District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3748	
THE PEOPLE OF THE STATE OF COLORADO, vs. **GARRETT COUGHLIN,** Defendant.	DATE FILED: April 14, 2020 4:02 PM CASE NUMBER: 2017CR1074 **▲ COURT USE ONLY ▲**
Attorney(s) for the People: Catrina Weigel and Christine Rinke *Attorney(s) for the Defendant:* Mary Claire Mulligan and R. Christian Griffin	Case Numbers: **17CR1074** Division: 4 Courtroom: S
ORDER RE: DEFENDANT'S MOTION FOR NEW TRIAL	

THIS MATTER comes before the Court in connection with the Defendant's June 27, 2019 Motion for New Trial. The Court, having reviewed the Defendant's Motion and the People's July 7, 2019 Response, and having held an evidentiary hearing on the matter, enters the following ORDER:

I. BACKGROUND

On May 17, 2017, the People charged Defendant Garrett Coughlin with three counts of first-degree murder after deliberation, three counts of first-degree felony murder, and one count of aggravated robbery. Defendant was tried by a jury between May 30, 2019 and June 17, 2019. On June 17, 2019, the jury returned a verdict finding Defendant not guilty on the three counts of first-degree murder after deliberation, guilty of three counts of first-degree felony murder, and guilty of one count of aggravated robbery. The Court sentenced Defendant to three consecutive life sentences, without the possibility of parole, on the three first degree felony murder convictions and to ten years for aggravated robbery.

On June 27, 2019 the Defendant filed a motion for a new trial based on allegations of juror misconduct. The People filed a Response. Defendant subsequently filed an appeal of his conviction

and this court lost jurisdiction over the Motion for a New Trial. On November 18, 2019 the Court of Appeals remanded the case back to this district court for the limited purpose of hearing and ruling upon the motion for new trial.[1]

The alleged juror misconduct initiated on May 30, 2019 during initial jury selections process when the panel of potential jurors completed a written questionnaire. The questionnaire had been jointly agreed upon by the parties, save the three additional questions posed by Defendant in an April 12, 2019 Motion.[2]

Question #10, inquired "Have you, a family member, or close friend, ever been charged with or convicted of a crime other than a minor traffic offense? Who? When? What type of crime?" Jurors M.A. and R.H. each answered "no" to question #10. *See* Defendant's Exhibit A and E. Both M.A. and R.H. were selected to serve as part of the jury of twelve, plus four alternates. It is undisputed that M.A. and R.H.'s responses to Question #10 were not truthful.

Defendant asserts the misrepresentations by the two jurors was deliberate and dishonest, and such entitles him to a new trial, as the concealment by the jurors of material biographical information renders them incapable of rendering a fair and impartial verdict in the matter. Defendant contends this impairs his constructional rights to due process and a fair trial.

The People argue the nondisclosures did not cause material prejudice. The People assert at M.A.'s non-disclosure was inadvertent and did not impact her ability to be fair and impartial or cause prejudice to Defendant. The People concede R.H.'s non-disclosure was intentional but assert his lack of candor did not prejudice the Defendant to the effect that he did not receive a fair trial.

Additionally, the People assert there is no evidence in the record that that the jurors' failures to disclose were discovered after the trial, rather than during the course of trial, when the lack of honesty could have been addressed prior to a verdict.

On January 30, 2020, the Court heard testimony and received evidence. M.A. testified. R.H. commenced testifying, but during the course of his testimony he asserted his Fifth Amendment

[1] In its November 18, 2019 Order the Court of Appeals also remanded the matter for this court to conduct a hearing for resentencing, which is unrelated to the issue now before this court.

[2] The three additional questions posed by Defendant are not material to the issue presently before the Court.

privilege. The People then motioned of a continuance in order to consider whether they would offer immunity to R.H. The Court granted a continuance.

On March 9, 2020, the Court reconvened the hearing. The People offered R.H. immunity. R.H. testified along with the People's investigator, Chuck Heidel.

Defendant now moves for a new trial asserting the alleged material and prejudicial juror misconduct violated his constructional rights to due process and a fair trial by jury.

II. LEGAL STANDARD

Pursuant to Colorado Rule of Criminal Procedure 33, the court "may grant a defendant a new trial if required in the interests of justice." Crim. P. 33(c).

The rule gives a trial court "an opportunity to correct its errors." *People v. Lopez*, 399 P.3d 129, 138 (Colo. App. 2015) (citing *Losavio v. Dist. Court*, 512 P.2d 264, 266 (Colo. 1973); *Haas v. People*, 394 P.2d 845, 848 (Colo. 1964); and *Cook v. People*, 266 P.2d 776 (Colo. 1954)). However, "[t]he decision to grant a new trial is within the court's discretion, and if such decision is not manifestly arbitrary, unreasonable, or unfair, it will be upheld." *People v. Esquivel-Alaniz*, 985 P.2d 22, 25 (Colo. App. 1999) (citing *People v. Eckert*, 919 P.2d 962 (Colo. App. 1996)). "The trial court may grant a new trial if it determines that the interests of justice so require." *Eckert*, 919 P.2d at 968.

There is minimal recent caselaw in Colorado regarding the standard for granting a new trial based on juror misconduct. That which exists is almost 20 years old and is not on point with the facts of this case. The evolution of Colorado law over the past 20 years primarily addresses errors in the jury selection process related to a trial court's ruling on challenges for cause and its impact on peremptory challenges versus actual juror misconduct.

The parties both cite to *People v. Rael*, 578 P.2d 1067, 1068 (Colo. App. 1978), an earlier Colorado case where the defendant appealed his conviction for second-degree burglary on the grounds of juror misconduct. A juror in that case had failed to disclose he had been previously convicted of burglary and served time in prison for that conviction. The Defendant in *Rael* argued that such misconduct required he be granted a new trial. The Court of Appeals found that a juror who misrepresents or conceals material and relevant matters is guilty of misconduct, and it may be prejudicial to either or both parties, because it impairs the right to challenge for cause or peremptorily.

Id at 1068. The Court held that the non-disclosure denied Defendant the right to exercise a peremptory challenge and under such circumstances prejudice was presumed.

Two years later, in *People v. Borrelli*, 624 P.2d 900 (Colo. App. 1980), the Court of Appeals considered whether to grant a new trial on grounds of juror misconduct in a case where Defendant was convicted of first-degree murder. After trial, newly discovered evidence showed that a juror provided false answers and concealed material facts during voir dire. In *Borrelli*, the juror was being treated for a serious personality disorder, had severe mental illness, had attempted suicide several times, and continuously used a psychoactive drug, even while on serving on the jury. *Id.* at 902. The *Borrelli* court held that untruthfulness during voir dire in and of itself does not warrant a new trial, but such misconduct *may* justify granting a new trial. *Id* at 903 (emphasis added). "The failure of a juror during void dire (sic) to answer material questions truthfully, if discovered . . . after the trial, . . . may justify the granting of a new trial." *Id* at 903. The *Borrelli* court found a "defendant has the right to exercise all his peremptory challenges, and when a juror misrepresents or conceals material and relevant matters, that right, as well as the right to challenge for cause, is impaired." *Id* at 903.

