories was "contrary to . . . [the] evidence" under Penal Code section 1181, subdivision 6. Appellant contends the trial court abused its discretion in denying his motion for new trial on this ground, and further argues the evidence was insufficient to support a conviction of first degree murder under either theory. We conclude he is not entitled to a modification of the judgment or a new trial.

In ruling on a motion for new trial under Penal Code section 1181, subdivision 6, the trial judge examines the evidence to determine whether it is sufficient to prove each element beyond a reasonable doubt to his or her satisfaction, effectively sitting as a "13th juror." (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133; see *People v. Robarge* (1953) 41 Cal.2d 628, 633 (*Robarge*).) "The trial court has broad discretion in determining whether the evidence has sufficient probative value to sustain the verdict [citation], and its order will not be reversed on appeal 'absent a manifest and unmistakable abuse of that discretion.' " (*People v. Dickens* (2005) 130 Cal.App.4th

1245, 1252.) In its written order, the trial court appropriately indicated it was required to independently review the evidence when considering whether the first degree murder verdict was contrary to the evidence, and appellant does not contend the trial court misconstrued the scope of its discretion. (See *Robarge*, at p. 633; compare *People v. Carter* (2014) 227 Cal.App.4th 322, 328.)

Where, as here, the trial court understood the scope of its discretion under Penal Code section 1181, subdivision 6, our standard of review dovetails with the standard for assessing the sufficiency of the evidence on appeal, which requires us to consider "the entire record in the light most favorable to the judgment below to determine whether it contains substantial evidence—that is, evidence which is reasonable, credible, and of solid value—from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1068-1069 (*Mendoza*); see *People v. Watkins* (2012) 55 Cal.4th 999, 1018-1020 [substantial evidence standard applied on appeal when trial court denied motion for new trial based on insufficient evidence under Pen. Code, § 1181, subd. 6.) We conclude substantial evidence supports the conviction of first degree murder under a theory of premeditation and deliberation, and that consequently, the trial court did not abuse its discretion in concluding the verdict was not contrary to the evidence. (See *People v. Lewis* (2001) 26 Cal.4th 334, 365 (*Lewis*).)

" ' "A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. [Citation.] 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.]" ' " (*Mendoza*, *supra*, 52 Cal.4th at p. 1069.) "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse. [Citations.] However, the requisite reflection need not span a specific or extended period of time." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.)

In *People v. Anderson* (1968) 70 Cal.2d 15, 26-27 (*Anderson*), the state Supreme Court identified three categories of evidence relevant to the presence of premeditation

and deliberation: (1) planning activity, (2) motive, and (3) the manner of the killing. (*Mendoza, supra*, 52 Cal.4th at p. 1069.) Though these so-called *Anderson* factors are not exhaustive or exclusive of other considerations (*ibid.*), their application to the present case supports a finding the murder was premeditated.

We turn first to planning. The evidence does not show appellant went to the shelter expecting to find or confront Smith, but it does show that several minutes elapsed between the time appellant was aware of Smith's presence and the stabbing itself. Although appellant testified that he had put the knife in his pocket before sitting down in the chair to sleep, the jury was not required to credit this testimony and could have concluded that he retrieved the knife from his bag after his first encounter with Smith. Viewed in the light most favorable to the judgment, appellant had ample time to pause and reflect before the killing. " ' " 'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.' " ' " (*Mendoza, supra*, 52 Cal.4th at p. 1069.)

The prosecution also presented evidence of motive, the second *Anderson* factor. Whitey Pavao testified that before appellant stabbed Smith, he said something about money, like "he won't rip off anybody anymore" or "you're not going to steal something from somebody else." This was consistent with a statement Pavao gave to police officers on the night of the stabbing, in which he told them "the guy who did the stabbing said I guess you're not going to rip anyone off anymore or something, but I remember him saying something to that effect about money and stealing the money, about money, okay" and "yeah, he said yeah, yeah, you're not going to steal something from somebody else." The jury was entitled to credit Pavao's trial testimony and prior consistent statement to police and to conclude appellant stabbed Smith because he believed Smith had stolen from him or was about to steal from him. (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1238 [sufficient evidence of premeditation and deliberation where defendant was motivated by "an incomprehensible need for revenge over the theft of his rifle"; "the incomprehensibility of the motive does not mean that the jury could not reasonably infer that the defendant entertained and acted on it"].)

Finally, the manner of the killing supports a determination appellant acted with premeditation and deliberation. Appellant stabbed Smith in the heart, a vital area of the body. (See *People v. Bolden* (2002) 29 Cal.4th 515, 561.) A " 'particular and exacting' " killing allows the jury to infer deliberation and premeditation, and supports a conviction of first degree murder. (*People v. Caro* (2012) 46 Cal.3d 1035, 1050, disapproved on another ground as stated in *People v. Whitt* (1990) 51 Cal.3d 620, 657, fn. 29; *People v. Garcia* (2000) 78 Cal.App.4th 1422, 1428.) Shelter worker James Joyner told police that after the stabbing, appellant followed Smith as he staggered away, looking like he wanted to "finish the job," and, when he identified appellant that same night in a lineup, he told officers appellant "was trying to finish him (Smith) off." Joyner's statements (and his similar testimony at trial) strongly suggest the stabbing was a part of a deliberate plan to kill Smith rather than the accident described by appellant.

Because the evidence was sufficient to support a conviction of first degree premeditated murder, we need not consider whether it also supported a conviction under a lying-in-wait theory. Any deficiency in the evidence of lying in wait is harmless "absent an affirmative indication in the record that the verdict actually did rest" on the lying-in-wait theory. (*Guiton*, *supra*, 4 Cal.4th at p. 1129 [where case given to jury on different factual theories, one of which is not supported by the evidence, court presumes the jurors rejected that theory and based the verdict on the factually supported theory].) The record does not affirmatively indicate the jury relied on lying in wait rather than premeditation as a basis for first degree murder, and appellant was not entitled to a new trial, or to reversal of the judgment, even if we assume for the sake of argument that the evidence did not support a lying-in-wait theory.

Appellant argues that the first degree murder conviction cannot stand because the testimony of Whitey Pavao was "incoherent, inconsistent and contradicted by the videotape of the incident." We do not agree. " 'It is blackletter law that any conflict or contradiction in the evidence, or any inconsistency in the testimony of witnesses must be resolved by the trier of fact who is the sole judge of the credibility of the witnesses. It is well settled in California that one witness, if believed by the jury, is sufficient to sustain a

verdict. To warrant the rejection by a reviewing court of statements given by a witness who has been believed by the trial court or the jury, there must exist either a physical impossibility that they are true, or it must be such as to shock the moral sense of the court; it must be inherently improbable and such inherent improbability must plainly appear. [Citations.]' " (*People v. Breault* (1990) 223 Cal.App.3d 125, 140-141; see *People v. Young* (2005) 34 Cal.4th 1149, 1181.)

A person may be disqualified as a witness only if he or she is "(1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or [¶] (2) Incapable of understanding the duty of a witness to tell the truth." (Evid. Code, § 701, subd. (a); see Evid. Code, § 700; *People v. Mincey* (1992) 2 Cal.4th 408, 444.) Even mentally ill and delusional witnesses are qualified to testify, and it was up to the jury (and the trial court, in ruling on the motion for new trial) to decide how much of Pavao's testimony should be credited. (See *Lewis, supra*, 26 Cal.4th at pp. 357-358 [although testimony "may have consisted of inconsistencies, incoherent responses, and possible hallucinations, delusions and confabulations, [the witness] 'presented a plausible account of the circumstances of [the victim's] murder' "].)

Pavao's testimony was disjointed and odd at certain points, but his description of the stabbing was relatively straightforward and consistent with what he told police officers when interviewed that same night. The jury watched the surveillance video and could determine for itself whether Pavao's testimony was contradicted in any way by what was captured on camera. Pavao was impeached with evidence of his chronic use of alcohol and he acknowledged on cross-examination he sometimes had visions, including a vision of a stabbing incident at the shelter that was similar to the actual event involving appellant and Smith. But nothing in Pavao's description of the incident was physically impossible or inherently improbable, and we will not second guess the jury or the trial court in their evaluation of the weight to be given to his testimony.

Framing the argument slightly differently, appellant argues the prosecution failed to carry its burden of showing he did not act as a result of a "sudden quarrel or heat of

passion" that rendered the killing voluntary manslaughter rather than murder. (Pen. Code, § 192, subd. (a).) We disagree.

The provocation variant of voluntary manslaughter "has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. As we explained long ago in interpreting the same language of section 192, 'this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,' because 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' " (*People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253.) A person acts upon a sudden quarrel or in the heat of passion if he or she "acts without reflection in response to adequate provocation." (*People v. Beltran* (2013) 56 Cal.4th 935, 942.) Provocation is legally adequate if it " ' "would cause the ordinarily reasonable person of average disposition to act rashly and . . . from . . . passion rather than from judgment." ' " (*Ibid.*)

There is little if any evidence to show adequate provocation under this standard. Crediting appellant's own testimony, Smith ran into or hit appellant while appellant was sleeping in a chair, glared at him, and approached him a few minutes later with a newspaper in his hands, conduct that falls far short of the kind that would cause an ordinarily reasonable person to act out of passion rather than from judgment. Smith's acts were not the kind that would give rise to "an emotion that obliterates reason that would prevail in the mind of a reasonable person." (*People v. Johnson* (2003) 113 Cal.App.4th 1299, 1311.) Certainly, the evidence did not compel a verdict of voluntary manslaughter as a matter of law, and does not require us to set aside the jury's verdict or the trial court's ruling on the motion for new trial.

Appellant finally argues that his conviction should be reduced to involuntary manslaughter because the evidence showed that at worst, he acted in imperfect self-defense, but without express or implied malice. We reject this argument, having

already concluded that substantial evidence supports a finding of premeditated and deliberate first degree murder.

C. *Evidence of Second Knife*

Appellant argues the trial court erred in admitting evidence that on the night of the stabbing, he was in possession of a weapon not used in the commission of the offense. Whether we view the challenge as being to the trial court's ruling admitting the evidence at trial, or to its order denying a motion for new trial on that ground (Pen. Code, § 1181, subd. 5), we review the claim for abuse of discretion and find none. (See *People v. Harris* (2005) 37 Cal.4th 310, 337 [evidentiary ruling reviewed for abuse of discretion]; *People v. Delgado* (1993) 5 Cal.4th 312, 328 (*Delgado*) [ruling on motion for new trial reviewed for abuse of discretion].)

