SUPREME COURT COPY

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In the Supreme Court of the State of California

In re

ROBERT WESLEY COWAN,

On Habeas Corpus

Case No. S158073

Fifth Appellate District Court Case No. F006980
Kern County Superior Court Case No. SC059675A
The Honorable Lee Phillip Felice, Judge

SUPREME COURT
FILED

OCT 13 2011

Frederick K. Ohlrich Clerk

Deputy

RETURN ON ORDER TO SHOW CAUSE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RETURN

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STATUTES

TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Respondent hereby presents its return to the order to show cause (OSC) issued in the above-entitled case.[1]

THE RETURN

Respondent, the People of the State of California, makes this return to the OSC and admits, denies, and alleges as follows:

Respondent admits the allegations in Paragraph 1 of the petition that petitioner is a prisoner of the state of California pursuant to convictions and a death sentence imposed by the Kern County Superior Court on August 5, 1996. Respondent specifically denies that petitioner is illegally or unconstitutionally confined. (Pet. at pp. 1-2.)[2]

Respondent admits the allegation in Paragraph 2 that no other petition has been filed on petitioner's behalf, and admits that certain factual bases for Claim No. 2 lie outside the record developed on appeal. Respondent denies that there have been substantial violations of petitioner's constitutional rights. (Pet. at p. 2.)

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[1] Respondent requests the Court take judicial notice of its files in this case, including all the pleadings filed in the related automatic appeal in *People v. Cowan* S055415, and all those materials filed, including exhibits, in No. S158073, regarding petitioner's writ petition. (Evid. Code, § 452.) Respondent will reference the documents and exhibits filed under No. S158073 in the return.

[2] "Pet." refers to the Petition for Writ of Habeas Corpus filed in this Court on November 9, 2007. "IR" refers to the Informal Response to Petition for Writ of Habeas Corpus filed in this Court on March 5, 2008; "Reply" refers to the Reply to Informal Response To Petition for Writ of Habeas Corpus filed in this Court on October 22, 2008; "CT" refers to the Clerk's Transcript on Appeal in *People v. Cowan* S055415; "RT" refers to the Reporter's Transcript on Appeal in *People v. Cowan* S055415.

Respondent admits, as alleged in Paragraph 3, that this Court has original jurisdiction over a petition for writ of habeas corpus. (Pet. at p. 2.)

Respondent admits, as alleged in Paragraph 4, that Claim No. 2 is cognizable on habeas corpus, and admits the petition is presumptively timely. (Pet. at p. 2.)

Respondent denies that the evidence presented thus far adequately supports Claim 2, or that the evidence presented justifies granting of relief, as alleged in Paragraph 8 of the petition. (Pet. at p. 3.)

Respondent denies that the facts set forth in the petition establish a prima facie case for relief, as alleged in Paragraph 13 of the petition. (Pet. at p. 4.)

Respondent denies that petitioner was deprived of effective assistance of counsel, or that decisions made by counsel were based on state interference, prosecutorial misconduct, inadequate and unreasonable investigation and discovery, or inadequate consultation with experts, as alleged in Paragraph 14 of the petition. (Pet. at p. 4.)

Respondent denies that there are any newly discovered facts which cast fundamental doubt on the accuracy and reliability of the proceedings below or which undermine the prosecutor's case against petitioner such that his rights to due process and a fair trial were violated, as alleged in Paragraph 15 of the petition. (Pet. at pp. 4-5.)

Respondent denies that petitioner would not have been convicted of first degree murders and special circumstances, or that he would not have been sentenced to death, absent misconduct by the state, trial court errors, or deficient performance of counsel, as alleged in Paragraph 16 of the petition. (Pet at p. 5.)

Respondent denies that defense counsel was ineffective at the trial and penalty phases, as alleged in Paragraph 17 of the petition. (Pet at p. 5.)

Respondent denies that petitioner's convictions and sentences were obtained in violation of his state and federal constitutional rights, or that the judgment must be reversed, as alleged in Paragraph 18 of the petition. (Pet. at p. 5.)

As to petitioner's allegations specific to Claim 2, respondent admits, denies, and alleges as follows:

Respondent admits that the prospective jurors in petitioner's case were required to answer a questionnaire under penalty of perjury, as alleged in Paragraph 1 of Claim 2. (Pet. at p. 20.)

Respondent generally admits the allegations of Paragraphs 2 and 3 of Claim 2. (Pet. at pp. 20-21.)

Respondent denies that Juror No. 045882 was untruthful in his responses to the juror questionnaire or in his answers at voir dire, as alleged in Paragraph 4 of Claim 2. (Pet. at p. 21.) Specifically respondent alleges, assuming the juror in fact was the person subject to the February 6, 1995, conviction over a year before his jury service, that the juror could well have forgotten about the misdemeanor conviction for which he received only informal probation and a fine; that the juror may not have seen his citation by a police officer as an "arrest" within the meaning of the question; that the juror in fact gave a positive response to Question 34 and may not have believed every arrest needed to be enumerated; and that the juror could have seen his citation and release, and later plea of guilty, as a "ticket" for which he indicated on his juror questionnaire that he had previously been in court.

Respondent alleges that there is a reasonable explanation for Juror No. 045882's failure to mention his misdemeanor conviction and probation sentence, and alleges that Question 34 was in fact vague and ambiguous under the circumstances of the present case. Thus, respondent denies the allegations in Paragraph 5 of Claim 2. (Pet. at p. 22.)

Respondent denies that Juror No. 045882 intentionally concealed the misdemeanor conviction, as alleged in Paragraph 6 of Claim 2. Moreover, even assuming, arguendo, the juror intentionally concealed the misdemeanor conviction, respondent denies that the concealment constituted juror misconduct. Respondent denies that the juror's other responses on voir dire indicated either a determination to serve on the jury, an affinity for the prosecution, a bias against the defense, or a prejudgment of the case, as alleged in Paragraph 6 of Claim 2. Respondent denies that the juror lied about his background in order to secure the opportunity to convict petitioner and sentence him to death, as alleged in Paragraph 6 of Claim 2. Respondent alleges that the responses of other jurors in their questionnaires demonstrate Juror No. 045882 did not demonstrate either an unusual willingness to serve on the jury or an unusual affinity for the prosecution. Moreover, Juror No. 045882's other responses on his questionnaire and at voir dire, as well as his failure to initially appear for jury duty, indicate that he was not determined to sit on petitioner's jury.

Respondent denies that any presumption of prejudice arose from Juror No. 045882's answers at voir dire, as alleged in Paragraph 7 of Claim 2. Even assuming, arguendo, the juror committed misconduct, any presumption of prejudice was rebutted by a review of the entire record of the present case. Respondent denies that the record of the case indicates a substantial likelihood that the juror was biased against petitioner, as alleged in Paragraph 7 of Claim 2. (Pet. at pp. 22-23.)

Respondent denies that Juror No. 045882 deliberately concealed his criminal record, or, assuming, arguendo, that he did so, that the concealment prevented petitioner from intelligently inquiring into an area of potential bias on which to base a challenge for cause or to exercise a peremptory challenge. Respondent alleges that other jurors served on the

present jury with similar misdemeanor convictions, rebutting any allegation that Juror No. 045882 would have been dismissed had defense counsel known of his misdemeanor conviction.

WHEREFORE, respondent prays:

1. That this Court discharge the OSC; and,

2. That the Petition for Writ of Habeas Corpus be denied.

VERIFICATION

I, LEWIS A. MARTINEZ, hereby declare that I am a Deputy Attorney General of the State of California and one of the attorneys for respondent herein. I have read the foregoing section of the Return to Order to Show Cause and know the contents thereof. The allegations contained therein are true of my own knowledge except as to matters stated on my information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 7, 2011, in Fresno, California.

LEWIS A. MARTINEZ
State Bar No. 234193

FACTUAL AND PROCEDURAL HISTORY

I. PROCEDURAL BACKGROUND

On June 6, 1996, a Kern County jury found appellant guilty of two counts of murder, found various special circumstances allegations to be true, and found true an allegation that a principal had been armed with a firearm. (6 CT 1459-1470.)

On June 10, 1996, the trial court found true prior serious felony allegations. (6 CT 1477-1478, 13 RT 2802-2805.)

On June 14, 1996, the jury found that the sentence on count two, the murder of Alma Merck, should be death. (6 CT 1574, 1582-1583.) On August 5, 1996, the trial court sentenced appellant to death on count two, plus a consecutive term of life without the possibility of parole and other determinate enhancement sentences. (6 CT 1615, 1644-49.)

On November 9, 2007, petitioner filed the present petition. The petition claims, inter alia, that Juror No. 045882 intentionally concealed that he had previously been arrested for a criminal offense and was on probation at the time of voir dire, and that this concealment amounted to prejudicial misconduct. (Pet. at pp. 20-23.)

In support of this allegation, petitioner filed a redacted police report and court documents purporting to show that on January 1, 1995, Juror No. 045882 was cited and released on, and later pled guilty to, one misdemeanor count of fighting in public. (Pen. Code,[3] § 415(1).) The exhibits further appear to show that the juror was given a suspended sentence and placed on court probation for three years. (Petitioner's Redacted Exhibits E, G.)

Also in support of the petition, petitioner's counsel submitted his own declaration stating that unredacted copies of the juror questionnaires in trial counsel's file show that Juror No. 045882's name and signature are identical to those of the defendant in the section 415(1) case described ante. (Petitioner's Redacted Exhibit G2.)

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[3] All further statutory references are to the Penal Code unless otherwise indicated.

On March 5, 2008, respondent filed an informal response to the petition, asserting that petitioner had not shown prejudicial misconduct because there was no substantial likelihood that the juror was biased against petitioner. More specifically, the informal response asserted that the juror's answers to other questions allowed ample opportunity to probe for bias, that the juror's misdemeanor conviction did not indicate bias, and that the juror may not have seen his citation and release as an "arrest" within the meaning of Question No. 34 in the jury questionnaire. (IR at pp. 54-60 and fn. 26.)

On October 22, 2008, petitioner filed a reply to the informal response.

On August 5, 2010, this Court affirmed petitioner's case on direct appeal. (*People v. Cowan* (2010) 50 Cal.4th 401.)

On June 22, 2011, this Court issued an order to show cause "why the relief prayed for should not be granted on the ground of juror misconduct, as alleged in Claim 2 of the petition . . .."