Alvarez v. People, 653 P.2d 1127 (Colo. 1982), addressed a situation where a juror used a dictionary to look up definitions of words used in jury instructions and shared those definitions with at least one other juror. The trial court found the conduct improper and then considered whether this improper juror conduct required reversal. The Court in Alvarez stated, that in considering whether other types of jury misconduct mandate reversal of a conviction, we have consistently held that a defendant must establish that he was prejudiced by the misconduct in order to overturn his conviction. *People v. Mackey,* 185 Colo. 24, 521 P.2d 910 (1974); *People v. Peery*, 180 Colo. 161, 503 P.2d 350 (1972); *Milano v. People*, 159 Colo. 419, 412 P.2d 225 (1966); *Segura v. People*, 159 Colo. 371, 412 P.2d 227 (1966). See *Alvarez* at 1131. The defendant in Alvarez urged the Court to find that prejudice should be conclusively presumed when a juror consults a dictionary for aid in understanding words used in the court's instructions. The Court in Alvarez found it need not reach that question, as the record amply established defendant was prejudiced in fact by the juror's misconduct. *Id* at 1131.

People v. Dunoyair, 660 P.2d 890 (Colo. 1983), the Colorado Supreme Court found under some circumstances a juror's nondisclosure of information during jury selection may be grounds for a new trial. Defendant *Dunoyair* was convicted of felony criminal mischief. After the trial a juror informed defense counsel that he knew a security guard who had testified for the prosecution. The Court found the juror's nondisclosure was inadvertent and denied the motion for a new trial based on

juror misconduct. However, the *Dunoyair* court also held when a juror deliberately misrepresents important biographical information relevant to a challenge for cause or a peremptory challenge or knowingly conceals a bias or hostility towards the defendant, a new trial might well be necessary. "In such instances the juror's deliberate misrepresentation or knowing concealment is itself evidence that the juror was likely incapable of rendering a fair and impartial verdict in the matter." *Id* at 895-896.

Dunoyair was grounded in the premise that the jury selection process cannot uncover every possible influence that might theoretically affect a juror's consideration of a case. Rather it found that the basis for a new trial must occur when the misconduct will impair the juror's ability of impartiality in the deliberative process. *Id*. at 895-96; *see generally Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed.2d 78 (1982).

The most recent Colorado case that addressed in detail the issue of whether a new trial should be granted based on juror misconduct was *People v. Espinoza*, 669 P.2d 142 (Colo. App. 1983). In *Espinoza*, the defendant was convicted by a jury of felony menacing, sexual assault and possession of dangerous drugs. A juror had not recalled at the time of jury selection that she had been a victim of a crime. Later, during deliberations the juror recalled being the victim of a crime during World War II where a soldier armed with a knife forced her to walk to the end of town with him so that he could go AWOL without arousing any suspicion on the part of the town people. The trial court held an evidentiary hearing where the juror testified she had not viewed herself as a victim of a crime, only recollected the event near the end of deliberations, and the incidents lack of effect on the outcome of the case. *Id* at 143-44. The Court of Appeals found the jurors nondisclosure was inadvertent and concluded that the burden was on the defendant to show prejudice. The Court found there was no prejudice shown and the defendant was therefore not entitled to reversal. *Id* at 144.

The trial court noted, "[i]f the court were to hold today that some fact not in the present recollection or reasonable present recollection of a person selected for jury duty but which later occurs to him is, per se, a basis for a new trial on the basis of inability to intelligently exercise a peremptory challenge or a challenge for cause, you have a circumstance where, under the present voir dire methods, almost every juror has something that he might well not remember until at some later time ...." *Id* at 144.

Similar later rulings were reached in *People v. McNeely*, 68 P.3d 540 (Colo. App. 2002)(no new trial required where juror failed to disclose she remotely knew the defendant as there was no

intentional deception or nondisclosure on the part of the juror); *People v. Key*, 851 P.2d 228 (Colo. App. 1992), reversed on other grounds *Key v. People*, 865 P.2d 822 (Colo. 1994) ("A prospective juror's untruthful answers on voir dire concerning material matters do not entitle a party to a new trial *per se*." (emphasis added). There the juror inadvertently failed to disclose that she was a former neighbor of the defendant and no prejudice resulted.).

It is notable that in *People v. McNeeley*, the Colorado Court of Appeals, in 2002, was still relying on the standard set forth in *People v. Espinoza*, 669 P.2d 142 (Colo. App. 1983), *aff'd,* 712 P.2d 476 (Colo. 1985) that prejudice warranting a new trial may be presumed when a juror deliberately or knowingly conceals important information during jury selection. The Colorado line of cases set forth above all remain good law.

The People urge the Court to apply the analysis in *People v. Novotny*, 320 P.3d 1194 (Colo. 2014) where the Colorado Supreme Court held that the overturning of a conviction requires an outcome-determinative analysis for structural error. *Novotny* was not a case that addressed jury misconduct. Rather it was a consolidated opinion of two separate cases where the Court of Appeals had applied a rule requiring automatic reversal to be the remedy for erroneous rulings by the trial court on challenges for cause that adversely impacted defendants' ability to shape the jury through peremptory challenges. *Id.* at 1199.

Novotny found a structural error is one that infects the entire trial process, rendering it fundamentally unfair, unless stated otherwise by an express legislative mandate or specific case law. *Id.* at 1201, 1203. However, prejudice resulting in the denial of preemptory challenges, in and of itself, will not prove a structural error. *Id.* at 1203. Defendant does not dispute the holding in *Novotny* but argues that *Novotny* "had nothing to do with the issue of juror misconduct, which is the basis for Mr. Coughlin's motion for a new trial."

This Court finds the ruling in *Novotny* can be reconciled with the standard applied in the above Colorado line of cases that address the impact of juror misconduct during voir dire on a defendant's motion for a new trial. *Dunoyair*, and the Colorado cases that follow it, require the Court to determine if the nondisclosure of a juror is either inadvertent or if the juror deliberately misrepresented important biographical information relevant to a challenge for cause or a peremptory challenge or knowingly conceals a bias or hostility towards the defendant. Colorado courts have held a new trial *might* well be necessary, as in such instances the juror's deliberate misrepresentation or knowing concealment is itself

evidence that the juror was *likely* incapable of rendering a fair and impartial verdict in the matter. (emphasis added.) If a juror was incapable of rendering a fair and impartial verdict then it would stand to reason that such inability would constitute a structural error that would infect the entire trial process, rendering the trial fundamentally unfair. Thus, the Colorado cases addressing juror misconduct during voir dire, though almost 20 years old, are not inconsistent with the structural error analysis set forth in *Novotny*.

