SUPREME COURT COPY

SUPREME COURT
FILED
AUG - 4 2015
Frank A. McGuire Clerk
Deputy

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

PETITIONER'S BRIEF ON THE MERITS AND EXCEPTIONS TO THE REFEREE'S REPORT

MARK GOLDROSEN (SBN 101731)
Attorney at Law
255 Kansas Street, Suite 340
San Francisco, CA 94103
Telephone: (415) 565-9600
Facsimile: (415) 565-9601

NINA WILDER (100474)
WEINBERG & WILDER
523 Octavia Street
San Francisco, CA 94102
Telephone: (415) 431-3472
Facsimile: (415) 552-2703

Attorneys for Petitioner
ROBERT WESLEY COWAN

DEATH PENALTY

TABLE OF CONTENTS

PAGE

I. INTRODUCTION 1

II. SUMMARY OF PROCEEDINGS 2

A. Trial Court Proceedings 2

B. Post-Conviction Proceedings 3

III. SUMMARY OF THE EVIDENCE AT THE REFERENCE HEARING 5

A. Exhibits Admitted at the Reference Hearing 5

B. Juror 045882's Testimony at the Reference Hearing 7
1. Question 34 7
2. Question 39 9
3. Question 53 9
4. Question 54 9
5. Other Relevant Testimony 11

IV. STANDARD OF REVIEW FOLLOWING AN EVIDENTIARY HEARING 14

V. EXCEPTIONS AND ARGUMENTS ON THE MERITS 15

A. Applicable Law 15

B. Exceptions to the Referee's Factual Findings 18
1. Question 1 18
2. Question 2 18
3. Question 3 23
4. Question 4 24
5. Question 5 26

C. Petitioner is Entitled to Relief 28
1. Juror 045882 Committed Misconduct 28
2. The Presumption of Bias Resulting from Juror 045582's Misconduct Was Not Rebutted 30

VI. CONCLUSION 32

CERTIFICATE OF COMPLIANCE 33

PROOF OF SERVICE 34

TABLE OF AUTHORITIES

PAGE

CASES:

Davis v. Alaska (1974) 415 U.S. 308 29

Dyer v. Calderon (9th Cir. 1998) 151 F.3d 970 . . . . 17, 25, 31

Green v. White (9th Cir. 2000) 232 F.3d 671 32

In re Cudjo (1999) 20 Cal.4th 673 14

In re Hamilton (1999) 20 Cal.4th 273 . . . . 15, 16, 29

In re Hardy (2007) 41 Cal.4th 977 15

In re Hitchings (1993) 6 Cal.4th 97 . . . . Passim

In re Scott (2003) 29 Cal.4th 783 14

In re Visciotti (1996) 14 Cal.4th 325 14

McDonough Power Equipment, Inc. v. Greenwood (1984) 464 U.S. 548
. . . . 16, 25

Miranda v. Arizona (1966) 384 U.S. 436 . . . . 5, 21

Morgan v. Illinois (2002) 504 U.S. 719 15

People v. Avila (2009) 46 Cal.4th 680 15

People v. Beardslee (1991) 53 Cal.3d 68 24

People v. Blackwell (1987) 191 Cal.App.3d 925 . . . . 15, 16, 28, 31

People v. Bradford (1997) 15 Cal.4th 1229 30

People v. Carpenter (1995) 9 Cal.4th 634 16

People v. Carter (2005) 36 Cal.4th 1114 28

People v. Cowan (2010) 54 Cal.4th 401 4

People v. Diaz (1984) 152 Cal.App.3d 926 . . . . 16, 17, 28

People v. Duvall (1995) 9 Cal.4th 464 14

People v. Espinoza (1977) 73 Cal.App.3d 287 29

People v. Farris (1977) 66 Cal.App.3d 376 . . . . 17, 25, 31

People v. Holloway (1990) 50 Cal.3d 1098 17

People v. Jackson (1985) 168 Cal.App.3d 700 28

People v. Kelly (1986) 185 Cal.App.3d 118 28

People v. Ledesma (1987) 43 Cal.3d 171 14

People v. Lent (1975) 15 Cal.3d 481 29

People v. Marshall (1990) 50 Cal.3d 907 17

People v. McPeters (1992) 2 Cal.4th 1148 29

People v. Morris (1991) 53 Cal.3d 152 . . . . 17, 25, 30, 31

People v. Price (1991) 1 Cal.4th 324 . . . . 17, 25, 31

People v. San Nicolas (2004) 34 Cal.4th 614 29

CONSTITUTIONAL PROVISIONS:

Cal. Const., Article I, section 16 15

U.S. Const., Sixth Amendment 15

U.S. Const., Fourteenth Amendment 15

STATUTES:

Code Civ. Proc. § 225, subd. ((b)(1)(B) 26

Code Civ. Proc. § 225, subd. ((b)(1)(C) 26

Penal Code § 415, subdivision (1) 4, 5

Penal Code § 835 30

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

PETITIONER'S BRIEF ON THE MERITS AND EXCEPTIONS TO THE REFEREE'S REPORT

I.

INTRODUCTION

The referee's findings of fact are not supported by substantial evidence. Juror 045882 was not truthful during the evidentiary hearing. The juror was on probation at the time of his jury service and had an interest in currying favor with the District Attorney's Office responsible for prosecuting him. Despite his claim to the contrary, he intentionally and deliberately failed to disclose his misdemeanor conviction and sentence of probation during jury selection and thereby committed misconduct. The most plausible explanation for his misconduct is that he wanted to finagle his way onto the jury so that he could lobby for a conviction and death sentence. By so doing, he hoped to earn good will with the District Attorney's Office in the event of any future probation violations or any request for early termination of his probation.

Under the circumstances of petitioner's case, the presumption of

prejudice resulting from Juror 045882's misconduct was not rebutted. There is a substantial likelihood that the juror was actually prejudiced against petitioner. The petition for a writ of habeas corpus should be granted.

II.

SUMMARY OF PROCEEDINGS

A. Trial Court Proceedings

On September 24, 1994, petitioner was charged in a three-count information filed in Kern County Superior Court. (3 CT 647-656.) Petitioner was charged with the murders of Clifford and Alma Merck, occurring on or about August 31, 1984 through September 4, 1984 (Counts I and II), and the murder of Jewell Francis Russell, occurring on or about September 4, 1984 through September 7, 1984 (Count III).

Attached to Count I were the enhancement allegations that petitioner personally used a firearm and that he was armed with a firearm, and the special circumstances that petitioner committed multiple murders and that the murder was committed during the commission of both a robbery and a burglary. Attached to Count II were the same enhancement allegations and the robbery-murder and burglary-murder special circumstances. Attached to Count III were the enhancement allegation that petitioner was armed with a deadly weapon and the special circumstances that petitioner committed multiple murders and that the murder was committed during the commission of both a robbery and a burglary. (3 CT 648-651, 653-654.)

The information further alleged that petitioner had previously served a prison term and had suffered a serious felony conviction. (3 CT 649-650, 652, 654-655.)

The jury selection process began on April 8, 1996, and the jury was

sworn on May 7, 1996. (5 CT 1284, 1320.) On May 13, 1996, the guilt phase of the trial commenced. (5 CT 1330.) The jury returned guilty verdicts on June 6, 1996. (6 CT 1458.) With respect to Counts I and II, the jury found that petitioner was guilty of first degree murder and that he was armed with a firearm. Also found to be true were all special circumstances charged in both counts – multiple murder, murder during the commission of a robbery, and murder during the commission of a burglary. (6 CT 1461-1471.) With respect to Count III, the jury was unable to reach a verdict and the court declared a mistrial. (6 CT 1459.)

On June 10, 1996, the superior court found that appellant had previously suffered a serious felony conviction, but had not previously served a prison term within the meaning of Penal Code section 667.5, subdivision (c). (6 CT 1477.)

The penalty phase of the trial began on June 11, 1996 and concluded on June 14, 1996. (6 CT 1479, 1487, 1573.) With respect to Count I, the jury returned a verdict of life without possibility of parole; with respect to Count II, the jury returned a verdict of death. (6 CT 1573, 1582-1583.)