II. FACTUAL BACKGROUND

According to the documents submitted by petitioner, Juror No. 045882 pled guilty on February 6, 1995, to one count of violating section 415(1), fighting or challenging another person to fight in a public place, a misdemeanor, was fined, and was placed on court probation for three years with the condition that he obey all laws. (Petitioner's Exhibit G at pp. 66, 68-69.) Records submitted by petitioner indicate the following occurred: On January 14, 1995, Juror No. 045882 and another person engaged in a fist fight in a mall. (Petitioner's Exhibit G at p. 76.) A Bakersfield police officer ultimately cited and released Juror No. 045882, and arrested the other person on charges of violating section 415(1) and section 12020.1 (illegal possession of a knife). (Petitioner's Exhibit G at pp. 75-77.)

For voir dire in the instant trial, Juror No. 045882 completed a twenty-page questionnaire that asked, inter alia, whether he had ever been arrested, whether he had ever known anyone who was falsely accused of a crime, and whether he had ever been in a courtroom for any reason other than jury service. Juror No. 045882 answered that he had been arrested in 1991 for assault and battery, and the charges had later been dropped; that his brother had been falsely accused of a crime: "my brother was partly wrong but still had to serve 6 month. For another's fault" and that he himself had been in court for "tickets." (Petitioner's Exhibit E at pp. 43, 47-48.)

Juror No. 045882 answered negatively the question

"Have you or your family members or close friends ever had any contact with law enforcement or the criminal justice system other than that previously mentioned in this questionnaire?" (Petitioner's Exhibit E at p. 48.) Juror No. 045882 left blank Question Number 34, which asked,

> If you have been arrested or in [sic] any member of your family or household have been arrested or if any of your close friends or relatives have been arrested, please explain how you feel about the way matters were handled by the police, the district attorney, the defense attorney, the courts, the probation department and any others involved in the law enforcement and judicial system?

(Petitioner's Exhibit E at 43-44.) Finally, Juror No. 045882 left blank the final question on the questionnaire, which stated, "If there is anything you would like to bring to our attention or you feel would bear on your ability to act as a juror, and it was not previously covered, please use the space below to indicate." (Petitioner's Exhibit E at p. 53.)

Juror No. 045882's other answers to this questionnaire indicated the following: He was a "utilities clerk[;]" was single and lived with his parents; had a five-month old child; believed he could be a fair and impartial juror; and had family members who owned firearms. (Petitioner's Exhibit E at pp. 36-41.)

Juror No. 045882 felt that "some laws can change" when asked how he felt about the criminal justice system (Petitioner's Exhibit E at p. 41); he stated about the death penalty, "If Guilty why not" (Petitioner's Exhibit E at p. 48); he believed the death penalty was imposed "too seldom" (Petitioner's Exhibit E at p. 49); he did not belong to any organization opposing or favoring the death penalty; and he had no trouble imposing the death penalty in an appropriate case. (Petitioner's Exhibit E at p. 50.) His next door neighbor had law enforcement training, and his uncle worked for the San Francisco County Sheriff's Department. (Petitioner's Exhibit E at pp. 41, 46.)

Juror No. 045882's brother had been arrested; a close friend or relative had a problem with drugs or alcohol; a close friend or relative had been a victim of a burglary; and no type of crime particularly upset him. (Petitioner's Exhibit E at pp. 43-45.) Juror No. 045885 had been a witness to a crime and had reported it to law enforcement but had not had to testify or identify anyone, and he had regular contact with members of law enforcement agencies. (Petitioner's Exhibit E at pp. 45-47.)

It appears there may have been some difficulty securing Juror No. 045882's presence at jury voir dire. Although the record appears to show Juror No. 045882 answered "Here" in response to a roll call by the trial court on the morning of April 17, 1996, later on the same page of the

transcript, the trial court stated, "Counsel, we have received no communication from 045882. Here comes somebody."[4] (3 RT 582.) Later that same day, the clerk of the court stated, "I don't have anything on Juror No. 045882." (3 RT 584.) The trial court then stated, "Counsel, let's take up the issue of 045882. My feeling is we should issue a body attachment for him." (3 RT 584.) After comments by counsel for both parties, the trial court concluded,

> He is ordered to appear to be here on whatever time and day that is. I am going to issue a body attachment for him, set bail at $5,000 and hold it to the date and time he's been ordered to appear. We will make at least one effort to contact him, but I am not going to require my staff to chase these people down, either.

(3 RT 585.)

At the end of the morning session on April 30, 1996, defense counsel stated, "And Mr. 045882 is set for this afternoon?" The trial court responded, "That's what I understand." (4 RT 1037.)

After some preliminary statements by the trial court during Juror No. 045882's voir dire, the trial court stated, "Before we get any further, I do want to recall the body attachment as to 045882." (4 RT 1039.)

During voir dire, Juror No. 045882 stated that his uncle was a sheriff in San Francisco, and his neighbors, to whom he talked "almost every day[,]" were local sheriff's deputies. (5 RT 1377.) Juror No. 045882 did not belong to any organizations that promoted or were interested in the criminal justice system, and he had never been a victim of crime. (5 RT 1378.)

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[4] It is a reasonable inference that the roll call was transcribed incorrectly, and in fact it was another juror who answered, "Here."

Juror No. 045882 agreed that people who use drugs are more likely to commit crimes than those who do not use drugs, although he stated that people who did not take drugs also committed crimes. (5 RT 1376.) He promised that he would not convict a person based on that person's drug use where the circumstantial evidence was susceptible of more than one reasonable interpretation. (5 RT 1376-77.)

Juror No. 045882 understood that being charged did not necessarily mean that a person was guilty of a crime, and that just because one person had been murdered did not mean that another person must pay for that crime. (5 RT 1381-82 [agreeing with answers of another juror].) He understood that his role was to determine whether the defendant was guilty, not to "go out looking" for the guilty person. (5 RT 1382.) He would be satisfied with a juror in his state of mind sitting in judgment of him if he were a defendant. (5 RT 1379.)

When asked whether he or a close relative had been the victim of a crime, Juror No. 045882 responded, "My brother was just in here not too long for assault and battery." (4 RT 1040.) Juror No. 045882 further explained, "And me, it was about three years back – well, I didn't come to court, my brother went through. I didn't get convicted or nothing; dropped charges against me." (4 RT 1041.)

Juror No. 045882 believed that his brother had received too severe a sentence after, according to the juror, the purported victim in his brother's case used a knife to try to stab his brother and instead stabbed himself during the altercation. (4 RT 1042-43.) Juror No. 045882 promised not to hold the outcome of his brother's case against the prosecutor in the instant case. (4 RT 1043.)

An examination of the voir dire questionnaires shows that other jurors displayed a positive attitude towards jury service. For example, Juror Number 042289 answered, "I am very interested in serving on this jury." (1 First Supp. CT 129.)[5] Juror Number 042206 answered, "I am glad to do my 'duty'. I do not shirk it or get excited about it." (1 First Supp. CT 190.) Juror Number 046189 stated of jury duty, "I think it would be an interesting experience." (1 First Supp. CT 222, 230.)

Other jurors also displayed positive attitudes towards the death penalty. For example, Juror Number 030321 wrote of the death penalty, "After appeals have been exhausted, the death penalty should be carried out." (1 First Supp. CT 15.) Juror Number 040149 wrote, "I believe that if a person is convicted of a crime that allows for the death penalty it should be carried out promptly with a minimum of appeals." (1 First Supp. CT 55.) Juror Number 042289 simply wrote, "I am in favor of the death penalty." (1 First Supp. CT 135.)

Finally, some of the other jurors had been charged with or convicted of various relatively minor offenses. On New Year's Day in 1979, Juror No. 041100 was arrested for driving under the influence. According to the juror, "The charges were dropped to wreckless [sic] driving." (1 First Supp. CT 150.) The juror stated he believed he was treated fairly when he was arrested. (1 First Supp. CT 151.)

Juror Number 041445 was previously arrested for failure to pay child support; the case was resolved "by 3 years probation and paying support—1994." (1 First Supp. CT 251.) The juror opined, "I was treated fairly and

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[5] This volume of the Clerk's Transcript is labeled "JUROR QUESTIONNAIRES SWARN [sic] JURORS."

within the law." (1 First Supp. CT 252.) Juror Number 046179 stated he had previously been arrested when he "tried to pick up a hooker & it was an undercover cop. 92 Fresno." (1 First Supp. CT 271.)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RETURN TO ORDER TO SHOW CAUSE

ARGUMENT

I. BECAUSE PETITIONER HAS NOT SHOWN THAT JUROR NO. 045882'S ANSWERS WERE DELIBERATE FALSE OR MISLEADING AND, IN ANY EVENT, HAS NOT SHOWN THAT THE JUROR'S ANSWERS, EVEN IF MISLEADING, BESPOKE A LACK OF PARTIALITY, PETITIONER HAS NOT SHOWN THE JUROR COMMITTED MISCONDUCT

It is misconduct for a juror to deliberately lie on voir dire. (*People v. Jackson* (1985) 168 Cal.App.3d 700, 704.)

> [W]hen a juror conceals material information on voir dire, "that information establish[es] substantial grounds for inferring that [the juror] was biased . . . despite protestations to the contrary."

(*In re Hitchings* (1993) 6 Cal.4th 97, 120.) "Concealment by a potential juror constitutes implied bias justifying disqualification." (*Ibid.*) According to *People v. Blackwell* (1987) 191 Cal.App.3d 925, 929,

> If the voir dire questioning is sufficiently specific to elicit the information which is not disclosed, or as to which a false answer is later shown to have been given, the defendant has established a prima facie case of concealment or deception.

(*Ibid.*) However, in *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, 973, the Ninth Circuit Court of Appeals stated, "[E]ven an intentionally dishonest answer is not fatal, so long as the falsehood does not bespeak a lack of impartiality."

An honest mistake at voir dire is not accorded the same effect as deliberate concealment. "There is a serious question whether honest voir dire mistakes can ever form the basis for impeachment of a verdict." (*In re Hamilton* (1999) 20 Cal.4th 273, 300.)

> What is clear is that an honest mistake on voir dire cannot disturb a judgment in the absence of proof that the juror's wrong or incomplete answer hid the juror's actual bias. Moreover, the juror's good faith when answering voir dire questions is the most significant indicator that there was no bias.