Over defense objection, the court indicated it would allow the prosecution to elicit evidence that appellant's bag, which was found in the homeless encampment near the shelter, contained a black-handled, fixed-blade steak knife in a cardboard sandwich bag box, which was wrapped in plastic sandwich bags and buried underneath other plastic sandwich bags. The parties stipulated that the steak knife was not used to stab Smith and did not carry Smith's DNA, although appellant's DNA was found on the knife. Appellant argues, as he did in his motion for new trial, that the evidence regarding the second knife was inadmissible because it was not used to stab Smith.

In *People v. Riser* (1956) 47 Cal.2d 566, 576-577 (*Riser*), disapproved on other grounds in *People v. Chapman* (1959) 52 Cal.2d 95, 98 and *People v. Morse* (1964) 60 Cal.2d 631, 637, fn. 2, the court held inadmissible evidence of guns, holsters and ammunition that had not been used in the commission of the charged murder. The court explained that when the prosecution relies on a specific type of weapon used to commit a homicide, a trial court should exclude "evidence that other weapons were found in [the defendant's] possession, for such evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*Riser*, at p. 577.) Similarly, in *People v. Henderson* (1976) 58 Cal.App.3d 349 (*Henderson*), the

court concluded that a handgun found during a search of the defendant's apartment, which he had not used in the charged assaults, was inadmissible because "[e]vidence of possession of a weapon not used in the crime charged against a defendant leads logically only to an inference that defendant is the kind of person who surrounds himself with deadly weapons—a fact of *no relevant* consequence to determination of the guilt or innocence of the defendant." (*Henderson*, at p. 360; see *People v. Archer* (2000) 82 Cal.App.4th 1380, 1392 [knives found in defendant's backyard two years after the murder that were determined not to be the murder weapons were irrelevant to show planning or the availability of weapons]; *People v. Witt* (1958) 159 Cal.App.2d 492, 497 [weapons found in defendant's car, which were not stolen during the charged burglary, were inadmissible].)

On the other hand, evidence of a weapon not used in the commission of the charged crime is admissible when relevant to other issues in the case. In *People v. Smith* (2003) 30 Cal.4th 581, 613, a murder defendant who had fatally shot the victim claimed to have taken the gun to the scene for the sole purpose of intimidation, and testified he had selected that gun because it was small and easy to conceal. Under these circumstances, evidence that the defendant owned another small gun for which he had no ammunition was relevant because "[a]n unloaded gun fully serves to intimidate; a loaded gun is necessary only to actually shoot." (*Id.* at p. 614.) In *People v. Jablonski* (2006) 37 Cal.4th 774, 821-823, a defendant convicted of two murders argued the trial court should have excluded evidence that a roll of duct tape, homemade wire handcuffs and a stun gun were found in his car at the time of his arrest in another state. The Supreme Court disagreed, as the evidence, though not used in the charged offense, suggested the defendant had planned to take the victims by surprise by immobilizing them and was relevant to whether he had acted with premeditation. (*Ibid.*)

Appellant argues the steak knife found in his bag had no relevance other than to show he was the sort of person who carried weapons, and should have been excluded under *Riser* and *Henderson*. The People respond that the steak knife was relevant to issues other than appellant's propensity to carry weapons because (1) Whitey Pavao and

one of the shelter workers, James Joyner, described the knife they saw appellant holding in a manner that was consistent with the steak knife, suggesting appellant was holding a second knife when he stabbed Smith; and (2) if appellant possessed a fixed-blade knife but chose to stab Smith with a folding knife that was more readily concealed, this would tend to support the theory that he acted with premeditation and/or was lying in wait.

We need not determine whether evidence of the second knife was admissible on these grounds because any error in admitting it was harmless. Even without evidence of the second knife, the jury would have known that appellant carried the folding knife used in the stabbing and had taken it inside the shelter despite the no-weapons policy. (See *Riser*, *supra*, 47 Cal.2d at pp. 577-578 [defendant not prejudiced by evidence of gun, holster and ammunition not used in the killing because even without that evidence, jurors would have known the defendant possessed firearms].) Appellant testified that he carried the knife for protection, and the testimony of shelter workers and the defense expert on homelessness established that it was not unusual for homeless individuals to carry small weapons for this purpose. The jury knew appellant was homeless and was likely carrying many of his possessions with him; it is not particularly noteworthy that he would have had a kitchen knife among his belongings. We cannot say it is reasonably probable a result more favorable to appellant would have been reached if evidence of the second knife had been excluded. (*People v. Nelson* (1964) 224 Cal.App.2d 238, 256, citing *People v. Watson* (1956) 46 Cal.2d 818, 836.) The trial court did not abuse its discretion in denying appellant's motion for new trial based on the evidence of the second knife. (Pen. Code, § 1181, subd. 5.)

D. *Newly Discovered Evidence*

Finally, appellant argues the trial court should have granted his motion for new trial under Penal Code section 1181, subdivision 8, which applies "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." Our standard of review is abuse of

discretion, and, finding none, we reject the claim. (*People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1151 (*Mehserle*); *Delgado*, *supra*, 5 Cal.4th at p. 328.)

A defendant is entitled to a new trial based on newly discovered evidence when he or she can show " ' "1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; 5. That these facts be shown by the best evidence of which the case admits." ' " (*Delgado*, *supra*, 5 Cal.4th at p. 328.) "A new trial motion based on newly discovered evidence is looked upon with disfavor." (*Mehserle*, *supra*, 206 Cal.App.4th at p. 1151.)

The evidence on which appellant relied for this aspect of the motion was a declaration by Eugene Lemelle (Bubble), another client of the homeless shelter who witnessed the stabbing. Appellant had testified that Bubble was present in the room at the time of the stabbing and that after he (appellant) had thrown the knife down, Bubble kicked it back to him and advised him to leave. In his declaration, Lemelle stated: "When I first saw Abdul Smith, he was in the TV Room. Smith was underneath the television spinning and twirling around in an erratic and aggressive fashion. It appeared as if he was getting ready to attack or hurt someone. [¶] I then saw Abdul Smith charge through the chairs at [appellant] and attack [appellant]. The two men came together and then Smith walked away. I did not actually see anyone being stabbed, but I saw that Smith had blood on his shirt as he walked away. I saw Smith walk over to where the coffee machine is located and fall on the ground. [¶] After the incident, [appellant] had a shocked look on his face. Based on what I saw, I believe that [appellant] acted to defend himself against Smith, who was behaving aggressively before attacking [appellant]. Based on my observations prior to the encounter between Smith and [appellant], [appellant] acted as if he did not wish to fight with or engage with Smith. Based on what I saw, I believe that Smith was the aggressor and that Smith attacked [appellant] without reason. [¶] After the incident, I told [appellant] that he should leave. I saw a knife on the floor and kicked it over to where [appellant] was seated. I saw [appellant] pick up the

knife and then leave the shelter." Although Lemelle was contacted by a defense investigator during the trial, "I did not wish to testify at that time because I was being prosecuted for a drug offense and did not wish to be questioned about my pending criminal case." Lemelle provided a statement to the defense on May 24, 2013, more than a month after the verdict was returned in appellant's case.

The trial court denied the motion for new trial on this basis, concluding the evidence was not newly discovered because appellant had known Lemelle was an eyewitness as early as the date of the stabbing. The court noted, "[C]onspicuously absent from [appellant]'s motion is any evidence as to when Lemelle's identity was first known, and any explanation for the failure to pursue potential evidence the existence of which was known to [appellant] from the time of the incident." It concluded appellant "is not excused from using reasonable diligence to secure an identified witness by awaiting a verdict before seeking to introduce the testimony, and then asserting in a new trial motion merely that Lemelle's concerns about his own case precluded interviewing and calling him to testify. Had Lemelle been subpoenaed, the court and counsel would know whether he would have invoked his Fifth Amendment right against compelled self-incrimination. If so, the court could have conducted an inquiry outside the jury's presence to determine the legitimacy of Lemelle's invocation of the privilege and fashioned an appropriate remedy." The court also concluded it was not reasonably probable Lemelle's testimony would result in a more favorable result for appellant on retrial.

Lemelle's testimony did not amount to newly discovered evidence because his identity and status as an eyewitness were known to appellant before he even fled the shelter, and he was interviewed by a defense investigator during the trial. The court did not abuse its discretion in concluding the defense did not exercise reasonable diligence to procure Lemelle's testimony at trial because Lemelle's vaguely described concern about unrelated charges does not appear to have any bearing on his status as a witness for appellant.

This is not the end of our review, because case law has recognized that a lack of diligence is not necessarily a sufficient basis for denial of a motion for new trial where "the newly discovered evidence would probably lead to a different result on retrial." (*People v. Martinez* (1984) 36 Cal.3d 816, 825.) "Numerous cases hold that a motion for a new trial should be granted when the newly discovered evidence contradicts the strongest evidence introduced against the defendant." (*Id.* at p. 823.)

Lemelle's declaration does not contradict the strongest evidence against appellant. Though Lemelle characterized Smith's purported "spinning" as aggressive, he did not say Smith had any sort of weapon that might warrant the use of deadly force against him. And, although Lemelle said Smith "attacked" appellant, appellant himself testified that he pulled out the knife in self-defense and Smith "charged" or "lunged" or "came at" him, falling accidentally into the knife. Lemelle did not come forward after the trial with his version of events, a circumstance that would diminish his credibility as a witness. The trial court did not abuse its discretion in concluding it was not reasonably probable Lemelle's testimony would result in a more favorable verdict to the defense on retrial.

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, ACTING P.J.

BRUINIERS, J.

APPENDIX D

SUPERIOR COURT OF CALIFORNIA

County of San Francisco

Department No. 29

People of the State of California,

Plaintiff,

vs.

Rickey Scott,

Defendant.

MCN: 12003786
SCN: 219205

Order Denying Motion for New Trial Based on Alleged Juror Misconduct, Insufficiency of the Evidence, Erroneously Admitted Evidence and Newly Discovered Evidence

HEARING DATES: June 14, July 5, 11,16, August 9, and September 6, 2013

JUDGE: Jeffrey S. Ross

It is undisputed that on February 6, 2012, Rickey Scott fatally stabbed Abdul Smith at the St. Vincent DePaul homeless shelter. The jury returned a verdict of guilty of murder in the first degree on Friday, April 12, 2013. On June 3, 2013, Defendant Rickey Scott filed a Motion for a New Trial pursuant to Penal Code § 1181(3) on the ground of juror misconduct, alleging that Juror 8 concealed relevant information—his 2009 misdemeanor conviction after representation by the Office of the Public Defender of San Francisco (hereinafter the "Juror New Trial Motion"[1]). On the same day he also filed a Motion for a New Trial pursuant to Penal Code § 1181(5), (6) and (8) on the grounds of insufficiency of the evidence, erroneously admitted evidence, newly-discovered evidence—specifically a witness (hereinafter the "Evidence New Trial Motion"). With respect to the Juror New Trial Motion, the court conducted evidentiary

[1] The Juror New Trial Motion was redacted to omit the name of the juror and refiled on June 12, 2013.

hearings at which the People called Juror 8 and defense counsel Jeff Adachi as witnesses. The defense witnesses were: Juror 8's daughter, Cherie L. [last name redacted]; his former attorneys, Emily Dahm and Marsanne Weese; and Fatima Ortiz, the victim from Juror 8's 2009 misdemeanor conviction. The court read and carefully considered the briefs filed and authorities cited by both parties and heard argument on June 14, July 5, 11, 16, August 9, and September 6, 2013. After hearing and evaluating all of the evidence, and considering all of the arguments, for the reasons set forth below, the **Motions for New Trial (the Juror New Trial Motion and the Evidence New Trial Motion) pursuant to Penal Code §§ 1181(3), (5), (6) and (8) are denied**.

