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

RESPONDENT'S REQUEST FOR ADOPTION OF REFEREE'S REPORT AND BRIEF ON THE MERITS

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RESPONDENT'S REQUEST FOR ADOPTION OF REFEREE'S REPORT AND BRIEF ON THE MERITS

INTRODUCTION

Petitioner claims Juror No. 045882 (the juror) was presumptively and actually biased against him because the juror had not disclosed during voir dire that he was on probation for misdemeanor fighting in public. (Pet. at pp. 20-23.) At the evidentiary hearing, however, the referee found that the juror did not disclose the conviction because he overlooked it; the nondisclosure was neither intentional nor deliberate; the nondisclosure was not indicative of bias; and the juror was not actually biased against petitioner. Respondent urges this Court to adopt the referee's findings in their entirety. Since the findings are fatal to petitioner's claim of juror misconduct, respondent further submits that this Court should deny the petition for writ of habeas corpus.

STATEMENT OF THE CASE

On June 6, 1996, a Kern County jury found petitioner 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.)[1] In a bifurcated proceeding on June 10, 1996,

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[1] "CT" refers to the Clerk's Transcript on Appeal; "RT" refers to the Reporter's Transcript on Appeal; "Pet" refers to petitioner's Petition for Writ of Habeas Corpus. "IR" refers to respondent's Informal Response to the Petition; "Ret" refers to respondent's Return on Order To Show Cause. Undesignated CT and RT references are to the trial in the underlying matter, *People v. Cowan* S055415. References preceded by "Habeas" refer to the habeas proceedings in the present case, *In re Cowan* S158073. Unless otherwise designated, "Exhibit" refers to petitioner's exhibits in his habeas corpus petition.

the trial court found true prior serious felony conviction 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 petitioner to death on count two, plus a consecutive term of life in prison without the possibility of parole. (6 CT 1615, 1644-1649.)

On November 9, 2007, petitioner filed the present petition. The petition claims, inter alia, that the juror 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.)

On March 5, 2008, respondent filed an informal response to the petition, asserting that petitioner had not made a prima facie showing of prejudicial misconduct because there was no substantial likelihood that the juror was biased against petitioner. (IR 54-60 & 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 petitioner is not entitled to relief on the ground of juror misconduct. Respondent filed a return on October 13, 2011. Petitioner filed a traverse on January 13, 2012.

On September 12, 2012, this Court issued an order directing the presiding judge of the Kern County Superior Court to appoint a referee to answer the following questions:

1) Is the juror the person who was cited for a misdemeanor violation of Penal Code section 415, subdivision (1),[2] on January 14, 1995, was charged with a violation of that section on January 18, 1995, pled guilty to that offense on February 6, 1995, and received a sentence of three years' probation and a fine of $225, as reflected in the court file in Bakersfield Municipal Court?

2) If so, what were the juror's reasons for failing to disclose these facts on his juror questionnaire and during voir dire at petitioner's trial?

3) Was the nondisclosure intentional and deliberate?

4) Considering the juror's reasons for failing to disclose these facts, was his nondisclosure of the above facts indicative of juror bias?

5) Was the juror actually biased against petitioner?

(Habeas 1 CT 138.)

On June 25, 2014, the referee held an evidentiary hearing at which the juror testified. (Habeas RT 102.)

On November 10, 2014, the referee issued the following findings:

1) The juror was the person who was charged with and later pled guilty to violating section 415, subdivision (1).

2) The juror did not believe the incident was significant when he filled out the questionnaire and later during voir dire. The juror was not arrested or handcuffed or booked, but was cited and released by law enforcement. He had forgotten all about the incident and it did not cross his mind during voir dire. The juror was not on formal probation and therefore did not have to check in with any probation officer and only had

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

to pay a fine and go. The incident did not stick out in the juror's mind, in contrast to the 1991 incident. The juror did not spend much time answering the questionnaire and did not give much detail in response to any of the questions on the questionnaire. The juror simply overlooked the misdemeanor conviction when he filled out the questionnaire.

3) The nondisclosure was not intentional or deliberate.

4) The nondisclosure was not indicative of juror bias.

5) The juror was not actually biased against petitioner.

On July 7, 2015, this Court invited objections to the referee's report and merits briefing. Respondent hereby submits the following brief in response to the Court's invitation.

FACTUAL BACKGROUND

The facts of petitioner's underlying crimes are not relevant to petitioner's present claim of juror misconduct. Accordingly, respondent focuses on the factual background pertaining to the juror and the jury voir dire.