(*Ibid.*) Similarly, the court in *People v. Kelly* (1986) 185 Cal.App.3d 118, 126-127 stated,

> [T]o find misconduct where "concealment" is unintentional and the result of misunderstanding or forgetfulness is clearly excessive. It is with good reason that the law places severe limitations on the ability to impeach a jury's verdict. To hold otherwise would be to declare "open season" on jury verdicts not to the party's liking.

(*Ibid.*) The *Dyer* court observed, "[W]e must be tolerant, as jurors may forget incidents long buried in their minds, misunderstand a question or bend the truth a bit to avoid embarrassment." (*Dyer v. Calderon, supra,* 151 F.3d at p. 973.)

In several cases, courts have properly found jurors' failures to disclose information to be unintentional under circumstances not far different from the present case. For example, in *People v. Green* (1995) 31 Cal.App.4th 1001, 1016, during the course of a hearing on a motion for new trial, it was discovered that a juror had failed to disclose a criminal record, including a felony conviction that would have made him ineligible for jury service. The juror explained that his wife had filled out the juror questionnaire, and he had signed it without reading it. (*Ibid.*) In holding that the presumption

of prejudice from the misconduct had been rebutted, the *Green* court noted, "The trial court seems to have concluded the concealment was not deliberate" and did not question that finding by the trial court.[6] (*Id.* at p. 1019.)

In *People v. Resendez* (1968) 260 Cal.App.2d 1, 4, 10, a prosecution under section 288, a juror answered negatively to a question whether she had experienced any similar events to the charged crimes. Nevertheless, during deliberations, she related to the other jurors that when she was 15, "her stepfather had caressed her sexually and inquired, much as appellant had done, whether it felt good or hurt; Mrs. Robinson therefore believed appellant was guilty." (*Id.* at p. 10.) The *Resendez* court accepted the juror's explanation that she had forgotten about the incident:

> The mention of the inquiry, "Does it feel good" stimulated Mrs. Robinson's recollection and in the heat of jury deliberation she commented accordingly, not to influence the verdict improperly, but merely to shed additional light on the issue of credibility.

(*Id.* at p. 11.)

In *People v. Kelly, supra,* 185 Cal.App.3d at pages 119-120, in which the defendant was ultimately convicted of 17 felony counts of sex crimes against two young boys, a juror failed to reveal during voir dire that when she was a child, a stepuncle started to unbuckle his belt and said, "I will show you mine if you show me yours." After trial, the juror revealed the

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[6] However, on federal habeas corpus review, the Ninth Circuit specifically found this finding by the state appellate court was unreasonable and erroneous, and granted the writ. (*Green v. White* (2000) 232 F.3d 671, 675-676, 678.) Respondent disagrees with this finding by the Ninth Circuit, and urges this Court not to follow it. (*People v. Avena* (1996) 13 Cal.4th 394, 431 [lower federal courts persuasive but not controlling, even on federal issues].)

incident to defense counsel. (*Ibid.*) The trial court ultimately denied the resulting motion for a new trial, finding that there was no jury misconduct as to the juror, that the juror was not biased against the defendant, and that the defendant received a fair trial. (*Id.* at pp. 120-121.) The *Kelly* court affirmed, stating in part that the failure to disclose was not intentional and the juror demonstrated her conscientiousness by coming forward with the information. (*Id.* at p. 128.)

By contrast, in *People v. Blackwell, supra,* 191 Cal.App.3d at page 928, the defendant admittedly shot and killed her husband, but claimed that the husband frequently drank to excess and became violent during those episodes, and that she shot him to prevent further beatings or her own death. One of the jurors, R. stated during voir dire that neither she nor anyone in her family had experienced problems with alcohol, and similarly responded that she had not experienced domestic or spousal violence in her family. (*Ibid.*) However, later in a declaration, R. revealed that she was the victim of a former abusive husband who became physically violent when drinking. The juror compared her situation to the defendant's, and opined that since she had been able to extricate herself from the situation without violence, the defendant should have been able to do so as well. (*Ibid.*)

The *Blackwell* court ultimately reversed, stating,

> We conclude that the subject voir dire questions in the instant case were sufficiently specific and free from ambiguity so that the only inference or finding which can be supported is that Juror R. was aware of the information sought and deliberately concealed it by giving false answers. In fact, she could be prosecuted for perjury.

(*People v. Blackwell, supra,* 191 Cal.App.3d at pp. 930-931.)

Similarly, in *Dyer*, the Ninth Circuit found that the juror in question had lied on voir dire and lied again when questioned by the state judge in

chambers "presumably to cover her earlier lie and remain on the jury." (*Dyer v. Calderon, supra*, 151 F.3d at p. 979.) In *Dyer*, the juror did not disclose that her brother had been killed in a manner very similar to the manner in which the defendant was accused of killing his victims, did not disclose that had been the victim of a number of crimes, and did not disclose that a number of relatives had been arrested or convicted of serious crimes. (*Id.* at pp. 979-981.)

Here, the circumstances of Juror No. 045882's responses are actually *less* suspicious than the responses in *Green*, *Resendez*, and *Kelly* that were ultimately found to be innocent oversights. In the present case, the juror's misdemeanor conviction was far less serious than the felony conviction of the juror in *Green* that would have made him ineligible for jury service. (*People v. Green, supra,* 31 Cal.App.4th at p. 1016.) Moreover, Juror No. 045882's misdemeanor conviction bore no relationship to the crimes with which petitioner was charged, unlike the incidents the jurors failed to mention in *Resendez* and *Kelly*; and, in any event, there is no indication Juror No. 045882 relied on the incident in any way during deliberations, unlike in *Resendez*, in which the juror related the incident to other jurors. (*People v. Resendez, supra,* 260 Cal.App.2d at pp. 4, 10-11; *People v. Kelly, supra,* 185 Cal.App.3d at pp. 119-120.)

In any event, the circumstances of the present case are wholly unlike those in *Dyer* and *Blackwell*. Unlike appellant's misdemeanor conviction, for which he was cited and released, and later received only informal probation and a fine, the juror in *Blackwell* could hardly have forgotten about her abusive and alcoholic husband, particularly since this relationship formed a part of her basis for concluding that the defendant was guilty. (*People v. Blackwell, supra,* 191 Cal.App.3d at p. 928.) In contrast to

appellant's lone misdemeanor conviction, the juror in *Dyer* failed to disclose numerous serious incidents that occurred to herself and her family. (*Dyer v. Calderon*, *supra*, 151 F.3d at pp. 979-981.)

Moreover, no inference can be drawn from Juror Number 045882's responses that he was deliberately deceptive in order to avoid being dismissed from the jury, as was inferable in *Dyer* and *Blackwell*. First, there is no indication on this record that Juror Number 045882 believed, or had any reason to believe, that his misdemeanor conviction would have resulted in his dismissal from the jury. Indeed, other jurors with misdemeanor charges and convictions ultimately served on the jury. (1 First Supp. CT 150-151, 251-252, 271.)

Second, at one point, the trial court issued a body attachment as to Juror Number 045882 in order to secure his attendance. (3 RT 585; 4 RT 1039.) While this perhaps does not display the juror in the best possible light, it belies the notion that the juror was, for some unknown reason, determined to sit on this particular jury.

Third, Juror Number 045882 revealed other information on voir dire that was damaging to his chances of sitting on the jury. For example, the juror revealed that he thought his brother had been wrongfully convicted, that he himself had previously faced assault and battery charges, that an uncle and neighbors with whom he spoke frequently were sheriff's deputies, and the fact that he socialized with a courtroom worker who was possibly a bailiff. (Petitioner's Exhibit E at pp. 47, 60; Petitioner's Exhibit F at p. 60; 5 RT 1377.)

Taken as a whole, the record indicates Juror Number 045882's omission of his misdemeanor conviction was an instance of either honest forgetfulness or of embarrassment over revealing his past indiscretion. Neither of these is a basis for overturning the verdict.

There is, as noted ante, some question as to whether an honest mistake can ever form the basis for overturning the verdict. (*In re Hamilton, supra,* 20 Cal.4th at p. 300.) Respondent submits that the answer to this question should be in the negative, for the reasons stated by then-Justice Rehnquist in the lead opinion of *McDonough Power Equip. v. Greenwood* (1984) 464 U.S. 548, 555:

> To invalidate the result of a 3-week trial because of a juror's mistaken, though honest, response to a question, is to insist on something closer to perfection than our judicial system can be expected to give. A trial represents an important investment of private and social resources, and it ill serves the important end of finality to wipe the slate clean simply to recreate the peremptory challenge process because counsel lacked an item of information which objectively he should have obtained from a juror on voir dire examination.

(*Ibid.*) Here, under this standard, petitioner's claim fails, because he has made no showing, beyond the bare fact of the inaccurate answer itself, that Juror No. 045882 was dishonest.

In any event, it is certain that for an honest mistake by a juror to overturn a verdict, there must be proof that the juror's wrong or incomplete answer hid the juror's actual bias. (*In re Hamilton, supra,* 20 Cal.4th at p. 300.) Here, there is no indication Juror No. 045882's misdemeanor conviction showed actual bias towards the defendant, and the other circumstances of the case do not so indicate. Nor has petitioner submitted any evidence, such as declarations from other jurors or from people associated with Juror No. 045882, to show that the juror was actually biased. Accordingly petitioner has not made the showing required in *Hamilton*, and his claim fails at the outset.

Petitioner asserts that it is implausible to believe Juror Number 045882's failure to disclose the misdemeanor conviction was unintentional. (Reply at pp. 19-20.) Respondent disagrees. It may well be that the juror's earlier encounter with the law, although it apparently did not result in a conviction for him, was more memorable than the later charge to which he apparently pled no contest and for which he was later fined and put on informal probation. Respondent notes that the juror's voir dire answers give a hint at some relationship between the earlier allegations against himself and the case in which he believed his brother was wrongfully convicted: "[W]ell, I didn't come to court, my brother went through. I didn't get convicted or nothing; dropped charges against me." (4 RT 1040-1041.)

Another possibility presents itself. Petitioner cites Juror No. 045882's answers to three questions as evidence of his deception. Question 34 asked whether the juror had ever been arrested, and if so, asked the juror to provide certain information about the arrest and the case. Juror No. 045882 mentioned the 1991 arrest but not the 1995 incident. Question 39 asked the juror to explain how he felt about the way law enforcement and the judicial system handled any arrests involving himself, immediate family members, or household members. The juror left this question blank. Question 54 asked if the juror, his family members, or his close friends had ever had any contact with law enforcement or the criminal justice system other than that previously mentioned in the questionnaire. Juror No. 045882 checked the "No" answer box to this question. (Reply to Informal Response at pp. 18-19.)