Colorado cases after *Novotny* make it clear that defendant's loss of a peremptory challenge based on the trial court's erroneous decision in a challenge for cause does not result in a presumption of prejudice. *See People v. Wise*, 348 P.3d 482 (Colo. App. 2014); *Vigil v. People*, 455 P.3d 332 (Colo. 2019). Last year, in *Vigil*, the Colorado Supreme Court set forth that when it issued *Novotny* it focused on the propriety of automatic reversal for what it had previously considered to be the "forced" use of a defendant's peremptory challenge to cure an erroneous ruling on a challenge for cause. It relied not only on developments in the harmless error doctrine, but also on its analysis that more recent Supreme Court jurisprudence finding a lack of any constitutional underpinning whatsoever for peremptory challenges, largely foreshadowed its holding. Thus, in *Vigil*, the Colorado Supreme Court expressly answered the question left open in *Novotny* by disavowing its prior understanding that the constitution, statute, rule, or some combination of the three, granted a criminal defendant a right to shape the jury through the use of peremptory challenges. *Id.* at 337.

Though the case before this court does not deal with the district court's erroneous decision in a challenge for cause, which obstructed a defendant's right to shape the jury through a peremptory challenge, this Court finds *Novotny* and *Vigil* instructive to the issue of whether juror misconduct, done inadvertently or deliberately, entitles a defendant to a new trial. The basis for the holdings in Colorado jury misconduct cases is, in part, that the misconduct, when material, impairs defendant the right to exercise all challenges, as well as the right to challenge for cause.

Colorado's earlier caselaw, finding prejudice was presumed when a juror misrepresents or conceals material and relevant matters, was based on the juror misconduct being prejudicial to either or both parties, *because* it impaired the right to challenge for cause or to *exercise a peremptorily challenge*. *People v. Rael*, 578 P.2d at 1068 (emphasis added). *Dunoyair*'s finding a new trial might well be necessary when a juror deliberately misrepresents important biographical information was also directed, in part, due to the defendant's inability to exercise a challenge for cause or a peremptory challenge. *Dunoyair*, 660 P.2d at 895-96. *See also Espinoza*, 669 P.2d at 144.

This Court finds that it must first determine if M.A. and R.H.'s non-disclosures were intentional or inadvertent misrepresentations. If there was no intentional deception or nondisclosure on the part of the juror, then Defendant must demonstrate prejudice that resulted from the nondisclosure.

If the misrepresentations were deliberate and intentional, the Court must determine if the juror was *likely* incapable of rendering a fair and impartial verdict in the matter. If the juror was likely capable of rendering a fair and impartial verdict than it is harmless error, as there is no structural error even if the defendant was denied an opportunity to shape the jury through challenges for cause or peremptory challenges. If the juror however was likely incapable of rendering a fair and impartial verdict, then a structural error exists, which infects the entire trial process, rendering it fundamentally unfair and prejudicial to Defendant.

The prosecution also advocates that this Court apply the standard from *McDonough Power Equipment, Inc. v. Greenwood*, 104 S.Ct. 845 (1984). *McDonough* is a civil product liability case in which a seated juror failed to respond affirmatively to a voir dire question asked orally of the jury panel members, seeking to elicit information about previous injuries to members of the juror's immediate family. The U.S. Supreme Court held the respondent was not entitled to a new trial unless the juror's failure to disclose denied respondent of the right to an impartial jury.[3]

In reaching its holding *McDonough* set forth, "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 a trial." *Id.* at 850. In reaching its holding *McDonough* declared that "[o]ne touchstone of a fair trial is an impartial trier of fact – a jury capable and willing to decide the case solely on the evidence before it." *Id.* at 849. (internal citations omitted). "Voir dire examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors….The necessity of truthful answers by prospective jurors if this process is to serve its purpose is obvious." *Id.* at 849.

[3] The respondent in *McDonough* had not directly asserted before the District Court that the juror's nondisclosure warranted a new trial. The Court found it was unclear as to whether the information regarding the juror that was set forth in an affidavit from respondent was known to respondent or their counsel at the time of voir dire. If it were, respondent would be barred from later challenging the composition of the jury when they had chosen not to interrogate the juror further upon receiving an answer which they thought to be incorrect. *See McDonough*, 104 S.Ct. at 846.

Though *McDonough* was a civil case that is more than 25 years old, its holding has been adopted in a more recent criminal case by the United States District Court for the District of Colorado. *See U.S. v. Chadwick,* No. 12-CR-00345 CMA, 2013 WL 3010823 (D. Colo. June 17, 2013) (denying Defendant's motion for new trial, among other reasons, for failure to prove the two-prong test set forth in *McDonough).*

More recently, in *Sampson v. U.S.*, 724 F.3d 150 (1st Cir. 2013), the Court of Appeals in the 1st circuit emphasized "[f]ew accouterments of our criminal justice system are either more fundamental or more precious than the accused's right to an impartial jury. That right is threatened when—as in this case—juror dishonesty occurs during the voir dire process yet is not discovered until well after final judgment has entered on the jury's verdict. But finality is also valuable, and not every instance of juror dishonesty requires setting aside a previously rendered verdict." *Id.* at 154.

In *Sampsom* the defendant has been sentenced to death on two counts of carjacking resulting in the murder of two individuals. Defendant had contended that three jurors falsely answered material questions during voir dire. The District Court had found two of the jurors' responses were inadvertent and not material. However, the District Court found one of the three juror's responses ("Juror C") were intentionally dishonest and that truthful answers would have justified an excusal for cause. The Court of Appeals applied a binary test based on *McDonough* and found in order to grant a motion for a new trial the defendant must show 1) that the juror failed to answer honestly a material voir dire question and 2) that a truthful response would have provided a valid basis for a challenge for cause. *Id.* at 164-65.

The court adhering to *McDonough*, emphasized that in this context, "[e]verything depends on the particular circumstances" of the case and the inquiry into potential bias in the event of juror dishonesty must be both context specific and fact specific. *Id.* at 166. "Although juror dishonesty, by itself, is not sufficient to demonstrate bias, it can be a powerful indicator of bias. *Id*. at 167 (*citing U.S. v. Colombo,* 869 F.2d 149, 151 (2d Cir. 1989); States v. *Perkins,* 748 F.2d 1519, 1532–33 (11th Cir, 1984)). The outcome of this inquiry ultimately turns on "whether a reasonable judge, armed with the information that the dishonest juror failed to disclose and the reason behind the juror's dishonesty, would conclude under the totality of the circumstances that the juror lacked the capacity and the will to decide the case based on the evidence (and that, therefore, a valid basis for excusal for cause existed)." *Id.* at 165-66.