According to the documents submitted by petitioner, the juror and another person engaged in a fist fight in a mall on January 14, 1995. (Petitioner's Exhibit G at p. 76.) A Bakersfield police officer cited and released the juror. The officer arrested the other combatant. (Petitioner's Exhibit G at pp. 75-77.)

Three weeks later, on February 6, 1995, the juror pleaded guilty to a misdemeanor violation of section 415, subdivision (1), fighting or challenging another person to fight in a public place, 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.)

Over a year later, the juror completed a twenty-page questionnaire as part of jury selection in the present case. The questionnaire 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, that the charges had later been dropped, and that he had been in court for "tickets." The juror also answered 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[.]" (Petitioner's Exhibit E at pp. 43, 47-48.)

The juror 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.) The juror 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 pp. 43-44.) Finally, the juror 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.)

When asked whether he or a close relative had been the victim of a crime, the juror responded, "My brother was just in here not too long for assault and battery." (4 RT 1040.) The juror 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.)

The juror believed that his brother had received too severe a sentence after the purported victim in his brother's case tried to stab his brother with a knife and accidentally stabbed himself instead. (4 RT 1042-43.) The juror 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.)[3] 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

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

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 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.)

The testimony of the juror during the evidentiary hearing revealed the following:

In 1991, when the juror was still a juvenile, he and his brother were involved in a "conflict" with his brother's ex-girlfriend's new boyfriend. (Habeas RT 118-119.) The juror and his brother were arrested, and, so far as the juror could recall, he stayed overnight in a juvenile facility. (Habeas RT 119.) Charges against the juror were later dropped. (Habeas RT 119.) At the time the juror filled out his jury questionnaire, this was the only incident in which he had been taken to a facility and booked. (Habeas RT 170.) The juror agreed that the incident was very memorable: "It's something that happened to me in my childhood of life where I felt I shouldn't have been taken in for . . . I didn't do nothing." (Habeas RT 169.)

On another occasion, a person attempted to stab the juror's brother and accidentally wound up stabbing himself. The juror's brother was convicted of a crime and spent six months in custody. The juror believed that his brother had been wrongfully convicted. (Habeas RT 126.)

In January of 1995, the juror engaged in a fight at a shopping mall, for which he pleaded guilty on February 6, 1995, to public fighting, and for

which was placed on probation for three years. (Exhibit G; Habeas RT 135, 180.) The juror testified at the present hearing that he was in two fights at the mall, but this was the only one that led to him being convicted and placed on probation. (Habeas RT 180.)

The juror stated that the incident occurred when an ex-boyfriend of a female friend "disrespected" the juror. (Habeas RT 135-136.) The juror later elaborated that the female friend was the mother of his stepdaughter. (Habeas RT 154-155.) Mall security personnel broke up the fight and detained the two male combatants. (Habeas RT 137.) According to the juror's testimony, the other person was handcuffed, but the juror was not. (Habeas RT 137, 155.) The juror testified he was not read his *Miranda*[4] rights and was not taken "downtown" or booked into jail. (Habeas RT 157, 166-167.) In the juror's view, he was not arrested after the incident. (Habeas RT 166.) Security guards informed the juror he would not be allowed back in the mall. (Habeas RT 156.)

The juror vaguely recalled coming to court after the incident, and believed he was in court when he signed the change of plea form. (Habeas RT 138-139.) His plea was completed in a brief court appearance, he did not have to check in with anyone while on probation, and he only had to "pay this fine and be on your way." (Habeas RT 157-58, 171-173, 183.) After his change of plea, someone contacted him to tell him, essentially, to pay his fine and stay out of trouble. (Habeas RT 172.) Outside of this brief contact, he did not have any interaction with probation officers or anyone else regarding his conviction. (Habeas RT 171-172.) The juror testified that he had "probably" been upset by the conviction because he was

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[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

convicted for "standing up for something that I believed in" but he did not believe he was wrongly convicted. (Habeas RT 139-140.) He explained, "I could have walked away." (Habeas RT 139-140.) The juror did not recall for how long he was placed on probation, even after reviewing the probation documents. (Habeas RT 34.) He did not recall whether he was on probation at the time of his jury service or whether his probation terminated early. (Habeas RT 134-135.)

The juror had never been involved in jury selection before his participation in the present case. (Habeas RT 160.) He agreed that the process was somewhat intimidating, but he also found it "interesting[.]" (Habeas RT 161, 163-164.)