As to Question 34, respondent notes that the juror's response to the question was literally true: he gave a positive response and briefly described the 1991 arrest. The question itself is phrased in the form of the

singular: "Include the type of charge, the approximate date of arrest, where the arrest took place and the outcome[.]" (Petitioner's Exhibit E at p. 43.) Nowhere in the question does it state the juror must describe ALL the arrests he or she has suffered. Accordingly, the juror may not have believed a further response was required.

In any event, respondent has previously explained how the juror might not have believed that he was arrested in 1995, within the meaning of the question, since, according to the documents submitted by petitioner, he was cited and released by the police officer. (Informal Response at p. 55.) Petitioner characterizes this as "unsupported speculation" by respondent, stating that the juror was subject to a citizen's arrest before he was given the citation and "[u]ndoubtedly was made aware of the arrest by the officer who cited him." (Reply at pp. 19-20.)

Respondent submits that petitioner has misapprehended where the burden lies in this matter. (See, *People v. Majors* (1998) 18 Cal.4th 385, 418.) In *Majors*, a juror responded no when asked, "Do you know anyone whom you believe to be a drug user or seller" although his wife sold drugs when she was a teenager. He later stated that he understood the question to be directed to present sales or use, only. (*Id.* at p. 419.) The *Majors* court found that the defendant had failed to meet his factual burden of showing that the juror concealed relevant facts or gave false answers during voir dire, stating, "[Q]uestion 51A was clearly phrased in the present tense. We cannot fault Mohr's decision to respond to the question as phrased." (*Id.* at pp. 418, 420.) Similarly, in *People v. Kelly, supra,* 185 Cal.App.3d at page 126, the court of appeals did not fault the juror for not revealing an incident that occurred in her childhood because "the questions propounded to Mrs. G. were anything but direct and unambiguous." Here, respondent submits that it is *petitioner's* burden to show the question was so clear and unambiguous that it foreclosed a negative response on the part of the juror.

As to Question 39, it asks the juror for an *opinion*, if he or friends, relatives, or family members were arrested, as to how matters were handled by the various entities involved. (Petitioner's Exhibit E at pp. 43-44.) Juror No. 045882's failure to respond to this request for an opinion simply cannot be seen as a factual misrepresentation. Nor, under the circumstances, can the failure to respond be seen as deceptive. Since the juror's answers to other questions, stating that he and his brother had previously been arrested, clearly implicated Question 39, this put anyone reviewing the questionnaire on notice that more probing on voir dire might be needed to determine the juror's opinion, if any, regarding his personal experiences with the criminal justice system.

As to question 54, asking whether the juror had any contact with law enforcement or the criminal justice system other than that previously mentioned in the questionnaire, it is true the juror gave a negative response to this question. However, in the previous question, the juror answered positively when asked whether he had been in a courtroom for any reason other than jury duty, and in explanation wrote "tickets." (Petitioner's Exhibit E at p. 48.) It is certainly possible that the jury saw his citation and release by the police officer as a "ticket" for which he had to appear in court, and later had to pay a fine.

Nor can petitioner show deceptiveness simply because the juror's interpretation of the question may be legally incorrect. (See, Reply at p. 20 [arguing that Juror No. 045882 was subjected to a citizen's arrest].)

> Called as they are from all walks of life, many may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges. Moreover, the statutory qualifications for jurors require only minimal competency in the English language.

(*People v. Jackson, supra,* 168 Cal.App.3d at p. 705.)

In sum, looking at Juror No. 045882's answers as a whole allows the conclusion that the juror in fact answered the questions truthfully, even if he did not reveal the misdemeanor conviction that he received previously. Accordingly, petitioner has not made a prima facie case of juror misconduct, and Claim Number 2 must fail.

The conclusion is the same if we conclude that the juror omitted the misdemeanor conviction out of embarrassment or reluctance to reveal his previous transgressions in open court. As the *Dyer* court observed, "[W]e must be tolerant, as jurors may forget incidents long buried in their minds, misunderstand a question or bend the truth a bit to avoid embarrassment." (*Dyer v. Calderon, supra,* 151 F.3d at p. 973.) Accordingly, the *Dyer* court stated, "[E]ven an intentionally dishonest answer is not fatal, so long as the falsehood does not bespeak a lack of impartiality." (*Ibid.*)

To the extent this is not already the standard in California, respondent respectfully submits that it should be. Where a juror's answer, although deceptive or incomplete, was not meant to hide bias and in fact did not do so, the defendant has not been prejudiced by the juror's answer, and should not be given the windfall of a reversal of judgment therefor. Courts have other, more effective ways of ensuring juror honesty, such as, in extreme cases, charging the juror with perjury. (See, *Dyer v. Calderon, supra,* 151 F.3d at p. 973, fn.1 ["We do not condone any lying by jurors; perjury is perjury. We are concerned here, however, with the rights of the defendant . . ."]; *Cabe v. Superior Court* (1998) 63 Cal.App.4th 732, 734, 742 [juror charged with perjury, although charge should have been dismissed because the answer, although unresponsive, was literally true].)

Here, even if we assume, arguendo, Juror No. 045882 was deliberately dishonest in his responses to the questionnaire, nothing about the juror's answer bespeaks a lack of partiality. The juror had already

revealed that his brother had previously been convicted and had apparently been incarcerated for six months, wrongfully, in Juror No. 045882's view. (Petitioner's Exhibit E at p. 47.) Surely if the juror had wished to hide his partiality, it is this incident he would have chosen not to reveal, rather than his own misdemeanor conviction for fighting in public. Accordingly, petitioner has not shown that the juror's false answer bespoke a lack of impartiality, and he therefore has not met the standard set forth in *Dyer*. His claims to the contrary fail.

Petitioner asserts that "the juror's lack of candor was couple with both a determination to serve on the jury and strong support for the death penalty." (Reply at p. 22.) Petitioner cites the juror's answers to the questionnaire indicating that serving on the jury would be "a great chance for me" and stating of the death penalty "If guilty, why not." (Reply at pp. 22-23, citing Petitioner's Exhibit E at pp. 42, 48.) Petitioner continues, "All of these circumstances make it substantially likely that Juror 045882 concealed information about his criminal record in order to 'finagle a seat on the jury so [he] could lobby for a conviction and death sentence.'" (Reply at pp. 23, citing *Dyer v. Calderon, supra,* 151 F.3d at p. 981.)

Respondent disagrees that any showing has been made that the juror concealed information about his criminal record in order to "finagle" a seat on the jury. Respondent has already distinguished the circumstances of the present case from those in *Dyer*, and has shown how the juror's misdemeanor conviction likely had far less effect on the juror's chances of sitting on the jury than other answers that the juror gave whose accuracy is not now challenged.

As for the juror stating that jury service would be "a great chance for me[,]" this is not particularly different from the responses of other jurors to the same question. For example, Juror Number 042289 answered, "I am

very interested in serving on this jury" and Juror No. 042206 stated, "I think it would be an interesting experience." (1 First Supp. CT 129, 222, 230.)

As for Juror Number 045882's opinion of the death penalty, Juror Number 030321 stated, "After appeals have been exhausted, the death penalty should be carried out." (1 First Supp. CT 15.) Juror Number 040149 similarly wrote, "I believe that if a person is convicted of a crime that allows for the death penalty it should be carried out promptly with a minimum of appeals." (1 First Supp. CT 55.) Finally, Juror Number 042289 wrote, "I am in favor of the death penalty." (1 First Supp. CT 135.)

In sum, contrary to petitioner's assertions, Juror Number 045882's responses on his questionnaire concerning his willingness to serve and his attitudes towards the death penalty, when compared with the responses of the other jurors, do not display any remarkable eagerness to serve on the jury or any unusually strong support of the death penalty. Accordingly, these answers do not provide any basis for concluding either that the juror was deliberately deceptive in order to serve on the jury or that the juror was biased in any way against petitioner. Petitioner's claims to the contrary fail.

II. ASSUMING, ARGUENDO, THAT JUROR NUMBER 045882 INTENTIONALLY CONCEALED THE CONVICTION AND THAT THIS GIVES RISE TO A FINDING OF MISCONDUCT, ANY PRESUMPTION OF BIAS IS REBUTTED BY A REVIEW OF THE RECORD AS A WHOLE

> Misconduct by a juror raises a rebuttable presumption of prejudice. [Citation.] However, we will set aside a verdict only where there is a substantial likelihood of juror bias. [Citation.] We will find such bias if the misconduct is inherently and substantially likely to have influenced the jury. Alternatively, even if the misconduct is not inherently prejudicial, we will

> nonetheless find such bias if, after a review of the totality of the circumstances, a substantial likelihood of bias arose. [Citation.] While the existence of prejudice is a mixed question of law and fact subject to this court's independent determination, we accept a trial court's credibility determinations and factual findings when they are supported by substantial evidence.

(*People v. Bennett* (2009) 45 Cal.4th 577, 626-627.) "Juror bias exists if a juror is incapable or unwilling to decide the case solely on the evidence before him or her." (*People v. Cissna* (2010) 182 Cal.App.4th 1105, 1122.)

Some of the factors to be considered when determining whether the presumption is rebutted are the strength of the evidence that the misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued. (*People v. Green, supra,* 31 Cal.App.4th at p. 1019.) The presumption of prejudice may be rebutted by an affirmative evidentiary showing "*or* by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct." (*In re Carpenter* (1995) 9 Cal.4th 634, 657, emphasis in original.) *The fact that the other party has not presented affirmative evidence showing a lack of prejudice is not dispositive.* (*Ibid.*) In an "extraneous-information" case, the strength of the evidence against the defendant is a relevant factor—the stronger the evidence, the less likely it is that extraneous information itself influenced the verdict. (*Id.* at p. 654.)

While prejudice is presumed once misconduct has occurred, it is the initial burden of the defendant to prove the misconduct. (*In re Carpenter, supra,* 9 Cal.4th at p. 657.) "We will not presume greater misconduct than the evidence shows." (*Ibid.*)

It is misconduct for a juror to deliberately lie on voir dire. (*People v. Jackson, supra,* 168 Cal.App.3d at p. 704.) "[W]hen a juror conceals material information on voir dire, 'that information establish[es] substantial grounds for inferring that [the juror] was biased . . . despite protestations to the contrary.'" (*In re Hitchings, supra,* 6 Cal.4th at p. 120.)