Procedural History

Jury Selection

Counsel for the People and Scott requested the use of a juror questionnaire and proposed various versions, initially posing 67 questions in 24 pages. After numerous hearings at which the court urged counsel to shorten and to simplify the questionnaire, the court acquiesced to the use of the 63-question, 23 page questionnaire. On March 13, 2013, jurors were summoned to court and filled out the questionnaire. Juror 8 completed the questionnaire and signed it under penalty of perjury. Question 24 asked: "Have you, a family member, or a close friend ever been investigated, arrested, charged with, or convicted of any crime?" Juror 8 wrote "No."

Question 21 asked: "Has a family member, or a close friend ever been the victim of or witness to a crime, whether or not the crime was reported to the police? If the crime involved a weapon, please identify the weapon." Juror 8 responded that in 2011, Cherie L. and Corinne [last names redacted; respectively Juror 8's daughter and wife] had been victims of a crime involving a "sawed off shotgun" in San Francisco.

In response to other questions about the criminal justice system, law enforcement, prosecutors and criminal defense attorneys, he indicated either that he could be fair or "NA." In response to Question 63 which asked, "After answering all of these questions, do you feel that you can be a fair and impartial juror in this case, and give both the prosecution and the accused a fair trial in this case?" he checked "yes." Juror 8 signed the questionnaire under penalty of perjury.

The venire returned for extensive voir dire over three days, March 18, 20 and 21, 2013. The court did not impose time limits on voir dire. Juror 8 was questioned briefly during voir dire. He was not asked about the incident in which his wife and daughter were victims. The jury was empanelled and sworn on March 21, 2013, and trial commenced.

The Trial and Verdict

Whitey Pavao testified to his observations during and after the incident. Shelter workers Jaime Torres, James Joyner and Alonzo Bowlegs testified to their observation of Scott after the stabbing and his departure from the shelter. The People rested on April 2, 2013.

The defense presented a case, during which Scott testified, and rested on April 5, 2013.

On Friday, April 12, 2013, the day of the verdict, Deputy Public Defender Emily Dahm, who was not counsel in the case, spoke to Juror 8 outside the courtroom. Ms. Dahm represented Juror 8 in a misdemeanor trial more than 3 years earlier (from July 20-23, 2009) in which he was convicted of violating Penal Code § 422, a misdemeanor, and acquitted of Penal Code § 241(b). He was sentenced on September 25, 2009. The matter was appealed. Appointed appellate counsel, Marsanne Weese, represented Juror 8. The conviction was affirmed, and the remittitur issued on April 18, 2011. On May 2, 2011, Ms. Dahm appeared—without her client—when the remittitur was spread on the record in Department 16.

Initially—when he saw her outside department 29 on Friday, April 12, 2013—Juror 8 did not recognize Ms. Dahm, having not seen her for three years. At his trial she was pregnant, and in the interim, she got a new shorter haircut. They had a brief, friendly conversation in which Juror 8 asked Ms. Dahm about the Hawaii vacation she had planned to take after his trial and the birth of her child. When Juror 8 said that he was a juror in Department 29, Ms. Dahm discontinued the conversation, told him she could not speak to him further and asked him to call her after the trial was over. It is unclear whether the conversation occurred shortly before the jury returned the verdict (as Juror 8 testified) or—as Ms. Dahm recalls—there were two conversations: one before and one after the verdict. Ms. Dahm promptly sent Mr. Adachi the following email at 11:24 AM:

> Hi Jeff
> I ran into one of my old misdemeanor trial clients today at the Hall: [redacted (Juror 8)]. We started talking and I realized that he is on your jury. I'm not sure that this information helps at this late stage of trial, but I'd be happy to talk to you about [redacted (Juror 8)]. He's a very nice guy, and I think he'd be defense friendly.

The Juror New Trial Motion

Scott argues that he is entitled to a new trial because Juror 8's concealment of information raises an irrebuttable presumption of prejudice, constitutes implied bias, and relieves him of the need to demonstrate actual bias to obtain a new trial. He also argues that the relationship between Juror 8 and the Office of the Public Defender constitutes implied bias pursuant to California Code of Civil Procedure (hereinafter "CCP") § 229, which provides:

> A challenge for implied bias may be taken for one of more of the following causes and for no other:
> (a) ….
> (b) … having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party….

CCP § 229(b).

The criminal complaint against Scott was filed February 6, 2012. Defendant asserts that because Ms. Dahm's appeared at the spreading of the remittitur on May 2, 2011—within one year before the filing of the complaint—a cause challenge for implied bias could have been taken.

Scott argues that the concealment denied him a fair trial because, with full disclosure, he would have exercised a peremptory challenge to Juror 8.

Scott also contends that—as a result of his conviction in a trial in which he was represented by Ms. Dahm—Juror 8 was actually biased against the Office of the Public Defender and therefore prejudiced against Scott and predisposed to convict him.

Juror 8's Motion to Quash

Because the concealment by Juror 8 occurred in response to a compound question which was merely one of 63 in a 23-page questionnaire, and Juror 8 was not questioned at voir dire about any of the related issues, the court ordered an evidentiary hearing. By a June 17, 2013, letter— the form of which was approved by counsel before it was sent—the court invited Juror 8 to attend. In response the court received a June 21, 2013 letter from attorney Eric Safire on behalf of Juror 8 advising that the juror would not attend voluntarily. On July 5, 2013 Mr. Safire appeared in court and advised the court that he would file a motion to quash the People's subpoena. The court set a hearing date and heard Juror 8's motion to quash the subpoena on July 11, 2013.

At the hearing Mr. Safire argued variously that Juror 8 would have no relevant information and that "there would have to be certainly agreeable immunity before any question would be answered in that regard, because I would advise him to assert his right to remain silent relevant to any kind of exposure to perjury." July 11 transcript at 6.

When asked the basis for the immunity, Mr. Safire responded: "But his answers to the questions, if he intentionally was dishonest in answering his questions under oath, that would expose him to criminal prosecution." *Id.* at 6.

But then Mr. Safire conceded that he had not read the transcript of the voir dire:

THE COURT: Have you read the transcript of the voir dire to Juror Number 8

MR. SAFIRE: No.

Id at 6-7.

The defense joined Juror 8's counsel efforts to quash the subpoena, arguing that Juror 8 could not provide any relevant testimony. Counsel for the People, Scott and Juror 8 disputed the issues as to which Juror 8's testimony could be relevant.

Mr. Safire argued about his client: "it's just incredulous to assume that he didn't know that he was represented by the Public Defender." *Id.* at 16. Safire concluded: "and to put him through this type of questioning, that in my view could subject him to criminal prosecution in the ultimate – if everything goes bad, is unfair." *Id.* at 20.

After hearing argument and considering the issues and applicable authority, the court denied the motion to quash, and ordered Juror 8 to appear in court to testify on July 16, 2013.

The Standard for a New Trial for Juror Misconduct

"Intentional concealment of relevant facts or the giving of false answers by a juror during the voir dire examination constitutes misconduct and the occurrence of such misconduct raises a rebuttable presumption of prejudice. Prejudicial jury misconduct constitutes grounds for a new trial." [Cites omitted.] *People v. Blackwell* (1987) 191 Cal.App.3d 925, 929 (*Blackwell*). To create the rebuttable presumption "the voir dire questioning [must be] sufficiently specific to elicit the information which is not disclosed, or to which a false answer is later shown to have

been given." *Id.* The *Blackwell* court instructed trial judges on the procedure to address juror concealment in the context of a new trial motion.

> The presumption of prejudice created by the juror's misconduct may be rebutted by '... an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct.' (*People v. Diaz,* 152 Cal.App.3d at 934, citing *Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 417)." When a prospective juror in a criminal case fails to respond to a relevant, direct and unambiguous question during voir dire, the trial court, when hearing a motion for a new trial, should "…determine whether the question propounded to the juror was (1) relevant to the voir dire examination; (2) whether it was ambiguous; and (3) whether the juror had substantial knowledge of the information sought to be elicited. If the trial court's determination of these inquiries is in the affirmative, the court should then determine if prejudice to the defendant in selecting the jury reasonably could be inferred from the juror's failure to respond. If prejudice reasonably could be inferred, then a new trial should be ordered [cites omitted.]

Blackwell, at 930.

Recently the California Supreme Court underscored the centrality of *voir dire* in assuring a fair trial and the inimical effect of juror concealment. *In re Boyette* (2013) 56 Cal.4th 866, 888-890 (*Boyette*). The Court articulated the standard for review:

> Although juror misconduct raises a presumption of prejudice [cites omitted], we determine whether an individual verdict must be reversed for jury misconduct by applying a substantial likelihood test. That is, the 'presumption of innocence is rebutted and the verdict will not be disturbed, if the entire record in the particular case, including the nature of the misconduct or other event, and the surrounding circumstances, indicates there is no reasonable probability of prejudice, i.e. no *substantial likelihood* that one or more jurors were actually biased against the defendant. [cites omitted.] In other words, the test asks not whether the juror would have been stricken by one of the parties, but whether the juror's concealment (or nondisclosure) evidences bias.

Id. at 889-890.

As recently as January 2013, the Ninth Circuit in *United States v. Olsen* (9th Cir. 2013) 704 F.3d 1172 (*Olsen*), restated the standard for evaluating juror bias in the context of a new trial motion:

> This court recognizes three forms of juror bias: (1) "actual bias, which stems from a pre-set disposition not to decide an issue impartially"; (2) "implied (or presumptive) bias, which may exist in exceptional circumstances where, for example, a prospective juror has a relationship to the crime itself or to someone involved in a trial, or has repeatedly lied about a material fact to get on the jury"; and (3) "so-called *McDonough*-style bias, which turns on the truthfulness of a juror's responses on voir dire" where a truthful response "would have provided a valid basis for a challenge for cause." *Fields v. Brown*, 503 F.3d 755, 766–67 (9th Cir.2007) (en banc) (citing *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 554–56, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984)).