On August 5, 1996, the superior court sentenced petitioner. On Count I the court imposed a sentence of life without possibility of parole, enhanced by one year for the armed with a firearm allegation. (6 CT 1636.) With respect to Count II, the court imposed a sentence of death, enhanced by one year for the armed with a firearm allegation. (6 CT 1636.) The sentences on the two counts were ordered to run consecutively. (6 CT 1637.) The court added five years to appellant's sentence for the prior serious felony conviction. (6 CT 1637.)

B. <u>Post-Conviction Proceedings</u>

The judgment was affirmed on appeal by the California Supreme

Court on August 5, 2010. (*People v. Cowan* (2010) 54 Cal.4th 401.) Petitioner's petition for rehearing was denied on September 15, 2010. On March 28, 2011, the United State Supreme Court denied a petition for a writ of certiorari.

On November 9, 2007, petitioner filed a petition for writ of habeas corpus in this Court. On June 22, 2011, after receiving informal briefing, this Court issued an order to show cause regarding petitioner's claim of juror misconduct. Later, on June 12, 2012, this Court ordered that a Judge be selected from the Kern County Superior Court to sit as a referee, taking evidence and make findings of fact regarding five questions. The questions were:

> 1) Is Juror 045882 the person who was cited for a misdemeanor violation of Penal Code section 415, subdivision (1) 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 No. 506741-B?
>
> 2) If so, what were Juror 045882'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 Juror 045882's reasons for failing to disclose these facts, was his nondisclosure of the above facts indicative of juror bias?
>
> 5) Was Juror 045882 actually biased against petitioner?

The evidentiary hearing was held before Judge Charles R. Brehmer on June 25, 2014, and the Report of the Referee was filed on November 10, 2014. Judge Brehmer found that Juror 045882 was the person convicted of a misdemeanor violation of Penal Code section 415, subdivision (1) and sentenced to three years' probation and a fine. He further concluded that

the juror's reason for failing to disclose this information was that he forgot. Finally, Judge Brehmer concluded that Juror 045882's nondisclosure was not intentional and deliberate, that the nondisclosure was not indicative of bias, and that the juror was not actually biased against petitioner.

III.

SUMMARY OF THE EVIDENCE AT THE REFERENCE HEARING

The evidence at the reference hearing consisted of three exhibits (A-1, B-1, C-1) and the testimony of Juror 045882.

A. <u>Exhibits Admitted at the Reference Hearing</u>

Exhibit A-1 was the court file in Bakersfield Municipal Court No. 506741-B. It showed that Juror 045882 was cited for a misdemeanor violation of Penal Code section 415, subdivision (1) 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. The police report in the court file indicated that a uniformed security officer made a citizen's arrest of the juror for fighting at the Valley Plaza Mall. The officer 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 the citation and received his copy.

Exhibit B-1 was the questionnaire completed by Juror 045882 during the jury selection process. Question 34 asked if the prospective juror had

ever been arrested, and if so, to provide information regarding the type of criminal charge, the approximate date and location of the arrest, and the outcome of the case. In response to this question, Juror 045882 wrote about a second, earlier arrest, but not the arrest and conviction at Valley Plaza Mall. His answer read, "assault and battery. 1991. From my hous (sic) charges dropped." (Exhibit B-1, at p. 10.)

Question 39 asked the prospective juror to explain how he felt about the way law enforcement and the judicial system handled any arrests involving himself, immediate family members, or household members. Juror 045882 left blank the space provided for his answer. (*Id.*, at pp. 10-11.)

Question 53 asked the prospective juror if he had ever been in a courtroom for any reason other than jury service. Juror 045882 checked the box "yes," but his explanation was only "tickets." (*Id.*, at p. 15.)

Question 54 asked the prospective juror if he, his family members, or his close friends had ever had any contact with law enforcement or the criminal justice system other than that previously mentioned in the questionnaire. In response to this question, Juror 045882 checked the box "No." (*Id.*, at p. 15.)

Question 30 asked about the juror's attitude toward jury service. Juror 045882 felt being on the jury was "a great chance for" him. (*Id.*, at p. 9.) The questionnaire also revealed the juror's strong support for the death penalty. When asked to describe his feelings about capital punishment, the juror wrote, "If guilty why not." (Id., at p. 15.) He further explained that he never had a different view of the death penalty, that the death penalty was imposed too seldom, that the death penalty was not wrong for any reasons, and that he would have no trouble voting for the death penalty in the

appropriate case. (*Id.*, at p. 16.)

