SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re	No. S158073
ROBERT WESLEY COWAN	Related to: People v. Robert Wesley Cowan
Petitioner,	Automatic Appeal No. S055415
On Habeas Corpus.	Kern County Superior Court No. 059675A

TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE

SUPREME COURT
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DEATH PENALTY

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TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE

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

Petitioner ROBERT WESLEY COWAN filed a petition for a writ of habeas corpus on November 9, 2007, challenging his confinement on death row at California State Prison - San Quentin. Subsequently, on June 22, 2011, after reviewing the informal briefing of the parties, this Court issued an order to show cause ("OSC") "why the relief prayed for should not be granted on the ground of juror misconduct, as alleged in Claim 2 of the petition for writ of habeas corpus." Respondent filed his return on October 13, 2011. Petitioner files this traverse in response to respondent's return.

I.

INCORPORATION BY REFERENCE

Petitioner hereby incorporates and realleges by reference each and every allegation

in the petition for writ of habeas corpus filed on November 9, 2007, as if fully set forth herein. Petitioner also incorporates all exhibits appended to the petition as if fully set forth herein. Specifically, petitioner relies on every material fact in Claim 2 of the petition, and the exhibits filed in support of Claim 2.

Petitioner hereby also incorporates all legal and factual arguments set forth in the reply to the informal response and in the memorandum of points and authorities accompanying this traverse.

II.

DENIAL OF ALLEGATIONS IN THE RETURN

Petitioner denies all allegations made by respondent on pages 1 through 5 of the return that are in any way contrary to or inconsistent with the facts alleged in the petition for a writ of habeas corpus. Specifically, petitioner denies that he is legally or constitutionally confined and that there have not been substantial violations of his state and federal constitutional rights. (Return at pp. 1, 3.)

Petitioner denies that the evidence presented thus far does not adequately support Claim 2, that the evidence presented does not justify the granting of relief, or that the facts set forth in the petition do not establish a prima facie case for relief. (Return at p. 2.)

Although these matters are not the subject of the OSC, petitioner denies that he received effective assistance of counsel at the trial and penalty phases, or that decisions

made by counsel were not based on state interference, prosecutorial misconduct, inadequate and unreasonable investigation and discovery, or inadequate consultation with experts. (Return at p. 2.)

Similarly, petitioner also denies that there are not 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. (Return at p. 2.)

Petitioner further denies that he would have been convicted of first degree murders and special circumstances, or that he would have been sentenced to death, absent misconduct by the state, trial court errors, or deficient performance of counsel. (Return at p. 2.)

With respect to Claim 2, petitioner denies that Juror 045882 was truthful in his responses to the juror questionnaire or in his answers in voir dire. Petitioner denies that the juror could have forgotten about his misdemeanor conviction; that the juror may not have seen his citation by a police officer as an "arrest" within the meaning of Question 34; 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 in his juror questionnaire he had previously been in court. (Return at p. 3.)

Petitioner denies that there is a reasonable explanation for Juror 045882's failure

to mention his misdemeanor conviction and probation sentence and that Question 34 was in fact vague and ambiguous. (Return at p. 3.)

Petitioner denies that Juror 045882 did not deliberately conceal his misdemeanor conviction and that his concealment did not constitute juror misconduct. Petitioner denies that the juror's other responses on voir dire did not indicate either a determination to serve on the jury, an affinity for the prosecution, a bias against the defense, or a prejudgment of the case. Petitioner denies that the juror did not lie about his background in order to secure the opportunity to convict petitioner and sentence him to death. Petitioner denies that the responses of the other jurors in their questionnaires demonstrated that Juror 045882 did not have either an unusual willingness to serve on the jury or an unusual affinity for the prosecution. Petitioner denies that Juror 045882's other responses on his questionnaire and at voir dire, as well as his failure to initially appear for jury duty, indicated he was not determined to sit on petitioner's jury. (Return at p. 4.)

Petitioner denies that a presumption of prejudice did not arise from Juror 045882's answers at voir dire or that any presumption of prejudice that did arise was rebutted by a review of the entire record of the case. Petitioner denies that the record of the case does not indicate a substantial likelihood that the juror was biased against petitioner. (Return at p. 4.)

Petitioner denies that Juror 045882 did not deliberately conceal his criminal record and that the concealment did not prevent petitioner from intelligently inquiring into an

area of potential bias on which to base a challenge for cause or to exercise a peremptory challenge. Petitioner denies that other jurors had similar misdemeanor convictions, thereby rebutting any allegation that Juror 045882 would have been dismissed had defense counsel known of his misdemeanor conviction. (Return at pp. 4-5.)

III.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF TRAVERSE

A. Introduction

In Claim 2 of his petition for a writ of habeas corpus, petitioner claims that during jury selection Juror 045882 deliberately concealed his prior misdemeanor arrest and conviction, as well as the fact that he was currently on probation. The juror's intentional and repeated failure to disclose this information on his questionnaire, which he filled out under penalty of perjury, and during his sworn in-court testimony, constituted misconduct, resulting in a presumption of prejudice that is not rebutted by the record.

Respondent argues that Juror 045882 did not commit misconduct because his answers on the questionnaire and during voir dire were not deliberately false or misleading. In addition, to the extent the juror's answers were inadvertently false or misleading, respondent argues there was no misconduct because the information concealed did not reflect any bias on the part of the juror. Finally, respondent claims that,

assuming arguendo Juror 045882 did commit misconduct, any presumption of bias was rebutted by a review of the record as a whole. Respondent asserts the petition for a writ of habeas corpus should be denied without an evidentiary hearing.

Respondent's contentions are without merit. Instead of providing factual refutations to the petitions allegations, they are based almost entirely on unsupported speculation. It is undisputed that the juror questionnaire was unambiguous in asking the jurors about any prior arrests and their outcomes. Juror 045882 would not have forgotten a conviction that had occurred only 14 months before jury selection and for which he was still serving three years of probation. In addition, there is more than a substantial likelihood the juror was biased against petitioner. Juror 045882 was on probation in Kern County, and he therefore had a strong motive to curry favor with the Kern County District Attorney prosecuting the case. He was likely to believe that in exchange for his voting to convict petitioner and sentence him to death the prosecutor would recommend an early termination of his probation, if he sought one, or leniency in the event of future probation violations. That the juror was determined to sit on the jury was evident from his answer to Question 37 of the questionnaire. Juror 045882 viewed jury service in petitioner's case as a "great chance for" himself. (1 First Supp. CT 210.) By concealing his own criminal record, Juror 045882 was able to secure a seat on the jury, where he could protect his own interests at petitioner's expense by voting for first degree murders with special circumstances and a death sentence.