> The presumption of prejudice is an evidentiary aid to those parties who are able to establish serious misconduct of a type likely to have had an effect on the verdict or which deprived the complaining party of thorough consideration of his case, yet who are unable to establish by a preponderance of the evidence that actual prejudice occurred.

(*People v. Holloway* (1990) 50 Cal.3d 1098, 1109.) If a review of the entire record shows no substantial likelihood of juror bias, the presumption has been rebutted. (*People v. Cissna, supra,* 182 Cal.App.4th at p. 1116.) Similarly, the First District Court of Appeals stated in *People v. Blackwell, supra,* 191 Cal.App.3d at page 929,

> The presumption of prejudice created by the misconduct may be rebutted by "'. . . an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct.'"

Even one biased juror requires overturning the verdict. (*In re Carpenter, supra,* 9 Cal.4th at p. 652.) But,

> before a unanimous verdict is set aside, the likelihood of bias under either test must be substantial. . . . [T]he criminal justice system must not be rendered impotent in quest of ever-elusive perfection. The jury system is fundamentally human, which is both a strength and a weakness. [Citation.] Jurors are not automatons. They are imbued with human frailties as well as

> virtues. If the system is to function at all, we must tolerate a certain amount of imperfection short of actual bias. To demand theoretical perfection from every juror during the course of a trial is unrealistic.

(*Id.* at pp. 654-655.)

The test for determining whether juror misconduct likely resulted in actual bias is "different from and indeed less tolerant than" normal harmless error analysis. (*In re Carpenter, supra,* 9 Cal.4th at p. 654.) If it appears substantially likely a juror was actually biased, the verdict must be set aside, no matter how likely it is that an unbiased jury would have reached the same result. (*Ibid.*) This is so because a biased adjudicator is one of the few structural defects in the constitution of the trial mechanism that defies harmless error analysis. (*Ibid.*)

Cases which have actually resulted in reversal because of juror concealment at voir dire have generally involved conduct far more potentially prejudicial than occurred in the present case. The following examples are instructive:

In *People v. Blackwell, supra,* 191 Cal.App.3d at pages 927-928, the juror failed to disclose that she was the victim of a former husband who became violent while drinking; the defendant in *Blackwell*, who shot and killed her husband, claimed that her husband drank to excess and thereby became violent, and claimed that she shot her husband to prevent further beatings or her own death. In a declaration submitted after trial, the juror stated that, based on her ability to escape the relationship without violence, she believed the defendant was able to do so as well. (*Id.* at p. 928.) The *Blackwell* court concluded that there was no affirmative showing that prejudice did not exist, and that "there is a reasonable probability of actual harm to [appellant] resulting from the misconduct." (*Id.* at p. 931.)

In *In re Hitchings, supra,* 6 Cal.4th at pages 118, 119- 120, a juror was untruthful in her responses on a jury questionnaire and at voir dire concerning her knowledge of the case, continued to lie at subsequent evidentiary hearings, violated her oath by discussing the case with nonjurors before the conclusion of the case, and stated in one of those conversations that the defendant should be horribly mutilated for his crimes. This Court concluded that the juror's intentional concealment of knowledge of the case created an inference that she prejudged the case, and, in conjunction with her other lies at the evidentiary hearing and her "vitriolic statements" made it "reasonably probable" that the juror had prejudged the case. (*Id.* at pp. 120-121.)

In *People v. Diaz* (1984) 152 Cal.App.3d 926, 929, the defendant was charged with assault with a deadly weapon, specifically a knife. After the People had rested, it came out that a juror had been attacked at knife point during a rape attempt. (*Id.* at p. 931.) The juror had not answered when the panel was asked during voir dire whether any of them or anyone close to them had been a victim or a complaining witness in a case of that kind. (*Id.* at pp. 930-931.) The bailiff opined that the juror was obsessed as to violent crimes, particularly against women. (*Id.* at p. 931.)

The *Diaz* court concluded the trial court erred in refusing to discharge the juror and, since there was no alternate juror, in refusing to discharge the jury. (*People v. Diaz, supra,* 152 Cal.App.3d. at p. 932.) The *Diaz* court noted that the peremptory challenge was a critical safeguard to the right of a fair trial, and stated that juror concealment "regardless of whether

intentional" undermined the right of the peremptory challenge.[7] (*Id.* at p. 932.) The *Diaz* court stated that there was a presumption of prejudice that arose from jury misconduct and stated,

> On these facts, there is a strong inference of potential prejudice to the defendant in his selection of the jury, as any astute lawyer would have examined Wolski [the juror] more closely regarding her prior victimization at the hands of a knife-wielding assailant, resulting in the establishment of a rational basis upon which to challenge her peremptorily, if not for cause.

(*Id.* at p. 936.)

In *People v. Castaldia* (1959) 51 Cal.2d 569, 570, 573, a bookmaking case that this Court described as "a close one" two jurors stated that they could be unbiased in such a case. It later turned out that one of the jurors went to take a look at the scene and made statements that she had no respect for bookmakers and that there was not enough evidence to convict the defendant but she was not going to turn him loose. The other juror asserted in deliberations that he knew a great deal about bookmaking, stating that he had lost his house to a bookmaker; the juror then spent fifteen minutes explaining aspects of bookmaking to the other jurors. (*Id.* at p. 571.) This Court found that the jurors committed misconduct in giving false answers during voir dire and found the error prejudicial in light of the close nature of the case. (*Id.* at pp. 572-573.)

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[7] For the reasons stated ante (Argument I) and for the reasons stated in *People v. Kelly, supra,* 185 Cal.App.3d at page 125, respondent specifically disagrees with *Diaz* to the extent it holds that even an unintentional concealment of relevant facts by a juror constitutes juror misconduct giving rise to a presumption of prejudice. As stated by the *Kelly* court, "[T]he majority opinion in *Diaz* is too far reaching and broad and could result in frequent unjustified reversals." Nevertheless, for the reasons discussed, post, *Diaz* is entirely distinguishable from the present case.

Finally, in *Dyer,* a juror answered negatively to questions asking whether she or any relatives or close friends had ever been the victim of any type of crime, and whether she or any of her relatives or close friends had ever been accused of any offense other than traffic cases. (*Dyer v. Calderon, supra,* 151 F.3d at p. 972.) It later turned out that her brother had been pistol-whipped and shot in the back of the head and that her own home had been burglarized on a number of occasions. Her husband had been arrested on rape charges a month before trial, her father was arrested for kidnapping, her uncle had been arrested for murder and later for armed robbery, and her brother had been convicted for possessing brass knuckles and later for possession of LSD and marijuana. (*Id.* at pp. 980-981.)

The *Dyer* court found that the circumstances of the case justified presuming bias:

> After watching a number of jurors disclose relatively minor crimes and get dismissed, she [the juror] chose to conceal a very major crime—the killing of her brother in a way that she knew was very similar to the way *Dyer* was accused of killing his victims.

(*Id.* at p. 982.) The court noted that the juror failed to disclose many other facts that would have jeopardized her chances of serving on the jury and lied again when questioned about her brother's death, stating that she thought it was an accident. (*Ibid.*) The *Dyer* court stated,

> [T]here is a fine line between being willing to serve and being anxious, between accepting the grave responsibility for passing judgment on a human life and being so eager to serve that you court perjury to avoid being struck. The individual who lies in order to improve his chances has too much stake in the matter to be considered indifferent.

(*Ibid.*) However, the *Dyer* court also noted,

> Not all jurors may walk a perfectly straight line. A distracted juror might fail to mention a magazine he subscribes to. An embarrassed juror might exaggerate the importance of his job. Few voir dires are impeccable, and most irregularities can be shrugged off as immaterial to the fairness of the trial. But the magnitude of Freeland's [the juror's] lies and her remarkable display of insouciance—her expressed feeling that only she would decide what matters—fatally undermine our confidence in her ability to decide Dyer's fate. The facts here add up to that rare case where we must presume juror bias.

(*Id.* at p. 984.)

Compared to *Blackwell*, *Hitchings*, *Diaz*, and *Dyer*, the present case involved conduct that is far less egregious and gives far less potential inference for bias. In all of these cases, the information not revealed at voir dire pertained directly to the case at hand. (*People v. Blackwell, supra,* 191 Cal.App.3d at pp. 927-928 [juror and defendant were both victims of domestic violence]; *People v. Castaldia, supra,* 51 Cal.2d at pp. 570-573 [bookmaking case; one juror did not respect bookmakers and the other juror lost his house to a bookmaker]; *In re Hitchings, supra,* 6 Cal.4th at p. 120 [juror lied about her knowledge of the case]; *People v. Diaz, supra,* 152 Cal.App.3d at pp. 929, 931 [juror victim of knife assault; defendant accused of assault with a knife]; *Dyer v. Calderon, supra,* 151 F.3d at p. 982 [juror's brother killed in manner similar to way defendant was accused of killing his victims].)

Moreover, in many of these cases, there were indications that the juror was in fact biased against the defendant or that juror's perception of the defendant's case was colored by the concealed incident. In *Blackwell*, the juror stated in a declaration her belief that, because she had escaped from her abusive relationship without violence, the defendant could have done so as well. (*People v. Blackwell, supra,* 191 Cal.App.3d at p. 928.) In *In re Hitchings, supra,* 6 Cal.4th at page 120, the juror stated that the defendant

should be horribly mutilated for his crimes. In *People v. Diaz, supra,* 152 Cal.App.3d at page 931, a bailiff stated that the juror in question was prejudiced with regard to violent crimes, particularly against women. In *People v. Castaldia, supra,* 51 Cal.2d at page 571, one of the jurors stated that she had no respect for bookmakers, and that there was not enough evidence to convict the defendant, but she was not going to turn him loose. Finally, in *Dyer*, the sheer number and scale of the juror's omissions and misrepresentations, along with the fact that she had seen other potential jurors dismissed for disclosures of far lesser magnitude, gave rise to a strong inference that she had deliberately lied in order to improve her chances of sitting on the jury. (*Dyer v. Calderon, supra,* 151 F.3d at p. 982.)