Exhibit C-1 was the transcript of Juror 045882's voir dire. In response to the court's questioning, the juror said that his "brother was just in here not too long ago for assault and battery," and that about three years ago, he himself had some charges dropped without having to come to court. (Exhibit C-1 at pp. 1040-1041.) During the voir dire, Juror 045882 did not mention his prior misdemeanor conviction and probation sentence.

B. <u>Juror 045882's Testimony at the Reference Hearing</u>

During the evidentiary hearing, Juror 045882 testified that he read and understood the directions on the first page of the questionnaire. The questionnaire directed him to answer the questions completely, accurately, and truthfully. (RT 142:12-143:8.)[1] Nonetheless, the juror failed to mention his misdemeanor conviction and probation sentence when filling out the questionnaire on April 17, 1996. Juror 045882's explanations for the omission were varied and inconsistent, as explained below.

1. Question 34

Question 34 asked if the prospective juror had ever been arrested, and if so, to provide information regarding the type of criminal charge, the approximate date and location of the arrest, and the outcome of the case. In response, the juror only described an incident from 1991 when his brother's ex-girlfriend's boyfriend showed up drunk at the house and started trouble. The police arrived and arrested both the juror, who was a juvenile and taken to juvenile hall, and his brother. (RT 119: 3-34.)

When asked on direct examination why he had not mentioned the

---

[1]Citations to the reporter's transcript refer to the transcript of the reference hearing.

prior misdemeanor case in his answer to Question 34, the juror responded, "There was no reason." (RT 143:23.) Asked to elaborate, the juror then gave a reason, "Didn't cross my mind." (RT 143:26.)

On cross-examination, Juror 045882 agreed with the Assistant District Attorney that Question 34 and other questions were a little vague and hard to understand. (RT 165:10-18.) The prosecutor then elicited from the juror that he did not believe he had actually been arrested, as opposed to just cited, during the incident which resulted in his conviction. The prosecutor followed up with the leading question: "And so when you filled out this . . . question 34 . . . , would it be fair to say that you didn't indicate this incident at the mall because, in your mind, your 19-year-old mind at the time, you didn't feel it was an arrest?" The juror responded, "Correct." (RT 167:12-18.) This testimony was the juror's third different reason for not mentioning his misdemeanor conviction in response to Question 34.

On redirect, Juror 045882 was asked to identify what he found vague or confusing in Question 34. In response, the juror acknowledged there was actually nothing about the question that he was unable to understand. (RT 175:13-16.) Petitioner's counsel also asked follow-up questions regarding the juror's claim on cross-examination that he did not mention the misdemeanor conviction in his answer to Question 34 because he believed there had not been an arrest. The juror was asked if when answering Question 34 he thought about the misdemeanor conviction but then consciously decided not to mention it because he reasoned he had only been cited, not arrested. Juror 045882 responded that the misdemeanor conviction did not cross his mind at all when he was answering Question 34, contradicting his response on cross-examination that he *did* think about the misdemeanor conviction when answering the question, but had

concluded disclosure would not have been responsive to the question. (RT 177:26-28.)

2. Question 39

Question 39 asked the prospective juror to explain how he felt about the way law enforcement and the judicial system handled any arrests involving himself, immediate family members, or household members. When asked on direct examination why he did not mention the criminal conviction in responding to Question 39, the juror's answer was similar to his first response regarding Question 34. He stated: "Don't have an answer, sir." (RT 145:12.) No other questions were asked of the juror regarding his answer to Question 39.

3. Question 53

Question 53 asked the prospective juror if he had ever been in a courtroom for any reason other than jury service. Juror 045882 checked the box "yes," but his sole explanation was "tickets." Juror 045882's explanation for not specifically mentioning the misdemeanor conviction and probations status was: "No explanation, sir." (RT 145:26.) On direct examination, petitioner's counsel asked the juror what he meant when he used the term "tickets." Juror 045882 affirmed multiple times that "tickets" referred only to "traffic tickets for driving violations." (RT 127:4-24.) On cross-examination, the prosecutor asked the juror if when he wrote "tickets," he was referring to the citation he received in the mall incident. Juror 045882 responded, "I don't remember" (RT 168:23-25), inconsistent with his testimony on direct examination that "tickets" referred only to driving violations. (RT 27:4-24).