Moreover, since respondent does not dispute that Juror 045882 was previously convicted of a misdemeanor offense and was on probation while serving as a trial juror, the petition for a writ of habeas corpus should be granted based only on the record before this Court. The juror's criminal conviction and probation sentence alone establish a substantial likelihood that Juror 045882 was biased against petitioner. "If the written return admits allegations in the petition that, if true justify the relief sought, the court may grant relief without an evidentiary hearing." (*In re Serrano* (1995) 10 Cal.4th 447, 455; *People v. Duvall* (1995) 9 Cal.4th 464, 477.) Alternatively, if this Court concludes that there are factual issues in dispute that must be resolved before petitioner's claim of juror misconduct can be decided, it should refer the matter for an evidentiary hearing before a neutral finder of fact.

B. Petitioner Has Shown That During Voir Dire Juror 045882 Intentionally Concealed His Prior Misdemeanor Conviction and His Status as a Probationer

Respondent acknowledges that a juror commits misconduct by deliberately concealing material information on voir dire, and that such misconduct constitutes implied bias justifying disqualification. (Return at 13, citing *People v. Jackson* (1985) 168 Cal.App.3d 700, 704; *In re Hitchings* (1993) 6 Cal.4th 97, 120.) He also acknowledges that deliberate concealment is accorded a very different effect than an honest mistake at voir dire. (Return at p. 14, citing *In re Hamilton* (1999) 20 Cal.4th 273, 300.) Respondent contends, however, that Juror 045882 did not commit misconduct

because the concealment of his prior misdemeanor conviction and his status as a probationer was not intentional. Respondent's analysis of misconduct becomes disturbingly muddled.

Respondent first asserts that Juror 045882's omission of his misdemeanor conviction was due to either honest forgetfulness or embarrassment over revealing his past indiscretion. (Return at p. 18.) Respondent then maintains that Juror 045882 answered the questions truthfully, *even if he omitted the conviction out of embarrassment or reluctance to reveal his previous transgressions.* (Return at p. 23, emphasis added.) But concealing material information during voir dire due to embarrassment or other self-interest is *lying*. It is *not* answering truthfully. Ultimately, respondent does not seem to be able to distinguish between whether Juror 045882 was telling the truth or lying. Either way, it does not seem to matter very much to respondent which of the two it was, as respondent later concedes that none of it is important enough to justify even holding an evidentiary hearing. (Return at p. 32)

In support of his contention that Juror 045882 did not commit misconduct, respondent cites three cases, which he claims "properly found jurors' failures to disclose information to be unintentional under circumstances not far different from the present case." (Return at 14.) The circumstances of the cases cited by respondent, however, are in fact very different from those in petitioner's case. Most significantly, the jurors in these cases actually testified under oath at evidentiary hearings. The jurors explained why

they did not deliberately disclose any information about their backgrounds and these explanations were deemed to be credible by the trial courts. The opinions were not based on unsupported speculation about a juror's state of mind like that advanced by respondent in his return.

In *People v. Green* (1995) 31 Cal.App.4th 1001, 1016, the juror gave a false answer during voir dire by failing to reveal a prior felony conviction for passing bad checks. At the evidentiary hearing on the defendant's motion for new trial, the juror explained that his wife filled out the jury questionnaire for him and he signed it without reading it. She was aware of his prior felony conviction, but would not have understood the question on the form. (*Ibid.*) After hearing the juror's testimony, the trial court concluded that the juror's concealment of his criminal record was not deliberate, and the Court of Appeal agreed. (*Id.* at 1019.)[1]

People v. Resendez (1968) 268 Cal.App.2d 1 is similar. In *Resendez*, a case involving a defendant charged with committing a lewd and lascivious act on a minor, a juror failed to disclose in voir dire that she had been caressed sexually by her stepfather when she was 15. (*Id.* at p. 10.) The juror testified at the motion for a new trial that she had forgotten about the incident during voir dire. The trial court found the juror's

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[1]The Ninth Circuit, however, disagreed with the state courts, finding that the juror deliberately lied about his criminal history and that he was biased against the defendant. *Green v. White* (9th Cir. 2000) 232 F.2d 671, 676-677 [ordering district court to grant a writ of habeas corpus].)

testimony to be credible, and therefore concluded, as did the Court of Appeal, that she had not deliberately lied about her background.

Finally, in *People v. Kelly* (1986) 185 Cal.App.3d 118, 121 a case involving various felony sex crimes, the juror failed to reveal during voir dire that when she was young a step-uncle suggested that they both undress. The trial court held an evidentiary hearing, at which the juror testified. She explained that two days before the trial began in *Kelly* she had been questioned as a prospective juror in a different case. She was asked in that case if she had ever been the victim of a crime. In response, she described the incident with her step-uncle. She believed she had been asked the same question during voir dire in *Kelly*. She did not answer because she was embarrassed and felt humiliated at the previous voir dire. In addition, the information she provided in the first jury selection "was discarded," so she felt there was no reason to suffer "further humiliation" by answering the question again. She also did not believe she was actually a crime victim. (*Id.* at p. 120.)

The trial court found the juror's testimony was credible and therefore concluded her failure to disclose the incident was not intentional. (*Ibid.*) In affirming the judgment, the Court of Appeal noted that although the juror testified she was questioned during voir dire about whether she had been a victim of child molestation, in fact, no such question was asked by the trial court or the attorneys. The juror "was not asked the type of questions necessary to elicit the information which was later revealed." (*Id.* at p. 126.)

The ambiguousness of the questions further supported the conclusion the juror did not deliberately conceal the incident involving her step-uncle.

In petitioner's case, unlike in *Green*, *Resendez*, and *Kelly*, Juror 045882 has not given an innocent explanation regarding why he withheld information about his criminal record during voir dire. The trial court did not hold an evidentiary hearing because Juror 045882's criminal record was not discovered until after the case was on appeal. In addition, the juror refused to be interviewed by either party to the habeas corpus proceedings, so the record does not include any declaration from him. The fact that Juror 045882 has never said that he forgot about his misdemeanor conviction, or offered any other innocent explanation for his omission, distinguishes the present case from the cases upon which respondent relied. Here, no court has ever heard Juror 045882's explanation for not revealing his criminal record, or found that his explanation is credible. That Juror 045882 has an innocent explanation for his omission cannot simply be assumed, as respondent has done. Moreover, the record supports the conclusion that Juror 045882 intentionally withheld information about his conviction. He was quite explicit in noting that while his brother was previously convicted of assault and battery, prior charges against him were dropped. "I didn't come to court. . . . I didn't get convicted or nothing; dropped charges against me." (4 RT 1040-1041; see Return at pp. 11, 20.)

Respondent next contends that the material concealed by Juror 045882 was both less serious and less relevant than the material withheld by jurors in cases in which

convictions were reversed for juror misconduct. (Return at pp. 16-17, citing *People v. Blackwell* (1987) 191 Cal.App.3d 925 and *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970.) In addition, according to respondent, even in *Green*, *Resendez* and *Kelly*, in which juror omissions were found to be innocent oversights, the omitted material was more significant than in petitioner's case. (Return at p. 17.) Based on the foregoing, respondent argues that Juror 045882's prior misdemeanor conviction was so insignificant he must have forgotten about it during voir dire. (Return at pp. 16-18.)