By contrast, in the present case, Juror No. 045882's misdemeanor conviction for fighting in public bears little relationship to petitioner's burglary, robbery and killing of two elderly victims. Unlike in the cases cited ante, petitioner has presented no evidence that the juror in the present case was biased in any way against the defendant because of his conviction (contrast *Diaz*); that the juror relied on the conviction in any way during deliberations (contrast *Blackwell*); that the juror had deliberately and repeatedly lied to improve his chances of sitting on the jury (contrast *Dyer*); or that the juror had in any way prejudged the case (contrast *Hitchings* and *Castaldia*). Accordingly, these cases cannot support the proposition that Juror Number 045882's omission of his misdemeanor offense on his juror questionnaire gives rise to an inference of juror bias.

There are various cases in which defendants have appealed after jurors were dismissed when they failed to reveal their criminal backgrounds or other facts on voir dire, and the reviewing courts have upheld the

dismissal. (E.g. *People v. Johnson* (1993) 6 Cal.4th 1, 21; *People v. Price* (1991) 1 Cal.4th 324, 399-400; *People v. Morris* (1991) 53 Cal.3d 152, 183-184; *People v. Farris* (1977) 66 Cal.App.3d 376, 385.) Respondent submits that these cases are distinguishable from the present case based on the different procedural posture. (*People v. Johnson, supra,* 6 Cal.4th at p. 21 ["The present case does not involve a claim of juror misconduct sufficient to overturn a verdict"]; see also *People v. Holt* (1997) 15 Cal.4th 619, 659-660 [defendant claimed juror should have been dismissed; this Court stated the case was not comparable to those where the defendant complained on appeal about the dismissal of a juror].) Nevertheless, an examination of these cases shows that they generally involve conduct either more egregious or more inherently prejudicial than the conduct in the present case.

In *Farris*, the trial court dismissed a juror who was absent from court one day because he was in custody on a felony charge; it was discovered that he was being prosecuted on two other misdemeanor charges and had an extensive arrest record. (*People v. Farris, supra,* 66 Cal.App.3d at p. 385.) His current and past involvement with law enforcement was deliberately concealed during voir dire. When asked why he had concealed his past and present entanglement with law enforcement, the juror stated that he felt the charges against him were "illegitimate" and he stated that a police search of his home in connection with one of the charges had been unreasonable. (*Id.* at p. 386.) The *Farris* court concluded,

> The nature and extent of the current criminal charges against this juror, and his past criminal activity, together with the attitudes evinced toward the police, make it clear that he could not have been the impartial arbiter that he claimed to be.

(*Id.* at p. 386.) The court continued,

> Moreover, the deliberate concealment by this juror of his past and present scrapes with the law, knowing that he would otherwise be subject to dismissal from the jury panel, is another factor evidencing his unfitness to serve as a juror.

(*Id.* at p. 387, fn. omitted.)

In *People v. Morris, supra,* 53 Cal.3d at pages 183-184, the defendant responded negatively to questions whether he had ever been arrested or jailed, although he had previous misdemeanor convictions and at least two previous charges for obstructing and resisting an officer. The prosecutor represented to the court that he had personally prosecuted the juror for some of the charges listed. The *Morris* court upheld the trial court's dismissal of the juror for cause over defense counsel's objection. (*Id.* at p. 183.) This Court noted that concealment by a potential juror constituted implied bias justifying disqualification, and also stated that, even apart from whether the juror concealed his arrest record, the trial court could reasonably infer that the juror might harbor ill feelings amounting to bias based on the prosecutor's representation that he had personally prosecuted the juror for some of the charges listed on the rap sheet. (*Id.* at pp. 183-184.)

In *People v. Price, supra,* 1 Cal.4th at pages 399-400, during the guilt phase of trial, the prosecutor stated that he had learned one juror was "far less than candid" during voir dire: He served a portion of a sentence for assault with a deadly weapon—he was later supervised on parole by a prosecution witness in the case, he at one point filed an action against a district attorney who later became the trial judge in *Price*. This Court held that the trial court properly dismissed the juror. (*Id.* at p. 401.) The Court reasoned,

> When considered in light of the juror's conduct in concealing it during voir dire, that information established substantial grounds for inferring the Juror Number Three was biased against the prosecution, despite his protestations to the contrary.

(*Id.* at pp. 400-401.)

In *People v. Johnson, supra,* 6 Cal.4th at page 21, the trial court properly discharged a juror for sleeping during trial and for failing to reveal two prior arrests on his questionnaire. This Court found the juror's "No" response to questions as to whether he had been arrested and whether he had been accused of a crime false and misleading, even though these arrests apparently never led to an accusatory pleading being filed. (*Id.* at p. 22.) "In any event, . . . the court's ruling excusing Solano [the juror] can be sustained solely on the basis of its finding that Solano had fallen asleep during trial." (*Ibid.*)

In most of these cases, there are strong indications, apart from the facts of the jurors' criminal histories, that the jurors in question might be biased in some manner. In *Farris*, the juror felt the charges against him were illegitimate, and a police search of his house was unreasonable. (*People v. Farris, supra,* 66 Cal.App.3d at p. 386.) Moreover, the sheer scale of the juror's deceptions indicated a deliberate attempt to avoid dismissal, reminiscent of the juror in *Dyer*. (*People v. Farris, supra,* 66 Cal.App.3d at p. 387; *Dyer v. Calderon, supra,* 151 F.3d at p. 982.) In *Morris*, the juror's previous charges including obstructing or resisting an officer, and the prosecutor in *Morris* had previously personally prosecuted the juror (*People v. Morris, supra,* 53 Cal.3d at pp. 183-184); both of these facts strongly indicated that the juror might harbor a bias against the

prosecutor and against any potential law enforcement witnesses. Finally, in *Price*, the juror had been supervised on parole by a prosecution witness and had filed an action against a prosecutor who later became the trial judge in *Price*. (*People v. Price, supra,* 1 Cal.4th at pp. 399-401.)

By contrast, in the present case, petitioner has presented no evidence, apart from the fact of the misdemeanor conviction itself, that Juror Number 045882 might be biased in any manner. Considering the lack of any similarity between the juror's misdemeanor conviction and the facts of the present case, and considering the fact that several other sitting jurors, whose impartiality is not now questioned, also had misdemeanor offenses in their background, it cannot be said that Juror No. 045882's misdemeanor conviction by itself gives rise to an inference of bias. Accordingly, *Price*, *Morris*, and *Farris* are distinguishable from the present case on their facts. Although the charges concealed in *Johnson* do not appear to give rise to the same sort of inference of bias as in the cases cited ante, in that case the fact that the juror fell asleep during trial provided a sufficient basis by itself for dismissing the juror. (*People v. Johnson, supra,* 6 Cal.4th at p. 22.) Accordingly, *Johnson*, too, is distinguishable from the present case on its facts.

In sum, the cases in which jurors were properly dismissed mid-trial because of concealment of their criminal histories during voir dire are distinguishable from the present case both because of their differing procedural posture and on their individual facts. Accordingly, they cannot support the proposition that prejudicial misconduct occurred in the present case.

Cases *affirming* the judgment against a charge of juror concealment generally involve conduct far less egregious than the cases cited ante, and often are the result of honest mistakes and omissions by jurors. Nevertheless, although these cases are far more similar to the present case than cases reversing because of juror misconduct, a close examination shows that, in general, the facts not disclosed by the jurors, even in these cases held far more potential for prejudice than in the present case.

In *People v. Green, supra,* 31 Cal.App.4th at page 1016, during the course of a hearing on a motion for new trial, it was discovered that a juror had failed to disclose a criminal record, including a felony conviction that would have made him ineligible for jury service. In holding that the presumption of prejudice from the misconduct had been rebutted, the *Green* court noted, "The trial court seems to have concluded the concealment was not deliberate[;]" stated that there was "no indication in the record that Adams' [the juror's] status as an ex-felon affected his ability to be impartial[;]"[8] and noted that the trial court expressly found that the juror had no actual bias against the defendant. (*Id.* at pp. 1019-1020.) The *Green* court expressly distinguished *Diaz* on the ground that in the latter case, "what the juror had concealed was her potential bias against the defendant." (*Id.* at p. 1019.)[9]

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[8] The *Green* court rejected the Attorney General's argument that the presumption of bias was rebutted by virtue of the fact that ex-felons are more likely to be biased against the system that punished them and in favor of the defendant on trial. (*People v. Green, supra,* 31 Cal.App.4th at p. 1018.)

[9] As noted ante, the Ninth Circuit Court of Appeals ultimately granted a petition for writ of habeas corpus in connection with the *Green* decision. (*Green v. White, supra,* 232 F.3d at pp. 675-676, 678.)

In *People v. Resendez, supra,* 260 Cal.App.2d at pages 4, 10, a prosecution under section 288, a juror answered negatively to a question whether she had experienced any similar events to the charged crimes. Nevertheless, during deliberations, she related to the other jurors that when she was 15, "her stepfather had caressed her sexually and inquired, much as appellant had done, whether it felt good or hurt; Mrs. Robinson therefore believed appellant was guilty." (*Id.* at p. 10.) The *Resendez* court accepted the juror's explanation that she had forgotten about the incident and ultimately concluded that there was no miscarriage of justice. (*Id.* at p. 11.) The *Resendez* court stated that the juror "commented . . ., not to influence the verdict improperly, but merely to shed additional light on the issue of credibility." (*Ibid.*) The *Resendez* court added,

> Mrs. Robinson's [the juror's] remarks do not disclose a biased or prejudiced mind against appellant, were disapproved by the rest of the jury, showed no immediate influence on the balloting, and apparently had no substantial influence on the ultimate verdict[.]

(*Ibid.*)

In *People v. Kelly, supra,* 185 Cal.App.3d at page 120, a case in which the defendant was ultimately convicted of 17 counts of felony crimes against two young boys, a juror failed to reveal during voir dire that when she was a child, a stepuncle started to unbuckle his belt and said, "I will show you mine if you show me yours." After trial, the juror revealed the incident to defense counsel. (*Ibid.*) The trial court ultimately denied the resulting motion for a new trial, finding that there was no jury misconduct as to the juror, that the juror was not biased against the defendant, and that the defendant received a fair trial. (*Id.* at pp. 120-121.)

The *Kelly* court ultimately found that the defendant was not denied his right to a fair and impartial trial, stating,

> This was shown by the following factors: (1) Mrs. G's [the juror's] nondisclosure was not intentional; (2) the past experience of Mrs. G. was dissimilar from the crimes in the instant case lessening the chance for bias; (3) Mrs. G. demonstrated her conscientiousness by coming forward with this information; (4) Mrs. G. did not reveal this during deliberations so the other jurors were not influenced; and (5) the court conducted an adequate inquiry to determine if Mrs. G. was biased. She clearly denied any bias or impropriety.