Olsen, at 1188-89.[2]

The Ninth Circuit previously described the standard for addressing *McDonough*-style bias: "The Supreme Court has held that an honest yet mistaken answer to a voir dire question rarely amounts to a constitutional violation; even an intentionally dishonest answer is not fatal, so long as the falsehood does not bespeak a lack of impartiality. *See McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 555-56, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984)." *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973 (*Calderon*). The *McDonough* concurrence instructed, "regardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option, in determining 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

[2] Scott cites *United States v. Torres* (2ndCir. 1997) 128 F.3d 38, 45; but reliance on that dicta is misplaced. In *Torres* the trial judge's denial of the motion for a new trial (where the trial judge **inferred** bias and excused a juror over the defense objection) was affirmed. In reaching that conclusion the Court of Appeal did not find implied bias and reaffirmed the limited circumstances in which implied bias exists: "Our court has consistently refused 'to create a set of unreasonably constricting presumptions that jurors be excused for cause due to certain occupational or other special relationships which might bear directly or indirectly on the circumstances of a given case, where ... there is no showing of actual bias or prejudice.' " *Brown*, 644 F.2d at 104-05 (quoting *Mikus v. United States*, 433 F.2d 719, 724 (2d Cir.1970))." *Id.* at 46.

facts are such that bias is to be inferred." *McDonough Power Equip. v. Greenwood* (1984) 464 U.S. 548, 556-57 (*McDonough*).[3]

The Evidentiary Hearings

At the July 16, evidentiary hearing, Juror 8's counsel advised the court that Juror 8 would assert his Fifth Amendment privilege against self-incrimination and—as to some questions—the attorney-client privilege. The prosecutor petitioned for and the court granted Juror 8 use immunity, pursuant to Penal Code § 1324. Juror 8 testified and was represented by counsel throughout the proceeding.

Juror 8 identified the questionnaire which he completed and testified that he understood the importance of providing truthful answers and that he attempted to do so. (July 16 transcript[4], at 40). In response to the question: "When you were selected as a juror in this case, did you feel like you could be fair and impartial to both sides?" He answered, "Yes." *Id.* at 76.

With respect to the 2009 misdemeanor charge, Juror 8 testified that he was represented by Emily Dahm and that he was convicted. *Id.* at 82. He testified that—prior to 2013 when he saw her at court—Juror 8 last spoke to Ms. Dahm in 2009. She did not contact him in 2011, after the judgment was affirmed and the remittitur issued, and he did not know that she appeared when the remittitur was spread on the record on May 2, 2011. *Id.* at 83-84. When asked whether, at the time he filled out the questionnaire he had any feelings about Ms. Dahm's representation, he said he didn't have any feelings. *Id.* at 85.

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[3] Scott argues that *People v. Diaz* (1984) 152 Cal.App.3d 926, 938 provides a "stricter standard." *Diaz* is not controlling as it involved juror misconduct discovered in the midst of trial—not misconduct identified after a verdict, raised by a motion for a new trial. *Id*. at 931-933. The trial court committed reversible error for not excusing the juror. *Id.*

[4] Counsel ordered and the court received partial transcripts of the post-trial hearings; they are referenced by date and page, e.g. "July 16 transcript at __."

As to their meeting on April 12, 2013, Juror 8 testified that, initially, he did not recognize Ms. Dahm as she had been pregnant and also had a different hairstyle during her representation of him. *Id.* at 87. He then described their cordial discussion about the birth of her baby. *Id.* at 88.

Juror 8 answered question 27, which asked about opinions about prosecutors or criminal defense attorneys, "NA," and testified that he did not have any opinions about counsel at the time he completed the questionnaire. *Id.* at 89.

When asked: "And my question to you was did you believe that you were going to give both sides a fair trial based on the evidence and the law?" he answered, "Yes." *Id.* at 98. Juror 8 testified that during jury selection he did not know either counsel before trial and that he did not have any feelings about either Mr. Barrett or Mr. Adachi which would prevent him from giving them both a fair trial. *Id.* at 98-99.

When asked why he did not disclose his 2009 conviction in response to Question 24, Juror 8 said that he didn't think about it. *Id.* at 102-103. He testified that, when he answered the questionnaire about his ability to be fair and impartial, he was being truthful. *Id.* at 113.

Juror 8 was asked: "Were you deliberately trying to mislead the Court to believe that you would be fair and impartial?" and said: "No." He elaborated: "No, I don't know any of that deceiving. I don't do that, because I'm not [interrupted by counsel]." *Id.* at 124-125.

Juror testified as follows in response to questions from Mr. Barrett:

Q. My question is during the jury selection process were you trying to be fair and honestly answer the questions that were involved in the questionnaire?
A. To the best of my knowledge and ability, yes. These are my answers.
Q. And would it be accurate to say then that when you were being selected as a juror, that you felt that you could be fair in this case?
….
A.: I thought I could be fair.
Q. And by fair, that's fair to both sides?

A. To both sides, yes.
Q. To the defense as well as the prosecution?
A. Sure, yes.
Q. At the time that you were selected as a juror here in this case, did you have any negative feelings against Mr. Scott?
A. No.
Q. Did you know Mr. Scott?
A. No.
Q. All right. So did you have any reason that you would have had any negative feelings concerning Mr. Scott?
A. No.
Q. Did you know Mr. Adachi?
A. No, I didn't know Mr. Adachi.
Q. Did you have any negative feelings against Mr. Adachi at that time?
A. No.
Q. And you didn't know me?
A. I didn't know you.
Q. Did you have any negative feelings against me at that time?
A. No.
Q. And at that time when you were selected as a juror, was it your intention to follow the law as the Court gave it to you?
….
A: Yes, I would have followed the law exactly the way it is.
Q: ... In not acknowledging that you had the conviction in 2009, were you trying to cheat Mr. Scott out of a fair trial?
….
A: Those words didn't even come into play in my decision. I don't think like that, cheat, and I'm not -- so that didn't come into my thoughts.
Q. So you were trying to give him a fair trial?
A. Yes.

Id. at 127-128.

In response to questions from Mr. Adachi, Juror 8 testified:

Q. Would it be correct to say that as a result of the representation you received from my office, from the Public Defender's Office, in 2009 you were not happy?
A. Yes.
Q. Okay.
A. Not happy
Q. And you felt that you had been wrongfully convicted and wrongfully jailed, correct?
A. Yes.
Q. Okay. And did you have those opinions in your mind at the time that you filled out the questionnaire?
A. Yeah, those opinions were there. I was hoping it didn't affect this, but they were there. I mean, I could have answered yes, I probably should have, you know, but I have my own

little mind game to play to try to eliminate that feeling, you know, and so I could have answered it correct, and I probably should have.

Q. I understand that.

A. Yeah.

Q. And because, as you said, in your mind game you had decided not to disclose this information. You're not saying that those feelings were not still there, correct?

A. Correct, they were still there.

Q. Okay. And these feelings that you had were partly because of the fact that you had been convicted of a crime, correct?

A. Yes.

Q. And partly because your public defender in your opinion had not provided you with adequate representation?

A. That's how I felt.

Q. Okay. And that you were jailed unjustly?

A. Yes.

Q. Because of the public defender?

A. Yeah.

Q. And what you're telling us now is that, and I appreciate you saying this, that you should have told us about the conviction and what had happened?

A. Yes.

Q. And that you realize now that at the time—and I understood you tried to be fair, but at the time that you were filling out the questionnaire and the time that you were serving as a juror in this case, I'll call it unconscious bias I think you referred to it, may have affected your service as a juror in this case?

Q. And that's the truth as you testify now, to the best of your ability?

A. To the best of my ability, because like I say, I'm not a psychologist, but it's there, and I guess, yeah, I guess could have affected it, you know, the decision that I made, so yes.

Id. at 130-132.

Juror 8 provided the following testimony in response to further questioning from Mr. Barrett:

Q. When you went through jury selection, did you want both sides to have a fair trial in this case?

....

A: Just bottom line yes, I wanted a fair trial, of course.

Q. And if there was something going on with you that came to your mind that would cause you to believe that you weren't going to be able to give both sides a fair trial, is there a reason you wouldn't have brought that to the Court's attention?

A. No, there's no reason.

Id. at 133-134.

In response to questioning from the court, Juror 8 testified:

Q. …why did you write the word "no" in answer to question number 24?
A. Well, it's been three years, I just forgot about it, just, you know --
Q. Between the time that you were sentenced on that conviction and April 12th, 2013 when you saw Ms. Dahm outside the courtroom …did you have any communications with Ms. Dahm from the day you were sentenced until the day you saw her here?
A. No. No.

Id. at 135.

Finally in response to the court's questioning, Juror 8 testified as follows:

Q. When you were in court in Department 28 with me as the judge in Mr. Scott's case, did you understand that the District Attorney who was prosecuting Mr. Scott was the same office, was from the same office as the District Attorney's Office that prosecuted you?
A. I didn't put all that together. I didn't know. I didn't know.
Q. Did you understand that Mr. Adachi was from the same office as Ms. Dahm?
A. No, I didn't know that.
Q. So when you were in Department 28 and I was asking you questions, you didn't associate Mr. Barrett with the District Attorney's Office that prosecuted you?
A. No, I didn't. Sorry about that. I just don't –
…..
Q. When you answered this questionnaire on March 13th, 2013, at the end of it, it asked you do you feel that you can be a fair and impartial juror in this case and give both the prosecution and the accused a fair trial in this case, and you put "yes."
A. Yes, that's how I felt.

Id. 146-147.

The court also heard and considered testimony from the following defense witnesses: daughter of Juror 8 (Cherie L. [last name redacted]); Juror 8's former attorneys Emily Dahm and Marsanne Weese; and Fatima Ortiz, the victim from Juror 8's 2009 misdemeanor conviction. Traffic patrol officer Fatima Ortiz testified to the incident which lead to Juror 8's conviction. Ms. Dahm's testimony was consistent with Juror 8 on the issues relevant to this inquiry—that they did not communicate between September 2009 and April 12, 2013. She also confirmed his account as to the essential details of their April 12, 2013 conversation. Marsanne Weese, was called by the defense and testified that, after the appeal from the misdemeanor conviction was

filed, she was appointed and represented Juror 8 on appeal to the Appellate Division of the Superior Court, but not in the Superior Court.

