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**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION**

MARK VINCENT TEDESCHI,

Petitioner,

vs.

DEBRA DEXTER, Warden, et al.

Respondents.

CASE NO. 08cv0820-JLS(CAB)

**ORDER DENYING 28 U.S.C. § 2254
HABEAS PETITION AND GRANTING
IN PART A CERTIFICATE OF
APPEALABILITY**

Petitioner Mark Vincent Tedeschi ("Tedeschi"), a state prisoner proceeding with the assistance of counsel, seeks a 28 U.S.C. § 2254 writ of habeas corpus to set aside his second-degree murder conviction. He is serving an indeterminate life sentence for the November 1995 shooting death of his ex-father-in-law. He alleges as violations of his federal constitutional rights three instances of juror misconduct in the course of their deliberations. Respondent filed an Answer and lodged an extensive record. (Dkt Nos. 11, 12; Lodgs. 1-17.) Tedeschi filed a Traverse and provided four additional lodgments to complete the record. (Dkt Nos. 13, 14, 15; Lodgs. A-D.) By Order entered November 25, 2008, this matter was reassigned from the bench of the United States District Court for the Eastern District of California, Fresno Division, to visiting District Judge Janis L. Sammartino,

1 United States District Court for the Southern District of California. (Dkt No. 17.) After careful
2 consideration of the parties' arguments, the trial transcript, transcripts and rulings from pertinent
3 subsequent proceedings, and controlling legal authority, for the reasons discussed below, the Petition
4 is **DENIED**.

5 **I. BACKGROUND**

6 **A. Factual Background**

7 On January 4, 1996, the Kern County District Attorney charged Tedeschi with first degree
8 murder and lesser-included offenses in the shooting death of his ex-father-in-law at Tedeschi's house
9 in November 1995, witnessed by his nine-year-old daughter. Additional charges included personal
10 use of a firearm in the commission of the murder and lying in wait. Tedeschi pled not guilty and
11 denied the special allegations on January 16, 1996. He was tried for the offense three years later, in
12 February 1999. (Lodg. 15, Vol. 10, RT 5467- 5622.) He testified on his own behalf. He admitted
13 shooting Robert Leisten, but contended it was an excusable or justifiable homicide, not murder. As
14 noted by the trial court and as characterized by the Respondent, the trial result turned on the credibility
15 of the only two witnesses to the killing. "After Mr. Tedeschi took the stand, we have Mr. Tedeschi and
16 Tiffani Tedeschi, the only percipient witnesses, agreeing that Mr. Tedeschi is the killer. . . . [A]s far
17 as who pulled the trigger, there is no dispute." (Lodg. 15, Vol. 11, RT 5699.)

18 Federal habeas courts presume the correctness of a state court's determination of factual issues.
19 28 U.S.C. § 2254(e)(1) (the petitioner has "the burden of rebutting the presumption of correctness by
20 clear and convincing evidence"). The Court culls pertinent facts from the Court of Appeal's summary
21 of the underlying crime and associated proceedings in its 47-page August 8, 2001 Opinion affirming
22 the judgment on direct appeal, provided as Respondent's Lodgment 4, and from that court's 23-page
23 January 17, 2008 Opinion denying Tedeschi's habeas petition presenting the same three claims
24 forming the subject matter of his federal habeas petition ("Petition"), provided as Respondent's
25 Lodgment 12. The Court has also augmented the detail from its independent review of the trial
26 transcript for its bearing on the strength of the government's case. (Lodg. 15, Vols. 1-11.)

27 Tedeschi and his wife Shelley separated multiple times following their marriage in 1984. In
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1 the summer of 1994, Shelley again left Tedeschi to live at her parents' house, taking with her their
2 nine-year-old daughter, Tiffani. The couple unsuccessfully attempted to reconcile in July and
3 September of that year. Neighbors witnessed an incident in September 1994 when Tedeschi accused
4 Shelley of seeing a man named Frank and held her on the ground when she could not convince him
5 otherwise. The couple made no further attempts to reconcile thereafter. Tedeschi continued to accuse
6 Shelley of seeing other men, and he started divorce proceedings.

7 In September 1995, Shelley bought a home where she moved with her sister and Tiffani. That
8 same month, Shelley told Tedeschi she would turn him in to the district attorney for nonpayment of
9 child support. Tedeschi angrily threatened to kill her if she did so, and made a similar threat in
10 October 1995. Tedeschi denied making the statement to Shelley, "Your days are numbered, bitch,"
11 on a prior occasion. (Lodg. 15, Vol. 10, RT 5545-5547.)

12 On Friday, November 10, 1995, Shelley's father, Robert Leisten ("Leisten"), drove Tiffani to
13 Tedeschi's house at about 6:00 p.m. for her weekend visit. Tedeschi was not home, so Leisten took
14 Tiffani back to his house. Later, Tedeschi called Leisten's house and told Tiffani to have her mother
15 bring her over. At about 7:30 that evening, Shelley and Leisten together took Tiffani there. They
16 stayed in the car while Tiffani got out and went to the front door. Tedeschi asked her who was in the
17 car, then told her to enter by the back door. When she came in, she saw a "big" gun leaning up against
18 the couch with a "knife on the end," and her father acting "kind of jumpy." (Lodg. 4, p. 4.)

19 Shelley dropped her father off at his house on her way home. When she got home, her friend
20 (now husband) Lynn Gudmundson told her Tedeschi had called while she was gone. Tedeschi called
21 again within a few minutes, telling Shelley "you must have said your prayers tonight." She asked,
22 "What do you mean by that?" and he responded, "You figure it out." (Lodg. 15, Vol. 3, RT 4112-
23 4113.) He questioned her about whom she was dating. He got angry when she told him it was no
24 longer his business, and she hung up. The phone rang again, and Shelley let the answering machine
25 pick up. Tiffani left a message to come pick her up. A few minutes later, Tiffani left a second
26 message on the machine to say Tedeschi was bringing her home. Shelley was afraid to be there when
27 he arrived, so she and Gudmundson left a note on her door and went to Leisten's house around the
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1 corner, letting themselves in when they found he was unexpectedly out. Tiffani testified her calls to
2 Shelley were both at Tedeschi's instructions. After she left the messages for Shelley, he instructed her
3 to call Leisten to come pick her up. Leisten asked her what was wrong, and she told him she did not
4 know, just to come pick her up. She told Tedeschi after that call, "They're going to pick me up."

5 After the call to Leisten, Tedeschi drove with Tiffani to a nearby liquor store, where he bought
6 a cigar, a bottle of tequila, a lime, and candy for Tiffani. He stated he was "going to have a
7 celebration." He paid his tab at the store, then they returned to his house. Tiffani testified Tedeschi
8 drank a shot of tequila when they got back to his house, gave her a hug, and told her he was sorry.
9 Tiffani heard Leisten's car horn, told Tedeschi, "They're here," then went to get her overnight bag.
10 She walked through the living room toward her bedroom, but Tedeschi stopped her in the hallway.
11 Tiffani saw two guns, both about three feet long, leaning against the wall, with Tedeschi handling the
12 one with the bayonet. He told her to go tell Leisten to come into the house, and she did so. Leisten
13 left his car and followed Tiffani a few feet inside the front door. Tedeschi walked over and slammed
14 the door behind him. He said twice to Leisten, "You and your daughter," then laughed. Leisten said
15 he did not know what Tedeschi was talking about. Tedeschi then "walked over to the gun and picked
16 it up and said, 'Well,' and then shot him" from a few feet away as he stood by the door. Tiffani
17 screamed and ran out of the back door to the neighbors crying when her grandfather fell to the ground
18 holding his knee or leg, grabbing the phone on her way. Next-door neighbors, the Aragons, took her
19 into their house. She told them her dad had shot her grandfather. Mrs. Aragon called 911, relaying
20 information between the operator and Tiffani. Other neighbors heard the shot and had also called
21 police.

22 Tiffani identified from a photo "the gun that my dad shot my grandpa with." (Lodg. 15, Vol.
23 4, RT 4220-4310.) She also testified about her conversations with police officers that night, her
24 impression her father did not appear to be aiming the gun when he shot it, and revisited the details of
25 the trips over and back from her father's house that night and the various phone calls she made or
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1 overheard.¹ (Id., RT 4310- 4360.)

2 Contrary to Tiffani's version of the shooting, Tedeschi testified he walked into the living room
3 and was surprised to see Leisten standing in the middle of the room. He said the men argued over
4 money Leisten claimed Tedeschi owed Shelley, while Tedeschi accused Leisten of owing him money.

5 ¹ The prosecution presented considerable other evidence. Additional witnesses included: Dr. George
6 Buldoc, M.D., a forensic pathologist who performed the autopsy on Robert Leisten in November 1995, and
7 described the victim's extensive injuries on face and torso in addition to the two gunshot wounds (Lodg. 15,
8 Vol. 2, RT 3924-3972, Vol. 3, RT 3875-4033); Shelley Tedeschi Gudmundson, who testified about her
9 relationship with Tedeschi, her fear of him, his threats to her, issues regarding his overdue child support
10 payments, and the details of the day of the shooting (Lodg. 15, Vol. 3, RT 4048-4190); Antonio Hereda, a
11 neighbor of Tedeschi's, who had witnessed and intervened until police arrived in Tedeschi's September 26, 1994
12 attack on Shelley outside their house, with her screaming and Tedeschi angrily asking about a man named Frank
13 (Lodg. 15, Vol. 3, RT 4190-4196); Larry Hobbs, a decades-long friend of Tedeschi's, who testified about an
14 incident six months before the November 10, 1995 shooting, the last time he had seen Tedeschi, when Tedeschi
15 came to his house to accuse him, angrily and mistakenly, about talking with Shelley's behind his back, implying
16 they were having an affair (Lodg. 15, Vol. 4, RT 4202-4219); the cashier at the liquor store (Lodg. 15, Vol. 4,
17 RT 4365-4395); Lynn Gudmundson, Shelley's second husband, who described the phone calls from Tedeschi
18 and Tiffani the night of the shooting, his suggestion they go to Shelley's father's house to avoid any
19 confrontation when Tedeschi dropped Tiffani off, Shelley taking a call there then yelling, "He had just shot my
20 dad," and driving her to Tedeschi's house (Lodg. 15, Vol. 5, RT 4401-4436); Ray Stamper, a neighbor of
21 Tedeschi's, who testified he heard a loud shot, then a female voice screaming, he called 911 then went outside
22 to look, seeing their neighbor, Mr. Aragon, outside his house next door to Tedeschi's, seeing Tedeschi at his
23 open door turning away from them and closing the door before police arrived, and describing the SWAT team
24 operations (Lodg. 15, Vol. 5, RT 4440-4461); Roger Dixon, a deputy sheriff dispatched to Tedeschi's house
25 at about 8:15 p.m. that night, who testified he saw several people standing at their front doors all pointing at
26 Tedeschi's house, saw a small truck parked in front of the residence with the lights still on and engine running
27 but no one inside it, knocked several times on Tedeschi's locked door and identified himself, hearing nothing
28 from inside and unable to see inside, his interview with a hysterical Tiffani, who told him her father had shot
her grandfather in the leg with a long rifle, and a second interview with Tiffani (Lodg. 15, Vol. 5, RT 4461-
4485); other law enforcement personnel who responded to the incident, including negotiators, who described
their efforts before a SWAT forced entry became necessary about midnight when Tedeschi did not respond,
finding the victim and Tedeschi inside and their condition(s), and his arrest details (Lodg. 15, Vol. 5, RT 4486-
4545, RT 4549-4572); evidence technicians who described the crime scene evidence they collected and
processed; investigators' testimony regarding interviews with witnesses and analyses of clothing, weapon, and
other evidence (Lodg. 15, Vol. 5, RT 4572-4604, Vol. 6, RT 4617-4662, RT 4684-4707, RT 4719-4743, RT
4765-4797, Vol. 7, RT 4840-4857, RT 4859-4942, RT 4946-4995, RT 5000-5007); testimony from the 911
operator authenticating the procedures, law enforcement response, and the record of Mr. Stamper's call and
Tiffani's call through Mrs. Aragon (Lodg. 15, Vol. 6, RT 4744-4765); Mrs. Aragon, who testified she heard
the horn honk from a vehicle outside Tedeschi's house, heard a gunshot, took Tiffani into her house when she
ran over from Tedeschi's house screaming and hysterical, placed the 911 call for her, authenticated the
conversation on the 911 tape, and Tiffani's call to her mother from the Aragon house (Lodg. 15, Vol. 6, RT
4797-4811); the 911 tape itself played for the jury (Lodg. 15, Vol. 6, RT 4805); Mr. Aragon, who testified he
heard a horn honk, looked out his window and saw a small truck he identified as belonging to "Shelley's dad"
parked in front of Tedeschi's house, then heard a gunshot about three minutes later, ran over to the house,
stopping in Tedeschi's driveway, seeing Tiffani run out the back door and her telling him her "daddy shot her
grandpa in the leg," continuing to Tedeschi's front steps where he saw the door open about a foot and Tedeschi
inside "running back and forth" and seeming "confused," describing a conversation he had with Tedeschi in the
summer of 1995 in their adjoining back yards when he told Mr. Aragon he wanted to kill his mother-in-law
because he "just hated her" and had "a bunch of bad things" to say about Mr. Leisten associated with money
he contended Leisten owed him for some electrical work. (Lodg. 15, Vol. 6, RT 4811-4828).