(*People v. Kelly, supra,* 185 Cal.App.3d at pp. 128-129.) The *Kelly* court noted that that case involved much more serious conduct than that described by the juror, and noted that the juror was not directly asked during voir dire if she was a victim of child molestation. (*Id.* at pp. 121-123.)

The *Kelly* court distinguished *Diaz*, since in *Kelly*, "the questions propounded to Mrs. G were anything but direct and unambiguous." (*People v. Kelly, supra,* 185 Cal.App.3d at p. 126.) However, the *Kelly* court also specifically disagreed with *Diaz*, stating, "We find that the majority opinion in *Diaz* is too far reaching and broad and could result in frequent unjustified reversals." (*Id.* at p. 125.)

In *People v. San Nicolas* (2004) 34 Cal.4th 614, 643-644, a case in which the defendant was accused of stabbing two people to death as well as committing other crimes, a juror failed to disclose the following information during voir dire: 1) He had a criminal case pending for felony possession of 0.5 grams of methamphetamine; 2) five years before trial he was prosecuted but the charges were dropped when the police discovered the person they were looking for had the same name; and 3) when he was approximately 12 years old, he was the victim of a crime in which he was repeatedly stabbed. After the juror's testimony at the new trial hearing, the

trial court concluded that the failure to disclose was inadvertent or unintentional, and there was no resulting bias. (*Id.* at p. 645.) By way of example, the juror testified that he "never thought about" the stabbing incident, although he was specifically asked whether he had been the victim of an assault of any kind, as a youth or as an adult. (*Ibid.*)

This Court upheld the trial court's conclusion. The Court distinguished *Diaz* "assuming it is correct" on the ground that any presumption of bias was rebutted, since the juror was consistent in his explanation that he never thought about the stabbing incident and since there was no evidence affirmatively showing juror bias, as in *Diaz*. Rather, there was substantial evidence the juror was unbiased. (*People v. San Nicholas, supra*, 34 Cal.4th at p. 647.) This Court also distinguished *Dyer*, contrasting the "cursory examination" performed by the trial court in *Dyer* with the "extensive evidentiary hearing" performed by the *San Nicolas* trial court. (*Id.* at pp. 647-648.)

In *People v. Carter* (2005) 36 Cal.4th 1114, 1127,1205-1210, a capital case in which the defendant was ultimately convicted of various crimes including the rape and murder of two victims and the murder of a third victim in the course of two burglaries, this Court rejected a claim of juror misconduct based on the juror's response to a questionnaire. In *Carter*, the juror answered "No" to Question 61, which asked, "Have you ever been in a situation where you feared being hurt or being killed as a result of violence of any sort?" (*Id.* at p. 1205.) In response to other questions on the questionnaire, the juror stated that she had been a victim of burglaries in San Jose, Pasadena, and West Los Angeles; and she stated, "[E]veryone has feares [sic] + you don't know what will happen in the next minute." (*Id.* at p. 1207.)

The juror, who was 31 years old when she completed the questionnaire, was questioned at a motion for new trial. (*People v. Carter, supra,* 36 Cal.4th at p. 1206 and fn. 46.) She revealed that when she first lived on her own in an apartment, at age 18 or 19, she slept with a knife one night because she could not sleep, and feared being raped and murdered. (*Id.* at p. 1206, fn. 46.)

This Court held that the juror had not committed misconduct, and that her voir dire clearly established her qualifications as a juror. (*People v. Carter, supra,* 36 Cal.4th at p. 1208.) This Court continued,

> Moreover, even if we were to assume Juror K.'s answer to Question No. 61 was inaccurate, evasive, and material, the circumstance that as a teenager living alone for the first time, Juror K. was "paranoid for a short period of someone breaking in," leading her to keep a kitchen knife in close proximity overnight, does not provide any basis for concluding that she harbored undisclosed juror *bias*. Accordingly, the presumption of prejudice was rebutted.

(*Id.* at p. 1209, emphasis in original; fn. omitted.)

An examination of these cases reveals that in most cases, the information that was not disclosed bore some relationship to the case at hand. In *Resendez*, the juror was caressed sexually by a stepfather whereas the crime charged was a violation of section 288. (*People v. Resendez, supra,* 260 Cal.App.2d at pp. 4, 10.) In *Kelly*, a juror, as a child, underwent an incident with a stepuncle with disturbing sexual overtones where the defendant was charged with multiple sex crimes against two young boys. (*People v. Kelly, supra,* 185 Cal.App.3d at p. 120.) In *San Nicolas*, the juror, as well as having a criminal background, had previously been the victim of a stabbing; the defendant in that case was accused of stabbing two

people to death. *People v. San Nicolas, supra,* 34 Cal.4th at pp. 643-644.) In *Carter*, the juror slept with a knife because she feared being raped and murdered; the defendant in *Carter* was accused of raping and murdering two people in the course of burglaries. (*People v. Carter, supra,* 36 Cal.4th at pp. 1127, 1206, fn. 46.) It is true that in *Green*, there is no indication the juror's criminal background that was not disclosed bore a resemblance to the charged crimes. Nevertheless, the juror's felony conviction, had it been disclosed, would have made him entirely ineligible for jury service. (*People v. Green, supra,* 31 Cal.App.4th at p. 1016.)

By contrast, in the present case, Juror No. 045882's misdemeanor conviction for public fighting bore no resemblance to the murders with which petitioner was charged, and, as evidenced by the other jurors who had misdemeanor offenses in their backgrounds, would not have barred him from service on the present jury, as would have the felony conviction in *Green*. Nor is there any indication that the juror's misdemeanor conviction was mentioned in any way during the deliberations, unlike the incident in *Resendez*, which the juror in question brought forth the undisclosed incident at deliberations in support of her belief that the defendant was guilty.

It is true that in these cases there were generally either express or implied findings that the juror was unbiased or that the failure to reveal the information was inadvertent, or both. In *Green* the trial court appeared to find that the failure to disclose was not deliberate and expressly found that the juror harbored no bias against the defendant. (*People v. Green, supra,* 31 Cal.App.4th at pp. 1019-1020.) In *Resendez*, the court accepted the juror's explanation that she had forgotten about the incident and the appellate court stated that her later remarks did not disclose a biased or

prejudiced mind against the defendant. (*People v. Resendez, supra,* 260 Cal.App.2d at p. 11.) In *San Nicolas*, after a hearing, the trial court concluded that the failure to disclose was inadvertent or unintentional, and that there was no resulting bias. (*People v. San Nicolas, supra,* 34 Cal.4th at p. 647.)

However, given the minor nature of the failure to disclose in the present case, any presumption of bias was rebutted even assuming, arguendo, that the failure to disclose was deliberate. By way of comparison, this Court stated in *Carter*,

> Moreover, even if we were to assume Juror K.'s answer to Question No. 61 was inaccurate, evasive, and material, the circumstance that as a teenager living alone for the first time, Juror K. was "paranoid for a short period of someone breaking in," leading her to keep a kitchen knife in close proximity overnight, does not provide any basis for concluding that she harbored undisclosed juror *bias*. Accordingly, the presumption of prejudice was rebutted.

(*Id.* at p. 1209, underlining added, italics in original; fn. omitted.) If it can be said that the fact that a juror's fear that she would be raped and murdered in her home did not provide any basis for concluding that she harbored bias where the defendant was accused of raping and murdering two women in the course of burglaries, then surely in the present case the fact of Juror No. 045882's misdemeanor conviction did not provide any basis for concluding that he harbored bias against the defendant. Accordingly, as in *Carter*, even if we assume, arguendo, the juror in the present case was *deliberately evasive* with regard to this misdemeanor conviction, the presumption of prejudice has been rebutted. Because any presumption of prejudice has been rebutted by an examination of the entire record in the case, Claim Number 2 fails.

III. BECAUSE PETITIONER HAS MADE NO SHOWING EITHER THAT THE JUROR WAS DELIBERATELY DECEPTIVE IN ORDER TO IMPROVE HIS CHANCES OF SITTING ON THE JURY OR THAT THE JUROR WAS BIASED IN ANY WAY, THE PRESENT PETITION MAY BE DENIED WITHOUT FURTHER PROCEEDINGS

As explained ante, petitioner has failed to show that the juror was deliberately deceptive, that the juror lied in order to improve his chances of sitting on the jury, or that the juror was biased in any way. Moreover, a review of the entire record, when compared with other cases in which juror misconduct through failure to reveal information was alleged, shows that any presumption of prejudice that might have arisen from Juror Number 045882's failure to reveal his misdemeanor conviction was rebutted. The question remains whether the mere fact that the juror apparently failed to reveal the misdemeanor conviction, by itself, creates a prima facie case of juror misconduct such that petitioner should be entitled to further proceedings, either in this Court or at the trial level, to attempt to prove, if he is able, his allegations of juror misconduct. Respondent submits that the answer to this question is "No."

The present case stands in habeas corpus, some 15 years after the jury rendered its verdict. Here, petitioner seeks to overturn a verdict which, because of societal interest in the finality of verdicts, is presumed to be valid. (*People v. Duvall* (1995) 9 Cal.4th 464, 474; *In re Clark* (1993) 5 Cal.4th 750, 764; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1260.)

Indeed, this Court has recognized the extraordinary nature of habeas corpus relief from a judgment that is presumed valid and has recognized the importance of the finality of state court judgments and the state's interest in the prompt implementation of its laws. (*In re Harris* (1993) 5 Cal.4th 813, 831; *In re Clark, supra,* 5 Cal.4th at p. 764.)

It is the petitioner's burden in a habeas corpus proceeding to allege and prove all facts upon which he relies to overturn the judgment. (*People v. Duvall, supra,* 9 Cal.4th at p. 474; *Ex parte Dixon* (1953) 41 Cal.2d 756, 760; *accord In re Bower* (1985) 38 Cal.3d 865, 872.)

> The petition should both (i) state fully and with particularity the facts on which relief is sought [citation] as well as (ii) include copies of reasonably available documentary evidence supporting the claim, including pertinent portions of the trial transcripts and affidavits or declarations.