Cherie L. testified that she was present in 2009 when her father was arrested and that she picked him up when he was released from jail. August 9, 2013 transcript at 18; 22. She testified that approximately 5 times in 2012 and 3 in 2013 he referred to the event: "if he saw a meter maid he'd say, oh, like that meter maid, like I need to watch out for her, you know, because, you know, I don't want to get a ticket, but it was made in a way that was very obviously related to what had happened to him." *Id.* at 27. On cross examination by the prosecutor, the witness testified:

Q. Did your father ever make the statement, because I was wrongly arrested and convicted, that I'm going to come to jury duty and make sure that happens to somebody else?
A. I've never heard him say that, ever.
Q. Is your father the type of person you think would do something like that?
A. I don't believe so, I don't see why he would. I don't believe he would do that.

Id. at 29.

Cherie L. also testified that her father is an honest person. *Id.* at 28-29. On examination by the defense she said that, in telling a story, he may omit some details or exaggerate. *Id.* at 31.

Analysis

With respect to alleged juror misconduct, the *Blackwell* court defined the inquiry as "whether the question propounded to the juror was (1) relevant to the voir dire examination; (2) whether it was ambiguous; and (3) whether the juror had substantial knowledge of the information sought to be elicited. If the trial court's determination of these inquiries is in the affirmative, the court should then determine if prejudice to the defendant in selecting the jury reasonably could be inferred from the juror's failure to respond." *Blackwell*, at 930.

Having considered all of the evidence presented and observed the witnesses who testified and assessed their credibility, I find the following: The questions presented in the questionnaire were relevant and unambiguous, and Juror 8 had sufficient knowledge of the information to respond. I find that as to question 24, Juror 8's response "No." was false. Concealment of the accurate information—his 2009 misdemeanor conviction while represented by Ms. Dahm—creates a rebuttable presumption of prejudice. *Id.* at 929. In assessing whether the People have or have not rebutted that presumption, the court must consider each of the forms of bias raised by Scott and identified by the Ninth Circuit in *Olsen*[5]:

> (1) "actual bias, which stems from a pre-set disposition not to decide an issue impartially"; (2) "implied (or presumptive) bias, which may exist in exceptional circumstances where, for example, a prospective juror has a relationship to the crime itself or to someone involved in a trial, or has repeatedly lied about a material fact to get on the jury"; and (3) "so-called *McDonough*-style bias, which turns on the truthfulness of a juror's responses on voir dire" where a truthful response "would have provided a valid basis for a challenge for cause."[cites omitted.]

Olsen, at 1188-89.

Actual Bias

The inquiry begins with my observations of Juror 8 during voir dire, the entire trial and during his testimony on July 16, 2013. He was attentive and responsive throughout the voir dire process, answering the questions posed clearly and directly. Juror 8 was similarly attentive and engaged throughout the trial. Juror 8 was also the foreperson and responded to the court's questions at the time the verdict was delivered. At all times he appeared to be comfortable in his role as a juror and later as foreperson; he never evidenced impatience with counsel or the

[5] The People argue that, under California law, Defendant Scott must prove that Juror No. 8 harbored actual bias. *Boyette*, at 889-890, 897; *People v. Ault* (2004) 33 Cal.4th 1250, 1270; *In re Hamilton* (1999) 20 Cal.4th 273, 296; *In re Hitchings* (1993) 6 Cal.4th 97, 118-19; *People v. San Nicolas* (2004) 34 Cal.4th 614, 644. I did not reach that issue, as I have found based on the evidence, that the People have rebutted any presumption of actual, implied or *McDonough* bias.

proceedings. Most significant in considering the issue of bias, I watched his body language and listened not only to his responses to questions but to his intonation. Upon coming to court with counsel on July 16, Juror 8 evidenced anxiety which was not present previously. After issuing the order of immunity the court gave counsel for Juror 8 time to explain the legal effect of the order. However during the hearing, Juror 8 still seemed apprehensive and anxious—traits not apparent previously. Notwithstanding the court's repeated requests that counsel not argue legal issues in the presence of the witness and the court's frequent assurances that there would be time to make a complete record of any objections or other legal issues outside the presence of Juror 8, counsel made numerous speaking objections. Often after the heated exchanges among counsel, Juror 8 appeared more anxious and concerned. After one such energetic episode, the court advised Juror 8 as follows:

> THE COURT: I just want to make sure you understand that both lawyers in this case have the right to ask you questions about the issues in the case. I want to make sure you understand that the order that I issue[d] today, I'm going to read it, none of the testimony, that is what you say here in court under oath, or information that is obtained from that testimony either directly or indirectly may be used against you in any criminal proceeding. That's what the Order that I issued is. So both lawyers, and I'm going to give Mr. Adachi time to question you as well, are entitled to ask you questions. If you don't know the answer to a question, you should just tell us that.
>
> THE WITNESS: Okay.
>
> THE COURT: Do you understand that the testimony you give today is both important to both sides in this case and to the Court; do you understand that?
>
> THE WITNESS: Yes, I do.
>
> THE COURT: And you understand that the testimony you give today cannot be used against you either directly or indirectly?
>
> THE WITNESS: Okay.
>
> THE COURT: Did you understand that?
>
> THE WITNESS: It's good to hear it again, yes.

Id. at 93. While Juror 8 said that he understood his status, it was evident from his tone of voice that, after being advised—for the first time by the court of the effect of the use immunity order—he was relieved. It appeared that prior to the explanation, he had not completely appreciated the

circumstances and his hesitance and reluctance to answer certain questions may have been attributable to that uncertainly.

I found Juror 8 to be credible. He was concerned with fulfilling his obligations as a juror, testifying truthfully and providing the information requested. The testimony of defense witness Cherie L., his daughter, was consistent with that conclusion. She said that her father is a truthful person who would not use his conviction to affect the outcome of another defendant's trial. Having considered all of the evidence—much of which is quoted above—I find no evidence that Juror 8 harbored actual bias against Scott, Mr. Adachi or the Office of the Public Defender as counsel for Scott. I do not find any evidence of prejudice in favor of the Office of the District Attorney nor evidence of bias against the Office of the District Attorney—the prosecutor in Juror 8's misdemeanor case.

The defense elicited testimony from Juror 8 with respect to the possibility that "unconscious bias" "may have" or "could have" affected his jury service and relies on that testimony in its Closing Brief. However the prosecution followed up as follows:

Q. Okay. So really, sir, what we're trying to get at is did you consciously take out your hostility against your old attorney on Mr. Scott, that's what we need to know.
A. Oh, well --
MR. ADACHI: That's not the issue in the case, and that calls for speculation by this witness.
THE WITNESS: Yeah, I would be –
THE COURT: Overruled.
THE WITNESS: I would be speculating, basically, you know, I don't know. I don't know.
MR. BARRETT: Q. So when you say you don't know, you can't say that you did?
A. I can't say if it affected me yes or no. I can't think like that right now.
Q. Let me say it as plainly as I possibly can. Did you walk into this trial thinking because you were convicted in 2009 that you were going to convict Mr. Scott?
A. No. No.
Q. That didn't factor into the equation at all?
A. No.

Id. at 132-133.

I listened carefully and observed Juror 8's body language during this colloquy and found him totally credible. I found **no** evidence that Juror 8's misdemeanor conviction or prior representation created actual bias either at the time of juror selection or during his service as a juror and foreperson.

Scott's motion for a new trial, initially filed June 3, 2013, stated "Because M [redacted Juror 8] could be prosecuted for perjury, the court should appoint counsel before questioning by any party." Motion for New Trial at 19: 19-20. In response to that concern, which the court shared, the court set a hearing date to address the issue: July 5, 2103. However on June 21, 2013—before the hearing—the court received a letter from Eric Safire advising that he would represent Juror 8, which obviated the need for the court to address the issue. It is undisputed that on June 5, two days after the defense filed the brief arguing that no party should confer with Juror 8, Greg Jowdy an investigator with the Office of the Public Defender interviewed Juror 8. At the July 16 hearing, counsel did not ask Juror 8 about the June 5 interview, at which Juror 8 was not yet represented by counsel. Greg Jowdy was not called as a witness, nor is there a recording of the June 5 interview. The Jowdy interview complicates the court's effort to assess whether or not the reference to "unconscious bias" refers to a condition present during jury selection, trial and deliberation, or whether it was engendered by questions asked by Jowdy. It is evident that the Jowdy interview and the July 16 hearing resurrected feelings—including anger about his conviction—that Juror 8 testified he had spent three years trying to release and to forget. Because no recording of that interview was provided, and Jowdy did not testify, the court cannot determine whether—as it appears—the "unconscious bias" first arose on June 5 during the Jowdy interview, and not during the March-April 2013 trial.

Another issue which may explain Juror 8's anxiety on July 16, was the potential criminal prosecution for perjury. At the July 11 hearing, even before reading the transcript of the voir dire—which is devoid of any answers which could have subjected Juror 8 to a perjury prosecution—his counsel assumed that he had criminal exposure. With respect to one question, Mr. Safire said, "it's just incredulous to assume that he didn't know that he was represented by the Public Defender." July 11 transcript at 16. That his own lawyer challenged his credibility without having read the voir dire transcript raises concerns as to whether Juror 8 was fully informed about his rights and the protections afforded him once immunity was granted. Although Mr. Safire was given time to advise Juror 8 about the immunity order and to explain its effect—and presumably did so— Juror 8 demurred to questions posed by counsel. In response the court—concerned about whether Juror 8 understood his status—explained the immunity order and his obligation to answer all questions posed by both the People and the defense. Juror 8 was visibly relieved by the explanation.

For the reasons stated above, the court cannot determine definitively whether Juror 8's answers to questions about "unconscious bias" are solely attributable to events in June and July, 2013. His friendly conversation with Ms. Dahm, on the day of the verdict, which they both described almost identically, contradicts any claim that Juror 8 harbored conscious or unconscious bias during the trial and deliberations. Juror 8's emphatic response to Mr. Barrett's examination (*Id.* at 132-133) coupled with the testimony quoted earlier lead me to conclude that Juror 8's sole objective—when he was called for jury duty, answered the questionnaire and voir dire questions and served as a juror—was to be fair to both sides and, as he told Ms. Dahm, to do his public service. Further, in response to the court's questions, he stated credibly that he did not associate Mr. Adachi with Ms. Dahm, nor Mr. Barrett with the prosecutor in his 2009 case.

More important, he and Cherie L. both testified without contradiction that he would never allow his own experience to influence his role as a juror in Scott's case. Whatever his feelings about his 2009 conviction were in June and July, considering all of the evidence, I find no evidence that actual bias—conscious or unconscious—actually affected Juror 8's service. Therefore, as to the claim of actual bias, I find that the People have met their burden and that, on the entire record, including the misconduct and the surrounding circumstances, there is no reasonable probability of prejudice, i.e. no *substantial likelihood* that Juror 8 was actually biased against Scott. *Boyette*, at 889-890. Since "the test asks not whether the juror would have been stricken by one of the parties, but whether the juror's concealment (or nondisclosure) evidences bias" (*Id.* at 889-890), I find no basis for granting a new trial on the claim of actual bias.