4. Question 54

Question 54 asked the prospective juror if he, his family members, or

his close friends had ever had any contact with law enforcement or the criminal justice system other than that previously mentioned in the questionnaire. In response, Juror 045882 checked the box "No." On direct examination, the juror's initial explanation for not mentioning his conviction and probation status was: "I don't have an answer, sir." (RT 146:16.) Soon thereafter, however, Juror 045882 claimed inconsistently that he had a reason for the omission in his answer to Question 54. He had forgotten about his misdemeanor conviction. "I mean, if I would have remembered, I would have put it in." (RT 147:5-6.) He also claimed that he had nothing to hide. (RT 146:26.)

On redirect, petitioner's counsel asked if Question 54 was one of the questions that appeared vague to him at the time he was filling out the questionnaire. This time, Juror 045882 responded that he understood "what it's saying," but that he "probably just didn't want to answer it." (RT 178:13-19.) Asked to explain his answer, the juror stated that his family had nothing to do with him and his own juvenile arrest had been thrown out of court. (RT 178:21-25.) Petitioner's counsel then pointed out that the juror had already mentioned his juvenile arrest in an answer to an earlier question and that Question 54 called for his own, additional contacts as well as those of his family. (RT 178: 26-28.) Juror 045882 then acknowledged that if his prior misdemeanor case did not involve an arrest and was therefore not responsive to Question 34, it was still a contact with the criminal justice system and he should have mentioned it in his answer to Question 54. (RT 179:13-26.) Asked if he had a reason why he omitted any reference to the prior misdemeanor case in his answer to Question 54, the juror answered, "No, sir." (RT 180:3-6.)

5. Other Relevant Testimony

In response to the court's questions, which preceded questioning by counsel, Juror 045882 testified that he did not remember the 1995 incident at the Valley Plaza Mall in which he was cited for disturbing the peace. (RT 114:22-115:6.) However, after petitioner's counsel asked the juror to review the court file and police report, he was able to recall both that he was put on probation for fighting in public and some of the details of the incident.[2] The juror recalled that he fought with a man who was probably the ex-boyfriend of the juror's then-girlfriend; that the fight was broken up by mall security; that the other person was handcuffed and he was not; that he was banned from returning to the mall; that he was given a citation and later went to court; and the person he fought was arrested by the police. (RT 133: 19-20, 135:19-136:22, 137:13-21, 138:19-20, 138:27-139:6, 154:15-19, 115:17-21, 156:15-20.) Moreover, the juror admitted that there were multiple reasons he would have remembered the incident when called for jury service. One reason was that the girlfriend who was the subject of the fight was important to him. (RT 155:3-10.) In addition, at the time Juror 045882 served on petitioner's jury, this misdemeanor conviction was his only criminal record. (RT 136:23-137:1.)

The juror was further upset about the conviction "cause I was convicted of something, you know, that I was doing standing up for something that I believed in." (RT 139:24-27.) He was also concerned that he was on probation because "[n]obody likes being on probation." (RT

[2]Pursuant to the superior court's order, neither party was permitted to have contact with Juror 045882 prior to the evidentiary hearing, As a result, there was no opportunity for the juror to have his memory refreshed before he testified.

140:9-10.) Being on probation was important to him. (RT 183: 6-7.) It meant that he "had to watch [him]self," (RT 140:11-13), and that he could go to jail for a violation. (RT 141:14-20).

Juror 045882 also recalled that he was contacted by a probation officer, who told him to stay out of trouble and pay his fine and asked if he had any questions. (RT 172:12-15, 173:17-21.) The juror remembered that he later paid the fine ordered by the court. (RT 178:25-26.)