1 He testified the conversation got "very aggressive" and hostile, with the men exchanging insults. He
2 said he was afraid of Leisten, who was the bigger man. He said Leisten struck him in the face, and
3 Tedeschi struck him back. Leisten grabbed him, and Tedeschi kept hitting until a blow from Leisten
4 knocked him down. Tedeschi testified he was very frightened by then and scrambled down the hall
5 into the office, grabbed his most intimidating rifle out of his unlocked gun safe, took the safety off,
6 and returned to the living room where Leisten was still standing. He told Leisten to get out, but
7 instead he stepped forward and tried to grab the rifle. Tedeschi testified he fired the weapon because
8 he thought Leisten was going to take it and come after him. When he realized how upset Tiffani had
9 become, he said to Leisten, "Look what you caused to happen, you son of a bitch, why did you come
10 in the house," and Leisten answered, "I don't know." (Lodg. 4, pp. 6-8.)

11 Police first arrived about 8:15 p.m., followed at about 9:30 p.m. by a SWAT team which
12 forcibly entered the house around midnight. They found Leisten lying dead on the floor with two
13 gunshot wounds and evidence of blunt force injuries, including a fractured nose and damage to his left
14 eye. He had bled to death. (Lodg. 4, p. 6.) They found Tedeschi lying in the hallway with a towel
15 over his face to shield it from tear gas and a rifle barrel under his chin. He at first refused to respond
16 to the officers' demands, then let go of the rifle and yelled at them to shoot him. All six officers finally
17 subdued him after a short struggle. They found notes he wrote asking Tiffani to pray for him, telling
18 Shelley "You wouldn't talk to me, this is the price you pay," and asking for mercy on his soul. (Id.)

19 The defense theory was essentially self-defense. Additional detail from Tedeschi's testimony
20 fleshed out his state of mind and addressed and attempted to recharacterize portions of others'
21 testimony, in particular Tiffani's.² He testified he finished work early that Friday in anticipation of

22 ² The defense evidence aimed to expose inconsistencies in Tiffani's story and other prosecution
23 testimony. In addition to Tedeschi, defense counsel called the deputy sheriff who briefly interviewed Shelley
24 at about 8:30 p.m. on November 10, 1995 (Lodg. 15, Vol. 8, RT 5032-5053); Shelley's sister; recalled
25 detectives and prosecution investigators regarding the content of interviews with Shelley and others two or three
26 years after the shooting regarding her relationship with Tedeschi, prior threatening incidents, and the like, as
27 well as the defense investigator and the original prosecutor assigned to the case in 1995 (Lodg. 15, Vol. 8, RT
28 5054-5085, RT 5098- 5108, RT 5120-5134, RT 5109-5119); a defense expert criminologist regarding alcohol
testing of samples from Tedeschi drawn the night of the shooting (Lodg. 15, Vol. 8, RT 5134-5146, RT 5150-
5159); the deputy who testified from his reports of his two preliminary interviews with Tiffani, while the
SWAT maneuvering was on-going, about the sequence of events leading to the shooting and not materially
different from her trial testimony (Lodg. 15, Vol. 8, RT 5160- 5191); a hostage negotiator who had responded
as part of the SWAT team testified about his interview with Tiffani at about 9:10 p.m. during which she

1 a trip to Magic Mountain he was arranging for Tiffani over the weekend, a special three-day visitation
2 for her birthday. (Lodg. 15, Vol. 10, RT 5470-5472.) He took his car to have new tires installed
3 starting at about 3:30 p.m., consumed two beers in Sear's parking lot and two more beers in a lounge
4 waiting for the car to be finished, and was "having a buzz" by the time the car was ready. (Id., RT
5 5484-5492, RT 5494.) He was running late but did not call Shelley or Leisten to let them know. By
6 the time he got home at about 6:40 p.m., he was still feeling intoxicated and had missed the drop-off
7 time. He called Shelley to let her know he was home and she could bring Tiffani over. Shelley told
8 him they had already been by his house, and Tiffani was at the Leisten residence. Tedeschi called
9 there and told Tiffani to have her mom drop her off. (Id., RT 5495-5500.)

10 Tedeschi testified Tiffani arrived at his house while he was on the phone with a friend. When
11 she came to the front door, he called out to her that she should go around back, where he met her at
12 the gate. He testified all five of his loaded rifles were in his unlocked gun safe at all times until he
13 retrieved one from the gun safe during his fight with Leisten, contrary to Tiffani's testimony. (Lodg.
14 15, Vol. 10, RT 5502-5505, RT 5508.) He made the decision to take Tiffani home after she had been
15 there about fifteen minutes because his friend had been unable to get discount tickets to Magic
16 Mountain, he wanted to use Saturday morning to get her a gift. (Id., RT 5506-5507, RT 5526-5527.)
17 He testified he called Shelley at about 7:15, leaving a message on the answering machine, then called
18 back a few minutes later when Gudmundson answered. Tedeschi asked him whether he was there for
19 Shelley or for her sister. He testified he asked only because he cared about who his daughter had

20 confirmed the chronology of events, consistent with her trial testimony, including her seeing two rifles in the
21 hallway, her grandfather's arrival at Tedeschi's house, her father's instruction she go out to the truck and have
22 her grandfather come inside, her father closing the door and making the statement to Leisten, "you and your
23 daughter, you and your daughter," his bringing from the hallway into the living room an "Army-type gun" then
24 shooting her grandfather in the leg, her running from the house to the neighbor's, and the information her
25 grandfather was not armed and had not provoked the attack (Lodg. 15, Vol. 8, RT 5191-5223); a recalled
26 deputy who testified about the September 26, 1994 assault incident he responded to and a two-hour interview
27 with Shelley, memorialized in a report, where she expressed concern for Tedeschi's mental state, indicated he
28 was possibly abusing methamphetamine, suffered from bouts of depression and paranoia and extreme mood
swings (Lodg. 15, Vol. 9, RT 5308-5320); two recalled witnesses who testified about Tedeschi's odd behavior,
paranoia, mood swings and depressed periods during 1995, with one testifying he took Tedeschi for drug
counseling in early 1995 (Lodg. 15, Vol. 9, RT 5322-5328, RT 5339-5345, RT 5348-5352); and Tedeschi's
half-brother, who testified Tedeschi talked about ongoing conspiracy as a fairly constant theme starting in 1992,
in particular in 1995, when Tedeschi believed the Kern County Sheriff's Department had it in for him, he
perceived people's conversations in public and newspapers were about him, and imagined veiled threats (Lodg.
15, Vol. 10, RT 5445-5463).

1 contact with, not who Shelley was dating, since they were divorced. (Id., RT 5509, RT 5511-5515.)
2 Shelley called him back to ask what he wanted, and while they were talking, he admitted he made the
3 statement, "You must have said your prayers," but purportedly not to Shelley, but rather to Tiffani.
4 Tedeschi characterized Shelley as angry during that call while he was not, although he conceded he
5 was speaking in a loud tone of voice. He told Shelley he was going to bring Tiffani back home. She
6 said she did not want him coming to her house. (Id., RT 5522.) He asked her about the man who had
7 answered the phone and about another man, Larry Hobbs, who he believed was harassing and stalking
8 him. He put Tiffani on the phone to tell Shelley, "Tell the truth or else" because he was in the process
9 of filing restraining orders against people he believed were harassing him, including Hobbs and
10 Shelley. (Id., RT 5519-5524, RT 5525.)

11 Tedeschi testified he went back into the kitchen to do dishes while Tiffani was still on the
12 phone with Shelley. She came in to tell him, "They're going to come pick me up." (Lodg. 15, Vol.
13 10, RT 5525, 5557.) He denied he told Tiffani to make any phone calls. (Id., RT 5531-5532.) He
14 denied he told Tiffani to call her grandfather to come pick her up, and he did not know who would be
15 coming. (Id., RT 5544.) He explained the quick trip to the liquor store as intended to buy cigarettes,
16 not alcohol, but he accepted an employee's suggestion he purchase tequila while he was there. (Id.,
17 RT 5557.) Since it was his payday, he also decided to pay off his tab, but denied making the
18 statements to store personnel that he was going to have a celebration. He denied he said to store
19 personnel, this "is going to be damn good," claiming he actually said "no, this will be good" in
20 response to the cashier's question would there be anything else. He suggested the employees'
21 impressions of his demeanor were perhaps because he was tired and had had a few beers. (Id., RT
22 5536-5542.)

23 Tedeschi testified he was "in my kitchen slicing lemons, and I had taken a few drinks of
24 tequila" (Lodg. 15, Vol. 10, RT 5558-5559) and was on the phone trying to call a friend when Tiffani
25 told him, "They are here." He heard no horn honk (Id., RT 5474-5475, RT 5555-5556) and disputed
26 Tiffani's testimony the horn honked while she was on the phone placing a call for him as he fiddled
27 with two of his rifles in the hallway. (Id., RT 5565, RT 5561-5562.) He denied he told Tiffani to go
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1 outside and tell her grandfather to come inside. (Id., RT 5563.) Rather, he testified he told her, "Tell
2 them it will be a minute." He washed his hands and when he went into his living room, he was
3 surprised to see Leisten standing there. (Id. RT 5475-5476, RT 5563-5564, RT 5567-5568.) He
4 testified he asked Leisten what he was doing there, and received the loud and angry questions "What
5 the hell is going on here," "what kind of games . . . are you playing now." Tedeschi closed the front
6 door and answered that it was Leisten and his daughter who were playing games. Leisten said
7 Tedeschi owed Shelley money, to which Tedeschi replied Leisten owed him money.³ A few more
8 words were exchanged, then Leisten hit him, he hit Leisten back, Leisten grabbed him, he struck back
9 repeatedly, then Leisten hit him again, knocking him to the ground. (Id., RT 5476, RT 5568.) He
10 described in detail the physical altercation he contended occurred before the shooting, contrary to
11 Tiffani's testimony no such fight occurred. (Id., RT 5479, RT 5571-5577.)