Importantly, *Sampson* held the party seeking to upset the jury's verdict has the burden of showing the requisite level of bias by a preponderance of the evidence. *See DeBurgo v. St. Amand*, 587 F.3d 61, 71 (1st Cir. 2009).

As the prosecution points out, the court in *Sampson* articulated several factors that may be relevant in determining "whether a juror has both the capacity and the will to decide the case solely on the evidence." *Sampson*, 724 F.3d at 166. These factors include, but are not limited to, the following:

1. The juror's interpersonal relationships, *see Colombo*, 869 F.2d at 151-52;
2. The juror's ability to separate emotions from duties, *see Dennis v. Mitchell*, 354 F.3d 511, 518-19, 521 (6th Cir. 2003);
3. The similarity between the juror's experiences and important facts presented at trial, *see U.S. v. Torres*, 128 F.3d 38, 47-48 (2d Cir. 1997);
4. The scope and severity of the juror's dishonesty, *see Dyer v. Calderon*, 151 F.3d 970, 983-84 (9th Cir. 1998) (en banc); and
5. The juror's motive for lying, *see McDonough*, 104 S.Ct. at 850.

Id. at 166.

Juror C in *Sampson* provided dishonest answers to voir dire questions that are remarkably similar to the information sought in juror questionnaire #10 in this case. In *Sampson* the juror lied about whether she had a daughter, whether anyone close to her had ever had a drug problem, been a victim of a crime, questioned in a criminal investigation, charged with committing a crime, ever had a fair experience with the police or if she knew anyone who had been sentenced to prison. *Id.* at 162. Juror C answered "no" to the above questions. But, in fact, Juror C had been married to an individual who had a substance abuse issue, had feared physical abuse from him, and had often been threatened by him. He once menaced her with a shotgun, which she reported to police. Her husband violated a protective order, thus committing a criminal offense. He was later sentenced to a 6-month period of incarceration. *Id.* at 162.

When Juror C belatedly admitted these events, she characterized them as "horrible" and "a nightmare." Juror C "forgot" about these experiences because thinking of them was "killing" her. She was unwilling to admit that such events could happen in her family. Juror C continued her charade during the initial session of the post-trial hearing regarding her misconduct. When defense counsel

attempted to probe her lies about her husband, she resisted that line of inquiry, professing that she did not "want to go into all of these [things]." On the second day of the post-trial hearing, the truth began to emerge; Juror C admitted, for the first time, that she had a daughter who had been arrested. There were other statements of dishonesty that were discovered during the post-trial hearing that did not occur during voir dire, which the court found were plainly relevant to Juror C's credibility and strongly supported the district court's finding of juror dishonesty. In all events, Juror C's demeanor while testifying evinced her emotional pain and humiliation; she was visibly distraught, crying and incoherently attempting to excuse her mendacity. *Id.* at 162-63.

As so powerfully set forth in *Sampson*, "[v]ior dire is a singularly important means of safeguarding the right to an impartial jury. A probing voir dire examination is '[t]he best way to ensure that jurors do not harbor biases for or against the parties.' *Correia v. Fitzgerald,* 354 F.3d 47, 52 (1st Cir. 2003). This goal, however, is not easy to achieve: a person who harbors a bias may not appreciate it and, in any event, may be reluctant to admit her lack of objectivity. *See McDonough,* 104 S.Ct. 845; *Crawford v. United States,* 29 S.Ct. 260 (1909). As the Supreme Court explained over a century ago, '[b]ias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence.' *Crawford,* 29 S.Ct. at 265." *Id.* at 163-64.

The voir dire process, which is fluid rather than mechanical, is frustrated when a prospective juror is dishonest. Both the juror's dishonesty and her motivation for that dishonesty may cast doubt upon her impartiality. *See McDonough,* 104 S.Ct. at 850. "If the answers to [voir dire] questions are willfully evasive or knowingly untrue, the talesman, when accepted, is a juror in name only." *Clark v. United States,* 289 U.S. 1, 11 (1933).

The Court in *Sampson* found the written questions, individually, were "designed to solicit information that potentially could impugn a juror's impartiality; and the questions, collectively, bore heavily on that subject. Thus, the voir dire questions were material." *Id.* at 167. It further found "a reasonable judge, armed with the information that the dishonest juror failed to disclose and the reason behind the juror's dishonesty, would conclude under the totality of the circumstances that the juror lacked the capacity and the will to decide the case based on the evidence (and that, therefore, a valid basis for excusal for cause existed). [It concluded] that this showing was made based on three cross-braced pillars: (i) Juror C's habitual dissembling; (ii) the intense emotions Juror C exhibited when

belatedly relating her life experiences; and (iii) the similarities between Juror C's unreported life experiences and the evidence presented during the penalty-phase hearing." *Id.*

The Court in *Sampson,* acknowledged "the stakes are high…and the cases that populate this arcane corner of the law are muddled." *Id.* at 154. This Court concurs. The stakes are indeed high. They include Defendant's sentence of life in prison without the possibility of parole, balanced with the human suffering and anguish of victim's families in protracted court proceedings, and the integrity of the justice system's trial by an impartial jury. There is not clear precedent in Colorado law as to how the more recent *Novotny* and *Vigil* analysis is applicable to the string of Colorado juror misconduct cases from the 1980's. *See People v. Dunoyair,* 660 P.2d 890 (Colo. 1983); *People v. Espinoza,* 669 P.2d 142 (Colo. App. 1983); *People v. Rael,* 578 P.2d 1067, 1068 (Colo. App. 1978). Nor does Colorado law address the application of the *McDonough* and *Sampson* test and whether it can or should be balanced with the *Novotny* and *Vigil* standard.

Considering the lack of clear authority, this Court finds persuasive the analysis done in *Sampson,* and its incorporation of the *McDonough* two-prong standard. The Court finds this analysis consistent with the structural error test set forth in *Novotny* and *Vigil,* as well as reconciled with prior Colorado juror misconduct holdings in *Rael, Dunoyair and Espinoza.* The referenced holdings do not pose conflicting analysis, but rather are reconcilable and permit an approach that balances the significant, compelling and competing interests the Court must consider.

III. FINDINGS OF FACTS

On Thursday, May 30, 2020 this Court swore in the jury panel. May 30, 2019 Tr., p. 3, 16. The panel was instructed, "…once you have each fully and diligently completed the questionnaire, you'll be excused for the day." *Id.* at 3. The Court set forth, "I can also tell you that the more thoroughly you complete the questionnaire, the easier the process will be for everybody. Now sometimes you just answer nothing to questions and there's nothing more you need to explain, but if there is a particular box where you checked yes to something and it says please explain, that's where you need to give me a thorough explanation and that will facilitate this process." *Id.* at 13. "When you are done with the jury questionnaire, you will be free to leave for today. The reason I am telling you to be thorough with the questionnaire is sometimes people think, oh, I can get done with the questionnaire and I can leave for the day, yet if you weren't thorough with it that means you're going to be coming back for a longer period of time at another time." *Id.* at 13.