On cross-examination, Juror 045882 maintained instead that at the time of filling out the questionnaire, he "had kind of put that [mall incident] behind him." (RT 171:12-15.) Juror 045882 then gave affirmative answers to leading questions contrary to his testimony on direct. The juror stated that the prior misdemeanor conviction was not a big deal to him, that it did not enter into his mind when filling out the questionnaire, and that he was not trying to hide anything in order to be selected for the jury. (RT 172:17-28, 181:26-82:6.)

The juror acknowledged that his response to Question 35, which asked whether any members of his immediate family or household, had ever been arrested, was incomplete. He stated that his brother had been arrested, but did not explain the type of charge, date and location of arrest, and outcome, as called for by the question. Juror 045882 believed he did not recall the date of his brother's arrest at the time he filled out the questionnaire, but was unable to explain why he failed to disclose the case outcome. (RT 120: 23-121:11.) Answers to questions 37, 39, and 40 of the questionnaire were also incomplete, and again the juror could not recall

why he did not fully respond to the questions.[3] (RT 122:13-124:20.)

Juror 045882 admitted that his answer to Question 36 was incorrect. He had written that none of his close friends or acquaintances had been arrested, but in fact, some had been. (121:12-122:12.) The juror elaborated that he is "real quick and short when it comes to answering things . . . ." (RT 121:24-25.)

Juror 045882 further explained that his statement about having some charges dropped without having to come to court in his voir dire was a reference to the 1991 arrest, also mentioned in his answer to Question 34, not to the 1995 fight. (RT 131:1-25.)

Juror 045882 claimed he was not concerned about the trial attorneys knowing he had a prior misdemeanor conviction and was on probation. Nor was he concerned that this information would give the attorneys an excuse to challenge him. (RT 147:12-19.)

On cross examination, the prosecutor elicited from Juror 045882 that he was not biased against either side at the time he filled out the questionnaire. (RT 164:22-165:1, 182:11-13.)

According to Juror 045882, he never asked the District Attorney's Office for favorable treatment in his criminal cases that occurred

---

[3]Question 37 asked whether the juror, a close friend, or a relative ever had a problem with drug or alcohol use. The juror answered, "yes," but did not provide the additional explanation requested by the question. (RT 122:13-20.) Question 39 asked the juror how he felt about the way the criminal justice system handled any arrests involving himself, family members, or close friends. Juror 045882 did not respond at all to the question. (RT 122:24-123:14.) Question 40 asked the juror if he, a close friend, or a relative had ever been the victim of a crime, and if so, to explain the circumstances. The juror answered, "yes," but gave no explanation. (124:7-15.)

subsequent to his jury service, based on his having voted for guilt and a death sentence in petitioner's case. (RT 150:3-12.)

The juror admitted that in 2003 he suffered a felony conviction for assault with personal use of a firearm. (RT 148:18-22.)

IV.

STANDARD OF REVIEW FOLLOWING AN EVIDENTIARY HEARING

At this juncture in petitioner's case, this Court already has determined that petitioner has made a prima facie case, i.e., that if his factual allegations are true, he is entitled to relief. (*People v. Duvall* (1995) 9 Cal.4th 464, 475.) The central purpose of the reference hearing was for the referee to hear the evidence and make factual and credibility determinations necessary to permit this Court to decide whether petitioner's factual allegations are true, and whether petitioner is entitled to relief. (*In re Scott* (2003) 29 Cal.4th 783, 824.)

"'A habeas corpus petitioner bears the burden of establishing that the judgment under which he or she is restrained is invalid. [Citation.] To do so, he or she must prove, by a preponderance of the evidence, facts that establish a basis for relief on habeas corpus. [Citation.]'" (*In re Cudjo* (1999) 20 Cal.4th 673, 687, quoting *In re Visciotti* (1996) 14 Cal.4th 325, 351.)

After a referee hearing, this Court "will independently review the evidence, and is not bound by a referee's factual findings. A referee's findings are entitled to judicial deference only when they are supported by 'ample, credible evidence' or 'substantial evidence.'" (*In re Hitchings* (1993) 6 Cal.4th 97, 122, citing *People v. Ledesma* (1987) 43 Cal.3d 171, 219.) Substantial evidence is defined as evidence that is "reasonable,

credible, and of solid value." (*People v. Avila* (2009) 46 Cal.4th 680, 701.)