Respondent's argument again relies on unsupported speculation. As already discussed, Jury 045882 has never said he forgot about his prior misdemeanor conviction when completing the juror questionnaire or during voir dire. Moreover, the circumstances regarding his criminal history strongly suggest he did not. The arrest and conviction were not remote, having occurred approximately 14 months before his jury service. In addition, at the time he filled out the juror questionnaire he had completed less than half of his probation and his misdemeanor sentence was his only criminal conviction. This was not a situation in which the juror had a long history of many criminal convictions and thus could have innocently forgotten about a less serious prior.

Moreover, to the extent respondent argues that a juror's concealment of his own misdemeanor conviction may never be material enough to constitute misconduct, he is wrong. The excusal for cause of a juror who did not accurately disclose his misdemeanor criminal record during voir dire was upheld by this Court in both *People v. Morris* (1991)

53 Cal.3d 152, 182 and *People v. Bradford* (1997) 15 Cal.4th 1229, 1334. In *Bradford*, the misdemeanor conviction was similar in severity to that of Juror 045882's. During voir dire, the prospective juror stated he had been convicted of disorderly conduct approximately 20 years earlier. In fact, he had suffered a misdemeanor conviction for both battery and disorderly conduct three years prior to the trial. The trial court excused the prospective juror for cause, a ruling found not to be error by this Court.

Respondent is also incorrect that Juror 045882's false answers on the questionnaire do not give rise to an inference that he was concealing his criminal record in order to avoid being dismissed from the jury. As the Ninth Circuit noted in *Dyer v. Calderon*, *supra*, 151 F.3d at p. 982, "[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 at stake in the matter to be considered indifferent." (Emphasis added.)

According to respondent, Juror 045882 would not have reason to believe his misdemeanor conviction would cause him to be excused from the jury because other jurors with misdemeanor convictions were allowed to remain.[2] (Return at p. 18.) There

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[2]Respondent alleges that three other jurors – Jurors 041100, 041445 and 046179 – had misdemeanor convictions. (Return at p. 18.) Juror 046179's questionnaire indicated only that he had been arrested for trying "to pick up a hooker" who turned out be "an undercover." It does not mention whether he was convicted of a crime. (1 First Supp. CT 271.)

is no evidence in the record, however, that at the time Juror 045882 completed his questionnaire he knew that any other prospective jurors had misdemeanor convictions. The convictions were disclosed by the other jurors in their questionnaires, which were not shared with Juror 045882. (See 1 First Supp. CT 150, 251.) Nor did he know which prospective jurors were going to be excused when he completed his questionnaire and underwent in-court questioning.

Respondent further argues that Juror 045882's failure to appear for jury selection on April 17, 1996, resulting in the issuance of a body attachment, was an indication that "belies the notion that the juror was . . . determined to sit on this particular jury." (Return at p. 18.) Respondent wants this Court to assume, without any supporting evidence, that the juror was trying to avoid jury service when he did not appear for voir dire. The record, however, suggests the contrary. On April 30, 1996, the body attachment was recalled without a finding of contempt and without the trial court reprimanding the juror. (4 RT 1039.) These circumstances suggest that the Juror 045882's failure to appear was not an attempt to avoid jury service, but rather was due to good cause subsequently explained to the satisfaction of the trial court. To conclude that the juror's absence was something more deliberate is sheer speculation.

Finally, the fact that Juror 045882 revealed other information concerning prior arrests of himself and his brother, and his relationships with persons in law enforcement, does not belie petitioner's claim that the juror was attempting to finagle his way onto the

jury. The juror was undoubtedly aware the information he disclosed was far less likely to result in his being excused (and clearly it did not) than the fact he currently was serving a three-year term of probation. Had he announced he was on probation, defense counsel likely would have sought his excusal for cause on the ground he might favor conviction in order to remain in good standing with the prosecution. As Juror 045882 wrote in response to Question 30 of the questionnaire, jury service was "a great chance for me" (1 First Supp. CT 210), and he did not want to miss that opportunity to help the prosecution, and thereby, help himself.

Respondent proposes several alternatives to petitioner's claim that Juror 045882 deliberately failed to disclose his criminal record during voir dire. All of respondent's theories are based on unsupported speculation and defy common sense. Respondent claims "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." (Return at p. 20.) No explanation is offered why this would be so. It surely is more likely that the juror would have had a better memory of the arrest that was four years more recent and actually resulted in a conviction, fine, and probation sentence.

Respondent also claims without evidentiary support that Juror 045882 may have understood Question 34 as only asking the juror to describe one prior arrest, rather than

all prior arrests, he suffered. (Return at pp. 20-21.) The question asked: "Have you *ever* been arrested? Yes [ ] No [ ] If yes, please explain. Include the type of charge, the approximate date of the arrest, where the arrest took place and the outcome." (1 First Supp. CT 211, emphasis added.) Clearly, Question 34 called for the juror to describe *all* of his prior arrests. Juror 045882 could not have reasonably construed the question otherwise. He would have understood that the trial court and counsel did not expect him to select and describe one arrest only. Indeed, the face sheet of the questionnaire asked Juror 045882 to answer the questions "as completely and as honestly as you can." In addition, he was told that if he wished to discuss any answer privately, he should put a "P" next to that question (which he did not do), and that if he wanted to clarify any answer he would be given the opportunity during "in-court questioning". (1 First Supp. CT 202.)

By describing only his arrest in 1991, Juror 045882 gave a responsive but incomplete answer to Question 34. He deliberately withheld additional information about his criminal record in order to conceal his bias against petitioner. Furthermore, by giving an incomplete answer to Question 34, rather than not answering the question at all, Juror 045882 created the misleading impression he was complying with the court's order to answer the questionnaire truthfully.

Respondent's alternative explanation for Juror 045882's omission is that because the juror was issued a citation rather than taken to jail, he might not have believed he was

actually arrested, and for that reason did not include the prior misdemeanor conviction in his answer to Question 34. (Return at 21.) This contention too is based on unsupported speculation. Moreover, the circumstances set forth in the police report attached to the petition as Exhibit G make clear Juror 045882 would have understood he was arrested for fighting in a public place in 1995. According to the Bakersfield Police Department Special Report, on January 14, 1995 at approximately 5:45 p.m., uniformed security officer Chris Sims made a citizen's arrest of the juror for fighting at the Valley Plaza. Sims placed the juror in handcuffs and took him to a walkway off the main plaza. The juror was held in custody by the security officer until Bakersfield Police Officer R. Wimbish arrived approximately 45 minutes later. Officer Wimbish advised the juror of his constitutional rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 and then questioned him about the fight. Later, the officer issued the juror a citation, and the juror was released from custody after he signed it and received his copy. Under these circumstances, in which Juror 045882 was subjected to a citizen's arrest by a uniformed security officer, detained while handcuffed for at least 45 minutes, advised of his *Miranda* rights, and then interrogated by a police officer, the juror must have understood he had been arrested.