Prior to completing the questionnaire, the jury panel were also informed by the Court that all the instructions being provided to them were orders of the Court with which they must comply. *Id.* at 6, 15, 16. They were cautioned that they must be fair and impartial (*Id.* at 8), and diligent and conscientious in their roles. *Id.* at 18.

The panel members were aware they would not need to remain in the Justice Center all day on Thursday but would rather be able to return to their work or homes after completing the questionnaire. They were informed they would return to the Justice Center on another day for further jury selection process. All panel members, who were sworn under oath to answer the questionnaire truthfully and completely, were reminded of their duty to be conscientious and to be fair and impartial.

A. Conduct of Juror R.H.

Juror R.H. answered "no," under oath, to question #10 on the juror questionnaire, "Have you, a family member, or close friend, ever been charged with or convicted of a crime other than a minor traffic offense? Who? When? What type of crime?" Ex. E. The jury questionnaire contained a statement that "I hereby declare that the information contained here is true to the best of my knowledge." *Id.* The parties concur, and the court finds, this response was not truthful.

R.H. has three children. He testified on March 9, 2020 that all three of his children had been charged or convicted of crimes other than minor traffic offenses. His son, also known as R.H. ("Son R.H."), was charged in 2013 with driving under the influence, careless driving, resisting arrest, obstructing a police officer, convicted of a DWAI and sentenced to 14 days in jail. *See* Mar. 9, 2020 Tr., p. 8, 9;[4] Ex. F. R.H. had hired counsel for his son, posted a $5,000 bond and attended court with Son R.H. Mar. 9, 2020 Tr., p. 10, 26, 27.

In 2004, Son R.H. was charged with first degree criminal trespass and theft during a time he resided in R.H.'s home. R.H. again posted bond and hired counsel for his Son R.H, who served four days of weekend jail time, and requested Son R.H. be permitted to leave the state and travel on a vacation to Florida with R.H. *Id.* at 9-11, 29.

[4] The Court notes that its pages on the March 9, 2020 transcript are not identical to those used by counsel. The Court is drafting this Order during the Covid 19 pandemic at a time when staff are not reporting to work due to the Governor's stay at home order. Thus, the Court is utilizing a transcript previously electronically provided by the court reporter, which appears to be formatted in a manner that is slightly different then the transcript used by counsel.

Son R.H. had also been charged as a juvenile in 2003 for unlawful sextual contact, and R.H. appeared in court with Son R.H., spoke with the sheriff and hired an attorney for him on that matter. *Id.* at 11-13, 29-30; Ex. H.

It is unreasonable to conclude that R.H. would have forgotten about Son R.H.'s three criminal encounters. In each of the criminal episodes R.H. was actively involved with the criminal proceedings for Son R.H., by posting bond, hiring counsel, making probation requests to be out of state, and at least in one case, appearing in court. Though the two earlier charges and convictions were somewhat remote in time, the most recent occurred in 2013. It is improbable that R.H. would not have remembered he had a child with three criminal proceedings in his history.

R.H. also had a daughter, April, who was charged with theft and false information to a pawn broker in 2001. Mar. 9, 2020 Tr., p. 13-14; Ex. I.

R.H.'s third child, Melanie, was charged with theft in 1995, at a time when she permanently resided in his home. Mar. 9, 2020 Tr., p. 14; Ex. J.

R.H. testified that he arrived at court on May 30, 2019 without his reading glasses. He signed the questionnaire, but he did not read it. Rather it was read to him by a court employee, to whom he verbally stated his answers. The court employee wrote the answers on the questionnaire and read the responses back to him. R.H. offered to leave the courthouse to obtain his glasses, but the court employee informed him she would read him the questions. The handwriting on the questionnaire is not the handwriting of R.H, except that he did write at the bottom of the form "I left my reading glasses at home, having hard time reading this." Mar. 9, 2020 Tr., p. 16, 17, 33, 34; Ex. E. The parties do not dispute these facts. The Court finds R.H.'s testimony in this regard to be credible.

R.H. testified the court employee read him the entire questionnaire, including the part that instructed him to answer completely and accurately. Mar. 9, 2020 Tr. 18. He concedes his answer to question #10 was false, as all three of his children had been charged with crimes. *Id* at 19, 20.

R.H. testified that at the time he was being read the questions and providing his verbal responses there were multiple people around him and the court employee. He testified he felt like he was on stage. R.H. is African American. He testified that his pride and the perceptions he constantly deals with as an African American caused him to answer the questions untruthfully in light of the fact that other people were around him as he verbally responded. He acknowledges he was wrong in doing

so. *Id.* at 16, 17, 18, 20. He further acknowledges when the office of the District Attorney contacted him in December of 2019 to discuss his son's charges, he "didn't come clean." *Id.* at 22, 23. R.H. had remembered his son's criminal circumstances but had forgotten his daughter's charges, due to the passage of time, until his wife reminded him while he was in a telephonic interview with the D.A.'s office. *Id.* at 23, 32. The Court finds his testimony credible in this regard.

The Court has considered the testimony of R.H., the exhibits, evidence of which the Court took judicial notice, and the record. In addition, the Court closely observed the demeanor of R.H. when he testified at the January 30 and March 9, 2020 hearings, considers his motives, the scope and severity of his dishonesty, the circumstances under which he completed the questionnaire, and gives weight to his statements during post-trial interviews with the District Attorney and its investigator.

R.H. testified he has no bias in favor of the prosecution or law enforcement or against Defendant in this case. *Id.* at 31. When asked whether he came into the jury trial with any predisposition in favor of the prosecution he responded, "Not at all." *Id.* at 32. R.H. testified he was able to remain fair and impartial throughout the trial. *Id.* at 34-37.

The Defendant asserts, and the People concede, R.H.'s misrepresentations/non-disclosures were intentional. The Court finds R.H. admitted his non-disclosure was intentional and it is unquestionable that he intended to conceal Son R.H.'s criminal charges and convictions when he completed the jury questionnaire.

The Court however, finds his failure to reveal his daughter's criminal charges at the time he completed the questionnaire was inadvertent. Though R.H. clearly intended to provide untruthful oral responses to the questions regarding he or his family's criminal history, the evidence supports that he truly had forgotten about his two daughters' more remote (2001 and 1995) and more minor criminal encounters. Once he was reminded of the daughters' criminal history by his wife, he reported it to the District Attorney investigator.