12 Tedeschi testified he then went into another room and "waited momentarily," thinking Leisten
13 was coming after him. When he thought he saw Leisten's shadow in the hallway, he grabbed a gun
14 out of his gun safe. He explained the facts the gun safe was already open and the guns loaded, with
15 additional ammunition left on the office floor, as because he had been inventorying his firearms.
16 (Lodg. 15, Vol. 10, RT 5608-5610.) He came back into the living room, told Leisten to get out, "and
17 that's when he tried to grab for the gun, and I shot it." (Id. RT 5476-5478, RT 5577-5580.) He denied
18 intending to shoot anyone, even though he took the safety off on his way back to the living room. (Id.,
19 RT 5604-5606.) He described how he pointed the gun while telling Leisten to get out, how Leisten
20 tried to grab the gun, and how he raised and pointed it while fanning the trigger several times from
21 a distance of about four or five feet "until Bob Leisten was no longer a threat to me, he wasn't making
22 any more advancement." (Id., RT 5479-5480, RT 5530-5531, RT 5585-5586). The firearm
23 discharged a total of three times, but Tedeschi contended he did not recall consciously pulling the
24 trigger. (Id., RT 5530-5531, RT 5578.) He testified he "went into trance," "numb," after he shot
25 Leisten, but he recalled words they exchanged as Leisten went down, and he remembered Tiffani

26 ³ Tedeschi testified he believed Leisten owed Shelley that money, to be paid in lieu of the child support
27 he owed Shelley. (Lodg. 15, Vol. 10, RT 5553.) He denied ever making statements or threats about killing
28 Shelley or her parents, contrary to Shelley's testimony and the description by a neighbor of a dispute Tedeschi
described with Leisten over money owed for electrical work. (Id., RT 5550-5554.)

1 screaming "Daddy" and running away. (Id., RT 5480-5481.) He recalled hearing sirens, opening the
2 front door, and seeing his neighbor standing on the sidewalk. (Id., RT 5481). He characterized the
3 incident as "a very, very tragic misfortune," an "accident" Leisten contributed to. (Id., RT 5483-5484,
4 RT 5612.) He stated several times he was afraid of Leisten and feared for his life when he shot him.
5 (*E.g.*, Id., RT 5569.)

6 Tedeschi testified it was only after the SWAT team started firing at him at about 11:30 p.m.
7 that he got a second and a third firearm out of his gun safe, so Tiffani would not have seen any gun
8 other than the one she saw him point at her grandfather. (Lodg. 15, Vol. 10, RT 5534-5536.) He
9 denied contemplating suicide, explaining the contents of the notes he wrote as in anticipation the
10 SWAT team or sheriffs were going to kill him. His request in the good-bye note that Tiffani forgive
11 him referred to the killing of her grandfather, not suicide. He was referring to Shelley's "lack of
12 communication skills" with him when he wrote "this is the price you pay, Shelley," meaning getting
13 her ex-husband killed.

14 Tedeschi testified he did not know Leisten was dead or dying during the four hours he waited
15 inside his house until the SWAT team's forced entry. He was not concerned about getting him medical
16 aid because "I was not aware that Bob Leisten was in grave danger," even though he had been shot
17 at least twice, he was bleeding, he was not moving or speaking, and his eyes were open. He did not
18 go to a neighbor to get him medical help because "I didn't want to leave Bob Leisten unattended in
19 the house . . . alone" in case he asked for help or wanted to say something. He heard the police officer
20 knock at his door at about 8:17 p.m., but did not respond because his "interpretation of that was there
21 was a man outside with a gun in his hand," and he has "a paranoia of the Kern County Sheriff's
22 Department." (Lodg. 15, Vol. 10, RT 5587-5597.) He explained he said nothing about Leisten
23 having been shot and needing help when he saw Mr. Aragon out front because "I was worried about
24 Tiffan[i]." (Id., RT 5599.) He denied punching or kicking Leisten with his work boots when he was
25 down, suggesting the blood got on his boots when he tripped over Leisten's leg returning to the living
26 room after looking outside for Tiffani from his front door. (Id., RT 5601-5604.)

27 Tedeschi stayed in the hallway "waiting for the police to come into the house and get to Bob"
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1 with a loaded gun against his body for protection. (Lodg. 15, Vol. 10, RT 5615-5616, RT 5600.)
2 When officers shot tear gas inside, then entered and pepper-sprayed him, he "sarcastically" said to go
3 ahead and shoot him. He denied resisting arrest or being assaultive.⁴ (Id., RT 5613-5615.)

4 **B. Procedural Background**

5 Tedeschi pled not guilty to capital murder charges and denied all additional allegations. As
6 summarized by the Court of Appeal:

7 Trial began on February 4, 1999, and, on February 26, 1999, the jury
8 found Tedeschi not guilty of first degree murder but guilty of the lesser
9 included offense of second degree murder. The jury found the firearm
10 allegation true and the trial court found the lying-in-wait allegation not
11 true. [¶] On April 9, 1999, the trial court sentenced Tedeschi to prison
12 for a total of 25 years to life: 15 years to life for second degree murder,
13 plus 10 years for the firearm enhancement.

14 (Lodg. 4, p. 2.)

15 Tedeschi appealed his conviction and sentence, alleging several errors associated with
16 evidentiary issues, jury instructions, and improper custody credit calculations. (Lodg. 1.) He also
17 filed a habeas petition in the Court of Appeal, seeking reversal and a new trial on grounds of
18 prosecutorial misconduct for failure to disclose material relevant to the impeachment of a government
19 witness. (Lodg. 2.) The Court of Appeal consolidated the direct appeal and the habeas petition and,
20 on August 8, 2001, affirmed the judgment in its entirety and dismissed the petition. (Lodg. 4.) On
21 October 31, 2001, the California Supreme Court denied his petition for review. (Lodg. 6.) Proceeding
22 *pro se*, Tedeschi initiated several unsuccessful collateral proceedings in the state courts in 2002 and
23 2003 seeking relief from his conviction on a variety of theories.

24 In March 2004, through counsel from the Kern County Public Defender's office, Tedeschi filed
25 a habeas corpus petition in Superior Court alleging six instances of newly-discovered juror
26 misconduct. (Lodg. 9.) He has been represented by counsel in all subsequent proceedings. The
27 Superior Court conducted an evidentiary hearing over two days, April 25-26, 2005, memorialized in
28 a 202-page transcript. (Dkt No. 14, Lodg. A, Exh. B; Respondent's Lodgment 16 is an incomplete
transcript of that hearing.) Each of Tedeschi's twelve jurors provided a declaration and also testified

⁴ A SWAT team member testified he pepper-sprayed Tedeschi because he was resisting arrest, and it took several of the men to subdue him. (Lodg. 15, Vol. 10, RT 5624-5635.)

1 at the hearing regarding the conduct of their deliberations at the trial six years earlier. In its July 6,
2 2005 ruling denying the petition, the Superior Court found insufficient evidence to support three of
3 the six juror misconduct claims, but found Tedeschi's jurors committed the other three alleged acts
4 of misconduct. However, the court found for each instance of misconduct, the evidence presented
5 rebutted any presumption of resulting prejudice. (Lodg. 10.) Tedeschi filed a petition in the Court
6 of Appeal on August 9, 2005 challenging the denial of relief on the three instances of misconduct the
7 Superior Court had found true. (Lodg. 11.) The Court of Appeal summarily denied that petition on
8 December 22, 2006.

9 On February 28, 2007, the California Supreme Court granted review, and referred two of the
10 three issues presented in the habeas petition back to the Court of Appeal. The Court of Appeal
11 instructed the parties to provide supplemental briefing:

12 Our Supreme Court has held that "when [juror] misconduct involves
13 the receipt of information from extraneous sources, the effect of such
14 receipt is judged by a review of the entire record, and may be found to
15 be non-prejudicial. The verdict will be set aside only if there appears
16 a substantial likelihood of juror bias." (*In re Carpenter* (1995) 9
17 Cal.4th 634, 653.) Juror bias may appear if either (1) the extraneous
18 material itself was "inherently prejudicial" or (2) the nature of the
19 misconduct and the surrounding circumstances indicated it is
20 substantially likely that a juror was actually biased. (*Ibid.*) As to the
21 second test, "the 'entire record' logically bearing on a circumstantial
22 finding of likely bias includes the nature of the juror's conduct, the
23 circumstances under which the information was obtained, the
24 instructions the jury received, the nature of the evidence and issues at
25 trial, and the strength of the evidence against the defendant." (*Id.* at p.
26 654.) Assuming *In re Carpenter* sets forth the standards applicable to
27 this case, **what specific portions of the trial record support a
28 determination under those standards that there is/is not a
substantial likelihood of juror bias arising from the misconduct in
the receipt of extraneous material?**

(Lodg. 12, pp. 9-10 (emphasis added).)

23 In its unpublished 23-page Opinion issued January 17, 2008, after hearing oral argument on
24 November 26, 2007 following the supplemental briefing, the Court of Appeal summarized:

25 A jury convicted petitioner Mark Vincent Tedeschi of second
26 degree murder for the shooting death of his ex-father-in-law. Five
27 years later, Tedeschi petitioned for a writ of habeas corpus in the trial
28 court seeking a new trial based on alleged instances of juror
misconduct during deliberations. Following an extensive hearing, the
trial court found three instance of juror misconduct occurred during

1 deliberations but determined the presumption of prejudice arising from
2 the misconduct had been rebutted. Tedeschi sought review of the trial
3 court's ruling by filing the instant petition for writ of habeas corpus.
4 We originally denied the petition. **The [California] Supreme Court**
5 **subsequently granted review, and transferred the matter to us with**
6 **directions to vacate our summary denial and to issue an order**
7 **showing cause why Tedeschi was not entitled to relief based on two**
8 **of the three instances of juror misconduct found by the trial court,**
9 **namely, "(1) considering an extrajudicial definition of 'malice,' and**
10 **(2) discussing whether [Tedeschi] had been previously tried, and**
11 **whether retrial was barred if the jury failed to reach a verdict. . . ."**
12 **Tedeschi contends the trial court erred in concluding that the**
13 **presumption of prejudice arising from these instances of**
14 **misconduct had been rebutted, and that he is entitled to a new trial.**
15 **We disagree, and deny his petition.**

16 (Lodg. 12, p. 2 (emphasis added).)

17 The California Supreme Court summarily denied Tedeschi's Petition For Review of that result
18 on March 26, 2008, noting one justice thought the petition should be granted. (Lodgs. 13, 14).

19 Tedeschi contends in his June 12, 2008 federal Petition he is unlawfully incarcerated because
20 the three instances of jury misconduct found by the Superior Court deprived him of his federal due
21 process rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution
22 to a unanimous and fair jury, to confront witnesses, and to effective assistance of counsel. (Pet. 4:8-
23 14; *see* Pet. P&A 2:5-11.) Respondent raises no untimeliness or procedural bar to this Court's
24 consideration of Tedeschi's constitutional claims.

25 **II. DISCUSSION**

26 **A. Legal Standards**

27 A federal court "shall entertain an application for a writ of habeas corpus in behalf of a person
28 in custody pursuant to the judgment of a State court only on the ground he is in custody in violation
of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a). Only errors of
federal law can support intervention in state proceedings. Oxborrow v. Eikenberry, 877 F.2d 1395,
1400 (9th Cir. 1989). Federal habeas courts are bound by a state's interpretations of its own laws.
Estelle v. McGuire, 502 U.S. 62, 68 (1991); Himes v. Thompson, 336 F.3d 848, 852 (9th Cir. 2003).