Respondent errs in relying on *People v. Majors* (1988) 18 Cal.4th 385, 418 and *People v. Kelly*, *supra*, 185 Cal.App.3d 118 as authority for finding that Question 34 was too ambiguous to have been correctly understood by Juror 045882. In these cases, unlike

petitioner's, the trial court held an evidentiary hearing in which the juror provided an innocent explanation for the failure to disclose relevant information. In petitioner's case, there has not been an evidentiary hearing and Juror 045882 has never said he did not fully understand Question 34.

In *Majors*, the juror responded "no" to the question "Do you know anyone whom you believe to be a drug user or seller." (*People v. Majors*, *supra*, 18 Cal.4th at p. 418.) The juror did not disclose that his wife had sold cocaine when she was a teenager, before he knew her. At the evidentiary hearing, the juror explained that he withheld the information about his wife's prior involvement in selling drugs because he understood the question as asking only for his knowledge of persons presently using or selling drugs. (*Id.* at p. 419.) This Court found that the juror's interpretation of the question was not erroneous since the question "was clearly phrased in the present tense," and therefore there was no misconduct. (*Id.* at pl. 420.)

In *People v. Kelly*, *supra*, 185 Cal.App.3d 118, as previously discussed, the juror failed to reveal during voir dire that when she was young a step-uncle suggested that they both undress. The trial court held an evidentiary hearing, at which the juror testified. Although the juror did not claim her omission was the result of any ambiguity in the questions posed to her, the Court of Appeal found that the juror "was not asked the type of questions necessary to elicit the information which was later revealed." (*Id.* at p. 126.) In fact, "neither the court nor counsel asked if any of the jurors had ever been victims of a

child molestation." (*Id.* at p. 121.) Accordingly, the Court of Appeal held that the juror did not intentionally withhold relevant information during voir dire.

The differences between petitioner's case and *Majors* and *Kelly* are striking. As already pointed out, Juror 045882 has not testified at an evidentiary hearing regarding his understanding of the questions asked of him during jury selection. In addition, unlike in *Kelly*, Juror 045882 was asked a direct question about whether he had ever been arrested, and if so, the outcome of any arrest. Finally, unlike in *Majors*, the question asked of the juror did not call for information limited to a certain time period. Juror 045882 was clearly asked to explain the circumstances of *all* prior arrests, regardless of when they occurred.

Significantly, Juror 045882 was a high school graduate, employed part-time as a utility clerk, whose responsibilities included working with customers. English was his native language. (1 First Supp. CT 204, 207 There was no reason for him to have any uncertainty regarding the meaning of Question 34. The only reasonable inference is that Juror 045882 was aware of the information sought by Question 34, and deliberately concealed it by giving a false answer.

Respondent next contends that Juror 045882's failure to respond to Question 39 was not a factual misrepresentation since the question merely asked for the juror's opinion regarding how his prior arrests were handled by the law enforcement and judicial systems. (Return at p. 22.) Petitioner agrees that the juror's failure to answer Question

39, considered by itself, does not amount to an intentional concealment of his prior misdemeanor conviction, but respondent misses the point regarding the significance of the juror's silence. Question 39 was one of several opportunities the juror had to inform the court and counsel about his criminal record. At each and every opportunity – on questions 34, 39, 53 and 54 of the questionnaire and during voir dire when the juror discussed his prior arrest in 1991 – he failed to disclose he had been arrested, convicted and sentenced to probation for fighting in public in 1995.

With regard to Question 54, respondent attempts to minimize the significance of Juror 045882's negative answer. (Return at p. 22.) The question asked the juror if he "ever had any contact with law enforcement or the criminal justice system other than that previously mentioned in this questionnaire[.]" (1 First Supp. CT 216.) If respondent's speculation is correct that Juror 045882 construed Question 34 as asking for information about only one prior arrest and/or did not understand he was actually arrested for fighting in public in 1995, the juror should have answered "yes" to Question 54, assuming he was attempting to being truthful. His conviction and probation sentence would have been a "contact with law enforcement or the criminal justice system" not "previously mentioned by" him in the questionnaire. Juror 045882, however, made no reference to the misdemeanor conviction in his answer to Question 54. Instead, he denied having any other contacts with law enforcement, thereby furthering the concealment of his criminal record.

Respondent attempts to explain the juror's negative response to Question 54 by referring to the answer given to the preceding question. Question 53 asked: "Other than jury service, have you even been in a courtroom for any reason?" Juror 045882 responded "yes," and offered a one word explanation: "tickets." (1 First Supp. CT 216.) According to respondent's speculation, "it is certainly possible" that the juror viewed his citation for the misdemeanor offense as a "ticket" and was thus making reference to the conviction in his answer to Question 53. (Return at p. 22.) This explanation is not plausible. The only reasonable explanation for the juror's answer is that he was referring to prior appearances in court for traffic tickets. A traffic citation is commonly referred to as a "ticket" in everyday language. That is not true of a misdemeanor conviction that results in a three-year probation sentence, even when the defendant was released on a citation after being arrested and held in custody for a short period of time.

Respondent exceeds the bounds of credibility in his effort to construe Juror 045882's answers to the questionnaire in a way that is consistent with an inadvertent omission of his misdemeanor conviction. Moreover, if in fact Juror 045882 was referring to his criminal conviction and probation sentence when he answered "yes" and "tickets" to Question 53, his answer was intentionally evasive. He certainly would have known that his cryptic answer would not be understood by the trial court and counsel as a reference to his prior conviction for a misdemeanor criminal offense. The juror's goal of falsely presenting himself as impartial and thereby obtaining a seat on the jury was

accomplished by not putting the trial court and the attorneys on specific notice of his criminal conviction.

An argument repeatedly made by respondent is that "petitioner has not made a prima facie case of juror misconduct." (Return at 23, 49.) This argument reveals respondent's misunderstanding of the present posture of the case. By issuing an order to show cause, this Court has already determined that petitioner made a prima facie showing of juror misconduct. If he had not, the petition would have been summarily denied. "If no prima facie case for relief is stated, the court will summarily deny the petition. If, however, the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an OSC." (*People v. Duvall*, *supra*, 9 Cal.4th at p. 475.)

Here, the totality of the circumstances indicates that Juror 045882 either deliberately withheld information or gave intentionally evasive answers regarding his prior criminal conviction and probation status. Respondent contends that even assuming arguendo Juror 045882 "was deliberately dishonest in his response to the questionnaire, nothing about the juror's answer bespeaks a lack of partiality." (Return at p. 23.) This argument ignores this Court's prior statements regarding jurors who are untruthful in voir dire. "A juror who conceals relevant facts or gives false answers during voir dire examination . . . undermines the jury selection process and commits misconduct." (*In re Hitchings* (1993) 6 Cal.4th 97, 110; *see also People v. Wilson* (2008) 44 Cal.4th 758, 823; *People v. Blackwell*, *supra*, 191 Cal.App.3d 925, 929.) Moreover, the concealment of

material information by a juror "establish[es] substantial grounds for inferring that [the juror] was biased . . . despite . . . protestations to the contrary." (*People v. Price* (1991) 1 Cal.4th 324, 400-401.)