The questionnaire the juror completed during the voir dire of petitioner's capital case was 20 pages long. (Habeas RT 161.) The juror agreed that he scanned the questionnaire, tried to "mark the right answer yes or no" and did not give much detail. (Habeas RT 164.) He stated "I'm real quick and short when it comes to answering things like—you know, to answering things. . . ." (Habeas RT 121-122.) He also agreed that some of the questions were vague and hard to understand. (Habeas RT 165.)

The juror testified that in 1996 he did not have any bias towards either petitioner or the prosecution, and that he came to the process with an open mind. (Habeas RT 164, 172-173, 182.) He did not try to hide anything when he filled out the questionnaire. (Habeas RT 165.) He did not fill out the questionnaire to increase his chances of being selected as a juror. (Habeas RT 172.)

The juror stated with regard to his conviction, "I put a lot of stuff behind me. . . . I don't dwell on things." (Habeas RT 137.) By the time of his jury service, he had put the shopping mall fight behind him; he forgot

all about it until he saw the documents regarding the incident at the evidentiary hearing. (Habeas RT 171.) He was doing well by the time of his jury service; he paid his fines; and he had not been in any new trouble. (Habeas RT 183.) The incident did not cross his mind at all while he filled out the questionnaire. (Habeas RT 177-178.)

The juror thought it was "a great opportunity to serve on a jury, to do something like that, you know." (Habeas RT 150.) His probation status, "didn't even cross my mind at the time." (Habeas RT 150.) In his subsequent contacts with the criminal justice system, the juror did not mention, or ask his attorneys to mention, that he had been a juror in the present case. (Habeas RT 149-150.) The juror admitted he suffered a 2003 conviction of felony assault with a firearm with an enhancement for personally using the firearm. (Habeas RT 148.)

ARGUMENT

I. THIS COURT SHOULD ADOPT THE REFEREE'S FINDINGS AND DENY THE PETITION

A. Referee's Findings Should Be Adopted By This Court

In evaluating a petitioner's claim, this Court gives great weight to the referee's findings that are supported by substantial evidence, especially those findings involving credibility determinations. (*In re Thomas* (2006) 37 Cal.4th 1249, 1256.)

> The central reason for referring a habeas corpus claim for an evidentiary hearing is to obtain credibility determinations [citation]; consequently, we give special deference to the referee on factual questions "requiring resolution of testimonial conflicts and assessment of witnesses' credibility, because the referee has the opportunity to observe the witnesses' demeanor and manner of testifying" [citation].

(Ibid.) However, this Court independently reviews prior testimony and all mixed questions of law and fact. (*Ibid.*)

Here, to the extent the referee's findings depend on credibility determinations of the juror's testimony at the evidentiary hearing, they should be given great weight. As discussed below, the findings are supported by substantial evidence, and should be upheld.

Finding 1: The referee found that the juror had been previously convicted of misdemeanor fighting in public. (Report of the Referee at p. 2.) The juror's testimony and the exhibits submitted at the evidentiary hearing sufficiently support the referee's finding. (Habeas RT 131-140.) Accordingly it may be upheld by this Court.

Finding 2: The referee made the following findings regarding the reasons why the juror did not disclose his misdemeanor conviction:

> The juror did not believe the incident was significant when he filled out the questionnaire and later during voir dire. The juror was not arrested or handcuffed or booked, but was cited and released by law enforcement. He had forgotten all about the incident and it did not cross his mind during voir dire. The juror was not on formal probation and therefore did not have to check in with any probation officer and only had to pay a fine and go.
>
> This incident did not stick out in the juror's mind, which was in contrast to the 1991 incident where he believed he had unjustifiably been taken to juvenile hall, booked and detained overnight, and where he believed his brother had been wrongly arrested.
>
> The juror did not spend much time answering the questionnaire and did not give much detail in response to any of the questions on the questionnaire. The juror simply overlooked the misdemeanor conviction when he filled out the questionnaire.

(Report of Referee at pp. 2-3, record citations omitted.)

The juror's testimony at the hearing supports the referee's findings. Indeed, the juror testified that the misdemeanor conviction "[d]idn't cross

[his] mind" when he filled out the jury questionnaire. (Habeas RT 143, 171.) Moreover, it was reasonable for the referee to find that the juror's explanation was sincere because the misdemeanor incident had occurred 14 months before voir dire, the juror had not been handcuffed or booked into jail, he did not have to check in with anyone while on probation, and he only had to "pay this fine and be on your way." (Habeas RT 155, 158-159, 166-167, 172, 183.)