Federal habeas petitions filed after April 24, 1996 are governed by the Antiterrorism and
Effective Death Penalty Act of 1996 ("AEDPA"). AEDPA establishes a "highly deferential standard

1 for evaluating state-court rulings,' " requiring "that state-court decisions be given the benefit of the
2 doubt." Woodford v. Visciotti, 537 U.S. 19, 24 (2002) (*per curiam*), quoting Lindh v. Murphy, 521
3 U.S. 320, 333 n.7 (1997). A federal court can grant a prisoner habeas relief only if it determines the
4 result of a claim adjudicated on the merits by a state court "was contrary to, or involved an
5 unreasonable application of clearly established Federal law, as determined by the Supreme Court of
6 the United States," or "was based on an unreasonable determination of the facts in light of the
7 evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); see Bell v. Cone, 535 U.S.
8 685, 694 (2002); Miller-El v. Cockrell, 537 U.S. 322, 340 (2003). A state court's decision is "contrary
9 to" clearly established federal law if it (1) applies a rule that contradicts governing Supreme Court
10 authority, or (2) "confronts a set of facts that are materially indistinguishable from" a Supreme Court
11 decision but reaches a different result. Early v. Packer, 537 U.S. 3, 8 (2002), quoting Williams v.
12 Taylor, 529 U.S. 362, 405-06 (2000). To be found "unreasonable," the application of the precedent
13 "must have been more than incorrect or erroneous;" it "must have been 'objectively unreasonable.'" "
14 Wiggins v. Smith, 539 U.S. 510, 520-21 (2003) (citation omitted); see also Middleton v. McNeil, 541
15 U.S. 433, 436 (2004) (*per curiam*).

16 A state court's findings of historical fact are presumed correct. 28 U.S.C. § 2254 (e)(1); see
17 Dickson v. Sullivan, 849 F.2d 403, 405 (9th Cir. 1988). However, the conclusion that a "constitutional
18 error was harmless does not constitute a factual finding entitled to a presumption of correctness."
19 Dickson, 849 F.2d at 405 ("The question whether [extraneous information] prejudiced [the defendant]
20 requires the application of a legal standard to historical facts," and is "thus a mixed question of law
21 and fact reviewable *de novo*"); see Sassounian v. Roe, 230 F.3d 1097, 1108 (9th Cir. 2000) ("Juror
22 misconduct is a mixed question of law and fact, reviewed *de novo*"); see also Lawson v. Borg, 60 F.3d
23 608, 612 (9th Cir. 1995) (federal courts review a state court's finding of "no prejudice" *de novo*).

24 A federal habeas court applying those standards looks to the last reasoned state court decision.
25 Delgadillo v. Woodford, 527 F.3d 919, 925 (9th Cir. 2008); see Ylst v. Nunnemaker, 501 U.S. 797,
26 803-04 (1991). The denial of a petition by the state's highest court "without comment or citation
27 constitute[s] a decision on the merits of the federal claims . . . subject to review in federal habeas
28

1 proceedings." Hunter v. Aispuro, 982 F.2d 344, 347-48 (9th Cir. 1992). The reasoned decision under
2 review here on two of the three claims in the Petition is the January 17, 2008 Court of Appeal's
3 second denial of Tedeschi's habeas petition. (Lodg. 12.) Rejection of Tedeschi's third juror
4 misconduct claim was not disturbed by proceedings subsequent to the Superior Court's July 6, 2005
5 denial of his habeas petition, the last reasoned decision on that issue, finding the misconduct but no
6 prejudice. (Lodg. 10.)

7 **B. Juror Misconduct Was Not Prejudicial**

8 **1. Federal Standard And Permissible Evidentiary Inquiry**

9 The Sixth Amendment guarantee of a fair trial before a panel of impartial jurors requires that
10 the verdict be based on the evidence presented at trial. Turner v. Louisiana, 379 U.S. 466, 471-73
11 (1965). Exposure to facts not in evidence can deprive a defendant of the Sixth Amendment rights to
12 confrontation, cross-examination, and assistance of counsel. Dickson, 849 F.2d at 404, 406. "Juror
13 misconduct typically occurs when a member of the jury has introduced into its deliberations matter
14 which was not in evidence or in the instructions." Thomas v. Borg, 74 F.3d 1571, 1574 (9th Cir.
15 1996); *see also* Jeffries v. Blodgett, 5 F.3d 1180, 1190-91 (9th Cir. 1993) (vacating a grant of
16 summary judgment and remanding for factual determinations as to the truth of two jurors' affidavits
17 concerning misconduct during a trial two years earlier associated with the highly inflammatory nature
18 of certain jurors' exposure to extrinsic evidence of the defendant's substantially similar prior bad acts).

19
20 Nevertheless, "[d]ue process does not require a new trial every time a juror has been placed
21 in a potentially compromising position." Smith v. Phillips, 455 U.S. 209, 217 (1982) ("Due process
22 merely means a jury capable and willing to decide the case solely on the evidence before it, and a trial
23 judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences
24 when they happen"). Federal habeas relief is warranted only if the petitioner establishes both that
25 constitutional error occurred and that the error had "substantial and injurious effect or influence in
26
27
28

1 determining the jury's verdict."⁵ Brecht v. Abrahamson, 507 U.S. 619, 627, 635-38 (1993) (rejecting
2 the "harmless beyond a reasonable doubt" standard of Chapman v. California, 386 U.S. 18, 24 (1967)
3 on collateral review). The Brecht Court adopted the harmless-error standard of Kotteakos v. United
4 States, 328 U.S. 750, 776 (1946):

5 [I]f one cannot say, with fair assurance, after pondering all that
6 happened without stripping the erroneous action from the whole, that
7 the judgment was not substantially swayed by the error, it is impossible
8 to conclude that substantial rights were not affected. The inquiry
9 cannot be merely whether there was enough to support the result, apart
10 from the phase affected by the error. It is rather, even so, whether the
11 error itself had substantial influence. If so, or if one is left in grave
12 doubt, the conviction cannot stand.

13 Kotteakos, 328 U.S. at 765, 776 (finding it "highly probable that the [trial] error had substantial and
14 injurious effect or influence in determining the jury's verdict"and reversing a judgment).

15 In determining the prejudicial effect of information improperly introduced into jury
16 deliberations, courts "place great weight on the nature of the extraneous information that has been
17 introduced" because "[n]o bright line test exists to assist courts in determining whether a petitioner
18 has suffered prejudice from juror misconduct." Mancuso v. Olivarez, 292 F.3d 939, 950 (9th Cir.
19 2002) (citations omitted). Thus, while the jury's consideration of extraneous information in convicting
20 a defendant may violate the defendant's federal constitutional rights, it is a trial error subject to
21 harmless error analysis on habeas review. Id. at 949-50, 953 (the reviewing court inquires "whether
22 there was a direct and rational connection between extrinsic material and the prejudicial jury
23 conclusion, and whether the misconduct relates directly to a material aspect of the case") (citations
24 omitted); *see also* Fry v. Pliler, 551 U.S. 112, 119-20 (2007) (holding that harmless error analysis is
25 still required after a showing that the state court opinion was contrary to or involved an unreasonable
26 application of clearly established federal law because Section 2254(d) "sets forth a precondition to the

27 ⁵ "[T]he standard for determining whether habeas relief must be granted is whether [the constitutional
28 error] 'had substantial and injurious effect or influence in determining the jury's verdict' " because that standard
"is better tailored to the nature and purpose of collateral review than the Chapman standard, and application
of a less onerous harmless-error standard on habeas promotes the considerations underlying our habeas
jurisprudence." Brecht, 507 U.S. at 623; *see* Bains v. Cambra, 204 F.3d 964, 976-77 (9th Cir. 2000) ("we now
join the vast majority of our sister circuits by deciding that the Brecht standard should apply uniformly in all
federal habeas corpus cases under § 2254"). Although Brecht pre-dated AEDPA, the "substantial and injurious
effect" test remains the standard. *See* Sassounian, 230 F.3d at 1111-12, *quoting* Kotteakos, 328 U.S. at 765.

1 grant of habeas relief, . . . not an entitlement to it").

2 The prejudice determination is made in consideration of all the circumstances of the trial.⁶
3 Sassounian, 230 F.3d at 1109. "The relevant inquiry is whether the [error] actually harmed the
4 appellant" by causing a "substantial and injurious effect or influence in determining the jury's verdict,"
5 . . . or . . . the judge 'is in grave doubt' about the harmlessness of the error." Medina v. Hornung, 386
6 F.3d 872, 877 (9th Cir. 2004), *quoting* Brecht, 507 U.S. at 637 and O'Neal v. McAninch, 513 U.S.
7 432, 436 (1995); *see also* Mancuso, 292 F.3d at 949 & n.4 (same).

8 The Supreme Court has made clear that whether a trial error had a
9 substantial and injurious effect is not to be analyzed in terms of burdens
10 of proof. . . . We, as the reviewing court, have the responsibility to
11 determine this legal question "without benefit of such aids as
12 presumptions or allocated burdens of proof that expedite factfinding at
13 trial." [7]

14 Mancuso, 292 F.3d at 950, *quoting* O'Neal, 513 U.S. at 436 ("Do [we, the judges on habeas review],
15 think that the error substantially influenced the jury's decision?"); *see also* Simmons v. Blodgett, 110
16 F.3d 39, 41-42 (9th Cir. 1997) ("Finding facts to determine if there is a constitutional error is a wholly
17 different thing from deciding whether or not an error, once found, affected the verdict).

18 "Before turning to the merits, we must determine what evidence may be considered in
19 evaluating the jury's consideration of the improper evidence." Sassounian, 230 F.3d at 1108. A jury's
20 deliberative process is not reviewable unless the allegation asserts extraneous prejudicial information

21 ⁶ Sassounian, 230 F.3d at 1109 (holding analysis of the factors relevant to whether improper evidence
22 was considered by the jury, excluding "the subjective impact" of improperly admitted evidence, "compels the
23 conclusion that the fact that four jurors recalled discussing the [extrajudicial evidence of a phone call], when
24 and how it occurred, the nature of the extrinsic evidence it introduced into the deliberations and the weakness
25 of the trial evidence bearing on the special circumstance, had a 'substantial and injurious effect or influence' on
the special circumstance finding"). The prejudicial error occurred in that case because the jury's considered a
phone call not in evidence that provided probative evidence of the defendant's nationality-based motive for a
killing: "Here, when all is said and done, these simple facts remain: after fifteen days of deliberation the jury
was hung on each of the special circumstances. Then, in response to Juror Rankin's searching question for the
'reason' for the killing, the improper extrinsic evidence was introduced into the deliberations. Within one hour,
the jury found true the special circumstance of murder because of nationality or national origin but hung on
each of the other charged circumstances." Id., at 1111-12.

26 ⁷ The Mancuso court observed Ninth Circuit decisions have not consistently interpreted or applied the
27 Brecht standard, citing examples. Some cases state the petitioner bears the burden of showing a trial error had
28 a substantial and injurious effect. Other cases state the government bears the burden to show it did not. That
court concluded the statement of the Brecht standard most accurately reflecting current Supreme Court case law
to be: "the reviewing court must determine independently whether a trial error had a substantial and injurious
effect, without consideration of burdens of proof." Mancuso, 292 F.3d at 949 n.4.