The information concealed by Juror 045882 was certainly material to the selection of a fair and impartial jury. His status as a probationer in Kern County gave him a motive to curry favor with the Kern County District Attorney, who would be prosecuting him for any probation violations. He may well have believed that by helping to convict petitioner of a capital murder he would receive in return a favor from the District Attorney if he had future problems complying with his probation conditions. He may also have feared that a vote for the defense would lead the prosecution to retaliate by scrutinizing him more carefully for possible violations of his probation. In a related context, it is well settled that a prosecution witness serving a probation sentence has a "potential bias or prejudice based on concern of jeopardy to his probation." (*People v. Espinoza* (1977) 73 Cal.App.3d 287, 291, citing *Davis v. Alaska* (415 U.S. 308, 311; *People v. Lent* (1975) 15 Cal.3d 481, 485.) The same "potential bias or prejudice" exists when a probationer serves as a juror in a criminal trial.

Respondent also argues that Juror 045882's enthusiasm to be a juror and his strong support for the death penalty were not unlike several other jurors who were selected for the trial. Therefore, according to respondent, Juror 045882 is indistinguishable from other jurors whom petitioner has not claimed were biased. (Return at pp. 24-25.) Juror

045882's circumstances, however, were not at all comparable to those of the other jurors. Although other jurors were "very interested in serving on the jury" (Juror 042289 [1 First Supp. CT 129]), "glad to do my 'duty'" but not "excited about it" (Juror 042206 [1 First Supp. CT 190], and thought "it would be an interesting experience" (Juror 046189 [1 First Supp. CT 230]), none went so far as to view jury service in petitioner's case as a "great chance for" themselves as Juror 045882 did (1 First Supp. CT 210). Only Juror 045882 considered jury service to be an opportunity to gain a benefit for himself. In addition, while other jurors were enthusiastic about serving on the jury and some supported the death penalty, only Juror 045882 was both eager to be on the jury and a death penalty supporter, and also was serving a misdemeanor probation sentence at the time of the trial that he failed to disclose during voir dire. Thus, respondent is incorrect in asserting that Juror 045882 was similarly situated to other jurors who served on petitioner's jury.

C. As a Result of His Prior Misdemeanor Conviction and Probation Sentence Juror 045882 Was Biased Against Petitioner; Misconduct Therefore Occurred Regardless of the Reason for the Juror's Failure to Disclose His Criminal Record During Voir Dire

In his return, respondent offers three inconsistent interpretations of Juror 045882's answers regarding his prior arrests. Respondent claims the juror "in fact answered the questions truthfully" (p. 23), his "omission of his misdemeanor conviction was an instance of . . . honest forgetfulness (p. 18), and "the juror omitted the misdemeanor conviction out of embarrassment or reluctance to reveal his previous transgressions in

open court"[3] (p. 23). Respondent further contends that under any of these scenarios, the juror did not commit misconduct and petitioner is not entitled to relief. (Return at pp. 18, 23.)

Respondent's argument that a juror's inadvertent failure to disclose material information can never be misconduct is contrary to existing case law. Indeed, two decisions of the Court of Appeal have held that a juror's concealment of relevant information during voir dire need not be intentional in order for a constitutional violation to occur. (*People v. Diaz* (1984) 152 Cal.App.3d 926, 934 ["A juror's concealment, regardless whether intentional, during voir dire examination of a state of mind which would prevent a person from acting impartially is misconduct constituting an irregularity for which new trial may be granted"]; *People v. Blackwell, supra*, 191 Cal.App.3d at p. 929 ["Intentional concealment of relevant facts or the giving of false answers by a juror during the voir dire examination constitutes misconduct"]; *but see People v. Kelly* (1986) 185 Cal.App.3d 118, 125 and *People v. Jackson* (1985) 168 Cal.App.3d 700, 704-706.)

This Court has twice acknowledged that a split exists in the decisions of the Court of Appeal, but has not had occasion to resolve "whether juror concealment must be intentional before it constitutes misconduct." (*In re Hitchings, supra*, 6 Cal.4th 87, 114-116 and fn. 5; *People v. Carter* (2005) 36 Cal.4th 1114, 1208.) However, even those

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[3]Respondent is incorrect regarding the juror having to give answers about his record in open court. The questionnaire was completed in private by the juror, and his voir dire was conducted outside the presence of other jurors.

cases that have either questioned whether honest voir dire mistakes can form the basis for impeachment of a verdict have acknowledged that "juror misconduct may still be found where bias is clearly apparent from the record." (*People v. San Nicolas* (2004) 34 Cal.4th 614, 646, citing *People v. McPeters* (1992) 2 Cal.4th 1148, 1175.) An "honest mistake on voir dire" can result in the reversal of a judgment if there is "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, the record clearly reveals evidence of Juror 045882's hidden bias against petitioner. As already explained, the juror's undisclosed status as a probationer suggested he had a substantial motive to favor the prosecution. That indication of bias was corroborated by his questionnaire answers, revealing he was a strong supporter of the death penalty, and his view that being on the jury was a "great chance" for him. Why did Juror 045882 believe jury service was a "great chance"? Because voting in favor of the prosecution could lead to future leniency in the resolution of any issues relating to his probation. Because Juror 045882 was biased against petitioner, misconduct occurred regardless of the juror's state of mind regarding his failure to disclose his prior misdemeanor conviction and probation sentence.

D. The Presumption of Bias Resulting from Juror 045882's Misconduct Is Not Rebutted by a Review of the Record

Respondent correctly describes the test for determining whether juror misconduct requires reversal of a judgment, but wrongly claims the record reveals no substantial

likelihood that Juror 045882 was biased. (Return at pp. 25-28.) It is well settled that "[t]he defendant need not affirmatively prove the jury's deliberations were improperly affected by the misconduct, for that cannot be done under Evidence Code section 1150 [excluding evidence of juror's thought processes in reaching a verdict]." (*People v. Carpenter* (1995) 9 Cal.4th 634, 652.) Instead, misconduct by a juror gives rise to a "rebuttable presumption of prejudice." (*Ibid.*)

This presumption will prevail unless there is "an affirmative evidentiary showing that prejudice does not exist" or "a reviewing court's examination of the entire record" determines there is no "reasonable probability of actual harm to the complaining party [resulting from the misconduct]." (*Id.* at p. 653, internal quotations and citations omitted.) In other words, if "there is a substantial likelihood of juror bias," the judgment must be reversed. (*People v. Bennett* (2009) 45 Cal.4th 577, 626.) Such bias will be found if: (1) "the misconduct is inherently and substantially likely to have influenced the jury," or (2) "after a review of the totality of the circumstances, a substantial likelihood of bias arose." (*Id.* at pp. 626-627.)