B. Conduct of Juror M.A.

Juror M.A. answered "no," under oath, to question #10 on the juror questionnaire, "Have you, a family member, or close friend, ever been charged with or convicted of a crime other than a minor traffic offense? Who? When? What type of crime?" Ex. A. The jury questionnaire contained a

statement that "I hereby declare that the information contained here is true to the best of my knowledge." *Id.* The parties concur, and the court finds, this response was not truthful.

At the January 30, 2020 hearing M.A. conceded her answer to question #10 was false and that she should have listed, herself, her husband and her son in the response. *See* Jan. 30, 2020 Tr., p. 17, 62.[5]

M.A. testified that in 1994 she had been arrested and charged in the State of Iowa with two counts of child endangerment of a child under the age of one years old. The charges were related to her child, E.A. The charges included acts of substantial risks to a child resulting in serious injury due to broken ribs and acts of substantial risk of serious injury due to a detached retina.

When M.A. was arrested at her home, taken to jail, and booked on charges. She contacted a friend to come and watch her children for the time she was at the jail. Jan. 30, 2020 Tr., 27. The charges against M.A. were dismissed two months after having been filed. *Id.* at 24; Ex. B.

Before the charges were filed, social services had removed E.A. from M.A. and her husband's custody and placed him in the care of a foster parent for a period of three years. At the time of this placement, E.A. was three-and-one-half months old. Jan. 30, 2020 Tr., p. 28.

M.A. testified that doctors at the University of Iowa's hospital had reviewed E.A.'s medical records and films and found he had been subjected to repeated episodes of painful trauma. Social Services removed E.A. from M.A.'s home as a result of these injuries. *Id*. at 30, 31.

Prior to the January 30, 2020 hearing, M.A. had not admitted she had been charged with a crime. *Id.* at 19, 20. In a telephone meeting with the District Attorney approximately a month prior to the January 30, 2020 hearing, M.A. informed the District Attorney her husband had been arrested but she had not. *Id.* at 20, 28. When Defendant's investigator contacted M.A. a few weeks after trial and inquired about a prior criminal case, M.A. responded that the investigator must have her confused with someone else. *Id.* at 20, 69. The hearing on January 30, 2020 was the first time M.A. admitted she was previously arrested and charged with a crime. *Id.* at 21.

[5] The Court notes that its pages on the March 9, 2020 transcript are not identical to those used by counsel. The Court is drafting this Order during the Covid 19 pandemic at a time when staff are not reporting to work due to the Governor's stay at home order. Thus, the Court is utilizing a transcript previously electronically provided by the court reporter, which appears to be formatted in a manner that is not identical to the format of the transcript used by counsel.

M.A.'s husband was also charged in the case with two felony child abuse charges. He plead guilty to three aggravated misdemeanors. *Id.* at 24, 25, 67; Ex. D. He was sentenced to six years in the Iowa Department of Corrections, two years for each count, to be served consecutively, and served one-half of that time. Jan. 30, 2020 Tr., p. 18, 24, 25, 67; Ex. D.

M.A. further testified that at age eleven E.A. was convicted in Boulder County 2003JD41 with Unlawful Sexual Contact and Harassment, with M.A. named as a respondent parent. Jan. 30, 2020 Tr.,32, 53, 54; *see also* Ex. C. E.A. resided in M.A.'s home at the time, and M.A. and her husband hired an attorney to represent E.A. Over a period of seven months she assisted E.A. in fulfilling the requirements for diversion, including appearing in Boulder County Court with E.A. E.A.'s diversion was successfully completed on August 15, 2003. Ex. C; *see* Jan. 30, 2020 Tr., p. 50, 51. She testified that at the time she completed the jury questionnaire she inaccurately thought E.A.'s case had been expunged. Jan. 30, 2020 Tr., p. 71.

Two days prior to the hearing, M.A. met with the District Attorney's office and their investigator. At that meeting, for the first time, she stated she was experiencing a stressful period in her life at the time she was called for jury duty in this case. M.A. works in a hospital and the hospital electronic system was going "live" in four months. She testified that, in part, this is an explanation for her "no" response to question #10. *Id.* at 59, 62, 64, 72, 73. She had not previously mentioned this to the District Attorney when she met with District Attorney a month prior to the hearing. *Id.* at 59, 60. M.A. did not identify any hardship on question #11 of the jury questionnaire or raise hardship as an issue during the jury selection process. *Id.* at 61, 62, 74; *see also* Ex. A.

During the hearing, M.A. emotionally testified she was embarrassed to discuss this period of her life. M.A. cried during her testimony and had difficulty speaking at times. She testified "we worked really hard to put everything that happened to us and our children in Iowa behind us, and we moved to Colorado shortly after my husband was released. And to dig this all up again is just – it's almost too much for me." Jan. 30, 2020 Tr., p. 70.

M.A. testified she did not intentionally or deliberately provide a false response to question #10 but made an honest mistake because she rushed through the questionnaire and misinterpreted the question. *Id.* at 72, 75. However, she stated despite feeling rushed when she completed the questionnaire, she paid full attention to the jury selection process and harbored no bias toward Defendant. *Id.* at 78, 79. The Court finds it incongruous that M.A. would feel rushed on the one day

during the jury selection process when she was told she would only be away from work and in court for a short period of time to complete the questionnaire, and yet would not be rushed on the other days of jury selection when she was told she would be away from work the entire day.

M.A. also testified that she was honest in her responses to other questions on the questionnaire, as well as questions from counsel and the court during the jury selection process, including whether she could be fair and impartial. *Id.* at 76-79. The Court finds this testimony cannot be reconciled with M.A.'s testimony that she was not dishonest in her response to question #10 but instead misread question #10.

Question #10 is not complicated. Though it used some legal terms, such as "charged" or "convicted" of a crime, these terms are not outside the general knowledge of a potential juror, especially jurors who have indeed been charged or convicted of a crime or had a family member charged or convicted. Clearly, these common terms are not outside the knowledge of a person, such as M.A., who has been charged with child abuse, arrested and removed from her home by a deputy, taken to jail and booked. The terms are also not beyond the basic understanding of a person, such as M.A., whose husband has been charged and convicted of child abuse and spent three years in prison for those convictions.

It is also inconceivable that M.A. read question #10 to not include family members. In *McDonough* the U.S. Supreme Court stated that jurors are called from all walks of life and many may be uncertain as to the meaning of the terms which are relatively easily understood by judges and lawyers. See *McDonough* at 849. However, here, the question was clear. It was not a term that might only be easily understood by lawyers or judges. The term "a family member" is a term easily understood by the general public and average juror. Whether an individual's husband or son should be considered "a family member" is a straightforward and uncomplicated question.