1 was brought to the jurors' attention. *See Tanner v. United States*, 483 U.S. 107, 121 (1987) (exception
2 to the common-law rule prohibiting admission of juror testimony to impeach a jury verdict recognized
3 for juror testimony relating to extraneous influences). Federal Rule of Evidence 606(b) embodies that
4 exception,⁸ and applies to petitions for a writ of habeas corpus from state prisoners pursuant to FED.
5 R. EVID. 1101(e). "[F]ederal courts can consider 'juror testimony about the consideration of extrinsic
6 evidence' but cannot consider testimony 'about the subjective effect of evidence on the particular
7 juror.'" *Fields v. Brown*, 503 F.3d 755, 798 (9th Cir. 2007), (Berzon, J., dissenting), *cert. denied sub*
8 *nom Fields v. Ayers*, -- U.S. --, 128 S.Ct. 1875 (Apr. 14, 2008), *quoting Sassounian*, 230 F.3d at 1108
9 (discussing FED.R.EVID 606(b)).

10 "A long line of precedent distinguishes between juror testimony about the consideration of
11 extrinsic evidence, which may be considered by a reviewing court, and juror testimony about the
12 subjective effect of evidence on the particular juror, which may not." *Sassounian*, 230 F.3d at 1108-
13 09; *see Dickson*, 849 F.2d at 406 ("the question of prejudice is an objective, rather than a subjective,
14 one," and "[a] trial judge should not investigate the subjective effects of any [extrinsic evidence] upon
15 the jurors") (citations omitted); *United States v. Bagnariol*, 665 F.2d 877, 884-85 (9th Cir. 1981)
16 ("Jurors may testify regarding extraneous prejudicial information or improper outside influences, [but
17 they] may not be questioned about the deliberative process or subjective effects of extraneous
18 information, nor can such information be considered by the trial or appellate courts").

19 Factors a reviewing court considers, based on objective evidence associated with the jury
20 deliberations, to determine whether introduction of extrinsic information resulted in reversible
21 constitutional error include:

22
23 ⁸ "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter
24 or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any
25 other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or
26 concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether
27 extraneous prejudicial information was improperly brought to the jury's attention. . . . A juror's affidavit or
28 evidence of any statement by the juror may not be received on a matter about which the juror would be
precluded from testifying." FED. R. EVID. 606(b); *see United States v. Rutherford*, 371 F.3d 634, 644 (9th Cir.
2004) (explaining that under Rule 606(b), "a juror cannot testify to whether an outside influence *caused* him
to change his vote from innocent to guilty"). California also frames the inquiry into the validity of a verdict
as permitting only objective consideration of the character of evidence as likely or not to have improperly
influenced the verdict. *See* CAL. EVID. CODE § 1150.

1 (1) whether the extrinsic material was actually received, and if so, how;
2 (2) the length of time it was available to the jury; (3) the extent to
3 which the jury discussed and considered it; (4) whether the extrinsic
4 material was introduced before a verdict was reached, and if so, at what
point in the deliberations it was introduced; and (5) any other matters
which may bear on the issue of the reasonable possibility of whether
the introduction of extrinsic material affected the verdict.

5 Bayramoglu v. Estelle, 806 F.2d 880, 887 (9th Cir. 1986); *see* Dickson, 849 F.2d at 406; Marino v.
6 Vasquez, 812 F.2d 499, 506 (9th Cir. 1987). Other considerations include:

7 1. whether the prejudicial statement was ambiguously phrased; 2.
8 whether the extraneous information was otherwise admissible or
9 merely cumulative of other evidence adduced at trial; 3. whether a
10 curative instruction was given or some other step taken to ameliorate
11 the prejudice; 4. the trial context; and 5. whether the statement was
12 sufficiently prejudicial given the issues and evidence in the case.

13 United States v. Keating, 147 F.3d 895, 902-03 (9th Cir. 1998) (footnote omitted), *quoting* Jeffries,
14 114 F.3d at 1491-92.

15 **2. Jury Misconduct Evidentiary Hearing And Subsequent Rulings**

16 The Supreme Court has long held that "the remedy for allegations of jury partiality is a hearing
17 in which the defendant has the opportunity to prove actual bias." Smith v. Phillips, 455 U.S. 209, 215
18 (1982). The Superior Court held an evidentiary hearing on April 25-26, 2005 associated with
19 Tedeschi's habeas petition alleging six newly-discovered instances of juror misconduct during
20 deliberations. (Lodg. 12, p. 8; *see* Lodg. 9.) Tedeschi does not challenge the fullness or fairness of
21 that hearing. The 202-page transcript of the two-day hearing is provided in its entirety as Exhibit B
22 to Lodgment A filed concurrently with Tedeschi's Traverse. (Dkt No. 14.) The lodgments also
23 include copies of the Declarations each juror provided in advance of their testimony. Prior to calling
24 each witness, the court ruled on objections, properly striking those portions of each declaration
25 describing the declarant's subjective reasoning or mental processes affecting his or her vote in reaching
26 the verdict or speculating about what other jurors were thinking.⁹ (*See, e.g.*, Dkt 14, Lodg. A, Exh.
B, RT 53:19-54:12, RT 101:24-28; RT 126:22-24; RT 136:25-137:1; RT 152:15-21.) Each of
Tedeschi's jurors then testified, as pertinent here, albeit most with an understandable lack of

27 ⁹ "No evidence is admissible to show the *effect* of such statement, conduct, admission or event upon
28 a juror either in influencing him to assent to or to dissent for [*sic*] the verdict or concerning the mental process
by which it was determined." (Lodg. A, Exh. B, RT 47:9-14, CAL. EVID. CODE § 1150(a); *see* fn 9, above.)

1 recollection of specifics given the intervening six years since the February 1999 trial, regarding: (1)
2 whether they recalled a fellow juror sharing an extra-judicial definition of malice he had looked up
3 in a dictionary; (2) whether they recalled jurors discussing whether Tedeschi had been tried before for
4 the crime and what might happen if their jury "hung;" and (3) whether they recalled jurors discussing
5 punishment during deliberations. The court heard counsel's closing arguments on June 29, 2005, then
6 issued its written ruling on July 6, 2005, finding those three of the six alleged instances of juror
7 misconduct occurred, but did not prejudice the result, and denying Tedeschi's habeas petition.

8 **The court notes that the misconduct** in numbers 4, 5, and 6 above
9 [i.e., jury discussion of a previous trial and effect if they failed to reach
10 a verdict, jury discussion of punishment during guilt deliberations, and
11 an extraneous definition of malice] **did not affect the rights of the**
12 **defendant and did not improperly influence or affect the jury as a**
13 **whole or any one juror individually.** This is true whether one
14 considers the acts of misconduct individually or as a whole. **No real**
15 **or actual bias was displayed by any of the jurors, even those who**
16 **committed the misconduct.** It must be understood that in reviewing
17 the entire case and weighing the misconduct, the evidence was
18 *overwhelming* that at a minimum the defendant was guilty of at least
19 second degree murder. Any evidence to suggest otherwise was simply
20 not credible.

21 (Lodg.10, p. 4 (bolded emphasis added).)

22 The California Supreme Court vacated the Court of Appeal's summary denial of relief from
23 that result. After soliciting additional briefing from the parties on instructions from the California
24 Supreme Court to conduct additional proceedings associated with two of the three instances of juror
25 misconduct, in its reasoned Opinion entered January 17, 2008, the Court of Appeal applied the two
26 tests of In re Carpenter, 9 Cal.4th 634, 653, 654 (1995) (reviewing the effects of misconduct involving
27 jurors' receipt of information from extraneous sources, citing United States Supreme Court authority,
28 and holding "judgment must be set aside if the court finds prejudice under either test"). (Lodg. 12,
pp. 1-2.) Under Carpenter, before a unanimous verdict is set aside for juror misconduct., the
likelihood of juror bias must be substantiated under either the "inherent" bias test (finding bias if the
extraneous material is inherently and substantially likely to have influenced the juror) or the "actual"
bias test (looking to the nature of the misconduct and surrounding circumstances to determine whether

1 it is substantially likely the juror was actually biased against the defendant).¹⁰

2 Under this second, or "circumstantial," test, the trial record is not a
3 dispositive consideration, but neither is it irrelevant. **All pertinent**
4 **portions of the entire record, including the trial record, must be**
5 **considered.** The presumption of prejudice may be rebutted, *inter alia*,
6 by a reviewing court's determination, *upon examining the entire record*,
7 that there is no substantial likelihood that the complaining party
8 suffered actual harm.

9 Carpenter, 9 Cal.4th at 654 (bolded emphasis added) (citation omitted).

10 **3. Improper Exposure To Extrajudicial "Malice" Definition Had No**
11 **Substantial Or Injurious Effect On Verdict**

12 The jury began its deliberations at 10:20 a.m. on February 25, 1999, took a one-hour break for
13 lunch, adjourned at 4:30 p.m., then reconvened to resume deliberations on February 26, 1999 at 9:01
14 a.m. (Lodg. 12, p. 10.)

15 At 12:25 p.m. [on the second day], the jury returned to the courtroom
16 and the trial court responded to a note from the jury foreperson asking
17 the court to explain "malice." The court told the jurors it could not tell
18 them anything more about "malice" except what was in the instructions.
19 The foreperson then asked whether the court could give the jury a law
20 dictionary. **The court said no and reiterated that the jury was**
21 **required "to follow the instructions, the definition of malice."** The
22 foreperson then stated, "I guess we weren't satisfied with the definition
23 as stated in the papers you gave us." The court responded, "But that is
24 the definition." The foreperson replied, "That is the definition?" **The**
25 **court repeated, "That is the definition."** ¶ Following this
26 discussion, the jury broke for lunch at 12:30 p.m. At 1:30 p.m., the
27 jury retired to deliberate further. After taking a 15 minute break at
28 2:58, the jury returned its verdict at 4:03 p.m.

(Lodg. 12, p. 10 (emphasis added).)

The Court of Appeal summarized the misconduct:

[E]vidence was presented [at the evidentiary hearing] that on the
second day of jury deliberations in Tedeschi's trial, one of the jurors
told the jury he had gone to the library over the lunch hour and
obtained a dictionary definition of "malice," and then shared this
definition with the jury. The juror who brought the dictionary

¹⁰ The Court of Appeal also discussed Marino, 812 F.2d 499 by way of "example" at Lodgment 12, pp. 18-19, in revisiting the two remanded juror misconduct issues. See Marino, 812 F.2d at 504 & n.5 (granting conditional habeas relief from convictions for second degree murder and attempted murder, finding a reasonable possibility the defendant suffered prejudice as a result of two errors: (1) conducting an out-of-court experiment with a third party; and (2) introduction of an unauthorized dictionary definition of an element of the crime ("malice") during deliberations). The Marino case pre-dates AEDPA and the adoption in Brecht of the Kotteakos harmless-error standard, applying instead the Chapman standard, which required the prosecution to prove that constitutional errors were harmless beyond a reasonable doubt.

1 definition of "malice" into the jury room never admitted to the conduct.
2 Although other jurors' descriptions of the juror pointed to Juror No.
3 044400 as being the likely culprit, Juror No. 044400 denied that it was
4 him and then testified he could not remember doing it.

(Lodg. 12, p. 11.)

5 The Court of Appeal identified its task as "to decide . . . whether the juror misconduct in
6 considering an extrajudicial definition of 'malice' was prejudicial." (Lodg. 12, p. 16.)

7 "This standard is well established. '[W]hen misconduct involves the
8 receipt of information from extraneous sources, the effect of such
9 receipt is judged by a review of the entire record, and may be found to
10 be nonprejudicial. **The verdict will be set aside only if there appears
11 a substantial likelihood of juror bias. . . .**"

(Lodg. 12, pp. 16-17 (bolded emphasis added), *quoting* People v. Danks, 32 Cal.4th 269, 303 (2004),
12 *quoting* Carpenter, 9 Cal.4th at 653.)