Significantly, "the test for determining whether juror misconduct likely resulted in actual bias is 'different from, and indeed less tolerant than,' normal harmless-error analysis, for if it appears substantially likely that a juror is actually biased, we must set aside the verdict, no matter how convinced we might be that an unbiased jury would have reached the same verdict." (*People v. Carpenter*, *supra*, 9 Cal.4th at p. 654, quoting

People v. Marshall (1990) 50 Cal.3d 907, 951.) Juror misconduct involving the concealment of material information on voir dire "'requires a new trial without a showing of actual prejudice.'" (*People v. Carter*, *supra*, 36 Cal.4th at p. 1208, quoting *Dyer v. Calderon*, *supra*, 151 F.3d 970, 973, fn. 2.)

In addition, when, as in this case, the misconduct does not involve the receipt of extraneous information, "[t]he sufficiency of the evidence of guilt is not part of the [prejudice] inquiry." (*People v. Green*, *supra*, 31 Cal.App.4th at p. 1019.) The factors to be considered include "the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued." (*Ibid.*) Finally, this Court "has made clear that even one biased juror requires overturning the verdict." (*People v. Carpenter*, *supra*, 9 Cal.4th at p. 652.) A defendant is "entitled to be tried by 12, not 11, impartial and unprejudiced jurors." (*Ibid*, internal quotations and citations omitted.)

Respondent claims that "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." (Return at p. 28, citing *People v. Blackwell*, *supra*, 191 Cal.App.3d at pp. 927-928; *In re Hitchings*, *supra*, 6 Cal.4th at pp. 118, 119-120; *People v. Diaz*, *supra*, 152 Cal.Appl3d 926, 929; *People v. Castaldia* (1959) 51 Cal.2d 569, 570, 573; *Dyer v. Calderon*, *supra*, 151 F.3d at p. 972.) Respondent is incorrect. The information Juror 045882 failed to disclose about his

background was no less potentially prejudicial than matters withheld in cases in which judgments were reversed. Moreover, comparison of petitioner's case with the decisions discussed by respondent is not particularly meaningful since those cases did not establish minimum prerequisites for a finding of substantial likelihood of juror bias. In addition, in most of the decisions cited by respondent evidentiary hearings were held in which the jurors who concealed information explained their conduct under oath.[4] Here, petitioner has not had a similar opportunity to further develop the factual bases of his claim. An evidentiary hearing is likely to reveal even more evidence of Juror 045882's bias.

In any event, on the present record there is a substantial likelihood that Juror 045582 was biased against petitioner. As this Court and other courts have repeatedly stated, when, as in petitioner's case, a juror conceals material facts, "that information establish[es] substantial grounds for inferring that [the juror] was biased . . . despite . . . protestations to the contrary." (*People v. Price*, *supra*, 1 Cal.4th at pp. 400-401. *See also People v. Tate* (2010) 49 Cal.4th 635, 672 ["A prospective juror's misstatement or concealment on voir dire of a material fact by itself undermines the selection and

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[4]In *Hitchings*, this Court ordered an evidentiary hearing at which the juror testified. (*In re Hitchings*, *supra*, 6 Cal.4th at pp. 103-104.) The federal district court held an evidentiary hearing in connection with the habeas corpus proceedings in *Dyer*. (*Dyer v. Calderon*, *supra*, 151 F.3d at p. 973.) In *Diaz*, an evidentiary hearing was held during the course of the defendant's trial. (*People v. Diaz*, *supra*, 152 Cal.App.3d at p. 931.) No evidentiary hearing was held in *Blackwell* or *Castaldia*, but undisputed, sworn declarations from the jurors were submitted to the trial courts. (*People v. Blackwell*, *supra*, 191 Cal.App.3d at p. 928; *People v. Castaldia*, 51 Cal.2d 569 at p. 572.)

empanelment of unbiased jurors"]; (*People v. Morris*, *supra*, 53 Cal.3d at pp. 183-184 ["Concealment by a potential juror constitutes implied bias justifying disqualification"]; *People v. Farris* (1977) 66 Cal.App.3d 376, 387 ["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"]; *Dyer v. Calderon*, *supra*, 151 F.3d at p. 979 [juror's "lies give rise to an inference of implied bias on her part"].)

In *Dyer*, the Ninth Circuit explained that a juror who lied repeatedly about his background may have done so

> because of some personal bias against the defendant which [he] managed to hide from the court. But a perjured juror is unfit to serve even in the absence of such vindictive bias. If a juror treats with contempt the court's admonition to answer voir dire questions truthfully, she can be expected to treat her responsibilities as a juror - to listen to the evidence, not to consider extrinsic facts, to follow the judge's instructions - with equal scorn. Moreover, a juror who tells major lies creates a serious conundrum for the fact-finding process. How can someone who herself does not comply with the duty to tell the truth stand in judgment of other people's veracity? Having committed perjury, she may believe that the witnesses also feel no obligation to tell the truth and decide the case based on her prejudices rather than the testimony.

(*Id.*, at p. 983; see also *Green v. White*, *supra*, 232 F.3d 671, 677.)

Respondent cites language from *Dyer* for the proposition that many irregularities during jury selection will not prejudice the defendant's right to a fair trial. (Return at 32.) Petitioner does not dispute respondent's point, but *Dyer*'s examples of nonprejudicial juror misconduct pale in comparison to Juror 045882's concealment of his criminal

record. The examples described in *Dyer* were "a distracted juror [who] fail[s] to mention a magazine he subscribes to," and "[a]n embarrassed juror [who] exaggerate[s] the importance of his job." (*Dyer v. Calderon, supra*, 151 F.3d at p. 984.) The present case involved conduct far more egregious and far more indicative of bias than the scenarios discussed in *Dyer*.

The information about which Juror 045882 lied was not some minor fact regarding his employment or reading material. The juror concealed that he was currently serving a probation sentence, a fact strongly suggesting a motive to favor the prosecution. This lie, coupled with his eagerness to serve on the jury ("a great chance for" him) and his strong support of the death penalty, necessarily leads to the conclusion he was attempting "to finagle a seat on the jury so [he] could lobby for a conviction and death sentence." (*Dyer v. Calderon, supra*, 151 F.3d at p. 981.)