By contrast, the 1991 incident that the juror disclosed on his questionnaire was very memorable because, as the juror explained, "It's something that happened to me in my childhood of life where I felt I shouldn't have been taken for. I mean, I didn't do nothing." (Habeas RT 169.) He had been handcuffed, put into a police car, and taken to juvenile hall. (Habeas RT 170.) Accordingly, the referee's finding that the juror had simply overlooked his misdemeanor conviction when he filled out the questionnaire is amply supported by the juror's testimony at the evidentiary hearing.

Finding 3: The referee found that the nondisclosure was not intentional and deliberate. (Report of the Referee at p. 3.) The juror's testimony at the evidentiary hearing supports the referee's finding. As previously stated, the incident did not cross the juror's mind when he filled out the questionnaire. (Habeas RT 143, 171.) The juror testified that he had nothing to hide and, had he remembered the incident, he would have disclosed it. (Habeas RT 146-147.) Moreover, the juror disclosed the 1991 incident and was candid about his brother's conviction and his views of that conviction. (Petitioner's Exhibit E at pp. 43, 47.) Accordingly, the referee's finding that the nondisclosure was not intentional and deliberate was amply supported by the juror's testimony, and should be upheld by this Court.

Finding 4: The referee found that the juror's nondisclosure was not indicative of juror bias. (Report of the Referee at p. 3.) The finding was supported by the juror's testimony and the other evidence. The juror disclosed the 1991 incident, in which he believed his brother had been wrongfully convicted, which was far more probative of the existence or non-existence of bias than the misdemeanor convicted for which the juror (in his view) was not even arrested and in which the juror conceded he was guilty. (Habeas RT 166, 169; Pet. Exhibit E at p. 47; Pet. Exhibit F at pp. 61-62.) The fact that the juror disclosed the 1991 incident, and his testimony that he simply overlooked his misdemeanor conviction, indicates the juror acted in good faith when he filled out his questionnaire, which supports the referee's finding that the juror's nondisclosure was not indicative of juror bias. (See *In re Hamilton* (1999) 20 Cal.4th 273, 300 [juror's good faith when answering voir dire questions is the most significant indicator that there is no bias].) Accordingly the referee's finding is amply supported by the record, and should be upheld.

Finding 5: The referee found that the juror was not actually biased against petitioner. (Report of the Referee at p. 3.) This finding was supported by the juror's testimony. The juror testified that he "came with an open mind" and did not have any bias toward either party at the time. (Habeas RT 164.) He testified that he had nothing to hide, and that he did not intentionally fail to disclose his conviction and the fact that he was on probation. (Habeas RT 123, 146-147.)

The finding is also supported by the juror's answers at voir dire. He stated that he would not hold the outcome of his brother's case against the prosecution. (4 RT 1043.) He stated he understood that his role was to determine whether the defendant was guilty and not to "go out looking" for

the guilty person, and he stated that 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, 1382.) Because the referee's finding that the juror was not actually biased against petitioner was supported by ample evidence from the evidentiary hearing as well as the juror's statements at voir dire, it should be upheld by this Court.

B. The Referee's Findings Negate Any Inference Of Prejudicial Misconduct

1. The Referee's Findings That The Juror Inadvertently Overlooked His Misdemeanor Conviction And That The Juror Was Not Biased Against Petitioner Are Fatal To Petitioner's Claim

The petitioner bears the burden of proving by a preponderance of the evidence that his restraint is invalid and that the facts "establish a basis for relief on habeas corpus." (*In re Visciotti* (1996) 14 Cal.4th 325.) Here, petitioner has failed to meet his burden of showing prejudicial juror misconduct.

> [A]n 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.

(*In re Hamilton, supra,* 20 Cal.4th at p. 300.) The case law contains a number of examples in which a juror's failure to disclose information more serious than the failure to disclose in the present case was ultimately found to be inadvertent and nonprejudicial.

For example, in *People v. Resendez* (1968) 260 Cal.App.2d 1, a prosecution under section 288, a juror denied experiencing any events similar to the charged crimes. (*Id.* at pp. 4, 10.) During deliberations,

however, 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; [the juror] therefore believed appellant was guilty." (*Id.* at p. 10.) Nevertheless, the *Resendez* court accepted the juror's explanation that she had forgotten about the incident until mention of the inquiry "Does it feel good" refreshed her recollection. (*Id.* at p. 11.) The *Resendez* court found that her remarks during deliberations regarding the incident did not disclose a biased or prejudiced mind against the defendant and apparently had no substantial influence on the ultimate verdict. (*Ibid.*)

In *People v. Kelly* (1986) 185 Cal.App.3d 118, a prosecution for felony sex crimes against two young boys, a juror failed to reveal 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." (*Id.* at pp. 126-127.) After trial, the juror revealed the incident to defense counsel. (*Ibid.*) The *Kelly* court ultimately affirmed the trial court's denial of a motion for new trial, stating in part that the failure to disclose was not intentional and the juror demonstrated her conscientiousness by coming forward with the information. The trial court conducted an adequate inquiry to determine if the juror was biased and she clearly denied any bias or impropriety. (*Id.* at pp. 128-129.)