13 "The concept of malice goes to the very heart of the deliberative process of a jury in a murder
14 case." Marino, 812 F.2d at 506. Tedeschi contends: "during deliberations, the jurors improperly
15 discussed at length an extra-record definition of the term 'malice,' brought to the deliberations by a
16 juror who looked up the definition in the library during a break." (Pet. 5:12-14.) "This misconduct
17 occurred **immediately after** the jurors had asked the court for a definition of the term 'malice,' and
18 the court had **refused** to give any definition beyond the jury instructions already given." (Id. at 5:14-
19 16.) "This misconduct is specifically attested to by at least six jurors," and "[n]ot a single juror
20 averred that this did **not** happen." (Id. at 5:16-18.) He urges the Court to find a "direct and causal
21 connection between the extrinsic material and a prejudicial jury conclusion." (Pet. P&A 11:7-8,
22 *quoting* Marino, 812 F.2d at 506.) However, the Marino case is distinguishable. That court granted
23 habeas relief on murder and attempted murder convictions because a juror changed his vote to guilty
24 after holding out for nearly 30 days against a guilty verdict, evidencing a direct temporal and causal
25 connection between extraneous evidence and a prejudicial result. In addition, the extrinsic definition
26 in that case was known to have been materially different from the jury instruction definition of
27 "malice."

28 As to the dictionary definition [of "malice"], the record here supports
the conclusion that there was both **a direct connection between the
extrinsic material and the jury's verdict, as evidenced by the**

1 holdout juror's change of verdict, and misconduct relating to a material
2 aspect of the case, the definition of the element of malice. . . . **In the**
3 **case at bar the presence or absence of malice was pivotal, as there**
4 **were no issues as to mistaken identity, causation, or diminished**
5 **capacity.** . . . There is a rational connection between the kind of
6 extrinsic evidence introduced, relating to the credibility of a defense of
7 self-defense, and a verdict of guilty of second degree murder.

8 Marino, 812 F.2d at 506 (emphasis added).

9 "[T]here is no dispute in this case that juror misconduct occurred when a juror obtained a
10 dictionary definition of 'malice' and shared it with the jury during deliberations." (Lodg. 12, pp. 15-
11 16.) "Jurors are not allowed to obtain information from outside sources either as to factual matters
12 or for guidance on the law." (Resp. Lodg. 12, p. 16, *quoting* People v. Karis, 46 Cal.3d 612, 642
13 (1988). Nevertheless, Respondent contends no "substantial and injurious influence" on the verdict
14 resulted in light of the Superior Court's factual finding the extra-record definition was similar to the
15 jury instruction definition "and the overwhelming evidence establishing Petitioner's guilt of at least
16 second degree murder," so that "the state court's rejection of this claim was not an unreasonable
17 application of Brecht" because: the "misconduct in this regard was minimal; the extra-record
18 definition was apparently similar to the legal one; and the jurors did not make much use nor remember
19 this fact as being significant." (Answer 22:7-9 & p. 24.) As summarized by Respondent:

20 **This murder case was in essence a credibility contest between the**
21 **only two living witnesses to the events leading to the death of the**
22 **victim.**[] Tiffani Tedeschi testified that the Petitioner shot the victim
23 in an unprovoked attack after the victim entered Petitioner's home to
24 pick her up. Petitioner, on the other hand, told a completely different
25 story in which he was the victim of an aggressive attack by the victim
26 and fearing for his safety he shot the victim in self-defense. Under
27 Tiffani's scenario of the events Petitioner would be guilty of either first
28 or second degree murder and under Petitioner's version he would either
be acquitted if the jury found he actually and reasonably feared for his
safety or he would be guilty of voluntary manslaughter if the jury
believed his story but did not find his honest belief in the need to
defend himself reasonable under the circumstances. **Thus, the key**
issues in this case were ones of credibility and the physical evidence
that supported or refuted the very different versions told by these
two witnesses.

The jury's interest in the term "malice," although highlighted by
Petitioner, does not, upon examination of the record and the
instructions given appear to be a crucial matter. **If the jury believed**
the story told by Tiffani Tedeschi then Petitioner was guilty of
murder under any definition of malice supplied by the parties. . . .

1 All the definitions supplied by the parties [at the evidentiary hearing,
2 obtained from a variety of dictionaries in libraries accessible to the
3 jury] focus on an intent to harm another. Clearly under Tiffani's
4 version, an intent to harm the victim was present.^[11]

5 (Answer p. 24 & n.5 (emphasis added). As emphasized by the prosecutor in closing argument:
6 "[t]here is no making these fit, ladies and gentlemen. One of these two is lying. And there is no
7 reconciling the testimony."¹² (Lodg. 15, Vol. 11, RT 5821.)

8 The lowest common denominator of the "malice" definitions from all likely dictionary sources
9 researched by the parties for the evidentiary hearing,¹³ as well as of CALJIC 8.11, is intent to harm.

10 "Malice" may be either express or implied. [¶] [Malice is
11 express when there is manifested an intention unlawfully to kill a
12 human being.] [¶] [Malice is implied when: [¶] 1. The killing resulted
13 from an intentional act; [¶] 2. The natural consequences of the act are
14 dangerous to human life; and [¶] 3. The act was deliberately performed
15 with knowledge of the danger to, and with conscious disregard for,
16 human life.] [¶] [When it is shown that a killing resulted from the
17 intentional doing of an act with express or implied malice, no other
18 mental state need be shown to establish the mental state of malice
19 aforethought.] [¶] The mental state constituting malice aforethought
20 does not necessarily require any ill will or hatred for the person killed.
21 [¶] The word "aforethought" does not imply deliberation or the lapse
22 of considerable time. It only means that the required mental state must

23 ¹¹ Respondent also contends " 'malice' would still be present under CALJIC No. 8.11 or any other
24 definition of malice provided *if* that instruction was [*sic*] viewed in isolation and the jury disbelieved Tiffan[i]
25 and instead credited Petitioner's version of the events. Under that version Petitioner honestly believed that the
26 victim was a threat to him and he acted in response to that threat. However, he clearly meant to do harm to the
27 victim even under a self-defense theory. Malice in that situation would not be negated by referring to any
28 instruction on that legal term but rather by reference to the instructions as a whole and in particular the
instructions on perfect and imperfect self defense which the jury was given. This is precisely what counsel for
Petitioner argued to the jury. (*See* RT 5883-87.) [¶] These self defense instructions, and not any instructions
on the term 'malice,' were the crucial ones for Petitioner's defense." (Answer 25:1-11.)

29 ¹² Tedeschi criticizes the characterization of the evidence as "overwhelmingly" against him: "Total
30 acquittal as to first-degree murder is the jury's rejection of this 'overwhelming' case." (Traverse 30:9-10.)
31 Contrary to the jurors' testimony at the evidentiary hearing, he attempts to describe their deliberations: "Again,
32 having **rejected** every theory of first-degree murder, the jury was left to consider **only** the difference between
33 second-degree murder and manslaughter: malice, the very concept which lies at the heart of the jury
34 misconduct in this case." (Traverse 31:9-11, followed by a series of speculative rhetorical questions about what
an "untainted jury" might have concluded.)

35 ¹³ As summarized by the Court of Appeal: "The prosecution and defense investigators attempted to
36 ascertain which dictionary definition of 'malice' might have been brought into the jury room by investigating
37 dictionaries kept in the law library of the superior court and the public library near the court. The parties
38 presented the trial court with various examples of definitions culled from these dictionaries, which included
both legal and common definitions of the term 'malice.' None of these, however, was established to be the
actual definition that was brought into the jury room." (Resp. Lodg. 12, p. 12.) The various definitions with
their sources are provided as part of the Traverse lodgments

1 precede rather than follow the act.

2 (CALJIC 8.11; Lodg. 12, p. 19, n. 3; Lodg. 17, Clerk's Transcript ("CT") 1194.)

3 Malice is a required element of first- and second-degree murder, but not of the lesser-included
4 offenses of voluntary or involuntary manslaughter, on which the jury was also instructed. Under
5 California law, the element of malice is negated if one kills out of fear of imminent peril. Middleton,
6 541 U.S. at 434. Unlike the Marino case, where "the presence or absence of malice was pivotal"
7 (Marino, 812 F.2d at 506), from the testimony of Tedeschi's jurors at the evidentiary hearing, their
8 sticking point was whether to convict of first-degree murder (favored initially by a 10-to-2 margin)
9 or second-degree murder, not whether to convict of murder or manslaughter or whether to acquit .

10 The Court of Appeal found under the first Carpenter test that the extraneous information,
11 objectively viewed, was not "inherently and substantially likely to have influenced the juror since we
12 do not know what the extraneous information actually was." (Lodg. 12, p. 17 (only "minimal
13 information about the extrajudicial definition of 'malice' brought into the jury room," and "[n]one of
14 the jurors could remember any specific details of the definition," with "one juror believ[ing] it was
15 similar to the one given in the jury instructions," testimony "the trial court apparently found . . .
16 credible".))

17 Under the second Carpenter test, the Court of Appeal considered the entire record to conclude
18 "we cannot find that actual bias nonetheless arose." (Lodg. 12, p. 17.) "In an extraneous-information
19 case, the 'entire record' logically bearing on a circumstantial finding of likely bias includes the nature
20 of the juror's conduct, the circumstances under which the information was obtained, the instructions
21 the jury received, the nature of the evidence and issues at trial, and the strength of the evidence against
22 the defendant." (Id., quoting Carpenter, 9 Cal.4th at 654 ("For example, the stronger the evidence, the
23 less likely it is that the extraneous information itself influenced the verdict".))

24 Without question, the juror's conduct in this case was troubling,
25 i.e., consulting a dictionary for the definition of an essential element of
26 the charged crime and sharing it with the rest of the jury, shortly after
27 the trial court clearly referred the jury back to the instructional
28 definition of "malice" and declined the foreperson's request for a law
dictionary. The presence, absence, or negation of "malice" was
undeniably a key issue in the case and in the juror's assessment of the
various theories of liability presented to them. As Tedeschi points out,

1 the jury was instructed, among other things, that "[t]he distinction
2 between murder and manslaughter is that murder requires malice while
manslaughter does not."

3 Nonetheless, these circumstances alone do not establish a
4 substantial probability that one or more jurors was actually biased
5 against Tedeschi as a result of the juror misconduct. We are
6 unconvinced by the main thrust of Tedeschi's prejudice argument which
7 is that the introduction of the extrajudicial definition of "malice" into
8 deliberations, in his words, "operated to lighten the People's burden by
9 removing the **true** legal definition of ["malice"] from the equation."
10 The record does not disclose what dictionary definition of "malice" was
11 shared with the jury, and, in contrast to some of the cases Tedeschi
12 cites, his suggestion that the jury likely disregarded the legal definition
13 of "malice" provided by the court in favor of the unknown extrajudicial
14 definition is based largely on speculation about the timing of the
15 verdict rather than on objective evidence indicating the jury was
16 actually influenced by the extrajudicial definition.