(*People v. Duvall, supra,* 9 Cal.4th at p. 474; *In re Harris, supra,* 5 Cal.4th at p. 827, fn. 5; *In re Clark, supra,* 5 Cal.4th at p. 781, fn. 16.) "Conclusory allegations made without any explanation of the basis for the allegations do not warrant relief, let alone an evidentiary hearing." (*People v. Karis* (1988) 46 Cal.3d 612, 656.) If the petition does not state a prima facie case for relief, it should be dismissed. (*Griggs v. Superior Court* (1976) 16 Cal.3d 341, 347; *In re Swain* (1949) 34 Cal.2d 300, 303-04.)

> For purposes of collateral attacks, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended.

(*People v. Duvall, supra,* 9 Cal.4th at p. 474, quoting *People v. Gonzalez, supra,* 51 Cal.3d at p. 1260, emphasis in original.) Moreover, a petition is judged on the factual allegations contained within it, without reference to the possibility of supplementing claims with facts to be developed later. (*In re Clark, supra,* 5 Cal.4th at p. 781, fn. 16.)

In the present case, the only *fact* that has been alleged, outside the record on appeal, is that Juror Number 045882 had a previous misdemeanor conviction for fighting in public which he did not reveal on his juror questionnaire. From this one fact, petitioner would infer that the juror was

deliberately deceptive in his answers on his questionnaire, that the juror was deceptive in order to improve his chances of sitting on petitioner's jury, and that the juror harbored an undisclosed bias against petitioner which prejudiced petitioner's trial. (Pet. at pp. 22-23; Reply at p. 23.)

Respondent has already discussed, ante, why it is not readily inferable either that the juror deliberately lied to sit on the jury or that the juror harbored some kind of undisclosed bias against petitioner. Lacking in the present petition are any declarations indicating that 1) the juror had any unusual desire to sit on the jury; 2) the juror made comments indicating a potential bias; or 3) that the juror's misdemeanor conviction or his experiences related to that conviction in any way affected the deliberations in the present case. In short, there is no evidence (or facts alleged) apart from the bare fact of the conviction itself that indicate the juror deliberately engaged in deception in order to sit on the jury or that the juror was biased. This, quite simply, for the reasons stated ante, is insufficient to warrant reversal in the present case.

It is true that petitioner's habeas counsel labors under a juror no-contact order which prevents counsel from contacting jurors who have not consented to contact, including, apparently, Juror No. 045882. Nevertheless, it is not unfair to require petitioner to make an evidentiary showing of purposeful concealment and concomitant bias before granting an evidentiary hearing or other relief in the present case. There is no indication that the record of Juror Number 045882's misdemeanor conviction was any less available to trial counsel in 1996, when the present trial was conducted, than it was to habeas counsel in 2007, when the present petition was filed. Had petitioner brought to light the juror's conviction before trial, during voir dire, the matter could have been discussed there and, if necessary, the juror could have been dismissed,

either for cause or by way of peremptory challenge. Had petitioner brought to light the juror's conviction during trial, the trial court could have examined the juror on the topic and, if necessary, seated an alternate in place of the juror. Finally, had petitioner brought the juror's misdemeanor conviction to light immediately after trial, the trial court could have held a hearing to determine the circumstances of the omission and whether those circumstances indicated any bias on the part of the juror. So soon after trial, it is presumable that all of the jurors would have been available for such a hearing and it is presumable that memories of any relevant events would have been relatively fresh.

Now, however, it is some 15 years after trial. In the intervening time, jurors may have died, moved and become unamenable to process, or simply have forgotten relevant events.

Nevertheless, petitioner would infer misconduct from the bare fact of an inaccuracy in a voir dire questionnaire, and, from that inferred misconduct, presume prejudice. Such a presumption, in the context of capital habeas cases, is likely to result in many unwarranted reversals, not because a biased juror in fact sat on a defendant's jury but because the People will be unable to rebut the presumptions created by an inaccurate juror statement and an otherwise silent record.

In a related vein, presuming concealment or deception from the mere fact of an inaccurate answer on voir dire at the habeas stage is likely to have adverse effects on the administration of justice in capital cases. Defendants would have a strong motivation to litigate indications of juror misconduct not at the trial stage, where, as explained ante, it is relatively easy for the court and the parties to investigate such claims, but at the habeas stage, where presumptions in the defendants' favor would be difficult to rebut. (See, *People v. Moreno* (2011) 192 Cal.App.4th 692, 706 [defendant who

knows of juror's incompetency or should have discovered it during voir dire cannot raise objection after trial; otherwise, defendants would take the chance of a favorable verdict at trial and raise the issue afterward if the verdict was not favorable].)

Moreover, the result might be that more jurors would be forced to appear in court years after they rendered their verdicts in order to defend or explain apparent inaccuracies in their voir dire answers. This is quite contrary to current standards regarding the treatment of jurors. In *People v. Dykes* (2009) 46 Cal.4th 731, 810, fn 23, this Court quoted the United States Court of Appeals for the Second Circuit as follows:

> "[C]ourts are, and should be, hesitant to haul jurors in after they have reached a verdict in order to probe for potential instances of bias, misconduct or extraneous influences." [Citation.] "This is to avoid harassment of jurors, inhibition of deliberation in the jury room, a deluge of post-verdict applications mostly without merit, . . . an increase in opportunities for jury tampering . . . [and] to prevent jury verdicts from being made more uncertain."

(*Ibid.*)

In light of the foregoing, respondent submits that, at least at the habeas level, not every inaccuracy in a juror questionnaire or at voir dire should be presumed to be the result of deception or concealment. Rather, such a presumption should operate, if at all, where as in *Dyer*, the inaccuracy was both closely related to the case at hand and difficult to explain by anything other than deliberate deception or concealment. Such is not the case here. Respondent has already shown how the juror's responses may very well have been innocent, and in any event the juror's misdemeanor conviction for fighting in public bears little relationship to the crimes with which petitioner was accused and for which he was later convicted. Accordingly, petitioner has not made a prima facie case for juror misconduct, and an evidentiary hearing should not be granted in the present matter.

By way of comparison, several other cases of jury misconduct that came by way of habeas corpus proceedings had much stronger initial showings of juror misconduct. In *Hitchings*, declarations supported allegations that the juror in question concealed her knowledge of the case and her bias against the defendant; prejudged the case; and improperly discussed the case with nonjurors during the pendency of trial. (*In re Hitchings, supra,* 6 Cal.4th at p. 103.) In *Hamilton*, the allegations of juror misconduct were supported by a declaration from the juror in question, Gholston, stating in the words of this Court, that

> (1) before trial, Gholston learned petitioner blamed a "Canadian" for Gwendolyn's murder, (2) Gholston and a neighbor agreed this "ridiculous" story showed petitioner himself was guilty, (3) Gholston "prayed" to sit on petitioner's jury after the spirit of her deceased Uncle Frank, a bank robber and killer, exhorted her to atone for his wrongs by "aveng[ing]" petitioner's crimes, and (4) during trial, Gholston saw the "skinnier" of petitioner's sisters watching her from a car in the alley behind Gholston's home, which prompted Gholston to request increased police patrols. None of these matters had been brought to the attention of court or counsel at petitioner's trial.

(*In re Hamilton, supra,* 20 Cal.4th at pp. 282-283, fn. omitted.) In *People v. Marshall* (1990) 50 Cal.3d 907, 949-950, this Court found that the defendant had adequately alleged misconduct where one juror informed the jury (incorrectly) that a lack of evidence of the defendant's criminal background did not mean that the defendant had no criminal background, since juvenile records were sealed at 18 years of age.[10]

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[10] This Court ultimately found that there was no substantial likelihood any juror was impermissibly influenced by the misconduct and, accordingly, that the misconduct was nonprejudicial. (*People v. Marshall, supra,* 50 Cal.3d at pp. 952-953.)

By contrast to *Hamilton* and *Hitchings* in particular, there has been no showing in the present case that Juror Number 045882 concealed his bias and knowledge of the case, prejudged the case, or believed that the spirit of a deceased relative exhorted him to sit on the jury. Nor is there any indication the juror introduced extraneous law to the other jurors as occurred in *Marshall*. Rather, the most petitioner has shown, thus far, is that Juror No. 045882's voir dire questionnaire responses may have been inaccurate. This, by itself, is not sufficient to warrant relief such as an evidentiary hearing.

It is true that some misstatements by jurors may be so egregious and numerous that, by themselves they warrant an inference of bias. (See, *Dyer v. Calderon, supra,* 151 F.3d at pp. 979-982 [juror concealed facts about her brother's murder, her being a victim of various crimes, and the criminal history of various family members].) It is also true that other misstatements are both unexplainable as mere mistakes and so closely relate to the issues in the case being tried that they warrant an inference of bias. (See, *People v. Blackwell, supra,* 191 Cal.App.3d at pp. 927-928 [juror denied problems in her family relating to alcohol and domestic abuse although she had been in an abusive relationship with an alcoholic husband].)

This case does not fit those categories. Rather, if the mere fact that Juror Number 045882 did not reveal his misdemeanor conviction on voir dire is cause to grant petitioner relief, then respondent is hard pressed to see why *any* inaccuracy by a juror either in answering written questionnaires or at voir dire would not entitle a defendant to some kind of relief. The adverse effects of such a holding scarcely need to be stated. Respondent submits that an extensive voir dire of twelve jurors is highly likely to produce some factual inaccuracy, whether through misremembering or overlooking a fact, embarrassment, or nervousness. Calling at least one,

and possibly twelve, jurors back into court, possibly years after they have rendered their verdicts, in order to explain an apparent inaccuracy or rebut a presumption of bias flowing from that inaccuracy, would adversely affect the willingness of jurors to serve on major cases and on the administration of justice as a whole to a degree far outweighing any corresponding gain in the accuracy of jury verdicts and the removal of bias from the jury pool.

In short, petitioner has not alleged facts sufficient to warrant a finding of juror misconduct, still less to find that a biased juror actually sat on his case. Claim Number Two fails.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the present petition be denied.

Dated: October 7, 2011.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **RETURN ON ORDER TO SHOW CAUSE AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RETURN** uses a 13 point Times New Roman font and contains 15,312 words.

Dated: October 7, 2011.

KAMALA D. HARRIS
Attorney General of California

LEWIS A. MARTINEZ
Deputy Attorney General
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***In Re Robert Wesley Cowan***
Case No.: **S158073**

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 7, 2011, I served the attached **Return on Order to Show Cause and Memorandum of Points and Authorities in Support of Return** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 2550 Mariposa Mall, Room 5090, Fresno, California 93721, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 7, 2011, at Fresno, California.

Debbie Pereira-Young
Declarant

Debbie Pereira-Young
Signature

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