Respondent also argues that cases in which appellate courts have affirmed the mid-trial dismissal of jurors who were found to have concealed material information are distinguishable from petitioner's case "based on the different procedural posture." According to respondent, different standards exist for the mid-trial dismissal of a biased juror and for the post-conviction reversal based on juror bias. (Return at pp. 33-37, discussing *People v. Johnson* (1993) 6 Cal.4th 1, 21; *People v. Price*, *supra*, 1 Cal.4th at pp. 399-400; *People v. Morris*, 53 Cal.3d at pp. 183-184; *People v. Farris*, *supra*, 66 Cal.App.3d at p. 385.) Even if that is correct, the principle articulated in the cases

affirming the mid-trial dismissal of a juror who lied during voir dire is equally applicable to petitioner's case. That principle – that a juror's deliberate concealment of material information during voir is strong evidence of the juror's bias – is no less valid when the issue of juror bias arises after the conviction.

Nor is respondent correct that the cases upholding the mid-trial dismissal of a juror who concealed relevant material involved more egregious conduct than in petitioner's case. Respondent continues to overlook the significance of Juror 045882's undisclosed probation status, which gave him a strong motive to favor the prosecution. The information concealed by Juror 045882 was thus inherently prejudicial, and certainly more prejudicial than, for example, the circumstances in *Johnson*. In that case, the juror's mid-trial dismissal was upheld on the grounds that he had failed to disclose two prior arrests that did not even result in charges being filed and he had fallen asleep during the trial. (*People v. Johnson*, *supra*, 6 Cal.4th at p. 22.)

Respondent emphasizes that petitioner has not questioned the impartiality of other jurors at petitioner's trial who also had "misdemeanor offenses in their backgrounds." (Return at p. 37.) Respondent's point appears to be that petitioner's concern regarding Juror 045882 is not sincere since he has not complained about the other jurors with criminal records. Petitioner, however, has good reason for singling out Juror 045882. He was not similarly situated to the other jurors with "misdemeanor offenses in their backgrounds." Unlike these other jurors, Juror 045882 gave false answers to the

questions about his criminal background during voir dire and concealed his misdemeanor conviction. Moreover, Juror 05882's lies were coupled with a strong desire to serve on the jury and strong support for imposition of the death penalty.

Respondent next reviews cases in which judgments were not reversed despite claims that jurors had concealed material information during voir dire. According to respondent, "in general, the facts not disclosed by the jurors, even in these cases held far more potential for prejudice than in the present case." (Return at p. 38.) Overlooked by respondent is that in each of these cases the trial court held an evidentiary hearing, resulting in a finding that the juror's failure to disclose information was unintentional and that the juror was not biased. (*People v. Green*, *supra*, 31 Cal.App.4th at pp. 1019-1020 ["trial court seems to have concluded the concealment was not deliberate" and expressly found that the juror had no actual bias against the defendant]; *People v. Resendez*, *supra*, 260 Cal.App.2d at pp. 10-11 [trial court found juror was not biased and her explanation she forgot about prior experience as victim of sexual battery was credible]; *People v. Kelly*, *supra*, 185 Cal.App.3d at pp. 120, 126 [juror's failure to disclose improper sexual advances made by a step-uncle was not deliberate because juror did not believe she was the victim of a crime and was not specifically asked any questions that would have elicited such information]; *People v. San Nicolas*, *supra*, 34 Cal.4th at pp. 643-644 [trial court concluded that juror's failure to disclose arrest and prior experience as victim was "inadvertent or unintentional" and there was no resulting bias].)

The absence of an evidentiary hearing with credible testimony from Juror 045882 that he forgot about his misdemeanor conviction distinguishes petitioner's case from those discussed by respondent. Moreover, none of the jurors at issue in those cases concealed the fact they were on probation while serving on the jury. Despite respondent's protestations to the contrary, Juror 04588's status as a probationer does provide a basis for concluding he harbored undisclosed juror bias against petitioner. This is true even though the conviction for which he was on probation was a misdemeanor and bore no resemblance to the murders with which petitioner was charged.

Moreover, respondent's reliance on *People v. Carter*, *supra*, 46 Cal.4th 1114 is misplaced. In *Carter*, the defendant's charges included burglary, rape and murder. The juror questionnaire asked the prospective jurors if they had ever been in a situation where they feared being hurt or killed as a result of violence of any sort. Juror K answered, "No." (*Id.* at p. 1206.) The juror failed to disclose that approximately 14 years earlier when she was first living by herself, she was afraid of someone breaking in to her apartment to rape and murder her. One night she was unable to sleep and put a knife under her mattress so she could defend herself from a potential assailant. (*Id.* at p. 1207.)

This Court found that Juror K.'s failure to answer the question more completely was not misconduct, and that even if it was, the presumption of prejudice was rebutted by the juror's testimony at the hearing on the motion for a new trial. Juror K. explained she had not thought about the incident with the knife under her mattress "at all for the last 12

years." In addition, the circumstances that the incident was "very brief" and occurred more than a decade earlier, and that the juror "realized because she had been burglarized that 'everyone has feares' [*sic*], established that the omitted information was immaterial to her overall qualifications or suitability to serve as a juror." (*Id.* at pp. 1208-1209.)

Here, in contrast, the information omitted by Juror 045882 was material to his ability to be impartial. The probation sentence was not remote, the length of the probation term was significant (three years), and Juror 045882 was still on probation while serving on the jury. In addition, the juror has never said he forgot about his being on probation while serving on the jury and reaching a verdict. Under these circumstances, the presumption of prejudice resulting from Juror 045882's misconduct was not rebutted. Rather, the record demonstrates a substantial likelihood of juror bias.

E. The Petition Should Not Be Denied Without an Evidentiary Hearing

Respondent's final argument is that the petition should be dismissed without further proceedings because petitioner has failed to make out "a prima facie case of juror misconduct." (Return at p. 45.) As previously discussed, this argument displays a glaring lack of understanding of habeas corpus law. The question of whether petitioner alleged a prima facie case for relief was already answered in the affirmative by this Court. If no prima facie case for relief had been stated, this Court would have been required to summarily deny the petition. "If, however, the court finds the factual allegations, taken as true, establish a prima facie case for relief, the court will issue an OSC." (*People v.*

Duvall, supra, 9 Cal.4th at p. 475.) The issuance of an OSC by this Court "indicates the . . . court's *preliminary assessment* that the petitioner would be entitled to relief if his factual allegations are proved." (*Ibid*, italics in original.)

Respondent complains that the petition did not include a declaration from Juror 045882 proving he deliberately concealed his criminal record and was in fact biased. (Return at p. 46.) Respondent does not explain how petitioner was supposed to obtain such a declaration in light of the trial court's having granted *respondent*'s motion to prohibit the defense from having contact with any jurors who did not consent to such contact. The questionnaire returned to the trial court by Juror 045882's father stated that the juror, who was then incarcerated, did not want to be contacted by either party. Therefore, petitioner was, and still is, prohibited from speaking with Juror 045882 by the superior court's order.