17 (Lodg. 12, pp. 17-18, *distinguishing* Marino, 812 F.2d 499, and *distinguishing* Glage v. Hawes
18 Firearms Co., 226 Cal.App.3d 314 (1990) (reversing a judgment when the legal definition of
19 "preponderance" in the "preponderance of the evidence" phrase differed from the common meaning
20 of "preponderance" two jurors looked up in a dictionary, finding the misconduct was prejudicial
21 because of the "quantity" connotation in the various common definitions, as distinct from the "quality"
22 of evidence meaning in the legal phrase, creating a "substantial likelihood" the jury was improperly
23 and prejudicially influenced by the dictionary definition); *see also* Sassounian, 230 F.3d at 1110.¹⁴

24 The Court of Appeal concluded "there is no clear indication that the introduction of the
25 extrajudicial definition of 'malice' directly resulted in one or more jurors changing their votes to
26 Tedeschi's detriment, or caused the jury to reject the proper legal definition in favor of a common

27 ¹⁴ The improper information here is distinguishable from the improper information introduced to the
28 Sassounian jurors resulting in a finding of substantial prejudice, as are the circumstances. The Sassounian jury
had informed the court after 15 days of deliberations it could arrive at a verdict, but could not agree on any of
the charged special circumstances. "The jury was sent back to the jury room at 2:40. It was during the next
hour, before the verdict was returned at 3:50 p.m., that the jury discussed the phone call as the reason the
Turkish Consul was killed [C]ompelling is the fact that the evidence was discussed in response to Juror
Rankins' question based on the jury instruction about the 'most reasonable reason' for the killing. The improper
phone call 'evidence' thus supplied the 'reasonable reason' Juror Rankins needed to convict." Sassounian, 230
F.3d at 1110. "The phone call directly related to Sassounian's motive, which was at issue in the special
circumstance for which he was convicted," and "[i]t cannot be said that the other evidence amassed at trial was
so overwhelming that the jury would have reached the same result even if it had not considered the extraneous
material," because the other evidence related to the special circumstance was all either circumstantial or
challenged at the trial. Id. at 1110-1111. In Tedeschi's case, his daughter witnessed the killing and testified
regarding the circumstances leading up to the murder which, if believed over Tedeschi's inconsistent trial
testimony at crucial junctures, provides the "overwhelming" direct evidence he committed a murder.

1 meaning of the term." (Lodg. 12, p. 20.)

2 Instead, Tedeschi asks us to speculate that the jury's dissatisfaction with
3 the instructional definition of "malice" was the single issue holding up
4 the verdict, and that the jury was able to return a verdict relatively
5 quickly after the jury misconduct occurred because it found some
6 guidance in the extrajudicial definition of "malice." [¶] The standard
of review articulated by our Supreme Court requires more than
speculation. "We emphasize that before a unanimous verdict is set
aside, the likelihood of bias under either test must be *substantial*."

7 (Lodg. 12, p. 20, quoting Carpenter, 9 Cal.4th at 654.)

8 The Court of Appeal found "[a] number of circumstances, revealed by our review of the record,
9 support the trial court's conclusion that the jury's receipt of the extrajudicial definition of 'malice' was
10 nonprejudicial." (Lodg. 12, pp. 20-21.)

11 A majority of jurors had no recollection of the incident. There is also
12 no evidence the juror mentioned the extrajudicial definition of "malice"
13 more than once or that it engendered lengthy discussion or debate
among the jurors. As noted above, the trial court credited juror
testimony that the discussion was brief.

14 (Lodg. 12, p. 21, distinguishing People v. Nesler, 16 Cal.4th 561 (1997).)¹⁵

15 In addition, the Court of Appeal found "the trial evidence was overwhelming and could have
16 easily supported a verdict of first degree murder," not merely the second-degree murder of which he
17 was convicted. (Lodg. 12, p. 21.) "Without more compelling circumstances indicating that the jury
18 was actually influenced or biased by the extrajudicial definition of 'malice,' we are precluded from
19 setting aside the jury's verdict under the applicable standard of review." (Id.)

20 After *de novo* review of the trial record and the evidentiary hearing record, the Court finds the
21 Court of Appeal reached an objectively reasonable result that is not contrary to the Brecht prejudice
22 standard, for all the reasons recited by that court. The totality of the deliberations lasted just two

23 ¹⁵ "Thus, this case is different from People v. Nesler [(1997)] 16 Cal.4th 561. The defendant in Nesler
24 was charged with killing the alleged molester of her young son. The impact of possible methamphetamine use
25 on the defendant's mental state was an issue at trial. The misconduct occurred when one juror revealed to the
26 other jurors damaging information that she overheard in a bar regarding the defendant's sale and use of
27 methamphetamine. The evidence presented in the trial court showed that the juror referred *repeatedly* to the
28 damaging information and 'intentionally interjected this outside information into the deliberations when she
disagreed with the positions of other jurors.'" (Lodg. 12, p. 21 (pinpoint citations omitted).) The Nesler court
concluded "repeated references to and use of the outside information during deliberations establish[ed] a
substantial likelihood that her extraneous knowledge concerning the defendant caused her to prejudice issues
that arose during deliberations and to render a verdict that was not based solely upon the evidence presented
in court." Nesler, 6 Cal.4th at 583.

1 days. Unlike in Marino (30 days) and Sassounian (15 days), Tedeschi's jury did not engage in
2 "lengthy deliberations." There is no indication the jury could not reach a unanimous guilty verdict just
3 before receiving the improper evidence. Cf. Mancuso, 292 F.3d 939. The evidentiary hearing record
4 discloses deliberations focused on which of the two of the two murder degree charges should be found
5 true, with malice an element of both. The extrinsic definition was offered late in the process, reducing
6 the likelihood any juror was affected by any deviant phrasing of a second definition of "malice," or
7 that any juror actually relied on the extraneous definition. No juror suggested there was any
8 discussion of any material discrepancy or the import of any such discrepancy in the malice definitions.
9 Thus, the jury's consideration of an extrinsic but unidentified dictionary definition of "malice" during
10 deliberations, while improper, did not have a substantial and injurious influence on the verdict,
11 foreclosing federal habeas relief for lack of prejudice. There is no reasonable probability that without
12 the improper introduction of an extrajudicial definition of "malice" the result would have been
13 different. Accordingly, relief on this claim is **DENIED**.

14 **3. Improper Prior Trial Speculation Was Not Prejudicial**

15 Tedeschi killed Leisten in November 1995. He was not tried until February 1999. He
16 contends a juror erroneously represented he had a prior trial due to the time lag, and others so
17 speculated. (Pet. pp. 11-13.) He argues "jurors extensively discussed that he had been tried either
18 once or twice previously for the charged offense," openly expressing "their collective concern that if
19 they could not arrive at a verdict, petitioner would 'walk,' or go 'Scot-free.'" (Pet. 6:3-5.)

20 This jury was under enormous and undisclosed pressure to find
21 Petitioner guilty of **some** offense regardless of the evidence. Nothing
22 offered by the State dispels the fact that these jurors violated their
oaths, and spent a good deal of time discussing this extrinsic fallacy.
Nothing offered by the State shows that the trial court or counsel had
any opportunity to correct the jurors' misguided notions.

23 (Pet. P&A 12:21-25.)

24 Respondent observes: "It is reasonable for a juror to wonder why there had been such a delay
25 in bringing the case to trial." (Answer 26:20-21.) The individuals' recollections at the evidentiary
26
27
28

1 hearing were inconsistent.¹⁶ In denying the habeas petition on this issue, the Superior Court found:

2 Any discussion about a previous trial was relatively brief and did not
3 play a part in the verdict. The jurors expressed a desire to reach a
4 verdict and wondered out loud why the case was so old and what would
5 happen if they hung. While there certainly should not have been any
6 discussion about this, **the evidence proves that the verdict reached
7 was not as a result of** any misguided notion of a previous trial or the
8 belief that the defendant would go free if they were a hung jury.

9 (Lodg. 10, pp. 2-3 (emphasis added).)

10 The Court of Appeal adopted the same view of the evidentiary hearing revelations: no
11 evidence suggests those discussion resulted in actual prejudice.

12 Two jurors recalled that the topic of prior trials came up in
13 connection with one juror's statement that she had read in a newspaper
14 article that Tedeschi had been tried before. Juror No. 044400 testified
15 that one of the female jurors had read the newspaper or somehow found
16 out about an article that said two juries had already hung, and the jury
17 discussed that if they hung, Tedeschi "would walk free." Juror No.
18 044400 testified the discussion was "brief" and occurred towards the
19 end of deliberations. Juror No. 010221 testified to recalling a
20 discussion between two jurors in the hallway about there having been
21 a previous trial; a female juror commented that she had read in the
22 newspaper that Tedeschi had been tried before. Juror No. 010221
23 could not recall the topic being discussed in the jury room. Nor could
24 Juror No. 010221 recall a discussion in the jury room of what the
25 consequences would be if there was a hung jury.

26 Juror No. 010117 testified that the jury discussed that if there
27 was a hung jury, Tedeschi would "get off scott-free," [but] could not
28 recall how long the discussion lasted or how many people participated
but testified "it wasn't long." [¶] Juror No. 010129 recalled there was
some discussion that they could not let there be a hung jury or Tedeschi
would go free. According to Juror No. 010129, all the jurors
participated in the discussion, and the subject "probably came out back
and forth a few times" during the two days of deliberations. [¶] Juror
No. 016713 also recalled that some of the jurors discussed that there
had been other trials, and if there was a hung jury this time, Tedeschi
could go free. [¶] Juror No. 016948, the foreperson, testified that the
jury discussed that there had been a previous trial. The jury discussed
that this would be the second hung jury if they did not reach a verdict.
The jury discussed that Tedeschi might go "scott-free" if there was a
hung jury. They also discussed that there might be another trial, which
would "burden the family with the grief again" [¶] Juror
No. 010218, Juror No. 0064776, and Juror No. 010217 recalled that
there was some discussion of a previous trial but not what it would
mean to Tedeschi if there was a hung jury. [¶] Juror No. 010213
testified that when the jury first went into the juror room, somebody

¹⁶ Tedeschi highlights juror testimony on this issue in his Petition Points and Authorities at pages 11 to 13, and Respondent summarizes the evidentiary hearing testimony on this issue at Answer pages 18 and 26.

1 asked whether this was the second trial, because there "was a long
2 amount of time till it came to trial And everybody looked around.
Nobody knew. And that's all I remember about that."

3 (Lodg. 12, pp. 12-14.)

4 The Court of Appeal concluded the conduct "was not prejudicial because there was no
5 evidence of juror bias arising therefrom under either [Carpenter] test discussed above." (Lodg. 12,
6 p. 22.) Viewing the information "objectively," the court "[could] not say that it was information that
7 would have inherently and substantially influenced the jurors," because there was "nothing in the
8 essential character of the information that Tedeschi had been unsuccessfully tried before, albeit
9 erroneous, that was so prejudicial in the context of this trial that its introduction would warrant
10 reversal of the judgment." (Id.) The court also found it was not "substantially likely that the jury was
11 actually biased against Tedeschi as a result of its discussion." (Id.)

12 Tedeschi characterizes the discussion as having been extensive.
13 However, the jurors' testimony was otherwise. While a majority of
14 jurors had some recollection of discussing whether Tedeschi had been
15 tried before, fewer than half testified to recalling specifically discussing
16 whether Tedeschi might go free if the jury failed to return a verdict.
17 The jurors also had vague and conflicting recollections as to where and
18 when these discussions took place. For example, one juror said it came
19 up a "few times" during the two days of deliberations, while another
20 described it not coming up until the very end of deliberations. Like his
21 argument concerning the jury's receipt of an extrajudicial definition of
22 malice, [this argument] is highly speculative in nature. The record
23 discloses no evidence of how the information affected the jurors'
24 decisionmaking processes or suggesting the information was utilized
25 . . . to Tedeschi's disadvantage.

19 (Lodg. 12, pp. 22-23.)