Implied or Presumptive Bias

CCP § 229(b)

Scott argues that CCP § 229(b) required "automatic disqualification" of Juror 8 and therefore compels a new trial. Scott's position raises two related, but distinct, questions: Does CCP § 229 apply to the relationship between Juror 8 and Emily Dahm and the Office of the Public Defender? Under the circumstances here, does the presence of a juror described within CCP § 229 necessarily require granting a motion for new trial?

As to the first issue, it is not clear that as of March 2013, CCP § 229 applied to the relationship between Juror 8 and the Office of the Public Defender. It is undisputed that Juror 8 and Ms. Dahm had no communication between sentencing on September 25, 2009, and their chance meeting on April 12, 2013. Juror 8 testified, and Ms. Dahm confirmed, that the last time he spoke to Ms. Dahm regarding the case was the day judgment was rendered in 2009. Although Ms. Dahm appeared in court when the remittitur was spread on the record in May 2011, Juror 8

testified that Ms. Dahm never notified him that she made a 2011 court appearance regarding his case, and there is no evidence that he consented to her appearing on his behalf[6]. According to his testimony, Juror 8 believed his relationship with and representation by Ms. Dahm ended in September 2009.

The policy of the San Francisco Public Defender's Office is consistent with the argument that Juror 8 was not a client of the office after the appointment of Marsanne Weese. The Public Defender's Office policy expressly excludes a person in Juror 8's position from its definition of a "currently represented client": "A defendant, against whom judgment has been pronounced, whether by imposition of sentence or grant of probation, is not a currently represented client. A defendant who was represented by the Public Defender whose conviction is thereafter being appealed by an attorney outside of our office is not a currently represented client." (Conflicts of Interest, page 1, Standards, Section B) "Currently Represented Client." Thus, according to the Office of the Public Defender's own definition of a "currently represented client," the Public Defender's representation of Juror 8 ended on September 25, 2009, the date judgment was pronounced, not the date the remittitur was read into the record. Applying the Office of the Public Defender's policy, Ms. Dahm's appearance—without notice to or authorization from Juror 8— in Department 16 to record the remittitur did not reestablish the attorney-client relationship.

The relevant implied-bias relationship defined in CCP § 229(b) identifies a relationship in which a potential juror would be unable to remain impartial because of his/her relationship to an attorney (or party) in the litigation. Unlike the litany of categories in which a cause challenge

[6] Scott argues that Juror 8 was so disaffected by his representation by Ms. Dahm that he was unable to be fair in his role as a juror three years later. If that were so, it is unlikely that—if asked—Juror 8 would have consented to representation by Ms. Dahm on May 2, 2011.

may be taken, the attorney-client relationship is the only one that terminates—the timeframe is one year prior to the filing of the complaint in the instant action. The clear assumption is that temporal proximity between a lawyer's representation of a juror and her subsequent role in a case could bias the juror, but that such bias dissipates quickly. Judgment in Juror 8's case was rendered in September 2009, more than two years before the Scott complaint was filed. That—unbeknownst to Juror 8—Ms. Dahm appeared when the remittitur was recorded does not resurrect the implied bias which CCP § 229(b) seeks to deter. Juror 8's testimony—which I found credible and persuasive—was that during the Scott trial he did not associate Scott's attorney with his former counsel, nor did he associate the People's lawyer with his prosecutor. Since Juror 8 was unaware of Ms. Dahm's May 2 appearance—whether or not the Office of the Public Defender was technically "in the relation of attorney and client" with Juror 8 "within one year previous to the filing of the [Scott] complaint—there is no justification to apply CCP § 229(b) here. Therefore, I find CCP § 229(b) does not apply to the relationship between Juror 8 and Scott's counsel, the Office of the Public Defender. Even if there were evidence—not present here—to find that the relationship is one defined by CCP § 229(b), that alone does not resolve the issue whether a new trial must be granted.[7]

[7] The People argue that—even in those cases where CCP§229 (a)-(g)provides grounds for a cause challenge, the implied prejudice is rebuttable: The first clause of section 229 provides, "A challenge for implied bias *may* be taken for one or more of the following causes, and for no other:…." (emph. added.) The use of the permissive "may" indicates a challenger can choose whether to challenge the juror for one of the enumerated reasons (subdivisions (a) through (g)), or waive the challenge. Nor is the trial judge required to excuse the juror. That a relationship described in subdivisions (a) through (g) exists is not a conclusive presumption of bias. In contrast, first clause of section 229, subdivision (h) provides, "If the offense is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror may neither be permitted nor compelled to serve." This subsection is the only portion of section 229 which disqualifies a person otherwise qualified to serve from acting as a trial juror. *See People v. McNabb* (1935) 3 Cal.2d 441, 452[7]. All other causes may be waived or rebutted. *Id.*

The implied bias standard

CCP § 229(b) is not synonymous with the limited and unusual circumstances in which California and federal courts have granted a new trial motion after finding presumptive bias in a juror. *Olsen*, at 1188-89. As the Ninth Circuit held, "implied (or presumptive) bias, [ ] may exist in exceptional circumstances where, for example, a prospective juror has a relationship to the crime itself or to someone involved in a trial, or has repeatedly lied about a material fact to get on the jury.... *Fields v. Brown* (9th Cir. 2007) 503 F.3d 755, 766–67 (en banc) (citing *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 554–56 (1984)). " *Olsen*, at 1188-89. Implied bias should be presumed only in "extreme" or "extraordinary" cases. *Tinsley v. Borg* (9th Cir.1990) 895 F.2d 520, 527 (*Tinsley*). The Ninth Circuit has recognized implied bias in only two contexts: **first**, "in those extreme situations 'where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances,' " *Fields v. Brown*, 503 F.3d at 770 (quoting *Gonzalez,* 214 F.3d at 1112), and **second**, "where repeated lies in voir dire imply that the juror concealed material facts in order to secure a spot on the particular jury." *Id*. (citing *Dyer*, 151 F.3d at 982)." *Olsen,* at 1191-92. As to the second context, in *Olsen*, the Ninth Circuit observed that the omissions by the juror in the case could "not have been motivated by a desire to pass judgment on Olsen, because [the juror] completed and mailed in the questionnaire over two weeks before he came to court and learned in which case he might be selected to serve as a juror." *Id*. at 1195.

This court must decide "whether '[the] case present[s] a relationship in which the "potential for substantial emotional involvement, adversely affecting impartiality," is inherent." *United States v. Plache* (9th Cir.1990) 913 F.2d 1375, 1378 (quoting *Tinsley,* at 527) (in turn,

quoting *United States v. Eubanks* (9th Cir. 1979) 591 F.2d 513, 517). The Ninth Circuit cautioned in *Tinsley,* and reiterated in *Fields*, that "[p]rudence dictates that courts answering this question should hesitate before formulating categories of relationships which bar jurors from serving in certain types of trials." *Tinsley,* at 527; *Fields v. Brown* (9th Cir. 2007) 503 F.3d 755, 772 (*Fields*). The Ninth Circuit only presumes bias as a matter of law "where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances." *Fields,* at 770; *Olsen,* at 1191-92. Typically the juror in question, or a close relative, "has had some personal experience that is similar or identical to the fact pattern at issue in the trial." *United States v.Gonzalez* (9th Cir. 2000) 214 F.3d 1109, 1112. *See, e.g., United States v. Mitchell* (9th Cir. 2009) 568 F.3d 1147, 1152–53; *see also Fields,* at 768–70 (describing earlier cases). Though some individuals in this position might be able to put aside their personal experiences, they "would be lacking the quality of indifference which, along with impartiality, is the hallmark of an unbiased juror." *Calderon,* at 982. Therefore, courts "presume[s] conclusively" that these jurors will be affected in their deliberations by those experiences." *Id*.

In March 2013, the relationship between Juror 8 and Mr. Adachi was not one of these "exceptional circumstances" *Fields,* at 766–67. *Olsen,* at 1188-89. Nor does it present an "extreme" or "extraordinary" case. *Tinsley,* at 527.

I found no evidence that Juror 8 lied about a material fact to get on the jury; his explanation for omitting his conviction from his response to question 24 was unrelated to any effort to be selected for the jury. As in *Olson,* Juror 8 completed the questionnaire weeks before trial with no knowledge of the specific case for which he had been summoned. Question 62 inquired about his knowledge of or bias against either "Prosecutor and Assistant District

Attorney Todd Barrett" or "Defense lawyer and Public Defender Jeff Adachi." As to both he responded "NA"—a fact he confirmed in his testimony. During the Scott trial Juror 8 did not associate either lawyer with the attorneys who defended or prosecuted him.

Nor did he have any relationship to the crime. To the extent Juror 8 had a prior relationship with an attorney in the Office of the Public Defender, from his perspective, that relationship ended two and one-half years before the trial. Further, as evidenced by both Ms. Dahm's uncontroverted testimony and her April 12, 2013 email to Mr. Adachi, Juror 8 was cordial to her and—in Ms. Dahm's candid view after speaking to him twice on April 12—" He's a very nice guy, and I think he'd be defense friendly." I find no facts to support a conclusion that Juror 8's prior relationship with or feelings about the Office of the Public Defender warrant a finding of exceptional circumstances to warrant presumptive bias. To the contrary, the evidence supports my finding that Juror 8 was not biased against Scott, Mr. Adachi or the Office of the Public Defender.

McDonough Bias

I found that Juror 8's answer to question 24 was not truthful, and therefore the court must apply the standard for "so-called *McDonough*-style bias, which turns on the truthfulness of a juror's responses on voir dire" where a truthful response "would have provided a valid basis for a challenge for cause. *Fields v. Brown,* 503 F.3d 755, 766–67 (9th Cir.2007) (en banc) (citing *McDonough Power Equipment, Inc. v. Greenwood,* 464 U.S. 548, 554–56, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984))." *Olsen*, at 1188-89.

Had Juror 8 disclosed in his questionnaire all of the information currently available, Scott argues he would have exercised a cause challenge and, failing that, a peremptory challenge and is therefore entitled to a new trial. The *McDonough* rule has been adopted and applied in appeals

and writs from criminal convictions: That a juror provided false information where the truth would have lead a party to exercise a peremptory challenge is only the first step of a *McDonough* analysis: "the motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *McDonough*, at 555-56. In his concurrence, joined by Justices Stevens and O'Connor, Justice Blackmun elaborated that "an honest yet mistaken answer to a voir dire question rarely amounts to a constitutional violation; even an intentionally dishonest answer is not fatal, so long as the falsehood does not bespeak a lack of impartiality. *See McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 555-56 (1984)." *Calderon*, at 973. Further, Justice Blackmun noted that, "regardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option, in determining 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." *McDonough*, at 556-57.