In *People v. San Nicolas* (2004) 34 Cal.4th 614, 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. (*Id.* at pp. 643-644.) 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 pp. 645-648.) 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.*) As to the pending methamphetamine case, he mistakenly thought the charges against him had been dropped. (*Id.* at p. 644.) This Court ultimately upheld the trial court's determination that the juror was unbiased, stating that the trial court found the juror credible in his explanations and there was no evidence affirmatively indicating juror bias. (*Id.* at p. 647.)

Here, as stated previously, the referee specifically found that the juror's failure to reveal his misdemeanor conviction was inadvertent; the juror had simply overlooked the misdemeanor conviction when he filled out the jury questionnaire. Moreover, the referee's finding was supported by the evidence. This is similar to the situations in *Resendez* and *Kelly* in which jurors similarly failed to recall incidents at voir dire. It is also similar to *San Nicholas*, in which the trial court concluded that the failure to disclosed was inadvertent or unintentional, and that there was no resulting bias, after the juror testified that he "never thought about" the stabbing incident even though he was specifically asked whether he had been the victim of an assault of any kind, as a youth or adult. (*People v. San Nicholas, supra,* 34 Cal.4th at p. 645.) Accordingly, this court should adopt the referee's finding that the juror was not biased against petitioner, and reject appellant's claim.

2. Even Assuming, Arguendo, The Juror Deliberately Withheld His Misdemeanor Conviction, Any Presumption Of Prejudice Has Been Rebutted By Evidence That The Juror Was Not Biased Against Petitioner

Even assuming, arguendo, that the juror deliberately withheld his misdemeanor conviction notwithstanding the referee's contrary conclusion, petitioner is not entitled to relief because there was no prejudice.

> 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* (1995) 31 Cal.App.4th 1001, 1019.) While prejudice is presumed once misconduct has occurred, it is the initial burden of the defendant to prove the misconduct. (*In re Carpenter* (1995) 9 Cal.4th 634, 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* (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.) 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, supra,* 9 Cal.4th at p. 657, original italics.)

> [B]efore 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, original italics.)

In *People v. Carter* (2005) 36 Cal.4th 1114, 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. (*Id.* at pp. 1127, 1205-1210.) The 31-year-old juror in *Carter* answered "No" to a question that 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.) At a hearing on the defendant's post-conviction motion for a new trial, the juror 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 that she had been afraid of being raped and murdered. (*Id.* at p. 1206 & fn. 46.)

On direct appeal, 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, original italics, fn. omitted.)

The present case is similar to *Carter*. Even if it is assumed, arguendo, that the juror's answers on voir dire were evasive (again, contrary to the referee's findings), the fact that he suffered a misdemeanor conviction does not provide any basis for concluding that he harbored undisclosed juror bias. This is particularly so in light of the juror's comments at the original trial that he would be fair to both sides, and his statements at the evidentiary hearing that he did not harbor any bias towards either party at the time. (Habeas RT 164.) The fact that the juror disclosed the 1991 incident, in which he believed his brother had been falsely accused of a

crime, further supports the conclusion that his failure to disclose his misdemeanor conviction did not show he harbored undisclosed juror bias. Because it is not substantially likely the juror was biased, petitioner's claim fails, and his petition should be denied.

CONCLUSION

Accordingly, respondent respectfully requests that the order to show cause be discharged and the petition for writ of habeas corpus be denied.

Dated: Aug. 4, 2015. Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **Respondent's Brief on the Merits** uses a 13 point Times New Roman font and contains 5,709 words.

Dated: Aug. 4, 2015.

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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 with postage thereon fully prepaid that same day in the ordinary course of business.

On August 4, 2015, I served the attached **Respondent's Request for Adoption of Referee's Report and Brief on the Merits** by placing a true copy thereof enclosed in a sealed envelope 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 August 4, 2015, at Fresno, California.

Debbie Pereira-Young
Declarant

Debbie Pereira-Young
Signature