Deference to the referee may be "particularly appropriate on issues 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. [Citations.]" (*In re Hamilton* (1999) 20 Cal.4th 273, 296.) Ultimately, however, it is for this Court to make the findings on which resolution of petitioner's claim will turn. (*In re Hardy* (2007) 41 Cal.4th 977, 993-994.) In addition, "any conclusions of law or resolution of mixed questions of fact and law that the referee provides are subject to our independent review. [Citation.]" (*In re Hamilton, supra*, 20 Cal.4th at 297.)

V.

EXCEPTIONS AND ARGUMENTS ON THE MERITS

A. Applicable Law

It is well settled that a defendant has a right to be tried by a fair and impartial jury under both the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 16 of the California Constitution. (*Morgan v. Illinois* (2002) 504 U.S. 719, 727; *In re Hitchings, supra*, 6 Cal.4th at p. 110.) Adequate voir dire plays a critical role in assuring that the right to an impartial jury will be honored.

"Of course, the efficacy of voir dire is dependent on prospective jurors answering truthfully when questioned." (*In re Hitchings, supra*, 6 Cal.4th at p. 110.) "A juror who conceals relevant facts or gives false answers during the voir dire examination . . . undermines the jury selection process and commits misconduct." (*Id.*, at p. 111; *People v. Blackwell* (1987) 191 Cal.App.3d 925, 929.) In the absence of truthful answers on voir dire, the trial court will be unable to identify and remove prospective

jurors who fall within one of the statutory categories permitting a challenge for cause. In addition, trial counsel will be unable to intelligently exercise peremptory challenges on those prospective jurors they believe cannot be fair. (*In re Hitchings*, *supra*, 6 Cal.4th at p. 110.)

The prosecution, the defense and the trial court rely on the voir dire responses in making their respective decisions, and if potential jurors do not respond candidly the jury selection process is rendered meaningless. Falsehood, or deliberate concealment or nondisclosure of facts and attitudes deprives both sides of the right to select an unbiased jury and erodes the basic integrity of the jury trial process. (*People v. Blackwell*, *supra*, 191 Cal.App.3d at p. 929; *People v. Diaz* (1984) 152 Cal.App.3d 926, 934.)

Juror misconduct involving the concealment of material information on voir dire raises a presumption of prejudice that requires reversal of the conviction unless rebutted. (*In re Hitchings*, *supra*, 6 Cal.4th at p. 119.) The 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]." (*People v. Carpenter* (1995) 9 Cal.4th 634, 653, internal quotations and citations omitted.) A "reasonable probability" of prejudice exists when there is a "substantial likelihood that one or more jurors were actually biased against the defendant." (*In re Hamilton*, *supra*, 20 Cal.4th at p. 296.)

"[I]n most cases, the honesty or dishonesty of a juror's response [to a question on voir dire] is the best initial indicator of whether the juror in fact was impartial." (*McDonough Power Equipment, Inc. v. Greenwood* (1984) 464 U.S. 548, 556, conc. of J. Blackmun.) When a juror conceals material information, such concealment "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.) (Italics added.) "Concealment by a potential juror constitutes implied bias justifying disqualification." (*People v. Morris* (1991) 53 Cal.3d 152, 183-184; *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* (9th Cir. 1998) 151 F.3d 970, 979 [juror's "lies give rise to an inference of implied bias on her part"].) A verdict must be overturned even if only one juror is biased. (*People v. Holloway* (1990) 50 Cal.3d 1098, 1112.)

Moreover, "[i]n determining whether the presumption of prejudice has been rebutted, 'it is clear that the usual "harmless error" tests for determining the prejudicial effect of an error [citations] are inapplicable. Convincing evidence of guilt does not deprive a defendant of the right to a fair trial [citation] since a fair trial includes among other things the right to an unbiased jury . . . .'" (*People v. Diaz, supra*, 152 Cal.App.3d at p. 935; *People v. Marshall* (1990) 50 Cal.3d 907, 951 ["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"]; *Dyer v. Calderon, supra*, 151 F.3d at p. 973 ["The presence of a biased juror cannot be harmless; the error requires a new trial without a showing of actual prejudice"].)