Based on my thorough review and consideration of all of the evidence, I do not find any evidence that Juror 8 harbored bias or prejudice against Scott, his attorney or, for that matter, against the People or the Office of District Attorney, which prosecuted him in 2009. There is **no** evidence of a lack of impartiality and "there is no reasonable probability of prejudice, i.e. no *substantial likelihood* that [Juror 8] …was actually biased against the defendant." *Boyette*, at 888-90.

For all of the reasons stated above, the Juror Motion for New Trial pursuant to Penal Code § 1181(3) is **denied**.

Evidence New Trial Motion

Scott also seeks a new trial pursuant to Penal Code § 1181 (5), (6) and (8) on the grounds of insufficiency of the evidence, erroneously admitted evidence, and newly-discovered evidence—specifically a witness, Eugene Lemelle (also known as "Bubble" or "Bubba") (collectively, the "Evidence New Trial Motion").

Sufficiency of Evidence Penal Code § 1181 (6)

In deciding the motion challenging the sufficiency of the evidence, I must independently review the evidence (*People v. Davis* (1995) 10 Cal.4th 463, 523), but I have broad discretion to determine whether the evidence has sufficient probative value to sustain the verdict of first degree murder. *People v. Ruberg* (1953) 41 Cal.2d 628, 633.

Lying-in-wait murder

> The defendant is guilty of first degree murder if the People have proved that the defendant murdered while lying in wait or immediately thereafter. The defendant murdered by lying in wait if: 1. He concealed his purpose from the person killed; 2. He waited and watched for an opportunity to act; *AND* 3. Then, from a position of advantage, he intended to and did make a surprise attack on the person killed. The lying in wait does not need to continue for any particular period of time, but its duration must be substantial enough to show a state of mind equivalent to deliberation or premeditation.

Judicial Council of California Criminal Jury Instructions: CALCRIM (2013) (hereinafter "CALCRIM"), CALCRIM No. 521.

Scott testified and thereby supplied evidence in support of the verdict. According to Scott, Smith had jolted him out of his sleep, which angered and upset him. Smith departed, but returned. From the video it appears that seven seconds elapsed from the time that Smith approached and Scott stabbed him. Pavao testified that he saw Smith pass through the area twice. On the second pass Pavao saw Scott suddenly rise, speak and attack. These facts support a sneak attack, which was concealed until it was too late for Smith to avoid it. From the evidence it

appears that the attack was executed in a quick and calculated manner—which is consistent with Pavao's testimony and not inconsistent with Scott's. Pavao saw Scott quickly rise from his seat and—he thought—punch Smith. Almost simultaneous with the blow Pavao heard Scott say words to the effect of "you'll never steal from me again." What Pavao interpreted to be a punch was in fact a single blow by the defendant with the knife. Pavao did not see the knife until after the stabbing had taken place. This evidence is consistent with defendant having concealed his purpose from Smith and made a surprise attack. Neither Scott nor Pavao testified to any verbal warning to Smith that Scott possessed a knife. Nor did either of them testify that Smith initiated any punches, kicks or swings. Shelter staff testified that, when they heard the words "fight" they immediately looked up and saw Smith who had already been stabbed and was fleeing from Scott. This, too, is consistent with Scott having perpetrated a surprise attack from a position of advantage. Scott testified that he did not see any type of weapon in Smith's hand before he stabbed Smith. However, Scott had two knives in his possession, one of which he used to stab Smith. The testimony of Dr. Judy Melinek concerning the lack of defensive wounds supports the theory that the victim was taken by surprise, before he had a chance to defend himself.

Premeditation and Deliberation

> The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if he decided to kill before completing the act that caused death.
>
> The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.

CALCRIM No. 521.

As the jury instruction makes clear, the length of time is not the test; a cold, calculated decision to kill can be reached quickly. Here there is evidence to support a finding that Scott decided to kill after Smith made the first pass through the room. Scott testified that he was upset with the victim over a perceived slight occurring during Smith's first pass, namely bumping into Scott as he slept. He also testified to a prior negative interaction with Smith at another homeless shelter. Approximately 10 minutes passed between Scott first becoming aware of Smith's presence in the first pass and the stabbing during Smith's second pass. During the 10 minute interval Scott could have considered and reflected on whether to use a knife, which of the two knives to use, and whether to murder Smith. Pavao's testimony that Scott said "you'll never steal again," before stabbing Smith is consistent with his having a motive to avenge what he perceived to be a prior slight. The evidence is consistent with Scott having decided to stab Smith after the first pass, but waiting until Smith returned, ten minutes later in the second pass. Further, the video demonstrates that there was a seven second gap where Smith was standing in the area near the television before walking near defendant. In that period there was sufficient time for defendant to ready his weapon after making the decision to kill Smith.

Having independently reviewed all of the evidence, including but not limited to the testimony of Scott, I find sufficient evidence to support the verdict of murder in the first degree on both the theory of lying in wait and the theory of premeditation and deliberation. Therefore the motion for a new trial pursuant to Penal Code § 1181 (6) is **denied**.

Admission of the second knife Penal Code § 1181 (5)

The defendant claims admitting the second knife—a black-handled, fixed-blade kitchen knife[8]—was prejudicial error. Scott narrowly circumscribes—in a manner inconsistent with the record—the evidentiary basis for overruling his motion in limine to exclude the knife. It is undisputed that—in violation of the long-standing prohibition against weapons in the shelter—Scott concealed two weapons to circumvent the shelter's metal detector and had them both in his possession at the time he stabbed Smith. The second knife easily meets the low threshold for relevance and admissibility. Evidence Code § 350, 351. The issue was whether: "its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury?" California Evidence Code § 352. Accordingly, the court conducted the prerequisite balancing, answered the questions in the negative and admitted the second knife.

As he did at trial, Scott relies principally on two clearly distinguishable cases: *People v. Riser* (1956) 47 Cal.2d 566 [no evidence at the time of incident defendant possessed weapons, which were not found until two week after crime] and *People v. Henderson* (1976) 58 Cal.App.3d 349 [loaded firearm was in a completely different room in defendant's house].

The second knife's probative value is self-evident, supporting numerous elements of the People's case: defendant's knowledge of his superior weapon power to defeat a claim of self-defense; his lying-in-wait ready to attack from a position of advantage; his decision to take on the victim, knowing he had two deadly weapons at his disposal in support of premeditation and deliberation; corroboration of James Joyner's testimony that he saw defendant with a black-handled steak knife in his hand shortly after the stabbing; corroboration of Pavao's statement that

[8] The black-handled fixed-blade knife is different from the undisputed murder weapon: a brown handled folding knife.

he saw the defendant pick up a fixed-blade boning kitchen knife after the stabbing; impeachment of Scott's testimony that he never took the second knife out of his bag; and Scott's hiding both knives (the folding knife thrown on a roof; the second knife, with Scott's DNA secreted in a discarded bag) as consciousness of guilt.

Conducting the Evidence § 352 analysis, while recognizing the second knife to be adverse to Scott, the court concluded that under the circumstances it was not **unduly** prejudicial, confusing or misleading, nor was its admission unduly time-consuming. *People v. Schrader* (1969) 71 Cal.2d 761, 773-74.

In *People v. Jablonski* (2006) 37 Cal.4th 774, over defendant's objection, the court admitted handcuffs and a stun gun. The California Supreme Court held that, "premeditation was a disputed fact and evidence that defendant carried devices to the crime scene that could have been used to restrain or immobilize the victims was relevant to premeditation." (*Id.*; *see also People v. Anderson* (1968) 70 Cal.2d 15, 26-27 [where the California Supreme Court found that evidence of planning activity is pertinent to the determination of premeditation and deliberation.]; *People v. Smith* (2003) 30 Cal.4th 581, 613 (*Smith*)[9] [where the California Supreme Court found that the trial court did not err in admitting evidence that defendant owned a derringer and ammunition not used in the murder because "[t]his evidence did not merely show that defendant was the sort of person who carries deadly weapons, but it was relevant to his state of mind when he shot [the victim]"].)

The second knife was properly admitted in evidence; the motion for new trial pursuant to Penal Code § 1181 (5) is **denied.**

"Newly discovered" evidence Penal Code § 1181 (8)

[9] In *Smith* the defendant argued that the trial court erred in light of *Riser*; the California Supreme Court disagreed. *Smith*, at 613.

Scott also seeks a new trial, pursuant to Penal Code § 1181 (8) and offers the declaration of Eugene Lemelle (also known as "Bubble" or "Bubba"; hereinafter the "Lemelle Declaration"), an eyewitness to the incident, as the newly-discovered evidence in support. When considering a new trial motion, a trial court has discretion to grant a new trial on the ground of newly discovered material evidence only when all of the following elements are met: (1) the evidence, and not merely its materiality, must be newly discovered; (2) the evidence must not be cumulative; (3) the evidence must be such as to render a different result probable on a retrial of the cause; (4) the party could not with reasonable diligence have discovered and produced the evidence at trial; and (5) that these facts be shown by the best evidence of which the case admits. Penal Code **§** 1181 (8). *People v. Sutton* (1887) 73 Cal. 243, 247-248 (*Sutton*); *People v. Turner* (1994) 8 Cal.4th 137, 212 (*Turner*); *People v. Delgado* (1993)5 Cal.4th 312, 328 (*Delgado*); *People v. Dyer* (1988) 45 Cal.3d 26, 50 (*Dyer*).

Newly-discovered evidence

A motion for a new trial based on newly discovered evidence must establish that the evidence, and not just its materiality, is newly discovered. Facts that are within the defendant's knowledge are not newly discovered evidence, even if he did not make them known to his counsel until later. *People v. Greenwood* (1957) 47 Cal.2d 819, 822. Here, it is undisputed from Scott's own testimony that he knew on February 6, 2012, that Lemelle was a percipient witness. (April 3, 2013 transcript, pages 16, 24, 33, 71). Scott testified that he spoke to Bubba (Lemelle) just before the stabbing, and afterwards Lemelle told Scott to pick up the knife. (April 3, 2013 transcript at pages 24, 33) According to the Lemelle Declaration, the defense investigator contacted Lemelle on April 5, 2013—before jury instruction or closing arguments.

That the defense did not interview Lemelle until after the trial concluded does not satisfy the prerequisite that evidence must be newly discovered. While the Lemelle Declaration states that he was first interviewed by Scott's investigator on April 5, 2013, conspicuously absent from Scott's motion is any evidence as to when Lemelle's identity was first known, and any explanation for the failure to pursue potential evidence the existence of which was known to Scott from the time of the incident. Therefore the evidence contained in the Lemelle Declaration is not newly discovered.