20 Tedeschi argues the jurors treated the erroneous information as "hard fact," and "they were
21 pressured not to 'hang' out of irrational and inaccurate fear that a hung jury would end the case
22 forever." (Pet. P&A 12:19-21.) However, his argument cuts both ways. Had the jury been persuaded
23 he was not guilty, it would not have been concerned with whether he had been tried before and would
24 have acquitted him. Had the jury been persuaded it should convict him of "some offense" merely to
25 avoid hanging and running the risk he would consequently go "scott-free," it could have found him
26 guilty of one of the lesser-included manslaughter offenses on which it was instructed. The jury
27 deliberated conscientiously enough to find the prosecution failed to prove Tedeschi's guilt of first-
28

1 degree murder, as evidenced by its second degree murder verdict. As noted by Respondent, from the
2 evidentiary hearing record, a majority of his jurors compromised and agreed to convict him of a lesser
3 degree of murder than the vast majority of their number originally wanted, suggesting any hung jury
4 discussion may well have benefitted him.

5 Three jurors (062954, 010218, and 044400) testified at the evidentiary
6 hearing that **the vote was ten to two for first-degree murder.**
7 (Lodging Doc. No. 9 [Exhibit B to Petition For Writ Of Habeas Corpus
8 filed in superior court, Transcript of Evidentiary Hearing, p. 10
9 (062954), p. 146 (010218), p. 159 (044400)].) It appears as though a
10 compromise was reached in the Petitioner's favor when ten jurors made
11 a decision to vote for second degree murder, instead of the first degree
12 murder that each of those jurors had previously voted for.

13 (Answer 27:21-27 (emphasis added).)

14 The jury had a range of clear options, from first-degree murder to acquittal. The jury
15 instructions as given appear at Lodgment 15, Vol. 11, RT 5721-5765. The trial court took pains to
16 ensure the verdict form reflected separately the options of guilty or not guilty as to each of the four
17 homicide theories (*i.e.*, first-degree murder, second-degree murder, voluntary manslaughter, or
18 involuntary manslaughter.) (Lodg. 15, Vol. 11, RT 5675-5678, RT 5704.) The jury was instructed
19 on involuntary manslaughter (CALJIC 8.45, Special Instruction 32) based on the evidence of
20 Tedeschi's intoxication and a theory of negligent discharge of the firearm while brandishing it. (*Id.*,
21 RT 5644-5649.) The court permitted the defense to argue voluntary intoxication as negating express
22 or implied malice. (*Id.*, RT 5686.) The court gave instructions on various self-defense theories,
23 including CALJIC 5.25, a straight self-defense instruction the court found could be supported by the
24 evidence and which would allow the jury to acquit him if they believed Tedeschi's version of the
25 shooting. (*Id.*, RT 5653-5654, RT 5668-5669.) The court also gave an excusable and justifiable
26 general homicide instruction. No accident or misfortune instruction was requested, but the trial court
27 *sua sponte* observed there was no evidentiary basis for one, despite Tedeschi's use of those terms in
28 describing the shooting. (*Id.*, RT 5705-5706.)

After *de novo* review, the Court finds no basis to conclude fear of a hung jury due to erroneous
prior trial comments had a "substantial and injurious effect or influence in determining the jury's
verdict." Brecht, 507 U.S. at 637. While speculation about prior proceedings against him for his ex-

1 father-in-law's murder was extraneous and therefore improper, this is not a case where other crimes
2 or prior bad acts information tainted deliberations, distinguishing this case from the cases finding
3 prejudicial error associated with jury exposure to extrajudicial information about a defendant's
4 criminal record or prior bad acts apart from the charged offense. Given the strong evidence of
5 Tedeschi's guilt, including prominently Tiffani's eye-witness testimony, it would be objectively
6 unreasonable to conclude the jury would have reached a result more favorable to him absent that
7 misconduct. Therefore, the Court finds any constitutional error was harmless, and relief on this claim
8 is **DENIED**.

9 **4. No Prejudice From Jurors' Consideration Of Punishment**

10 Tedeschi argues the "jurors violated their oaths by deliberately and repeatedly disobeying
11 explicit instructions not to discuss punishment during the guilt phase of the trial "blatantly
12 disobey[ing]" their CALJIC No. 8.83.2 instruction "from start to finish."¹⁷ (Pet. 6:11-17.) He
13 complains the "Court of Appeal's January 17, 2008 opinion does not address this issue *at all*." (*Id.*
14 7:4-5.) However, the explanation for that omission is plain from the record. The California Supreme
15 Court instructed the Court of Appeal to vacate its summary denial of Tedeschi's habeas petition and
16 to reconsider just two of the three instances of juror misconduct found by the Superior Court: the
17 "malice" extrajudicial definition, and the improper discussion of a previous trial. The Superior Court's
18 third misconduct finding -- improper consideration of punishment during guilt phase deliberations had
19 no substantial or injurious effect on the verdict -- was not disturbed by either the Court of Appeal or
20 the California Supreme Court, nor was the Court of Appeal instructed to revisit that issue.

21 The only reasoned state court decision addressing this claim remains the Superior Court's
22 July 6, 2005 decision finding jury misconduct, but no prejudice. (Lodg. 10.) The Superior Court
23 determined, without citation to authority:

24 5) Did the jury discuss penalty or punishment during its deliberation
25 and therefore commit misconduct? Yes. Does the evidence rebut any
26 presumption of prejudice that resulted? Yes. Again, this "death
qualified" jury briefly discussed an issue which they should not have

27 ¹⁷ "In your deliberations the subject of penalty or punishment is not to be discussed or considered by
28 you. That is a matter which must not in any way affect your verdict or affect your finding as to the special
circumstance (s) alleged in this case." CALJIC No. 8.83.2; *see* Pet. P&A 13:10-13.

1 discussed. Clearly the jury should not have discussed penalty or
2 punishment at that stage of the trial even though in many ways it was
3 natural to do so. **However, any discussion did not cause them to find
the defendant guilty of second degree murder instead of a lesser
charge or instead of an acquittal.**

4 (Lodg. 10, p. 3 (emphasis added).)

5 Several jurors recalled at the evidentiary hearing some among them had openly stated during
6 deliberations Tedeschi should be executed. Some had also speculated how much time would attach
7 to a second-degree murder conviction. From those recollections, Tedeschi argues "[t]heir
8 deliberations were focused more on punishment than upon the elements of each offense." (Pet. P&A
9 14:4-5.)

10 They were instructed on second-degree murder, voluntary
11 manslaughter, and involuntary manslaughter. They were also
12 instructed on the elements of heat of passion, provocation, cooling-off
13 period, unreasonable belief in the necessity to defend, and justifiable
14 homicide (self-defense). (C.T. pp. 1209-1232.) Yet the hot topic
15 addressed by many of the jurors was that Petitioner should be executed
16 or how much time he should serve. It is no answer that this jury was
17 "death-qualified" during hardship voir dire. They were instructed
18 specifically **not** to discuss punishment during the guilt phase, yet that
19 is exactly what they did.

20 (Pet. P&A 14:5-12 (footnote omitted).)

21 No evidence supports Tedeschi's characterization the deliberations were "more" focused on
22 potential punishment than guilt, or that the "hot topic" of his potential execution or other sentence
23 preoccupied the jurors. Their testimony established no temporal distribution of any particular subject
24 matter discussions. Moreover, this issue strikes the Court as entailing no "extraneous influence" such
25 as might authorize incursion into the mechanics of the jury's deliberations, but posits an inquiry that
26 risks encroaching on jurors' subjective thought processes in reaching their verdict, an inquiry
27 prohibited under FED. R. EVID. 606(b). Just because some improper, speculative discussion occurred,
28 it cannot be said that proper deliberations were consequently and necessarily circumvented.
Nevertheless, even if such considerations were construed as extraneous information, error without
prejudice cannot support federal habeas relief. Brecht, 507 U.S. at 637.

Tedeschi criticizes the court for having purportedly "proceeded directly to the bald conclusion
that 'the trial evidence was overwhelming and could . . . have supported a verdict of first degree

1 murder," ignoring controlling federal law, citing Brecht. (Pet. P&A 14:20-15:18.) He argues "the
2 Court of Appeal recited the State's case against Petitioner and declared it sufficient to support the
3 verdict," but in so doing, "the Court 'improperly place[d] itself in the role of the jury,' disregarding the
4 admonition of Kotteakos and its progeny," with that "departure from settled federal law mandat[ing]
5 reversal." (Pet. P&A 15: 16-20, quoting Sassounian, 230 F.3d at 1112.) The Court finds, on the
6 contrary, the state courts appropriately reviewed the evidence *de novo*, correctly applied the harmless-
7 error analysis to all three instances of juror misconduct, and reached an objectively reasonable result
8 with respect to each, consistent with controlling federal authority.

9 After *de novo* review, the Court finds no evidentiary support for Tedeschi's characterization
10 of penalty discussions as having prejudiced the guilt phase due to some overarching preoccupation
11 with that subject matter. The evidentiary hearing revealed a majority of the jurors promoted an
12 execution-eligible verdict of first-degree murder but ultimately did not prevail. Given the second-
13 degree murder verdict, it appears probable all were convinced beyond a reasonable doubt fairly
14 quickly Tedeschi committed a murder, with deliberations focused on which degree. This Court is left
15 in no "grave doubt" the error of discussing punishment during the guilt phase of the trial in the
16 speculative manner the jurors described had a "substantial and injurious effect" on the verdict.
17 Medina, 386 F.3d at 877. The second-degree murder conviction suggests the discussion likely
18 redounded to Tedeschi's advantage, particularly if certain jurors' expressed aversion to having to make
19 a death penalty decision is credited. The Court finds no reasonable probability that without the
20 penalty consideration the result would have been more favorable to Tedeschi. On this record, the
21 Superior Court's opinion on the issue of punishment discussion is objectively reasonable and is not
22 contrary to the Brecht standard. Federal habeas relief on this ground is accordingly **DENIED**.

23 When "no single trial error examined in isolation is sufficiently prejudicial to warrant reversal,
24 the cumulative effect of multiple errors may still prejudice a defendant." United States v. Frederick,
25 78 F.3d 1370, 1381 (9th Cir. 1996). As traced above, the government's case against Tedeschi was
26 strong, and in the context of all the evidence, this was not a close case for the second-degree murder
27 conviction. Tedeschi's three juror misconduct claims, individually or collectively, were not
28

1 sufficiently prejudicial to warrant federal habeas relief.


2 **III. CONCLUSION AND ORDER**

3 For all the foregoing reasons, the Court finds the state courts' determinations none of the
4 instances of juror misconduct raised in Tedeschi's Petition had a substantial or injurious effect on the
5 verdict were not contrary to nor an unreasonable application of controlling federal authority,
6 foreclosing habeas relief. Accordingly, the Petition is **DENIED** in its entirety, with judgment to be
7 entered accordingly.

8 A Certificate of Appealability ("COA") is required pursuant to 28 U.S.C. § 2253(c) before a
9 petitioner can pursue an appeal. AEDPA permits a court to issue a COA when "the applicant has
10 made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "[T]he
11 issuance of a COA is not precluded where the petitioner cannot meet the standard to obtain a writ of
12 habeas corpus." Lambright v. Stewart, 220 F.3d 1022, 1025 (9th Cir. 2000); *see* Barefoot v. Estelle,
13 463 U.S. 880, 893 n.4 (1983); Slack v. McDonald, 529 U.S. 473 (2000). The Court **GRANTS**
14 Tedeschi a COA with regard to the improper introduction of an extrajudicial definition of "malice"
15 into jury deliberations, but **DENIES** a COA as to the two other juror misconduct claims raised in this
16 Petition.

17 **IT IS SO ORDERED.**

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19 DATED: December 9, 2009

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21 Honorable Janis L. Sammartino
22 United States District Judge
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