It stretches beyond the bounds of credulity that M.A. would not recall that her husband had been sentenced to six years in prison after being convicted of three separate counts of child abuse involving the severe physical injury to their three-month old son. The Court finds it implausible that M.A and her husband would have their child removed from their home and placed in foster care for a period of three years, as a result of the abuse that was inflicted on the child, and M.A. would not recollect these events when she read question #10.

M.A.'s assertion that she misread question #10 because she was rushed is also not plausible. Despite indicating she was rushed when she completed the jury questionnaire, M.A., answered the last question, #12, after reading through a lengthy list of over 100 witnesses and identifying a witness she knew. Ex. A; Or. Re: Combined Witnesses, May 29, 2019. Question #12 was the only question on the back side of the questionnaire. It required attention to detail and the exercise of purposefulness, as the juror had to turn the page over, read the question on the back side, and then look at the separate page with the names of over 100 witnesses. M.A. did so and identified one of the witnesses that she knew. The Court finds this action incongruous with M.A.'s statement that she misread question #10 because she was in a hurry.

M.A. had been instructed by the Court to be thorough in responses to the questionnaire. During the jury selection process, the jurors were also instructed by the Court to identify any reason they could not be fair and impartial to both parties. The Court assumes jurors comply with all instructions and orders from the court. *People v. Flockhart*, 304 P.3d 227, 235 (Colo. 2013). The Court assumes jurors who act in good faith are not distinguishing which instructions they will read carefully and respond to truthfully.

The Defendant asserts M.A.'s misrepresentations/non-disclosures were intentional. The People assert they were inadvertent. This Court has considered the testimony of the M.A. at the January 30, 2020 hearing, the exhibits, evidence of which the Court took judicial notice and the record. The Court considers M.A.'s motives, the scope and severity of her dishonesty, the circumstances under which she completed the questionnaire, and gives weight to her post-trial statements to the Defendant's investigator and her interviews with the District Attorney and its investigator. The Court finds it inconceivable that M.A.'s non-disclosures were inadvertent. The Court finds the jurors nondisclosures were deliberate, intentional misrepresentations designed to keep hidden her, her husband and her son's criminal history from public disclosure.

Further, when it came to the juror's attention that her family's past criminal history might be exposed, she was willing to continue to subvert the truth-seeking process in order to have that information remain concealed. This ongoing willingness to engage in deception and avoid detection raises alarm for the Court. M.A. was willing to continue her pretense in order to avoid the truth from being revealed. The intent of her misrepresentation is clear.

IV. APPLICATION OF INTENTIONAL MISREPRENTATION TO LAW

The first prong of *McDonough* and *Sampson* analysis, whether the dishonesty was intentional, is met. The Court next addresses whether the question to which the jurors provided untruthful responses was material. The Court finds question #10 was material. The materiality of the question the two jurors answered dishonestly is abundantly clear. The Court permitted a jury questionnaire that both parties agreed upon. The fact that counsel for both parties felt it pertinent to obtain information regarding a juror and their family members encounters with the law and convictions of crimes, speaks volumes to its materiality. The question was designed to elicit information that potentially could raise doubt regarding a juror's impartiality and bore heavily on a juror's ability to be unbiased, fair and impartial in a triple homicide case. The question is central to juror impartiality and was undoubtedly material to the voir dire process.

The Court moves to the second prong of the *McDonough* and *Sampson* analysis and considers whether the information the jurors failed to disclose and the reason behind the jurors' dishonesty, under the totality of the circumstances, show the jurors lacked the capacity and the will to decide the case based on the evidence. In other words, as set forth in *Novtony* and *Vigil,* were the jurors likely incapable of rendering a fair and impartial verdict, such that a structural error exists, which infected the entire trial process, rendering it fundamentally unfair and prejudicial to Defendant.

Although juror dishonesty, by itself, is not sufficient to demonstrate bias, it can be a powerful indicator of bias. *See Sampson at 167 citing Colombo,* 869 F.2d at 151; *Perkins,* 748 F.2d at 1532–33. Here, both R.H. and M.A. were willing to lie, under oath, to protect their reputation and the reputation of their family. In both instances, the jurors, to different degrees, continued to perpetuate misleading and evasive information not only on the questionnaire but in post-trial inquiry and proceedings.

R.H.'s lack of candor is notable. He didn't "come clean" initially regarding Son R.H.'s criminal charges and convictions when confronted post trial by the District Attorney's investigator on December 9, 2019. He did admit to the dishonesty prior to the January 30, 2020 hearing. Further, though counsel agree R.H.'s answer to question #10 was intentional, the evidence supports his failure to disclose his daughters more minor charges from 1995 and 2001 was inadvertent. He genuinely did not seem to recall the events related to his daughter until his wife reminded him during the telephone call with the District Attorney's investigators.

Additionally, the circumstance under which R.H. purported his dishonest statements provide a basis for understanding his desire to not publicly provide information that other jurors were given the opportunity to provide in a private context. The juror questionnaire stated, "The information provided in this questionnaire will be kept confidential." R.H.'s responses were however being provided in an environment where others could overhear the question and response. The circumstances do not excuse R.H.'s intentional misrepresentations but does show a lack of designed deceit in this circumstance. Instead, it demonstrates a spontaneous, though dishonest, reaction to having to provide the information in an environment that did not provide for confidentiality.

Moreover, R.H. did not exhibit intense emotions when he testified regarding his children's experiences with the law. Rather, the emotion he displayed was that of a parent who is proud of his children and their life accomplishments. Finally, there is some similarity between R.H.'s children's criminal encounters and this case. Though the primary charges in this case were first degree murder, there was also a robbery charge against Defendant. R.H.'s children each had a theft charge filed against them. The Court finds this was not likely to influence R.H.'s ability to be biased in this case. None of his children were sentenced to prison or severe jail sanctions. His son served a 14-day jail sentence and 4 weekend jail days, and as a juvenile was involved in a diversion program.

Under the totality of the circumstances the Court finds R.H. was likely capable of rendering a fair and impartial verdict and had the capacity and the will to decide the case based on the evidence. The Court finds no structural error existed in the trial based on his intentional misrepresentations. Thus, as with respect to R.H., the Court finds he was not deprived of a fair and impartial jury.

The Court however does not reach the same conclusion when it considers M.A.'s repeated, ongoing intentional misrepresentations. M.A. demonstrated a habitual evasion and dishonesty with the facts of her and her family's criminal history. Her inability to perform her sworn duty as an impartial juror was compromised from the start. She was motivated to protect her and her family's reputation in the community and was willing to do so at great cost. Her post-trial testimony that "we worked really hard to put everything that happened to us and our children in Iowa behind us, and we moved to Colorado shortly after my husband was released. And to dig this all up again is just – it's almost too much for me," is evidence of the extent to which she was willing to go to keep hidden the serious nature of charges against her, the serious convictions and prison sentence her husband served, as well as the charges and diversion sentence served by her son.