Respondent further argues that petitioner should have been "require[ed] . . . to make an evidentiary showing of purposeful concealment and concomitant bias before granting an evidentiary hearing or other relief in the present case." (Return at p. 47.) Petitioner, however, is not required to present evidence, either in his petition or in this traverse, that will prove he is entitled to relief. His initial burden is only to plead facts that if proven to be true will entitle him to a reversal of the judgment. (*People v. Duvall, supra*, 9 Cal.4th.at p. 474.) If petitioner meets this burden, as this Court has found he has done by issuing an OSC, the question that next must be asked is whether respondent is

disputing the facts alleged. If there is a dispute as to material facts, this Court will order that an evidentiary hearing be held to determine the truth of the allegations. (*Id.* at p. 478..) At that hearing, petitioner will be required to prove his claim for relief.

Respondent adopts the bizarre position that petitioner's showing "by itself, is not sufficient to warrant relief such as an evidentiary hearing." (Return at p. 51.) An evidentiary is not "relief." It is a vehicle for determining the facts of what occurred. Given the current state of the record, one would have thought respondent would eagerly have sought an evidentiary hearing to attempt to counter the inference of bias and the presumption of prejudice.

Respondent additionally complains that petitioner should have raised his claim of juror misconduct during the trial or immediately thereafter. (Return at pp. 48.) The juror's prior record, however, was unknown to trial counsel at that time. It was not discovered until present counsel began investigating potential claims for a petition for writ of habeas corpus. Petitioner's failure to present a claim of misconduct that was unknown until recently does not bar him from seeking habeas corpus relief in this Court. Moreover, respondent's concern that jurors' memories may have faded or that jurors are now unavailable is purely speculative. Respondent provides no information regarding the unavailability of Juror 045882 or other jurors to testify at an evidentiary hearing.

Dire consequences are predicted if petitioner's claim is found to have merit because, according to respondent, "petitioner would infer misconduct from the bare fact

of an inaccuracy in a voir dire questionnaire." (Return at p. 48.) Respondent grossly mischaracterizes petitioner's claim for relief. Petitioner has not argued that *any* inaccuracy by a juror in responding to a question on voir dire is grounds for reversal of a judgment. Rather, petitioner's claim is that Juror 045882 intentionally concealed information that was highly relevant to his qualifications to be an impartial juror – his misdemeanor conviction and the fact that he was on probation at the time of trial. The information concealed by this juror indicated a substantial likelihood of his bias in favor of the prosecution. Thus, petitioner's claim of juror misconduct is not seeking to create new law that "is likely to result in many unwarranted reversals" in capital habeas claims, as respondent argues. (Return at p. 49.) Rather, the relief requested by petitioner is based on this Court's existing precedent regarding a defendant's right to be tried by an impartial jury. Respondent engages in hyperbole when he argues that if petitioner is granted relief "he 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." (Return at p. 51.)

Also hard to fathom is respondent's concern that holding an evidentiary hearing would have an adverse effect on jurors' willingness to serve and on the administration of justice as a whole. Respondent also minimizes the benefit to be derived from increased accuracy in jury verdicts or the removal of bias from the jury pool. (Return at p. 52.) A greater concern over the integrity and reliability of the process is appropriate in a case in

which the petitioner has been sentenced to death.

In sum, respondent advances no convincing argument this Court issued the OSC in error. At best, respondent disputes certain factual allegations made by petitioner which, if determined to be material, should result in the ordering of an evidentiary hearing by this Court.

IV.

CONCLUSION

Respondent disputes many of petitioner's allegations, but significantly does not dispute that Juror 045882 was in fact convicted of a misdemeanor offense on February 6, 1995, that he was on probation while serving as a trial juror, and that he did not disclose this information during voir dire. Juror 045882's criminal record and probation sentence, by itself, is substantial evidence he was actually biased against petitioner – that he voted to convict and sentence petitioner to death in order to earn good will with the prosecution in the event of his own future probation violation. Petitioner was thus denied his constitutional right to be tried by a fair and impartial jury pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Article I, section 16 of the California Constitution.[5]

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[5]A constitutional violation occurred even if Juror 045882's concealment of his criminal record was "inadvertent," as respondent claims, because the information withheld establishes the juror's actual bias. (*People v. San Nicolas*, *supra*, 34 Cal.4th at

In light of the violation of these constitutional rights[6], the petition for a writ of habeas corpus should be granted on the record before this Court. Alternatively, if this Court concludes there are material factual issues in dispute that must be resolved before petitioner's claim of juror misconduct can be decided, it should order an evidentiary hearing at which Juror 045882 can be questioned about his responses during jury selection.

V.

PRAYER FOR RELIEF

WHEREFORE, Petitioner respectfully requests that this Court:

1. Take judicial notice of the record on appeal in *People v. Robert Wesley Cowan* (No. S055415) and all pleadings filed therein, and all pleadings, files and exhibits filed in *In re Robert Wesley Cowan* (No. 158073) pursuant to Evidence Code sections 452(d)(1) and 459;

2. Issue a writ of habeas corpus to vacate the judgment imposed against petitioner, or alternatively refer the matter for an evidentiary hearing before a neutral

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p. 646; *In re Hamilton*, *supra*, 20 Cal.4th at p. 300.)

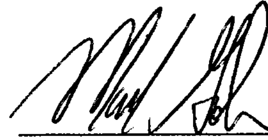
[6]Petitioner was also denied his right to due process of law pursuant to the Fourteenth Amendment of the United State Constitution and Article 1, section seven of the California Constitution and to a reliable verdict and sentence pursuant to the Eighth and Fourteenth Amendments of the United States Constitution and Article 1, section 17 of the California Constitution. To enforce these constitutional rights, petitioner must also have the statutory right to exercise peremptory challenges to prospective jurors whom petitioner believes cannot be fair and impartial (Code. Civ. Pro. § 231), and to challenge for cause any juror harboring actual or implied bias (Code. Civ. Pro. § 225).

finder of fact; and

3. Grant petitioner such further relief as the Court deems appropriate.

DATED: January 13, 2012

Respectfully submitted,



MARK GOLDROSEN
Attorney for Petitioner
Robert Wesley Cowan

CERTIFICATE OF COMPLIANCE

I certify that the attached TRAVERSE IN RESPONSE TO RETURN TO ORDER TO SHOW CAUSE uses 13 point Times New Roman font and contains 10,515 words.

DATED: January 13, 2012

Respectfully submitted,

MARK GOLDROSEN

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that I am over eighteen years of age and not a party to the within action; that my business address is 255 Kansas Street, Suite 340, San Francisco, California 94103; and that on January , 2012, I served a true copy of TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE on the parties below by depositing a true copy of the original thereof enclosed in a sealed envelope with postage fully prepaid, in the United States mail at San Francisco, California addressed as follow:

Lewis Martinez
Deputy Attorney General
2550 Mariposa Mall
Room 5090
Fresno, CA 93721

Michael Millman
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Robert Wesley Cowan
K-18501
California State Prison at San Quentin
San Quentin, CA 94964

Executed January 13, 2012, at San Francisco, California.

MARK GOLDROSEN