Non-cumulative evidence, such as to render a different result probable on retrial

Second, newly-discovered evidence must not only be material, but not cumulative to warrant granting a new trial. And, third, the evidence must be such as to render a different result probable on a retrial of the cause. *Sutton*, at 247-248; *Turner*, at 212; *Delgado*, at 328; *Dyer*, at 50.

Scott argues that Lemelle's statement that "Smith was underneath the television spinning and twirling around in an erratic and aggressive fashion" and that he "…saw Abdul Smith charge through the chairs at Rickey Smith and attack Scott" is new evidence "since no other witnesses testified to the events preceding the stabbing except for the prosecution witness Whitey Pavao." However, Scott himself testified to events that preceded the stabbing. To the extent that Lemelle would merely corroborate Scott, while the evidence may add weight, it is cumulative. However, in other respects the Lemelle Declaration is contradicted by Scott's own testimony. While the Lemelle Declaration (which presumably was not drafted by Lemelle) states that he saw Smith "attack" Scott, that word—or any synonym—is absent from Scott's own description of the events. For example on direct examination, Scott testified:

Q. Okay. Did Abdul Smith ever stop walking towards you?

22 A. No. (April 3, 2013 transcript at 29.)

Scott testified that Smith was "coming towards me" (April 3, 2013 transcript at page 45, line 7) but—unlike Lemelle—Scott did not testify that Smith "charged" at him or that Smith "attack[ed]" him. Further, Scott admitted on cross examination that the first time he mentioned to anyone that Smith acted aggressively towards him was when he met with defense counsel:

> Q: You didn't tell anyone from the shelter that Mr. Smith had engaged in an aggressive act against you?
>
> A. I hadn't told anyone until I met Mr. Adachi. (April 3, 2013 transcript, page 74 at lines 21-23).

Whether or not the Lemelle testimony is cumulative, to warrant a new trial it must also be such as to render a different result probable on a retrial of the cause. *Sutton*, at 247-248; *Turner*, at 212; *Delgado*, at 328; *Dyer*, at 50; *People v. Drake* (1992) 6 Cal.App.4th 92, 99.

The defense theory—which Scott argued, and the jury rejected—was that Scott pulled the knife in self-defense and thereafter Smith fell on the knife: an accident. A claim of self-defense focuses on what the defendant himself believed:

> The defendant is not guilty of murder if he was justified in killing someone in self-defense. The defendant acted in lawful self-defense if:
>
> 1. The **defendant** reasonably **believed** that he was in imminent danger of being killed or suffering great bodily injury;
> 2. The **defendant** reasonably **believed** that the immediate use of deadly force was necessary to defend against that danger; AND
> 3. The defendant used no more force than was reasonably necessary to defend against that danger.

(emphasis added) CALCRIM No. 505.

Lemelle's proffered evidence cannot substitute for the absence from Scott's testimony of a factual predicate to support **his** reasonable **belief** that he was in imminent danger of being killed or suffering great bodily injury. Scott did not testify that Smith had any weapon, nor does

Lemelle provide that evidence. Nor can Lemelle provide any evidence to support a claim that **Scott** reasonably **believed** that the immediate use of deadly force was necessary to defend against that danger. Like Scott, Lemelle would not testify that Smith had any weapon which required the immediate use of deadly force for defense.

Given the theory of the defense and Scott's own testimony, after reviewing all of the record evidence while considering this motion, I do not find that the admission of Lemelle's testimony would render a different result probable on a retrial of the cause. To the extent that the Lemelle Declaration is not merely cumulative, it is either inconsistent with or contradicted by evidence on which the defense relies. As noted above, Scott did not testify that Smith attacked him. The video upon which the defense relied repeatedly during trial and closing argument, does not depict Smith's "twirling" which presumably lasted longer than the few seconds which are not depicted in the video. The defense argues that Lemelle's credibility is a jury issue, which would have been accurate had Lemelle testified. However on a new trial motion the court must consider whether the evidence is such that a different result is probable. That inquiry necessarily entails considering whether the testimony if presented at a new trial would be persuasive. That Lemelle failed to come forward on the night of the incident or to provide the evidence to anyone until after the trial is a factor which may reduce the weight the jury would accord it. Similarly if his stated reluctance to provide the evidence on April 4 was due to a drug arrest and that fact were to be elicited, that, too, could reduce the probative value of the testimony and diminish the likelihood of a different result in a new trial. Therefore the proffered evidence fails to meet these two prerequisites for granting a new trial.

Reasonable diligence

A defendant relying "on ground of newly discovered evidence to sustain his motion for new trial must have made reasonable effort to produce all his evidence at trial, and he will not be allowed new trial for purpose of introducing evidence known to him and obtainable at time of trial, or which would have been known to him had he exercised reasonable effort to present his defense." (*People v. Williams* (1962) 57 Cal.2d 263, 273.) The crime in this case occurred on February 6, 2012. Scott testified that Bubba (Lemelle) was present and an eyewitness to the incident. (April 3, 2013 transcript at pages 16, 24, 33 and 71). Scott provides no evidence as to why no effort was made to interview Lemelle before April 5, or to subpoena him to testify at the preliminary hearing and/or trial. The preliminary hearing concluded on December 10, 2012, the opening statements in the trial were made March 25, 2013. There is no evidence that the defense served a subpoena on Lemelle, although his identity and presence at the incident were known to Scott on February 6, 2012—more than a year before trial. Nor did the defendant request a continuance of the trial for the purpose of presenting this witness.

Scott is not excused from using reasonable diligence to secure an identified witness by awaiting a verdict before seeking to introduce the testimony, and then asserting in a new trial motion merely that Lemelle's concerns about his own case precluded interviewing and calling him to testify. Had Lemelle been subpoenaed, the court and counsel would know whether he would have invoked his Fifth Amendment right against compelled self-incrimination. If so, the court could have conducted an inquiry outside the jury's presence to determine the legitimacy of Lemelle's invocation of the privilege and fashioned an appropriate remedy. *People v. Lopez* (1999) 71 Cal.App.4th 1550, 1555-56.

Under the circumstances, I do not find the delay in locating or interviewing the witness or proffering the evidence to be reasonably diligent. A defendant's failure to diligently pursue and to present evidence to demonstrate its truth and materiality, is inconsistent with granting a new trial motion. A motion for a new trial based on newly discovered evidence is disfavored. (*People v. McDaniel* (1976) 16 Cal.3d 156, 179.) Because the proffer of Eugene Lemelle is deficient for all of the stated reasons, Scott's motion for a new trial pursuant to Penal Code 1181(8) is **denied**.

Conclusion

After hearing and evaluating all of the evidence and considering all of the written and oral arguments, for the reasons set forth above, the **Motions for New Trial pursuant to Penal Code §§ 1181(3), (5),(6) and(8) are denied**.

DATE: September 24, 2013

/s/ *Jeffrey S. Ross*

JEFFREY S. ROSS
Judge of the Superior Court

APPENDIX E

FILED

AUG 14 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICKEY LEON SCOTT, Petitioner-Appellee, v. ERIC ARNOLD, Warden, of California State Prison, Solano, Respondent-Appellant.	No. 18-16761 D.C. No. 4:16-cv-06584-JST Northern District of California, San Francisco ORDER

Before: MELLOY,* BYBEE, and N.R. SMITH, Circuit Judges.

The panel recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellee's petition for rehearing en banc, filed July 6, 2020, is DENIED.

* The Honorable Michael J. Melloy, United States Circuit Judge for the U.S. Court of Appeals for the Eighth Circuit, sitting by designation.

APPENDIX F

The Sixth Amendment to the United States Constitution provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

28 U.S.C. § 2254 provides:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on—

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

California Code of Civil Procedure § 225 provides:

A challenge is an objection made to the trial jurors that may be taken by any party to the action, and is of the following classes and types:

(a) A challenge to the trial jury panel for cause.

(1) A challenge to the panel may only be taken before a trial jury is sworn. The challenge shall be reduced to writing, and shall plainly and distinctly state the facts constituting the ground of challenge.

(2) Reasonable notice of the challenge to the jury panel shall be given to all parties and to the jury commissioner, by service of a copy thereof.

(3) The jury commissioner shall be permitted the services of legal counsel in connection with challenges to the jury panel.

(b) A challenge to a prospective juror by either:

(1) A challenge for cause, for one of the following reasons:

(A) General disqualification—that the juror is disqualified from serving in the action on trial.

(B) Implied bias—as, when the existence of the facts as ascertained, in judgment of law disqualifies the juror.

(C) Actual bias—the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party.

(2) A peremptory challenge to a prospective juror.

California Code of Civil Procedure § 229 provides:

A challenge for implied bias may be taken for one or more of the following causes, and for no other:

(a) Consanguinity or affinity within the fourth degree to any party, to an officer of a corporation which is a party, or to any alleged witness or victim in the case at bar.

(b) Standing in the relation of, or being the parent, spouse, or child of one who stands in the relation of, guardian and ward, conservator and conservatee, master and servant, employer and clerk, landlord and tenant, principal and agent, or debtor and creditor, to either party or to an officer of a corporation which is a party, or being a member of the family of either party; or a partner in business with either party; or surety on any bond or obligation for either party, or being the holder of bonds or shares of capital stock of a corporation which is a party; or having stood within one year previous to the filing of the complaint in the action in the relation of attorney and client with either party or with the attorney for either party. A depositor of a bank or a holder of a savings account in a savings and loan association shall not be deemed a creditor of that bank or savings and loan association for the purpose of this paragraph solely by reason of his or her being a depositor or account holder.

(c) Having served as a trial or grand juror or on a jury of inquest in a civil or criminal action or been a witness on a previous or pending trial between the same parties, or involving the same specific offense or cause of action; or having served as a trial or grand juror or on a jury within one year previously in any criminal or civil action or proceeding in which either party was the plaintiff or defendant or in a criminal action where either party was the defendant.

(d) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his or her interest as a member or citizen or taxpayer of a county, city and county, incorporated city or town, or other political subdivision of a county, or municipal water district.

(e) Having an unqualified opinion or belief as to the merits of the action founded upon knowledge of its material facts or of some of them.

(f) The existence of a state of mind in the juror evincing enmity against, or bias towards, either party.

(g) That the juror is party to an action pending in the court for which he or she is drawn and which action is set for trial before the panel of which the juror is a member.

(h) If the offense charged is punishable with death, the entertaining of such conscientious opinions as would preclude the juror finding the defendant guilty; in which case the juror may neither be permitted nor compelled to serve.