The Court finds her explanation that she rushed through the questionnaire as the result of a work matter, which was to be completed four months away, is situational pretext. It is wholly inconsistent with her having carefully and purposefully reviewed the back page of the questionnaire and the list of over 100 witnesses. Rather, the Court, having considered M.A.'s demeanor and emotions finds she engaged in efforts, during and after trial, that impaired the judicial process. Even after her dishonesty was discovered she told the Defendant's investigators that "you must have me confused with someone else." When the District Attorney inquired regarding charges against M.A., she continued to deny she had been charged with a crime up until the day she underwent cross-examination. It defies logic that an individual who was arrested and taken from her home, jailed and booked, along with her husband, would not realize she had been charged with a crime.

Moreover, M.A.'s actions throughout the jury selection process and post-trial proceedings demonstrate an intent to resist disclosure. Only after she obtained counsel, and underwent cross-examination, as her cloak of deceit was being revealed, did she fully admit her failure to be truthful and honest about her own charges. Notably, despite clear and convincing evidence that her misrepresentation was deliberate, M.A. still contends she did not intentionally fail to disclose the information contained in question #10. The necessity of truthful answers if this process is to serve its purpose, is obvious. See *McDonough* at 849.

M.A. displayed intense emotions during her post-trial testimony, which sheds light on her motives for lying. This display of emotional distress further illuminates M.A.'s motives for lying. It is far more likely than not that M.A.'s reasons for lying impaired her ability to decide the case solely on the evidence. The degree of her distress strongly suggests she was focused on carrying out a subversion of the truth-seeking process in order to intentionally protect her and her family's previously undisclosed criminal involvement. If a juror will go to such lengths to hide their own personal legal history, then we cannot rely on that juror's compliance with an oath to seek the truth and decide a case based only on the evidence and the rule of law provided to the jury.

Finally, the Court addresses the similarities between M.A.'s undisclosed life experiences and the evidence in this case. M.A.'s experiences dealt with the charges of child abuse against her, and the convictions of child abuse by her husband, which were inflicted on their child, as well as her son's unlawful sexual conduct charges as a minor. None of M.A. or her family's experiences involved burglary or a homicide case. However, M.A. was clearly ashamed of her and her families legal background. Her actions support a conclusion that she viewed difficulty with the law as a shameful

event. Though this element provides less weight to the Court's decision than the first two elements, it still raises a significant concern as to whether M.A. would be able to disregard her and her family's troubles with the law and avoid a bias against the defendant on this account.

This Court presided over the trial in this matter. The jurors were tasked with determining the credibility of witnesses and rendering a verdict that was based, in significant part, on how the jury evaluated the credibility of each witness. It was essential that each member of the jury be able to fairly assess the credibility of others in order to render a fair and unbiased verdict. It was for the trial court not only to assess the juror's credibility but also to evaluate whether a juror would be able to render an impartial verdict. *See Vigil v. People*, 455 P3d 332, 338 (Colo. 2019). The Court finds that M.A. could not do so. Thus, the defendant was deprived of his right to an impartial jury and is entitled to a new trial.

V. TIMING OF DISCLOSURES

In its July 19, 2010 Response the People raised the issue of when Defendant obtained information of the jurors' non-disclosure on the jury questionnaire. The People set forth in their March 20, 2020 brief that Defendant did not respond to this issue at the March 9, 2020 hearing. The People assert this suggests the non-disclosures were in fact discovered before the end of the trial but not brought to the court's attention during trial. Defendant's March 20, 2020 brief sets forth "Ten days later, after speaking with some of the jurors who had served in this case, the defense filed D-110: Motion for New Trial, which was based on misconduct that took place during the jury selection process. By that time, the defense had learned that two of the jurors, who convicted Mr. Coughlin, … (juror names omitted), had misrepresented and concealed information requested in their juror questionnaires, as set forth in Mr. Coughlin's Motion."

Defendants March 20, 2020 brief then states, "Continued investigation into these two jurors revealed that they had misrepresented and concealed even more information than the defense had been aware of prior to filing the motion for new trial." After Defendant's initial June 27, 2019 motion for new trial Defendant filed three supplemental motions for new trial on September 23, 2019, October 2, 2019, and January 5, 2020. Each contained additional allegations of charges and or convictions not disclosed by R.H. or M.A. The evidence also shows Defendant's investigator contacted M.A. after trial.

Both counsel for Defendant submitted affidavits following the June 17, 2019 conclusion of trial. Ms. Mulligan's affidavit, dated June 26, 2019, states, "I searched the Colorado State Court Data Access system for … (juror names omitted), names." The affidavits also state, "According to Iowa court records, ….". Mr. Griffin's affidavit, dated June 27, 2019, states, "Having reviewed court records, I learned the following…"

In *Rael,* the Court noted, "the People do not contend, and there is no evidence, that either the defendant or his attorney knew of the juror's misconduct until after the trial ended." See *Rael* at 1068. Also see *Borrelli* at 903, wherein the court stated, "if the lack of candor on the part of the juror is not discovered until after the trial, it may justify the granting of a new trial."

Here, the Court has no evidence that Defendant or his counsel knew of R.H. and/or M.A.'s misconduct prior to the conclusion of trial. In order to make a finding that Defendant or his counsel obtained information of the non-disclosure during the course of trial this Court would have to presume that Defendant's counsel failed to disclose this information to the Court. The Court declines to do so. The Court presumes, absent evidence to the contrary, that counsel for all parties, as officers of the court, exercise candor with the Court.

VI. CONCLUSION

It is with lengthy deliberation, research and contemplation that the Court issues this ruling. The enormity of this decision and how it will impact the lives of many weighs heavily on the Court. The conclusion reached by the Court places in context the stark impact juror dishonesty has on our justice system. The integrity of the judicial process cannot be preserved if jurors do not own their sworn oath to ensure justice for victims, victim's families and defendants. We ask jurors to judge the credibility of witnesses who take an oath to tell the truth, the whole truth, and nothing but the truth. If a juror is not accountable to hold to their oath and responsibility to engage in the truth-seeking process, then the entire system will crumble.

The costs of these proceeding are vast. The pain and grief to the victims' families to go through another trial, after already enduring delays in trial, will be tortuous. The taxpayers have expended immense monetary costs for this trial and the post-trial proceedings that have and will now follow. The attorneys diligently prepared for and presented the case to the Court and will now be

tasked with doing so again. But ultimately, we the protections afforded us under our constitution and our laws must be safeguarded. Those protections cannot be endangered or threatened by the actions of those who would not uphold an oath to do just that.

DATED: April 14, 2020

BY THE COURT

Judith L. LaBuda

Judith L. LaBuda
District Court Judge